1-11

BEVERLY GUSLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured teacher, now retired from the district – contested the Board's denial of her claim for six additional workers' compensation days, instead charging her for six sick days for time lost due to a work-related injury in February 2004. The case was put on the inactive list pending completion of the workers' compensation matter, after which a hearing was held at the OAL in December 2009.

The ALJ found, *inter alia*, that: petitioner made claims for more than 30 work related injuries during the course of her 25 years of employment with the district; petitioner's only documentary evidence in the record were multiple certificates of fitness from respondent's workers' compensation physician, which stated that her injuries resulted from bruising and presented dates upon which the physician had deemed petitioner able to return to work; petitioner's testimony lacked credibility; and petitioner failed to prove that the Board's rejection of her claim for additional workers' compensation days rather than sick days was arbitrary, capricious, unreasonable, or not otherwise in accordance with the law. Accordingly, the ALJ ordered the instant petition dismissed.

Upon review, and in the absence of any basis in the record on which to dispute the fact-finding and credibility determinations of the ALJ, the Commissioner concurred that the petitioner failed to prove that the Board's decision to reject the petitioner's claim for additional workers' compensation days was arbitrary, capricious or unreasonable. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter for the reasons expressed 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.

January 3, 2011

OAL DKT. NO. EDU 07614-04
AGENCY DKT. NO. 173-5/04

BEVERLY GUSLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
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 reply exceptions filed by the Board of Education (Board).[1]

The petitioner takes exception to the Administrative Law Judge's (ALJ) finding that the Board's decision to charge the petitioner for sick days rather than worker's compensation days was not arbitrary, capricious or unreasonable. The petitioner maintains that the evidence indicates that petitioner's absences in April 2004 were caused by her work-related injury; therefore, she should not be charged sick days for those absences. The petitioner further argues that there was nothing in the record to support the ALJ's credibility determination or his characterization of her injuries as "trivial."

In reply, the Board incorporated the arguments put forth in its post-trial submission to support its assertion that the petitioner received worker's compensation benefits as permitted by law, but was denied certain days in April 2004 because they could not be characterized as such. The Board also contends that the ALJ properly determined that the

[1] The record contains no transcripts from the hearing conducted at the OAL on December 28, 2009.

petitioner was not credible because during testimony, the petitioner contradicted herself with respect to the number of times she called her physician when she was in too much pain to return to work, and was allegedly directed by her physician to stay home.

Upon review, and 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 petitioner failed to prove that the Board's decision to reject the petitioner's claim for additional worker's compensation days was arbitrary, capricious or unreasonable. Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/03/11

Date of Mailing: 1/03/11

[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 07614-04
AGENCY DKT. NO. 173-5/04

BEVERLY GUSLER,

Petitioner,

v.

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

Respondent.

Gregory T. Syrek, Esq., and **Mary J. Hammer**, Esq., for petitioner (Bucceri & Pincus, attorneys)

Joanne Butler, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: May 20, 2010 Decided: November 18, 2010

BEFORE **JAMES A. GERAGHTY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Beverly Gusler, contests respondent State Operated School District of the City of Paterson's denial of her claim for six workers' compensation days and instead charging her with six sick days. She requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) on August 5, 2004. The case was

placed on the inactive list pending completion of the workers' compensation matter. A hearing was held at the OAL on December 28, 2009. After post hearing briefing, the Director and Chief Administrative Law Judge extended the time for the issuance of this initial decision up to and including November 18, 2010.

STATEMENT OF THE ISSUES

The issue is whether petitioner was entitled to six workers' compensation days rather than being charged with six sick days.

STATEMENT OF FACTS

Petitioner Beverly Gusler was a tenured teaching staff member who had been employed by the respondent since July 1981. On February 25, 2004 she slipped and fell on her buttocks and back, on the job, resulting in various injuries. Petitioner was awarded workers' compensation days for February 26, and 27, March 23 and 26, and April 1, 2004. P-8,9,10. The respondent charged her for sick days on April 2, 20, 21, 26, 29, and 30, 2004. P-10. Petitioner contends that these absences were work related for which she should not be charged. She filed a claim with the Division of Workers' Compensation for her injuries. The claims were denied. However, that matter was settled on April 25, 2008. P-11. The status of the six days in question became a contested matter before the OAL.

On February 25, 2004, on the date of her injury, the school nurse applied ice to petitioner's knee. Respondent's risk management supervisor, Linden Smith, had her transported by ambulance to Barnett Hospital. The City of Paterson Emergency Medical Services reported that petitioner complained of pain in her left knee, hip, and shoulder. P-1. P-2. The Barnett Hospital February 25, 2004 assessment references pain in petitioner's left shoulder, hip, and knee. P-3. The petitioner testified that she was not x-rayed and received no treatment. She suffered no broken bones.

Petitioner was examined on February 27, 2004 by respondent's workers' compensation physician Dr. Hadjanian whose certificate of fitness stated that petitioner could return to work on March 1, 2004. P-4. The diagnosis was contusions (bruses) to petitioner's shoulder, buttocks, and knee. There were no recommended restrictions or treatment beyond applying moist heat. Both petitioner and the doctor signed the certificate. Petitioner returned to work.

On March 5, 2004 petitioner was examined by Dr. Hadjanian who again diagnosed petitioner with contusions to her shoulder, buttocks, hip, and knee. He prescribed physical therapy three times a week for two weeks. The diagnosis and prescription were memorialized in a certificate of fitness which noted that the petitioner was working. P-5. Both petitioner and the doctor signed the certificate of fitness.

Petitioner testified that the physical therapy had been prescribed for four weeks although the certificate unequivocally states two weeks. Dr. Hadjanian again examined petitioner on March 19, 2004 during which she admitted to the doctor that she had not attended physical therapy, which the doctor noted in his follow up visit report. However, at the OAL hearing, petitioner contradicted her statement to the doctor and said that she attended physical therapy but missed only one or two sessions.

Petitioner next saw Dr. Hadjanian on April 1, 2004. The doctor's diagnosis remained unchanged and he prescribed physical therapy three times a week for two weeks. In addition, the doctor advised petitioner not to lift over twenty pounds or to lift objects over her head. P-6. With these restrictions, the certificate of fitness stated that petitioner was able to return to work April 2, 2004. Both the doctor and the petitioner signed the certificate.

Petitioner failed to return to work on April 2, 2004 despite the doctor's certificate. At the OAL hearing, she testified that she was in too much pain to return to work. In addition, she testified that Dr. Hadjanian told her that if she was unable to return to work, she should not return to work. Petitioner did not ask for a new certification or other document confirming his advice. Dr. Hadjanian was not called to testify.

The petitioner again visited Dr. Hadjanian on April 19, 2004. The doctor maintained the lifting restrictions and referred petitioner to an orthopedist. Both the petitioner and the doctor signed a certificate stating that she would return to work April 21, 2004. P-7. Petitioner failed to return to work on that date, as well as on April 26, 29, and 30, 2004. Petitioner testified that physical pain prevented her return, and that each time she contacted Dr. Hadjanian he told her that she need not return to work. However, as to the aforesaid four days during April 2004, petitioner adduced no certificate of fitness, medical witnesses, or other documentary evidence to substantiate her testimony. During cross examination, she admitted that she had called Dr. Hadjanian only twice during that period.

At the OAL hearing, petitioner admitted that she claimed more than 30 work related injuries during the course of her 25 years employment, and stated that she filed between 7 and 9 actual claims for workers' compensation. R-3.

FINDINGS OF FACT

Based on the testimony and documents of record, I **FIND**:

1. Petitioner's testimony lacked both demeanor and circumstantial credibility. She claimed an inability to return to work for over two months after her fall although her only injuries were bruises. There were no fractures or other injuries and certainly no corroborating medical evidence. Petitioner lacked circumstantial credibility due to her numerous alleged work related injuries which exceeded the number of years that she was employed by the district.

2. Petitioner's doctor ordered her back to work on March 1, 2004. She complied. Later, the doctor prescribed physical therapy which petitioner admitted that she neglected. After the April 1, 2004 follow up visit, the doctor ordered her to return to work on April 2, 2004. She failed to comply and did not return that day or on five subsequent work days despite the Doctors subsequent order to return to work on April 21, 2009. Her claim to have been in too much

pain is difficult to believe because of the trivial nature of her original injuries, her lack of credibility, and her failure to corroborate any of her statements.

3. Petitioner's testimony that her doctor told her to stay home from work if she was in excessive pain was uncorroborated hearsay.

LEGAL AUTHORITY

New Jersey State law defines sick leave as an employee's absence from work because of personal disability due to illness or injury, among other things. N.J.S.A. 18A:3-1. An employee injured due to an accident during the course of employment is entitled to full salary during the period of absence for up to one calendar year, and the absence is charged to annual sick leave accumulated by the employee. N.J.S.A. 18A:30-2.3. The district's decision to change the absences in question as sick days rather than workers' compensation days is sustainable unless arbitrary and capricious. Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1964).

Credibility is that quality of testimony or evidence which makes it worthy of belief. The Supreme Court has stated: "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Estate of Perrone 5 N.J. 514 (1950). See also, Spangnuolo v. Bonnet, 16 N.J. 546 (1954).

To assess credibility a trier of fact may draw inferences from a witness' expression, tone of voice, and demeanor. MacDonald v. Hudson Bus Transportation Co., 100 N.J. Super. 103 (App. Div. 1968). The witness' interest in the outcome of the matter or that person's motive or bias should be considered. State v. Spruill, 16 N.J. 73 (1954); State v. Salimone, 19 N.J. Super. 600 (App. Div. 1952).

The fact finder may reject testimony because it is inherently incredible or inconsistent with common experience. Conglaton v. Pura-Tex Stone Corp. 53 N.J. Super. 282 (App. Div. 1958).

Surrounding circumstances may affect credibility. In re Perrone, supra, at 521; D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109 (App. Div. 1997). State v. Salimone, supra, at 608.

A fact finder's rejecting a witness' testimony must simply be reasonable. Renan Realty Corp. v. Community Affairs Department, 182 N.J. Super. 415 (App. Div. 1981).

Hearsay is admissible subject to the residuum rule that requires corroboration of ultimate fact questions. N.J.A.C.1:1-15.1, .5. Weston v. State of New Jersey, 60 N.J. 36 (1972).

DISCUSSION

Petitioner had the burden of proving by a preponderance of the credible evidence that her absences on the six days in question were necessitated by injuries which occurred during the course of her employment. Her only documentary evidence were certificates of fitness which state that her injuries resulted from bruising. She had no witnesses, expert or otherwise, and no substantiating documentary evidence that she had suffered injuries of a magnitude to cause her to justify absences from work, despite the doctor's orders to return two months after the event. Her credibility was seriously eroded by the circumstances, the nature of her injuries, her uncorroborated difficult to believe testimony, and her numerous prior injury claims which diminished rather than enhanced her credibility. She contradicted herself during cross examination on her number of contacts with her doctor and her failure to attend therapy. The doctor's purported advice, except for the certifications, constituted nothing more than hearsay which a trier of fact is free to reject.

Finally, petitioner failed to prove that the district's rejection of her claim for additional workmen's compensation days rather than sick days was arbitrary, capricious, unreasonable, or not otherwise in accordance with law.

CONCLUSION

Based on the foregoing findings of fact and legal authority, I **CONCLUDE** that petitioner has failed to meet her burden of proving by a preponderance of the credible evidence that the district's decision to consider the contested days in question as sick days was arbitrary or capricious, unreasonable, or otherwise not in accordance with law.

ORDER

Based on the foregoing findings of fact and legal authority, I decide this matter in favor of the respondent and **ORDER** 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.

November 18, 2010
DATE

JAMES A. GERAGHTY, ALJ

Date Received at Agency:

November 18, 2010
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: NOV 19 2010

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APPENDIX

WITNESSES

For Petitioner:

Beverly Gusler, petitioner

For Respondent:

No witnesses

EXHIBITS

For Petitioner:

P-1 EMS report

P-2 Barnert Hospital admission consent

P-3 Barnert Hospital assessment

P-4 Fitness certificate February 22, 2004

P-5 Fitness certificate March 5, 2004

P-6 Fitness certificate April 1, 2004

P-7 Fitness certificate April 19, 2004

P-8 Attendance record

P-9 Attendance record

P-10 Attendance record

P-11 Workers' compensation settlement order

For Respondent:

R-1 Occupational Medical Associates registration and consent form (difficult to read)

R-2 2004 attendance record

R-3 District payment record

2-11

OAL DKT. NO. EDU 12203-10
AGENCY DKT. NO. 630-11/10

B.G., on behalf of minor child, E.G.,	:	
PETITIONER ,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN 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 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1|03|11

Date of Mailing: 1|03|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
EMERGENT RELIEF
OAL DKT. NO. EDU 12203-10
AGENCY DKT. NO. 630-11/10

B.G., ON BEHALF OF MINOR CHILD, E.G.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LYNDHURST, BERGEN COUNTY,
Respondent.

Mitchell R. Friedman, Esq. for petitioner

Kenneth A. Porro, Esq., for respondent (Wells, Jaworski & Liebman, attorneys)

Record Closed: November 19, 2010 Decided: November 22, 2010

BEFORE **JESSE H. STRAUSS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on November 10, 2010, 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 hearing was scheduled for November 19, 2010.

On the date of the hearing, the parties were able to settle both the emergent application and the underlying petition. The parties submitted the attached Settlement Agreement indicating the terms of the agreement. The parties put the settlement terms on the record.

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 including that of counsel for the Lyndhurst Board of Education

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 **Acting 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 22, 2010
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

11-23-10
Date Received at Agency:

Date Mailed to Parties:

id

WELLS, JAWORSKI & LIEBMAN, LLP
Attorneys at Law
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Paramus, New Jersey 07653-1827
(T) (201) 587-0888
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Attorneys for Lyndhurst Board of Education

B.G. and D.G. ON BEHALF OF THEIR MINOR CHILD, E.G.,	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY**
Petitioners	**BUREAU OF CONTROVERSIES AND DISPUTES**
LYNDHURST PUBLIC SCHOOLS a/k/a LYNDHURST BOARD OF EDUCATION	**Administrative Reference No.:** **OAL Docket No.** 12203-10 EDU
Respondent	**CONSENT ORDER**

This matter having been brought before the Court by Mitchell R. Friedman of Law Offices of Mitchell R. Friedman, P.C., appearing as attorney herein, for Petitioners, B.G. and D.G. (Badr Guirguis and Dalia Guirguis) on behalf of their minor child E.G. (Elaria Guirguis) and Kenneth A. Porro, Esq., of Wells, Jaworski & Liebman, LLP, Kenneth A. Porro, Esq. appearing on behalf of Respondent, Lyndhurst Public Schools a/k/a Lyndhurst Board of Education ("LBOE") and consent being given to the form and entry of within Consent Order, and the Court having approved same;

IT IS on this 19 day of November, 2010, **ORDERED** and **ADJUDGED** as the parties agree to the following:

1. The minor child E.G. shall be elevated to 2nd Grade after the conclusion of the upcoming Thanksgiving Holiday vacation break.

2. The Minor E.G., shall participate in an INRS evaluation and the LBOE INRS Evaluation Team's reasonable recommendations and accommodations will be followed by all parties. The INRS evaluation to be held as soon as possible MJ (KP)

3. Petitioner acknowledges that the LBOE Superintendent and Principal **DO NOT** recommend the above course of action, but have agreed to same as a result of Petitioner's Parents adamant desire to have their daughter elevated to 2nd Grade from her existing 1st Grade retained status.

4. The LBOE has presented standardized testing to Petitioner which demonstrated that Petitioner's child has not mastered her 1st Grade academic material. (See, Exhibit "A" hereto)

5. Petitioner is welcome to return to 1st Grade, but such action should be considered by Petitioner sooner than later, in order to address the best interest of the child.

6. This agreement resolves all issues emergent and otherwise under Petition. (KP) MJ

APPROVED BY THE COURT:

Jesse H. Strauss

Honorable Jesse H. Strauss, A.L.J.

I HEREBY CONSENT TO
THE FORM AND ENTRY
OF THE WITHIN ORDER

Mitchell R. Friedman, P.C.
Attorneys for Petitioner,

By Bruce Ciszi
Mitchell R. Friedman, Esq.

Wells, Jaworski & Liebman, LLP
Attorneys for Respondent,

By: _____
Kenneth A. Porro, Esq.
with authority of
LBOE Superintendent and Principal. (KP)

3-11

OAL DKT. NO. EDU 10523-09
AGENCY DKT. NO. 294-10/09

IN THE MATTER OF THE TENURE	:	
HEARING OF MARVIN DAVIS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ASBURY PARK, MONMOUTH COUNTY.	:	

The record of this matter, the proposed 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 ALJ 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 Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/03/11
Date of Mailing: 1/03/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10523-09

AGENCY DKT. NO. 294-10/09

IN THE MATTER OF THE TENURE HEARING OF MARVIN DAVIS, SCHOOL DISTRICT OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY.

Douglas J. Kovats, Esq., for petitioner (Kenney, Gross, Kovats & Parton, attorneys)

Marissa A. McAleer, Esq., for respondent (Zazzali, Fagella, Nowack, Kleinbaum and Friedman, attorneys)

Record Closed: September 23, 2010 Decided: October 20, 2010

BEFORE **LISA JAMES-BEAVERS,** ALJ:

STATEMENT OF THE CASE

This case concerns certified tenure charges against respondent, Marvin Davis, a tenured custodian, for conduct unbecoming. The parties agreed to a settlement of all issues in dispute and prepared a settlement agreement, which I have attached and fully incorporated herein.

PROCEDURAL HISTORY

The Asbury Park Board of Education certified tenure charges against Marvin Davis on October 14, 2009 and filed tenure charges with the Commissioner of Education on October 22, 2009 under the Tenured Employees Hearing Law. On October 27, 2009, the Commissioner received an Answer to the charges on behalf of respondent Marvin Davis. The Commissioner transmitted the matter to the Office of Administrative Law 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 parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. Douglas Kovats, Esq. has signed the agreement on behalf of the Asbury Park Board of Education indicating its approval at a public meeting.

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 I and is in accord with the requirements of In re Cardonick, 1990 S.L.D. 842, 846 and that it 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 20, 2010
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: NOV 23 2010

Date Mailed to Parties: NOV 23 2010

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2010 SEP 30 P 3:37
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT REGARDING ACTIONS PENDING BEFORE THE COMMISSIONER OF EDUCATION

This Settlement Agreement is entered into by and between the Asbury Park Board of Education ("BOARD") and its tenured employee Marvin Davis ("DAVIS").

WHEREAS, DAVIS has been continuously employed by the BOARD as a custodial staff member for more than three years and a day and is tenured; and

WHEREAS, on October 14, 2010 the BOARD certified tenure charges against DAVIS to the Commissioner under the Tenure Employees Hearing Law, which charges were captioned:

IN THE MATTER OF THE TENURE HEARING OF MARVIN DAVIS, ASBURY PARK BOARD OF EDUCATION, MONMOUTH COUNTY.

OAL DKT NO. EDU 10523-2009 S
AGENCY REF. NO. 294-10/09;

WHEREAS, DAVIS filed an answer contesting the tenure charges;

WHEREAS, the BOARD and DAVIS have each retained independent counsel of their own choosing, and have been advised of their respective rights and responsibilities under the Tenure Employees' Hearing Law; and

WHEREAS, notwithstanding BOARD's right to pursue the tenure charges before the Commissioner and DAVIS's right to contest such charges and be afforded full procedural due process under the Tenure Employees' Hearing Law, the parties have knowingly, intelligently, and voluntarily agreed to waive such rights.

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 above recitals are repeated and made a part of this Settlement Agreement by reference;

2. The Board agrees to withdraw the tenure charges against DAVIS in return for his agreement:

a. Not to challenge an increment withholding previously imposed upon him;

b. Not to seek return pay for the 120-day suspension served without pay during the pendency of the tenure charges;

c. DAVIS will accept a reassignment of his shift and/or hours and/or building assignment;

d. With the exception to seek enforcement of the terms of this settlement, neither party shall seek anything further from the other with regard to this matter whatsoever.

3. The BOARD will seek the Office of Administrative Law's and the Commissioner's approval for this Settlement Agreement, and if both approve the Settlement Agreement without modification, ask the Commissioner to allow the tenure charges against DAVIS to be withdrawn and dismissed with prejudice;

4. Should the Office of Administrative Law or the Commissioner fail to approve this Settlement Agreement without modification, the parties have agreed to make every reasonable effort to reform this Settlement Agreement to meet any objections. In the event that

such reformation is not possible, this Settlement Agreement will become null and void, the parties will return to the status quo as it existed before this Settlement Agreement was drafted, the matter will be listed for a tenure hearing and the parties agree, in advance that neither the settlement, this Settlement Agreement, the BOARD's Motion to Withdraw Tenure Charges, nor any representations of fact set forth in the settlement, this Settlement Agreement or the BOARD's Motion to Withdraw Tenure Charges will be admissible for any purpose in the hearing or any appeals arising therefrom.

5. DAVIS acknowledges that the BOARD's withholding of his increment for the 2009-2010 school year are and will be permanent increment withholdings. Provided, however, that nothing prevents the BOARD from restoring the increments at some time in the future pursuant to its discretionary power as acknowledged in *Probst v. Haddonfield Bd. of Ed.*, 127 *N.J.* 518 (1992).

6.. DAVIS agrees that he has been fairly and adequately represented and advised at all stages of these proceedings, that he is fully satisfied with the services of counsel and that he is voluntarily and without coercion with a full understanding of his rights and the ramifications of this Settlement Agreement entering into it on his own accord. DAVIS specifically acknowledges that by signing this settlement agreement, he is waiving his right to a hearing that he otherwise would have under the Tenure Employees Hearing Law. DAVIS fully understands that this Settlement Agreement is subject to the approval of the Office of Administrative Law and the Commissioner of Education.

7. The signatory for the BOARD acknowledges that the BOARD has ratified this Settlement Agreement at a duly-noticed meeting.

DATED:

ASBURY PARK BOARD OF EDUCATION

BY: _____

DATED: 9/17/2010

_____
MARVIN DAVIS

DATED: 9/17/2010

4-11

OAL DKT. NO. EDU 05062-10
AGENCY DKT. NO. 46-3/10

F.P., on behalf of minor child, B.J.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record, settlement agreement, and 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 observes that the file only includes what appears to be one page of an agenda for a Board meeting that lists the proposed settlement as a topic to be discussed. The file does not contain a copy of the Board's resolution approving the settlement and designating the Board President and/or the Business Administrator to sign the agreement on its behalf, nor was the settlement agreement signed by the Board's attorney, who is the Board's duly authorized representative in litigation. Therefore, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Stipulation of Settlement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1|03|11

Date of Mailing: 1|03|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05062-10

AGENCY DKT. NO. 46-3/10

F.P., ON BEHALF OF MINOR CHILD, B.J.W.

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,

Defendant.

John Wiley, Jr., Esq., for petitioner

Viola Lordi, Esq., for respondent (Wilentz, Goldman & Spitzner, attorneys)

Record Closed: December 3, 2010 Decided: December 3, 2010

BEFORE **JAMES J. GERAGHTY,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law on May 12, 2010 for hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 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 agreed to settle this matter and have prepared the attached agreement indicating the terms of settlement.

2 The settlement fully disposes of all issues in controversy and is consistent with the law.

I CONCLUDE that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement shall be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms and that it is further ordered that the proceedings in this matter hereby are **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.

12/3/10
DATE

JAMES A. GERAGHTY, ALJ

Date Received at Agency: 12-7-10

Date Mailed to Parties: DEC 7 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

db

AGREEMENT BETWEEN
THE METUCHEN BOARD OF EDUCATION
AND FLORENCE PATIKOWSKI AND BOBBIE WALP

The Metuchen Board of Education, with principal offices located at 12 Simpson Place, Metuchen, N.J. 08840 ("Board") and Florence Patikowski, residing at 26 Ferndale Place, Metuchen, N.J. 08840 ("Petitioner") and Bobbie Walp, residing at 10 Denherder Drive, Somerset, N.J. 08873, hereby set forth their full and complete agreement ("Agreement"), as follows:

W I T N E S S E T H:

WHEREAS, Bobbie Walp ("Bobbie") is an 18-year-old student, born May 12, 1990, who has been enrolled in the Metuchen School District ("District") since September 3, 2003; and

WHEREAS, Bobbie's parents, Douglas and Donna Walp, are not domiciled in the District; and

WHEREAS, Petitioner filed a Pro Se Residency Appeal before the Bureau of Controversies and Disputes, New Jersey Department of Education, Agency Reference Number 46-3/10, OAL Docket No. EDU 05062-10, seeking a determination that Bobbie is entitled to a free public education in the District; and

WHEREAS, the Board, in its Answer to the Pro Se Residency Appeal asserted that Petitioner is liable to the Board for tuition for the period of Bobbie's ineligible attendance in the Metuchen Public Schools;

WHEREAS, the parties have reached an amicable resolution of the issues in dispute.

NOW, THEREFORE, for the consideration specified below, the parties set forth the following mutual covenants and agreements:

1. The parties agree that, pursuant to N.J.S.A. 18A:38-1 et seq., Bobbie's domicile for school attendance purposes is 10 Denherder Drive, Somerset, N.J. 08873. Or Bobbie's parents DS EP Bu

2. The Board agrees to waive any and all claims against Petitioner for tuition pursuant to N.J.S.A. 18A:38-1 et seq. and N.J.A.C. 6A:22-6.1 et seq., for the period of Bobbie's ineligible attendance in the Metuchen Public Schools for the period from September 2003 through June 2010.

3. Petitioner and Bobbie agree that Bobbie will not attend Metuchen High School for the 2010-2011 school year and acknowledge that Bobbie has signed Exhibit "A" to this Agreement advising of her withdrawal from the status of student at Metuchen High School effective immediately. Petitioner and Bobbie further agree that Bobbie will not attempt to re-enroll in the District during the 2010-2011 school year or at any time thereafter. Should Bobbie, or someone on Bobbie's behalf, attempt to re-enroll Bobbie in the District, Petitioner agrees to pay the Board the sum of eighty-thousand ($80,000.00) dollars, which represents a reduced per-pupil fee for Bobbie's ineligible attendance in the schools of the District from September 2003 through June 2010.

4. Petitioner and Bobbie agree that this Agreement sets forth a complete and full resolution of this matter and that it fully resolves any and all issues, causes of action and claims related thereto, which may exist as of the date of

this Agreement, including, but not limited to, any and all claims for damages (whether compensatory, incidental, punitive or otherwise), experts' fees or costs, and/or attorney's fees or costs that they have or may have against the Board, its officials, officers, employees, agents and attorneys, whether such claims arise under any State or Federal law, statute, rule or regulation, and regardless of the forum for the claim.

5. This Agreement shall not constitute, be interpreted, construed or used as evidence of any admission of fact, law, responsibility, wrongdoing or liability on the part of the Board. This Agreement shall not be used in any subsequent proceeding by any party other than to enforce the express terms of this Agreement. Petitioner and Bobbie specifically acknowledge that the Board's agreement to waive any amount of tuition that may be owed by Petitioner to the Board as set forth herein shall not be used against the Board in any subsequent proceeding or litigation in any manner.

6. Petitioner and Bobbie acknowledge that they have been represented by and have consulted with their attorney throughout the negotiations of this Agreement and that they have reviewed this Agreement in detail with their attorney and that they fully understand its requirements and limitations. Petitioner and Bobbie further expressly state that they are fully satisfied with the representation provided by their attorney.

7. Petitioner and Bobbie hereby state that they are signing this Agreement voluntarily of their own free will and not under duress or coercion of any kind.

8. This Agreement shall be construed fairly according to the plain language of its terms and not for or against any party hereto.

9. Upon full execution of this Agreement, Petitioner will withdraw her Pro Se Residency Appeal. The withdrawal of Petitioner's Pro Se Residency Appeal shall not constitute an abandonment of Petitioner's appeal pursuant to N.J.A.C. 6A:22-6.1(a).

10. If it is determined that a specific clause(s) of this Agreement is/are illegal under federal or state law, then the remainder of this Agreement not affected by such a ruling shall remain in full force and effect.

11. This Agreement and each of its provisions binds the parties to this Agreement. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns also are bound. This Agreement is made for the benefit of all parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors and assigns.

12. This Agreement constitutes the full and complete agreement of the parties hereto with respect to its subject matter. This Agreement supersedes any prior or contemporaneous representations, whether oral or written, and it may not be modified or amended except by a written instrument signed by all parties hereto.

13. Notwithstanding anything to the contrary contained herein, it is expressly understood and agreed that, following the full execution of this Agreement, Petitioner, Bobbie and their attorney will not take any action to

publicize the terms or nature of this Agreement except that disclosure is permitted: (1) as necessary with regard to any proceeding for the enforcement of this Agreement; (2) to Bobbie's immediate family and attorney(s), who shall agree not to disclose the fact of or any of the terms of this Agreement as if they were a party to this Agreement; (3) as may be required by any court or agency of competent jurisdiction; and (4) as may be required by law.

14. This Agreement is subject to the Board's formal approval.

15. In the event that this Agreement is not fully executed and approved by all parties, this Agreement shall become null and void and shall not constitute an admission of any party and shall not be referred to by any party in any subsequent legal proceeding for any purpose whatsoever.

IN WITNESS WHEREOF, THE PARTIES HERETO SET THEIR HANDS TO THIS AGREEMENT AS FOLLOWS:

Florence Patikowski
FLORENCE PATIKOWSKI

8-3-10
Date

Bobbie Jane Walp
~~BOBBIE~~ WALP
Bobbie Jane

8-3-10
Date

BOARD OF EDUCATION

Eileen Frowenfeld
~~TERRY KOHL~~ Eileen Frowenfeld
Board President

8/10/10
Date

ATTEST:

MICHAEL HARVIER
Business Administrator/
Board Secretary

8/10/10
Date

#11-11SEC

AGENCY DKT. NO. 679-11/10

IN THE MATTER OF GREG COLLINS,	:	
MARION P. THOMAS CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, ESSEX COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The Commission recommends that respondent be suspended from the Marion P. Thomas Charter School Board until he has completed the online web-based Finance training program, and if respondent completes the web-based training program by December 15, 2010, the Commission recommends that respondent be censured for failing to timely complete the program. The Commission further recommends that respondent should be removed from the board if this online web-based training program is not completed by December 15, 2010.

On December 16, 2010, the Commission advised the Commissioner that respondent had completed the requisite program. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the

unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

IT IS HEREBY ORDERED that Greg Collins be censured as a school official found to have violated the School Ethics Act.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/10/11

Date of Mailing: 1/10/11

* 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)

	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
IN THE MATTER OF GREG COLLINS Marion P. Thomas Charter School Essex County	:	**DECISION FOR FAILURE TO ATTEND TRAINING**
	:	**DOCKET NO. T19-10/2**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advised all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes, beginning March 25, 2009. The NJSBA conducted seven NJQSAC training sessions between May 20, 2009 and January 9, 2010 at varying locations. The NJSBA also made available an on-line web-based opportunity to meet this second-year training requirement from January 12, 2010 through May 28, 2010. These training opportunities were published in School Board Notes and posted on the NJSBA's website. By correspondence dated April 30, 2010, the Commission notified all board members and charter school trustees of their non-compliance with the training mandate and reminded them of the opportunity to obtain training or to inform the Commission of errors in its data.

Additionally, in July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified the board member/trustee as having failed to complete the "NJQSAC" training program within the required training period. In addition to providing another opportunity to inform the Commission of any errors in its data, this notice identified a final on-line training opportunity, made available by the NJSBA from July 19, 2010 through August 27, 2010, to fulfill the second-year training requirement at a time convenient to the respondent's schedule.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the "NJQSAC" training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent replied that he was unaware of the training requirement and that when he became aware of the requirement, he had problems accessing training. The respondent has not completed the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission recommends to the Commissioner of Education that the respondent be suspended from the above-named Board until demonstrating completion of the online web-based NJQSAC training program, and further recommends that the board member/trustee be removed from the Board if this online web-based training program is not completed by December 15, 2010. However, should the respondent complete the online web-based training *prior* to the Commissioner's issuance of a final decision in this matter, the Commission recommends that the respondent be censured for failing to timely complete the program.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions/after OTSC/T19-10-2.

#12-11SEC

AGENCY DKT. NO. 675-11/10

IN THE MATTER OF MAGDA NIEVES,	:	
CAMDEN'S PROMISE CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION

The Commissioner has considered the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty.

Because the respondent completed training prior to the Commission's October 26, 2010 meeting (but after the issuance of the Commission's September 22, 2010 Order to Show Cause), the Commission recommended a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

The Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Respondent is thus 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: 1/10/11
Date of Mailing: 1/10/11

* 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)

	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
IN THE MATTER OF MAGDA NIEVES Camden's Promise Charter School Essex County	:	**DECISION FOR FAILURE TO ATTEND TRAINING**
	:	**DOCKET NO. T12-10/2**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advised all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes, beginning March 25, 2009. The NJSBA conducted seven NJQSAC training sessions between May 20, 2009 and January 9, 2010 at varying locations. The NJSBA also made available an on-line web-based opportunity to meet this second-year training requirement from January 12, 2010 through May 28, 2010. These training opportunities were published in School Board Notes and posted on the NJSBA's website. By correspondence dated April 30, 2010, the Commission notified all board members and charter school trustees of their non-compliance with the training mandate and reminded them of the opportunity to obtain training or to inform the Commission of errors in its data.

Additionally, in July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified the board member/trustee as having failed to complete the "NJQSAC" training program within the required training period. In addition to providing another opportunity to inform the Commission of any errors in its data, this notice identified a final on-line training opportunity, made available by the NJSBA from July 19, 2010 through August 27, 2010, to fulfill the second-year training requirement at a time convenient to the respondent's schedule.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training

mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the "NJQSAC" training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent failed to reply to the Commission's Order. Following receipt of the Order to Show Cause, the respondent completed the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission finds that although a finding of violation is warranted, the respondent's completion of the program after receipt of the Order to Show Cause may fairly serve to mitigate the penalty in this matter. Therefore, the Commission recommends to the Commissioner of Education a penalty of reprimand.

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. The school official 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.

Robert W. Bender

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions after OTSC/T12-10-2

13-11

AGENCY DKT. NO. 683-11/10

IN THE MATTER OF MICHAEL LYTLE,	:	
NORTH STAR ACADEMY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, ESSEX COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately completed training after the issuance of its September 22, 2010 Order to Show Cause, but prior to the Commission's October 26, 2010 meeting and it, therefore, recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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: 1/10/11
Date of Mailing: 1/10/11

* 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)

	:	**BEFORE THE SCHOOL**
	:	**ETHICS COMMISSION**
IN THE MATTER OF	:	
MICHAEL LYTLE	:	
North Star Academy Charter School	:	**DECISION FOR**
Essex County	:	**FAILURE TO ATTEND TRAINING**
	:	
	:	**DOCKET NO. T23-10/2**
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as 'New Board Member Orientation' (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as 'NJQSAC' (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as 'Finance' (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advised all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes, beginning March 25, 2009. The NJSBA conducted seven NJQSAC training sessions between May 20, 2009 and January 9, 2010 at varying locations. The NJSBA also made available an on-line web-based opportunity to meet this second-year training requirement from January 12, 2010 through May 28, 2010. These training opportunities were published in School Board Notes and posted on the NJSBA's website. By correspondence dated April 30, 2010, the Commission notified all board members and charter school trustees of their non-compliance with the training mandate and reminded them of the opportunity to obtain training or to inform the Commission of errors in its data.

Additionally, in July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified the board member/trustee as having failed to complete the 'NJQSAC' training program within the required training period. In addition to providing another opportunity to inform the Commission of any errors in its data, this notice identified a final on-line training opportunity, made available by the NJSBA from July 19, 2010 through August 27, 2010, to fulfill the second-year training requirement at a time convenient to the respondent's schedule.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the 'NJQSAC' training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent replied that he had registered for training. Following receipt of the Order to Show Cause, the respondent completed the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission finds that although a finding of violation is warranted, the respondent's completion of the program after receipt of the Order to Show Cause may fairly serve to mitigate the penalty in this matter. Therefore, the Commission recommends to the Commissioner of Education a penalty of reprimand.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions/after OTSC/T23-10-2.

14-11

#14-11SEC

AGENCY DKT. NO. 680-11/10

IN THE MATTER OF JACQUELINE PHILLIPS-AGINS, VILLAGE CHARTER SCHOOL, MERCER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately completed training after the issuance of its September 22, 2010 Order to Show Cause, but prior to the Commission's October 26, 2010 meeting and it, therefore, recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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: 1/10/11
Date of Mailing: 1/10/11

* 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)

	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
IN THE MATTER OF JACQUELINE PHILLIPS-AGINS Village Charter School Mercer County	:	**DECISION FOR FAILURE TO ATTEND TRAINING**
	:	**DOCKET NO. T20-10/2**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advised all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes, beginning March 25, 2009. The NJSBA conducted seven NJQSAC training sessions between May 20, 2009 and January 9, 2010 at varying locations. The NJSBA also made available an on-line web-based opportunity to meet this second-year training requirement from January 12, 2010 through May 28, 2010. These training opportunities were published in School Board Notes and posted on the NJSBA's website. By correspondence dated April 30, 2010, the Commission notified all board members and charter school trustees of their non-compliance with the training mandate and reminded them of the opportunity to obtain training or to inform the Commission of errors in its data.

Additionally, in July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified the board member/trustee as having failed to complete the "NJQSAC" training program within the required training period. In addition to providing another opportunity to inform the Commission of any errors in its data, this notice identified a final on-line training opportunity, made available by the NJSBA from July 19, 2010 through August 27, 2010, to fulfill the second-year training requirement at a time convenient to the respondent's schedule.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training

mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the "NJQSAC" training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent failed to reply to the Commission's Order. Following receipt of the Order to Show Cause, the respondent completed the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission finds that although a finding of violation is warranted, the respondent's completion of the program after receipt of the Order to Show Cause may fairly serve to mitigate the penalty in this matter. Therefore, the Commission recommends to the Commissioner of Education a penalty of reprimand.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions after OTSC/T20-10-2.

#15-11SEC

AGENCY DKT. NO. 676-11/10

IN THE MATTER OF CORYNDA HAGAMIN,	:	
CAMDEN'S PROMISE CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION
	:	

The Commissioner has considered the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty.

Because the respondent had still not completed training at the time of the Commission's October 26, 2010 meeting – one month after the issuance of the Commission's September 22, 2010 Order to Show Cause – the Commission recommended a penalty of suspension from the board of trustees until the completion of training or, if training is not completed by January 8, 2011, removal from office. The Commission's decision provides, however, that if respondent completes her training before the issuance of the Commissioner's final decision, the penalty may be downgraded to censure.

Information has been provided to the Commissioner indicating that respondent completed training on December 13, 2010; however, the New Jersey School Boards Association (NJSBA) inadvertently sent her the wrong training materials. The correct materials have now been forwarded, and NJSBA has advised that respondent has been given credit for QSAC training for 2009-10 and Finance training for 2010-11. Accordingly, censure is the penalty recommended by the Commission. As respondent has neither filed exceptions to the recommended penalty or instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation, the Commissioner adopts the penalty recommended by the Commission in consequence of respondent's failure to timely honor the obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

IT IS HEREBY ORDERED that Corynda Hagamin be censured as a school official found to have violated the School Ethics Act.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/10/11

Date of Mailing: 1/10/11

* 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)

	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
IN THE MATTER OF CORYNDA HAGAMIN Camden's Promise Charter School Camden County	:	**DECISION FOR FAILURE TO ATTEND TRAINING**
	:	**DOCKET NO. T15-10/2**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advised all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes, beginning March 25, 2009. The NJSBA conducted seven NJQSAC training sessions between May 20, 2009 and January 9, 2010 at varying locations. The NJSBA also made available an on-line web-based opportunity to meet this second-year training requirement from January 12, 2010 through May 28, 2010. These training opportunities were published in School Board Notes and posted on the NJSBA's website. By correspondence dated April 30, 2010, the Commission notified all board members and charter school trustees of their non-compliance with the training mandate and reminded them of the opportunity to obtain training or to inform the Commission of errors in its data.

Additionally, in July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified the board member/trustee as having failed to complete the "NJQSAC" training program within the required training period. In addition to providing another opportunity to inform the Commission of any errors in its data, this notice identified a final on-line training opportunity, made available by the NJSBA from July 19, 2010 through August 27, 2010, to fulfill the second-year training requirement at a time convenient to the respondent's schedule.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the "NJQSAC" training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent did not reply to the Commission's Order and has not attended the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission recommends to the Commissioner of Education that the respondent be suspended from the above-named Board until demonstrating completion of the online web-based NJQSAC training program, and further recommends that the board member/trustee be removed from the Board if this online web-based training program is not completed by December 15, 2010. However, should the respondent complete the online web-based training *prior* to the Commissioner's issuance of a final decision in this matter, the Commission recommends that the respondent be censured for failing to timely complete the program.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions after OTSC/T15-10-2

16-11

AGENCY DKT. NO. 681-11/10

IN THE MATTER OF JAMES ANDERSON,	:	
NEW HORIZONS COMMUNITY	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, ESSEX COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The Commission recommends that respondent be suspended from the New Horizons Community Charter School Board until he has completed the online web-based Finance training program, and if respondent completes the web-based training program by December 15, 2010, the Commission recommends that respondent be censured for failing to timely complete the program. The Commission further recommends that respondent should be removed from the board if this online web-based training program is not completed by December 15, 2010.

On December 16, 2010, the Commission advised the Commissioner that respondent had completed the requisite program. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the

unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

IT IS HEREBY ORDERED that James Anderson be censured as a school official found to have violated the School Ethics Act.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/10/11

Date of Mailing: 1/10/11

* 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)

	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
IN THE MATTER OF JAMES ANDERSON New Horizons Community Charter School Essex County	:	**DECISION FOR FAILURE TO ATTEND TRAINING**
	:	**DOCKET NO. T21-10/2**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advised all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes, beginning March 25, 2009. The NJSBA conducted seven NJQSAC training sessions between May 20, 2009 and January 9, 2010 at varying locations. The NJSBA also made available an on-line web-based opportunity to meet this second-year training requirement from January 12, 2010 through May 28, 2010. These training opportunities were published in School Board Notes and posted on the NJSBA's website. By correspondence dated April 30, 2010, the Commission notified all board members and charter school trustees of their non-compliance with the training mandate and reminded them of the opportunity to obtain training or to inform the Commission of errors in its data.

Additionally, in July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified the board member/trustee as having failed to complete the "NJQSAC" training program within the required training period. In addition to providing another opportunity to inform the Commission of any errors in its data, this notice identified a final on-line training opportunity, made available by the NJSBA from July 19, 2010 through August 27, 2010, to fulfill the second-year training requirement at a time convenient to the respondent's schedule.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training

mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the "NJQSAC" training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent replied to the Commission's Order that he experienced difficulty accessing the online training and would be willing go to training. The respondent has not completed the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission recommends to the Commissioner of Education that the respondent be suspended from the above-named Board until demonstrating completion of the online web-based NJQSAC training program, and further recommends that the board member/trustee be removed from the Board if this online web-based training program is not completed by December 15, 2010. However, should the respondent complete the online web-based training *prior* to the Commissioner's issuance of a final decision in this matter, the Commission recommends that the respondent be censured for failing to timely complete the program.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions after OTSC/T21-10-2.

17-11

N-11SEC

AGENCY DKT. NO. 672-11/10

IN THE MATTER OF LINDA STERLING,	:	
TEAM ACADEMY CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION

The Commissioner has considered the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty.

Because the respondent completed training prior to the Commission's October 26, 2010 meeting (but after the issuance of the Commission's September 22, 2010 Order to Show Cause), the Commission recommended a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

The Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Respondent is thus 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: 1|10|11
Date of Mailing: 1|10|11

* 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)

	:	**BEFORE THE SCHOOL**
	:	**ETHICS COMMISSION**
IN THE MATTER OF	:	
LINDA STERLING	:	
TEAM Charter School	:	**DECISION FOR**
Essex County	:	**FAILURE TO ATTEND TRAINING**
	:	
	:	**DOCKET NO. T01-10NB**
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advises all newly elected and appointed board members and trustees of this training requirement in writing upon their election or appointment and continues to advise them through notices published in its newsletter, School Board Notes. The NJSBA conducted five NBMO training sessions between May 2009 and January 2010 at varying locations and continuously published the dates and times of those sessions in School Board Notes and on the NJSBA website. As well, by correspondence dated April 30, 2010, the School Ethics Commission notified all board members/trustees who were not compliant with the training mandate of a final opportunity to obtain the necessary NBMO training on June 12, 2010. In July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified this board member/trustee as having failed to complete the NBMO training program within the required training period. This notice also provided the opportunity to inform the Commission of any errors in its data.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the NBMO training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board

member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent replied to the Commission's Order that she was unaware of the training requirement until August 2010 and could not attend training at that time because of pre-existing travel plans. Following receipt of the Commission's Order to Show Cause, the respondent completed the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter, the Commission finds that although a finding of violation is warranted, the respondent's completion of the program after receipt of the Order to Show Cause may fairly serve to mitigate the penalty in this matter. Therefore, the Commission recommends to the Commissioner of Education a penalty of reprimand.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions after OTSC/T01-10NB

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

ROCHELLE R. HENDRICKS
Acting Commissioner

September 22, 2010

Linda Sterling
TEAM Academy Charter School
41 Prospect Avenue
Montclair, NJ 07042

Subject: School Ethics Commission's Order to Show Cause for Failure To Attend Training, Docket No. T01-10NB

Dear Ms. Sterling:

Enclosed please find an Order to Show Cause issued by the Chairperson of the School Ethics Commission. As set forth therein, the Order has been issued because the New Jersey School Boards Association (NJSBA) advised the Commission that you failed to attend training, as required by N.J.S.A. 18A:12-33 of the School Ethics Act. Pursuant to N.J.A.C. 6A:28-1.6, you must respond within **20 days** from the date of this Order with any reasons that the Commission should not find you in violation of the Act. **Your response to the Commission must be:**

(1) In writing (no e-mails);
(2) Signed, dated and notarized; and
(3) Submitted as an original statement, along with two copies.

To the extent you assert that the data provided by the NJSBA are inaccurate and you have, in fact, completed the required training program, please submit documentation to the above address verifying completion of the program. If you are no longer a board member or a charter school trustee, or if you are not a voting member of the Board, please inform the Commission in writing.

If you do not respond within 20 days of the date of this Order, the Commission will deem the facts set forth in the Order to be admitted and take action accordingly. If a violation of the Act is found, the Commission may recommend to the Commissioner of Education reprimand, censure, suspension, or removal. Thank you for your prompt attention to this matter.

Sincerely,

Joanne Boyle, Executive Director
School Ethics Commission

E/training/2010/OTSC/cover letter
Enclosure
c: Lawrence Feinsod
Ryan Hill
Charter Schools Office

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	**ORDER TO SHOW CAUSE FOR FAILURE TO ATTEND BOARD MEMBER/TRUSTEE TRAINING**
LINDA STERLING **Team Academy Charter School** **Essex County**	:	**DOCKET NO. T01-10NB**

AUTHORITY:

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each newly elected or appointed board member and charter school trustee to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA). This mandate is included both in the Commission's regulations (N.J.A.C. 6A:28-4.1(a)) as well as the regulations governing charter schools. (N.J.A.C. 6A:11-3.1(d)). For the 2009-2010 training cycle, that program was identified as "New Board Member Orientation" (NBMO).

THE SCHOOL ETHICS COMMISSION FINDS AND CONCLUDES:

The NJSBA advises all newly elected and appointed board members and trustees of this training requirement in writing upon their election or appointment and continues to advise them through notices published in its newsletter, School Board Notes. The NJSBA conducted five NBMO training sessions between May 2009 and January 2010 at varying locations and continuously published the dates and times of those sessions in School Board Notes and on the NJSBA website. As well, by correspondence dated April 30, 2010, the School Ethics Commission notified all board members/trustees who were not compliant with the training mandate of a final opportunity to obtain the necessary NBMO training on June 12, 2010. In July 2010, the School Ethics Commission issued a Notice of Enforcement to your Board Secretary/Charter School Administrator, with a copy of the same to you, which alerted you that the NJSBA identified you as having failed to complete the NBMO training program within the required training period. This notice also provided the opportunity to inform the Commission of any errors in its data.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training mandate. A report from the NJSBA indicates that you have failed to complete New Board Member Orientation training within the required time period. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33.

IT IS THEREFORE ORDERED:

That, pursuant to N.J.A.C. 6A:28-1.6, you show cause under oath and in writing before the Commission, within 20 days from the date of this Order, why the School Ethics Commission should not find you in violation of N.J.S.A. 18A:12-33 and recommend that the Commissioner of Education impose a sanction of reprimand, censure, suspension or removal from your position as a school board member or charter school trustee as authorized by N.J.S.A. 18A:12-29(f) and N.J.A.C. 6A:28-10.12.

Robert W. Bender
Robert W. Bender, Chairperson
School Ethics Commission

Date: September 22, 2010
E/training/2010/OTSC/NBMO/T01-10NB Sterling.docx

AGENCY DKT. NO. 678-11/10

IN THE MATTER OF DEREK CAPANNA,	:	
TEAM ACADEMY CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
ESSEX COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately completed training after the issuance of its September 22, 2010 Order to Show Cause, but prior to the Commission's October 26, 2010 meeting and it, therefore, recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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: 1/10/11
Date of Mailing: 1/10/11

* 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)

	:	**BEFORE THE SCHOOL**
	:	**ETHICS COMMISSION**
IN THE MATTER OF	:	
DEREK CAPANA	:	
TEAM Charter School	:	**DECISION FOR**
Essex County	:	**FAILURE TO ATTEND TRAINING**
	:	
	:	**DOCKET NO. T17-10/2**
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advised all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes, beginning March 25, 2009. The NJSBA conducted seven NJQSAC training sessions between May 20, 2009 and January 9, 2010 at varying locations. The NJSBA also made available an on-line web-based opportunity to meet this second-year training requirement from January 12, 2010 through May 28, 2010. These training opportunities were published in School Board Notes and posted on the NJSBA's website. By correspondence dated April 30, 2010, the Commission notified all board members and charter school trustees of their non-compliance with the training mandate and reminded them of the opportunity to obtain training or to inform the Commission of errors in its data.

Additionally, in July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified the board member/trustee as having failed to complete the "NJQSAC" training program within the required training period. In addition to providing another opportunity to inform the Commission of any errors in its data, this notice identified a final on-line training opportunity, made available by the NJSBA from July 19, 2010 through August 27, 2010, to fulfill the second-year training requirement at a time convenient to the respondent's schedule.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training

mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the "NJQSAC" training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent replied that he did not know that he was delinquent in training until July 2010. Following receipt of the Commission's Order to Show Cause, the respondent completed the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission finds that although a finding of violation is warranted, the respondent's completion of the program after receipt of the Order to Show Cause may fairly serve to mitigate the penalty in this matter. Therefore, the Commission recommends to the Commissioner of Education a penalty of reprimand.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions after OTSC/T17-10-2.

19-11SEC

AGENCY DKT. NO. 682-11/10

IN THE MATTER OF LAUREL DUMONT,	:	
NEWARK EDUCATORS CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, ESSEX COUNTY.	:	DECISION
	:	

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The Commission advises that the respondent ultimately completed training after the issuance of its September 22, 2010 Order to Show Cause, but prior to the Commission's October 26, 2010 meeting and it, therefore, recommends a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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: 1/10/11
Date of Mailing: 1/10/11

* 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)

	:	**BEFORE THE SCHOOL**
	:	**ETHICS COMMISSION**
IN THE MATTER OF	:	
LAUREL DUMONT	:	
Newark Educators Charter School	:	**DECISION FOR**
Essex County	:	**FAILURE TO ATTEND TRAINING**
	:	
	:	**DOCKET NO. T22-10/2**
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advised all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes, beginning March 25, 2009. The NJSBA conducted seven NJQSAC training sessions between May 20, 2009 and January 9, 2010 at varying locations. The NJSBA also made available an on-line web-based opportunity to meet this second-year training requirement from January 12, 2010 through May 28, 2010. These training opportunities were published in School Board Notes and posted on the NJSBA's website. By correspondence dated April 30, 2010, the Commission notified all board members and charter school trustees of their non-compliance with the training mandate and reminded them of the opportunity to obtain training or to inform the Commission of errors in its data.

Additionally, in July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified the board member/trustee as having failed to complete the "NJQSAC" training program within the required training period. In addition to providing another opportunity to inform the Commission of any errors in its data, this notice identified a final on-line training opportunity, made available by the NJSBA from July 19, 2010 through August 27, 2010, to fulfill the second-year training requirement at a time convenient to the respondent's schedule.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training

mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the "NJQSAC" training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent replied that until notification in July 2010, she believed that she had completed all of the necessary training. Following receipt of the Order to Show Cause, the respondent completed the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission finds that although a finding of violation is warranted, the respondent's completion of the program after receipt of the Order to Show Cause may fairly serve to mitigate the penalty in this matter. Therefore, the Commission recommends to the Commissioner of Education a penalty of reprimand.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions/after OTSC/T22-10-2.

20-11

AGENCY DKT. NO. 677-11/10

IN THE MATTER OF DEBORAH BURNS,	:	
ACADEMY CHARTER HIGH SCHOOL,	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY.	:	DECISION

The Commissioner has considered the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty.

Because the respondent completed training prior to the Commission's October 26, 2010 meeting (but after the issuance of the Commission's September 22, 2010 Order to Show Cause), the Commission recommended a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

The Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Respondent is thus 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: 1|10|11
Date of Mailing: 1|10|11

* 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)

	:	**BEFORE THE SCHOOL**
	:	**ETHICS COMMISSION**
IN THE MATTER OF	:	
DEBORAH BURNS	:	
Academy Charter High School	:	**DECISION FOR**
Monmouth County	:	**FAILURE TO ATTEND TRAINING**
	:	
	:	**DOCKET NO. T16-10/2**
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advised all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes, beginning March 25, 2009. The NJSBA conducted seven NJQSAC training sessions between May 20, 2009 and January 9, 2010 at varying locations. The NJSBA also made available an on-line web-based opportunity to meet this second-year training requirement from January 12, 2010 through May 28, 2010. These training opportunities were published in School Board Notes and posted on the NJSBA's website. By correspondence dated April 30, 2010, the Commission notified all board members and charter school trustees of their non-compliance with the training mandate and reminded them of the opportunity to obtain training or to inform the Commission of errors in its data.

Additionally, in July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified the board member/trustee as having failed to complete the "NJQSAC" training program within the required training period. In addition to providing another opportunity to inform the Commission of any errors in its data, this notice identified a final on-line training opportunity, made available by the NJSBA from July 19, 2010 through August 27, 2010, to fulfill the second-year training requirement at a time convenient to the respondent's schedule.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the "NJQSAC" training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33 The respondent replied to the Commission's Order that she missed training because of personal health issues and the death of her mother. Following receipt of the Order to Show Cause, the respondent completed the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission finds that although a finding of violation is warranted, the respondent's completion of the program after receipt of the Order to Show Cause may fairly serve to mitigate the penalty in this matter. Therefore, the Commission recommends to the Commissioner of Education a penalty of reprimand.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions after OTSC/T16-10-2.

21-15

24-11SEC

AGENCY DKT. NO. 686-11/10

IN THE MATTER OF JEFFREY SIEDLECKI,	:	
SHAMONG TOWNSHIP	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION,	:	DECISION
BURLINGTON COUNTY.	:	
	:	

The record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to attend board member training in accordance with *N.J.S.A.* 18A:12-33 – forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. The Commission recommends that respondent be suspended from the Shamong Township Board of Education until he has completed the online web-based Finance training program, and further recommends that he be removed from the board if this online web-based training program is not completed by December 15, 2010. Should respondent complete the web-based training program by this date, the Commission recommends that respondent be censured for failing to timely complete the program. Respondent did not file exceptions nor did he appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4. On December 16, 2010, the Commission advised the Commissioner that respondent had completed the requisite program.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon school board members by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

IT IS HEREBY ORDERED that Jeffrey Siedlecki be censured as a school official found to have violated the School Ethics Act.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/10/11

Date of Mailing: 1/10/11

* 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)

	:	**BEFORE THE SCHOOL**
	:	**ETHICS COMMISSION**
IN THE MATTER OF	:	
JEFFREY SIEDLECKI	:	
Shamong Township Board of Education	:	**DECISION FOR**
Burlington County	:	**FAILURE TO ATTEND TRAINING**
	:	
	:	**DOCKET NO. T31-10/3**
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advised all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes, beginning March 25, 2009. The NJSBA conducted seven Finance training sessions between May 20, 2009 and January 9, 2010 at varying locations. The NJSBA also made available an on-line web-based opportunity to meet this third-year training requirement from January 12, 2010 through May 28, 2010. These training opportunities were published in School Board Notes and posted on the NJSBA's website. By correspondence dated April 30, 2010, the Commission notified all board members and charter school trustees of their non-compliance with the training mandate and reminded them of the opportunity to obtain training or to inform the Commission of errors in its data.

Additionally, in July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified the board member/trustee as having failed to complete the "Finance" training program within the required training period. In addition to providing another opportunity to inform the Commission of any errors in its data, this notice identified a final on-line training opportunity, made available by the NJSBA from July 19, 2010 through August 27, 2010, to fulfill the third-year training requirement at a time convenient to the respondent's schedule.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the "Finance" training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent did not provide a timely written response to the Commission's Order and did not complete the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission recommends to the Commissioner of Education that the respondent be suspended from the above-named Board until demonstrating completion of the online web-based Finance training program, and further recommends that the board member/trustee be removed from the Board if this online web-based training program is not completed by December 15, 2010. However, should the respondent complete the online web-based training *prior* to the Commissioner's issuance of a final decision in this matter, the Commission recommends that the respondent be censured for failing to timely complete the program.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions After OTSC/T31-10-3

22-11

#22-11SEC

AGENCY DKT. NO. 674-11/10

IN THE MATTER OF ANN ROSARIO,	:	
JERSEY CITY COMMUNITY	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, HUDSON COUNTY.	:	DECISION
	:	

The Commissioner has considered the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. The Commission recommends that respondent be suspended from the Jersey City Community Charter School's Board until she has completed required training, and further recommends that she be removed from the Board if training is not completed by January 8, 2011.

To date, there is no indication that respondent has completed training. Nor has she filed exceptions to the recommended penalty or instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation. The Commissioner therefore adopts the penalty recommended by the Commission in consequence of respondent's failure to honor the obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the required training is completed; provided, however, that if such training is not completed by January 8, 2011, respondent shall be summarily removed from office.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/10/11

Date of Mailing: 1/10/11

* 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)

	:	**BEFORE THE SCHOOL**
	:	**ETHICS COMMISSION**
IN THE MATTER OF	:	
ANN ROSARIO	:	
Jersey City Community Charter School	:	**DECISION FOR**
Hudson County	:	**FAILURE TO ATTEND TRAINING**
	:	
	:	**DOCKET NO. T09-10NB**
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advises all newly elected and appointed board members and trustees of this training requirement in writing upon their election or appointment and continues to advise them through notices published in its newsletter, School Board Notes. The NJSBA conducted five NBMO training sessions between May 2009 and January 2010 at varying locations and continuously published the dates and times of those sessions in School Board Notes and on the NJSBA website. As well, by correspondence dated April 30, 2010, the School Ethics Commission notified all board members/trustees who were not compliant with the training mandate of a final opportunity to obtain the necessary NBMO training on June 12, 2010. In July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified this board member/trustee as having failed to complete the NBMO training program within the required training period. This notice also provided the opportunity to inform the Commission of any errors in its data.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the NBMO training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent failed to respond to the Commission's Order and has not attended the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission recommends to the Commissioner of Education that the respondent be suspended from the above-named Board until demonstrating completion of the New Board Member Orientation program, and further recommends that the board member/trustee be removed from the Board if the New Board Member Orientation Program is not completed by January 8, 2011. However, should the respondent complete the training *prior* to the Commissioner's issuance of a final decision in this matter, the Commission recommends that the respondent be censured for failing to timely complete the program.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions after OTSC/T09-10NB

23-11

#23-11SEC

AGENCY DKT. NO. 687-11/10

IN THE MATTER OF CHRISTINA OZTAN,	:	
GREATER BRUNSWICK CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
MIDDLESEX COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33 – forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. The Commission advises that the respondent ultimately completed training after the issuance of its September 22, 2010 Order to Show Cause, but prior to the Commission's October 26, 2010 meeting and it, therefore, recommends a penalty of reprimand. Respondent filed neither exceptions nor proof of having attended the required training prior to the issuance of the Commission's Order to Show Cause. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon charter school trustees by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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: 1/10/11

Date of Mailing: 1/10/11

* 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)

	:	**BEFORE THE SCHOOL**
	:	**ETHICS COMMISSION**
IN THE MATTER OF	:	
CHRISTINA OZTAN	:	
Greater Brunswick Charter School	:	**DECISION FOR**
Middlesex County	:	**FAILURE TO ATTEND TRAINING**
	:	
	:	**DOCKET NO. T32-10/3**
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advised all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes, beginning March 25, 2009. The NJSBA conducted seven Finance training sessions between May 20, 2009 and January 9, 2010 at varying locations. The NJSBA also made available an on-line web-based opportunity to meet this third-year training requirement from January 12, 2010 through May 28, 2010. These training opportunities were published in School Board Notes and posted on the NJSBA's website. By correspondence dated April 30, 2010, the Commission notified all board members and charter school trustees of their non-compliance with the training mandate and reminded them of the opportunity to obtain training or to inform the Commission of errors in its data.

Additionally, in July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified the board member/trustee as having failed to complete the "Finance" training program within the required training period. In addition to providing another opportunity to inform the Commission of any errors in its data, this notice identified a final on-line training opportunity, made available by the NJSBA from July 19, 2010 through August 27, 2010, to fulfill the third-year training requirement at a time convenient to the respondent's schedule.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the "Finance" training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent failed to respond to the Commission's Order. Following receipt of the Order to Show Cause, the respondent completed the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission finds that although a finding of violation is warranted, the respondent's completion of the program after receipt of the Order to Show Cause may fairly serve to mitigate the penalty in this matter. Therefore, the Commission recommends to the Commissioner of Education a penalty of reprimand.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions After OTSC/T32-10-3

24-11

#24-11SEC

AGENCY DKT. NO. 684-11/10

IN THE MATTER OF RICHARD MORALES-WRIGHT, ACADEMY CHARTER HIGH SCHOOL, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33 – forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. The Commission advises that the respondent ultimately completed training after the issuance of its September 22, 2010 Order to Show Cause, but prior to the Commission's October 26, 2010 meeting and it, therefore, recommends a penalty of reprimand. Respondent filed neither exceptions nor proof of having attended the required training prior to the issuance of the Commission's Order to Show Cause. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon charter school trustees by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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: 1/10/11

Date of Mailing: 1/10/11

* 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)

	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
IN THE MATTER OF RICHARD MORALES-WRIGHT Academy Charter School Monmouth County	:	**DECISION FOR FAILURE TO ATTEND TRAINING**
	:	**DOCKET NO. T24-10/2**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advised all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes, beginning March 25, 2009. The NJSBA conducted seven NJQSAC training sessions between May 20, 2009 and January 9, 2010 at varying locations. The NJSBA also made available an on-line web-based opportunity to meet this second-year training requirement from January 12, 2010 through May 28, 2010. These training opportunities were published in School Board Notes and posted on the NJSBA's website. By correspondence dated April 30, 2010, the Commission notified all board members and charter school trustees of their non-compliance with the training mandate and reminded them of the opportunity to obtain training or to inform the Commission of errors in its data.

Additionally, in July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified the board member/trustee as having failed to complete the "NJQSAC" training program within the required training period. In addition to providing another opportunity to inform the Commission of any errors in its data, this notice identified a final on-line training opportunity, made available by the NJSBA from July 19, 2010 through August 27, 2010, to fulfill the second-year training requirement at a time convenient to the respondent's schedule.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training

mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the "NJQSAC" training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent replied that upon receipt of the Commission's Order he registered for training. Following receipt of the Order to Show Cause, the respondent completed the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission finds that although a finding of violation is warranted, the respondent's completion of the program after receipt of the Order to Show Cause may fairly serve to mitigate the penalty in this matter. Therefore, the Commission recommends to the Commissioner of Education a penalty of reprimand.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions after OTSC/T24-10-2

25-11

AGENCY DKT. NO. 689-11/10

IN THE MATTER OF MARIA LITTLES,	:	
CHESILHURST BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to attend board member training in accordance with *N.J.S.A.* 18A:12-33 – forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. The Commission advises that the respondent ultimately completed training after the issuance of its September 22, 2010 Order to Show Cause, but prior to the Commission's October 26, 2010 meeting and it, therefore, recommends a penalty of reprimand. Respondent filed neither exceptions nor proof of having attended the required training prior to the issuance of the Commission's Order to Show Cause. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon board members by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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: 1/10/11

Date of Mailing: 1/10/11

* 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)

	:	**BEFORE THE SCHOOL**
	:	**ETHICS COMMISSION**
IN THE MATTER OF	:	
MARIA LITTLES	:	
Chesilhurst Board of Education	:	**DECISION FOR**
Camden County	:	**FAILURE TO ATTEND TRAINING**
	:	
	:	**DOCKET NO. T35-10/3**
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advised all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes, beginning March 25, 2009. The NJSBA conducted seven Finance training sessions between May 20, 2009 and January 9, 2010 at varying locations. The NJSBA also made available an on-line web-based opportunity to meet this third-year training requirement from January 12, 2010 through May 28, 2010. These training opportunities were published in School Board Notes and posted on the NJSBA's website. By correspondence dated April 30, 2010, the Commission notified all board members and charter school trustees of their non-compliance with the training mandate and reminded them of the opportunity to obtain training or to inform the Commission of errors in its data.

Additionally, in July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified the board member/trustee as having failed to complete the "Finance" training program within the required training period. In addition to providing another opportunity to inform the Commission of any errors in its data, this notice identified a final on-line training opportunity, made available by the NJSBA from July 19, 2010 through August 27, 2010, to fulfill the third-year training requirement at a time convenient to the respondent's schedule.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training

mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the "Finance" training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent replied that she missed training because of difficulty accessing online training. Following receipt of the Order to Show Cause, the respondent completed the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission finds that although a finding of violation is warranted, the respondent's completion of the program after receipt of the Order to Show Cause may fairly serve to mitigate the penalty in this matter. Therefore, the Commission recommends to the Commissioner of Education a penalty of reprimand.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly
adopted by the School Ethics Commission
at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions After OTSC/T35-10-3

27-11SEC

27-11

AGENCY DKT. NO. 690-11/10

IN THE MATTER OF JUDITH RIVERA KIRTZ, CAMDEN'S PROMISE CHARTER SCHOOL, CAMDEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33 – forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. The Commission recommends that respondent be suspended from Camden's Promise Charter School's Board until she has completed the New Board Member Orientation program, and further recommends that she be removed from this board if this training is not completed by January 8, 2011. Respondent filed neither exceptions nor proof of having attended the required training. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon charter school trustees by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Accordingly, respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the required training is completed; provided, however, that if such training is not completed by January 8, 2011, respondent shall be summarily removed from office.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1|10|11

Date of Mailing: 1|11|11

* 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)

	:	**BEFORE THE SCHOOL**
	:	**ETHICS COMMISSION**
IN THE MATTER OF	:	
JUDITH RIVERA KIRTZ	:	
Camden's Promise Charter School	:	**DECISION FOR**
Camden County	:	**FAILURE TO ATTEND TRAINING**
	:	
	:	**DOCKET NO. T39-10NB**
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on November 1, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advises all newly elected and appointed board members and trustees of this training requirement in writing upon their election or appointment and continues to advise them through notices published in its newsletter, School Board Notes. The NJSBA conducted five NBMO training sessions between May 2009 and January 2010 at varying locations and continuously published the dates and times of those sessions in School Board Notes and on the NJSBA website. As well, by correspondence dated April 30, 2010, the School Ethics Commission notified all board members/trustees who were not compliant with the training mandate of a final opportunity to obtain the necessary NBMO training on June 12, 2010. In July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified this board member/trustee as having failed to complete the NBMO training program within the required training period. This notice also provided the opportunity to inform the Commission of any errors in its data.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the NBMO training program within the required time period.

The November 1, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent failed to respond to the Commission's Order and has not attended the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on November 23, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission recommends to the Commissioner of Education that the respondent be suspended from the above-named Board until demonstrating completion of the New Board Member Orientation program, and further recommends that the board member/trustee be removed from the Board if the New Board Member Orientation Program is not completed by January 8, 2011. However, should the respondent complete the training *prior* to the Commissioner's issuance of a final decision in this matter, the Commission recommends that the respondent be censured for failing to timely complete the program.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions after OTSC/T09-10NB

28-11SEC

28-11

AGENCY DKT. NO. 688-11/10

IN THE MATTER OF ADAM SZPREINGEL,	:	
LEAP ACADEMY CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to attend charter school trustee training in accordance with *N.J.S.A.* 18A:12-33 – forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. The Commission advises that the respondent ultimately completed training after the issuance of its September 22, 2010 Order to Show Cause, but prior to the Commission's October 26, 2010 meeting and it, therefore, recommends a penalty of reprimand. Respondent filed neither exceptions nor proof of having attended the required training prior to the issuance of the Commission's Order to Show Cause. Respondent also did not appeal the Commission's underlying finding of violation pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to honor an obligation placed upon charter school trustees by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

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: 1|10|11

Date of Mailing: 1|11|11

* 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)

	:	**BEFORE THE SCHOOL**
	:	**ETHICS COMMISSION**
IN THE MATTER OF	:	
ADAM SZPREINGEL	:	
LEAP Charter School	:	**DECISION FOR**
Camden County	:	**FAILURE TO ATTEND TRAINING**
	:	
	:	**DOCKET NO. T33-10/3**
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advised all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes, beginning March 25, 2009. The NJSBA conducted seven Finance training sessions between May 20, 2009 and January 9, 2010 at varying locations. The NJSBA also made available an on-line web-based opportunity to meet this third-year training requirement from January 12, 2010 through May 28, 2010. These training opportunities were published in School Board Notes and posted on the NJSBA's website. By correspondence dated April 30, 2010, the Commission notified all board members and charter school trustees of their non-compliance with the training mandate and reminded them of the opportunity to obtain training or to inform the Commission of errors in its data.

Additionally, in July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified the board member/trustee as having failed to complete the "Finance" training program within the required training period. In addition to providing another opportunity to inform the Commission of any errors in its data, this notice identified a final on-line training opportunity, made available by the NJSBA from July 19, 2010 through August 27, 2010, to fulfill the third-year training requirement at a time convenient to the respondent's schedule.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the "Finance" training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent did not reply to the Commission's Order. Following receipt of the Order to Show Cause, the respondent completed the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission finds that although a finding of violation is warranted, the respondent's completion of the program after receipt of the Order to Show Cause may fairly serve to mitigate the penalty in this matter. Therefore, the Commission recommends to the Commissioner of Education a penalty of reprimand.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions After OTSC/T33-10-3

29-11

AGENCY DKT. NO. 673-11/10

IN THE MATTER OF GERALD MURRAY,	:	
WOODBINE BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CAPE MAY COUNTY.	:	DECISION

The Commissioner has considered the record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to timely attend Board of Education member training in accordance with *N.J.S.A.* 18A:12-33. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty.

Because the respondent completed training prior to the Commission's October 26, 2010 meeting (but after the issuance of the Commission's September 22, 2010 Order to Show Cause), the Commission recommended a penalty of reprimand. Respondent has neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4, of the Commission's underlying finding of violation.

The Commissioner concurs with the penalty recommended by the Commission in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels.

Respondent is thus 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: 1/10/11
Date of Mailing: 1/11/11

* 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)

	:	**BEFORE THE SCHOOL**
	:	**ETHICS COMMISSION**
IN THE MATTER OF	:	
GERALD MURRAY	:	
Woodbine Board of Education	:	**DECISION FOR**
Cape May County	:	**FAILURE TO ATTEND TRAINING**
	:	
	:	**DOCKET NO. T07-10NB**
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advises all newly elected and appointed board members and trustees of this training requirement in writing upon their election or appointment and continues to advise them through notices published in its newsletter, School Board Notes. The NJSBA conducted five NBMO training sessions between May 2009 and January 2010 at varying locations and continuously published the dates and times of those sessions in School Board Notes and on the NJSBA website. As well, by correspondence dated April 30, 2010, the School Ethics Commission notified all board members/trustees who were not compliant with the training mandate of a final opportunity to obtain the necessary NBMO training on June 12, 2010. In July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified this board member/trustee as having failed to complete the NBMO training program within the required training period. This notice also provided the opportunity to inform the Commission of any errors in its data.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the NBMO training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board

member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent replied to the Commission's Order that he had missed training because it conflicted with work. Following receipt of the Commission's Order to Show Cause, the respondent completed the requisite training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission finds that although a finding of violation is warranted, the respondent's completion of the program after receipt of the Order to Show Cause may fairly serve to mitigate the penalty in this matter. Therefore, the Commission recommends to the Commissioner of Education a penalty of reprimand.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions after OTSC/T07-10NB

30-11

30-11SEC

AGENCY DKT. NO. 685-11/10

IN THE MATTER OF HENRIETTA COOMBS,	:	
CHESILHURST BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for failure to attend board member training in accordance with *N.J.S.A.* 18A:12-33 – forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 for final determination on the Commission's recommended penalty, have been reviewed. The Commission recommends that respondent be suspended from the Chesilhurst Board until she has completed the online web-based NJQSAC training program, and further recommends that she be removed from the board if this online web-based training program is not completed by December 15, 2010. Should respondent complete the web-based training program by this date, the Commission recommends that respondent be censured for failing to timely complete the program. On December 16, 2010, the Commission advised the Commissioner that respondent had not completed the requisite program.

By letter dated November 18, 2010, addressed to the Executive Director of the School Ethics Commission, respondent stated "I'm writing this letter to inform you that I have been seriously ill since July 2010 to the present. It's been an honor and a privilege being a member of the Chesilhurst Board of Education. I would like to continue being a member when my health problems improve."

Upon review, the Commissioner is compelled to concur with the penalty recommended by the Commission. The statutory provision which directs the training required for board members, *N.J.S.A.* 18A:12-33, makes no exception – for any reason – to its stated

requisites. Absent satisfaction of this statutory edict, respondent cannot be permitted to continue to serve on the Chesilhurst Board of Education.

Accordingly, respondent is hereby removed from office, as of the filing date of this decision, as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/10/11

Date of Mailing: 1/11/11

* 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)

	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
IN THE MATTER OF HENRIETTA COOMBS Chesilhurst Board of Education Camden County	:	**DECISION FOR FAILURE TO ATTEND TRAINING**
	:	**DOCKET NO. T27-10/2**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on September 22, 2010 to the above-named respondent alleging that the board member/trustee failed to complete training as required by N.J.S.A. 18A:12-33 and offered by the New Jersey School Boards Association (NJSBA). Pursuant to N.J.S.A. 18A:12-33, all board members and charter school trustees must complete:

- during the first year of their first term, a training program offered by the NJSBA identified as "New Board Member Orientation" (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d));
- in the second year of their first term, a training program offered by the NJSBA which, for the 2009-2010 training cycle, was identified as "NJQSAC" (N.J.A.C. 6A:28-4.1(a));
- in the third year of their first term, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Finance" (N.J.A.C. 6A:28-4.1(a)); and
- within one year after re-election or re-appointment to a board, a training program offered by the NJSBA, which for the 2009-2010 training cycle, was identified as "Legal Update." (N.J.A.C. 6A:28-4.1(a)).

The NJSBA advised all board members and trustees of this training requirement through notices published in its newsletter, School Board Notes, beginning March 25, 2009. The NJSBA conducted seven NJQSAC training sessions between May 20, 2009 and January 9, 2010 at varying locations. The NJSBA also made available an on-line web-based opportunity to meet this second-year training requirement from January 12, 2010 through May 28, 2010. These training opportunities were published in School Board Notes and posted on the NJSBA's website. By correspondence dated April 30, 2010, the Commission notified all board members and charter school trustees of their non-compliance with the training mandate and reminded them of the opportunity to obtain training or to inform the Commission of errors in its data.

Additionally, in July 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Board Secretary/Charter School Administrator, with a copy of the same to the respondent, notifying that the NJSBA identified the board member/trustee as having failed to complete the "NJQSAC" training program within the required training period. In addition to providing another opportunity to inform the Commission of any errors in its data, this notice identified a final on-line training opportunity, made available by the NJSBA from July 19, 2010 through August 27, 2010, to fulfill the second-year training requirement at a time convenient to the respondent's schedule.

Pursuant to N.J.A.C. 6A:28-4.2(c), the NJSBA is required to provide the School Ethics Commission with a report listing those board members and trustees who have not fulfilled the training mandate. The 2010 report from the NJSBA indicated that the respondent failed to complete the "NJQSAC" training program within the required time period.

The September 22, 2010 Order to Show Cause sent to the respondent via regular and certified mail, specifically stated, pursuant to N.J.A.C. 6A:28-1.6, that the respondent must show cause under oath and in writing before the Commission, within 20 days of receipt of the Order, reasons why the board member/trustee should not be found in violation of N.J.S.A. 18A:12-33. The respondent did not reply to the Commission's Order and has not completed the training.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators; N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training, as specified above.

There is no dispute that the respondent did not complete the required training program prior to the issuance of the Commission's show cause order. N.J.A.C. 6A:28-4.2(d) provides that board members and trustees failing to comply with the training mandate shall be considered in violation of N.J.S.A. 18A:12-33. The respondent failed to timely comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33.

DECISION

At its meeting on October 26, 2010, the Commission voted to find the respondent in violation of N.J.S.A. 18A:12-33 and to recommend a penalty, as set forth below.

PENALTY

If a violation of the School Ethics Act is found by the Commission, it may recommend to the Commissioner the reprimand, censure, suspension or removal of the school official. N.J.A.C. 6A:28-10.12. Upon review of the record in this matter the Commission recommends to the Commissioner of Education that the respondent be suspended from the above-named Board until demonstrating completion of the online web-based NJQSAC training program, and further recommends that the board member/trustee be removed from the Board if this online web-based training program is not completed by December 15, 2010. However, should the respondent complete the online web-based training *prior* to the Commissioner's issuance of a final decision in this matter, the Commission recommends that the respondent be censured for failing to timely complete the program.

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. The school official 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.

Robert W. Bender
Chairperson

Mailing Date: November 24, 2010

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on November 23, 2010.

Joanne Boyle, Executive Director

E/training/2010/Decisions after OTSC/T27-10-2

31-11R

OAL DKT. NO. EDU 12520-10
(EDU 8015-10 ON REMAND)
AGENCY DKT. NO. 96-5/10

D.R., on behalf of minor child, D.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
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. 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: 1/11/11

Date of Mailing: 1/11/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12520-10

AGENCY DKT. NO. 96-5/10

ON REMAND EDU 8015-10

D.R. ON BEHALF OF MINOR CHILD, D.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,

Respondent.

D. R., petitioner, pro se

Nicholas J. Dotoli, Esq., for respondent (Schwartz, Simon, Edelstein & Celso, attorneys)

Record Closed: December 3, 2010 Decided: December 6, 2010

BEFORE **RONALD W. REBA**, ALJ:

This matter was remanded to the Office of Administrative Law on November 15, 2010, for failure to provide a copy of the Board resolution approving the Agreement and authorizing Sharon Dey, Board president, to sign the Agreement on its behalf.

On December 3, 2010, a certified Resolution approving the settlement agreement and release was provided

I have reviewed the record and the settlement terms 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.

DECEMBER 6, 2010
DATE

Ronald W. Reba
RONALD W. REBA, ALJ

Date Received at Agency: DEC - 7 2010

Date Mailed to Parties: DEC - 7 2010

/cad

SCHENCK
PRICE
SMITH &
KING, LLP
ATTORNEYS AT LAW
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2010 DEC -3 A 11:16
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

MARC H. ZITOMER
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December 2, 2010

Honorable Ronald W. Reba
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625-0049

Re: D.R. o/b/o D.T. vs. Jackson Township Board of Education
OAL Docket No.: EDU 08015-2010S

Dear Judge Reba:

This firm is counsel to the Jackson Township Board of Education. Enclosed please find a certified Resolution approving the Settlement Agreement and Release in the above matter. If you require anything ther, please contact me.

Very truly yours,

SCHENCK, PRICE, SMITH & KING, LLP

Marc H. Zitomer

MHZ/afc
Encls.
cc: Deshia Rodriguez

JACKSON BOARD OF EDUCATION

151 Don Connor Boulevard
Jackson, NJ 08527

(732) 833-4600
FAX (732) 833-4609

RECEIVED

2010 DEC -3 A 11: 16

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Thomas Gialanella
Superintendent of Schools

Michelle D. Richardson
Board Secretary/
Business Administrator

The Jackson Board of Education, at their official meeting on September 21st, 2010, on a motion by Mr. Krakower, seconded by Mrs. Fiero, approved the following settlement and release resolution:

Resolution

Resolved, that the Board approved the Settlement and Release in the matter captioned D.R. o/b/o D.T. v. Jackson Board of Education, Agency Docket No.: 96-5/10; and

Be it Further Resolved, that the Board President is authorized to execute the agreement on behalf of the Board.

Roll Call Vote: Yes: Mrs. Lackay
Mr. Krakower
Mrs. Murnane
Mrs. Schiazza
Mr. Sargent
Mrs. Fiero
Mrs. Dey

Vote: 7 - 0

MOTION CARRIED

I hereby certify that this is a true accurate recording of the Jackson Board of Education meeting held on September 21st, 2010 and the action taken as identified above.

Michelle Richardson
Business Administrator/Board Secretary

SSE C Schwartz Simon Edelstein & Celso LLC
ATTORNEYS AT LAW

44 Whippany Road ▪ Suite 210 ▪ P.O. Box 2355 ▪ Morristown, New Jersey 07962
Tel: 973.301.0001 ▪ Fax: 973.993.3152 ▪ www.sseclaw.com
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845 Third Avenue
17th Floor
New York, New York
10022
212.752.5258

September 16, 2010

VIA FAX & LAWYERS SERVICE

Nicholas J. Dotoli
ndotoli@sseclaw.com

Hon. Ronald W. Reba, ALJ
Office of Administrative Law
9 Quakerbridge Plaza, P.O. Box 049
Mercerville, New Jersey 08625-0049

RE: D.R. o/b/o D.T. v. Jackson Township Board of Education
Agency Docket No.: 96-5/10
OAL Docket No.: EDU 08015-2010 S

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW
2010 SEP 20 A 11: 23

Dear Judge Reba:

This firm represented the Jackson Township Board of Education as of September 15, 2010. Enclosed, please find Petitioner's signed settlement and release which has been executed by the Jackson Board of Education.

By way of copy, I would ask that the District's Board Secretary/Business Administrator share this correspondence with superseding counsel if you should require any further clarification.

Very truly yours,

Schwartz Simon
Edelstein & Celso LLC

Nicholas J. Dotoli, Esq.

NJD/
Enc:
c: Deshia Rodriguez, Pro Se
Michelle Richardson, Bd. Scre/Bus. Admin.

2010 SEP 20 A 11:23
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Hon. Ronald W. Reba, ALJ
Office of Administrative Law
9 Quakerbridge Plaza, P.O. Box 049
Mercerville, New Jersey 08625-0049

Re: Withdrawal Request

RE: D.R. o/b/o D.T. v. Jackson Township Board of Education
Agency Docket No.: 96-5/10

Dear Judge Reba:

With this letter, I am formally withdrawing the above-captioned Petition in the above referenced matter as I have reached a settlement with the Jackson Township Board of Education.

Sincerely,

Deshia Rodriguez

c: Nicholas J. Dotoli, Esq.

SCHWARTZ SIMON EDELSTEIN
CELSO & ZITOMER LLC
44 Whippany Road, Suite 210
Morristown, New Jersey 07962
Tel. (973) 301-0001; Fax (973) 993-3152
Attorneys for Respondent, Jackson
Township Board of Education.

2010 SEP 20 A 11:23
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

D.R. o/b/o D.T.,

Petitioner,

vs.

JACKSON TOWNSHIP
BOARD OF EDUCATION,

Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

AGENCY REF. NO.: 96-5/10

SETTLEMENT AGREEMENT AND RELEASE

WHEREAS, a residency determination concerning pupil D.T. was reviewed by the Jackson Township Administration on April 29, 2010; and

WHEREAS, on that date the administration determined that D.T. was ineligible to attend Jackson Memorial High School pursuant to the Affidavit Pupil Law; and

WHEREAS, D.R. filed a Petition of Appeal contesting the Board's residency determination, Agency Reference Number 96-5/10 on May 16, 2010; and

WHEREAS, the Board filed a Counterclaim for back tuition on July 1, 2010; and

WHEREAS, the parties have agreed to resolve this dispute without the need for litigation;

NOW, THEREFORE, it is hereby agreed by and between the parties as follows:

1. Deshia Rodriguez, Petitioner, agrees to withdraw this matter, with prejudice, and also agrees that no further action will be taken to seek the same relief; and

2. The Board agrees to withdraw its counterclaim for tuition, with prejudice.

3. Deshia Rodriguez, in consideration of the Jackson Township Board of Education's settlement and release, agrees to reimburse the Board a sum of $100 (one hundred dollars) for the period of time that D.T. attended the Jackson Public Schools while ineligible pursuant to N.J.S.A. 18A:38-1(b); and

4. The Jackson Township Board of Education agrees to accept payment of this settlement over a ten month period at a rate of $10.00 (ten dollars) per month beginning on September 1, 2010 and concluding on June 1, 2010; and

5. This Agreement represents the entire Agreement between the parties and will not be modified, in whole or in part, except by a subsequent mutual written and signed Agreement; and

6. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily, without duress or coercion, and that each party has consulted with legal counsel or representation of their choice; and

7. It is agreed that neither party is a prevailing party for any purpose and that each party will be responsible for bearing their own attorneys fees and costs; and

8. Deshia Rodriguez acknowledges that this Agreement constitutes a full and final settlement as to all issues and she agrees, in consideration for the terms hereof, to release the Jackson Township Board of Education, collectively and individually, and its agents, servants and employees from any and all claims which were or could have been raised to date; and

9. This Agreement shall be governed by the Laws of the State of New Jersey; and

10. This Agreement is subject to the approval of the Jackson Township Board of Education at its next regularly scheduled meeting.

11. The Jackson Township Board of Education authorizes Ms. Sharon Dey to execute this settlement and release on behalf of the Board.

Date: 8/21/2010

Deshia Rodriguez, Individually and o/b/o D.T.

JACKSON TOWNSHIP BOARD OF EDUCATION

Date: 8/21/2010

By: Sharon E. Dey
Ms. Sharon Dey
Board President

STATE OF NEW JERSEY)
SS:
COUNTY OF OCEAN)

I CERTIFY that on August 21, 2010, Deshia Rodriguez, individually and o/b/o D.T., personally came before me and acknowledged under oath, to my satisfaction, that this person:

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as her act and deed.

Attorney or Notary Public

[redacted]
Notary Public
State of New Jersey
My Commission Expires Apr 14, 2016

32-11

IN THE MATTER OF THE TENURE	:	
HEARING OF BIL MORGAN,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF CORRECTIONS, SOUTH WOODS	:	
STATE PRISON.	:	
	:	

SYNOPSIS

The petitioning Board certified tenure charges against respondent – a teacher of media arts – for conduct unbecoming a teacher and other related charges, including: taking the electronic signature of the prison administrator without authorization and affixing it to a document; downloading a "bootleg" movie still in general release in the theaters; downloading software on the prison's computer to bypass the encryption code on rented DVDs in order to copy the films prior to their return to the rental company; and using prison inmates to edit video footage produced by respondent's private company. The Board sought dismissal of respondent from his tenured employment.

The ALJ found that: respondent claimed naivet regarding the ramifications of his admitted conduct, none of which represents conduct of a teacher that an inmate should emulate; respondent's explanations of his behavior lacked credibility; and the Board has carried its burden to prove the charges against respondent by a preponderance of the credible evidence. Accordingly, the ALJ recommended respondent's removal from his tenured employment.

Upon independent review of the record, the Commissioner concurred with the ALJ's findings and adopted the Initial Decision of the OAL as the final decision in this matter. Respondent was dismissed from his tenured employment, and the matter transmitted to the State Board of Examiners for action against respondent's 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 11, 2011

OAL DKT. NO. EDU 4284-10
AGENCY DKT NO. 71-4/10

IN THE MATTER OF THE TENURE	:	
HEARING OF BIL MORGAN,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF CORRECTIONS, SOUTH WOODS	:	
STATE PRISON.	:	
	:	

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 that the New Jersey State Department of Corrections has sustained its charges of conduct unbecoming a teacher against respondent by a preponderance of the credible evidence, warranting respondent's termination from his tenured position at South Woods State Prison.

Accordingly, the recommended decision of the OAL is adopted for the reasons clearly presented therein, and respondent is hereby terminated from his tenured position. A copy of this decision will be forwarded to the State Board of Examiners for action, as that body deems appropriate, against respondent's certificate(s).

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1|11|11

Date of Mailing: 1|11|11

[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 4284-10
AGENCY DKT. NO. 71-4/10

IN THE MATTER OF THE TENURE HEARING OF BIL MORGAN, NEW JERSEY DEPARTMENT OF CORRECTIONS.

Christopher C. Josephson, Deputy Attorney General for the New Jersey Department of Corrections, petitioner (Paula T. Dow, Attorney General of New Jersey, attorney)

George R. Saponaro, Esq., for Bil Morgan, respondent (Saponaro & Sitzler, attorneys)

Record Closed: October 18, 2010 Decided: December 2, 2010

BEFORE **ANA C. VISCOMI,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent appeals from certified tenure charges seeing his removal as a media arts teacher at the South Woods State Prison for alleged conduct unbecoming a teacher and other related charges. The matter was transmitted to the Office of Administrative Law (OAL) on April 30, 2010, for a hearing as a contested case, pursuant to N.J.S.A. 52:14B-10.1 et seq., and N.J.S.A. 18A:6-16. The hearing was

heard on July 27, 2010, August 2 and August 11, 2010. The record closed on October 18, 2010, upon receipt of post-hearing summations.

FACTUAL DISCUSSION

The parties have stipulated to the following.

On January 6, 2010, Senior Corrections Officer S. Buscemi was touring the facilities at South Woods State Prison, Facility One. He noticed that the movie "2012" starring John Cusack was being played to inmates. On the following day, this information was passed through the chain of command, and Captain Moretz and Lieutenant Stevens met with Bil Morgan, who confirmed that he brought this movie into the South Woods State Prison. The Captain and staff retrieved the movie and referred the matter to the Special Investigation Division. (J-1). That concludes the stipulated facts.

The following summary of facts is essentially undisputed and shall constitute my findings of fact.

Respondent, Bil Morgan has taught Media Arts to inmates at South Woods State Prison for the past 11 years. He is 68 years old. As a Media Arts teacher, his responsibilities included providing instruction to inmates regarding media arts, which includes print, television, computer editing and marketing.

His responsibilities were later enhanced to include the setting up of films to be shown to the inmates throughout the prison population. The films would be ordered by his supervisor, David Metlow, through the prison's Netflix[1] account. Unbeknownst to Metlow, when the films arrived from Netflix, respondent would make multiple copies of each respective film on both DVD and VHS tapes and maintain them in his office. (C-2, P-9, P-6, DOC 27). Metlow never ordered the film "2012" from the prison's Netflix account.

[1] Netflix is a web-based company offering subscriptions to movies that have already been released.

The reason the matter was referred to the Special Investigation Division is because the movie "2012" was still being shown in the movie theaters and had not yet been released to DVD at the time respondent brought the movie into the prison to be shown to the inmates. The investigation was conducted by Investigator Eleazor Spratley. The DVD of the movie "2012" was confiscated because Spratley believed, and later verified, it was a "bootleg[2]" version of the movie. As part of the investigation, Spratley interviewed respondent, his supervisor, and prison Administrator Karen Balicki. Additionally, Senior Investigator Jeffrey Poling, who is assigned to the Computer Forensic/Polygraph Unit of the Special Investigations Division, conducted a forensic examination of the hard drive of the respondent's computer. This computer was not accessible to any of the inmates. The examination revealed the following: two files pertaining to the movie "2012" which consisted of an internet search of the movie's title and the DVD cover art; 46 files from the recycle folder which had been deleted by the user; two scanned images of Karen Balicki's signature which were found in the recycle folder and had been deleted by the user; 115 graphic files depicting DVD cover art; 33 files that had references to Mecca Video; 3 programs related to media art which included Arcsoft software for video editing; Google Video Player for viewing video files; Epson Print CD for printing on CDs and DVDs; 45 files pertaining to internet searches for DVD cover art; 15 files pertaining to internet searches on methods to copy DVDs; and one Google search on how to unlock a hard drive. (P-7).

The interview of the respondent was conducted in the presence of his union representative. (C-2, P-6, DOC 26). He was advised, prior to the interview, that the subject was regarding DVD and VHS duplication and introduction of contraband into the prison facility. (C-2, P-6, DOC 26). As a result of the interview, respondent admitted to the following conduct, which he incorporated in a written statement (C-2, P-6, DOC 27 – DOC 30) in response to specific questions. (C-1). Respondent admitted to bringing the movie "2012" into the facility without any permission and although he indicated that it was for use in class instruction on special effects, he showed the movie to the general inmate population. (C-2, P-6, DOC 27). He knew the movie was still being shown in

[2] A "bootleg" version of a recording is defined as a recording which is made, reproduced or sold illegally or without authorization.

theatres but did not know when the DVD was to be released. (C-2, P-6, DOC 27). Respondent admitted to making copies of the movies rented from Netflix, without any authorization or knowledge from the supervisory staff. (C-2, P-6, DOC 27). No one authorized the introduction of the software which enabled him to bypass the Netflix security encryption which enabled him to copy the DVDs. (C-2, P-6, DOC-28). He brought footage from his outside company, Mecca Productions, so that his student inmates would get experience in editing music, graphic and video. (C-2, P-6, DOC 28). He scanned Administrator Balicki's signature to reproduce a graduation certificate for one of the inmates. (C-2, P-6, DOC 29).

Based on the foregoing admissions, as well as the interviews conducted and the forensic examination of the respondent's computer, certified tenure charges were filed. It should be noted that petitioner initially treated this matter as a civil service disciplinary matter and part of the charges address violations of the civil service regulations.[3] Respondent was also charged with violation of the tenure statute, N.J.S.A. 18A:6-10, conduct unbecoming a teacher, relating to the following: the introduction of a pirated videos into the secured perimeter of the institution for inmate viewing; copying DVD's rented from the institution's Netflix account by using outside software without permission; using inmates to edit filmed material for respondent's outside film business; using his work computer for his private business; conducting searches on how to unlock a hard drive; downloading of DVD cover art; and scanning images of Administrator Balicki's signature and forging them onto documents. This initial decision addresses the only charges of which I have jurisdiction, the tenure charges.

The following relevant testimony, not addressing previously noted factual findings and stipulations, was offered at this hearing.

Investigator Spratley testified that he visited the Media Arts Center at the prison and saw 58 DVDs and 210 VHS video cassettes stored there. He compared the titles of these films with the list of movies rented by the prison through its Netflix account and

[3] Specifically, respondent was charged with violations of NJAC 4A:2-2.3(a)(6), conduct unbecoming an employee; N.J.A.C. 4A:2-2.3(a)(7), neglect of duty; and N.J.A.C. 4A:2-2.3(a)(11), other sufficient cause. Respondent was also charged with violations of internal policies as reflected in the Human Resource Bulletin for the Department of Corrections. (P-8).

noted they matched completely. (P-9). Respondent admitted to copying these films through computer software he downloaded on his computer at the Media Arts Center located within the prison. Spratley also testified that his investigation revealed that inmate David Taylor, one of respondent's students, also copied the movies. Taylor also admitted to Spratley that he edited footage from respondent's private enterprise, Mecca Productions.

Respondent had explained to Spratley that the reason the movies were copied onto VHS cassettes was because the DVD carousel purchased by the institution did not allow for continuous play of the movies throughout the facility during the overnight hours. The equipment was locked in the Media Arts building, so once Morgan set the movies to play prior to leaving work for the day, the door to his office was locked and no one, with the exception of corrections officers, could enter to continually re-run the movies. Inmate Taylor confirmed that the Netflix DVD movies could not be played continuously on the DVD carousel. Respondent Morgan also told Investigator Spratley that it was his understanding, based upon his own research, that as long as he copied the films for educational purposes; he was not in violation of any Netflix licensing agreement.

David Metelow has been employed with the New Jersey Department of Corrections, South Woods Prison since December 1997. He has been the Supervisor of Education since 2000. His duties include overseeing all academics, vocational education, recreation and the law library. He was respondent's supervisor. He had no knowledge that respondent was copying movies. Their respective offices were located in different buildings at the prison facility. The inmates had complained often they were not being shown new film releases. Respondent made a list of newer films in response to the inmate complaints and provided the list to Metelow. The inmates in respondent's film class were supposed to be making educational films for the inmates on such topics as MRSA and HIV.

Karen Balicki has been the Administrator of the South Woods State Prison for the past three and one-half years. She testified that while the institution had an

account with Netflix, the Media Arts Center was to maintain a video library of educational movies. While she visited the Media Arts Center and saw the movie library respondent maintained, she assumed it was the educational films but never looked at any of the titles. It wasn't until the bootleg version of "2012" was brought to her attention that she learned of the commercial movie library maintained by respondent.

She also testified that no one, with the exception of her assistant, is authorized to sign any document on her behalf. She has not authorized anyone to scan her signature on a document. She would accommodate any request for an immediate signature even if she was not in the institution by having her assistant sign on her behalf.

Respondent Bil Morgan testified he started Mecca Productions in 1985. He primarily produced videos used at church conventions. He had not produced any videos for Mecca since the late 1990s, but he retained the video tapes. He donated his video equipment, worth approximately $90,000 to a youth organization in Camden. (R-3, R-4). The reason he brought the Mecca footage to the prison was to show the inmates how to shoot film. He did not make any profit from having the inmates edit his Mecca produced film.

When his department was told it would be responsible for showing the films to the inmate population, he requested a DVD player. The DVD he was provided had five slots for five movies. The DVD machine player ran each film once and then stopped. This was a problem because his office was secured after he left work at 3:00 p.m. That is why he began making copies. Additionally, the Assistant Recreation Supervisor asked him to make copies of the movies for the inmates housed in the drug prevention program at South Woods known as Nu Way. He was concerned about copyright laws and researched Federal Communication Commission (FCC) regulations and determined that the copying of the films was not illegal because it was for educational purposes. He did not tell anyone he was making copies but the copies were stored in a visible area of his office.

With regard to the movie "2012," respondent testified that his class that was graduating had been watching the movie trailer on the television. One of them said that he would like to see the movie before he graduated. Morgan downloaded the movie on his home computer and burned it onto a DVD. The reason he wanted to show the movie to his students was for the special effects, a topic he had been teaching at the time.

Respondent testified that he was about to take a vacation and had submitted a list of graduates to Administrator Balicki's secretary. He realized that he forgot to include a graduate's name on the list. He found the template for Administrator Balicki's signature but his attempt to insert it on the inmate's certificate was futile. He then requested a certificate from Administrator Balicki's secretary.

LEGAL ANALYSIS

Respondent has been charged with conduct unbecoming a teacher, a violation of N.J.S.A. 18A:6-10, for which the Department of Corrections seeks the removal of his tenure and thus, the termination of respondent's employment as a teacher. The burden of proof in this matter rests with the petitioner who must prove by a preponderance of the competent, credible evidence that the certified tenure charges should be affirmed. The petitioner herein has met that burden in this matter. The expectation of teachers in the prison system is no less than the expectation of teachers in our schools. Teachers are to conduct themselves in a manner for which society expects them to be role models for their students. This expectation is even greater perhaps in the prison system where inmates are in the process of hopefully being rehabilitated and being taught skills so they have the opportunity to become productive members of society once they have completed their sentence and are released. In this matter, respondent Bil Morgan attempts to claim naiveté about the ramifications of his admitted conduct: taking the electronic signature of the prison administrator and affixing it to a document; downloading a "bootleg" movie still in general release in the theaters; downloading software on the prison system's computer that would enable the encryption code on rented DVDs to be bypassed so that he could make copies of the films prior to their

return to Netflix; and using inmates to edit footage from his private company. None of this represents conduct of a teacher that an inmate should emulate. Respondent's explanations after being caught are feeble and not credible. If there was an issue of the inability of the supplied DVD equipment to show continuous play of the movies, he should have brought it to the attention of his supervisors. The movies had previously been shown continuously by corrections officers and operated from a secure area. It is incredulous that a media arts teacher who is supposed to be teaching film making and editing would claim that he did not realize there would be a problem in copying movies or downloading a "bootleg" version of a movie still being shown in the theaters. This is not an issue, as respondent claims, of violation of copyright laws or not being privy to the contract between the institution and Netflix. Rather, this concerns conduct unbecoming a teacher. Similarly absurd is the notion of respondent attempting to justify the copying of movies rented from Netflix for "educational" purposes wherein the reality is that it was for the entertainment purposes of the prison inmates. Although respondent presented some evidence that he donated some electronic equipment from Mecca Productions, that is not proof that he did not continue to operate that concern as evident from the 33 files referencing Mecca Video that were found on his work computer hard drive. No justification whatsoever could be made for the copying of the prison administrator's signature onto a document.

DECISION AND ORDER

Based on the foregoing, petitioner's certified tenure charges seeking the removal of the respondent as a teacher is hereby **AFFIRMED** and the respondent's tenure is **REMOVED** and his employment is **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.

December 2, 2010
DATE

ANA C. VISCOMI, ALJ

Date Received at Agency: 12-2-10

Date Mailed to Parties: 12-7-10

lam

EXHIBITS

For the Judge:

C-1 SWSP Interview Questions

C-2 Typed Answers to statement provided by respondent as requested by Judge; copy of P-6, DOC 27-DOC 30

Joint:

J-1 Factual Stipulation

For petitioner: *

P-6 SID investigation report

P-7 Forensic report regarding computer hard drive

P-8 Human Resources Bulletin

P-9 Netflix Rental Activity for South Woods

For respondent:

R-1 Employee of the Month acknowledgment

R-2 e mails

R-3 Camden IDEA newsletter

R-4 Acknowledgment of receipt of media related equipment

R-5 former inmate book excerpt acknowledging respondent

R-7 Daily movies June 2007 through November 2009

*Break in numerical sequence denotes exhibits not admitted into evidence.

WITNESSES

For petitioner:

Eleazer Spratley

Jeffrey Poling

David Metelow
Karen Balicki

For respondent:
Bil Morgan

33-11

OAL DKT. NO. EDU 2000-10
AGENCY DKT. NO. 310-11/09

T.Z., on behalf of minor child, S.Z.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HADDON, CAMDEN 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' settlement and adopts the Initial Decision as the final decision in this matter. 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|11|11

Date of Mailing: 1|11|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2000-10

AGENCY DKT. NO. 310-11/09

T.Z., ON BEHALF OF MINOR CHILD, S.Z.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HADDON, CAMDEN COUNTY,

Respondent.

Howard S. Mendelson, Esq., for petitioner (Davis and Mendelson, attorneys)

LaTonya N. Bland, Esq., for respondent (Capehart and Scatchard, attorneys)

Record Closed: November 29, 2010 Decided: December 2, 2010

BEFORE **LISA JAMES-BEAVERS,** ALJ:

STATEMENT OF THE CASE

Petitioner, T.Z., on behalf of minor child, S.Z., contends that the respondent, Haddon Township Board of Education (Board), has failed to comply with law and policy in addressing harassment, intimidation and bullying of a child, necessitating the child's removal from school and treatment by medical/counseling professionals. Petitioner seeks out-of-district placement, compensatory education and reimbursement of

expenses incurred. The parties agreed to a settlement of all issues in dispute and prepared a settlement agreement, which I have attached and fully incorporated herein, together with a copy of the Board's Minutes of the Regular Meeting of November 18, 2010 wherein the settlement was approved.

PROCEDURAL HISTORY

On November 9, 2009, T.Z. filed a petition on behalf of minor child, S.Z., seeking out of district placement, compensatory education and reimbursement of expenses. On December 15, 2009, respondent Haddon Township Board of Education filed an answer. This matter was transmitted to the Office of Administrative Law (OAL) 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. It was filed on January 5, 2010. During a prehearing conference on April 14, 2010, the parties discussed that the relief being sought was more appropriately obtained through a petition filed with the Office of Special Education Programs. On June 22, 2010, petitioner filed a Petition for Due Process with the Office of Special Education Programs seeking similar relief. A hearing was scheduled for July 14, 15 and 16, 2010, but adjourned because the Petition for Due Process had not been transmitted to the OAL. The hearing was rescheduled for October 4 and 5, 2010. These dates were adjourned so that the parties could pursue mediation, which was scheduled in October. On November 18, 2010, the parties advised that they had settled both cases. On November 29, 2010, the parties appeared at the OAL and placed the settlement on the record.

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.

December 2, 2010
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: DEC 6 2010

Date Mailed to Parties: DEC 6 2010

cmo

CAPEHART & SCATCHARD, P.A.
A Professional Corporation
Laurel Corporate Center
8000 Midlantic Drive, Suite 300 S
Mount Laurel, N.J. 08054
(856) 234-6800
Attorneys for Haddon Township Board of Education

T.Z. o/b/o minor child S.Z.,	:	BEFORE THE COMMISSIONER OF EDUCATION
Plaintiff,	:	
	:	AGENCY NO.: 310-11/09
vs.	:	
	:	OAL DOCKET NO.: EDU 02000-2010 S
HADDON TOWNSHIP BOARD OF EDUCATION,	:	
Defendant.	:	SETTLEMENT AGREEMENT

T.Z. o/b/o minor child S.Z.,	:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW
Plaintiff,	:	
	:	AGENCY REF. NO.: 2010-16140
vs.	:	
HADDON TOWNSHIP BOARD OF EDUCATION,	:	
Defendant.	:	SETTLEMENT AGREEMENT

WHEREAS, S.Z. is an eleven (11) year-old student currently in the Good Shepherd Regional Catholic School, formerly a student in the Haddon Township School District;

WHEREAS, S.Z., through her mother, T.Z. (referred to altogether as "the Petitioner"), filed a Petition of Appeal before the Commissioner of Education against the Haddon Township Board of Education (the "Board") in the matter of T.Z. o/b/o minor child S.Z. v. Haddon Township Board of Education (AGENCY REF. NO.: 310-11/09; OAL DOCKET NO.: EDU 02000-2010 S);

WHEREAS, in the Petition of Appeal, S.Z., through her mother, alleges that she was the victim of intimidation, harassment and bullying in violation of N.J.S.A. 18A:37-14 and N.J.A.C. 6A:16-1.3 and that the Board failed to address the bullying;

WHEREAS, in the Petition of Appeal, S.Z., through her mother, also alleges that she was not provided with homebound instruction for September 2009 as agreed and that she was deprived of a free and appropriate education;

WHEREAS, in the Petition of Appeal, S.Z., through her mother, sought an out-of-district placement, reimbursement of costs for medical and counseling services, compensatory education and attorney's fees;

WHEREAS, the Board denies all claims asserted by S.Z., through her parents; specifically, the Board denies that S.Z. was bullied, that the Board had notice of such a claim and failed to appropriately address such conduct, that S.Z. was denied a free and appropriate education and all other claims in the Petition of Appeal;

WHEREAS, S.Z., through her mother, also filed a Petition for Due Process before the Office of Administrative Law in the matter of T.Z. o/b/o minor child S.Z. v. Haddon Township Board of Education (AGENCY REF NO. 2010-16140) wherein she alleges that the Board failed

to identify S.Z.'s learning deficiencies, failed to provide special education services, failed to provide homebound instruction or out-of-district placement, and failed to provide S.Z. with a free and appropriate education;

WHEREAS, S.Z., through her parents, request reimbursement of medical and counseling services, payment for out-of-district placement, and attorney's fees;

WHEREAS, the Board denies petitioner's claims; specifically, the Board denies that it failed to identify S.Z.'s learning deficiencies, to provide S.Z. with necessary services and to provide S.Z. with a free and appropriate education, as well as all other allegations;

WHEREAS, despite their respective differences concerning claims and defenses in these matters, the Petitioner and the Board wish to resolve this dispute amicably and without resort to further time-consuming and costly litigation;

WHEREAS, the parties have agreed to a full and final settlement of all claims and matters which could have been asserted in the petition of appeal, petition for due process hearing or litigation involving such claims through the date of this Agreement, and any claims that could be asserted in a state or federal court proceeding that relate directly or indirectly to same;

WHEREAS, nothing set forth in this Settlement Agreement ("the Agreement"), or the execution and implementation of same, shall be construed or considered an admission of liability by the Board (inclusive of its former, present and future board members, officers, employees, agents and servants), said liability being expressly denied;

WHEREAS, this Agreement is subject to the approval of the Board of Education and the Office of Administrative Law;

NOW, THEREFORE, in consideration of the mutual promises and agreements contained herein, the parties AGREE AS FOLLOWS:

(1) The Board will pay to Petitioner a total of $15,000.00 by November 20, 2010;

(2) The Petitioner agrees to a continued enrollment and placement of S.Z. for the remainder of the 2009-10 school year, and for the 2010-2011, 2011-2012 and 2012-2013 school years at Good Shepherd Regional Catholic School or such other school as S.Z.'s parents may wish outside of the Haddon Township School District at the sole expense of S.Z.'s parents;

(3) The Petitioner agrees that it will not seek to re-enroll S.Z. in the Haddon Township school district prior to the 2013-2014 school year;

(4) The Petitioner releases, waives and forever discharges the Haddon Township Board of Education (its former, present and future board members, officers, employees, agents, and servants) from any claim or cause of action whether known or unknown, whether asserted or unasserted, contingent or otherwise, related directly or indirectly to:

a. the education of S.Z. through June 2013; and

b. the Petition of Appeal in T.Z. o/b/o minor child S.Z. v. Haddon Township Board of Education (AGENCY REF. NO.: 310-11/09; OAL DOCKET NO.: EDU 02000-2010 S); and

c. the Petition for Due Process hearing in T.Z. o/b/o minor child S.Z. v. Haddon Township Board of Education (AGENCY REF NO. 2010-16140); and

d. generally S.Z.'s education, including special education services, homebound instruction and an out-of-district program and placement for the school years up to and including the 2012-2013.

(5) With respect to matters covered in Paragraph (4) a-d above, this Release and Waiver includes, but is not limited to: any claim or cause of action concerning bullying, intimidation, harassment, denial of a free and appropriate public education, special education

services, homebound instruction, an independent evaluation, an out-of-district placement, discrimination, inappropriate discipline, reimbursement for educational costs, reimbursement for medical/counseling services and compensatory education; any claim or cause of action for loss, monetary damages, personal injury, property damage, reimbursement, attorneys' fees and costs, and expert fees; any claim or cause of action arising under state or federal statutes, regulations, constitutions, or common law, including but not limited to the New Jersey statutes pertaining to special education (inclusive of N.J.S.A. 18A:46-1 et seq.), N.J.S.A. 18A:37-14 and N.J.A.C. 6A:16-1.3, N.J.A.C. 6A:16-7.9, the New Jersey Law Against Discrimination, N.J.A.C. 10:5-1 et seq., the New Jersey Constitution, the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., the Individuals With Disabilities Education Improvement Act of 2004, 20 U.S.C. 1400 et seq., the Rehabilitation Act, 29 U.S.C. §701 et seq. (inclusive of §794 and 794a), the American With Disabilities Act, 42 U.S.C. §12101 et seq. (inclusive of § 12132), the New Jersey Constitution, the United States Constitution, and the Civil Rights Act, 42 U.S.C.§1983, 1985, and 1988.

This release and waiver does not apply to an action to enforce the terms of this Agreement.

RELEASE AND WAIVER

BY THEIR SIGNATURE TO THIS AGREEMENT, T.Z. AND K.Z. ACKNOWLEDGE THAT THEY HAVE READ THIS RELEASE AND WAIVER, AND ACCEPT AND AGREE TO THE PROVISIONS IT CONTAINS. T.Z. and K.Z. FURTHER ACKNOWLEDGE THAT THEY ARE EXECUTING THIS RELEASE AND WAIVER VOLUNTARILY, BOTH IN THEIR INDIVIDUAL CAPACITIES AND ON BEHALF OF S.Z., WITH THE FULL UNDERSTANDING OF ITS CONSEQUENCES,

AND THAT THEY HAVE OBTAINED THE ADVICE OF COUNSEL WITH RESPECT TO IT.

(6) Upon execution of this Agreement and approval by the Office of Administrative Law, the petition of appeal and petition for due process hearing shall be dismissed with prejudice. The Petitioner agrees not to request a further appeal or due process hearing with respect to all matters concerning S.Z.'s education and other matters covered in this agreement.

(7) The Petitioner agrees to keep the existence of this Agreement and the terms and conditions of the Agreement confidential and not to disclose same to anyone. This provision does not preclude disclosure to a court or agency of competent jurisdiction in an action to enforce the provisions of the Agreement, or to Petitioner's attorney or accountant, or to a state or federal taxing authority or the Social Security Administration.

(8) This Agreement shall not be admissible in any judicial or administrative proceeding except a proceeding to enforce its terms.

Date: 11/5/10

Tara Zane, individually and on behalf of Stephanie Zane

Date: 11/5/10

Keith Zane, individually and on behalf of Stephanie Zane

Date:

Dr. Mark Raivetz, Superintendent of Schools

#7 STUDENT PERSONNEL

-18. HOMEBOUND INSTRUCTION

That the Board approves student #3464826283 to be placed on Homebound Instruction, effective October 19, 2010. Student is being placed on Homebound Instruction until an out-of-district placement is located.

-19. HOMEBOUND INSTRUCTION

That the Board approves student #3057026526 to be placed on Homebound Instruction, effective November 8, 2010. This student was taken to crisis and will be placed on Homebound Instruction until released and returns to out-of-district placement. Services will be provided by Education Inc, Plymouth, MA., at the rate of $35.00 per hour for 10 hours per week.

-20. SETTLEMENT AGREEMENT

That the Board approves the Settlement Agreement in the matter filed under OAL Docket Number EDU 02000-2010S and OSEP Agency Ref. No. 2010-16140, on file in the office of the Business Administrator, and authorizes and directs the Superintendent to execute same on behalf of the Board.

-21. HOMEBOUND INSTRUCTION – RMS STUDENT

That the Board approves the following student for bedside instruction:

Middle School Student #20171007

-22. WRAP-AROUND SERVICES

That New Behavioral Network be approved to provide Wrap-around Home Services to student #9517374130, a classified MD student as mandated by his IEP. Wrap-around Services will start on November 18, 2010 and continue through the 2010-2011 school year. Services will include 2 hours per week of Behavioral Consultation/Supervision at $100.00 per hour as well as direct intervention, up to 5 hours per day at $40.00 per hour. Total estimated costs per year are approximately $52,800.00. Wrap-around services were previously obtained from DiNovi Associates but they have discontinued services at this time.

Rebecca O'C Barbieri

Sworn before me this 29th day of November, 2010 that this is a true copy of the resolution approved by the Haddon Township Board of Education at the regular meeting of 11/18/2010.

REBECCA O'C. BARBIERI
Commission # 2396114
Notary Public, State of New Jersey
My Commission Expires
April 30, 2015

The Regular Meeting of the Haddon Township Board of Education was held on November 18, 2010, at 6:15 PM in the Paul C. Gilligan Media Center, Mrs. Richards, President, presiding.

FLAG SALUTE The meeting opened by a salute to the American flag led by Mrs. Richards. Mrs. Richards announced that the due notice of this meeting had been provided to *The Retrospect* as a Legal ad on May 11, 2010.

ROLL CALL Mr. Albino*, Mr. Brown, Mrs. Caputi, Mrs. Chudd, Mr. Kendall, Mr. Mann, Mr. Mulroy, and Mrs. Richards.

*Mr. Albino arrived at 7:50 PM.

Mr. Cavallo was absent.

Also present: Dr. Mark Raivetz, Superintendent; Dr. Lisa Palmer, School Business Administrator/Board Secretary; Mrs. Elizabeth Mennig, Supervisor of Teaching and Learning, and seventy members of the public.

WORK SESSION

Motion by Mrs. Chudd and seconded by Mr. Kendall that the Board moves into a Work Session at 6:15 PM.

Unanimous Voice Vote

EXECUTIVE SESSION

Motion by Mrs. Chudd and seconded by Mr. Kendall that the Board moves into an Executive Session to discuss personnel, legal matters, and negotiations the results of which will be made public at a later date and time. The Board moved into Executive Session at 7:00 PM.

Unanimous Voice Vote

Motion by Mrs. Chudd and seconded by Mr. Kendall that the Board moves to Regular Session at 7:40 PM.

Unanimous Voice Vote

ROLL CALL

Mr. Albino	Yes
Mr. Brown	Yes
Mrs. Caputi	Yes
Mrs. Chudd	Yes
Mr. Kendall	Yes
Mr. Mann	Yes
Mr. Mulroy	Yes
Mrs. Richards	Yes

Roll Call 8-0-0

Motion by Mr. Mann and seconded by Mr. Albino that the following items be approved:

#3 SUPERVISOR OF TEACHING AND LEARNING

NONE

#4 HIGH SCHOOL PRINCIPAL

-4. SENIOR PRIVILEGE

That the Board approves the attached as presented for 2010-2011, per Policy 5116.

#5 MIDDLE SCHOOL PRINCIPAL

NONE

#6 ELEMENTARY PRINCIPALS

NONE

#7 STUDENT PERSONNEL

-18. HOMEBOUND INSTRUCTION

That the Board approves student #3464826283 to be placed on Homebound Instruction, effective October 19, 2010. Student is being placed on Homebound Instruction until an out-of-district placement is located.

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#7430	School Safety
#7432	Eye Protection
#7433	Hazardous Substances
#7434	Smoking on School Grounds
#7435	Alcoholic Beverages on School Premises
#7436	Drug Free Workplace
#7440	Security of School Premises
#7450	Property Inventory
#7460	Energy Conservation
#7490	Animals on School Property
#7513	Recreational Use of Playgrounds
#7520	Loan of School Equipment
#7610	Vandalism

#10 MONTHLY REPORTS

-15. Fire Drills

-16. Enrollment Report

-17. Suspension Report

-18 Drug Report

-19. Vandalism Report

-20. Summary of Work-related Lost Time Injuries

#11 MISCELLANEOUS

-13. 2010 SPECIAL EDUCATION ANNUAL DATA REPORT

That the Haddon Township Board of Education approves the 2010 Special Education Annual Data Report.

ROLL CALL

Mr. Albino	Yes
Mr. Brown	Yes
Mrs. Caputi	Yes
Mrs. Chudd	Yes
Mr. Kendall	Yes
Mr. Mann	Yes
Mr. Mulroy	Yes
Mrs. Richards	Yes
Roll Call	**8-0-0**

Motion by Mrs. Caputi and seconded by Mr. Brown that the following items be approved:

-14. APPROVAL OF USE AGREEMENT BETWEEN HTAA AND HADDON TOWNSHIP BOARD OF EDUCATION FOR RECCHINO FIELD

That the Board approves the attached Use Agreement between the Haddon Township Board of Education and the Haddon Township Athletic Association for the 2010-2011 school year subject to the conditions contained therein.

ROLL CALL	
Mr. Albino	Yes
Mr. Brown	Yes
Mrs. Caputi	Yes
Mrs. Chudd	Yes
Mr. Kendall	Yes
Mr. Mann	Abstain
Mr. Mulroy	Abstain
Mrs. Richards	Yes
Roll Call	**6-0-2**

34-11

OAL DKT. NO. EDU 1838-03
AGENCY DKT. NO. 3-1/03

LISA L. WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JERSEY CITY BOARD OF EDUCATION, HUDSON COUNTY,	:	DECISION
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. 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|11|11

Date of Mailing: 1|11|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01838-03
AGENCY DKT. NO. 3-1/03

LISA L. WILLIAMS,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Alan S. Porwich, Esq., for petitioner
(Feintuch, Porwich and Feintuch)

R. Scott Eveland, Assistant General Counsel, for respondent
(The Jersey City Public Schools)

Record Closed: November 29, 2010 Decided: December 14, 2010

BEFORE **ROBERT J. GIORDANO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education 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 parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached document.

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 **Acting 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.

12/14/10
DATE

ROBERT J. GIORDANO, ALJ

Date Received at Agency: 12-17-10

Date Mailed to Parties: DEC 17 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

cml

OFFICE OF ADMINISTRATIVE LAW
33 WASHINGTON STREET
NEWARK, NJ 07102
NOV 22 2010

FEINTUCH, PORWICH & FEINTUCH
721 Newark Avenue
Jersey City, New Jersey 07306
(201) 656-8600
Attorneys for Petitioner

LISA L. WILLIAMS, Petitioner,	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
vs.	OAL DKT NO. EDU-01838-03 Agency Ref. No. 3-1/03
JERSEY CITY SCHOOL DISTRICT, Respondent.	**STIPULATION OF SETTLEMENT**

THIS MATTER having been brought before the Office of Administrative Law by Feintuch, Porwich & Feintuch, attorneys for petitioner, with R. Scott Eveland, Esq., appearing for respondent, and the parties having adjusted the differences between them as a result of the settlement of petitioner's workers' compensation claim, Lisa Williams vs. Jersey City Board of Education, C.P. No. 2002-27166, and for good cause being shown,

IT IS HEREBY STIPULATED AND AGREED that Respondent shall restore 38 days to Petitioner's sick leave bank which were deducted subsequent to Petitioner's work-related accident on July 23, 2002.

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE ABOVE STIPULATION.

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner

By: _____
ALAN S. PORWICH
DATED: 11/18/10

_____
R. SCOTT EVELAND, ESQ.
Attorney for Respondent
DATED:

FEINTUCH, PORWICH & FEINTUCH
721 Newark Avenue
Jersey City, New Jersey 07306
(201) 656-8600
Attorneys for Petitioner

LISA L. WILLIAMS, Petitioner,	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
vs.	OAL DKT NO. EDU-01838-03 Agency Ref. No. 3-1/03
JERSEY CITY SCHOOL DISTRICT, Respondent.	**STIPULATION OF SETTLEMENT**

THIS MATTER having been brought before the Office of Administrative Law by Feintuch, Porwich & Feintuch, attorneys for petitioner, with R. Scott Eveland, Esq., appearing for respondent, and the parties having adjusted the differences between them as a result of the settlement of petitioner's workers' compensation claim, Lisa Williams vs. Jersey City Board of Education, C.P. No. 2002-27166, and for good cause being shown,

IT IS HEREBY STIPULATED AND AGREED that Respondent shall restore 38 days to Petitioner's sick leave bank which were deducted subsequent to Petitioner's work-related accident on July 23, 2002.

WE HEREBY CONSENT TO THE FORM AND ENTRY OF THE ABOVE STIPULATION.

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner

By: _____
ALAN S. PORWICH
DATED: 11/18/10

_____
R. SCOTT EVELAND, ESQ.
Attorney for Respondent
DATED:

OAL DKT. NO. EDU 6854-10
AGENCY DKT. NO. 115-6/10

HARRY WILSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION 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 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/11/11

Date of Mailing: 1/11/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6854-10
AGENCY DKT. NO. 115-6/10

DR. HARRY WILSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,
Respondent.

Jay J. Rice, Esq., for petitioner (Nagel Rice, attorneys)

Anthony P. Sciarrillo, Esq., for respondent (Lindabury, McCormick, Estabrook & Cooper, attorneys)

Record Closed: December 3, 2010 Decided: December 3, 2010

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

On or about June 8, 2010, petitioner Dr. Harry Wilson filed a Verified Petition with the Commissioner of Education seeking retroactive salary and other emoluments and benefits from respondent Board of Education of the City of Summit (the Board). On or about June 23, 2010, the Board filed an Answer to Verified Petition. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on

June 29, 2010, for determination as a contested case. The undersigned held a prehearing conference on July 27, 2010, during which the hearing was scheduled for January 24 and 25, 2011. Subsequently, the parties reached an amicable agreement, and counsel for the Board submitted the attached Stipulation of Settlement indicating the terms of the agreement, and the attached extract from the minutes of the Board's meeting approving the Stipulation of Settlement.

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.

December 3, 2010
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency:

12-7-10

Date Mailed to Parties: DEC 7 2010

jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

LINDABURY, McCORMICK, ESTABROOK & COOPER
A Professional Corporation
53 Cardinal Drive
P.O. Box 2369
Westfield, New Jersey 07091
(908) 233-6800
Attorneys for the Summit Board of Education

2010 NOV 23 P 5:31

DR. HARRY WILSON	OFFICE OF ADMINISTRATIVE LAW
Petitioner, vs.	OAL DOCKET NO. 06854-2010n AGENCY REF. NO. 155-7/09
SUMMIT BOARD OF EDUCATION	
Respondent.	**STIPULATION OF SETTLEMENT**

WHEREAS, Dr. Harry Wilson (hereinafter "Dr. Wilson") previously served as an employee and member of the teaching staff of the Summit Board of Education (hereinafter "Board") in the position of K-12 Supervisor of Art, Industrial Technology and Family Consumer Sciences; and

WHEREAS, on April 6, 2010, Dr. Wilson submitted a letter of retirement from his said position with an effective date of July 1, 2010; and

WHEREAS, on June 2, 2009, Dr. Wilson filed a Verified Petition with the Commissioner of Education seeking retroactive salary and other emoluments and benefits earned during his employment as a teaching staff member;

NOW, THEREFORE, the parties, having a desire to settle the above matter in an amicable way, hereby agree as follows:

1. Dr. Wilson shall receive a lump sum payment of Thirty Five Thousand Dollars ($35,000.00), as full and final compensation for any and all claims set forth in the said Verified Petition which include: payment of salary for the period April 1, 2010 through June 30, 2010; payment of any salary increase due for the 2009-2010 school year; payment of any retroactive salary increase as a K-12 Supervisor pursuant to the Agreement between the Board and the Summit Supervisors Association; payment for the Summer 2009 FLASH program; payment of a stipend for serving as advisor to the Art Magazine for the 2008-2009 school year funded by the Summit Educational Foundation; reimbursement of any COBRA premiums paid; payment of a cancellation fee for Dr. Semel; and any and all accumulated sick day compensation due pursuant to any Collective Bargain Agreement. Wilson acknowledges and understands that the said lump sum payment will be subject to state and federal tax and that the payment he will receive will be net of the mandated tax deductions. Payment will be made to Dr. Wilson within 30 days from the date the Board receives the Stipulation of Settlement signed by Dr. Wilson.

2. Dr. Wilson's 2008-2009 Annual Performance Report is hereby withdrawn ab initio, and shall be immediately physically removed from his file. The Board agrees that responses to any inquiries as to Dr. Wilson's employment with the District, including but not limited to, job reference inquiries, shall be limited to an acknowledgment of his position, length of employment with the District, salary and retirement.

3. In exchange for the above consideration, Dr. Wilson, 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 or officially, individually and collectively, its past and present Board members, its officers and administrators, its agents 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, and all claims involving taxes required by law to be paid by Dr. Wilson as a result of this settlement, and 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 Constitution, 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 bargaining 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. This release applies to claims, known or unknown, resulting from anything that occurred prior to the date of this Stipulation of Settlement. 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, and claims arising under this Stipulation of Settlement.

4. Dr. Wilson acknowledges that he has had the opportunity to consult with legal counsel and representatives of his choice regarding this Stipulation of Settlement which includes his release and waiver prior to executing it; and that he represents that he has read this Stipulation of

Settlement and fully understands it and agrees to be bound by it. Dr. Wilson also acknowledges that he has been given a reasonable period of time within which to consider this settlement and the terms of this Stipulation of Settlement prior to executing it.

5. This Stipulation of Settlement contains the entire agreement and understanding between the parties and constitutes a full and final Agreement on any and all issues referred to herein.

6. This Stipulation of Settlement shall be governed by the laws of the State of New Jersey.

7. If, during the term of this Stipulation of Settlement, a specific clause of this Stipulation of Settlement is determined to be illegal or in violation of any Federal or State law, the remainder of the Stipulation of Settlement shall not be affected by such a ruling and shall remain in full force and effect. Notwithstanding the foregoing, however, if Dr. Wilson is required to return all or any part of the sum paid under Section 1 of this Stipulation of Settlement as a result of the illegality or unenforceability of a provision of this Stipulation of Settlement, at Dr. Wilson's option, this Stipulation of Settlement will be void ab initio as if it never had been signed.

8. The parties have entered into this Stipulation of Settlement freely and voluntarily with a full understanding of their rights and the contents of this Stipulation of Settlement. The parties acknowledge that they had the opportunity to consult with legal counsel or a representative of their choice and that they reviewed the Stipulation of Settlement in detail with their counsel or representative and fully understand its requirements and limitations.

9. This Stipulation of Settlement shall remain confidential to the maximum extent permitted by law. A copy of this Stipulation of Settlement shall *not* be maintained in Dr. Wilson's personnel file.

10. This Stipulation of Settlement may not be altered, amended or modified except by a writing, signed and duly authorized by all parties.

11. This Stipulation of Settlement is subject to ratification by the Summit Board of Education after receipt of a signed Stipulation of Settlement from Petitioner. Execution and delivery of this Stipulation of Settlement on behalf of the Board constitutes a representation and warranty that the execution, delivery, and performance of this Stipulation of Settlement on behalf of the Board, and the consummation by the Board of the transactions contemplated hereby, have been duly authorized by all necessary action; that no other proceedings are necessary to authorize or approve the execution and delivery of this Stipulation of Settlement on behalf of the Board or the Board's performance of its obligations hereunder; and that this Stipulation of Settlement has been duly and validly executed and delivered on behalf the Board and constitutes a valid and binding obligation of the Board enforceable in accordance with its terms.

ON BEHALF OF DR. HARRY WILSON

Dr. Harry Wilson Date: 1/2/10

Witness Date: 1/2/10

ON BEHALF OF THE SUMMIT BOARD OF EDUCATION

President Date: 11/11/10

Secretary Date: 11/11/10

Board of Education
14 Beekman Terrace
Summit, New Jersey 07901-1702
Tel: (908) 273-3025

Summit Public Schools

Louis J. Pepe, RSBA, School Business Administrator/Board Secretary

RECEIVED
2010 DEC -3 A 8:56
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

November 29, 2010

Paul E. Griggs, Esq.
Lindabury, McCormick, Estabrook & Cooper, P.C.
53 Cardinal Drive
P.O. Box 2369
Westfield, New Jersey 07091-2369

Re: Stipulation of Settlement

Dear Paul:

The Board of Education of Summit in the County of Union, New Jersey convened a Workshop Meeting on Thursday, October 14, 2010, at 7:30 PM in the Wilson School Board Meeting Room.

The following Board members were present:
Mr. Lyness, Board President, Mrs. Stevenson, Vice President, Ms. Colbert, Mrs. Kalin, Mrs. Ron-Fornes, Mr. O'Rourke, and Mr. Lucaci.

Also present were:
Dr. Nathan Parker, Superintendent
Julie Glazer, Assistant Superintendent
Louis J. Pepe, RSBA, School Business Administrator
Dr. Kenneth Shulack, Director of Human Resources
Dr. Jane Kachmar-Desonne, Director of Special Services

School Board Operation:

L. Approval of Stipulation of Settlement with Employee #4956 subject to approval by the employee's attorney

Motion by Mrs. Stevenson, seconded by Mr. Lucaci
Roll Call 7-0
Motion Carried

I, Louis J. Pepe, RSBA, School Business Administrator of the City of Summit, in the County of Union, 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 14, 2010 has been compared by me with the original minutes of said City of Summit Board of Education and is a true and 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 whereunto set my hand and affixed the corporate seal of the said board of education.

Louis J. Pepe, RSBA
School Business Administrator/
Board Secretary

41-11E

OAL DKT. NO. EDU 13039-10
AGENCY DKT. NO. 694-11/10

S.N.K. and S.K., on behalf of minor child, S.N.K.,	:	
	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL, BERGEN COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
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 that petitioners have 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. Although this case involves a suspension from extracurricular activities, the irreparable harm alleged by the petitioners was not the student's inability to participate in four scrimmages and two regular season basketball games, but rather the fact that the Board's policy involving suspension from extracurricular activities is unlawful and will remain in effect unless emergent relief is granted.

The Commissioner finds that the continued existence of the Board's policy does not rise to the level of irreparable harm necessary to establish an entitlement to emergent relief. [1]

[1] In so holding, I am fully cognizant of the longstanding precedent that a prohibition from participation in activities such as sports does not, in and of itself, rise to the level of irreparable harm necessary to warrant extraordinary remedy. However, harm is "irreparable" when there can be no adequate after-the-fact remedy in law or in equity, and monetary damages cannot adequately redress the intangibles of a lost experience after the event is over. In past cases denying similar applications for emergent relief, the irreparable nature of the harm and the degree or severity

Accordingly, the recommended Order of the OAL denying petitioners' application for emergent relief is adopted. 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.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/14/11

Date of Mailing: 1/19/11

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of the harm have frequently been addressed together; they are, however, two separate factors, and it is on the basis of the *severity* of the harm – which pertains to the weighing of interests – and not its irreparable nature that applications of this kind typically fail. *Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County*, decided by the State Board April 17, 1996; *L.J. on behalf of minor child, S.J., and David Wickham v. Board of Education of the Township of Manchester, Ocean County*, decided by the Commissioner May 2, 2003. See *D.M.S., on behalf of minor child, E.B., and Gregory Heck v. Board of Education of the Pinelands Regional School District, Ocean County, et al.*, decided by the Commissioner May 9, 2008; *M.R., on behalf of minor child, J.R. v. Board of Education of the Town of Kearny, Hudson County,* decided by the Commissioner May 30, 2008; *Samantha Walsh v. Board of Education of the Monmouth Regional High School District, Monmouth County,* decided by the Commissioner June 20, 2008.

[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

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 13039-10

AGENCY DKT. NO. 694-11/10

S.N.K. & S.K. o/b/o S.N.K., Jr.,

Petitioners,

v.

NORTHERN HIGHLANDS REGIONAL BOARD OF EDUCATION,

Respondent.

Stephen J. Christiano, Esq. for petitioners (Christiano and Christiano, attorneys)

James Plosia, Esq. for respondent (Apruzzese, McDermott, Matro & Murphy, attorneys

Record Closed: December 8, 2010 Decided: December 9, 2010

BEFORE **JEFFREY A. GERSON** ALJ:

STATEMENT OF CASE

S.N.K., Jr. is on the Varsity Basketball Team of Northern Highlands Regional High School.

On or about October 9, 2010, S.N.K., Jr. after attending a private party in New Jersey with several other students and they were then taken by bus to a restaurant in New York where the party continued. Alcohol was consumed by S.N.K., Jr. a fact not in serious dispute.

As a result of this off-campus alcohol consumption, S.N.K., Jr., after a hearing, was prohibited from participating in the first two Varsity Basketball games of the upcoming season in addition to being unable to participate in Interschool scrimmages. He was not prohibited from practicing with the team.

THE LAW

It is conceded by petitioners that participation in co-curricular activities is a privilege rather than a right. Conduct violations involving drugs or alcohol among other violations can lead to a prohibition of participation in co-curricular activities, a disciplinary action which does not give rise to irreparable harm. See C.D. v. Board of Education of Monroe Twp., Closter County OAL DKT. No. EDU 0100-89, Initial Decision, 1989 (S.L.D. 2169, aff'd. August 4, 1989). The Commissioner of Education has held that students do not suffer irreparable harm when they are prohibited from participating in extra-curricular activities such as interscholastic sports. See Board of Education of Elmwood Park v. N.J.S.I.A.A. 94 N.J.A.R.2d (EDU) 106 (1993); City of Camden v. N.J.S.I.A.A. 92 N.J.A.R.2d (E DU) 182 (1992); Board of Ed. of City of Trenton v. N.J.S.I.A.A. 91 N.J.A.R.2d (EDU) 158 (1991).

N.J.A.C. 6A:3-1.6(b) codifying Crowe v. DeGioia 90 N.J. 126 (132-34 (1982) provides four prongs to consider when determining the need for emergent relief. Prong 1 is whether the petitioner will suffer irreparable harm if the required relief is not granted. Prong 2 is if the legal right underlying the petitioner's claim is well settled, Prong 3 is that there is a likelihood that the petitioner will prevail on the merits of the underlying claim and Prong 4 is when the equity and interest of the parties are balanced whether the petitioner would suffer greater harm than the respondent will suffer if the requested relief is not granted.

Although suspension from the Varsity Basketball Team undoubtedly amounts to discipline, it is not discipline that will result in irreparable harm. Case law and statutory law confirm this proposition and it has not been overcome by the argument of the petitioner.

The essence of petitioners' argument is that "Off-Campus" conduct which does not affect the school itself is not conduct that can be addressed by and disciplined by the Board of Education. This principle is certainly not well settled and in fact is not a proposition supported by any case law. Without addressing the likelihood of petitioners' success on the merits nor is it necessary to balance the equities and interests of the parties for it is with little doubt that I **CONCLUDE** that suspension from two varsity games and some basketball scrimmages does not amount to irreparable harm warranting the granting of emergent relief.

It is **ORDERED** that petitioner's application for Emergent Relief requesting that S.N.K., Jr. be restored to full varsity basketball activities with no suspension is hereby **DENIED**.

December 9, 2010

DATE

JEFFREY A. GERSON ALJ

sej

Attachment

42-11

OAL DKT. NO. EDU 8796-10
AGENCY DKT. NO. 171-7/10

W.B. and L.M. on behalf of minor child, A.B.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

Review of the record in this residency matter reveals that petitioners 1) failed to appear in the OAL at a telephonic hearing of which they were duly advised by notice dated October 7, 2010, and 2) failed to subsequently offer any explanation for their non-appearance, despite a notice dated December 9, 2010, advising them that they could file a written explanation with the Commissioner within thirteen days of receiving said notice. In light of the foregoing, petitioner's appeal is dismissed pursuant to *N.J.A.C.* 1:1-14.4. As no counterclaim for tuition was filed by respondent, disposition of this case is complete.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/14/11
Date of Mailing: 1/19/11

[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
33 Washington Street
Newark, NJ 07102

OAL Docket. No.: EDU 08796-2010 N

Agency Ref. No.: 171-7/10

Transmitting Agency: Department of Education

Judge: Richard McGill
Judge Phone No. (973) 648-6066
****
W.B. and L.M., on behalf of minor child, A.B. vs. City of Plainfield BOE

Notice of Return
Failure to Appear

****

W.B. & L.M. O/B/O A.B. failed to appear at a scheduled hearing on 11/22/2010. This case is returned to the transmitting agency listed above for appropriate disposition.

If you failed to appear and still want to have a hearing, you must explain, in writing, why you did not appear and send the explanation to Department of Education. The agency must receive the explanation within 13 days of this notice. Copies of the explanation must be sent to all other parties.

December 09, 2010
Date

Deputy Clerk, OAL

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street
Newark, NJ 07102

SERVICE LIST
OAL DOCKET NO. EDU 08796-2010 N

M. Kathleen Duncan
Bureau of Controversies & Disputes
NJ State Department of Education
100 Riverview Plaza, 4th Floor
PO Box 500
Trenton, NJ 08625-0500

ROBERT T. PICKETT ESQ
PICKETT & CRAIG ESQS
80 MAIN ST STE 430
WEST ORANGE, NJ 07052

Winston Brown & Lester Martin Pro Se
721 Dorbett Place
Plainfield NJ 07062

BOARD SECRETARY
PLAINFIELD BOE
1200 MYRTLE AVENUE
PLAINFIELD, NJ 07063

44-11

IN THE MATTER OF THE TENURE	:	
HEARING OF DENISE NICHOLSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF ORANGE, ESSEX	:	
COUNTY.	:	

SYNOPSIS

The petitioning Board certified charges of conduct unbecoming and insubordination against respondent – a tenured administrative secretary – for, *inter alia:* defiant, combative, and unprofessional behavior; failure to adhere to expectations regarding punctuality and absenteeism; failure to adhere to the district's dress code policy; and failure to comply with the professional improvement plan(s) developed for her. Respondent denied the charges.

The ALJ found, *inter alia,* that: the Board's witnesses presented credible testimony, supported by documentation; testimony from no less than six administrators stated that respondent was rude and abusive to students, parents, and coworkers, and that respondent failed to complete assignments and ignored directives; respondent clearly exhibited a pattern of behavior that included an inability to complete tasks and stay on task, difficulty working with fellow staff and supervisors, and problems with punctuality and attendance. The ALJ concluded that the Board has carried its burden to prove the charges against respondent, and ordered her dismissed and removed from tenured employment.

Upon independent review of the record, the Commissioner concurred with the ALJ's findings 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.

January 24, 2011

44-11

OAL DKT. NO. EDU 08375-10
AGENCY DKT NO. 265-8/10

IN THE MATTER OF THE TENURE	:	
HEARING OF DENISE NICHOLSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF ORANGE, 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 respondent, and the Board of Education's (Board) reply to respondent's exceptions.[1]

The respondent's exceptions largely reiterate the substance of her post-hearing submission at the OAL, recasting the arguments therein to support the contention that the Administrative Law Judge (ALJ) erroneously sustained the Board's charges. Respondent asserts that the ALJ erred in finding respondent guilty of unbecoming conduct and insubordination, and that the forfeiture of respondent's tenure is too severe a penalty. Respondent generally maintains that the Board's witnesses, who consisted of a number of different administrators, were not credible because they provided contradicting testimony with respect to who was in charge of providing respondent with her assignments, the number of assignments she was permitted to work on at one time and her work location. With respect to the Board's charge that respondent did not improve after two performance improvement plans were established, respondent contends that the Board relies on general allegations rather than specific facts, and that there was

[1] The record contains no transcripts from the hearings conducted at the OAL on October 29, 2010, November 8, 2010 and November 9, 2010.

confusion as to what events occurred while the performance plans were in progress. In her exceptions, respondent also argues that her attendance and lateness record over a few months did not rise to the level of conduct that would require removal of her tenure.

In its reply, the Board urges the adoption of the Initial Decision asserting that the respondent's exceptions essentially challenge the credibility determinations made by the ALJ. The Board stresses that the choice of rejecting the testimony of a witness rests with the trier of fact and such determination must simply be reasonable. The Board maintains that the ALJ gave each witness a fair and ample opportunity to testify, and that her assessment of the witnesses' testimony was reasonable; therefore, the conclusions drawn by the ALJ should be upheld.

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 and insubordination. The Commissioner finds respondent's exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and clearly taken into account by her in weighing the testimony and evidence and in concluding that the record overall supported the Board's charges. Notwithstanding respondent's contentions to the contrary, the 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 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 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 from tenured employment.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL directing removal of respondent from her position of tenured employment is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/24/11

Date of Mailing: 1/24/11

[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 08375-10
AGENCY DKT. NO. 265-8/10

IN THE MATTER OF THE TENURE HEARING OF DENISE NICHOLSON, SCHOOL DISTRICT OF THE CITY OF ORANGE, ESSEX COUNTY.

Melvin C. Randall, Esq., for petitioner Board of Education of the City of Orange (Love & Randall, attorneys)

Nancy Oxfeld, Esq., for respondent Denise Nicholson (Oxfeld Cohen, attorneys)

Record Closed: November 23, 2010 Decided: December 9, 2010

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On July 14, 2010, the Board of Education of Orange, New Jersey, filed tenure charges against respondent Denise Nicholson. The respondent was charged with eleven counts of unbecoming conduct and insubordination. The charges included that on May 18, 2010, Ms. Nicholson was "defiant, insubordinate and assaultive" toward Dana Gaines, assistant principal at Orange High School; on October 15, 2009, the respondent acted unprofessionally toward a parent and her son; on February 27, 2009, she acted unprofessionally toward a student; on October 6, 2009, Ms. Nicholson acted

unprofessionally and insubordinate toward a supervisor, Mr. Gaines, and on October 21, 2010, acted unprofessionally and insubordinate toward a supervisor, Mr. Green; on April 23, May 14 and May 17, 2010, she "failed to adhere to the recognized procedures regarding punctuality, absenteeism and/or leaving the school building during the school day"; in April 2010 "she failed to adhere to the school district's dress code policy"; on February 5 and February 8, 2010, Ms. Nicholson refused or was unwilling to perform an assigned task given to her by a supervisor; on May 17, 2010, she was combative and attempted to walk out of a meeting with her supervisors; on April 1, 2010, Ms. Nicholson "refused and/or failed to comply with the professional improvement plan(s) developed for her"; and Ms. Nicholson "exhibited a continuing pattern of conduct unbecoming" including insubordination on September 10, 2003, defiant and disruptive behavior on October 28, 2003, insubordination on October 19, 2006, and a pattern of unsatisfactory performance documented on September 18, 2007, and prior evaluations.

On August 2, 2010, the respondent filed an Answer to the tenure charges. On August 8, 2010, the matter was forwarded from the Department of Education to the Office of Administrative Law, where it was filed on August 11, 2010. On August 13, 2010, the Orange Township Board of Education filed additional charges nunc pro tunc against Ms. Nicholson and asked that those charges be consolidated with the prior charges. A prehearing conference was held on August 24, 2010, at which time a discovery schedule and hearing dates were determined and an Order was issued. The matter was originally scheduled for hearing on October 22 and 29 and November 8 and 9, 2010. However, the District asked for the October 22 date to be adjourned because Mr. Randall had a conflict. The matter was heard on the remaining dates. Simultaneous summation briefs were received on November 23, 2010.

ISSUES

1. Did the actions of the respondent rise to the level of insubordination and conduct unbecoming such that Ms. Nicholson should lose her tenured position?

2. What penalty, if any, should be imposed on the respondent?

FINDINGS OF FACT

1. The following facts have been stipulated by the parties: (See Joint Stipulation of Facts with Exhibits)

a. On or about August 1999, petitioner employed respondent as an administrative secretary.

b. Upon employment, the respondent possessed an associate's degree in applied science and secretarial arts dated April 15, 1994.

c. Upon employment, respondent was given a job description.

d. The respondent served in the capacity of administrative secretary at several schools in petitioner's school district. The schools are:

Central Elementary
Park Elementary
Orange Middle School
Orange High School

e. During her employment respondent received job performance evaluations.

f. In February, during the 2009–10 school year, respondent was denied a salary increment by petitioner for the 2010–11 school year based on performance.

2. The following are facts found as a result of the review of testimony and exhibits entered into evidence:

Prior to May 18, 2010, Dana Gaines, the assistant principal of Orange High School and Ms. Nicholson's immediate supervisor, gave Ms. Nicholson an assignment

to complete. On May 18, 2010, Mr. Gaines and Oliverto Agosto, another assistant principal at the high school, were standing near the school entrance watching the students as they entered to make sure that they were abiding by the school dress code. Ms. Nicholson approached Mr. Gaines and told him that she could not do the assignment he had given her because it was not in the format that she used. Mr. Gaines told her that the format was not the problem, but Ms. Nicholson said that she had too much work to complete the assignment. Mr. Gaines said that it was critical that the work be done. At that point Ms. Nicholson took a lanyard holding a large set of keys from around her neck, balled the keys up in her hand, and forcefully slammed and partially threw them into Mr. Gaines's folded arms. She said that she had work to do in another office and he could do the assignment himself. Mr. Gaines did not shout or do anything that would have caused Ms. Nicholson to act in that manner, and he had never had a personal conflict with her prior to this incident.

Barbara Clark is the director of Special Services at Orange High School. On October 15, 2009, she sent a memo to Ms. Nicholson titled "Unprofessional Demeanor." Ms. Clark outlined that she had shared a complaint with Ms. Nicholson from a parent, Athena Smith, alleging that she had called the guidance office two times and the person who answered hung up on her. Ms. Clark came to the guidance office several times following this complaint and observed that the door was locked and Ms. Nicholson did not get up to open the door to let people in. (Ms. Nicholson was situated in the guidance office at that time.) The door to the guidance office was never to be locked for safety reasons, because of fire hazards and because the school wished to project a welcoming climate for parents and students at the guidance office.[1]

On February 27, 2009, Mr. Gaines walked into the office where Ms. Nicholson was assigned to work. He witnessed the respondent yelling at a student about a print job that he had delivered from the print shop and that was not to her liking. The student was visibly upset. Mr. Gaines intervened and removed the student from the office. Mr. Gaines put a formal reprimand in Ms. Nicholson's file (Ex. C) regarding this incident

[1] Ms. Clark testified to other instances in which she was informed by parents of Ms. Nicholson's rude behavior toward them. While I allowed the testimony in under the residuum rule, since there was no direct testimony regarding her behavior toward parents, I could not make a finding of fact as to these allegations.

asserting that her actions were inappropriate and unprofessional. In the memo, he also recommended ways that Ms. Nicholson could develop more positive relationships with students.

Another reprimand was placed in Ms. Nicholson's file as a result of an incident that occurred on or about October 6, 2009. Mr. Gaines gave Ms. Nicholson a priority task to complete by 3:00 p.m. on October 6, 2009. Sometime after 3:00 he spoke to Ms. Nicholson about the task and was told that it had not been completed. He did not recall Ms. Nicholson giving him any excuse for not completing the work. (See Exhibit D.) He then told her to forego any other tasks and attend to the task he had assigned her. The next day, Mr. Gaines tried to call Ms. Nicholson to see if the task had been completed, but she did not answer her telephone. He tried to track her down through another secretary, who reported that Ms. Nicholson was in fact at her own desk. After several more telephone calls, Ms. Nicholson finally picked up the telephone. When Mr. Gaines asked her to come to his office, she responded, "why?" Ms. Nicholson said that she was busy assisting a parent.[2] Mr. Gaines told her to have another secretary assist the parent. When she came to his office, she informed Mr. Gaines that she still had not completed the task that he had given her as a priority the day before.[3] Mr. Gaines tried to make suggestions to Ms. Nicholson about getting to work on time and prioritizing her tasks. He also told her that, if she felt that a time frame that she was given for a task was not reasonable, then she should let it be known. Ms. Nicholson refused to sign the October 13, 2009, Notice of Reprimand.

Jason Green is the athletic director at Orange High School. Originally during the 2008–09 school year he worked on a part-time basis. Beginning in September 2009 Ms. Nicholson worked part time for Mr. Green and part time for Mr. Gaines. Prior to Mr. Green's coming aboard full time, Ms. Nicholson was located in the main office. When he came in September, she was in the guidance office. She remained there for a few months. However, there were problems with the staff in the guidance office and Mr. Green suggested that Ms. Nicholson be moved to his office and work for him. In

[2] Mr. Gaines pointed out that there were six other secretaries who could have assisted the parent, thereby leaving Ms. Nicholson free to complete her assignment.
[3] As per the union contract, Mr. Gaines called an OEA representative to come to the meeting with Ms. Nicholson.

November she was moved to Mr. Green's office, and for a time she only did work for the Athletic Department. In January she was moved to the central office of the high school, even though she was still working for the Athletic Department. Following this, Ms. Nicholson was moved to the nurse's office.

On April 21, 2010, Mr. Green approached Ms. Nicholson and asked her what assignments she was working on that day. She responded that she had assignments to complete for administrators. When he asked what administrators, Ms. Nicholson rolled her eyes and said, "Sir, not today." He asked her again and she responded the same way. Mr. Green then told her about the newly assigned lunch schedule. (Prior to this time Mr. Green had told Ms. Nicholson orally that she needed to relieve Ms. Banks, the guidance secretary, so that she could take her lunch.[4]) Ms. Nicholson was to take lunch from 11:30–12:30 and relieve Ms. Banks at 1:00. Ms. Nicholson then stated that the directive was not in writing. Mr. Green sent Ms. Nicholson a "Reprimand" on April 21, 2010, informing her that this was her official notice of insubordination. (E-6.)

Ms. Nicholson received a number of written reprimands regarding her late arrival, failure to sign in and absences. She was late on January 12, 2010; Mr. Green sent a memo to Ms. Nicholson (E-12) noting that between September 2009 and January 2010 she had used eleven and a half sick days. The school has a policy that if a staff member is going to be absent, the staff member is to call a central sub-service no later than 7:00 a.m. on the date of the absence so that a substitute can be arranged. In the alternative, the staff member could call the main office to report the impeding absence. Ms. Nicholson was to be at work at 8:00 a.m.

On Monday, January 19, 2010, Ms. Nicholson did not arrive at work on time, nor did she call sub-service or the main office. At 9:05 a.m. she called Mr. Green on his cell phone and told him that she was not coming into work that day. Ms. Nicholson claimed that she could not call sub-service or the main office because her phone would not allow her to call the 908 area code. Ms. Nicholson had no response when Mr. Green asked

[4] This schedule was being implemented because there had been complaints that Ms. Nicholson had not returned from lunch in a timely fashion to relieve the secretary in the Guidance Department.

her why, if that was the case, she had not called him on his cell over the prior weekend or before 7:00 a.m. on Monday. (See E-11.)

On Wednesday, January 21, Ms. Nicholson called Mr. Green at 8:05 a.m. on his cell phone and informed him that she would be arriving at the high school at 11:00 a.m. She did not call the sub-service or the main office by 7:00 a.m. Mr. Green wrote a reprimand (E-10) regarding the incident, which Ms. Nicholson refused to acknowledge. On January 26, 2010, Ms. Nicholson arrived at the main office at 8:40. She did not call sub-service or the main office and refused to put her time of arrival on the sign-in sheet when requested to do so by Mr. Green. (E-9.) She also refused to sign the acknowledgment of the reprimand.

A similar incident occurred on January 27, 2010, when she arrived at 8:42 a.m., did not notify anyone of her late arrival, and refused to put the time of her arrival in the sign-in book. (E-8.) On February 4, 2010, Mr. Green sent Ms. Nicholson a written notice of excessive absenteeism/lateness. (E-7.) He outlined that between September 2009 and February 2010 she had used fifteen and a half sick days. This amounted to an additional five sick days since the January notice. From Tuesday, April 20, through Friday, April 23, 2010, Ms. Nicholson was late arriving at work and failed to sign the daily attendance log with the appropriate time of arrival. On April 23, 2010, Mr. Green sent a written reprimand to Ms. Nicholson outlining this situation and reminding her again to call sub-service or the main office and/or him prior to 7:00 a.m. if she were going to be late or absent. (E-5.)

On April 23, 2010, Ms. Nicholson was supposed to relieve Ms. Banks at 1:00 p.m. so that she could take her lunch from 1:00 to 2:00. Ms. Nicholson left for lunch on time, but did not return to the building until 1:55. Mr. Green found Ms. Nicholson out in the parking lot speaking to the grandparent of a student. Ms. Nicholson did not return to the building until she was instructed to meet with Mr. Green, Ms. Stewart, the principal, Mr. Markel and Ms. Easley. Ms. Nicholson's actions caused Ms. Banks to miss her assigned lunch time. (E-4.)

On May 14, 2010, Mr. Green sent Ms. Nicholson another written reprimand outlining her late arrival to work from April 26 through April 30, May 3 through May 7, and May 10 through 14, 2010. Again Mr. Green pointed out that Ms. Nicholson had failed to call sub-service, the main office or him to inform him of her late arrival, and that her behavior was detrimental to the operations of the school and the morale of the rest of the staff. (E-3.)

On May 17, 2010, Ms. Nicholson did not arrive at work until 8:44. She did not call sub-service or inform the school or Mr. Green of her late arrival. Mr. Green again reminded Ms. Nicholson of the District policy regarding late arrival and absences. (E-1.)

On March 22, 2010, Mr. Agosto received a telephone call from the principal of the high school, who instructed him to go to the nurse's office and inspect how Ms. Nicholson was dressed. Ms. Nicholson had on an Orange High School tee shirt and a pair of thin black sweatpants. This outfit was not in conformity with the Orange High School dress code for staff and teachers. Mr. Agosto asked the respondent why she was dressed that way, and she said, "because she was going to be working on dirty files in the guidance office."[5] Mr. Agosto said that he has observed other secretaries working on files and they were dressed according to the dress code, which is on the school website and in the teachers' manual. Ms. Nicholson had never asked anyone in administration whether she could dress "informally" in order to do this job. Mr. Agosto told her to go home and change. Ms. Nicholson told him that she would not change, and made it clear that she worked for Mr. Gaines and not Mr. Agosto.[6] Mr. Agosto told her to go to Human Resources (HR). Ms. Nicholson snatched up some bags next to her and left the room. By the time she got to HR, she had changed into professional clothing. Ms. Nicholson told Ms. Smiley, administrative assistant to the superintendent for operations and human resources, that she had to work with dirty files and the location of the files would mean that her "tush would be in the air," exposed to the students walking by in the hall. From Ms. Nicholson's explanation, Ms. Smiley thought

[5] Mr. Agosto stated that the Guidance Department is not in the basement and does not have a dirt floor. People work on files in the guidance office every day and adhere to the dress code.
[6] Mr. Agosto described Ms. Nicholson's response as defiant and insubordinate.

that she would be sitting on the floor. As a result, Ms. Smiley wrote a memorandum to Ms. Nicholson.

On February 5 and February 8, 2010, Mr. Green gave Ms. Nicholson assignments that were to be completed by the end of the day. Ms. Nicholson did not complete the tasks; she sat in the guidance office chairs that were supposed to be for visitors and did not work on the assignments. When Mr. Green asked her why she had not completed the assignments, Ms. Nicholson said that she was waiting for the internet to be fixed in the nurse's office. At the time Ms. Nicholson had the athletic office laptop, which was wireless. The tasks could have been completed on the laptop. On February 5, 2010, Mr. Green told Ms. Nicholson that he needed the laptop in order to do some work over the weekend. Ms. Nicholson left early without Mr. Green's knowledge and took the laptop home with her. On Monday, February 8, 2010, Mr. Green again asked Ms. Nicholson for the laptop. She told him "no," and said that he would have to wait until after the school board meeting. She rolled her eyes, turned her head and walked away. (F-2.) While there was testimony, and Exhibit F-3 was entered into evidence regarding a failure to complete an assignment given on January 4, 2010, this incident was not addressed in the tenure charges and therefore will not be dealt with in the Findings of Fact.

On May 17, 2010, Mr. Green convened a meeting with Ms. Nicholson, Mr. Gaines and Ms. Easley. Mr. Green handed the respondent two letters of reprimand and an updated Professional Improvement Plan. Mr. Green asked Ms. Nicholson to review the letters, but she refused to review them. During the meeting Ms. Easley and Mr. Gaines informed Ms. Nicholson of her new assignment to compile a list of students who were in danger of failing. She was then supposed to input the information into a computer system which would generate a letter to the parents of students who were failing. In addition, she was to organize student records in alphabetical order for the 2007–08 school year. Ms. Nicholson was combative and tried to walk out of the meeting. Mr. Gaines had to call her back into the meeting several times. At the meeting Mr. Gaines and Ms. Easley informed Ms. Nicholson of assignments that were past due since March 9, 2010. (E-2.)

Because of problems with her performance, Mr. Green gave the respondent a sixty-day Professional Improvement Plan (PIP) for the period of January 25 to March 23, 2010. This plan included recommendations to improve her performance and professional-development goals. Following this period, Mr. Green did not see any improvement in Ms. Nicholson's performance and developed another PIP. (M-1.) This PIP was to cover the period of April 1 to May 20, 2010. At the end of this period, Mr. Green did not see any improvement and so he recommended on May 23, 2010, that Ms. Nicholson be terminated.

On May 26, 2010, Ms. Stewart, the principal of the high school, wrote a letter to the superintendent of schools in which she stated:

> There are great concerns regarding the decision to return Ms. Nicholson to Orange High School. Her inappropriateness, deficiencies, and insubordination have been documented during her tenure with Orange and she has gone through a number of district schools. The administrative team has grave concerns with her return to Orange High School for the following reasons:
>
> Safety and security of Administrative team
>
> Adverse impact of Ms. Nicholson's actions on her colleagues.

This letter was also signed by Mr. Gaines, Mr. Agosto, Mr. Green, Ms. Easley and three other administrators at the high school.

On June 27, 2001, Ms. Nicholson received an evaluation from Ms. Whitworth, her supervisor. Ms. Whitworth gave her "satisfactory" in "attitude toward children, computer skills and telephone etiquette." She received an evaluation of "needs improvement" in "ability to work with staff, clerical and organizational skills, knowledge of job and overall evaluation." She received "unsatisfactory" in "ability to work independently, human relations skills and punctuality and attendance." Ms. Nicholson "vehemently disagreed" with the evaluation. Ms. Nicholson received good evaluations in 2002. In 2004, while her overall evaluation was satisfactory, the principal pointed out that she had trouble focusing on her primary assignment and functions in the health office. She was also

told that her duties required "consistency of attendance and temperament" and better collaboration with other staff members. Her 2006 evaluation by Mr. DePalma of the Athletic Department was "outstanding." The 2007 evaluation was "satisfactory," although "unsatisfactory" with regard to "punctuality and attendance." Her 2008 evaluation was "satisfactory" in all respects. Her evaluation by Mr. Gaines in 2009 was overall "needs improvement." He graded her "satisfactory" in "ability to work independently, computer skills and knowledge of job." She was rated "unsatisfactory" in "clerical and organizational skills" and "needs improvement" in all other areas.

According to a memorandum dated September 18, 2007, from Mr. McGriff, the athletic director, Ms. Nicholson's performance was unsatisfactory in that it took her three to four days to complete a task that should have taken only a few hours. (Ex. H.) On October 19, 2006, Kimberly Hall, assistant principal of Orange High School, wrote a letter to Ms. Nicholson stating that the respondent failed to follow a directive from Dr. McCaskill, the principal, and herself to assign a locker to a student. Ms. Nicholson claimed that she had other responsibilities that took priority. (Ex I.) On October 28, 2003, Ms. Nicholson received a memorandum from Antonine Gayles, the principal of Orange Middle School, regarding her unauthorized departure from the school. Ms. Nicholson claimed that she could not remain in the building because her room was very cold. According to Ms. Gayles, there were two portable space heaters in the room; alternatively, Ms. Nicholson could have relocated to another room until the matter was resolved. Ms. Nicholson failed to follow protocol for notifying the building supervisor about a problem in the workplace and disregarded the instructions of the assistant principal to not leave the building without talking to Ms. Gayles. On September 10, 2003, Ms. Gayles sent a memo to Ms. Nicholson in which she claimed that Ms. Nicholson was insubordinate and rude. The memo stated:

> Our conversation today marks the third occasion in which I have spoke to you about your lack of professionalism in performing your assigned tasks. I will not tolerate your verbal challenges, rude behavior, and disrespectful manner one more day.

ARGUMENTS OF THE PARTIES AND ANALYSIS OF THE LAW

1. Arguments

The District argued that from the beginning of her employment there were problems with Ms. Nicholson's performance, and that her July 2001 evaluation concluded that her performance was unsatisfactory and that there were concerns regarding her human relations skills, punctuality and attendance, and ability to work independently. She also had problems working with other staff members, and problems with clerical and organizational skills. However, instead of terminating her the District transferred her to another school. These same concerns manifested themselves again in her 2008–09 evaluation by Mr. Gaines. The areas in which Mr. Gaines recommended improvement were the areas in which Ms. Nicholson's performance had deteriorated. Because of the concerns regarding punctuality, human relations skills, ability to work with others, etc., the administration instituted a professional-improvement plan for Ms. Nicholson. However, Ms. Nicholson did not adhere to the plan, which led to her unsatisfactory evaluation for the 2009–10 school year. This negative evaluation and the other incidents outlined caused the District to file tenure charges against Ms. Nicholson.

Ms. Nicholson argued that the issue was not what had occurred when she was first employed, but what happened during the 2009–10 school year. The respondent claimed that she was put in an impossible situation. She was given directives from supervisors in different departments. If she obeyed the orders of one administrator, then another administrator would be upset with her. She gave as an example the incident involving the keys to the nurse's office. She said that she was put in charge of the nurse's office while the nurse was out. However, Mr. Gaines told her to leave the nurse's office and deal with the job that he wanted her to do. She claimed that the administration could not coordinate among themselves; she had too many bosses.

In reviewing the testimony it is clear that the reason that Ms. Nicholson had different people giving her different assignments was that she failed to complete the assignment of one administrator and was unable to work with any one of them. Out of

frustration she was assigned to do work for another administrator. However, in each case, she failed to complete that assignment as well. The problem therefore was not that she had too many bosses, but that she failed to complete the work given to her. She appeared to believe that she could work on her own timetable and pick and choose which assignment she wanted to work on. She used the other assignments that she never completed as an excuse not to do the next assignment given to her. In addition, contrary to her assertion, Mr. Gaines or Mr. Green, depending on the time period, was the person through whom assignments to Ms. Nicholson were funneled. They might have allowed other administrators to give her assignments, but that was done serially, not simultaneously, and Mr. Gaines or Mr. Green was aware of her workload. Therefore, her contention that she had too many masters to answer to is not persuasive. This same problem of focusing on her primary job responsibilities was noted in her May 24, 2004, evaluation by principal Samuel H. Hazell. He stated:

> Ms. Denise Nicholson has demonstrated on many occasions the capacity and competence of a competent, well-intended administrative secretary. . . . Nevertheless, there is a need for Ms. Nicholson to focus more pointedly on the duties of her primary assignment and function: Health Office Administrative Secretary. There are records to record and files to systematically keep. Ms. Nicholson frequently has assisted in the Main Office. . . . The principal strongly recommends that Ms. Nicholson focus her attention to duties, obligations and responsibilities in the Health Office.
>
> [Ex. C, Stipulation of Fact.]

Further, Ms. Nicholson took on responsibilities that were not part of her assignment. The key incident seems to have stemmed from the fact that Ms. Nicholson was upset that she was ordered to complete a priority assignment for Mr. Gaines when she had been given the keys to the nurse's office and believed that she had to remain there to open the office. However, there was testimony from Mr. Gaines that if the nurse was not in her office, then the student would be referred to the nurse in the adjoining school. If that nurse needed the student's records, then it would be her responsibility to retrieve them from the high school nurse's office. Ms. Nicholson decided that since the high school nurse had given her keys to the office, she now had

to assume that responsibility, despite her other assignment. Mr. Gaines and Mr. Agosto's testimony was quite clear and convincing that Ms. Nicholson forcefully slammed the keys into Mr. Gaines's folded arms. However, even if I were to give credence to Ms. Nicholson's testimony, that she took a lanyard of keys from around her neck, held them up in the air and dropped them into Mr. Gaines's folded arms, this would have been a clear act of defiance. It was the equivalent of saying, if you insist on my completing your priority assignment, then you deal with the nurse's office.

I agree with Ms. Nicholson that the charges regarding reports made to Ms. Clark, who sat on the PTO Council, regarding inappropriate behavior by a secretary in the guidance office cannot be sustained, since they are based entirely on hearsay. While hearsay is admissible in OAL hearings under the residuum rule, it cannot be the basis for determining an ultimate fact. Barbara Clark, the director of special services, did testify that Ms. Nicholson ignored her when she tried to talk with the respondent at her desk, and she observed that the guidance office door was locked on a number of occasions when Ms. Nicholson was the secretary in the office. Clearly, from the point of view of fire safety and accessibility of parents to the Guidance Department, Ms. Nicholson's locking the guidance office door for whatever reason was not appropriate. However, this was not among the tenure charges lodged against the respondent. The only direct testimony regarding an incident with Michelle Ogilvie came from Ms. Nicholson, who claimed that she did not respond when Ms. Ogilvie said "God bless you" after she sneezed. While it is hard to believe that a student observing this interaction would have exclaimed that "no parent should be treated that way," there is no direct testimony from which I can conclude that Ms. Nicholson was rude to this parent.

However, there was direct testimony from Mr. Gaines regarding an incident that he observed on February 27, 2009. He testified that he encountered the respondent addressing a student in a loud, negative tone. He intervened and removed the student from the room. The incident led Mr. Gaines to write a memo to Ms. Nicholson regarding her behavior. Ms. Nicholson's explanation, if believed, that the student had been rude to her was still not sufficient to warrant her "dressing down" the student. Further, it was not necessary for Mr. Gaines to repeat the exact words used by Ms. Nicholson to

sustain the charge that she was abusive toward the student. He observed the encounter and certainly could draw conclusions from Ms. Nicholson's words and tone of voice.

The District alleged that Ms. Nicholson failed to complete an assignment that Mr. Gaines had given her on October 6, 2009, and which he designated as "priority." When Mr. Gaines attempted to contact her to find out the status of the assignment, she eluded him and did not answer his telephone calls. When he finally made contact with her, Ms. Nicholson claimed that she was busy helping a parent. When Mr. Gaines told her to come to his office, her response was "why?"[7] The respondent countered that if she responded to Mr. Gaines, she would have been seen as being rude to the parent she was speaking with. She was again in the double bind of not knowing which master to answer to. In addition, she claimed: "If Mr. Gaines cannot keep track of the assignments that he gave to Respondent, why should he expect her to do a better job?" This argument is specious. The fact that Mr. Gaines could not remember a year after the incident what assignment he had given Ms. Nicholson on October 6, 2009, is certainly not proof that he could not keep track of his assignments at the time. Mr. Gaines documented the incident in his Notice of Reprimand on October 13, 2009. (Ex. D.) In addition, Ms. Nicholson's continuing pattern of doing other people's work and getting sidetracked from her own assignments is evidenced in this incident. Ms. Nicholson could have referred the parent's inquiry to another secretary without being rude. Instead she chose to continue her conversation with the parent, disregarding the priority work that had been given to her by her supervisor.

The District charged that on April 21, 2010, Ms. Nicholson was disrespectful to Jason Green, athletic director at Orange High School. Mr. Green had asked Ms. Nicholson what she was working on that day and she responded that she had assignments to complete for administrators. When Mr. Green inquired who the administrators were, respondent became testy, rolled her eyes and commented, "Sir, not today." Ms. Nicholson responded that the charge is a generalized allegation by Mr. Green and was inconsistent with his testimony that all assignments went through

[7] In his testimony Mr. Gaines said that there were a number of other secretaries who could have assisted the parent that Ms. Nicholson was talking to.

him. Since there has already been testimony that Ms. Nicholson failed to complete a number of assignments, it is not unusual that Mr. Green would ask what assignment she was working on, on a particular day. As to the charge that "the testimony support[ing] this charge is a generalized allegation," it is not clear how that relates to this particular allegation. Mr. Green testified to the statements and actions taken by Ms. Nicholson; that was not a generalized allegation.

Ms. Nicholson was also charged with not providing coverage to the guidance secretary when she had been instructed to do so. She was to take lunch from 11:30–12:30 and relieve the guidance secretary at 1:00. On this occasion Ms. Nicholson was seen outside in the parking lot, and she did not return until well after 1:00 to relieve the secretary. Ms. Nicholson's explanation was that she was talking to the grandparent of a student who was asking for advice about how her grandson could improve his performance in school. She believed that it was her responsibility to counsel this grandparent and that is why she ignored the directive to take lunch from 11:30–12:30 and relieve the secretary at 1:00. Ms. Nicholson's response is indicative of the behavior that has caused her to have problems with her supervisors. As pointed out in this decision, Ms. Nicholson had been advised in prior evaluations that she should handle her own tasks rather than be sidetracked by doing other people's jobs. In this case we have a secretary taking on the responsibility of counseling a grandparent regarding a student's performance. This matter should have been referred to the Guidance Department or the particular teacher involved; it was not within the purview of a secretary.

Part of the tenure charges related to Ms. Nicholson's pattern of tardiness, failure to list the sign-in time, absences, and failure to follow the call-out procedure. Ms. Nicholson did not deny that she was late or absent. She claimed that she was in a state of semi-homelessness and therefore had trouble coming to work, being on time for work and calling in to report that she would be absent or late.[8] However, she did not explain why she did not call the central office or Mr. Green on his cell phone, which was

[8] Ms. Nicholson claimed that her cell phone was not capable of dialing numbers in the 908 area code. The call-in number for the sub-service was in the 908 area code.

not in the 908 area code, prior to her absences and tardiness.[9] She never explained why she had not called Mr. Green on his cell phone over the weekend to tell him that she would be out of work, when she knew that she would be absent on Monday. Ms. Nicholson argues that she should not be terminated based on the absence issues, but rather progressive discipline must be utilized prior to termination. If absences, tardiness and failure to report were the only issues in this hearing, Ms. Nicholson's argument would hold more weight. However, it is clear that this was part of a broader pattern of failure to follow the directives of her superiors and insubordination.

From the testimony of the District's witnesses and their appearance at the hearing, it is clear that proper attire was an important feature that was stressed to the students at Orange High School. The teachers and staff were expected to set a good example for the student body and the dress code was in the teacher/staff handbook (Ex. R) and on the website. There was testimony that on two occasions Ms. Nicholson was not properly attired when she came to work. One time Ms. Nicholson explained that she was in the process of moving and did not have any clothes to wear other than sweats. On the other occasion she stated that she wore clothes that she believed to be appropriate to her working with dirty files. She had brought a change of clothes, so that when she was done working with the files she could change into proper attire. In fact, when Mr. Agosto told her to report to Human Resources because she was dressed inappropriately, she changed her clothes before going to the HR office. It does not appear that Ms. Nicholson was wearing revealing clothes. The problem is that Ms. Nicholson took it upon herself to decide to wear clothing that was not sanctioned by the school, without consulting with her superiors. There was testimony that other secretaries worked on these files and were dressed appropriately. The files were not located in the basement or another dirty area. Ms. Nicholson might not have felt comfortable, as she said, working with her "gluteus maximus in the air," but if she wanted to deviate from the dress code she should have discussed this with her supervisors.

[9] Ms. Nicholson did not refute Mr. Green's testimony that she could have reported her absences and/or tardiness by either calling the sub-service, the central office or his cell phone.

The District asserted that on January 4 and 13, 2010, Ms. Nicholson was insubordinate and failed to meet an assignment deadline. While Exhibit F-3 outlines this occurrence and Mr. Green gave testimony on this issue, it is not part of the tenure charges and the District did not move to amend the petition to add these charges. Therefore, the allegations regarding incidents that occurred that were not part of the tenure charges will not be considered.

The District did argue, as part of its charges, that the respondent refused and/or was unwilling to perform a task assigned to her on February 5 and 8, 2010. There was testimony that on Friday, February 5, 2010, Mr. Green gave Ms. Nicholson an assignment to complete by the end of the day. Mr. Green also stated that he observed Ms. Nicholson sitting in one of the visitor's chairs in the guidance office and she was not performing any task. When questioned, Ms. Nicholson said that she was waiting for someone to fix the internet service in the nurse's office. However, Mr. Green said that Ms. Nicholson had the Athletic Department's laptop, which was wireless. When he asked for the computer back to do work of his own, she told him "no," and that he had to wait until after a board of education meeting. In response, the respondent claimed that this charge had to be dismissed because "If the Board of Education and Mr. Green cannot identify the assignment given to the Respondent, how can she be expected to begin to work at it, let alone to complete it?" However, during direct and cross-examination Ms. Nicholson never claimed that she was unable to complete the February 2010 job because she did not know the nature of the assignment. In addition, when questioned about the computer, she admitted that she did not turn it over until after the board meeting. Refusal (either actively or passively) to complete an assignment and to turn over department equipment ordered by a superior demonstrates insubordination on the part of the respondent.[10]

Ms. Nicholson was also charged with being combative and trying several times to walk out of a performance-review meeting, held on May 17, 2010, with Mr. Green, Mr. Gaines and Ms. Easley, the supervisor of guidance at the high school. In addition,

[10] There was testimony regarding a reprimand dated March 29, 2010, (F-1) about charges of insubordination and unprofessional conduct in front of students and staff members. However, this incident was not part of the tenure charges and therefore will not be dealt with in this opinion.

the respondent was informed by Ms. Easley at the meeting that she still had not completed an assignment given to her on March 9, 2010, to place the files of students for the 2008–09 school year in graduation order in order for the records to be archived. Ms. Easley acknowledged that she did not know what other assignments Ms. Nicholson was handling at the time of this assignment, but the head of guidance was able to complete the assignment for the 2003–04 through 2006–07 school years in one day.[11] Ms. Nicholson claimed that during the performance-review meeting the supervisors pressed her to sign several documents, and she would not sign them until she had reviewed them. Thinking the meeting was over, Ms. Nicholson left. I do not find it plausible that someone would just get up from a meeting with a group of supervisors and leave without being told that the meeting was over, or that she was free to leave. From the testimony, it appears that Ms. Nicholson again took it upon herself to unilaterally decide what she would do and how she would do it.

The District argued that Ms. Nicholson failed to adhere to two Professional Improvement Plans, one for the period of January 25 through March 23, 2010, and the other for the period of April 1 through May 20, 2010. As a result of her failure to improve in the areas suggested, her performance was determined to be unsatisfactory. The respondent has claimed that

> it is very difficult to understand the exact facts relied upon by the Board of Education in support of this charge. Again, there are generalized allegations, not facts and a confusion of events which occurred while the PIPs were in progress with events which occurred at other times.

She argues that the only charges that have been clearly addressed are lateness and dress-code violations, and these are de minimis claims that would not support termination.

While a number of the charges do involve absenteeism and tardiness, there are others that involve unprofessional demeanor, such as an incident with Mr. Green in which Ms. Nicholson refused to respond to him and slammed the door and the books on

[11] The assignment had to do with the files of students in danger of failing. There are about 150–200 graduates each year. For a ten-year period that would amount to about 2,000 files.

the desk, resulting in a March 29, 2010, reprimand (F-1); an incident on February 8 in which Ms. Nicholson did not complete an assignment and did not turn over a laptop (F-2); and a problem on January 13, 2010, when Ms. Nicholson did not complete an assignment and refused to go to a room where she was directed to go by Mr. Green. During Ms. Nicholson's second Professional Improvement Plan period, April 1 through May 20, 2010, she was cited for late arrival on a number of dates in April (E-5); excessive absences on May 14 (E-1); and failure to sign in on May 17 (E-2). There was a written reprimand for her behavior on April 21, 2010, which involved her response to Mr. Green when he asked her what work she was doing. She answered that she was working for other administrators. When he asked who, she responded by rolling her eyes and saying, "Sir, not today." In addition, on May 17, 2010, there was the incident in which Ms. Nicholson slammed the keys into Mr. Gaines's folded arms. (Ex. A.) The situation had become so severe that all of the administrators in the school signed a memo, composed by the principal, asking for Ms. Nicholson's removal from the school. (Ex. O.)

Ms. Nicholson's original Professional Improvement Plan outlined a number of goals, including arriving at work on time, signing the attendance log, adhering to the dress code, improving her professional and personal manner of conduct, completing tasks assigned to her, interacting with her immediate supervisor in a more respectful manner and maintaining a positive working relationship with staff. The second PIP basically mirrors the first set of goals. The testimony and exhibits clearly show that Ms. Nicholson did not demonstrate improvement in any of these areas. While the respondent has honed in on the fact that the school did not approve courses that it had recommended in the PIP to improve her performance on the job, the District correctly pointed out that Ms. Nicholson did not need courses to learn to come to work on time, to sign in on time, to call to report her absences, to complete her assignments in a timely fashion and to be more respectful of supervisors. She had been a secretary in the Orange school system for many years and should have been aware of the proper way to interact with her supervisors and fellow staff.

Finally, Ms. Nicholson is charged with prior incidents of insubordination on September 10, 2003, October 28, 2003, and October 19, 2006. Ms. Smiley, special

assistant to the superintendent, identified the documents that outlined these charges. (See Stipulation of Facts, Ex. C.) There were also documents submitted regarding a memorandum from Mr. McGriff, former athletic director, dated September 18, 2007, wherein he voiced his concerns regarding Ms. Nicholson's performance; a memorandum from Kimberly Hall, assistant principal, that stated that Ms. Nicholson refused to carry out the directive to assign a locker to a student; and a memorandum from Antoine Gayles, principal of Orange Middle School, regarding insubordinate behavior. There was no testimony from anyone who authored the memoranda. However, some of these documents mirror a pattern of behavior that is evident in the present charges, namely, Ms. Nicholson's inability to complete tasks and to stay on task, difficulty working with fellow staff and supervisors, and punctuality and attendance.

2. 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)). While 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) (citing Zimmerman, supra, 38 N.J. at 71), 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 on a single incident, "if sufficiently flagrant." In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967) (citing Redcay v. State Bd. of Educ., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E. & A. 1944)).

Among the charges lodged against Ms. Nicholson 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/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 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. 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 administrative directives." Scarpignato v. Edgewater Bd. of Educ., Comm'r of Educ., 83 S.L.D. 335, aff'g 83 S.L.D. 311, aff'd, State Bd. of Educ., 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 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, 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. 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].

In this case there was testimony from no less than six administrators, all of whom stated that Ms. Nicholson was rude and abusive to students, parents and themselves. They also testified that Ms. Nicholson failed to complete assignments and ignored their directives, and was assaultive toward Mr. Gaines when she half threw a ball of keys into his folded arms. In addition, there was testimony that the respondent was excessively absent and/or tardy and did not follow the instructions of her supervisor to call in prior to being late or absent. Ms. Nicholson failed to elicit any evidence to show that any of these witnesses had previous ill feelings toward her or that they had any motive to lie about what had occurred.

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.

In the instant case, there is no evidence of bias or motive on the part of the administrators to concoct charges against Ms. Nicholson. Though the District's witnesses might not have recalled every detail of each assignment given to Ms. Nicholson, they were consistent in their overall recollection of the respondent's actions and what led up to the charges against her. The various memoranda composed shortly after the incidents occurred reinforce the District's rendition of Ms. Nicholson's behavior. In addition, several of Ms. Nicholson's prior evaluations point out the same type of behavior that led to the filing of tenure charges.

CONCLUSION

Based on the **Findings of Fact** and reasoning outlined in the **Arguments** and **Analysis of the Law** above, I **CONCLUDE** that the District has sustained its burden of proving the tenure charges against the respondent.

ORDER

It is hereby **ORDERED** that the tenure charges against Denise Nicholson be sustained and that the respondent be terminated from her position.

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.

12/9/10
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 12/9/10 db

Date Mailed to Parties: 12/9/10 db

db

APPENDIX

WITNESSES

For Petitioner:

Oliverto Agosto, Jr.
Barbara Clark
Jocelyn Easley
Dana Gaines
Jason A. Green
Belinda Scott-Smiley
Erica Stewart

For Respondent:

Denise Nicholson, respondent

EXHIBITS

Joint Stipulation

A Respondent's Associate Degree in Applied Science in Secretarial Arts

B Orange Board of Education job description

C Orange Public Schools attendance observation evaluation report

D Letter dated February 26, 2010 to Denise Nicholson from Ronald C. Lee, Superintendent of Schools

For Petitioner:

A- Correspondence dated May 18, 2010 from D. Gaines, Asst. Principal

B- Correspondence dated October 15, 2009 from B. Clark, Director of Special Services

C- Formal Reprimand/Interaction with Student dated March 4, 2009

D- Notice of Reprimand dated October 13, 2009 from D. Gaines, Asst. Principal

E- Notice(s) of Reprimand and Documentation regarding Respondent's excessive absenteeism

F- Notice(s) of Reprimand regarding Respondent's Substandard Performance/Insubordination

G- Correspondence dated December 1, 2008 from Dr. J. Kronin, Interim Superintendent of Schools

H- Memorandum dated September 18, 2007from W. McGriff, Athletic Director regarding unsatisfactory performance

I- Correspondence dated October 19, 2006 from K. Hall, Asst. Principal

J- Memorandum dated October 28, 2003 from A. Gayles, Principal

K- Memorandum dated September 10, 2003 from A. Gayles, Principal

L- Professional Improvement Plan from January 25, 2010-March 23, 2010 and Observation/Evaluation Report dated March 29, 2010

M- Professional Improvement Plan from April 1, 2010-May 20, 2010 and Observation/Evaluation Report dated May 23, 2010

N- Observation/Evaluation Report dated June 8, 2009

O- Memorandum dated May 26, 2010 requesting that Respondent be reassigned

P- Memo from Ms. Smiley to Ms. Nicholson dated March 23, 2010 regarding inappropriate attire

Q- E-mail from Gaines to Nicholson dated May 17, 2010

For Respondent:

None

D- Notice of Reprimand dated October 13, 2009 from D. Gaines, Asst. Principal

E- Notice(s) of Reprimand and Documentation regarding Respondent's excessive absenteeism

F- Notice(s) of Reprimand regarding Respondent's Substandard Performance/Insubordination

G- Correspondence dated December 1, 2008 from Dr. J. Kronin, Interim Superintendent of Schools

H- Memorandum dated September 18, 2007from W. McGriff, Athletic Director regarding unsatisfactory performance

I- Correspondence dated October 19, 2006 from K. Hall, Asst. Principal

J- Memorandum dated October 28, 2003 from A. Gayles, Principal

K- Memorandum dated September 10, 2003 from A. Gayles, Principal

L- Professional Improvement Plan from January 25, 2010-March 23, 2010 and Observation/Evaluation Report dated March 29, 2010

M- Professional Improvement Plan from April 1, 2010-May 20, 2010 and Observation/Evaluation Report dated May 23, 2010

N- Observation/Evaluation Report dated June 8, 2009

O- Memorandum dated May 26, 2010 requesting that Respondent be reassigned

P- Memo from Ms. Smiley to Ms. Nicholson dated March 23, 2010 regarding inappropriate attire

Q- E-mail from Gaines to Nicholson dated May 17, 2010

R- Orange High School dress code

For Respondent:

None

46-11R

OAL DKT. NO EDU 12146-10
(EDU 3656-10 ON REMAND)
AGENCY DKT. NO. 55-3/10

IN THE MATTER OF THE TENURE :
HEARING OF JOHN LEWKOWICZ, :
SCHOOL DISTRICT OF THE TOWNSHIP :
OF IRVINGTON, ESSEX COUNTY. :

COMMISSIONER OF EDUCATION

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 approved with the understanding that – in accordance with the jurisdictional purview of the Commissioner – the parties use of the word "retire" in term #8 of the agreement must be interpreted as "resign". The tenure matter is hereby 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: 1/25/11
Date of Mailing: 1/26/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION -
SETTLEMENT
OAL DKT. NO. EDU 12146-10
AGENCY REF. NO. 55-3/10

REMAND OF OAL DKT. NO. EDU 03656-10

IN THE MATTER OF THE TENURE HEARING OF JOHN LEWKOWICZ, SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY.

Kenyatta K. Stewart, Esq., for petitioner (Hunt, Hamlin & Ridley, attorneys)

Richard J. Simon, Esq., for respondent

Record Closed: December 13, 2010 Decided: December 16, 2010

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

By Order dated October 29, 2010 the Commissioner of Education remanded the matter OAL Dkt. No. EDU 03656-10 to the Office of Administrative Law (OAL) to rectify certain discrepancies in the Initial Decision Settlement Agreement, setting forth terms and duties over which the Commissioner of Education has no jurisdiction. Counsel for the petitioner submitted the attached correspondence and revised settlement agreement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by 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. 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.

12/16/10
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: December 20, 2010

Date Mailed to Parties: DEC 20 2010
db

Laura Sachies
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN.
2010 DEC 13 P 2:

SETTLEMENT AGREEMENT

In consideration of the mutual covenants and promises provided herein, by and between the Irvington Board of Education (hereafter "Petitioner"), whose address is 1 University Place, Irvington, New Jersey 07111 and John Joseph Lewkowicz (hereafter "Respondent"), whose address is 377 Oak Street, Perth Amboy, 08861, the parties hereby state and agree as follows:

WHEREFORE Petitioner and Respondent agree that the nature of the charges stemming from the matter discussed in further detail herein deal with allegations of providing a learner's permit to an individual who was not an Irvington High School student; and

WHEREFORE Respondent has been employed by the Petitioner in the Irvington School District for a period of approximately twenty two (22) years; and

WHEREFORE Petitioner is an Abbott School District that is currently facing economic hardship and due to reasons of economy and efficiency and the inherent difficulties in proving the charges as stated in the pleadings submitted to the Court, and Respondent, opposing the charges and facing the risk of losing his State issued teaching certification, have determined that resolution of the allegations and claims made herein are in their best interests; and

WHEREFORE Petitioner and Respondent hereby agree and voluntarily give their consent to the settlement in the within matter as set forth herein; and

WHEREFORE Respondent has entered into this Agreement with a full understanding of his rights; and

WHEREFORE Respondent is aware that the Commissioner of Education may forward the pleadings and other related documents in this matter to the State Board of Examiners for a determination on Respondent's teaching certification; and

WHEREFORE this Agreement is consistent with public policy; and

WHEREFORE Petitioner and Respondent have had adequate time to consult with their respective legal counsel in this matter and are fully satisfied with the legal representation provided; and

WHEREFORE Petitioner and Respondent have fully discussed and resolved all outstanding issues and have no further questions for the Court; and

NOW THEREFORE The parties hereto agree as follows:

1. Petitioner shall dismiss all tenure charges against Respondent with prejudice.

2. Respondent shall file for disability pension within 30 days following approval of the Settlement Agreement by the Commissioner of Education. Health insurance benefits shall continue to be provided by Petitioner to Respondent for a period of nine (9) months following the date of approval of the Settlement Agreement by the Commissioner of Education. Should the Respondent be approved for disability pension within said nine (9) months his health insurance benefits shall terminate on the date that his disability pension commences. The Petitioner shall take no action to impede or disrupt Respondent's application process for disability pension and cooperate with Respondent upon request.

3. Respondent shall proceed with his workers' compensation claim against Petitioner until his application for disability pension is approved. Petitioner shall take no action to impede or delay Respondent's workers' compensation claim. If Respondent's disability pension application is approved, then Respondent shall immediately dismiss his workers' compensation action against Petitioner with prejudice.

4. Respondent shall waive any and all back pay from March 15, 2010, the date of his suspension without pay by Petitioner.

5. Respondent shall waive any and all pay raises that have been allocated by Petitioner since March 15, 2010.

6. Respondent shall waive any and all lawsuits/litigation in law or equity against Petitioner.

7. Petitioner shall pay the Respondent within 30 days, 75 sick days at $150.00 per day for a total of $11,250.00 in lump sum payment.

8. The parties hereto agree that Respondent will retire from Petitioner upon approval of the within Settlement Agreement by the Commissioner of Education.

9. Neither party to this Settlement Agreement shall hinder or interfere with the other party's ability to comply with the terms and conditions set forth herein.

SIGNATURES The parties hereto by signing this Agreement acknowledge their rights and obligations pursuant to the terms and conditions set forth herein. The representative on behalf of Petitioner signs this document with full authority to bind the Petitioner hereto.

Witnessed by:

Richard J. Simon, Esq.

12-9-10
Date

By
John Lewkowicz, Respondent

Hunt, Hamlin & Ridley
Attorneys for Petitioner on behalf of the Irvington Board of Education

Witness

12/13/10
Date

By
Kenyatta K. Stewart, Esq.

47-11

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

SYNOPSIS

Petitioner challenged a disciplinary suspension imposed upon her during her senior year of high school, in the aftermath of an altercation with another student. Petitioner was readmitted to school following her suspension, went on to graduate in June 2009, and is currently on active duty in the United States Marine Corps. The school district contends that the issues raised in the petition have been rendered moot by Ms. Robinson's graduation, and asks that the matter be dismissed.

The ALJ found, *inter alia*, that: the claims raised in the petition are moot, as petitioner has already received her high school diploma and there is no longer any record of the suspension maintained in petitioner's student records; petitioner's assertions that the suspension was imposed in violation of her due process rights and that the district's disciplinary procedures are legally flawed are likewise moot because petitioner is no longer subject to the force of school procedures or regulations; and petitioner's argument that her within claims require resolution so that she may pursue claims against the district elsewhere is flawed as dismissal here does not preclude petitioner from later bringing her defamation and other claims before the appropriate court. Accordingly, the ALJ concluded that the petition should be dismissed.

Upon full consideration, the Commissioner concurred with the ALJ for the reasons comprehensively detailed in the Initial Decision, and dismissed the petition 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.

January 25, 2011

47-11

OAL DKT. NO. EDU 9407-09
AGENCY DKT. NO. 114-6/09

ASIA ROBINSON,[1]	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner requested and was granted an extension of time within which to file exceptions to the Initial Decision. These exceptions and the District's reply thereto were filed in accordance with the modified timelines.

Petitioner's exceptions essentially recast and reiterate her arguments advanced below. As the Commissioner finds that such arguments were fully considered and addressed by the ALJ in her decision, they will not be revisited here.

Upon full consideration, the Commissioner concurs with the ALJ – for the reasons comprehensively detailed on pages 4-6 of her Initial Decision – that this matter is appropriately dismissed as moot.

[1] It is noted that a prior named petitioner in this matter, Stephen Kent, was dismissed as a petitioner by Interlocutory Order of the Administrative Law Judge (ALJ) dated November 23, 2009. In this order the ALJ further determined that there was no authorization which would allow Mr. Kent to serve as a non-attorney representative of Ms. Robinson in this matter. The Commissioner is in full accord with the ALJ's November 23, 2009 Interlocutory Order.

Accordingly, the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1|25|11

Date of Mailing: 1|26|11

[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 09407-09
AGENCY DKT. NO. 114-6/09

ASIA ROBINSON,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,
Respondent.

Nancy C. Ferro, Esq., for petitioner (Ferro and Ferro, attorneys)

Perry L. Lattiboudere, Esq., for respondent (Adams, Stern, Gutierrez and Lattiboudere, attorneys)

Record Closed: December 13, 2010 Decided: December 14, 2010

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

STATEMENT OF THE CASE

Petitioner, Asia Robinson, a former student of the State-Operated School District of the City of Paterson (the school district), challenges a disciplinary suspension imposed upon her during her senior year of high school. The school district contends

that the issues raised by the petition have been rendered moot by Ms. Robinson's graduation. The school district asks that the petition be dismissed.

PROCEDURAL HISTORY

Petitioner filed her appeal before the Commissioner of Education (the Commissioner) on or about June 8, 2009. The school district filed an answer and the contested case was transmitted to the Office of Administrative Law (OAL) on July 27, 2009. At the time of the filing of the petition, Stephen Kent was named as a co-petitioner. Mr. Kent, who described himself as a surrogate father to Ms. Robinson, and is not a licensed attorney, also asserted that he intended to serve as Ms. Robinson's non-attorney representative. Ms. Robinson is an adult, and was at the time the petition was filed.

A prehearing conference was conducted via telephone on October 7, 2009. It was agreed that it was appropriate to preliminarily address Mr. Kent's standing to assert the claims contained in the petition, and his right to represent Ms. Robinson's interests in this proceeding.[1] I invited briefs on these issues, which were filed by the parties. In its brief, the school district additionally asserted that the petition should be summarily dismissed as moot. Mr. Kent filed a brief in opposition that addressed all the arguments raised by the school district.

By order dated November 23, 2009, I dismissed Mr. Kent as a petitioner, and determined that he should not be permitted to serve as a non-attorney representative for Ms. Robinson. I reserved my decision on the mootness issue, and afforded Ms. Robinson a forty-five-day period within which to either retain an attorney, or reply pro se to the school district's request that the petition be dismissed. Mr. Kent had indicated in his submission that Ms. Robinson was actively serving in the military. Accordingly, I further directed that if her active service precluded Ms. Robinson from

[1] It should be noted that prior to the transmittal of this case to the OAL, the Department communicated with Mr. Kent and raised concerns about both his standing to proceed as a petitioner, and the appropriateness of his representation of Ms. Robinson. It was ultimately decided that these issues would be transmitted to the OAL, and to me as the judge assigned, for determination.

filing written opposition to the school district's motion she should so advise me in the form of an affidavit that complied with the requirements of R. 1:13-6.

I received an affidavit from Ms. Robinson via letter dated December 29, 2009, in which she confirmed that she was actively serving in the United States Marine Corps, and was stationed at Camp Lejune, North Carolina. She stated that she was unable to prosecute this matter as she was participating in "boot camp," and might then be deployed to Iraq or Afghanistan. Via order dated January 4, 2010, I placed this matter on the inactive list for a period of six months. In accordance with R. 1:13-6, the order indicated that the matter would be automatically restored to the active hearing calendar unless Ms. Robinson filed an additional affidavit attesting to the fact that her ability to prosecute this matter continued to be materially affected by her military service.

Hearing nothing further from Ms. Robinson, via letter dated July 13, 2010, I confirmed that the matter had been restored to the active calendar, and again asked for any opposition to the school district's pending motion. In reply, on August 24, 2010, Ms. Robinson again filed an affidavit and asked that her case continue on the inactive list. She stated that she was now stationed in Red Bank, New Jersey.

Via letter order dated September 15, 2010, I denied Ms. Robinson's request. The court rule affords me that discretion, and I advised that I did not believe that Ms. Robinson's ability to respond in writing to the motion continued to be materially affected by her military service. I afforded Ms. Robinson until October 15, 2010, to submit opposition to the school district's motion to dismiss. As of October 27, 2010, she had not done so, and, accordingly, I closed the record. Thereafter, on November 2, 2010, I received correspondence from counsel for Ms. Robinson, in which she indicated that an October 14, 2010, letter to me confirming her representation had been misfiled. She sought leave to file opposition to the pending motion on Ms. Robinson's behalf.

I reopened the record and conferred with counsel via telephone on November 10, 2010. I granted counsel for Ms. Robinson leave to file opposition to the motion, which she did via letter dated December 1, 2010. Counsel for the school district replied via letter dated December 10, 2010, at which time the record closed.

FINDINGS OF FACT

The facts relevant to the school district's request that the petition be dismissed are not in controversy and I **FIND**:

Ms. Robinson was a senior at the district's Silk Academy, when, in or about October 2008, she was suspended in the aftermath of an altercation with a fellow student. A hearing was conducted before the district hearing committee on March 5, 2009. The committee determined that Ms. Robinson had committed the offenses for which she was charged, but readmitted her to Silk Academy. She graduated in June 2009, and is currently actively serving in the United States Marine Corps. The district has submitted the certification of its general counsel, Mark Tabenkin, Esq., who states that he has reviewed Ms. Robinson's student records and they contain no reference to the October 2008 disciplinary incident.

CONCLUSIONS OF LAW

The district asks that the petition be dismissed because Ms. Robinson's claims are moot. It urges that she has graduated, and that her permanent school records contain no reference to the controverted disciplinary incident. Accordingly, the district contends that there is no relief that the Commissioner can grant to Ms. Robinson.

An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For reasons of judicial economy and restraint it is appropriate to refrain from decision-making when an issue presented is hypothetical, judgment cannot grant effective relief, or the parties do not have a concrete adversity of interest. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff'd, Comm'r (May 3, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>; S.J. v. Bd. of Educ. of Mountain Lakes, EDU 07081-03, Initial Decision (October 7, 2003), aff'd, Comm'r (Nov. 17, 2003), aff'd, St. Bd. (Feb. 3, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>.

The claims raised by this petition are moot. Ms. Robinson challenges a disciplinary suspension that took place during the 2008–2009 school year. At the end of that year, Ms. Robinson received a high school diploma. If her suspension were ongoing, I arguably could order her return to school. But in light of her graduation, doing so now plainly would be academic.

Likewise, I arguably could order that Ms. Robinson's school records be expunged. But as indicated in the certification supplied by the school district, there is no longer any record being maintained of the suspension, and, accordingly, nothing to expunge.[2] In her opposition to the motion to dismiss petitioner renews her assertion that the suspension was imposed in violation of her due process rights, and that district disciplinary procedures were legally flawed. But our courts have recognized that where a petitioner is no longer a student, and no longer subject to the force of school procedures or regulations, a challenge to those procedures or regulations becomes academic and moot. Oxfeld v. S. Orange-Maplewood Bd. of Educ., 68 N.J. 301, 304 (1975).

Petitioner's contention that her claims before the Commissioner require resolution so that she may pursue claims against the district elsewhere is unpersuasive. The school district correctly asserts that dismissal of this action does not preclude petitioner from later bringing her defamation and other claims before the appropriate court. Indeed, the administrative forum exists to afford concrete relief to litigants, not simply to create a record for use in a subsequent proceeding. For this matter to be justiciable here, petitioner must have suffered a distinct injury or harm that can be remedied by the Commissioner. See e.g. :New Jersey Turnpike Auth. v Parsons, 3 N.J. 235, 240 (1949). It is not the role of the Commissioner to function in the abstract or to enter rulings that are advisory. See: N.J. Civil Serv. Ass'n v. State of New Jersey, 88 N.J. 605, 611 (1982); Crescent Park Tenants Assoc. v Realty Eq. Corp. of New York, 58 N.J. 98,107.

[2] The district points out that disciplinary records are not a part of the permanent student record mandated to be maintained by the district under N.J.A.C. 6A:32-7.8(e).

Nor does this case raise any matter of great public importance compelling a definitive resolution of the issues raised despite their mootness. Id. at 303. As a result, and because there is no effective relief that could be granted to Ms. Robinson in this forum, I **CONCLUDE** that the claims raised by the petition should be dismissed.

ORDER

Based on the foregoing, it is **ORDERED** that the petition of appeal be dismissed as moot.

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, 2010
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: December 14, 2010

Date Mailed to Parties: DEC 15 2010

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

48-11

MAUREEN E. SMITH,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner asserted that the Board's decision to withhold her increment for the 2004-2005 school year was arbitrary and capricious.

Both petitioner and respondent failed to appear at the scheduled hearing despite appropriate notice, and neither provided any explanation for their nonappearance. Having received no explanation from either party, 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.

January 25. 2011

OAL DKT. NO. EDU 3571-06
AGENCY DKT. NO. 370-12/05

MAUREEN E. SMITH,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
	:	
RESPONDENT.	:	

The record of this matter and the advisement of the parties' 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 notifications sent to the parties by the OAL on December 14, 2010, providing them thirteen (13) days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner – who bore the burden of proving her charges against the Board – this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1|25|11
Date of Mailing: 1|26|11

* 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.A.P., on behalf of minor child, J.M.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her child in September 2010. The respondent filed an answer and requested that the petition be dismissed. Petitioner received appropriate notice of a hearing on December 13, 2010, but failed to appear and provided no explanation for her nonappearance. Having received no explanation from the petitioner for her non-appearance, 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.

January 25, 2011

OAL DKT. NO. EDU 11404-10
AGENCY DKT. NO. 526-9/10

M.A.P., on behalf of minor child, J.M.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter – transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, and including an advisement of petitioner's failure to appear at the OAL hearing scheduled for December 13, 2010 – has been reviewed. Petitioner filed no explanation for her failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1|25|11
Date of Mailing: 1|26|11

* 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).

#53-11

IN THE MATTER OF THE TENURE HEARING OF SHAWN JOHNSON, SCHOOL DISTRICT OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

The petitioning Board certified charges of conduct unbecoming, misbehavior, and neglect against respondent – a tenured custodian – for leaving the school building before the end of his shift on several occasions and for falsification of time sheets. Respondent contended that he was forced to leave his post early whenever his co-worker – a custodian who possessed a "black seal' license to operate the building's boilers – wanted to leave early, because respondent did not hold the "black seal" license and was therefore not allowed to remain in the building alone to complete his shift.

The ALJ found, *inter alia,* that: on several dates in the 2008-2009 school year, respondent – by his own admission – left his assigned job prior to the 11 p.m. end of his shift; respondent gave credible testimony that he did so at the direction of a more senior custodian, because respondent did not hold the "black seal" license; and respondent's testimony was corroborated by the school's head custodian, who also admitted that Johnson had complained to him about being forced to leave early at the insistence of his co-worker. The ALJ concluded that: the Board met its burden of proof relative to the charges of conduct unbecoming and misbehavior, but did not meet its burden on the neglect charge as the record reflects that respondent performed his actual duties and was by all accounts a good employee; respondent's lack of any disciplinary history and his reputation as a good worker who performed the tasks required of him – and who advised his immediate supervisor about the problem with his co-worker insisting that he leave early – mitigate against his dismissal from his tenured position. Accordingly, the ALJ ordered that respondent be suspended without pay for the period of one hundred twenty days.

Upon independent review of the record, the Commissioner concurred with the ALJ's findings and adopted the Initial Decision of the OAL as the final decision in this matter. The Commissioner ordered that petitioner 1) reinstate respondent to his tenured position, and 2) ensure that respondent has not lost more than 120 days of 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.

February 3, 2011

OAL DKT. NO. EDU 14062-09
AGENCY DKT. NO. 293-10/09

IN THE MATTER OF THE TENURE HEARING OF SHAWN JOHNSON, SCHOOL DISTRICT OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

A review of the record in this matter supports the findings in the Initial Decision of the Office of Administrative Law (OAL) that the respondent tenured custodian was a good worker, but was liable for misbehavior and unbecoming conduct when, on a number of occasions, he left work before the end of his evening shift and did not so indicate on his time sheets. The petitioning district certified tenure charges to the Commissioner seeking the termination of respondent's employment.

In the course of the hearing in the OAL, however, testimony was presented by respondent – and corroborated by at least one of petitioner's representatives – that respondent's early departures were the result of the early departures of a senior employee. That employee had a black seal license to operate the building's boiler. On a number of occasions he left work before the end of the evening shift, at which time he advised respondent – who lacked a black seal license – that he could not remain in the building alone.

It is also undisputed that respondent had complained to petitioner's head custodian about the occasions on which he was told to leave work early, but that petitioner's representatives did not institute measures to deter further such incidents. Nor was respondent given permission by his superiors to remain in the building to finish his shift if the employee

with the black seal license were to continue to depart prematurely.[1] As the senior employee apparently did continue to leave before the end of the work shift, respondent continued to be subjected to reductions in his work hours upon the whim of a colleague. With these circumstances in mind, the Administrative Law Judge (ALJ) determined that dismissal was too severe a penalty, and that an 120-day suspension without pay is a consequence that better fits the offense.

There is no question that respondent's falsification of time sheets warrants discipline. However, in light of 1) petitioner's failure – when advised of the problem that precipitated respondent's infractions – to ameliorate same, 2) the testimony of petitioner's representatives that respondent is a hard worker who not infrequently arrived at work early, and 3) the absence of prior disciplinary action against respondent, the Commissioner deems reasonable the determination that dismissal is too severe a penalty in the present case.[2]

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case. Respondent shall be reinstated and petitioner will ensure that respondent has not lost more than 120 days of pay and benefits.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/03/11
Date of Mailing: 2/04/11

[1] It also appears from the record that for a period of several months respondent's time cards had shown frequent handwritten entries for the end-of-shift sign-out – as opposed to showing end-of-shift clock stamps. The administrators responsible for approving the time sheets, however, had not investigated this alleged aberration from official procedure.

[2] No exceptions to the reduced penalty recommended by the ALJ have been filed by petitioner.

[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 14062-09
AGENCY DKT. NO. 293-10/09

IN THE MATTER OF THE TENURE HEARING OF SHAWN JOHNSON, SCHOOL DISTRICT OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY.

Douglas J. Kovats, Esq., for petitioner, Board of Education of City of Asbury Park (Kenney, Gross Kovats & Parton, attorneys)

Stephen B. Hunter, Esq., for respondent, Shawn Johnson (Detzky & Hunter, LLC, attorneys)

Record Closed: December 2, 2010 Decided: December 21, 2010

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE

Shawn Johnson is employed by petitioner, the Board of Education of the City of Asbury Park (Board), as a custodian under tenure, pursuant to N.J.S.A.

18:17-3. The Board seeks his removal for his failure to work assigned hours and falsification of time records.

PROCEDURAL HISTORY

On September 18, 2009, tenure charges were filed with the Board by Corey Lowell, Business Administrator and Board Secretary, and served on Johnson. On October 14, 2009 the Board determined that probable cause existed to credit the evidence in support of the charges, and that the charges, if so credited, warranted Johnson's dismissal from his employment. Also on October 14, 2009, the Board suspended Johnson without pay, in accordance with N.J.S.A. 18A:6-14.

On October 22, 2009, the Board filed the certified charges of unbecoming conduct, misbehavior, and neglect against Johnson, with the Commissioner of Education who directed Johnson to file an answer to the charges. When an answer was not filed on behalf of Johnson within the allowed time, the Commissioner issued summary decision on behalf of the Board on November 18, 2009. On November 20, 2009, respondent's counsel filed an answer and moved for reconsideration of the summary decision. On December 9, 2009, the Commissioner vacated her earlier decision. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on December 16, 2009.

A prehearing conference was held on January 19, 2010, and the matter was scheduled for hearing on April 6 and 8, 2010. At the request of counsel (See Kovats letter of January 25, 2010) the matter was rescheduled to May 3 and 5, 2010. By letter of April 30, 2010, the parties jointly requested an adjournment of the scheduled hearing dates as a settlement had been reached. By letter dated April 30, 2010, the Board filed a Motion, Certification and proposed form of Order in support of its application pursuant to N.J.A.C. 6A:3-5.6 to dispense with the prosecution of the tenure charges. On May 19, 2010, an

executed copy of the signed Settlement Agreement was forwarded by Board's counsel but on May 25, 2010, counsel for the Board advised that the Resolution affirming the agreement by the Board would not be placed on the May 26, 2010 agenda. A telephone status conference was held on June 1, 2010, and due to the failure of the Board to ratify the settlement, the matter was rescheduled to July 22, 2010.

The charges transmitted consisted of six counts and the district proceeded on five of those counts, placing on the record at the hearing that they were not proceeding on Charge Five. Hearings were conducted on July 22, 2010, and August 5, 2010. The record remained open until December 2, 2010, for the receipt of transcripts documentary evidence and post-hearing briefs.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Many of the material facts in this matter are not in dispute. Johnson has been employed by the Board as a school custodian since 2004, and has acquired tenure in that position. Assigned to the Bradley Elementary School in Asbury Park, his direct supervisor was Head Custodian Douglas Cobb. Johnson was assigned to the evening shift at the school with a more senior custodian, Marvin Davis. According to the job description for the custodian position, work schedules are assigned by the "Head Custodian, Supervisor of Buildings and Grounds and/or the Principal of the school" (R-2). The collective bargaining agreement in effect between the Board and the Asbury Park Education Association for the relevant time period, the 2008-2009 school year, provides that the workweek for custodial and maintenance staff will be forty hours and five days, Monday through Friday. (R-1 – Article XIII (B)).

While he was assigned to the Bradley School, Johnson's scheduled work hours were 2 p.m. until 11:00 p.m., with two fifteen minute breaks and an hour for dinner, a nine hour shift with an hour and a half for dinner and breaks. The

custodians at the school clocked in and out through a time clock at the beginning and end of each shift. Custodians also clocked in and out during their one hour dinner break. The time clock was originally located at the back entrance to the school, near the custodians' work area and boiler room. It was then moved to the front of the school in the main office area. The time cards were collected and reviewed by the Head Custodian for the building, in this case, Douglas Cobb. Then they were sent on to Supervisor of Buildings and Grounds, Angelo Del Pizzo, for review and processing.

When clocking out at the end of their evening shift, the custodians were charged with setting the building's alarm. On the evening of March 5, 2009, Del Pizzo, received a call from the district's security alarm company. He was informed that the alarm at the Bradley Elementary School had been alerted. The security service had tried unsuccessfully to reach the custodians supposed to be in the building at the time. The service then tried Head Custodian Douglas Cobb, but received no response. They then contacted Del Pizzo, who went to the school, arriving sometime between 8:45 and 9 p.m. Upon walking the school premises, he found no one there. As it was prior to 11 p.m., the evening custodial staff of Johnson and Davis should have been at the school. Del Pizzo contacted his superior and the school's vice principal the next morning.

Del Pizzo testified to his review of Johnson's time cards. No cards could be located by the district prior to 2008. Del Pizzo has been in his current position since 2008. Although custodians should punch out their time card at the end of their shift, Del Pizzo allowed that an occasional handwritten notation could be acceptable, depending on the circumstances. He does not review the cards on a daily basis, but rather reviews two weeks worth as they are processed for payroll. During his testimony he reviewed Johnson's time cards for the 2008-09 school year (R-4 and 5). Each time card showed some handwritten entries for the daily clock out. Appointed to his position in October 2008, Del Pizzo described his counseling of Johnson when he began to review the cards. He advised Johnson

perhaps four times that he needed to clock out on the machine rather than writing in his departure. He did not feel a reprimand was in order since he felt Johnson was making an effort to comply.

Vice Principal Kelly A. Gayle also testified. After being informed of the alarm incident, she held a meeting on March 10, 2008 with the custodians. At the meeting, Johnson admitted he had left early that day and on other days due to Marvin Davis. According to Johnson, Davis told him he had to leave the building early when Davis wanted to leave because Johnson did not have a "black seal" license to operate the building's boilers. Davis insisted that Johnson therefore could not remain in the school alone to complete his shift. Gayle further recalled Johnson explaining that Davis had insisted on leaving early on occasions over the years. Johnson also explained that he had informed his supervisor Cobb about Davis insisting he leave the building early at times.

Gayle described Johnson as a good employee. She often worked late at the school and while she was there, the custodians were always present for their shift.

Douglas Cobb was the final witness for the Board. The head custodian at Bradley for sixteen years, he is present at the school for the earlier day shift, setting his own hours. He testified that despite being head custodian it is not his practice to review the time cards, he merely collects them and sends them on for payroll processing. However, at times he will initial a handwritten notation by a custodian. He denied that all of the initials on the handwritten entries on Johnson's time cards were his. Present at the meeting with Gayle and Johnson, he too recalled Johnson explaining that Davis and his lack of a black seal license were his reason for leaving early.

Cobb also admitted that Johnson had complained to him about Davis' insistence that he leave early. Cobb took no formal action about the situation but

said he advised both men not to leave early. He found Johnson to be a good worker who often came in early for his shift.

Johnson testified on his own behalf and admitted leaving early on the evening of March 5, 2009. As on other occasions, Davis had insisted he leave early due to his lack of a black seal license. As to the other occasions during the 2008-09 school year when he had not clocked out on the time clock, but had written in his departure as 11 p.m., he admitted that on some of those evenings he had left early at Davis' insistence. However, he said the majority of the handwritten entries were evenings when he had forgotten to clock out at the end of his shift. Johnson stated he was a good worker who had gone to his immediate supervisor on several occasions with his discomfort over Davis' insistence that they leave the shift early. He said that no one had clarified for him whether he was allowed to remain in the building without another custodian with a black seal license. He had been hired without one, and Asbury Park had not completed arrangements for him to obtain his license. Johnson further pointed out that he walked to work and would arrive early or work through his breaks to be certain that even if he left early, his work would be complete.

From the evidence presented, I **FIND** that on March 5, 2009, and on at least several other dates in the 2008-09 school year, Johnson by his own admission, left his assigned job prior to the 11 p.m. end of his nine hour shift. Johnson was credible in his testimony that he did so at the direction of the more senior custodian, Marvin Davis. Johnson's assertion that Davis insisted he could not remain in the building alone without a black seal license was also credible and corroborated by Cobb.

Prior Disciplinary History

Johnson has no prior disciplinary history.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to N.J.S.A. 18A:6-10 ". . . no tenured employee in the public school system of the State shall be dismissed except for inefficiency, incapacity, unbecoming conduct, or other just cause." The specific rights of custodial employees are set forth at N.J.S.A. 18A:17-3 as follows:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation . . . except for neglect, misbehavior or other offense . . . .

The Board has charged Johnson with neglect, misbehavior and conduct unbecoming a tenured custodian. The Board bears the burden of proving these charges by a preponderance of the credible evidence. Atkinson v Parsekian, 37 N.J. 143 (1962); Matter of 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). After giving careful consideration to the competent credible evidence, I **CONCLUDE** that the Board has met its burden of proof relative to the charges of conduct unbecoming and misbehavior. The Board has not met its burden on the neglect charge as the record reflects that Johnson performed his actual duties and was by all accounts a good employee.

The Board urges that Johnson's conduct warrants his dismissal from his tenured position of employment. However many facts in this case mitigate against such a drastic sanction. Johnson has no prior disciplinary history and by all accounts was a good worker who performed the tasks required of him. He

often began work early, in effect giving the district work time, albeit not within his fixed schedule of hours. Concerned over the more senior Davis' behavior and unsure about his duties relative to the black seal requirement, he advised his immediate supervisor, Douglas Cobb, but to little avail. While these facts do not obviate Johnson's behavior, they do speak to the severity of the penalty.

Accordingly, I **CONCLUDE** that Johnson is to be suspended without pay for one hundred twenty days.

ORDER

I **ORDER** that Johnson be suspended without pay for the period of one hundred twenty days.

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 21, 2010
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency:

12.21.10

Mailed to Parties:

12.22.10
DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

APPENDIX

Witnesses

For Petitioner:

Angelo Del Pizzo

Kelly A. Gayle

Douglas Cobb

For Respondent:

Shawn Johnson

Exhibits

For Petitioner:

R-1 Agreement between Asbury Park and the Asbury Park Education Association

R-2 Job Description (Pages 63-67)

R-3 Angelo DelPizzo Memo – undated (Page 21)

R-4 March 15, 2009 Time Card (Page 80)

R-5 Time Cards (Pages 68-79)

R-6 March 10, 2009 Gayle Memo (Pages 24-25)

R-8 Coolidge Memo – March 16, 2009(Pages 22 and 22a

R-9 December 10, 2004 Evaluation Form

For Respondent:

None

#55-11

OAL DKT. NO. EDU 13229-09 AND 5449-10 (CONSOLIDATED)
AGENCY DKT. NO. 270-10/09 AND 61-4/10

O.E.R. AND M.R., on behalf of minor child, A.O.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	
A.O. AND E.O., on behalf of minor child, A.O.	:	
RESPONDENTS.	:	

The records of these consolidated matters, the proposed Settlement Agreement (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 notes that paragraph 1 of the Agreement states that the settlement payment is due within thirty (30) days from the date of the Initial Decision. That date has 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 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/08/11

Date of Mailing: 2/09/11

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.EDU 13229-09

Agency Docket No.270-10/09

(**CONSOLIDATED**)

O.E.R. & M.R. ON BEHALF OF A.O.

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY,

Respondent.

BOARD OF EDUCATION OF THE BOROUGH OF BULTER, MORRIS COUNTY

Petitioner,

v.

A.O. AND E.O. ON BEHALF OF A.O.,

Respondent.

OAL DKT. NO. EDU 5449-10

Agency Docket No. 61-4/10

Jay Y. Lee, Esq. on behalf of A.O., E.O. and O.E.R.

Anthony P. Sciarillo, Esq. on behalf of Butler Borough Board of Education

Record Closed: December 28, 2010 Decided: December 29, 2010

BEFORE **KIMBERLY A. MOSS**, ALJ:

The initial matter (EDU 13229-09) was transmitted to the Office of Administrative Law (OAL) 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. The matter was initially assigned to ALJ Howard Solomon. On or about March 23, 2010 the matters were reassigned to the undersigned. A status was conducted on March 29, 2010 in lieu of a hearing. During the status conference it was determined that the hearing should be rescheduled to June 22, 2010. On or about June 11, 2010 the Board filed a petition against the petitioners which was received by the Department of Education on April 6, 2010. The matters were consolidated on June 16, 2010 and the June hearing date was adjourned to September 14, 2010.

During the September 14, 2010 hearing, the parties engaged in extensive settlement discussions. Hearings were scheduled for November 29, 2010 and January 7, 2011. However, the November 29, 2010 hearing was converted into a telephone conference and the parties resolved all issues in dispute. On December 28, 2010 the OAL received the Stipulation of Settlement with original signatures and an extract from the minutes of the Board of Education meeting held on December 16, 2010.

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 29, 2010
DATE

KIMBERLY A. MOSS, ALJ

1-4-11
Date Received at Agency:

Date Mailed to Parties:

ljb

BUTLER BOARD OF EDUCATION

High School Annex
Butler, New Jersey 07405

OFFICE OF ADMIN LAW

EXTRACT OF MEETING MINUTES

TYPE OF MEETING: (X) Regular ( ) Special ( ) Other

DATE OF MEETING: December 16, 2010

PLACE OF MEETING: Butler High School Library
38 Bartholdi Avenue, Butler, NJ 07405

BOARD MEMBERS PRESENT: Dean, Luciani, O'Shea, Puglise, Sokoloff, Walsh, Bross (Bloomingdale Rep.), and Lee

MEMBERS ABSENT: Marion, Smith

AT THE MEETING IDENTIFIED ABOVE, THE FOLLOWING ACTION TRANSPIRED TO WIT: On motion of Mrs. Luciani and seconded by Mr. Walsh, at the recommendation of the superintendent, it was moved to approve settlement of a residency case, as per the attached document, for a student whose name is on file with the School Business Administrator's Office.

On a roll call vote, the motion carried 7-0.

CERTIFICATION

The foregoing information is hereby certified to be a true copy of the official records of the Butler Board of Education, having been extracted from and compared with the contents of the official minutes of the subject meeting.

12/20/10
Date

Debra Naley-Minenna
School Business Administrator / Board Secretary

LINDABURY, McCORMICK, ESTABROOK & COOPER
A Professional Corporation
53 Cardinal Drive
P.O. Box 2369
Westfield, New Jersey 07091
(908) 233-6800
Attorneys for Borough of Butler Board of Education

2010 DEC 20 A 7:54
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

O.E.R. & M.R. ON BEHALF OF A.O. Petitioner, -vs- BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY Respondent.	: STATE OF NEW JERSEY : DEPARTMENT OF EDUCATION : DOCKET NO: EDU 13229-2009 : AGENCY REF NO.: 270-10/09

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY Petitioner, -vs- A.O. & E.O. ON BEHALF OF A.O. Respondent.	: STATE OF NEW JERSEY : DEPARTMENT OF EDUCATION : DOCKET NO: EDU 05449-2010 : AGENCY REF NO.: 61-4/10 : **STIPULATION OF SETTLEMENT**

WHEREAS, the Petitioners O.E.R. & M.R. and Respondent Board of Education of the Borough of Butler, Morris County, and Petitioner Board of Education of the Borough of Butler and Respondent and Respondents, A.O. & E.O. a desire to settle the above matters in an

amicable way;

NOW THEREFORE, the parties hereby agree as follows:

1. Respondents A.O. and E.O. (hereinafter "Respondents") agree to pay to the Board of Education of the Borough of Butler, Morris County (hereinafter "Board") the sum of $3,750.00 within thirty (30) days from the date of the Initial Decision is entered by the Honorable Kimberly C. Moss, A.L.J.

2. In the event that the Respondents fail to pay in strict accordance with the terms set forth in this Stipulation of Settlement, then, and in that event, Board shall be entitled to obtain entry of a judgment against Respondents in accordance with Paragraph 4 herein, in the sum of $12,050.00.

3. In the event that the Respondents fail to pay in strict accordance with the terms set forth in this Stipulation of Settlement ("Agreement"), then, and in that event, Board shall be entitled to an award of counsel fees and costs incurred solely in connection with the enforcement of this Stipulation of Settlement 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 Board is entitled to under paragraph 2 of this Stipulation of Settlement. Counsel fees incurred in connection with the prosecution or defense of the above consolidated actions shall not be part of any award of counsel fees or the entry of judgment contemplated in this Agreement.

4. In the event of default as aforesaid, Board shall be entitled to obtain the entry of Judgment upon *ex parte* application, with supporting certification, with notice to Respondents

only in the form of a copy of the application addressed to the Respondents by certified mail.

5. This Agreement contains the entire Agreement and understanding between the parties and constitutes a full and final Agreement on any and all issues.

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, Jae Y. Lee, Esq. and that they reviewed the Agreement in detail with their counsel and fully understand its requirements and limitations.

9. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.

10. O.E.R. & M.R. ON BEHALF OF A.O. agree to withdraw the pending petition in the matter of O.E.R. & M.R. ON BEHALF OF A.O. vs. Board of Education of the Borough of Butler, Morris County, DOCKET NO: EDU 13229-2009 and AGENCY REF NO.: 270-10/09, and the Board agrees to withdraw its Counterclaim to such petition.

11. Upon receipt and clearance of the payment set forth in paragraph 1. herein, Board agrees to provide to Respondents a full release of any and all claims the Board has asserted against the Respondents and as more specifically set forth in the Petition. *Similarly, Respondents*

shall provide to the Board a full release of any and all claims the Respondents may have against the Board.

12. This Agreement is subject to ratification by the Borough of Butler Board of Education after receipt of a signed Agreement from Respondents.

Marcelino Rivera — Date: 12/11/10

Olga Rivera — Date: 12/11/10

Angel Ortiz — Date: 12/11/10

Evelyn Ortiz — Date: 12/11/10

ON BEHALF OF THE BOROUGH OF BUTLER BOARD OF EDUCATION

President — Date: 12/20/10

Secretary — Date: 12/20/10

56-11

OAL DKT. NO. EDU 9929-09
AGENCY DKT. NO. 202-8/09

G.B. and K.B. on behalf of minor children A.B. and A.B.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

On November 22, 2010, a final agency decision was rendered in this matter, wherein the Commissioner approved a settlement obligating Graham and Kathleen Bazikian to pay $61,160.18 in tuition to respondent for their children's period of ineligible attendance in the public schools of the district – pursuant to *N.J.S.A.* 18A:38-1. The Board subsequently requested that the Commissioner seek entry of the unsatisfied portion of the tuition on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Petitioners responded to the Board's request but offered no cognizable reasons why the judgment against them should not be so docketed.

Accordingly, as Graham and Kathleen Bazikian are – pursuant to *N.J.S.A.* 2A:58-10 – subject to entry of a judgment by the court in the amount of $61,160.18, with interest to accrue as provided by law, the Commissioner directs that judgment in that amount be docketed against them.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2|09|11
Date of Mailing: 2|09|11

OAL DKT. NO. EDU 11596-09
AGENCY DKT. NO. 209-8/09

VIRGINIA BUSH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WARREN COUNTY TECHNICAL SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the parties' exceptions and replies thereto.[1] For the following reasons, the Initial Decision is adopted in part, modified in part, and remanded to the OAL for further fact-finding.

In November 2007, petitioner was a tenured secretary in the office of respondent's business administrator. The instant controversy arose when, on or about November 8, 2007, respondent demanded that petitioner sign a contract containing a provision that would allow the district to terminate her upon ten business days' notice. She declined to sign the contract, advising respondent that to do so would be to abdicate her tenure rights. Respondent nonetheless fired petitioner effective December 1, 2007, paid her salary until

[1] On February 2, 2011, petitioner filed a request to submit a set of exceptions to the Initial Decision of the OAL. The Commissioner rejects same. First, the deadline for the filing of exceptions has passed. Second, on November 3, 2010 petitioner submitted a reply to respondent's exceptions. The arguments in petitioner's most recent submission could have and should have been made at that time.

December 14, 2007 and paid her benefits until April 1, 2008. It is undisputed that, subsequent to her termination, petitioner neither sought employment nor applied for unemployment benefits.

On February 26, 2008, petitioner filed with the Commissioner of Education (the Commissioner) a petition requesting 1) a "declaratory ruling" that respondent had violated her tenure rights, and 2) an order reinstating her to her prior employment. During the same time period the business administrator reorganized his office to create better efficiencies, and recommended the elimination of the post which petitioner had occupied. On March 19, 2008, the respondent board of education approved the recommendation, and petitioner's old position was abolished.

After a hearing at the OAL, an Initial Decision was issued on April 23, 2009, finding that respondent had terminated petitioner unlawfully. Referring to the fact that the petition had been submitted as a request for a declaratory ruling, the Administrative Law Judge (ALJ) ordered no relief. He did, however, correctly note that if petitioner were to be reinstated she would not necessarily be entitled to the same position that she had previously held or even a post in the same department.

The ALJ further found that petitioner had neglected her obligation to mitigate damages.[2] On May 27, 2009, the Commissioner issued a final decision 1) adopting the ALJ's determination that petitioner had been improperly terminated, 2) rejecting the balance of the Initial Decision and 3) ordering respondent to reinstate petitioner "to a secretarial position" with back pay and emoluments – less mitigation. The decision further directed that a new petition be filed if the parties could not agree on an appropriate mitigation figure.

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[2] Claims made by persons illegally dismissed by a board of education are subject to the common law rule of mitigation of damages. *Mullen v. Board of Education of Jefferson Township,* 81 *N.J. Super.* 151, 159 (App. Div. 1963).

Documentary evidence in the record indicates that at the time of the Commissioner's decision, the only secretarial vacancy in respondent's district was the position of secretary to the child study team (CST Secretary). This position was offered to petitioner on or before April 28, 2009 – five days after the Initial Decision and a month before the Commissioner's final decision. The record contains correspondence indicating that respondent reiterated its offer on June 3, 2009, June 22, 2009 and July 27, 2009. It is also undisputed that respondent offered petitioner a salary equal to her prior salary.

On the other hand, respondent advised petitioner that since she had taken no steps to mitigate her damages, it would disburse no back pay or benefits. It appears that petitioner ultimately did not accept the position that she was offered, but instead filed a new petition on September 8, 2009, seeking resolution of the issue of back pay and emoluments.

While the second petition did not raise the issue of reinstatement, the ALJ heard argument about it at the OAL hearing. Ultimately, however, he concluded that a determination as to whether respondent had complied with the Commissioner's May 27, 2009 order – that petitioner be reinstated to a secretarial position – constitutes an enforcement issue and must be adjudicated in Superior Court, pursuant to *R.* 4:67-6(a)(2) and *N.J.A.C.* 6A:3-3.1(b). The Commissioner will address this conclusion below.

Turning his attention to petitioner's claim for back pay and respondent's position that absent good faith mitigation efforts petitioner is due no back pay,[3] the ALJ studied the job

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3 *See, e.g., Goodman v. London Metals Exchange*, 86 *N.J.* 19, 34 (1981):

> When a wrongful discharge of an employee occurs the measure of damages is usually the employee's salary for the remainder of the employment period. *Moore v. Central Foundry Co.*, 68 *N.J.L.* 14, 15 (Sup. Ct. 1902). However, since the employee has available time which may be used profitably, the employer has been permitted to reduce its damages by showing that the employee has earned wages from other employment. *Sandler v. Lawn-A-Mat Chemical & Equipment Corp.*, 141 *N.J. Super.* 437, 455 (App. Div. 1976), certif. den. 71 *N.J.* 503 (1976); *Rogozinski v. Airstream by Angell*, 152 *N.J. Super.* 133, 158 (Law Div.

descriptions for 1) petitioner's post in the business administrator's office (Petitioner's Exhibit P-2) and 2) the position of CST Secretary (Respondent's Exhibit 9, annexed to the Affidavit of Allan P. Dzwilewski, submitted with Motion for Summary Decision dated March 8, 2010), which position was offered to petitioner on April 28, 2009. He found, as a matter of fact, that the two positions were comparable, and the record would appear to support that finding. Consequently, the ALJ determined that petitioner had had the opportunity to mitigate as of April 28, 2009, but did not. He concluded that she therefore did not qualify for back wages past April 27, 2009, and the Commissioner agrees.

As to the period between December 15, 2007 and April 27, 2009, the ALJ found that respondent had not proven that petitioner could have – but did not – mitigate her damages with employment similar to that which she had held in respondent's district. Since mitigation is an affirmative defense, placing on the wrongdoer (in this case respondent) the burden of proving the appropriateness of its application, *see, e.g., Goodman v. London Metals Exchange*, *supra,* 86 *N.J.* at 40, the ALJ concluded that petitioner was entitled to full back pay for that time period. However, the ALJ concluded that he did not have before him sufficient facts to calculate the award. Nor does the Commissioner.

The ALJ's concern was that while the record indicates that petitioner's last annual salary was $48,747.50, it was not clear whether she was a twelve-month employee. Petitioner responded to this concern in her reply exceptions, wherein she indicated that she had been a twelve-month employee. Even with this information, however, a fact-finding hearing is

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1977), *mod.* 164 *N.J. Super.* 465 (App. Div. 1979). The employer may also reduce the award by showing that the employee could have secured other employment by reasonable efforts, but did not. See *Roselle v. La Fera Contracting Co.*, 18 *N.J. Super.* 19, 28 (Ch. Div. 1952); *Goebel v. Pomeroy Brothers Co.*, 69 *N.J.L.* 610, 611 (Sup. Ct. 1903); *Moore v. Central Foundry Co.*, 68 *N.J.L.* at 15-16; *Larkin v. Hecksher*, 51 *N.J.L.* 133, 138 (Sup. Ct. 1888). (Emphasis added)

necessary to arrive at the amount of back pay due petitioner. For example, the record does not contain sufficient information about the benefits withheld from petitioner for the period between April 1, 2008 and April 27, 2009. Nor does the record reveal whether any increments would have been due petitioner for the 2008-2009 school year.

Thus, the Commissioner directs that a fact finding hearing concerning back pay be held in the OAL. In the course of same, the ALJ shall evaluate respondent's position that petitioner could have sought substitute employment or applied for unemployment insurance, and that her failure to do so should be considered in determining a back pay amount for the period from December 15, 2007 (for salary) and April 1, 2008 (for benefits) through April 27, 2009. Further, although no demand for interest was included in either of Ms. Bush's petitions, or debated at the January 23, 2009 and July 1, 2010 hearings, the ALJ has the discretion to allow or deny argument on petitioner's belated demand for 4% pre-judgment interest.

As to the issue of reinstatement, the Commissioner concludes that the factual finding of the comparability of CST secretary with the position that petitioner had held in the business administrator's office is fatal to any claim by petitioner for reinstatement. Petitioner's refusal of the "comparable" CST position terminated her tenure rights. *See, e.g. Annette O'Toole v. Larry Forestal, Principal, Parthenia Smith, Director, Millburn School for the Hearing Handicapped a/k/a/ New Jersey Regional Day School at Millburn and Division of Field Services of the Department of Education,* 211 *N.J. Super.* 394, 402-03 (App. Div. 1986).

In light of the foregoing, there is no need for petitioner to institute an action in Superior Court. While actions to enforce Commissioner decisions are generally filed there, *N.J.A.C.* 6A: 3-3.1(b)(1) allows the Commissioner to take jurisdiction when enforcement adjudication requires further determinations concerning school law issues. The present case

called for a ruling on the comparability of the CST Secretary position to the position petitioner once held in the business administrator's office. That ruling having been made, the issue of reinstatement is resolved.

Accordingly, to the extent that petitioner seeks reinstatement, that request is denied. The case is hereby remanded to the OAL solely for fact finding and recommendations on any and all issues – including the issues set forth above – related to the amount of back pay for salary and benefits that is due petitioner for the period between December 15, 2007 and April 27, 2009, less any applicable mitigation.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/09/11

Date of Mailing: 2/10/11

[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
OAL DKT. NO. EDU 11596-09
AGENCY DKT. NO. 209-8/09

VIRGINIA BUSH,
Petitioner,
v.
WARREN COUNTY TECHNICAL SCHOOL DISTRICT,
Respondent.

Ty Hyderally, Esq. for petitioner (Hyderally and Associates, attorneys)

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

Record Closed: August 5, 2010 Decided: October 1, 2010

BEFORE **JEFFREY A. GERSON**, ALJ:

BACKGROUND

Petitioner, Virginia Bush (Ms. Bush), was a tenured secretary in the Warren County Technical School District (District). Her official title was secretary to the board secretary. On November 30, 2007, Respondent, the District's Board of Education (Board), terminated Ms. Bush for refusing to sign an employment contract. Subsequent

to her termination, Ms. Bush continued to be paid up to and including December 14, 2007. Thereafter, on or about February 26, 2008, Ms. Bush filed a Petition of Appeal, challenging her termination as violative of New Jersey's tenure laws. On January 23, 2009, a hearing was held at the Office of Administrative Law (OAL). Four months later, on April 23, 2009, Judge Geraghty issued an Initial Decision, finding that the Board unlawfully terminated Ms. Bush in violation of her tenure rights. By this time, however, it was alleged by the Board that Ms. Bush's position was abolished. On April 28, 2009, an email was sent to Ms. Bush's counsel wherein it was asserted by the Board's counsel, "[a]s per your request, checked - no other positions available other than CST Secretary." The official title of this position is administrative assistant to the CST office (administrative assistant).

On May 27, 2009, the Commissioner of Education issued a Final Decision. In relevant part, the Commissioner's decision ordered

> that the Board of Education of the Warren County Vocational School District immediately reinstate petitioner to a secretarial position and award her back pay-less mitigation-and emoluments due her consistent with this decision. If the parties are unable to agree on an appropriate mitigation figure, a new Petition of Appeal should be filed in this regard.

On June 03, 2009, email was exchanged once again between the parties. Pursuant to the Board's counsel, "[t]he secretarial position available still remains CST Secretary . . . ." On June 22, 2009, written correspondence was exchanged. In said letter the Board reasserted the availability of the administrative assistant position and asked Ms. Bush to provide her decision in writing. The letter noted, "[f]ailure to respond in the affirmative . . . will be viewed as a refusal of the offer of employment." Finally, on June 27, 2009, a letter from the Board's counsel set forth that Ms. Bush's compensation as administrative assistant would have been equivalent to what she was receiving as secretary to the board secretary at the time of her termination.

On or about August 10, 2009, Ms. Bush filed a second Petition of Appeal. The appeal was filed pursuant to the parties' inability to come to terms on back pay and

emoluments. At the hearing, however, the scope of the issues was expanded to include reinstatement. The latter issue will be discussed first.

LEGAL DISCUSSION AND ANALYSIS

The OAL is not the Proper Forum to Enforce the Commissioner of Education's Order to Reinstate Petitioner

"Parties seeking enforcement of judgments of the Commissioner [of Education] shall generally bring an action in the Superior Court as provided in New Jersey Court Rules at R. 4:67-6." N.J.A.C. 6A:3-3.1(b). New Jersey Court Rule 4:67-6 is applicable to "all such enforcement actions brought by a party to the administrative proceeding in whose favor a written order or determination was entered affording that party specific relief." R. 4:67-6(a). If the order sought to be enforced provides in full or in part for a non-monetary remedy, the action shall be brought in a trial division of the Superior Court. R. 4:67-6(b)(1). Generally, actions in which the principal relief sought is equitable in nature are brought in the Chancery Division, General Equity, even though legal relief is demanded as well. R. 4:3-1(a)(1).

In this matter, a dispute has arisen as to whether the Board has complied with the Commissioner's order to "reinstate petitioner to a secretarial position." In particular, Ms. Bush asserts that contrary to the Commissioner's order, the Board has failed to reinstate her to the position of secretary to the board secretary, or in the alternative, to offer an equivalent position if in fact her position no longer exists. In response, the Board contends that the Commissioner's decision calls only for reinstatement to a secretarial position, irrespective of the department, and Ms. Bush's refusal to accept it equates to a forfeiture of her tenure rights and relinquishes the Board from any further duty to reinstate her.

In the alternative, Ms. Bush contends that assuming arguendo that the Board is correct in their interpretation of the Commissioner's order, the position offered was secretarial in neither title nor nature. In retort, the Board, by Certification of Edmund Zalewski, business administrator/board secretary, proclaims that the position was

originally titled "*Secretary* to the CST Office," but was subsequently re-named. The Certification further sets forth that despite this change in title, no substantive changes were made to the job description.

Pursuant to R. 4:67-6, parties seeking enforcement of judgments of the Commissioner of Education must bring an action in the Superior Court. Accordingly, the OAL is not the proper forum for the entertainment of the reinstatement issue presented. Rather, if Ms. Bush wishes to pursue her rights, an action should be brought in the Chancery Division, General Equity of the Superior Court.

Ms. Bush is Entitled to Back Pay for the Time Period of December 15, 2007, to April 27, 2009

Any person holding office, position or employment in the public school system is entitled to back pay and emoluments if removed without cause in violation of his/her tenure rights. See N.J.S.A. 18A:6-30; Mueller v. Bd. of Educ. of the Hunterdon Central Reg'l High Sch. Dist., 93 N.J.A.R.2d (EDU) 419, 422; Bourhis v. Bd. of Educ. of the Borough of Fort Lee, 92 N.J.A.R.2d (EDU) 540, 543; Snack v. Bd. of Educ. of the City of Orange, 92 N.J.A.R.2d (EDU) 509, 511. In the pursuit of equity and justice, interest may be added to the award of back pay. Decker v. Bd. of Educ. of the City of Elizabeth, 153 N.J. Super. 470, 475 (App. Div. 1977).

Subsequent to termination and irrespective of wrongdoing, an employee has a duty to mitigate his/her damages by looking for substitute employment. See Goodman v. London Metals Exchange, 86 N.J. 19, 21 (1981) (mitigation principles encourage the unemployed to seek employment, a socially desirable goal); O'Lone v. Dep't of Human Serv., 357 N.J. Super. 170, 181 (App. Div. 2003). Succinctly,

> mitigation . . . is the deduction of other income received, from the amount of back pay otherwise recoverable . . . . [W]here other income is not actually received, the amount of back pay awarded may be reduced by the amount the discharged employee could or should have received by reasonable and sincere efforts to locate other employment . . . when there is no showing by the employer that the

> employee obtained other employment, or could have done so by the exercise of diligence, the measure of damages is the contract price.
>
> [Zielenski v. Bd. of Educ. of the Twp. of Guttenberg, 1981 S.L.D. 759, 762, 766.]

"In order to invoke mitigation there must, of course, be available jobs. In their absence, mitigation is not feasible." Goodman, supra, 86 N.J. at 23; accord O'Lone, supra, 357 N.J. Super. at 180 ("the Court's conclusion in Goodman that the availability of substitute employment is relevant to establishment of this defense is also applicable in the present context"). Accordingly, "[w]hether the individual sought a job [is] irrelevant in the absence of the existence of a position." Goodman, supra, 86 N.J. at 32. In O'Lone the issue presented to the court was whether an employer may deny a back pay claim based solely on the employee's failure to seek substitute employment during the period of separation from public service, without considering the availability of such employment. O'Lone, supra, 357 N.J. Super. at 173. Factual findings at the administrative level demonstrated that "O'Lone did not apply for a single job. He did not send out a single resume. He did not register with any employment agency. He did not attend any job fairs. He did not prepare a resume. His efforts to find work [were] to review classified ads and review job positions on the Internet and talk to a few friends." Id. at 175. Concurring that the employee made no serious efforts to obtain substitute employment, the court nevertheless concluded that "appellant's failure to seek substitute employment was a not a sufficient basis for the denial of his back pay claim, without any consideration of the availability of such employment." Id. at 176-77.

Further, an employee is not required to mitigate his/her damages by taking any job which presents itself. Rather, "[i]t has been held that in a breach of employment contract context that mitigation depends on the time lost 'before similar employment can be obtained by using proper diligence.'" Goodman, supra, 86 N.J. at 24 (emphasis added) (citation omitted). Similar employment is determined by looking at three factors: a) the nature of the work; b) the location of the job; and c) the rate of compensation. Ibid. The first characteristic—the nature of the work—involves flexibility and is determined by analyzing the particular responsibilities and skills of the job. Ibid. The degree of comparability required, however, is not static. With the passage of time,

circumstances may require the claimant to lower his sights and accept employment with lower pay, with different work, or at a more distant location. Id. at 26-27. This notion is known as the lower-sights principle and it is applied with caution in cases where the employee is terminated unlawfully. See Id. at 31.

Mitigation, including the lower-sights principle, is an affirmative defense and the initial burden of proving the appropriateness of its application rests with the employer. Id. at 32; O'Lone, supra, 357 N.J. Super. at 18 ("In the absence of an administrative rule that sets forth the employee's and the appointing authority's evidentiary burdens in a case where an appointing authority claims that a back pay award should be denied or reduced due to the employee's failure to seek substitute employment . . . the appointing authority should bear the initial burden of presenting evidence of the employee's failure-to-mitigate."). Notably, if termination results from the employer's wrongful conduct, the employer will not establish a prima facie case by presenting evidence that the aggrieved party made no efforts to secure substitute employment. Rather, to shift its burden, the employer must make an initial showing that comparable employment opportunities were available and, if the lower-sights doctrine is applicable, that there were other suitable jobs. Goodman, supra, 86 N.J. at 32. Only then does the burden of going forward shift to the employee who may introduce evidence that comparable employment did not exist, that reasonable and diligent efforts on his/her part had not been successful, or that the circumstances did not justify acceptance of a dissimilar job. Ibid.

In the matter at hand it is undisputed that Ms. Bush made no efforts to mitigate her damages from November 30, 2007, the date she was terminated, to July 01, 2010, the date of this hearing. In fact, Ms. Bush conceded at the hearing that since her termination she had neither looked for another position nor applied for unemployment benefits. Pursuant to this admission, the Board asserts that mitigation principles warrant a total bar on recovery of back pay. The Board, however, overlooks the well-founded principle that mitigation is an affirmative defense and the initial burden of proving the appropriateness of its application rests with the employer. As will be discussed below, the Board has failed to present prima facie evidence that comparable employment existed between December 15, 2007, and April 27, 2009. Accordingly, the

Board has failed to shift its initial burden and Ms. Bush is entitled to back pay for said time period.

To properly determine whether the Board has met its initial burden, a brief analysis of the termination itself is in order. Ms. Bush was terminated in violation of her tenure rights, and accordingly, the wrongful act was committed by the Board. That being the case, and in conformity with the Goodman and O'Lone holdings, the Board has to make an initial showing that comparable employment opportunities were available, or if the lower-sights doctrine was applicable, that there were other suitable jobs. Due to the fact that Ms. Bush was paid up to December 14, 2007, a back-pay award may go back as far as December 15, 2007.

On April 23, 2009, Judge Geraghty held that the Board unlawfully terminated Ms. Bush in violation of her tenure rights. Thereafter, on April 28, 2009, email was exchanged which confirmed the availability of a "CST secretary position" for Ms. Bush. However, as has been articulated in Goodman, Ms. Bush was not required to take this job, for purposes of mitigation, unless it was similar to her position as secretary to the board secretary. This determination requires an analysis of the nature of the work, the location of the job and the rate of compensation. As will be articulated below, the two positions are sufficiently similar for the purposes of mitigation.

First and foremost, the rate of compensation for the two positions was identical. This fact is supported by a July 27, 2009, letter from the Board's counsel. This letter was provided in response to a July 21, 2009, correspondence from Ms. Bush's counsel, inquiring among other things, into the position's pay rate. Second, had Ms. Bush taken the position offered, she not only would have been working in the same geographical region, but within a block of her old building, if not in the same building itself. Third, the nature of the work is sufficiently similar for purposes of mitigation. Notwithstanding that this factor naturally involves flexibility on the part of the employee, the two positions were in the same field, were for the same employer, required equivalent skills and shared a number of responsibilities. These responsibilities included, taking phone calls and messages, typing, filing, running computer-generated reports, and other clerical tasks as assigned. As such, the Board has satisfied its initial burden of presenting

evidence that comparable employment existed as of April 28, 2009. Finally, although Ms. Bush has pointed out several differences in the job's responsibilities, for purposes of mitigation, they are not substantial enough to justify her refusal of the position. Being that the two positions were equally compensated, Ms. Bush must be denied all back pay from April 28, 2009, to the present.

Finally, in the Board's post-hearing brief, it is asserted in passing that a position was offered to Ms. Bush in the summer of 2008. Nothing, however, is revealed as to the type of position which was offered or the exact date it was offered. Further, this blanket statement is supported by neither documentary evidence nor any testimony at the hearing. Accordingly, it is impossible for this forum to discern whether this position—assuming it was actually offered—was comparable to Ms. Bush's position, and in turn, whether Ms. Bush failed to mitigate her damages by not accepting it. Mitigation is an affirmative defense and the initial burden of proving the appropriateness of its application rests with the employer. The Board has failed to carry its initial burden of proving that comparable employment existed between December 15, 2007, and April 27, 2009. Accordingly, Ms. Bush is entitled to back pay for said time period.

More Facts are Necessary to Accurately Calculate the Amount of Back Pay Owed to Ms. Bush

Ms. Bush is entitled to back pay for the time period of December 15, 2007, to April 27, 2009, at a rate of $48,747.50 per year; the rate she was making at the time of her termination. This monetary figure was not disputed by the Board, and accordingly, should be used for purposes of calculating back pay. In addition, Ms. Bush is requesting interest in the amount of four (4) percent for moneys held by the Board during the relevant time period.

The difficulty in assessing Ms. Bush's back pay award stems from the fact that the parties did not shed light on the length of Ms. Bush's work year. In a June 03, 2009, letter, Ms. Bush's counsel indicates that "Ms. Bush's salary at the time of her termination was $48,747.50 per year, or approximately $937.45 per week." By dividing the two amounts, it appears that Ms. Bush worked fifty two weeks; or in other words, the

whole year. It is possible, however, that this is an oversight and Ms. Bush only worked when school was in session. That is, from September 7 to June 17.[1] Although it is undisputed that one (1) year, fourteen (14) months and thirteen (13) days has passed between December 15, 2007, and April 27, 2009, it is impossible to accurately determine the amount owed to Ms. Bush without knowing the actual number of work days missed. Accordingly, an inquiry into the length of Ms. Bush's work year is in order.

CONCLUSION

The OAL is not the proper forum to enforce the Commissioner's Order to reinstate Ms. Bush to a secretarial position. As such, a ruling as to the issue of reinstatement has not been made. As to the issue of back pay, Ms. Bush should be compensated for the time period of December 15, 2007, to April 27, 2009. This amounts to a minimum of $48,747.50. However, as I do not know the length of her work year, this information should be provided to the Commissioner to facilitate his calculation of the back-pay award. Finally, Ms. Bush should be awarded all emoluments due to her from her employment with respondent.

ORDER

It is **ORDERED** that Ms. Bush be awarded back pay plus interest for the time period of December 15, 2007, to April 27, 2009.

It is further **ORDERED** that Ms. Bush be awarded all emoluments due to her from her employment with respondent.

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

[1] <http://www.warrennet.org/warrentech/generalinfo/calendar.pdf>

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 1, 2010

DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 10/1/10

Date Mailed to Parties: 10/1/10

sej

APPENDIX

WITNESSES:

For Petitioner:

Virginia Bush

For Respondent:

None

EXHIBITS:

P-1 Copy of Commissioner's Decision dated 5/27/09

P-2 Copy of Job Description (5 pgs)

P-3 Criteria for Administrative Assistant to CST Office (2 pgs)

P-4 2007 Employee Attendance Calendar

P-5 Packet of Pay Stubs for Edgar Bush

#61-11E

OAL DKT. NO. EDU 13861-10
AGENCY DKT. NO. 714-12/10

CHARLES JACKSON AND JANICE WILLIAMS,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE TRENTON SCHOOL DISTRICT, MERCER COUNTY AND GREG GRANT,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

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 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 the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/18/11

Date of Mailing: 2/22/11

* 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 APPLICATION FOR EMERGENT RELIEF

OAL DKT. NO. EDU 13861-10
AGENCY DKT. NO. 714-12/10

CHARLES JACKSON AND
JANICE WILLIAMS,
Petitioners,
v.
TRENTON BOARD OF EDUCATION
AND GREG GRANT,
Respondents.

Richard Friedman, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Rocky Peterson, Esq. for respondents, (Hill Wallack, LLP, attorneys)

Record Closed: January 10, 2011 Decided: January 14, 2011

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

Petitioners Charles Jackson and Janice Williams seek an emergent order from the Commissioner of Education (Commissioner), pursuant to N.J.A.C. 6A:3-1.1 et seq., that the respondent Trenton Board of Education be: 1) enjoined from denying

Petitioner Jackson his right to an appointment in the position of Head Basketball Coach of the Trenton High School boys' team, 2) required to appoint Petitioner Jackson to this position and 3) restrained from assigning respondent Greg Grant the duties of the position. Further, petitioners seek an order restraining Greg Grant from accepting or performing the duties of the position.

PROCEDURAL HISTORY

On December 21, 2010, petitioners filed a petition for emergent relief with the Commissioner of Education. The Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on December 22, 2010, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 for determination as a contested case. On December 29, 2010, petitioners filed a Motion to Amend the Petition. I granted the motion to amend and heard the application for emergent relief on January 3, 2011. The record remained open for the submission of an answer to the amended petition and transcripts from the two public board meetings in question. On January 10, 2010, I received respondents' answer to the amended petition with minutes from the two meetings in question, rather than transcripts. In order to have the matter resolved expeditiously, petitioners' counsel sent the audio CD recordings of the two meetings. As the meetings were over five hours long collectively and could not be queued to the appropriate place, listening took a considerable amount of time. The record closed on January 10, 2011.

FACTUAL DISCUSSION

The following facts are not in dispute. Petitioner Jackson is a tenured certified teacher employed by the Trenton Board of Education. Petitioner Williams is a citizen and taxpayer in the City of Trenton who is also the Grievance Chair of the Trenton Education Association. Respondent Grant is not an employee of the Trenton Board of Education and is not a certified teacher. Grant possesses a substitute teacher credential. Petitioner Jackson applied for the position of Head Coach of the boys'

basketball team. Respondent Grant also applied for the position of Head Coach of the boys' basketball team. The Director of Human Resources informed the superintendent that Jackson was entitled to the job because a certified teacher in the district is preferred to an applicant who is not a certified teacher in the district. On December 6, 2010, the appointment was on the Board agenda, but the Board did not appoint Jackson. Many members of the public voiced their opinion in favor of Grant being coach, including the captain and members of the basketball team, during public comment. The members of the team focused on how Grant believed and taught them that they were students first and athletes second and that they must be scholar athletes. After a lengthy executive session, the Board appointed Grant. Specifically, pursuant to the minutes of the public meeting, the Board voted unanimously to appoint Grant as Head Coach at the JV Coach salary and appoint Jackson as JV Coach at the Head Coach salary. Jackson filed a petition to overturn the decision of the Board.

The Trenton Board of Education is under the watch of a State Monitor, Mark Cowell. On December 15, 2010, Cowell met with Jackson, Grant and the principal of Trenton Central High School. Jackson was not represented by counsel or a union representative at the time of this meeting. At some point during the meeting, Cowell and the principal left the room and the two coaches remained talking. After the meeting, by letter dated December 15, 2010, Jackson signed a letter to the Board that he was withdrawing his name from consideration for the coaching position. Cowell accepted the withdrawal. On December 17, 2010, Jackson's counsel sent a letter to Cowell with a copy to the acting superintendent and Kathleen Smallwood-Johnson, Executive Director of Human Resources, rescinding the withdrawal. The letter was written and received by fax by all parties including the superintendent, the monitor and board attorney on December 17, 2010. Cowell did not accept the rescission of Jackson's withdrawal from consideration as head coach.

On December 20, 2010, two team members and nine members of the public expressed support of the Board's vote to appoint Grant Head Coach. Cowell expressed to the Board that its vote of December 6, 2010 was in violation of N.J.A.C. 6A:9-5.19 because a certified teacher was a candidate for the position, but the Board chose a

person who was not certified. Cowell stated at the meeting that he did not believe that the Board violated N.J.S.A. 18A:27-4.1 because from his research he believed that Acting Superintendent Broach made the recommendation for Grant to be the head basketball coach. Cowell advised the Board that Jackson had withdrawn his name from consideration. He then advised the Board that he would be overturning its December 6, 2010 vote and recommending the appointment of Grant as head basketball coach. During the December 20, 2010, meeting, the Board voted to approve adding the appointment of Grant as Head Boys' Basketball Coach to the consent agenda. The appointment of Grant was then approved by all board members present.

The above facts are undisputed and I therefore, **FIND** them as **FACT**.

There are disputed facts regarding the purpose of the monitor's meeting with Jackson, Grant and the principal; the reason that Jackson wrote the letter withdrawing from consideration; the reason that Jackson through counsel rescinded his letter of withdrawal and the reason that the monitor did not accept the letter from Jackson's counsel rescinding the letter of withdrawal. However, petitioner argues that the disputed facts are immaterial to the question of whether Jackson is entitled to the position of head coach. Respondents contend that not only is the issue of Jackson's withdrawal from consideration for the position a material issue, it is the only issue. The Board contends that Jackson was not an applicant for the Head Coach position as of the December 20, 2010 meeting and therefore the Board did not violate N.J.A.C. 6A:9-5.19. Cowell had accepted his withdrawal and did not accept the rescinding of his withdrawal. These disputed facts could only be determined at a full hearing.

DISCUSSION

N.J.A.C. 6A:3-1.6 sets forth the standard for emergent relief as follows:

> (b) 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. De Gioia, 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.

The moving party bears the burden of proving each of the elements for emergent relief "clearly and convincingly." Waste Mgmt of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

1. Whether Petitioners Will Suffer Irreparable Harm

Petitioner Jackson contends that he will suffer irreparable harm if he is not appointed as head coach immediately because the season will be over before this matter is remedied and he will not be able to recover the time he could have coaching the team. Petitioner must show that immediate, substantial and irreparable injury will result if emergent relief is not granted. Crowe, supra, 90 N.J. at 132-33. The Court in Crowe found that "[h]arm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Id. at 132. Irreparable injury has been defined as "substantial injury to a material degree coupled with the inadequacy of money damages." Stroh Assoc., supra, 95 N.J.A.R.2d (EDU) at 237 (citing Judice's Sunshine Pontiac, Inc. v. General Motors, Inc., 418 F.Supp. 1212 (D.N.J. 1976); John Tully v. Mott Supermarkets, Inc., 337 F.Supp. 834 (D.N.J. 1972)).

I have heard the arguments of the parties and read their submissions. Regarding irreparable harm, petitioners' Motion for Emergent Relief further contends that they meet the standard of irreparable harm because the team is already midway into the basketball season in which Jackson wants to coach. If the case is not decided on an emergent basis, the season will be over and that is irreparable harm. Petitioners

note that this application is not about the money. Indeed, the Board voted to pay Jackson the head basketball coach's stipend even without him serving in that capacity. Petitioner Jackson further argues that having worked seven years previously as Assistant Coach, the Board's action irreparably interfered with his career trajectory as this was his time to move to a head coach position. Petitioner Williams representing taxpayers argues that there is also irreparable harm in hiring an individual who is less qualified for the position and is not a certified teacher to be the coach. The Respondent Board and Grant contend however, that this is not an emergent matter and there is no irreparable harm. Respondent argues that if the head coach position was so substantial as to cause him irreparable harm if he were not appointed, then he would not have withdrawn from consideration. Respondent argues, although no evidence has been presented to support, that Jackson has not attended any practices or games of the team since the beginning of December 2010.

Since both petitioners Jackson and Williams claim irreparable harm to the children and public of Trenton by not hiring Jackson who is a certified teacher, it seems only fair to consider the other side of that argument. Specifically, that by overturning the appointment of Grant and granting Jackson the appointment as head coach, the basketball team will have to adjust to a completely new coaching style and philosophy at the end of the season. In short, granting such relief would alleviate the harm to Jackson at the expense of the players that he so badly wants to coach. Such a scenario does not present an ideal coach-player relationship that competing teams will have developed with their coach by the time the relief is granted. I **CONCLUDE** that petitioners have not proved that the harm to be suffered by Jackson if he is not appointed as head coach is immediate and substantial and therefore I **CONCLUDE** that petitioners have failed to prove the first prong of irreparable harm.

Although I need not continue to analyze the other three prongs since all four prongs have to be met and petitioners have not met that burden, I will continue so that the Commissioner of Education has complete conclusions of law.

2. Whether the Legal Right Underlying Petitioners' Claim is Settled

Petitioners argue that their legal rights pursuant to N.J.S.A. 18A:27-4.1 and N.J.A.C. 6A:9-5.19 have been violated. They argue that the Superintendent recommended the appointment of Petitioner Jackson on December 6, 2010. Yet it hired Grant, in clear violation of N.J.S.A. 18A:27-4.1, which provides that the Board can appoint an employee only upon the recommendation of the chief school administrator. The Respondent Board concedes that the December 6, 2010 vote was in error as it has been told by the State Monitor. However, the State Monitor stated at the December 20, 2010 meeting that the vote was not invalid pursuant to N.J.S.A. 18A:27-4.1because his "research" showed that the acting superintendent made the recommendation for Grant to be head coach. From the minutes, it appears clear that the recommendation was for Jackson to be head coach, but the Board voted for Grant. This constitutes a violation of N.J.S.A. 18A:27-4.1. However, the analysis cannot stop there, as petitioners argue, because as of December 6, 2010, the Board vote would be nullified and there would be no head coach appointed.

Respondent argues that, in any event, the December 6, 2010 vote was subsequently overturned by the State Monitor and the Board voted again legally on December 20, 2010 to appoint Greg Grant as coach. From the minutes and CD of the December 20, 2010, meeting, it is unclear who actually made the recommendation for Grant to be head coach. The State Monitor said near the beginning of the meeting that "a recommendation will be submitted this evening for the appointment of Mr. Grant as the TCHS boys' head basketball coach" in the passive voice not indicating who will make that recommendation. Later, someone called attention to the fact that the appointment of head coach was not placed on the consent agenda and two board members moved and seconded to have it considered on the consent agenda. The consent agenda then passed unanimously. For the foregoing reasons, the law is settled, but there is a factual dispute as to whether the superintendent made the recommendation and thus, whether the law was actually violated. Further complicating the issue of whether petitioners' legal right underlying the claim is settled is petitioner Jackson's intervening withdrawal from consideration. I **CONCLUDE** that the

circumstances surrounding Jackson's signing of the withdrawal and subsequent rescission of his withdrawal are factual disputes that are material to the issue of whether the Board violated the N.J.S.A. 18A:27-4.1.

With regard to N.J.A.C. 6A:9-5.19, respondents concede that this regulation was violated on December 6, 2010, when the Board appointed Grant over Jackson who is a certified teacher in the district. At the December 20, 2010, the State Monitor made the announcement that the violation had occurred and that the vote was being overturned on that basis. Cowell went on to say, however, that Jackson voluntarily agreed to withdraw his name for consideration such that, at the time of the appointment, the only person being considered was a person who was not a certified teacher and therefore, N.J.A.C. 6A:9-5.19 no longer operated to give Jackson a legal right to the position. Petitioners argue, however, that the State Monitor had no authority to unilaterally decide to not accept Jackson's letter rescinding his withdrawal from consideration. The withdrawal, they argue, was null and void as of the date of the letter rescinding it, December 17, 2010; as the Board had not taken any action on it. Petitioners cite CF Lippincott v. Board of Education of the Borough of Riverton, 1990 SLD (April 26, 1990) (slip op. at 3) for the proposition that a resignation is not effective until the Board accepts it at a public meeting and can be rescinded at any time before that. In the present case, Petitioner Jackson was not resigning from his job, but withdrawing his name from consideration, the distinguishing factor being that he did not yet have the position as the employee did in Lippincott.

Taking into consideration the totality of the circumstances surrounding the two meetings in question, I cannot find that petitioners established by clear and convincing evidence that their legal right underlying their claim is settled. Therefore, I **CONCLUDE** that this prong has not been met.

3. Whether Petitioners Have a Likelihood of Prevailing on the Underlying Claim

In addition to the arguments enumerated under number two, petitioners contend that even if the superintendent ultimately recommended Grant's appointment on December 20, 2010, N.J.A.C. 6A:9-5.19(c)3 requires that the Board obtain the county superintendent's approval prior to such employment. There is no evidence in the record thus far that the board has ever acquired such approval. The respondent board relies on the fact that the State Monitor recommended that such action be taken after announcing that Jackson had withdrawn from consideration. In the absence of some authority shown that the State Monitor may act in the place of the County Superintendent, I **CONCLUDE** that, on this point, petitioners have demonstrated a likelihood of success on the merits.

4. Whether Petitioners Can Show that when the Equities and Interests of the Parties are Balanced, the Petitioners Will Suffer Greater Harm than the Respondent Will Suffer if the Requested Relief is Not Granted.

Petitioners contend that the Board will suffer no harm as it is only being required to do what it was legally bound to do in the first instance. It similarly argues that Grant will suffer no harm as he "merely will be prohibited from being employed in a position in which he had no legal entitlement or right to." Petitioners argue as enumerated in section one above, that Petitioner Jackson and the public will be irreparably harmed by not being able to get this coaching season back and possibly not getting another opportunity to serve as head coach as he was destined to do after seven years as an assistant coach. The public will be harmed by having an unqualified person serving in that capacity. Respondents argue, mostly in oral argument, that the team will suffer irreparably by placing Jackson in the position of head coach at this time. The team came out united in support of Grant being their coach as the members indicated that he is interested in their academic accomplishments and not just their record of wins and losses.

As set forth in the discussion of prong one above, petitioners have not adequately demonstrated that the harm to them is irreparable. There is no question some harm, but the petitioners cannot demonstrate that their harm is greater than the disruption of the team and by extension, the high school, by replacing the currently serving coach with Jackson. Further, to say that no harm will come to Grant a result of Grant being removed because he was not entitled to the position in the first place overlooks the bond that Grant has developed with the team in the absence of Jackson from December until the present. The public comment on the CDs of the board meetings indicates that there will be suffering on the part of Grant and the team members if that relationship is not allowed to continue. I **CONCLUDE** therefore, that petitioners have not demonstrated that the relative hardship to the parties militates in favor of an award of emergent relative and the fourth prong has not been satisfied.

In summary, I **CONCLUDE** that petitioners have failed to establish irreparable harm, that the legal right underlying their claim is settled and that the harm to the petitioners outweighs the harm to respondents if the relief is not granted. Because all four standards have to be met, I **CONCLUDE** that petitioners did not satisfy N.J.A.C. 6A:3-1.6 and the Crowe v. DeGioia standards and the petition for emergent relief must be denied.

ORDER

It is hereby **ORDERED** 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 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.

January 14, 2011
DATE

LISA JAMES-BEAVERS, ALJ

cmo

62-11

#62-11E

OAL DKT. NO. EDU 00304-11
AGENCY DKT. NO. 724-12/10

JILLIAN ALLEN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
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 the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/18/11
Date of Mailing: 2/22/11

* 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

EMERGENCY ORDER
OAL DKT. NO. EDU 00304-11
AGENCY DKT. NO. 724-12/10

JILLIAN ALLEN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNIONCOUNTY,
Respondent.

Jessica S. Swenson Esq., for petitioner (Fox and Fox, attorneys)

Karen A. Murray, Esq., for respondent

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On December 29, 2010, Jillian Allen filed with the Commissioner what purports to be a petition but instead is set forth as a "letter brief in support of Ms. Allen's request for emergent relief and appeal of the Elizabeth Board of Education's failure to honor Ms. Allen's contract for the 2010-2011 school year." The application is supported by a certification of Allen with attached exhibits.

In essence, Allen, who had been a non-tenured social studies teacher, argues that, although the Board renewed her contract for the 2010-2011 school year on June

24, 2010, she was informed by the Board's Executive Director for Human Resources, Karen Murray, on August 11, 2010, that she had received the contract in error and that, "[s]ince you had not earned tenure, you should not have been renewed for the 2010-2011 year, as a result of the Board's budgetary reduction in force." Allen contends that the action by Murray was improper because there was no Board action deeming Allen's contract as non-renewed. Allen further contends that Murray's letter followed her July 2010 request for maternity leave and Family Medical Leave effective September 5, 2010, several days after the commencement of the school year, a request which Murray allegedly denied.

On January 4, 2011, the Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the emergent relief application 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, for determination as a contested case. Although not transmitted with the file from the Department, I learned on the return date of the emergent relief application, that the Board had filed a Motion to Dismiss on January 13, 2011, contending that the petition should be dismissed as time-barred pursuant to N.J.A.C. 6A:3-1.3(i) and for failure to comply with the required format for a petition in accordance with N.J.A.C. 6A:3-1.4.

I heard the application for emergent relief on January 18, 2011, but declined to rule on the Motion to Dismiss at that time.

DISCUSSION

For a request for interim relief or stay, N.J.A.C. 6A:3-1.6 requires as follows:

(b) 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.

These four standards are in the conjunctive, and petitioner must satisfy all requirements in order to entitled to the requested relief.

I have heard the arguments of all parties and read their submissions. I **CONCLUDE** that Allen is not entitled to emergent relief in that she has not satisfied all of the four requirements. The likelihood of her prevailing on the merits of the underlying claim is questionable in that the petition was filed on December 29, 2010, approximately 137 days after her receipt of Murray's August 11, 2010, letter advising her that the renewal of her contract had been in error. Allen argues that the filing limitations period did not start accruing from the date of Murray's letter because it did not constitute notice of legitimate Board action in the absence of a Board resolution or consideration at a Board meeting. The regulation establishing a ninety-day limitation for the filing of a contested action does not appear to be so limiting as to require actual Board action before a cause of action arises. N.J.A.C. 6A:3-1.3(i) provides:

> 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.
> [emphasis added]

Allen has not made a sufficient showing of irreparable harm. If the renewal of her contract had been improperly reversed, a remedy would lie in money damages. The issue of health insurance for her newborn child has been resolved according to Allen's certification, which indicates that he is receiving COBRA coverage. Her claim of emotional stress associated with being terminated due to her request for maternity leave is not a remedy within the jurisdiction of the Commissioner.

ORDER

It is hereby **ORDERED** that petitioner's application for emergent relief be **DENIED.**

It is further hereby **ORDERED** that supplemental briefs supporting or opposing the Motion to Dismiss shall be filed by February 18, 2011, and responses, if any, shall be filed by March 4, 2011.

This order on application for emergency relief may be adopted, modified or rejected by the **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 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.

January 18, 2011

DATE

Jesse H. Strauss

JESSE H. STRAUSS, ALJ

id

63-11

TRICIA WITKINS,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF PITMAN, GLOUCESTER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner challenged a three day suspension imposed upon her during her senior year of high school, in the aftermath of an altercation during a football game. Petitioner sought to remove the discipline from her student records, and additionally sought reimbursement of attorney's fees. The suspension was subsequently expunged from petitioner's student records.

The ALJ dismissed that portion of the complaint related to discipline as moot, and found that the Commissioner has no authority to award attorney's fees in claims arising under *N.J.S.A.* 18A:6-9. Accordingly, the ALJ dismissed with prejudice the petitioner's appeal for attorney fees.

Upon full consideration, the Commissioner concurred with the ALJ for the reasons detailed in the Initial Decision, 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.

February 18, 2011

63-11

OAL DKT. NO. EDU 2441-10
AGENCY DKT. NO. 13-1/10

TRICIA WITKINS,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF PITMAN, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	

After independent review of the record of this matter and the Initial Decision of the Office of Administrative Law (OAL), the Commissioner adopts the Initial Decision as the final decision. Insofar as all references to the discipline which had been imposed upon petitioner have been expunged from her student file, the portion of her petition that challenged same is dismissed as moot. Petitioner's remaining demand for attorney fees is also dismissed in consequence of the Commissioner's lack of authority to award same.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2|18|11

Date of Mailing: 2|22|11

[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 02441-10
AGENCY DKT. NO. 13-1/10

TRICIA WITKINS,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF PITMAN, GLOUCESTER COUNTY,
Respondent.

Christopher M. Manganello, Esq., for petitioner

Samuel H. Bullock, Esq., for respondent

Record Closed: January 10, 2011 Decided: January 14, 2011

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an appeal by petitioner of the Board's disciplinary action, seeking removal of the discipline from her record and attorney's fees. The matter was transmitted to the Office of Administrative Law (OAL) on March 29, 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.

In a May 12, 2010, telephone conference, the parties agreed that the Board of Education would be asked to conduct a hearing on the matter in closed session on May 17, 2010, as a means of curing the lack of due process hearing and would additionally provide petitioner with various elements sought in discovery. Alternatively, the parties agreed that expunging the record would obviate the need for the various procedural steps outlined above. Correspondence received at the OAL on December 28, 2010, from counsel for petitioner and on January 6, 2011 from counsel for respondent confirm that the discipline was expunged. Therefore, the portion of the complaint related to the discipline itself is now moot.

The correspondence from counsel also incorporated short briefs on the purely legal issue of whether the Commissioner of Education has the authority to award legal fees in a matter such as this. There being solely an issue of law remaining, the matter is appropriate for summary disposition. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995). The inquiry is "'whether the evidence presents a sufficient disagreement to require submission to [a fact finder] or whether it is so one-sided that one party must prevail as a matter of law. Liberty Surplus Insurance Corp., Inc. v. Nowell Amoroso, P.A., 189 N.J. 436 (2007).

LEGAL ANALYSIS

The primary issue is whether the Commissioner of Education has the authority to award legal fees. The Appellate Division and the Supreme Court have answered this question in the negative, in a case involving a female high school student who objected to being excluded from the football team on the basis of sex. Following a consent order that allowed her to participate, the student sought recovery of counsel fees from the Commissioner of Education. The Appellate Division concluded that the Commissioner "does not have plenary authority to award counsel fees in determining "controversies and disputes" presented under N.J.S.A. 18A:6-9. The core proposition was affirmed in 117 N.J. 434 (1990), which also determined that although the Commissioner and the Director of Civil Rights both have authority to resolve discrimination complaints arising in the education setting, the authority to award attorneys' fees growing out of such

complaints arising under the Law Against Discrimination rests entirely with the Division on Civil Rights. For this reason, I **CONCLUDE** that the Commissioner has no authority to award attorney's fees in claims arising under N.J.S.A. 18A:6-9.

ORDER

Accordingly, I **CONCLUDE** that petitioner's appeal concerning her disciplinary record must be **DISMISSED** as **MOOT** and her appeal for attorney's fees must be **DISMISSED WITH PREJUDICE**.

I **ORDER**, therefore, that the appeal of Tricia Witkins 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.

January 14, 2011
DATE

Laura Sanders
LAURA SANDERS
ACTING DIRECTOR AND CHIEF ALJ

Date Received at Agency: January 14, 2011

JAN 18 2011

Date Mailed to Parties:

caa

64-11

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION, ON BEHALF OF THERESA KWIAKOWSKI, LINDA PIRO, EILEEN KORZ AND JACQUELINE CALANDRIELLO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners alleged that respondent Board's policy regarding the preparation of annual written performance reports (AWPR) for teaching staff members does not comply with *N.J.A.C.* 6A:32-4.4(f), which states that the report "shall be prepared by a certified supervisor who has participated in the evaluation of the teaching staff member." Petitioners contended that this regulation requires the individual who performs the end of year performance report to be the same individual who participated in the mid-year, in-class observation of the teacher. The Board argued that the regulation permits different administrators to conduct the mid-year observation and the AWPR, so long as they are properly certified. Both parties submitted motions for summary decision.

The ALJ found that: there are no material facts in dispute, and the matter is ripe for summary decision; the evaluation of a teacher's performance involves a process that is broader in scope than the annual, in-class observation, and the regulation only mandates that the preparer of the AWPR be a certified participant in the evaluation process; and the Board's practice of having a building principal or assistant principal complete the AWPR does not, on its face, violate the dictates of *N.J.A.C.*6A:32-4.4(f). Accordingly, the ALJ granted the respondent's motion for summary decision and dismissed the petition.

The Commissioner concurred with 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.

February 18, 2011

OAL DKT. NO. EDU 9224-10
AGENCY DKT. NO. 150-7/10

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION, ON BEHALF OF THERESA KWIAKOWSKI, LINDA PIRO, EILEEN KORZ AND JACQUELINE CALANDRIELLO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
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 consideration, the Commissioner concurs with the Administrative Law Judge – for the reasons presented on pages 5-6 of his decision – that summary decision is appropriately granted to the Board in this matter.

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: 2|18|11
Date of Mailing: 2|22|11

* 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 09224-10

AGENCY DKT. NO. 150-7/10

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION, ON BEHALF OF THERESA KWIAKOWSKI, LINDA PIRO, EILEEN KORZ AND JACQUELINE CALANDRIELLO,

Petitioners,

v.

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION, MONMOUTH COUNTY,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Christopher Parton, Esq., for respondent (Kenny, Gross, Kovats and Parton, attorneys)

Record Closed: December 6, 2010 Decided: January 6, 2011

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

This matter, involves the proper interpretation of a regulation, N.J.A.C. 6A:32-4.4(f), which provides

> The Annual Written Performance Report shall be prepared by a certified supervisor who has participated in the evaluation of the teaching staff member.

and poses the question whether the respondent Board of Education's policy regarding the preparation of annual written performance reports (AWPR) for its tenured teachers is consistent with, or violative, of the regulation. The parties have stipulated the record and each requested summary decision.

The Stipulation of Facts reads

1. The Education Association represents a wall-to-wall unit of employees employed by the Middletown Township Board of Education (hereinafter "the Board"), including all professional, non-administrative staff.
2. This matter involves the observation and evaluation of tenured staff members.
3. The District has required the once-a-year in-class observation and subsequent report to be performed and completed by a District-wide subject matter supervisor. (Examples include District Director of Humanities, District Director of Student Services, etc.).
4. In many instances the District has the required annual written performance report (AWPR) as per N.J.A.C. 6A:32-4.4 to be performed/completed by a building administrator, such as the Building Principal or Assistant Principal.
5. In most instances, the school administrator who performs the annual evaluation is said teaching staff member's direct day-to-day supervisor; but not the individual who performed the yearly, in-class observation as set forth in paragraph 3, *supra*.
6. The Association's position is that said regulation, at sub-paragraph F, requires the individual who performs the end-of-year AWPR to be the same individual who participated in the mid-year, in-class observation referred to in paragraph 3, *supra*.
7. The District's position is that the regulation permits different administrators to conduct the observation/report referenced in paragraph 3, *supra*, and the AWPR referenced in paragraph 4 *supra*.

It should also be noted that counsel for the petitioner has expressly advised that, should its position carry the day, it does not seek any reevaluation for prior years but

only to assure that the Board will comply in the future with the regulatory scheme. In his own cross-motion, counsel for the Board has requested that apart from the Board's request for dismissal of the petitioner's case because the Board policy does comply with the regulation, the petition should also be dismissed as even if the evaluation procedures violate the regulation, there is no remedy available for such a violation.

The parties not surprisingly agree that an understanding of the meaning of the regulation must first be sought in its own words. Again, it reads

> The Annual Written Performance Report shall be prepared by a certified supervisor who has participated in the evaluation of the teaching staff member.

As the parties agree that the persons involved in the preparation of the AWPR under the current District practice are all "certified supervisor[s]", the key phrase is "participated in the evaluation." The Association contends that any proper reading of the regulation must be made in pari materia with N.J.A.C. 6A:32-4.4 as a whole, which mandates that districts "adopt policies and procedures" dealing with annual evaluations whose purpose it is to "provide a basis for the review or performance of teaching staff members." In so doing, it is apparent that having an administrator "other than the administrator who did the previous observation" cannot achieve the goals of the process, which are defined, as related specifically to the AWPR

> 1. Performance areas of strength;
> 2. Performance areas needing improvement based upon the job description;
> 3. An individual professional development plan developed by the supervisor and the teaching staff member;
> 4. A summary of indicators of student progress and growth, and in statement of how these indicators relate to the effectiveness of the overall program and the performance of the individual teaching staff member; and
> 5. Provisions for performance data, which have not been included in the report prepared by the supervisor, to be entered into the record by the evaluatee within 10 working days after the signing of the report.
>
> [N.J.A.C. 6A:32-4.4(f)]

The Association argues that an administrator who did not observe the teaching staff member performing his or her tasks cannot identify areas of strength or weakness. While conceding that it might be theoretically possible for another administrator to participate in development of a teacher's professional development plan or other such performance analysis "based upon test results" nevertheless it cannot see how such a "bifurcated process" as is in place in Middletown adheres to the regulation. Additionally, it looks to the language of the first sentence of the regulation, which requires that the AWRP be prepared by one who has "participated in the evaluation" and argues that the plain meaning of the words, "leads to a clear and unambiguous result" and therefore ends the interpretive process, citing In the Matter of the Probate of the Alleged Will of Macool, 416 N.J. Super. 298, 310 (App. Div. 2010), which itself cites the education matter, Klumb v. Bd. of Ed. of the Manalapan-Englishtown Reg'l High Sch., Dist., 199 N.J. 14, 23-24 (2009). The Association understands the stipulated facts to demonstrate that the policy is inappropriate, for the Board has agreed that the "individual who performed the yearly, in-class observation" is "not the individual" who performs the annual review.

The Board responds that a plain reading of the regulation demonstrates that, contrary to the Association's "claustrophobic construction", the Board is acting properly. The regulation nowhere commands that the only person who can prepare the AWPR is the person who performed the in-class observation. The wording demands that the preparer of the AWPR be "a certified supervisor," a fact that is stipulated to be the case in Middletown. It further commands that the preparer have "participated in the evaluation of the teaching staff member." It does not define what that participation must be, or what it must consist of; only that the preparer be a part of the evaluation process for that staff member. And the Association's perception that that "participa[tion]" must perforce be the formal, in-class observation, and that only, is simply wrong. Case law has long recognized that the process of evaluation for a teacher can include a number of different elements. Indeed, it has been recognized that evaluation of teachers can involve "observations" and "formal evaluation instruments" as well as "formal and informal" evaluation, even by school board

members who may have access to teaching staff evaluations. Stevens v. Board of Education of the Township of Spotswood, 93 N.J.A.R. (EDU) 453, adopted (Comm'r of Education, 93 N.J.A.R. (EDU) 456. While Board members are certainly not authorized to prepare the AWPR, the point is that the evaluation of a teacher's performance involves a process that is broader in scope than merely the annual, in-class observation, and the regulation only mandates that the preparer of the AWPR be a participant in that evaluative process. If the preparer has reviewed data about the teacher, has reviewed the report of the in-class observation and other relevant materials, including perhaps the persons own assessment of the teacher, then as a person who has participated in considering the teacher's performance, the person is authorized by the regulation to prepare the AWPR. Had the drafter of the regulation deemed it appropriate for only that person who performs the annual observation to prepare the AWPR, they could easily have said so in the regulation, i.e. "certified supervisor who conducted the annual, in-class observation." They did not, and a reading of the regulation to impose that restriction would be unduly narrow and not in consonance with the actual wording itself, or with the overall tenor of the entire regulation. While a person who performs the annual, in-class observation is no doubt a person with the ability and knowledge to "provide a basis for the review or performance of teaching staff members", that person is not necessarily the only such person.

Having considered the positions of the parties, I agree that as the matter is currently presented, summary decision is an appropriate means to resolve the case. The petitioner has approached the issue as one involving nothing other than the question of whether the practice as described in the stipulated facts conforms to the regulation. No specific facts have been offered to demonstrate how in any specific case the District has applied the policy. Given the limits of the attack on the policy, I am persuaded that the Board is correct in its argument that it has not violated the regulation, and that so long as the preparer of the AWPR is someone who has in fact been involved in the evaluation of the teaching staff member, that person may prepare the AWPR even if he or she is not the person who observed the teacher during the annual, in-class observation, which it is truly argued, is by no means the sole element involved in the overall evaluation of a teacher's ability. While *perhaps* it might be that in

any given situation, the person in the best position to write the AWPR is that observer, there is no evidence in the record that that person is in general, or in any given case, the sole person involved in evaluating the teacher. And there is nothing in the record that precludes the notion that others involved in the evaluation are in a reasonable position to offer the teacher, alone or in concert with other properly certified personnel, the assistance and guidance contemplated by N.J.A.C. 6A:32-4.4.

Based upon the record, I **FIND** that there are no material facts in dispute and as such, summary decision is appropriately invoked. N.J.A.C. 1:1-12.5. I **CONCLUDE** that the practice as stated in paragraph 4 of the Stipulation of Facts does not, on its face, violate the dictates of N.J.A.C. 6A:32-4.4(f). The respondent's motion for summary decision is **GRANTED** and 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.

January 6, 2011
DATE

JEFF S. MASIN, ALJ

Date Received at Agency: January 6, 2011

Date Mailed to Parties: January 6, 2011

mjm

WITNESS LIST

FOR THE PETITIONER:

None

FOR THE RESPONDENT:

None

EXHIBIT LIST

FOR THE PETITIONER:

None

FOR THE RESPONDENT:

None

65-1

OAL DKT. NO EDU 3774-06
AGENCY DKT. NO. 88-2/06

PATRICIA FITZGIBBON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed "Settlement Agreement and Release for Sick Days Reimbursement" (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 Agreement 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: 2|18|22

Date of Mailing: 2|22|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03774-06

AGENCY REF. NO. 88-2/06

PATRICIA FITZGIBBON,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,

Respondent.

Laurie W. Fiedler, Esq., for petitioner

John E. Croot, Jr., Esq., for respondent (Schwartz, Simon Edelstein & Celso, LLC, attorneys)

Record Closed: January 14, 2011 Decided: January 19, 2011

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

On April 3, 2006 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. On April 24, 2006, the late Thomas E. Clancy, ALJ's, decided that the claim asserted at the OAL was dependent upon the outcome of a companion Workers' Compensation petition, and therefore, the within matter would be placed on the

inactive list and continued automatically for successive periods of six months until such time as the ALJ is notified by either party that the workers' compensation matter is resolved. At a telephone status conference on October 21, 2010, the undersigned was advised that the parties had reached a settlement subject to Board approval. The Board approved the settlement on November 18, 2010. By letter dated January 4, 2011 petitioner's counsel forwarded a copy the fully executed Release and Settlement Agreement. By letter dated January 14, 2011, the undersigned received the Board resolution.

The parties have agreed to and submitted the attached Settlement Agreement and Release 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 the signature of the parties and/or 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.

1/19/11
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: January 21, 2011

Date Mailed to Parties: JAN 21 2011
db

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SETTLEMENT AGREEMENT AND RELEASE FOR SICK DAYS REIMBURSEMENT

This Release, dated December 30 2010, is given

BY the Releasor, **PATRICIA FITZGIBBON**, referred to as "I", "Plaintiff" and "Petitioner",

TO WAYNE BOARD OF EDUCATION, (the "BOE") and also to its agents, servants, assigns and employees, referred to as "You", "Respondent" and "Defendant".

WHEREAS, PATRICIA FITZGIBBON, has asserted a claim wherein the BOE failed to pay her full salary without loss of 25.5 sick days for an injury sustained in the course of her employment which case was filed in the Office of Administrative Law under Docket No.: EDU 03774-06;

WHEREAS, the parties have settled this Petition to the Commissioner of Education, Dept. Of Education with Agency Reference number 88-2/06;

THEREFORE I, PATRICIA FITZGIBBON, in consideration of fifteen (15) sick days being added back into my bank of sick days, do hereby release, acquit and forever discharge, and by these presents do for the BOE, its heirs, executors, legal representatives, administrators, successors and assigns, release, acquit and forever discharge the BOE and its related corporations, their employees, representatives, successors, insurers and assigns, and all other persons, firms or corporations who might be liable from any and all claims, demands, charges, costs of court including but not limited to attorney's fees, and causes of action of whatsoever

nature, or any other legal theory arising out of the circumstances herein, from any and all liability damages of any kind known or unknown, whether in contract or in tort, property damages and any other damages which have accrued to me, my heirs, executors, legal representatives, administrators, successors or assigns, for or on account of the facts and subject matter referred to in the Office of Administrative Law under Docket No.: EDU 03774-06 which was scheduled for a Hearing on August 23, 2010.

I recognize the fifteen (15) sick days will be put back into my bank of sick days within thirty (30) days.

The aforementioned consideration is accepted by the undersigned in full satisfaction of all damages or claims owed to me or that may be owed to me by the BOE and its related and/or successor corporations. It is further understood that this is a compromise and settlement of all matters alleged by the undersigned including but not limited to those contained in Petitioner's complaint. It is also agreed to by the parties hereto that upon acceptance by the undersigned of the consideration herein recited that the undersigned shall dismiss or cause to have dismissed the above styled and numbered cause with prejudice.

IT IS FURTHER UNDERSTOOD AND AGREED that there are no promises of any additional payments or of any further benefits to be received by the undersigned from the BOE, its employees, agents, successors, assigns and/or affiliates other than the consideration of fifteen (15) sick days being added back into my bank

IT IS FURTHER UNDERSTOOD AND AGREED that in making the settlement, the acceptance of the undersigned of the consideration herein stated is in full accord and satisfaction

of all disputed claims I have pending. The reimbursement of fifteen (15) sick days is not now, nor at any time in the future, to be construed as an admission of liability by respondent.

As part of the consideration for the reimbursement of fifteen (15) sick days by the parties hereby released, I expressly warrant and represent and do hereby state for the parties referred to above and thereby represent to each and all of the parties hereby released, that I am legally competent to execute this Release and Agreement and I am above the age of 18 years, that no promise or agreement which is not herein expressed has been made to me in executing this Release, and that I am not relying upon any statement or representation of any agent of the parties being released hereby. I am relying on my own judgment and I have been represented by legal counsel in this matter. The aforesaid legal counsel has read and explained to me the entire contents of this Release, as well as the legal consequences of this Release, and I understand that this Release shall operate as a full and complete and final Release and settlement of any and all claims referred to above.

As part of the consideration for the payment of the above sum of money, the undersigned hereby agree to and do hereby indemnify and hold harmless each and all of the parties hereby released from any and all claims, demands, costs of court, attorney fees, actions and causes of actions which may hereafter be asserted by any person, firm or corporation claiming by, through or under us in connection with this Release.

WHEREAS, it is acknowledged, agreed and understood that I have read this full Release and that it is a complete, written statement of the terms and conditions of said Release.

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.

WITNESSED OR ATTESTED BY:

Cindy Ribarich — Patricia Fitzgibbon

PATRICIA FITZGIBBON
Petitioner, Releasor

WAYNE BOARD OF EDUCATION

P Bloem Krenell 12/21/10 — James Campbell

Respondent, Releasee

STATE OF NEW JERSEY, COUNTY OF

SS.:

I certify that on December 30 2010, PATRICIA FITZGIBBON, personally came before me and acknowledged under oath, to my satisfaction, that they are the persons (a) named and personally signed this document and (b) signed, sealed and delivered this document as her act or deed.

Cindy Ribarich

NOTARY PUBLIC

Cindy Christina Ribarich
I.D. # 2333271
Notary Public of New Jersey
Commission expires 08/26/2015

Public School District
Wayne
50 Nellis Drive Wayne, New Jersey 07470

Administrative Offices

www.wayneschools.com
Phone: 973.633.3000

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK.

The Board of Education of the Township of Wayne in the County of Passaic, New Jersey, convened in a Regular Meeting on November 18, 2010 in the Council Chambers of the Municipal Building, 475 Valley Road, Wayne, New Jersey 07470. This meeting was scheduled to begin at 8:00 p.m. pursuant to the terms of the Sunshine Law.

The following members of the Wayne Board of Education were present: R. Ceberio, F. Mazzei, J. Hutchison, J. Jimenez, J. Walsh, M. Badiner, D. Del Sardo, D. Pavlak, Jr., and A. Mordkoff

E-56-11 – Approval of Settlement Agreement and Release – **RECOMMENDED ACTION:** "that the Board approve a Settlement Agreement and Release between the Wayne Township Board of Education and P.F., as per attached."

MOTION: **M. Badiner**
SECOND: **A. Mordkoff**
VOTE: **9-0**

STATE OF NEW JERSEY)
COUNTY OF PASSAIC) ss:

I, Juanita A. Petty, School Business Administrator, Wayne Board of Education of the Township of Wayne, in the County of Passaic, State of New Jersey, hereby verify that the foregoing extract from the minutes of the meeting of the Wayne Board of Education, duly called and held on November 18, 2010 has been compared by me with the original minutes as officially recorded in my office in the minute book of said Wayne 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 the Wayne Board of Education this 14th day of January 2011.

SEAL

Juanita A. Petty, RSBA
School Business Administrator/Board Secretary

JAP:plc

#66-11

OAL DKT. NO. EDU 11481-10
AGENCY DKT. NO. 522-9/10

M.E., on behalf of minor child, A.E.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter – transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, and including an advisement of petitioner's failure to appear at the scheduled January 10, 2011 OAL hearing – has been reviewed. Petitioner filed no explanation for her failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/17/11
Date of Mailing: 2/18/11

* 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.* 6:4-1.1 *et seq.*

#67-11

MELINDO A. PERSI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – who previously served the district as Interim Superintendent – challenged his April 30, 2008 termination by the respondent Board, contending that their action violated the terms of a written employment contract which did not expire until November 20, 2008. The Board contended that petitioner was employed through a verbal agreement in which the sole remuneration was $700 per day for each day worked.

The ALJ found, *inter alia,* that: all of the competent, credible and reliable evidence in this matter supports a finding that the petitioner had a valid and enforceable written contract with the Board, which appointed him as Interim Superintendent through November 20, 2008; petitioner's contract required 30 days written notice, and he is therefore only entitled to 30 days reimbursement in the amount of $21,000, reflecting the month of May 2008; petitioner otherwise was compensated appropriately pursuant to his contract. Accordingly, the ALJ ordered that respondent pay petitioner $21,000, and dismissed the respondent's counterclaim for reimbursement of $17,804.66 for payments the Board claimed were erroneously made to petitioner for days not worked and for expenses he was not entitled to as a per diem appointment.

Upon comprehensive 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.

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, 2011

OAL DKT. NO. EDU 2011-09
AGENCY DKT. NO. 376-12/08

MELINDO A. PERSI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions and reply exceptions of both petitioner and respondent – filed in accordance with *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in making his determination herein.

The parties' exceptions – in pertinent part – recast and reiterate their arguments advanced below which it is determined were clearly considered and addressed in the Administrative Law Judge's (ALJ) decision and, therefore, do not require further elaborative comment.[1]

Upon comprehensive consideration of the record in this matter – which included transcripts of the hearing conducted on December 9, 2009, April 27 and April 30, 2010 – the Commissioner concurs with the ALJ – for the reasons clearly detailed on pages 9-10 of her Initial Decision – that "[a]ll of the competent, credible and reliable evidence supports a finding

[1] It is noted that petitioner – for the first time in his exceptions – presents a claim for indemnification of legal fees pursuant to *N.J.S.A.* 18A:12-20. Even assuming, *arguendo*, that petitioner qualified for such statutory relief, in that this claim was never presented or argued below, it cannot be considered here.

that petitioner Melindo Persi had a valid, enforceable contract with the Brick Township Board of Education as reflected in J-C, as amended, appointing him as Interim Superintendent through November 20, 2008." (Initial Decision at 9-10) In so determining, the Commissioner has given full consideration to all evidentiary proofs which comprise the record and recognized that of particular importance was the ALJ's assessment of the credibility of the witnesses. Such being the case – and 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 upon 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's reasoned review of the entire record before him provides no basis whatsoever for any alteration of the ALJ's determinations.

The Commissioner further concurs with the ALJ "that the BOE employees, in furtherance of the valid contract, paid petitioner appropriately as to salary and expenses" (Initial Decision at 10-11) and, therefore, respondent's counterclaim for reimbursement of $17,804.66 – which is predicated on a finding that no valid contract existed between the parties – is appropriately dismissed.

Finally – for the reasons presented by the ALJ on page 12 of her decision – the Commissioner finds and concludes that the sole compensation due petitioner in this matter, pursuant to his contract, is 30-days pay at his per diem rate of $700, or $21,000.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. The Board of Education of the Township of Brick is hereby ordered to pay petitioner $21,000 and its counterclaim for reimbursement is hereby dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/24/11

Date of Mailing: 2/28/11

[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 2011-09
AGENCY DKT. NO. 376-12/08

MELINDO A. PERSI,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,
Respondent.

Robert C. Shea, Esq., for petitioner (R.C. Shea and Associates, attorneys)

Ben A. Montenegro, Esq., for respondent (Montenegro, Thompson, Montenegro & Gentz, attorneys)

Record Closed: July 14, 2010 Decided: January 10, 2011

BEFORE **ANA C. VISCOMI**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter commenced as a verified complaint in lieu of prerogative writ filed in the Superior Court of New Jersey, Ocean County of June 6, 2008. Plaintiff therein challenged the action of defendant Brick Board of Education (hereinafter "BOE") terminating the employment of the plaintiff as Interim Superintendent, effective April 30,

2008. Defendants therein counterclaimed for return of certain money received by the plaintiff in connection with his purported per diem compensation. By Order of December 5, 2008, the Honorable Vincent J. Grasso, A.J.S.C., transferred the matter to the Commissioner of Education for disposition of all claims. On January 8, 2009, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to -15. By Amended Consent Order dated September 30, 2009, counts 1, 2 and 3 of the complaint were dismissed with prejudice as the Brick Board of Education and dismissed without prejudice as to respondents Daniel Woska, Virginia Reinhold, Kim Terebush, Michael Pifko and Vicky Leone. It was further Ordered that count 4 of the complaint and corresponding counterclaim would be the only remaining issues for determination. The matter was then scheduled for hearing based upon counsels' availability; December 9, 2009; April 27, 2010; and April 30, 2010. The record closed on July 14, 2010, upon receipt of written summations. Several extensions were granted in order to issue this Initial Decision.

FACTUAL DISCUSSION

Count 4 of the verified complaint addresses the crux of the issue presented herein: was there a valid, written contract entered into between the petitioner Melindo Persi and the Brick BOE or did the arrangement consist of a verbal agreement in which the sole remuneration consisted of $700 per diem actually worked.

Petitioner has 53 years of experience in education in the state of New Jersey, holding such positions as Acting Assistant Commissioner, County Superintendent, fiscal monitor, School Superintendent, Business Administrator, teacher and Interim Superintendent. From November 20, 2006, through June 30, 2007, petitioner had a consultant agreement with the BOE in which he served as Board Administrator/Board Secretary. (J-N). Notably, that agreement indicated petitioner's office address as 3900 Galt Ocean Drive, #801, Ft. Lauderdale, Florida. (J-N). By letter dated June 14, 2007, Brick Superintendent of Schools Thomas Seidenberger tendered his resignation effective September 10, 2007. (J-R). Petitioner testified Seidenberger's resignation was not a surprise as he had been looking for another position. In the Spring of 2007,

several BOE members approached him to consider becoming the Interim Superintendent after Seidenberger resigned.

On June 11, 2007, the BOE adjourned to closed session to discuss the appointment of petitioner as Interim Superintendent. (J-A) Board members Daniel Woska and Brian DeLuca,[1] respectively, were present. (J-A). Woska testified that during closed session he asserted that petitioner should remain Interim Business Administrator/Board Secretary and the BOE should search for a permanent Superintendent. Woska also testified that a majority of BOE members disagreed with him. He further testified that no discussion of contractual terms occurred at that meeting.

On June 19, 2007, the BOE adjourned to closed session to discuss the appointment of petitioner as Interim Superintendent. (J-B). Board members Woska and DeLuca, respectively, were present as was legal counsel, John Sahradnik. (J-B). Board meeting minutes reflect that petitioner initially left the closed session since his potential employment was to be discussed but returned approximately 45 minutes later to discuss contract provisions. (J-B). Woska testified that petitioner presented an unsigned draft contract (R-1) and that the BOE members discussed it in closed session. The proposed contractual term at issue herein, as drafted by petitioner and rejected by the BOE provided:

> 7. This Agreement may be terminated by mutual agreement of the Board and Persi or by the Board upon 30 days' written notice to Persi. If the Board terminates this Agreement, it shall pay Persi the balance due under the Agreement plus 3% of the balance due under this Agreement. (R-1).

Woska testified that he questioned the 3% clause and paying petitioner for not working. He further testified that while several BOE members disagreed with his position, everyone just decided that petitioner would be hired at a rate of $700 per day with no written contract. BOE President DeLuca then presented agenda item (t), the appointment of petitioner as Interim superintendent "at a salary of $700 a day, pursuant

[1] Brian DeLuca was BOE President.

to the attached contract effective July 1, 2007." (J-W). No contract was attached to the BOE minutes; however, petitioner testified that the proposed contract was provided to the BOE members as a "walk through" item for consideration during the closed session. DeLuca similarly testified that the contract was handled as a "walk through" which he indicated was common practice for the Brick BOE. All BOE members were provided a copy of the proposed contract at that meeting, DeLuca testified. The BOE voted 5-2, approving the appointment; DeLuca voted in favor and Woska voted against in open session.[2] (J-W). Petitioner testified that the contract was voted on by reference to letter "t" at the meeting and was not read into the record.[3] Petitioner also testified that Board President DeLuca referenced the resolution by paraphrasing it and made no mention to the contract even though each BOE member had the resolution which specifically referenced the contract. DeLuca testified that contracts are not included as part of agenda for BOE meetings; it is part of the paperwork available for BOE members to read if they want. However, Woska testified that once the BOE returned to open session, the motion that was made by BOE President DeLuca was consistent with what was discussed in closed session; the appointment of petitioner on a per diem basis with no mention of a contract. (Petitioner also continued in his role as Business Administrator/Board Secretary. [4]) (J-X).

A written "Interim Superintendent Agreement" was executed by petitioner and BOE President DeLuca by date of August 10, 2007. (J-C). Petitioner testified that the gap in time from the BOE resolution approving the contract to the execution date is probably explained by the fact that when the Board Secretary sends the contract to the BOE president, he or she will sign it when available. DeLuca testified that he did sign the contract as BOE President on August 10, 2007, at BOE offices. Petitioner testified that he drafted the contract based upon the prior contract he had with the district as Business Administrator/Board Secretary, made some changes and provided it to BOE

[2] Woska testified that although the only vote presented that evening in relation to petitioner was to appoint him at a per diem rate of $700, Woska still voted against him because he did not want Persi to be the Interim Superintendent.

[3] The video of the July 19, 2007 BOE meeting indicates that as to item "t" the BOE was asked to approve hiring petitioner as Interim Superintendent "at a rate of $700 per diem." (R-2). Assistant Board Secretary Marie Barnes testified that it would have been "unusual" for the BOE to discuss contractual terms during the open session portion of a meeting.

[4] The BOE ultimately approved the appointment of James Edwards as Business Administrator/Board Secretary. (J-Y).

counsel Sahradnik, who ultimately drafted the contract that was executed. DeLuca testified that the BOE asked Sahradnik at the June 19, 2007, meeting to review the contract prepared by petitioner. DeLuca further testified that BOE members wanted a 90 day termination clause in order to have a smooth transition to a new Superintendent. DeLuca testified that during closed session BOE member Dr. Athera expressed concern regarding the notice issue as the BOE members were looking to protect the district if Persi wanted to leave. Sahradnik recommended the 30 day provision. DeLuca also testified that the BOE wanted the termination to be effectuated by a "written" notice as the members did not want there to be any discrepancy as to the termination. DeLuca testified that by inclusion of this requirement, the BOE members knew the BOE would have an additional 30 days of Persi's services when he decided to leave or if the BOE wanted to replace Persi prior to the expiration of his contract. DeLuca testified that he reviewed the contract with Sahradnik the week leading up to the vote. Provision #7, as executed, indicates:

> This Agreement may be terminated by either party upon 30 days' written notice. (J-C).

DeLuca testified there would be no severance short of the 30 days written notice. He further testified that the last sentence of proposed contract provision #7, as presented by petitioner (R-1), was deleted at the June 19, 2007, meeting at the direction of BOE counsel Sahradnik during closed session. The duration of the agreement was from July 1, 2007, through November 1, 2008, "unless extended by mutual agreement of the parties," (J-C), although petitioner testified the duration was April 2008. (The extension later requested would bring him to a two year statutory limit, November 20, 2008, as he was already collecting his pension.) The agreement further provided that petitioner would be paid based on a 240-day schedule at a per diem rate of $700 "and there shall be no deductions for days not in attendance or for school holidays." (J-C). The agreement also contained the following clause:

> 11. This Agreement embodies the entire agreement between the parties hereto and cannot be varied except by written agreement of the undersigned. (J-C).

The agreement listed petitioner's address as 3900 Galt Ocean Drive #801, Ft. Lauderdale, Florida. (J-C). Assistant Board Secretary Marie Barnes testified that she recalls typing an agreement and that she worked with the Human Resources department to make sure the contract was signed and filed where it belonged.

By e-mail dated October 12, 2007, Barnes, forwarded board counsel Sahradnik information she located regarding petitioner's employment. (J-D). The subject matter of the e-mail indicated the information was being provided for the motion on the BOE agenda of that date. (J-D). The information provided, indicates:

> **November 15, 2006: Personnel Teaching item (r)**
>
> Move the Board of Education approve the appointment of MAP Associates LLC, Melindo A. Persi as Interim Business Administrator/Board Secretary, effective November 26, 2006, on an as-needed basis at a rate of $600 per day. This appointment will be in effect until a permanent replacement is hired.
>
> **June 19, 2007: Personnel Teaching item (t)**
>
> Move the Board of Education approve Melindo A. Persi to the position of Interim Superintendent of Schools, pursuant to the attached contract effective July 1, 2007.
>
> **Resolution for today's packet**
>
> **Be it resolved by the Board of Education of the Township of Brick that pursuant to NJSA 18A:56-53.2b, and because of a dire need for filling the vacant position of superintended of schools, approval is hereby granted to extend the appointment of Melindo A. Persi, as Interim Superintendent of the Brick Township Public Schools through November 20, 2008. (J-D).**

BOE minutes for October 18, 2007, reflect that the BOE approved the following:

> Be it resolved by the Board of Education of the Township of Brick that pursuant to NJSA 18A:56-53.2b, and because of a dire need for filling the vacant position of superintended of schools, approval is hereby granted to extend the appointment of Melindo A. Persi, as Interim Superintendent of the Brick Township Public Schools, in keeping with the previously approved contract, (emphasis added) through November 20, 2008. (J-E).

The resolution passed 5-0, with one abstention. (J-E). Board members Woska and DeLuca voted in the affirmative. (J-E). Woska testified he assumed they were voting to extend the per diem oral contract to November 20, 2008. Board counsel Sahradnik was present. (J-E). De Luca testified that the BOE wanted to "lock in" petitioner for as long as possible. The members did not realize, until advised by Sahradnik, of the statutory limitation. By letter dated October 18, 2007, Business Administrator/Board Secretary James Edwards forwarded the "resolution concerning the extension of the appointment of Melindo A. Persi as Interim Superintendent of Schools for the second year concluding on November 20, 2008," to Ocean County Superintendent of Schools, Dr. Bruce Greenfield, for his approval. (J-F). Edwards testified that he added the following certification to the BOE minutes because he needed to send the agenda to the county superintendent. (J-E):

> To whom it may concern: This is to certify that the items on this page were approved by the Brick Township Board of Education at their Public Meeting held on October 18, 2007.

This certification was signed by Edwards as Board Secretary. (J-E). Greenfield approved the extension by letter dated October 24, 2007. (J-G).

Petitioner testified that prior to early 2008; no one approached him to express concern with regard to his contract. At that point, Assistant Board Secretary Barnes advised him that BOE member Woska requested a copy of his contract; he directed her to provide it to him.

By e-mail dated March 17, 2008, Business Administrator/Board Secretary James Edwards inquired of Board counsel Sahradnik whether specific items petitioner submitted for reimbursement were covered by his contract or whether state Department of Education Circular 08-13-OMB X.A. superseded the contractual language. (J-H). Sahradnik's associate, Lauren Dooley, Esq., responded by e-mail dated April 8, 2008, and approved some of the reimbursements pursuant to the contract with petitioner. (J-H). Edwards testified that he first requested to see the contract in January 2008 because petitioner wanted to attend a seminar in Florida and due to the then recently enacted accountability regulations; the BOE was required to approve the expenditure

prior to the seminar. Human Resources did not have a copy so he asked petitioner for a copy. Petitioner initially provided an unsigned copy which Edwards did not accept. Petitioner provided a copy of the signed contract with one week thereafter.

BOE election occurred on April 15, 2008. Petitioner testified that some BOE members that had voted favorably on his appointment as Interim Superintendent lost their respective bids to remain on the BOE. Petitioner testified that after the election, he knew "the handwriting was on the wall" as he sensed a different attitude towards him from some of the BOE members.

Assistant Board Secretary Marie Barnes testified that she was contacted by Business Administrator Edwards at 8:00 a.m. on April 25, 2008, to send petitioner a Rice notice. Barnes testified Edwards told her that Woska directed him to send out the notice. Edwards testified that Woska told him the "BOE" wanted to discuss petitioner's employment at its next meeting. Woska testified that he did not discuss sending the Rice notice with anyone prior to directing Edwards to send it. Schools were not in session as it was Spring break. Barnes testified that she had spoken to petitioner prior to Spring break and he advised he would be in Florida with his family. By letter of same date, Barnes forwarded petitioner the Rice notice advising that his employment would be discussed at the BOE meeting of April 29, 2008. (J-I). The notice was mailed to petitioner at the Florida address he provided, as reflected on the agreement, (J-P), by certified mail (J-Q), and at an address in Lavallette located by Barnes that proved to be erroneous. (J-I). Petitioner conceded that the Florida address is his primary residence. Barnes also called and spoke with petitioner to advise of the notice. She read it to him over the telephone. While petitioner initially did not recall receiving this call from Barnes, he later testified that he did speak with Barnes wherein she advised she was sending the Rice notice and she apologized for it.

Petitioner testified that prior to the meeting, he cleaned out his office. He also had dinner with Edwards and Assistant Superintendent Hrycenko and referred to it as "the Last Supper." Edwards testified that earlier that day petitioner told him that the BOE may terminate his employment at the meeting.

On April 29, 2008, after the BOE election, the BOE held its reorganization meeting. (J-AA). Board counsel, Sahradnik was replaced by Mr. Montenegro's firm. (J-AA). The BOE adjourned to closed session to discuss petitioner's employment. (J-AA). The BOE returned to open session and board member Woska made a motion to terminate petitioner's employment as Interim Superintendent effective April 30, 2008. (J-AA). The motion passed 5-2. (J-AA, J-J). Petitioner commented that he was to be provided 30 days' written notice and that BOE member Woska replied that he had no contract. Petitioner testified that he never received written notice to terminate his contract. He was paid through April 29, 2008.

Petitioner testified that pursuant to the contract, because he never was provided 30 days' written notice, he should be paid through the expiration of the agreement; approximately $92,000. [5] He also seeks reimbursement of counsel fees. Petitioner concedes; however, that he performed no services on behalf of the Brick Township school district after his termination through what would have been the expiration of the contract, November 20, 2008. And in October 2008, he commenced per diem employment at the Belleville school district at a rate of $750 per day.

Edwards testified that based upon the BOE's counterclaim that no contract existed and that petitioner was to be paid $700 per diem of days worked, the respondent is entitled to reimbursement from petitioner in the amount of $17,804.66 as he only worked 179 days and he was erroneously paid an additional $951.00 in expenses. (J-L). With regard to the expenses, Edwards testified that since petitioner had no contract, he was not entitled to expenses.

Having had an opportunity to assess the credibility of the witnesses and having considered the evidence in this case, I make the following **FINDINGS OF FACT.**

All of the competent, credible and reliable evidence supports a finding that petitioner Melindo Persi had a valid, enforceable contract with the Brick Township Board

[5] This amount was amended by petitioner's counsel written summation of June 7, 2010, thusly; a total of $106,615.68, reflecting 33 weeks from May 1, 2008, through November 20, 2008, @ $3,230.76 weekly. (Petitioner's written summation contained a typographical error indicating the time period as May 1, 2007 through November 20, 2007.) See reply brief submitted on behalf of petitioner.

of Education as reflected in J-C, as amended, appointing him as Interim Superintendent through November 20, 2008. This is reflected by the credible testimony of petitioner, Brian DeLuca and Marie Barnes as well as the documents in evidence. Additionally, Business Administrator/Board Secretary James Edwards certified to the meeting minutes of October 18, 2007, which he forwarded to County Superintendent Dr. Bruce Greenfield, to approve the contract extension through November 20, 2008. Those meeting minutes specifically referenced the extension "in keeping with the previously approved contract." (J-E). With regard to the initial contract appointing petitioner to the position of Interim Superintendent, petitioner's testimony that contracts are routinely handled as "walk through" items was corroborated by former BOE President DeLuca and Assistant Board Secretary Marie Barnes. DeLuca even indicated this was common practice for Brick BOE. Woska's testimony that all they voted on was an oral agreement providing for paying petitioner $700 on a per diem basis is belied by his "no" vote. His explanation that he voted no because he did not want petitioner appointed to the position of Interim Superintendent is not credible. The video of the public portion of the June 19, 2007, meeting in which BOE President DeLuca paraphrased what the Board was voting upon in relation to the Petitioner is not dispositive. This was also corroborated by Barnes who testified that contracts are not read in open session. DeLuca credibly testified that prior Board counsel Sahradnik negotiated the contract with Persi and advised the BOE as to the effect of the language. DeLuca credibly testified that Sahradnik directed that the last sentence of provision #7 as reflected in the draft agreement provided by petitioner (R-1) be deleted as reflected in the final executed document of August 10, 2007. (J-C). This was corroborated by Barnes who typed the agreement, made sure it was signed, and that a copy was placed in Human Resources files. The existence of this executed contract, rather than the verbal per diem agreement suggested by the respondent, is further corroborated by the exchange of e-mails from Business Administrator/Board Secretary Edwards with Sahradnik's office in which Edwards asks counsel whether specific items submitted by Persi as expenses were reimbursable pursuant to the contract or whether the accountability regulations superseded the contract. It is clear from the evidence in this case that the BOE was advised by legal counsel throughout the negotiation process with the petitioner and that advice, which furthered the intention of the majority of the Board, resulted in the execution of a valid contract with the petitioner. I also find that the BOE

employees, in furtherance of the valid contract, paid petitioner appropriately as to salary and expenses.

I further find that the contract specifically indicated that the executed agreement reflects the entirety of the contract. The contract did not provide for any separation pay short of that which would be encompassed in a 30 day written notice. While petitioner contends he has never been provided written notification pursuant to the express contractual terms, I find that the Rice notice, followed by petitioner's presence at the reorganization meeting of April 29, 2008, in which he was terminated, constructively acted as reasonable notification that his contract was terminated.

I further find that the Rice notice was forwarded to the petitioner to the Florida address he provided to the BOE as his primary residence and as reflected in the executed contract. Petitioner was also telephonically advised by Assistant Board Secretary Barnes of the Rice notice as she read the full contents of the form letter to him. Based upon petitioner's actions wherein he remarked to Business Administrator/Board Secretary Edwards that his employment was probably being terminated and he cleared out his office in anticipation thereof, petitioner was put on notice of his possible termination and knew his rights pursuant to the Rice requirements.

LEGAL ANALYSIS

Petitioner asserts that exhibit J-C entitled "Interim Superintendent Agreement" is a valid, binding contract because the contents of the document were presented during an open meeting as well as acted upon and authorized by the Brick Township BOE at a public meeting in compliance with all procedural regulations under the Open Meetings Act and pursuant to N.J.S.A. 18A:66-53.2(b). Petitioner further contends that the BOE failed to comply with the terms of the Open Meeting Act relating to his termination at the April 29, 2008 public meeting, thereby violating the Rice requirements in advance of the public meeting. Petitioner contends the Board has failed to comply with the contractual requirement to provide him 30 days written notice and therefore, petitioner asserts he is owed the remainder due on his contract; $106,615.08 in addition to attorney's fees. Petitioner contends the Rice notice was improper because it was issued by Woska at

his own volition; he was not the BOE President and he did not consult any BOE members or counsel.

Respondent contends that exhibit J-C was never presented to, acted upon, or authorized by the Brick Township BOE. Respondent relies upon the video of the June 19, 2007, public action by the Board wherein Board President DeLuca in his motion merely indicated that the Board was seeking to appoint petitioner as Interim Superintendent at $700 per day. Thus, respondent contends no written notice was due to petitioner and petitioner was paid erroneously for days not worked and for expenses he was not entitled to as a per diem appointment. Thus, the respondent contends it is entitled to reimbursement of $17,804.66.

Based upon my findings as noted above, I conclude the petitioner is entitled to 30 days reimbursement reflecting the month of May 2008, in the amount of $21,000.00. While petitioner contends that he is entitled to the remainder of his contract reflecting payment from May 1, 2008, through November 20, 2008, the executed contract did not provide for that relief as it merely called for 30 days' written notice. The failure to provide written notice in the manner prescribed by the petitioner would elevate form over substance. The Rice notice, albeit unusual, was received by the petitioner. He acted in furtherance of it and appeared at the meeting and failed to exercise his right to have his employment discussed during the public session at his own volition. He understood that right. The intent of Rice was otherwise satisfied; petitioner received reasonable advance notice to enable him to make a decision on whether he desired a public discussion and to prepare and present an appropriate request in writing. Rice v Union County Regional High School, 155 N.J. Super. 64, 73 (App. Div. 1977). There was no violation of the Open Public Meetings Act. N.J.S.A. 10:4-6, et seq. At most, separation pay would also be limited to the remaining salary due under the contract, or three months pay for each year remaining, whichever is the lesser. N.J.A.C. 6A:23A-3.1(e)(4), New Jersey Association of School Administrators v. Schundler, 414 N.J. Super. 530 (App. Div. 2010). However, by terms of the executed contract, only 30 days is reimbursable.

DECISION AND ORDER

Based upon the foregoing, I **ORDER** respondent pay petitioner the amount of $21,000.00 and respondent's counterclaim 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.

January 10, 2011

DATE

Ana C. Viscomi

ANA C. VISCOMI, ALJ

Date Received at Agency: 1-10-11

JAN 11 2011

Date Mailed to Parties:

/lam

APPENDIX

WITNESSES

For Petitioner:

Melindo Persi
Brian DeLuca

For Respondent:
Marie Barnes
James Edwards
Daniel Woska

EXHIBITS

Joint:

JA - June 11, 2007 Brick Board of Education closed session Minutes

JB - June 19, 2007 BOE Minutes

JC - August 10, 2007 Interim Superintendent Agreement Contract executed by Persi and BOE President DeLuca

JD - October 12, 2007 Barnes e-mail to Board counsel re: Persi's employment

JE - October 18, 2007 BOE agenda, certified by Board Administrator Jim Edwards

JF - October 19, 2007 Edwards letter to Dr. Greenfield asking for approval of Persi's extension of employment

JG - October 24, 2007 Greenfield letter to Edwards approving extension of appointment

JH - March 17, 2008 Edwards e mail to Sahradnik citing to Persi's contract

JI - April 25, 2008 Rice notice to Persi

JK – April 30, 2008 BOE meeting agenda and closed session minutes

JM – May 12, 2009 Edwards supplemental answers to interrogatories

JN – Persi Consultant Agreement with Brick BOE for November 20, 2006 to June 30, 2007

JO – Vouchers submitted by Persi but denied for reimbursement

JP – Rice notice sent to Florida

JQ – certified mail return receipt from Florida

JR – June 14, 2007 Seidenberger Resignation

JS – Business Administrator job description

JT – Persi's answers to interrogatories

JU – June 19, 2007 minutes appointing Dwyer

JV – November 15, 2006 minutes

JW – June 19, 2007 Brick BOE closed session meeting minutes

JX – July 12, 2007 BOE special meeting agenda and minutes

JY – July 16, 2007 employment agreement for the school public administrator/board secretary

JZ – October 18, 2007 Brick BOE closed session and regular public meeting minutes

JAA – April 29, 2008 BOE annual reorganization and regular public meeting minutes

JBB – July 12, 2007 video

For Respondent:

R1 – Unsigned Persi BA contract

R2 – June 19, 2007 video

68-11

AGENCY DKT. NO. 7-1/11

SUZANNE K. SCHIAVONI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
J. THOMAS MORTON AND BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA, SUSSEX COUNTY,	:	DECISION
RESPONDENTS.	:	

The submissions by the above-captioned parties and the letter from petitioner dated February 14, 2011, withdrawing the petition in the instant case, have been reviewed. The Commissioner hereby approves the withdrawal of the controversy and the matter is accordingly closed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2|28|11

Date of Mailing: 2|28|11

SUZANNE K. SCHIAVONI, : BEFORE THE COMMISSIONER

PETITIONER

V. OF EDUCATION OF NEW JERSEY

J. THOMAS MORTON

RESPONDENT

RECEIVED BY C&D
2011 FEB 15 A 7:15
CONTROVERSIES & DISPUTES

Re: Schiavoni v. Morton
Agency DKT. No. 7-1/11
Petitioner Response to legal arguments in respondent's motion

With regret, petitioner does respectfully request to withdraw the petition. Following is the legal reasoning:

A controversy or dispute under the State school laws arises when one party alleges that another has violated State statutes governing education (Title 18A). Such a violation occurred when the Sparta Board of Education failed to uphold NJSA 18A:17A-3 et seq, and specifically within the understanding of that law, NJSA 18A:12-24. 1(j), which states that the school board or advisory board refers all complaints to the CSA and acts on the complaints at public meetings only after failure of an administrative solution. In addition, according to Sparta Board of Education policy 0120, the Board functions only when in session, and at no time, while in session, did the Board of Education as a body, take action on petitioner's complaint. There are no recorded votes in any minutes regarding the complaint. No votes were taken authorizing action, such as a dismissal of the complaint or the writing of a letter by the Assistant Superintendent. No individual board member could have or should have authorized action. (NJSA 18A:12-24 1(d).) This failure to properly deal with petitioner's complaint was contrary to law and an indication of bad faith on the part of the board. Therefore the Commissioner has jurisdiction in this matter. When a board of education, including a superintendent, fails to uphold the statues, the Commissioner can act to ensure that statutory and regulatory requirements are followed.

The issue of accountability is a more difficult one. Citizens, including petitioner, have a right to truthful and accurate information as presented by

the Board of Education. This is essential if the school system is to have the support of the public. Petitioner believes that acting with integrity and truthfulness is at the heart of the legal system, but this particular situation is a legal Catch 22. When a board of education, including a superintendent, fails to interpret faithfully the information citizens need to be properly informed, support for the system falters. However, there does not appear to be a specific law that compels public officials to speak truthfully and accurately nor does the Commissioner seem to have authority to determine accountability on the part of public officials. On balance, therefore, regardless of any violation of statute, petitioner appears to be without options and affirms the withdrawal of the petition.

Date 2-14-11

Susan K Schiavoni
Signature of petitioner

44 Cherokee Ct
Sparta, NJ 07871
973-726-0394

RECEIVED BY C&D
2011 FEB 15 A 7:15
CONTROVERSIES & DISPUTES

SUZANNE K. SCHIAVONI, : BEFORE THE COMMISSIONER

PETITIONER

V. OF EDUCATION OF NEW JERSEY

J. THOMAS MORTON

RESPONDENT

Re: Schiavoni v. Morton
Agency DKT. No. 7-1/11
Petitioner Response to legal arguments in respondent's motion

With regret, petitioner does respectfully request to withdraw the petition. Following is the legal reasoning:

A controversy or dispute under the State school laws arises when one party alleges that another has violated State statutes governing education (Title 18A). Such a violation occurred when the Sparta Board of Education failed to uphold NJSA 18A:17A-3 et seq, and specifically within the understanding of that law, NJSA 18A:12-24. 1(j), which states that the school board or advisory board refers all complaints to the CSA and acts on the complaints at public meetings only after failure of an administrative solution. In addition, according to Sparta Board of Education policy 0120, the Board functions only when in session, and at no time, while in session, did the Board of Education as a body, take action on petitioner's complaint. There are no recorded votes in any minutes regarding the complaint. No votes were taken authorizing action, such as a dismissal of the complaint or the writing of a letter by the Assistant Superintendent. No individual board member could have or should have authorized action. (NJSA 18A:12-24 1(d).) This failure to properly deal with petitioner's complaint was contrary to law and an indication of bad faith on the part of the board. Therefore the Commissioner has jurisdiction in this matter. When a board of education, including a superintendent, fails to uphold the statues, the Commissioner can act to ensure that statutory and regulatory requirements are followed.

The issue of accountability is a more difficult one. Citizens, including petitioner, have a right to truthful and accurate information as presented by

the Board of Education. This is essential if the school system is to have th e support of the public. Petitioner believes that acting with integrity and truthfulness is at the heart of the legal system, but this particular situation s a legal Catch 22. When a board of education, including a superintendent, fails to interpret faithfully the information citizens need to be properly informed, support for the system falters. However, there does not appear t o be a specific law that compels public officials to speak truthfully and accurately nor does the Commissioner seem to have authority to determin accountability on the part of public officials. On balance, therefore, regardless of any violation of statute, petitioner appears to be without options and affirms the withdrawal of the petition.

Date 2-14-11

Susan K Schiavoni
Signature of petitioner

44 Cherokee Ct
Sparta, NJ 07871
973-726-0394

69-11

#69-11R

OAL DKT. NO. EDU 8421-09
(EDU 2892-03 on remand)
AGENCY DKT. NO. 153-5/03

CHARLOTTE KLUMB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT,	:	DECISION
RESPONDENT.	:	

Subsequent to the Commissioner's approval of the parties' proposed settlement agreement in this matter on July 23, 2010 (see Attachment A), the parties advised that the Attorney General's Office expressed certain reservations about the lack of specificity contained within the agreement relating to the satisfaction of a disability retirement lien affecting Ms. Klumb and the Teacher's Pension and Annuity Fund (TPAF). The parties have now collectively revised their Settlement Agreement to address these concerns to the Attorney General Office's satisfaction and now request that the Commissioner approve their settlement agreement as amended.[1]

Upon his full review, the Commissioner approves the parties' revised Settlement Agreement. This matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/25/11

Date of Mailing: 2/28/11

[1] Submitted materials confirm that the Manalapan-Englishtown Board of Education approved this amended agreement at its December 7, 2010 meeting.

BROWN & CONNELLY, L.L.C.
1127 Highway 35
Ocean, NJ 07712
Attorneys for Respondent
Board of Education of the
Manalapan-Englishtown Regional School District
732-571-0720

CHARLOTTE KLUMB	:	**BEFORE THE COMMISSIONER OF EDUCATION**
Petitioner	:	
v.	:	**OAL DOCKET NO. EDU-08421-2009S**
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT,	:	**ADDENDUM TO STIPULATION OF SETTLEMENT**
Respondent	:	

This matter having come before the Office of Administrative Law upon a remand to the Department of Education by order of the Supreme Court of New Jersey for proceedings consistent with the order of the Supreme Court, and the parties having amicably resolved the matter, it is hereby stipulated and agreed as follows:

WHEREAS, on or about April 29, 2002, petitioner filed a lawsuit against the Board of Education of the Manalapan-Englishtown Regional School District and agents servants and employees of said Board of Education, seeking re-employment after retirement, back-pay and other monetary damages; and

WHEREAS, said matter was transmitted to the New Jersey Department of Education and heard by the Office of Administrative Law and decided by the Commissioner of Education on or about June 16, 2005; and

WHEREAS, in accordance with the decision of the Commissioner of Education, petitioner was re-employed by the respondent Board of Education in or about September 2005, and terminated her employment on or about June 30, 2010; and

WHEREAS, after review by the State Department of Education, the Appellate Division of the Superior Court and the Supreme Court of the State of New Jersey, the matter was returned to the Department of Education for a hearing to resolve the issues relating to back-pay as set forth in the decision of the Supreme Court of New Jersey dated May 11, 2009 and its supplemental order entered July 2, 2009; and

WHEREAS, the remanded matter was transmitted by the Department of Education to the Office of Administrative Law for a hearing; and

WHEREAS, the matter was settled pursuant to the terms and conditions of the Stipulation of Settlement attached hereto, and approved by the Office of Administrative Law, and by the Commissioner of Education on or about January 23, 2010; and

WHEREAS, the funds for the settlement (minus federal, state and local taxes on the entire amount) have been deposited in the trust account of Brown & Connelly, L.L.C., for distribution in

accordance with the terms and conditions of the settlement agreement; and

WHEREAS, in order for the Teacher's Pension and Annuity Fund (TPAF) claims against the funds payable to the petitioner to be resolved between the petitioner and TPAF, the TPAF has required that the settlement agreement state the specific dollar amount, and label such funds as back wages with specific beginning and ending dates; and

WHEREAS, the Stipulation of Settlement referred to above did not contain a specific allocation as required by TPAF, and it is in the interest of the petitioner that there be a specific allocation of the funds in order that the TPAF claim may be resolved;

NOW THEREFORE, the parties agree to amend the Stipulation of Settlement as follows:

1. The settlement amount ($240,000.00) set forth in paragraph 1 of the Stipulation of Settlement shall be allocated as follows:

(A) $210,000.00 is stipulated by the parties to be allocated for back wages for the school years 2002-03, 2003-04, and 2004-05 ($70,000.00 per year); said sums represent back wages allocation based upon salary guide rates of $74,570.00 (2002-03); $76,070.00 (2003-04); and $77,445.00 (2004-05), minus agreed upon mitigation in accordance with the decision of the Supreme Court of New Jersey;

(B) the remaining $30,000.00 is allocated for and in consideration of waiver of all back-pay claims for any preceding years, all claims for future employment and future pay, all claims for benefits of whatsoever kind or nature, and in consideration of the continued waiver and release of all claims against the District of whatsoever kind or nature as set forth in the paragraph 7 of the Stipulation of Settlement previously agreed upon and approved by the Commissioner of Education.

2. The parties understand and agree that the aforesaid allocation is for the purpose of concluding the matter in order that the claims against the petitioner by TPAF may be resolved, so that payment may be made to the petitioner out of the funds that are being held in trust for her benefit. This allocation represents a compromise of the claims of the parties, and neither party, by making this allocation, makes any admissions with respect to any of the claims or defenses in the matter.

3. This Supplement to the Settlement Agreement is contingent upon final approval by the Commissioner of Education. The proceeds of the settlement amount set forth in paragraph 1 shall not be released by the law firm of Brown & Connelly, L.L.C. until such time as there is final approval by the Commissioner of Education.

4. The parties understand and agree that the proceeds of the settlement shall not be released from the trust account of

the law firm of Brown & Connelly, L.L.C. until such time as there is a full and final release by the TPAF of any and all claims it may have with respect to the proceeds of this settlement. The parties understand and recognize that the Respondent Board of Education does not take any position with respect to the amount of the settlement proceeds to be paid to TPAF, and that said amount shall be negotiated between petitioner herein and TPAF, or resolved through the ordinary administrative and legal procedures for the resolution of said claims. No amount of the settlement proceeds shall be released to TPAF without the approval of petitioner herein or order of a court of competent jurisdiction.

5. Upon resolution of the claims of TPAF and upon approval of this Supplement to the Settlement Agreement by the Commissioner of Education, a portion of the proceeds of this settlement shall be paid to TPAF in the amount determined by agreement of petitioner and TPAF or by other legal proceedings; and the remainder shall be paid to petitioner herein by payment to the trust account of Richard Swarbrick, Esquire, attorney for the petitioner.

6. The Stipulation of Settlement and this Supplemental Agreement represent the full agreement between the parties, and no other promises or agreements have been made by or to either party. All parties represent that they have consulted with counsel prior to the execution of this agreement and that they are satisfied with the representation of counsel, and all parties

agree that they are responsible for payment of their own attorneys' fees. This agreement is being made voluntarily and with full understanding of the terms and conditions herein. To the extent this Supplement to the Stipulation of Settlement is inconsistent with the Stipulation of Settlement approved by the Commissioner, this Supplement to the Stipulation of Settlement shall prevail, upon approval by the Commissioner of Education. Otherwise, the terms and conditions of the Stipulation of Settlement shall remain in full force and effect.

7. This agreement is expressly subject to approval of the Board of Education of the Manalapan-Englishtown Regional School District. In the event the aforesaid approval is not obtained, then this agreement shall be null and void.

Dated: 12/31/10

Charlotte Klumb
CHARLOTTE KLUMB

Dated: 12/9/10

John J. Marciante Jr. Ph.D.
JOHN J. MARCIANTE, JR., Ph.D.
Superintendent, Manalapan-Englishtown Regional School District

BROWN & CONNELLY, L.L.C.
Attorneys for Respondent,
Board of Education of the Manalapan-Englishtown Regional School District

Dated: 1/6/11

By: SANFORD D. BROWN, ESQUIRE

Dated: 1/3/11

Richard Swarbrick

RICHARD SWARBRICK, ESQUIRE
Attorney for petitioner,
Charlotte Klumb

ATTACHMENT A

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

BRET SCHUNDLER
Commissioner

July 23, 2010

Richard C. Swarbrick, Esq.
301 Overbrook Road
Piscataway, New Jersey 08854

Patricia D. Connelly, Esq.
Brown & Connelly, L.L.C.
1127 Highway 35
Ocean Township, NJ 07712

Dear Parties:

CHARLOTTE KLUMB V. BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY, AGENCY DKT NO. 153-5/03, OAL DKT NO. EDU 8421-09, REMAND EDU NO. 2892-03, COMMISSIONER DECISION NO. 222-10R

We are enclosing a copy of the decision of the Commissioner of Education dated July 23, 2010 in the above-captioned matter. Appeals of Commissioner decisions may be filed with the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36.*

Additionally, please note that, pursuant to *N.J.A.C.* 6A:3-1.14(c), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/pp:o/dec ltr/cklumb-222-10R
Enclosure
c: State Law Library
OAL Library

OAL DKT. NO. EDU 8421-09
(EDU 2892-03 on remand)
AGENCY DKT. NO. 153-5/03

CHARLOTTE KLUMB,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed "Stipulation of 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 and adopts the Initial Decision as the final decision in this case, with the following comment.

The Commissioner notes that paragraphs 1 and 2 prescribe actions that predate the Commissioner's consideration of the settlement terms. The parties are reminded that a settlement of litigation is not binding until the Commissioner approves same.

The foregoing notwithstanding, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have already 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.

COMMISSIONER OF EDUCATION

Date of Decision: 7/23/10

Date of Mailing: 7/23/10

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INIITAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8421-09

AGENCY DKT. NO. 153-5/03

REMAND OF EDU 2892-03

CHARLOTTE KLUMB,

Petitioner,

v.

MANALAPAN-ENGLISHTOWN BOARD OF EDUCATION,

Respondent.

Richard C. Swarbrick, Esq., for petitioner

Patricia D. Connelly, Esq., for respondent (Brown & Connelly, attorneys)

Record Closed: June 10, 2010 Decided: June 14, 2010

BEFORE **BEATRICE S. TYLUTKI**, ALJ t/a:

This matter concerns the determination of the back salary and emoluments due to the petitioner, Charlotte Klumb, pursuant to the final decision of the Commissioner of Education (Commissioner) dated June 16, 2005, and the decision of the State Supreme Court dated May 11, 2009.

The matter was referred to the Office of Administrative Law (OAL) on July 27, 2009 for a hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

PROCEDURAL HISTORY

On December 22, 2004, I rendered an initial decision based on a motion for summary decision, in which I concluded that there were no factual disputes and that the respondent, the Manalapan-Englishtown Board of Education (Board) had the right to deny the petitioner's request that she be rehired to her former teaching position after the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF Board) had determined that her disability had disappeared or substantially diminished. On June 16, 2005, the Commissioner rejected my initial decision and held that the pension statute mandated the rehiring of a formerly disqualified employee and ordered her reinstated as of March 1, 1999, with all appropriate emoluments and back pay. It was noted that March 1, 1999, was the day that the Board interviewed the petitioner for an existing elementary teacher vacancy but that the Board did not rehire her until September 1, 2005.

The State Board of Education (State Board) affirmed the Commissioner's decision on January 4, 2006, and the Appellate Division of the Superior Court (Appellate Division) affirmed the State Board's decision on July 25, 2005. The State Supreme Court on May 11, 2009 affirmed the Appellate Division's decision as to the rehiring of the petitioner but remanded to the Commissioner issues relating to the back salary payment. The period of time in issue as to the back salary issues is between March 1, 1999 and September 1, 2005.

The Commissioner then remanded the back salary issues to the OAL. It is OAL's policy to give a remanded matter to the administrative law judge (ALJ) who had initially handled the case. Consistent with this policy, the matter was reassigned to me.

Richard C. Swarbrick, Esq., on behalf of the petitioner, filed a motion to disqualify me from hearing the remanded matter since I had issued the initial decision in the

original case, had ruled against the petitioner, and other ALJs were available to handle the matter.

As to the motion, I concluded that the petitioner had not shown any legal reason why I should recuse myself and that there was no reason to believe that I could not provide a fair, unbiased and impartial hearing and determination in this matter. On October 29, 2009, I ordered that the petitioner's motion for recusal be denied. Swarbrick filed an appeal with the Director and Chief Administrative Law Judge. On November 24, 2009, Director Laura Sanders issued a final order in which she affirmed my decision.

Both parties filed a number of motions regarding the issue in this matter as well as discovery, and I handled the matters in a number of orders. After there was substantial compliance by the petitioner as to the discovery requests, I had a settlement conference with the parties on April 26, 2010. During the conference, we were able to agree to the outline of a settlement of the matter. The parties had to work out the details of the settlement and have a discussion with a representative of the TPAF Board. I received a written and signed stipulation of settlement on June 10, 2010.

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 settlement terms 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.

June 14, 2010
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ t/a

JUN 15 2010

Date Received at Agency:

JUN 15 2010

Date Mailed to Parties:

/cad

BROWN & CONNELLY, L.L.C.
1127 Highway 35
Ocean, NJ 07712
Phone (732)517-0720
Fax (732)517-0722
Attorneys for Respondent, Board of Education of the
Manalapan-Englishtown Regional School District

CHARLOTTE KLUMB	:	**BEFORE THE COMMISSIONER OF EDUCATION**
Petitioner,	:	**OAL DOCKET NO. EDU-08421-2009S**
v.	:	
BOARD OF EDUCATION OF THE MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT,	:	**STIPULATION OF SETTLEMENT**
Respondent.	:	

This matter having come before the Office of Administrative Law upon a remand to the Department of Education by order of the Supreme Court of New Jersey for proceedings consistent with the order of the Supreme Court, and the parties having amicably resolved the matter, it is hereby stipulated and agreed as follows:

WHEREAS, on or about April 29, 2002, petitioner filed a lawsuit against the Board of Education of the Manalapan-Englishtown Regional School District and agents, servants and employees of said Board of Education, seeking re-employment after retirement, back-pay and other monetary damages; and

WHEREAS, said matter was transmitted to the New Jersey Department of Education and heard by the Office of Administrative Law and decided by the Commissioner of Education on or about June 16, 2005; and

WHEREAS, in accordance with the decision of the Commissioner of Education, petitioner was re-employed by the respondent Board of Education in or about September 2005, and remains an employee in the Manalapan-Englishtown Regional School District; and

WHEREAS, after review by the State Department of Education, the Appellate Division of the Superior Court and the Supreme Court of the State of New Jersey, the matter was returned to the Department of Education for a hearing to resolve the issues relating to back-pay as set forth in the decision of the Supreme Court of New Jersey dated May 11, 2009, and its supplemental order entered July 2, 2009; and

WHEREAS, the remanded matter was transmitted by the Department of Education to the Office of Administrative Law for a hearing; and

WHEREAS, as set forth above, the litigation in this matter

has been lengthy and protracted and further litigation will result in continued extensive time and expense, which is not in the best interest of the parties;

WHEREAS, the matter is ripe for settlement at this time because it will allow petitioner to make plans for retirement at the end of this school year (2009-10), and for the respondent Board of Education to conduct educational planning for the next school year (2010-2011) in a prudent, timely and fiscally responsible manner; and

WHEREAS, the parties desire to resolve any and all claims of petitioner that may have arisen during her employment with the Board of Education in order to finally resolve all claims and put a conclusive end to any and all disputes between the parties; and

WHEREAS, the New Jersey Teacher's Pension and Annuity Fund (hereinafter "TPAF") has certain claims to the proceeds of any back-pay award that may have been made in this proceeding, and resolution of the claims in this matter will enable TPAF to recover funds out of the proceeds of this settlement;

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the parties agree as follows:

1. Within 30 days of the date hereof, the Respondent Board of Education shall issue payment in the amount of TWO HUNDRED FORTY THOUSAND DOLLARS ($240,000.00) minus all federal, state and local withholding taxes on the entire amount, said payment

representing full and final settlement of all claims of the petitioner in this matter. Payment of the aforesaid net amount shall be made payable to the trust account of Brown & Connelly, L.L.C., to be held in trust pending resolution of claims by TPAF and pending final approval by the Commissioner of Education, as set forth below.

2. Petitioner agrees that she shall finally and conclusively end her employment with the Respondent Board of Education on or before July 1, 2010, and hereby waives any and all claims of whatsoever kind or nature to re-employment at any time after July 1, 2010. Said agreement to leave the employ of the respondent Board of Education is final and absolute, and is not contingent upon approval of petitioner's retirement application by the Division of Pensions or resolution of any claims that the Teacher's Pension and Annuity Fund may have against petitioner or against the settlement proceeds, or any other contingencies for release of the funds from the trust account of Brown & Connelly, L.L.C.

3. This settlement agreement is contingent upon approval by the Administrative Law Judge assigned to this matter and upon final approval by the Commissioner of Education. The proceeds of the settlement amount set forth in paragraph 1 shall not be released by the law firm of Brown & Connelly, L.L.C. until such time as there is final approval by the Commissioner of Education.

4. The parties understand and recognize that the TPAF has certain claims against the proceeds of the settlement amount set forth in paragraph 1, for payments that were made to petitioner by TPAF or for payments that petitioner may be required to make as contribution to her retirement from the settlement proceeds. In light of these claims, the parties understand and agree that the proceeds of the settlement shall not be released from the trust account of the law firm of Brown & Connelly, L.L.C. until such time as there is a full and final release by the TPAF of any and all claims it may have with respect to the proceeds of this settlement. The parties understand and recognize that the respondent Board of Education does not take any position with respect to the amount of the settlement proceeds to be paid to TPAF, and that said amount shall be negotiated between petitioner herein and TPAF, or resolved through the ordinary administrative and legal procedures for the resolution of said claims.

5. Upon resolution of the claims of TPAF and upon approval of this settlement agreement by the Commissioner of Education, a portion of the proceeds of this settlement shall be paid to TPAF in the amount determined by agreement of petitioner and TPAF or by other legal proceedings; and the remainder shall be paid to petitioner herein by payment to the trust account of Richard Swarbrick, Esquire, attorney for the petitioner. No amount of the settlement proceeds shall be released to TPAF without the

approval of petitioner herein or order of a court of competent jurisdiction.

6. The parties understand and agree that this settlement represents a compromise of the claims and positions of the parties, and that neither party makes any admission with respect to the claims or defenses of the other party to these proceedings.

7. In consideration of this agreement, petitioner hereby expressly releases and forever discharges the Board of Education of the Manalapan-Englishtown Regional School District and its agents, servants, employees, and Board of Education members, past and present, from and against any and all claims, demands, actions, causes of action, of whatsoever kind or nature, including but not limited to any claim for interest, attorneys' fees, costs or expenses by reason of any act or omission of the Board of Education of the Manalapan-Englishtown Regional School District or any of its agents, servants, employees or Board of Education members, past or present. This release includes, but is not limited to, any claims which have been made, or could have been made, under the education laws of State of New Jersey, Sections 1981 through 1988 of Title 42 of the United States Code, the civil rights acts of the United States of America and the State of New Jersey, the New Jersey Law Against Discrimination, the Americans with Disabilities Act, the Family and Medical Leave

Act and the Family Leave Act, the Workers' Compensation Law of the State of New Jersey, the New Jersey Conscientious Employee Protection Act, the Age Discrimination in Employment Act, and all other laws and statutes relating to civil rights, employment, retirement, pensions and wages, and any action for tort, defamation, infliction of emotional stress, tortious interference with employment or contract, personal injury, breach of contract or other common law action. Petitioner specifically releases all parties named in the complaint filed under Docket No. MON-2190-02, and all claims raised or which could have been raised in that proceeding or the proceedings before the New Jersey Commissioner of Education.

9. Petitioner agrees to hold harmless the law firm of Brown & Connelly, L.L.C. from and against any and all claims by petitioner or any other party to the settlement proceeds to be held in trust by said law firm pending resolution of the claims set forth above.

10. This agreement represents the full agreement between the parties, and no other promises or agreements have been made by or to either party. All parties represent that they have consulted with counsel prior to the execution of this agreement and that they are satisfied with the representation of counsel, and all parties agree that they are responsible for payment of their own attorneys' fees. This agreement is being made

voluntarily and with full understanding of the terms and conditions herein.

11. This agreement is expressly subject to approval of the Board of Education of the Manalapan-Englishtown Regional School District. In the event the aforesaid approval is not obtained, then this agreement shall be null and void.

Dated: 5-20-10

Charlotte Klumb
CHARLOTTE KLUMB

BOARD OF EDUCATION OF THE
MANALAPAN-ENGLISHTOWN REGIONAL
SCHOOL DISTRICT

Dated: 6-8-10

By: John J. Marciante, Ph.D.
JOHN J. MARCIANTE, JR., Ph.D.,
Superintendent

BROWN & CONNELLY, L.L.C.
Attorneys for Respondent,
Board of Education of the
Manalapan-Englishtown Regional
School District

Dated: June 7, 2010

By: Patricia D. Connelly
PATRICIA D. CONNELLY

Dated: 5/26/10

Richard Swarbrick
RICHARD SWARBRICK, ESQUIRE
Attorney for petitioner,
Charlotte Klumb

LAW OFFICES

BROWN & CONNELLY, L.L.C.

SANFORD D. BROWN
E-mail: sbrown@brownconnellylaw.com

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1127 HIGHWAY 35
OCEAN TOWNSHIP, NJ 07712
(732)517-0720
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June 9, 2010

The Honorable Beatrice S. Tylutki, A.L.J.
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, NJ 08625-0049

RE: KLUMB v. MANALAPAN-ENGLISHTOWN REGIONAL SCHOOL DISTRICT
DOCKET NO. EDUOR 08421-2009S

Dear Judge Tylutki:

I am enclosing an original and one copy of Stipulation of Settlement in the above matter for your review and approval. Please return a copy marked "filed" in the self-addressed stamped envelope provided herein.

The settlement was approved by the Board of Education of the Manalapan-Englishtown Regional School District at its meeting on June 8, 2010.

Respectfully yours,

Patricia D. Connelly

PATRICIA D. CONNELLY

PDC/mek
Enclosures

cc: Board of Education of the Manalapan-Englishtown Regional School District
Stephen Hunter, Esquire, with enclosures
Cynthia A. Satter, Esquire
Richard C. Swarbrick, Esquire

71-11

OAL DKT. NO. EDU 8085-10
(EDU 6819-10 ON REMAND)
AGENCY DKT. NO. 135-6/10

SCOTT E. RIXFORD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODLAND PARK, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, the parties' proposed Stipulation of Dismissal of the Petition with Prejudice, 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 their resultant recommended dismissal of this matter as moot and, therefore, adopts the Initial Decision as the final decision in this matter. 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|04|11
Date of Mailing: 3|04|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL WITH PREJUDICE
OAL DKT. NO. EDU 8085-10
AGENCY DKT. NO. 135-6/10
On REMAND
OAL DKT. NO. EDU 6819-10

SCOTT E. RIXFORD,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF WOODLAND PARK, PASSAIC COUNTY,
Respondent.

Lawrence Tosi, Esq., for petitioner

Jeffrey R. Merlino, Esq., for respondent, (Lindabury, McCormick, Estabrook & Cooper, attorneys)

Record Closed: December 15, 2010 Decided: January 13, 2011

BEFORE **JEFFREY A. GERSON,** ALJ:

This matter was transmitted to the Office of Administrative Law August 3, 2010 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 matter was scheduled for hearing on December 16, 2010 but adjourned because the parties agreed to settle the matter. The petitioner withdrew his request for

hearing and a Stipulation of Dismissal with Prejudice was prepared and signed by the parties on December 15, 2010. A copy of the Stipulation of Dismissal is attached hereto and made 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.

Jan 18 11
DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: January 18, 2011

Date Mailed to Parties: JAN 19 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

LINDABURY, McCORMICK, ESTABROOK & COOPER
53 Cardinal Drive
Westfield, New Jersey 07091
(908) 233-6800
Attorneys for Respondent

SCOTT E. RIXFORD,	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	
v.	OAL DKT. NO.: EDUOR 08085-2010N AGENCY DKT. NO.: 135-6/10
BOROUGH OF WOODLAND PARK BOARD OF EDUCATION, PASSAIC COUNTY,	**STIPULATION OF DISMISSAL OF THE PETITION WITH PREJUDICE**
Respondent.	

Petitioner, Scott E. Rixford, and Respondent the Woodland Park Board of Education (the "Board") (collectively, the "Parties"), having reached an amicable resolution of the above-captioned matter, hereby stipulate as follows:

The Board, having reappointed the seven (7) individuals as full-time aides for the 2010-11 school year upon the recommendation of the Acting Superintendent, has remedied the issues in dispute and renders the Petition in this matter moot.

The Petition submitted by the Petitioner in this matter is hereby voluntarily withdrawn with prejudice and without costs to any party.

STIPULATED AND AGREED UPON BY:

LAW OFFICES OF LAWRENCE TOSI

Dated: 12/11/10 By: _____
LAWRENCE TOSI, ESQ.
Attorneys for Petitioner
24-06 Broadway, Suite 4
Fair Lawn, New Jersey 07410

LINDABURY, MCCORMICK, ESTABROOK AND COOPER

Dated: 12/15/10 BY: _____

JEFFREY MERLINO, ESQ.
53 Cardinal Drive
Westfield, New Jersey 07091-2369
Attorneys For Respondent

The Parties having stipulated above to the voluntarily dismissal of the Petition with prejudice, and good cause having been shown, it is hereby ORDERED as follows:

1. The Agreement is hereby approved;

2. The Petition is hereby dismissed with prejudice and without costs to any party.

Dated: _____

Hon. Jeffrey Gerson, A.L.J.

72-11

JOSEPH CUMBERLAND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
LEAP ACADEMY UNIVERSITY CHARTER SCHOOL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a non-tenured high school English teacher employed by respondent LEAP Academy University Charter School (LEAP), appealed the termination of his employment contract. In lieu of an answer, LEAP filed a motion to dismiss, contending that the petition was not timely filed.

The ALJ found, *inter alia*, that: procedurally, respondent's motion to dismiss must be considered a motion for summary decision; the material facts are undisputed, and the matter is ripe for summary judgment; the threshold issue is whether the petition was timely filed; petitioner received written notice on November 20, 2009 that he was being terminated in accordance with the sixty-day notice provision of his employment contract, and that is the date from which the ninety-day period within which to file an appeal began to run; petitioner's appeal was not filed until July 29, 2010. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition as untimely.

The Commissioner concurred with the ALJ 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.

March 4. 2011

OAL DKT. NO. EDU 9886-10
AGENCY DKT. NO. 191-7/10

JOSEPH CUMBERLAND,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
LEAP ACADEMY UNIVERSITY CHARTER SCHOOL, CAMDEN COUNTY,	:	DECISION
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 concurs with the Administrative Law Judge that the LEAP Academy University Charter School is entitled to summary decision. Accordingly, the petition of appeal is dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|04|11
Date of Mailing: 3|04|11

* 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 9886-10
AGENCY DKT. NO. 191-7/10

JOSEPH CUMBERLAND,
Petitioner,
v.
LEAP ACADEMY UNIVERSITY CHARTER SCHOOL, CAMDEN COUNTY,
Respondent.

Cristal Holmes-Bowie, Esq., for petitioner (Michael Armstrong & Associates, attorneys)

Nicholas J. Repici, Esq., for respondent (Genova, Burns & Giantomasi, attorneys)

Record Closed: December 1, 2010 Decided: January 20, 2011

BEFORE **ISRAEL D. DUBIN, ALJ**:

Joseph Cumberland appeals from the termination of his employment contract by the LEAP Academy University Charter School. Cumberland filed his petition of appeal with the Commissioner of Education on July 29, 2010; LEAP filed a motion to dismiss in

lieu of answer on August 30, 2010;[1] and the matter was transmitted to the Office of Administrative Law where it was filed on September 14, 2010, for hearing as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A pre-hearing conference was held on November 3, 2010, at which time it was agreed that Cumberland would be permitted to file his brief in opposition to the motion by November 24, 2010, and LEAP would file its rebuttal by December 1, 2010. The record was closed upon receipt of LEAP's brief on December 1, 2010.

The material facts are undisputed and I therefore find them as follows. Joseph Cumberland was employed as a high school English teacher by the LEAP Academy University Charter School, Inc., on June 3, 2009. Among other things, his contract provided that it could be "TERMINATED BY EITHER PARTY GIVING TO THE OTHER SIXTY (60) DAY'S WRITTEN NOTICE OF INTENTION TO TERMINATE THE SAME." Employment Contract, Exhibit P-1 (emphasis in original).

By letter dated November 20, 2009, Exhibit P-2, Cumberland was notified by LEAP's Chief Learning Officer, Dr. Deanna Burney, that his employment was being terminated in accordance with the sixty-day notice provision of his employment contract, "subject to ratification by the Board of Trustees at its January Board Meeting." Cumberland was also advised that while he would be paid for the next sixty days, he was not to report to work or otherwise enter LEAP Academy's building or grounds. His personal belongings were delivered to his home by messenger on December 22, 2009.

By letter dated January 20, 2010, and delivered on January 21, 2010, Exhibit P-3, Cumberland was notified that the LEAP Board of Trustees would be hearing "recommendations regarding [his] employment at LEAP Academy University Charter School in a private meeting" the evening of January 21, 2010. He was also advised of his right to request that the matter be heard during the public session of the meeting, but that any such request had to be submitted to Dr. Burney by no later than 4:00 p.m. the day of the meeting. Cumberland did not attend the meeting.

[1] LEAP requested and was granted a two-week extension of time in which to file its answer by the Department of Education, Bureau of Controversies and Disputes.

By letter dated January 22, 2010, Exhibit P-4, Cumberland's counsel, Ms. Holmes-Bowie, notified LEAP's counsel, Mr. Repici, that the "Rice Notice" her client received had been "insufficient" because it had been delivered less than twenty-four hours before the scheduled meeting and therefore constituted "less than reasonable notice of the board's intention to discuss his employment, as required." Ms. Holmes-Bowie also asserted that the Board had "erred" in not sending her, as Cumberland's attorney, notice of the date, time, and place of the meeting. Consequently, she requested that the Board "rescind any action that it may have taken with respect to his employment, continuing his employment until he is properly and timely noticed and given the opportunity to be heard by the Board of trustees." Ibid.

By letter dated February 24, 2010, Exhibit P-5, Mr. Repici denied the request and advised Ms. Holmes-Bowie that the Board had not gone into executive session during the meeting on January 21, 2010. He also advised her that Cumberland's employment had not been discussed during the public session. Rather, the termination of his contract:

> was simply listed as an agenda item and voted on by the Board.[2] Thus, since no discussions of Mr. Cumberland's employment occurred in executive sessions (*sic*) or otherwise, there was no obligation on the part of LEAP Academy to send Mr. Cumberland a Rice notice. Thus, the insufficiency of notice to Mr. Cumberland (a point contested by LEAP Academy) is a moot issue and the Board will not rescind its action.
>
> [Ibid.]

The Board has filed a motion to dismiss the petition, which is not recognized by the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1, et seq. However, "[w]hen required in individual cases, the judge at any time of the proceeding may convert any form of proceeding into another, whether more or less formal or whether in-person or by telephone." N.J.A.C. 1:1-14.6(d). The administrative law judge may also render any ruling or order necessary to decide any matter presented which is within the jurisdiction of the transmitting agency. N.J.A.C. 1:1-14.6(h). Additionally, "[t]he judge may take such

other actions as are necessary for the proper, expeditious and fair conduct of the hearing or other proceeding, development of the record and rendering of a decision." N.J.A.C. 1:1-14.6(p). Consequently, this matter is hereby converted to a motion for summary decision and shall be governed by N.J.A.C. 1:1-12.5.

N.J.A.C. 1:1-12.5(b) provides that a motion for summary decision may be granted where "there is no genuine issue as to any material fact challenged and . . . the moving party is entitled to prevail as a matter of law." In deciding whether a genuine issue of material fact exists, a court 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." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Where the evidence "is so one-sided that one party must prevail as a matter of law," summary decision should be granted. Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 214 (1986)). In the present matter, the parties agree on the essential facts as presented by Cumberland. I therefore conclude that there is no genuine issue of material fact and that the matter is appropriate for summary decision.

The threshold issue in this matter is whether Cumberland's petition alleging that the Board improperly terminated his contract was timely filed. The regulations promulgated by the Department of Education provide that a petitioner may challenge the action of a board of education by filing a petition conforming to the requirements of N.J.A.C. 6A:3-1.3. In addition to serving the petition upon the respondent, the petition must be filed:

> 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)]

[2] See Minutes, Board of Trustees Meeting, January 21, 2010, Board's Exhibit A.

Although this provision does not address the type of notice that may be considered "adequate notice" under the rule, the New Jersey Supreme Court has held that "adequate 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 Township Bd. of Educ., 131 N.J. 572, 597 (1993). Therefore, the ninety-day limitation period for commencing an action begins to run when the "plaintiff learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action." Id. at 587, citing Burd v. New Jersey Tel. Co., 76 N.J. 284, 291 (1978). Stated differently, the ninety-day period begins when a petitioner learns of facts that would enable him or her to file a timely claim. Kaprow v. Berkeley Township Bd. of Educ., supra, 131 N.J. at 588-89.

It is now well-established that a non-tenured teaching staff member:

> whose cause of action arises out of the nonrenewal of his or her employment must—unless facts necessary to make a claim are unknown at the time—file a petition within 90 days of the *notice of nonrenewal*, and that the running of the regulatory limitations period is not tolled by the possibility that the petitioner might ultimately persuade the board to offer reemployment through statutory and regulatory mechanisms provided for this purpose.[3]
>
> [Lygate v. Board of Educ. of the Borough of Carteret, Middlesex County, OAL Dkt. No. EDU 2660-07, Commissioner's Decision, (March 18, 2008) <http://www.nj.gov/njded/legal> (emphasis in original).]

Therefore, a petitioner must file his petition within ninety days of the notice of his nonrenewal, not within ninety days of his exhaustion of the other avenues and mechanisms he might have employed in seeking the renewal of his employment. Wise v. Board of Educ. of the City of Trenton, Mercer County, OAL Dkt. No. 160-00,

[3] See N.J.S.A. 18A:27-4.1b (nontenured employee who is not recommended for renewal by the chief school administrator *shall be deemed nonrenewed*, but shall be permitted to make an informal appearance before the board of education to convince it to offer reemployment). See also N.J.A.C. 6A:32-4.6(c) (nontenured teaching staff member whose contract has not been renewed may request an informal, non-adversarial appearance before the board "to permit the staff member to convince the members of the board to offer reemployment.").

Commissioner's Decision No. 301-00 (September 11, 2000), aff'd, State Board of Education (January 3, 2001) <http://lawlibrary.rutgers.edu/oal/search.html>. In other words, the cause of action arises upon notice that the employment will not be renewed, not upon ratification of the nonrenewal or, as in this case, termination, by the board of education. Lygate v. Board of Education of the Borough of Carteret, Middlesex County, supra.; Charapova v. Board of Education of the Township of Edison, Middlesex County, OAL Dkt. No. 6722-05, State Board of Education Decision No. 30-06 (August 1, 2007), reversing Commissioner's Decision No. 224-06 (June 20, 2006).

The ninety-day requirement has been strictly followed and applied almost without exception. Regardless of whether the board has complied with statutory, administrative or regulatory requirements, the petitioner is required to file the petition no later than ninety days after the receipt of notice of the decision. Portee v. Newark Board of Educ., 94 N.J.A.R. 2d (EDU) 381, 383.

The ninety-day rule may only be relaxed under exceptional circumstances or if there is a compelling reason to do so. Kaprow v. Berkeley Township Bd. of Educ., supra, 131 N.J. at 590; DeMaio v. New Providence Bd. of Educ., 96 N.J.A.R. 2d (EDU) 449, 453. As a general rule, relaxation will not be permitted unless strict adherence would be inappropriate, unnecessary or where injustice would occur. Ibid. In this regard it has been held that the ninety-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." Bogart v. Board of Educ. of the City of East Orange, OAL Dkt. No. 6245-82 (January 26, 1983), aff'd by Commissioner (March 14, 1983).

Here, on November 20, 2009, Cumberland received written notice that he was being terminated in accordance with the sixty-day notice provision of his employment contract, and it was then that the ninety-day period within which to file his appeal began to run. Consequently, his appeal should have been filed by no later than February 18, 2010. Even if one were to accept his argument that, pursuant to the notice of termination, the decision to terminate was subject to ratification by the Board, which occurred on January 21, 2010, the petition would have to have been filed by April 21,

2010. And even if one were to accept his additional argument that he did not receive actual notice of his termination until his counsel received Mr. Repici's letter of February 24, 2010, the petition would have to have been filed by no later than May 25, 2010, to be considered timely.

Although Cumberland has argued that the limitations period may be extended or relaxed where there is an issue of fundamental public interest beyond that of the parties themselves, he has failed to articulate any such issue. The fact is that he did not file his petition of appeal until July 29, 2010—well after the ninety-day period in which to do so had expired. Therefore, without regard to the merits of his case, I find that the petition of appeal was not filed within ninety days of the notice(s) of his termination and conclude that the petition should 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.

January 20, 2011

DATE

ISRAEL D. DUBIN, ALJ

Date Received at Agency: 1-20-11

Date Mailed to Parties: JAN 28 2011

IDD/lam

LIST OF EXHIBITS

For petitioner:

P-1 Employment Contract

P-2 Burney Letter of November 20, 2009

P-3 Board Chair's Letter of January 20, 2010

P-4 Holmes-Bowie Letter of January 22, 2010

P-5 Repici Letter of February 24, 2010

(These exhibits are attached to Cumberland's petition)

For respondent:

A Minutes of Board of Trustees Meeting of January 21, 2010

73-11

OAL DKT. NO. EDU 11997-09
AGENCY DKT. NO. 250-9/09

PASSAIC COUNTY TECHNICAL AND VOCATIONAL EDUCATION ASSOCIATION,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.		DECISION
BOARD OF EDUCATION OF THE PASSAIC COUNTY TECHNICAL INSTITUTE, PASSAIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed "Memorandum of Agreement" (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 observes that the record does not include a copy of a Board resolution approving the Agreement and authorizing Diana C. Lobosco, District Superintendent, to sign the Agreement on respondent's behalf. Nor, in the alternative, is the Agreement signed by the Board's attorney, who is the Board's duly authorized representative in litigation. Also absent from the record are bylaws indicating who has the authority to enter into contracts on behalf of petitioner. Nor, in the alternative, is the Agreement signed by petitioner's attorney.

Consequently, the Acting 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 attorneys of record or to include as exhibits 1) the Board resolution approving the

Agreement and 2) the by-law or other authority allowing Enrico Cannataro to execute the Agreement for petitioner.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|04|11

Date of Mailing: 3|04|11

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

GERALD SEAN KEEGAN
ATTORNEY AT LAW

948 McBride Avenue
West Paterson, New Jersey 07424
GERALDKEEGANLAW@OPTONLINE.NET

Telephone (973) 256-3700
Telefax (973) 256-6851
Legal Assistant: Nancy Villegas

January 14, 2011

Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Attention: LaToya / Judge JoAnn LaSala Candido

RE: PASSAIC COUNTY TECHNICAL AND VOCATIONAL EDUCATION ASSOC. VS. PASSAIC COUNTY TECHNICAL INSTITUTE BOARD OF EDUCATION

Dear LaToya / Judge JoAnn LaSala Candido:

Enclosed please find copy of the fully executed Memorandum of Agreement with regard to the above matter.

Thank you for your attention.

Respectfully submitted,

GERALD SEAN KEEGAN

GSK/nv
Encs.
Via fax to 973-648-6124 and regular mail
Cc: Sandford R.Oxfeld, Esq.

MEMORANDUM OF AGREEMENT BETWEEN THE PASSAIC COUNTY TECHNICAL AND VOCAITONAL EDUCATION ASSOCIATION AND THE PASSAIC COUNTY TECHNICAL INSTITUTE BOARD OF EDUCATION

2011 JAN 20 A 9:35

WHEREAS a Petition of Appeal was filed with the Commissioner of Education on behalf of the Passaic County Technical and Vocational Education Association (hereinafter the Education Association) on or about September 22, 2009, alleging that the Passaic County Technical Institute Board of Education (hereinafter, the Board) violated the school laws in certain regards and,

WHEREAS, the parties are desirous of amicably resolving this matter with neither Party admitting that its position prevailed or was wrong,

NOW, THEREFORE, BE IT RESOVED, that the Education Association and the Board hereby agree to the following:

1. Commencing July 2010, whenever a teaching member of any Academic Department covered in the position represented by the Education Association retires or leaves for any reason, rather than the Board hiring a replacement, the leaving teacher's scheduled classes will be distributed as a sixth teaching period to other teachers within the same department based on seniority, appropriate certification, and the willingness to take a sixth teaching period assignment. If there becomes a point in time when all teaching staff members have six periods or no one remaining desires a sixth period, then it is understood and agreed that any member who leaves through attrition may be replaced.

2. This Agreement terminates with the termination date of the current Collective Negotiations Agreement between the parties.

3. Upon the execution of the Memorandum of Agreement, the Educational Association will withdraw the within Petition of Appeal from the Office of Administrative Law.

Passaic County Technical &
Vocational Education Association

Enrico Cannataro, President

Passaic County Technical Institute
Board of Education

Diana C. Lobosco, Superintendent

DATE: June 9, 2010

MEMORANDUM OF AGREEMENT BETWEEN THE PASSAIC COUNTY TECHNICAL AND VOCAITONAL EDUCATION ASSOCIATION AND THE PASSAIC COUNTY TECHNICAL INSTITUTE BOARD OF EDUCATION

WHEREAS a Petition of Appeal was filed with the Commissioner of Education on behalf of the Passaic County Technical and Vocational Education Association (hereinafter the Education Association) on or about September 22, 2009, alleging that the Passaic County Technical Institute Board of Education (hereinafter, the Board) violated the school laws in certain regards and,

WHEREAS, the parties are desirous of amicably resolving this matter with neither Party admitting that its position prevailed or was wrong,

NOW, THEREFORE, BE IT RESOVED, that the Education Association and the Board hereby agree to the following:

1. Commencing July 2010, whenever a teaching member of any Academic Department covered in the position represented by the Education Association retires or leaves for any reason, rather than the Board hiring a replacement, the leaving teacher's scheduled classes will be distributed as a sixth teaching period to other teachers within the same department based on seniority, appropriate certification, and the willingness to take a sixth teaching period assignment. If there becomes a point in time when all teaching staff members have six periods or no one remaining desires a sixth period, then it is understood and agreed that any member who leaves through attrition may be replaced.

2. This Agreement terminates with the termination date of the current Collective Negotiations Agreement between the parties.

3. Upon the execution of the Memorandum of Agreement, the Educational Association will withdraw the within Petition of Appeal from the Office of Administrative Law.

Passaic County Technical & Vocational Education Association

Enrico Cannataro, President

Passaic County Technical Institute Board of Education

Diana C. Lobosco, Superintendent

DATE: June 7, 2010

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, 2011
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: 1-28-11

Date Mailed to Parties: JAN 28 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.EDU 11997-09

Agency Docket No.250-9/09

PASSAIC COUNTY TECHNICAL AND VOCATIONAL EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE PASSAIC COUNTY TECHNICAL INSTITUTE, PASSAIC COUNTY,

Respondent.

Sanford R. Oxfeld, Esq. on behalf of petitioner

Gerald Sean Keegan, Esq., on behalf of respondent

Record Closed: January 20, 2011 Decided: January 24, 2010

BEFORE **JOANN LaSALA CANDIDO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 2, 2009 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 for November 20, 2009 at which time a settlement conference was scheduled. Several status conferences were conducted wherein the parties engaged in extensive settlement

discussions. During the pendency of the May 12, 2010 conference the parties advised that the matter was resolved and that the settlement agreement would follow within the next few weeks thereafter. After several inquiries to both counsel, on January 20, 2011 respondent's counsel submitted a letter stating that this matter was resolved on June 9, 2010, however, he simply forgot to forward the settlement. The 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, 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.

74-11

S.G.S. on behalf of minor child S.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her daughter, S.S., was not eligible for a free public education in the Northern Valley Regional High School district during the 2009-2010 school year. The respondent contended that S.S. was domiciled with her father in Cresskill during the time period in question. Petitioner contends that S.S. was domiciled with her in Closter – a town within the Northern Valley district – and spent limited time in Cresskill with her father, from whom petitioner is separated.

The ALJ found that: the weight of the evidence indicates that petitioner and her daughter were domiciled within the school district, in an apartment in Closter, during the 2009-2010 school year; petitioner and S.S. then moved into a home in Demarest – another town within the district – in June 2010; and the occasional presence of S.S. at the Cresskill home of her father does not amount to residency at that address. Accordingly, the ALJ ordered that the respondent's determination that S.S. was not domiciled in the Northern Valley Regional High School district for the 2009-2010 school year be reversed; and further ruled that the respondent Board is not entitled to tuition reimbursement from petitioner.

Upon a full and independent review, the Commissioner concurred with 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.

March 4, 2011

OAL DKT. NO. EDU 12412-09
AGENCY DKT. NO. 345-11/09

S.G.S. on behalf of minor child S.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision have been reviewed. Respondent submitted exceptions which reiterate the arguments it presented in its post-hearing brief – which arguments are unpersuasive in light of the record as a whole. Accordingly, and for the following reasons, the Initial Decision is adopted as the final decision in this matter.

In this controversy, petitioner challenges respondent's determination that during the 2009-2010 school year, her minor child, S.S., was ineligible to receive a public education in the Northern Valley Regional High School District. In the Commissioner's view, the facts support the conclusions that 1) petitioner provided sufficient evidence of her own residency in respondent's district during the 2009-2010 school year, 2) petitioner provided evidence that her minor child, S.S., lived with her in the district during the 2009-2010 school year, and

3) respondent presented insufficient evidence to support its position that S.S. lived outside the district with her father during the 2009-2010 school year.[1]

Accordingly, the petition is granted. To the extent that the third affirmative defense in respondent's answer – in which respondent stated that it would seek tuition reimbursement – can be regarded as a counterclaim, that counterclaim is denied.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|04|11

Date of Mailing: 3|04|11

[1] The testimony of respondent's investigator – upon which respondent's case primarily relies – was not thorough. He did not keep accurate records of his reconnaissance. He could not provide specific dates, times, or the exact number of occasions that he observed each of the addresses given to him, and he provided testimony – such as the date of his first encounter with S.S.'s father at the out-of-district home – which was discrepant with certain correspondence between himself and school administrators. Further, assuming *arguendo* that respondent's investigator – who admittedly spent no more than 21 hours over the course of nine months on the instant case – saw S.S. with her father on the occasions described in his testimony, it would still not rebut the *prima facie* case presented by petitioner that S.S. was domiciled with her mother, S.G.S., in an apartment in respondent's district for all but a few days of the 2009-2010 school year.

[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 12412-09
AGENCY DKT. NO. 345-11/09

S.G.S. ON BEHALF OF S.G.,
Petitioners,
v.
NORTHERN VALLEY REGIONAL
HIGH SCHOOL BOARD OF EDUCATION,
Respondent.

Robert T. Tessaro, Esq., for petitioners

James L. Plosia, Jr., Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: December 14, 2010 Decided: January 27, 2011

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

During the 2008/2009 school year (SY), petitioner, S.G.S., her husband J.S., and their daughter, S.S., resided together at 15 Churchill Street in Cresskill, New Jersey. S.S. attended Northern Valley Regional High School (Northern Valley) even though she

did not reside in the school district. Petitioner was required to pay tuition for S.S. to attend Northern Valley.

Petitioner submitted an application and payment for S.S. to return to Northern Valley for the 2009/2010 SY. However, prior to the first day of the new school year S.S.'s parents changed their minds about Northern Valley and enrolled S.S. in Cresskill High School. A student-transfer card and withdrawal-consent form was completed on September 1, 2009, and S.S. started the 2009/2010 SY at Cresskill High School.

On September 3, 2009, S.S. left Cresskill High and returned to Northern Valley with the consent of the vice principal and guidance counselor. Petitioner explained to the Northern Valley administrators that S.S. would be more comfortable at Northern Valley. On September 4, 2009, J.S., S.S.'s father, received a telephone call from the Northern Valley vice principal that informed the family that S.S. could not be re-admitted as a tuition student because the school could not meet her needs. S.S. had been attending collaborative classes. On September 7, 2009, J.S. sent an e-mail to the vice principal and guidance counselor that informed Northern Valley that the family found a house in-district and would be moving to Closter on Thursday of the same week. A registration form dated September 8, 2009, was completed listing S.S.'s new address as 120 High Street, Closter. Closter is included in the Northern Valley School District.

The Cresskill property, 15 Churchill Street, was placed on the market during the summer of 2009; a Contract For Sale with a provision for a sixty-day closing from completion of attorney review; and a requirement to vacate the premises within thirty-days was signed in August 2009. The purchase and sale was not completed and the Contract was voided. Prior to the voiding of the Contract For Sale, petitioner and her husband found an apartment unit in Closter and signed a one-year lease that commenced on September 7, 2009.

On November 5, 2009, the chief school administrator for Northern Valley wrote to petitioner to advise that the school district had determined that S.S. was ineligible to

attend the high school because she was not living in the school district. The letter also informed petitioner that a tuition assessment at the rate of $81.98 for each day S.S. was in attendance could be imposed. In June 2010, a sale of the Cresskill property occurred with another purchaser. During July 2010, and after the closing on the Cresskill house, S.G.S. purchased a house, in her name only, at 42 Stelfox Street, Demarest, New Jersey. Demarest is also included in the Northern Valley School District. Petitioner challenges the determination of the school district.

PROCEDURAL HISTORY

The Department of Education Bureau of Controversies and Disputes transmitted this case to the Office of Administrative Law (OAL) on December 22, 2009, 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. Hearings were to commence on February 18, 2010, and continue and conclude in April 2010. Respondent's counsel was required to appear for oral arguments before the Third Circuit Court of Appeals in April 2010. Taking into consideration the time required for the Third Circuit matter, the onset of school recess, pre-planned vacation schedules, and the OAL Case Calendar, the completion of testimony was delayed until August 18, 2010. Thereafter, respondent's counsel proposed the submission of post-hearing briefs with petitioner's counsel's consent. A briefing schedule was finalized once the parties received transcripts. The record was closed on December 14, 2010, upon receipt of all briefs and reply briefs by the undersigned.

ISSUE

Was petitioner S.G.S. and her daughter S.S. residents of the Northern Valley Regional High School District during the 2009/2010 school year? If residency is not established, what is the amount of the tuition reimbursement due from petitioner to respondent?

SUMMARY OF TESTIMONY

Louis D' Arminio is a licensed private investigator in the State of New Jersey and is the residency officer for Northern Valley Regional High School. He has conducted approximately one hundred investigations of which fifty percent of the families were cleared. In September 2009, he was provided with an address in Cresskill and in Closter to investigate the residency of S.S.

The investigator testified,

> I went to both the Cresskill and Closter properties on several occasions, typically on mornings, evenings, and weekends, from early September until September 23, 2009, before finally meeting with J.S., who is S.S.'s father, at the Cresskill property.[i] During the conversation J.S. told me that S.S. was not feeling well, was sick and in bed upstairs. J.S. never made mention of the High Street address in Closter during the September meeting.[ii]
>
> I was never provided pictures of either S.G.S. or her daughter and did not know what they looked like. I saw S.S. on two occasions at the Cresskill address. Prior to June 1, 2010, on the first occasion, both her father and mother were present. On the second occasion, on June 1, 2010, I saw S.S. leave the Cresskill property with her father who drove her to school. I also went several times, perhaps half a dozen or more, between September 23rd and October 25, 2009, to the Closter address and I did not make any observations or have any contact with S.G.S., S.S. or her father. I was able to ascertain from the mail boxes that two families were living at the Closter address one of whom was S.G. I was not aware that S.G. was the mother of S.S. and I was not aware that she sometimes uses her maiden name, S.G.

On cross-examination, the investigator said he went to Closter apartment on three or four occasions, but never saw anyone. He went to the Cresskill home about six times and saw no sign of anyone being home; there were no cars in the driveway. He acknowledged that no days, dates, or hours had been recorded for his reports or forms.

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[i] The investigator testified that he first met J.S. in early October 2009, but his October 6, 2009, email indicates that he met J.S. on Wednesday September 23, 2009. (See Exhibit R-14.)

ii It is noted that the investigator's email pertaining to the September 23 meeting indicates that J.S. discussed the Closter property in detail. (See Exhibit R-14.)

Raymond Jacobus, assistant superintendent for business and board secretary at Northern Valley Regional High School testified that a notice was provided to the family about the tuition rate of $81.98 per diem that would be assessed if S.S. was determined by the Commissioner to be ineligible.

Jacobus stated the student tuition for the district is consistent with the provisions for Calculation of Tuition, as set forth in, N.J.A.C. 6A:22-6.3(a) and N.J.A.C. 6A:22-4.2(b). He also testified that the district is seeking additional money above the standard rate because S.S. had an IEP and was classified eligible for special education. The 2009/2010 SY annual rate for special education students is $24,000. Jacobus said he did not know if a letter was sent to petitioner regarding an added rate, or different rate, for special education students. The usual-educational process for special education students is to have them placed at another school with a special education curriculum. In this case, S.S. had an IEP with a prescribed educational program.

S.G.S., petitioner, testified that on September 14, 2009, D. Storicks Moving Company transported belongings and furniture from the family's Cresskill home to petitioner's Closter apartment on the first floor of a two-family house. Petitioner said,

> My daughter and I moved to Closter and my husband continued residing in the Cresskill home. I leased the apartment with the expectation that the Cresskill home would be sold by the end of October. I was having on-going marital problems and expected to separate and purchase my own place when the Cresskill house was sold.

Petitioner explained that the procedures taken to settle in the Closter apartment included the signing of a one-year house lease commencing on September 7, 2009 (a copy of the Lease was provided); changing of auto driver's license address (copy of license, showing date of issuance September 9, 2009, was provided); establishing gas service (copies of the PSE&G monthly statements for September 2009 through January 2010 was provided); establishing electric service (copies of Orange and Rockland Electric bill statements for September 2009 through January 2010 was provided); establishing water service (copies of the United Water Company statements for

October 2009 and January 2010 was provided); setting-up Cablevision (copies of the December 2009 and January 2010 bill was provided); changing of address for bank account (copies of Lakeland Bank Checking Account Statements for October 2009 through January 2010 was provided); and acquiring Renter's Insurance (copy of the application and binder, effective November 13, 2009, was provided).

Petitioner testified that the Cresskill home was sold in June 2010 and closed on June 24. Shortly thereafter petitioner moved from the Closter apartment and purchased a home, in her name alone, in Demarest, New Jersey. Petitioner, her daughter, her mother, and a housekeeper reside in the Demarest home and petitioner's husband moved into the Closter apartment. Petitioner produced an Affidavit of Title and a Deed both dated July 13, 2010, for the Demarest property she purchased. She signed a Certificate of Residency to attest ownership and occupancy, including the fact that her husband does not reside with her.

In regard to the living arrangements for petitioner's daughter, petitioner testified, "My husband and I agreed that my daughter would live with me and she would see her father whenever she and he wanted and she would stay on occasion at the Cresskill address. My daughter stayed with me three to seven days per week." On cross-examination, petitioner explained that her mother lived in Florida until recently and petitioner and petitioner's daughter would visit petitioner's mother in Florida during vacation time. Petitioner said she never met respondent's investigator.

On cross-examination petitioner responded,

> A couple of days before school started in September 2009, my husband and I thought about S.S. not returning to Northern Valley, but going to Cresskill or Old Tappan. She did not have an IEP on June 30, 2009, at the end of the school year at Northern Valley. We had gotten a private IEP for S.S. and provided her with tutors. She was taking collaborative classes with two certified teachers, one is an EDS teacher. In September 2009, S.S. was classified as eligible for special education. We did know that Northern Valley did not take special education students as tuition students.

FINDINGS OF FACT

Based on the law, the credible testimonial and documentary evidence, I **FIND** the following as **FACTS** in this matter:

1. During the 2008/2009 SY petitioner, S.G.S., her husband J.S., and their daughter, S.S., resided together at 15 Churchill Street in Cresskill, New Jersey;

2. The town of Cresskill, New Jersey, is not in the Northern Valley School District;

3. S.S. attended Northern Valley Regional High School during the 2008/2009 SY as a tuition student;

4. Petitioner planned to have S.S. attend school at Northern Valley again for the 2009/2010 SY and to that extent submitted an application and payment for S.S. to return to Northern Valley;

5. Prior to the first day of the new school year S.S.'s parents reversed the decision about Northern Valley and enrolled S.S. in Cresskill High School. Student-transfer and withdrawal documents were completed on September 1, 2009, and S.S. was in class at Cresskill High School on the first day of school;

6. On September 3, 2009, petitioner withdrew S.S. from Cresskill and returned her to Northern Valley with the consent of the vice principal and guidance counselor. Petitioner explained to administrators that S.S. would be more comfortable at Northern Valley;

7. On September 4, 2009, J.S., S.S.'s father, received a telephone call from the Northern Valley vice principal that advised that S.S. could not be re-admitted as a tuition student because the school could not meet her special education needs;

8. S.S. did not have an IEP at the close of the 2008/2009 SY at Northern Valley. Petitioner obtained a private IEP for S.S. and equipped her with two certified teachers who tutored her; one teacher was a special education teacher. In September 2009 S.S. was classified as eligible for special education classification. Northern Valley placed S.S. in collaborative classes;

9. On September 7, 2009, J.S. sent an e-mail to the vice principal and guidance counselor that informed Northern Valley that the family found a house in the district and would be moving to Closter on Thursday September 10. During the week of September 7 petitioner transported personal items to the Closter apartment. On September 14, 2009, D. Storicks Moving Company moved heavy furnishings and items belonging to petitioner and her daughter into the Closter apartment;

10. The Cresskill property, 15 Churchill Street, had been placed on the market during the summer of 2009 and a Contract For Sale was signed in August 2009. The Contract was renegotiated in September 2009, but ultimately was voided;

11. In anticipation of a sale of the Cresskill property in October 2009, petitioner signed a one-year lease commencing on September 7, 2009, for the apartment in Closter;

12. Only petitioner and her daughter moved into the Closter apartment. J.S. continued to reside in the Cresskill home;

13. On September 8, 2009, Northern Valley filed a registration form that listed S.S.'s new address as 120 High Street, Closter. The town of Closter, New Jersey is included in the Northern Valley School District;

14. On November 5, 2009, the chief school administrator for Northern Valley advised petitioner that S.S. was ineligible to attend the high school because she was not domiciled in the school district. The letter included a possible tuition assessment

rate of $81.98 if S.S. was ineligible;

15. In June 2010 the Cresskill property was sold. In June petitioner purchased a house, in her name only, at 42 Stelfox Street, Demarest, New Jersey. Demarest is included in the Northern Valley School District. Since June 2010 petitioner and her daughter have resided in Demarest, New Jersey;

16. Petitioner's proofs of residency in Closter are a signed one-year house lease commencing on September 7, 2009, an auto driver's license issued on September 9, 2009, showing the Closter address, copies of the PSE&G monthly statements for September 2009 through January 2010 for the Closter, copies of Orange and Rockland Electric Bills Statements for September 2009 through January 2010 for Closter, copies of the United Water Company statements for October 2009 and January 2010 for Closter, Cablevision bills for December 2009 and January 2010 for Closter, copies of Lakeland Bank Checking Account Statements for October 2009 through January 2010 with the Closter address, and Renter's Insurance effective November 13, 2009, with the Closter address;

17. Petitioner's proofs of residency in Demarest are an Affidavit of Title and a Deed both dated July 13, 2010, for the Demarest property she purchased, and a Certificate of Residency to attest ownership and occupancy, including the fact that her husband does not reside with her;

18. Commencing in September 2009, petitioner's daughter lived with petitioner in Closter for three to seven days each week depending on a). when the daughter wanted to visit her father, b). when the father wanted to see his daughter, c). when the mother and daughter were visiting Florida, and d). when the mother and daughter were on vacation. Commencing in June 2010 petitioner's daughter moved with her mother to a house in Demarest;

19. The investigator went to Closter apartment on three or four occasions and never saw anyone. He went to the Cresskill home on six occasions and saw no sign of

anyone being home, there were no cars in the driveway;

20. On September 23, 2009, the investigator found J.S. at the Cresskill home and spoke with him. S.S. was at the Cresskill home on Wednesday September 23 and she was ill and in bed upstairs while the investigator and J.S. conversed;

21. J.S. spoke to the investigator about the High Street apartment in Closter and said some furnishings had already been taken to the rental unit;

22. The investigator provided reports to Northern Valley that he had met with J.S. in September 2009 at the Cresskill home, that he saw S.S. with her mother and father at the Cresskill home on one occasion prior to June 1 and that on June 1, 2010, he saw S.S. leave the Cresskill property with her father who drove her to school;

23. The investigator saw names on the mail boxes of the Closter two-family house. One name was S.G., the mother of S.S. The investigator was unaware that petitioner used her maiden name, S.G., at times;

24. The investigator was never provided pictures of either S.G.S. or her daughter and did not know what they looked like;

25. The investigator did not record days, dates, or hours for his investigative reports.

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;
>
> and
>
> 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, 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 indicates that petitioner and her daughter were domiciled in Closter, New Jersey, during the 2009/2010 SY. There was never a time after petitioner moved from the Cresskill home on September 14, 2009, that respondent witnessed her and her daughters occupancy again in the Cresskill home. The presence of the mother, father, and daughter on one occasion outside of the Cresskil home and the one occasion on which S.S. stayed overnight with her father during an illness does not amount to residency in the Cresskill home. Therefore, on September 14, 2009, petitioner and her daughter established a permanent residence in Closter, New Jersey, until she purchased a home in Demarest, New Jersey in June 2010. The Closter apartment and the Demarest house are in the Northern Valley Regional High School District.

I also **CONCLUDE** that respondent's rebuttal of petitioners' evidence of being domiciled with her daughter, initially in the Borough of Closter, from September 2009 through July 2010, and thereafter in Demarest from July 2010 to the present, is not supported by the testimony and documentation. The fact that petitioner and respondent did not possible other witnesses has no impact on the other evidence that was presented and the final outcome of the case.

I finally **CONCLUDE** that since September 2009 petitioner has remained a resident of Closter and Demarest, New Jersey, and thus has been domiciled in the Northern Valley School District and therefore entitled to have her daughter enrolled at the Northern Valley Regional High School, without responsibility for tuition reimbursement.

ORDER

It is **ORDERED** that the determination of the Northern Valley Regional High School Board of Education that S.S. was not domiciled in the school district for the 2009/2010 SY shall be **REVERSED**.

It is further **ORDERED** that the Northern Valley Regional High School Board of Education shall be not be entitled to tuition reimbursement from petitioner 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 (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.

January 27, 2011 — Sandra Ann Robinson

DATE — **SANDRA ANN ROBINSON**, ALJ

Date Received at Agency: January 27, 2011 db

Date Mailed to Parties: January 27, 2011 db

Lr/db

APPENDIX

WITNESSES

For Petitioners:

S.G.S., petitioner

For Respondent:

Louis D' Arminio, Investigator

Raymond Jacobus, assistant superintendent for business and board secretary Northern Valley Regional High School

EXHIBITS

For Petitioners:

P-I House Lease for 120 High Street Closter, New Jersey, September 7, 2009, to August 31, 2010

P-2 Photographs of 120 High Street, Closter interior (no date)

P-3 PSE&G bills, September 2009 through January 2010

P-4 Orange & Rockland Electric bills, September 2009 through January 2010

P-5 United Water bills, October 2009 and January 2010

P-6 Cablevision, December 8, 2009 to January 7, 2010

P-7 Lakeland Bank Statements, October 2009 through January 2010

P-8 State Farm Insurance renter's binder, effective November 13, 2009

P-9 N.J. Driver's License, issued to petitioner, September 9, 2009

P-10 Bill for D. Storicks Moving, Inc., move date September 14, 2009

P-11 Letter Klein from Shapiro – Purchasers Contract Review Letter, dated August 3, 2009

P-12 Deed to petitioner for 42 Stelfox Street, Demarest, dated July 13, 2010

P-13 Affidavit of Title by petitioner for 42 Stelfox Street, dated July 13, 2010

P-14 Certificate of Residency for 42 Stelfox Street, by petitioner, dated June 29, 2010

For Respondent:

R-1 Petition of Appeal to Commissioner of Education, dated November 20, 2009 with attachment respondent's letter to petitioner "Ineligibility for Enrollment", dated November 5, 2009

R-2 Answer to Petition of Appeal, dated December 9, 2009

R-3 Letter signed by Dr. Ortega 2009/2010 SY Placement, dated August 31, 2009

R-4 Student Transfer Card Northern Valley to Cresskill in September 2009

R-5 Northern Valley Final Transcript printed September 2009

R-6 Student Withdrawal Form Northern Valley to Cresskill, September 1, 2009

R-7 Student Transfer Card Cresskill to Northern Valley, September 2, 2009

R-8 Email from J.S. (father) to Demarest High School V.P. James Santana, dated September 7, 2009

R-9 House Lease for 120 High Street, Closter, New Jersey, September 7, 2009, to August 31, 2010

R-10 Registration Form for Northern Valley for S.S., dated September 8,2009

R-11 PSE&G Customer of Record Confirmation Letter, dated September 8, 2009

R-12 Petitioner's driver's license change of address, dated September 9, 2009

R-13 Letter from Orange & Rockland Utilities, Inc., to J.S. (father) confirming High Street Services, dated September 9, 2009

R-14 Email from Louis D' Arminio, investigator to Susan Parducci of Northern Valley Regional High School, dated September 23, 2009

R-15 Memo from Northern Valley BOE "Residence Issue," dated October 26, 2009

R-16 Letter from J.S. (father) to Cresskill High School "Withdrawal of Evaluation Consent," dated September 14, 2009

R-17 Email from Louis D' Arminio, investigator to Susan Parducci of Northern Valley Regional High School, dated October 25, 2009

R-18 Email from Louis D' Arminio, investigator to Susan Parducci of Northern Valley Regional High School, dated June 1, 2010

77-11

KEVIN GILBERT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ADELAIDE L. SANFORD CHARTER SCHOOL, ESSEX COUNTY	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, an elementary school teacher formerly employed by respondent Adelaide L. Sanford Charter School, appealed the non-renewal of his employment contract. Petitioner asserted that he was not given written notice of his non-renewal on or before May 15, 2010, as required by *N.J.S.A.* 18A:27-10, and was not provided with written reasons for his non-renewal as required by *N.J.S.A.* 18A:27-3.2.

The ALJ found, *inter alia*, that: petitioner was timely served with notice of his non-renewal; while there appears to have been a technical procedural violation of the statute with respect to him being provided with written reasons for his non-renewal, such violation did not impact petitioner's ability to present his case to the Board at a hearing on July 13, 2010. Petitioner additionally failed to sustain his burden to prove that respondent's decision not to renew his contract was arbitrary, capricious or unreasonable. Accordingly, the ALJ recommended dismissal of the petition.

The Commissioner concurred with the ALJ 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.

March 7, 2011

OAL DKT. NO. EDU 9321-10
AGENCY DKT. NO. 146-7/10

KEVIN GILBERT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ADELAIDE L. SANFORD CHARTER SCHOOL, ESSEX 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 in accordance with *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

Petitioner's exceptions essentially attempt to relitigate his case. In so doing, he 1) challenges the Administrative Law Judge's (ALJ) conclusion that he was served with notice of his non-renewal on or before May 15, 2010 as required by statute, presenting a myriad of reasons he believes demonstrate that the testimony of the individual who claims to have delivered such notice was not believable, and 2) disagrees with the ALJ's discounting of the significance of the school's failure to provide a written statement of reasons for his non-renewal.

Upon full consideration, finding petitioner's exception arguments to be non-persuasive, the Commissioner concurs with the ALJ – for the reasons clearly and thoroughly presented in her decision – that petitioner was timely served with notice of his non-renewal

(Initial Decision at 5-6)[1]; that any procedural violation with respect to the provision of written reasons for petitioner's non-renewal was cured (Initial Decision 6-7); and that petitioner has failed to sustain his burden of establishing that the Charter School's decision not to renew his teaching contract was arbitrary, capricious or unreasonable (Initial Decision at 7-8).

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]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|07|11

Date of Mailing: 3|09|11

[1] It is noted that the ALJ's determination of this issue was solely based upon her assessment of the credibility of the witnesses. The Commissioner's applicable standard of review in this regard is clear and unequivocal – he "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)) A reasoned review of the ALJ's stated reasoning in this regard, with this governing standard in mind, does not provide a basis for concluding that her implicit credibility assessments and resultant fact finding were without the requisite level of support.

[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 09321-10
AGENCY DKT. NO. 146-7/10

KEVIN GILBERT,
Petitioner,
v.
ADELAIDE L. SANFORD CHARTER SCHOOL,
ESSEX COUNTY,
Respondent.

Kevin Gilbert, pro se

Dwayne D. Warren, Esq., for respondent (Schwartz, Simon, Edelstein & Celso, attorneys)

Record Closed: December 22, 2010 Decided: January 19, 2011

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 30, 2010, Kevin Gilbert (petitioner) sent a letter to the Commissioner of Education appealing the non-renewal of his contract by the Adelaide L. Sanford Charter School (respondent). On July 1, 2010, the Department of Education (DOE) sent a letter to Mr. Gilbert asking him to supplement his appeal by providing certain necessary

information. Upon his request, on July 13, 2010, Mr. Gilbert appeared before the Board of the Adelaide L. Sanford Charter School to informally present his case for renewal of his contract. The Board denied his request for renewal of his contract. On August 27, 2010, the matter was forwarded to the Office of Administrative Law, and it was assigned to the undersigned on September 13, 2010. A pre-hearing conference was held on September 20, 2010, and a discovery schedule was arranged. The matter was scheduled to be heard on December 6 and 7, 2010. On November 18, 2010, Mr. Gilbert asked for an adjournment of the dates in order to seek counsel. The matter was rescheduled for December 21 and 22, 2010, and heard on those dates.

ISSUES

a. Was Mr. Gilbert served on or about May 15, 2010, notifying him that his contract was not going to be renewed?

b. Did the Board provide Mr. Gilbert with the reasons why his contract was not being renewed within the time provided?

c. Was the Board's decision not to renew Mr. Gilbert's contract arbitrary and capricious?

FINDINGS OF FACT

The petitioner was employed by the Adelaide L. Sanford Charter School for three years. He was a second-grade teacher for one year, and followed the students into the third grade the next year. This procedure is called looping a student with a teacher. It is supposed that the teacher's having the same students for two years will result in a "bounce" in the students' test scores. This did not occur with Mr. Gilbert's students.

In September of the 2009–2010 school year Mr. Gilbert's class was moved to the conference room. The lighting in the room was poor, the walls were leaking and there was trouble with the heat. Mr. Gilbert asked to have the class moved, but the class was not moved until February 2010.

During his second year of employment, Mr. Gilbert and another teacher worked with students on test preparation for the NJ ASK, which is a State-mandated test that is taken in the third and eighth grades. The first year he volunteered for the position. The second year he was paid for his services.

The students were also required by the school to take the TerraNova examination in May of each year. This test was not required by the State. The TerraNova assessment tests proficiency in the core curriculum. The test is designed to show how effective a teacher has been in the delivery of information and whether the students have been able to retain the information. Teachers were given sample tests and coaches were provided to help students prepare for the TerraNova examination. The results of this test were sent home to the parents. In the 2009–2010 school year Mr. Gilbert's class scored in the 31st percentile on the TerraNova test. The other third-grade class, whose teacher was new to the school, scored in the 51st percentile.

The teachers in the school were aware that if their students did not meet expectations on the standardized test, then their contracts might not be renewed. The Board was very focused on raising the students' standardized test scores. In addition, the school was up for renewal of its charter by the State Department of Education, and scores on standardized tests were an important factor in deciding whether a school would be recertified. In the past, DeLacy Davis, the school leader (principal), had discussed the importance of the standardized test results with Mr. Gilbert.

Mr. Davis signed the letter terminating Mr. Gilbert. However, he did not discuss the termination letter with the petitioner, nor did he handle the delivery of the letter. He had instructed the people who were to deliver the termination letters that delivery should not be done in school, since there had been incidents in the past when teachers had reacted badly to receiving the letters and it caused a disturbance in the school.

Deshon Tutt, who worked for Joseph Simpson Investigators, was assigned to serve termination letters to teachers at the Charter School. On May 15, 2010, at approximately 6:30 p.m., he delivered an envelope to 362 Bath Avenue, Long Branch, N.J., which was Mr. Gilbert's address. Prior to delivering the letter, he had checked with

the landlord to make sure that Mr. Gilbert lived at that address and to find out his apartment number. Mr. Tutt went to the apartment, looked in the window and saw that the air conditioner was on. He knocked on the door, but no one answered. Mr. Tutt stuck the envelope on the side, near the bottom of the door. On May 21, 2010, he sent a memo to the attorney for the Board giving confirmation of service. In July he went back to the apartment to leave another envelope with a notice regarding a Board meeting.

Mr. Gilbert sent an "acceptance letter" to the school dated May 24, 2010, but which was actually delivered on May 18, 2010. In it he stated that since the school had "failed to give me notice of renewal or non-renewal on or before May 15, I hereby accept employment for the 2010–2011 school year. This request is in accordance with state laws (N.J.S.A. 18A:27-11 and 12)."

When Mr. Gilbert appeared at the Donaldson hearing in July 2010, along with his prior evaluations he brought documents that critiqued the TerraNova standardized tests. Mr. Gilbert's prior evaluations were generally positive, though there were a number of areas in which he was told he needed improvement.

LEGAL ARGUMENT AND ANALYSIS

N.J.S.A. 18A:27-10, Written offer or notice to nontenure teachers, states:

> On or before May 15 in each year, each nontenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either
>
> > a. A written offer of a contract for employment from the board of education for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or

> b. A written notice from the chief school administrator that such employment will not be offered.

Mr. Gilbert claimed that he was not given notice of the non-renewal of his contract by May 15, 2010, as required, and that the Charter School had not provided sufficient documentation that the termination letter was delivered in a timely manner. Since the Charter School had not terminated him by May 15, he had the right on May 24, 2010, to send a letter to the school accepting employment for the 2010–2011 school year. Mr. Gilbert also argued that the fact that he was allowed to stay on teaching until the close of the school year, even though the termination letter stated that his services ended on June 1, 2010, was proof that he had not been properly terminated. The Charter School asserted that it had given notice to Mr. Gilbert on May 15, 2010, via personal service, and therefore had conformed to the notice requirement of the statute.

There was testimony from Mr. Tutt that, at the instance of the attorney for the Charter School, he delivered an envelope to Mr. Gilbert's apartment on May 15, 2010. He described the apartment complex in detail, the time when he was at the apartment, and the location where he left the envelope. Mr. Gilbert claims that he did not receive the notice until May 18, 2010, which would have been past the May 15 deadline under the statute. The issue of whether the notice of termination was timely served depends upon the credibility of the testimony of Mr. Tutt and Mr. Gilbert. 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. United States, 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. In this case I found Mr. Tutt to be a credible witness. He had good recollection of the circumstances surrounding the service of the notice. He gave a good physical description of the apartment complex and described where he left the notice. He also described the location where he telephoned the landlord to find out the location of Mr. Gilbert's apartment. He did not appear to have any bias against Mr. Gilbert; it was purely a business matter and he did not appear to have any motive to present a false statement. Therefore, I **FIND** that personal service was attempted on Mr. Gilbert on May 15, 2010, as per the requirements of the statute.

Mr. Gilbert also claimed that he was not given written reasons for his termination. N.J.S.A. 18A:27-3.2 states:

> Any teaching staff member receiving notice that a teaching contract for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such nonemployment which shall be given to the teaching staff member in writing within 30 days after the receipt of such request.

The District did not present proof that it had provided written notice to Mr. Gilbert of its reason for non-renewal. However, it asserted that the reasons were known to the petitioner prior to his appearing at the Donaldson hearing on July 13, 2010. Mr. Gilbert did admit on cross-examination that at the Donaldson hearing he brought information to refute the value of the TerraNova testing. He stated that he brought this along with other information regarding his teaching abilities. The purpose of the written-notice requirement is to allow the teacher to know, prior to the hearing, the basis for his non-renewal. In that way he can prepare his case to be presented to the Board. While it appears that there was a technical procedural violation of the statute, it does not seem that this violation impacted Mr. Gilbert's ability to present his case to the Board. In addition, any procedural deficiencies were cured when the petitioner was given a de novo hearing at the Office of Administrative Law.

The petitioner also asserted that the reasons eventually given for his non-renewal were flimsy and based on an arbitrary standard, i.e., his students' test scores on the TerraNova examination, rather than his overall teaching performance. He pointed to evaluations that he had received from his supervisors, which were generally positive. He also testified that in a competition among seven charter schools, the third graders in his school[1] won second place. He asserted that if a standardized test was to be used to judge his performance, it should have been the NJ ASK test, which is State mandated, rather than the TerraNova test, which is not required by the State. He also claimed that he was not given the proper supplies to help him perform his duties successfully.

The school argued that the school leader's decision to terminate Mr. Gilbert was based on the students' achievement, which was not up to the standards of the school. Mr. Gilbert's students received the lowest score on the TerraNova examination of the two third-grade classes, and the scores were in the 31st percentile. The school pointed out that Mr. Gilbert had not presented any testimony to show that there were deficiencies in the scoring on the TerraNova testing. In addition, he had not shown that the school's decision to use the results of the test as the standard to decide whether to renew his contract was arbitrary or capricious.

The Commissioner has held that "[i]t is by now axiomatic that a board has virtually unlimited discretion in hiring or renewing non-tenured teaching staff members." Adams v. Trenton Bd. of Educ., EDU 8237-07, Comm'r (August 13, 2008) <http://lawlibrary.rutgers.edu/oal/search.shtml>. "[A]bsent 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 teacher who has no tenure and is regarded as undesirable by the local board." Dore v. Bedminster Twp. Bd. of Educ., 185 N.J. Super. 447, 456 (App. Div. 1982). The Supreme Court, in Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974), pointed out that the discretionary authority of the school board was not unlimited. Quoting from the Commissioner's decision in Ruch v. Board of Education of the Greater Egg Harbor Regional High School

[1] He was teaching third grade at the time.

District, Atlantic County, 1968 S.L.D. 7, the Supreme Court stated that "the board's discretionary authority was not unlimited and that its action could be set aside if it was 'arbitrary, unreasonable, capricious or otherwise improper.'" A board could not resort to discriminatory practices or adopt practices "'based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served. 1968 S.L.D. at 10.'" Donaldson, supra, 65 N.J. at 247. The teacher had the burden of proof and bare allegations of arbitrariness were not sufficient.

There was a rational basis for the Charter School's decision not to renew Mr. Gilbert's contract, which was his students' poor performance on the TerraNova examination. While the school could have used another standard, such as supervisors' evaluations, to decide on renewal, I cannot say that the standard used by the Charter School was arbitrary, capricious or unreasonable.

CONCLUSION

Based on the testimony and exhibits presented and having reviewed the legal arguments, I **CONCLUDE** that the Charter School's decision to not renew the petitioner's contract was neither arbitrary, capricious nor unreasonable.

Further, I **CONCLUDE** that the petitioner was served in a timely manner as per the statute, and that any procedural violations of the written-notice requirement were cured.

ORDER

It is therefore **ORDERED** that the petitioner's prayer for relief 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.

1/19/11
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: January 19, 2011

Date Mailed to Parties: JAN 20 2011

db

Debra Bardes
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Petitioner:

Kevin Gilbert
Madeleine Leach
Audra Stith

For Respondent:

DeLacy Davis
Deshon Tutt

EXHIBITS

Joint:

5 Notice of Donaldson Hearing
-Board Agenda, Board's Decision on Donaldson Hearing
-TerraNova results

Petitioner

1 Termination Letter
2 Acceptance of Employment and Request for a Statement of Reason
3 Petition
-Letter to Commissioner
-Donaldson Hearing Request
4 Certified Mail Receipts (identified; not in evidence)

5 Correspondence with attachments from Department of Education pgs. 17–19
-Letter to Commissioner pgs. 20–21
-Page 22 (identified; not in evidence)
-NJ ASK News

-A Rite of Spring (identified; not in evidence)

-Education Law Primer (identified; not in evidence)

-TerraNova Practice (identified; not in evidence)

-The Achievement Network Information (identified; not in evidence)

-Provisional Teacher Program (identified; not in evidence)

-U.S. Secretary of Education Interview (identified; not in evidence)

6 Observations (identified; not in evidence)

Respondent

None

78-11

IN THE MATTER OF J. GARFIELD JACKSON, JR., EAST ORANGE BOARD OF EDUCATION, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

The School Ethics Commission determined that East Orange Board of Education member J. Garfield Jackson violated *N.J.S.A.* 18A:12-24.1(d), (e) and (g) of the Code of Ethics for School Board Members when he took private action in unilaterally proposing to the district administration that he develop a student-level database, without consulting with the Board. After considering the nature of the charge, the Commission recommended that the Commissioner of Education impose a penalty of censure.

Upon a thorough review of the record, the Commissioner found that even if the respondent's action constituted a violation, it was fully supported by the superintendent, was well intentioned and designed to benefit the District. Accordingly, the Commissioner found that respondent's conduct does not warrant the imposition of a penalty.

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 9, 2011

AGENCY DKT. NO. 717-12/10
SEC DKT. NO. C37-07

IN THE MATTER OF J. GARFIELD	:	
JACKSON, EAST ORANGE BOARD	:	COMMISSIONER OF EDUCATION
OF EDUCATION, ESSEX COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission – finding that respondent violated the School Ethics Act for unilaterally proposing to the administration that he develop a student-level database, without consulting the Board – have been reviewed. The Commission's decision was forwarded pursuant to *N.J.S.A.* 18A:12-29 for the Commissioner's final determination on the recommended penalty. Respondent did not file exceptions, nor was the Commission's underlying finding of violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Notwithstanding the Commission's finding of a violation of the School Ethics Act, which the Commissioner is not empowered to review, the Commissioner finds that even if the respondent's development of a student database without the Board's approval was a violation, the respondent's effort to assist the District in correlating curriculum with standardized test results was fully supported by the superintendent, was well intentioned and designed to benefit the District. Accordingly, the Commissioner finds that under the circumstances and based on the considerations existing in this matter, the respondent's conduct does not warrant the imposition of a penalty.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|09|11
Date of Mailing: 3|10|11

* 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.

108-11

OAL DKT. NO. EDU 806-11
AGENCY DKT. NO. 19-1/11

RICHARD J. MASINI, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION ON 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 February 4, 2011 – along with the recommended Order of the Administrative Law Judge have been reviewed.

Upon such review, the Commissioner concurs with the ALJ that petitioner – having chosen to assert his right to be heard on this emergent matter in Superior Court and having proceeded to a decision in that court – is precluded from re-litigating the identical issue at the OAL.

Accordingly, the recommended order of the OAL dismissing petitioner's emergent 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: 3|14|11

Date of Mailing: 3|14|11

* 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 00806-11
AGENCY DKT. NO. 19-1/11

R.J.M., JR.,
Petitioner,
v.
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,
Respondent.

Steven D. Farsiou, Esq., for petitioner (Gebhardt & Kiefer, attorneys)

John B. Comegno II, Esq., for respondent (Comegno Law Group, attorneys)

Record Closed: February 4, 2011 Decided: February 7, 2011

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On January 24, 2011, R.J.M., Jr. (petitioner) filed a due process petition with the Department of Education, Bureau of Controversies and Disputes, seeking expungement from his record of a one-day out-of-school suspension imposed on him;

immediate reinstatement to the school's hockey team; and permanent and immediate removal from his school record of all disciplinary actions relative to the "swirly" incident.[1]

Petitioner also filed a request for emergent relief, seeking immediate return to the varsity hockey team pending resolution of the due process petition.

The Board of Education of the Hunterdon Central Regional High School, County of Hunterdon, (respondent) opposed the request for emergent relief, contending that petitioner failed to satisfy the requirements for such relief. It also alleged that petitioner's due process rights were not violated; that discipline was properly imposed by the school; that the petition should be dismissed; that judgment should be entered in respondent's favor; and that counsel fees and costs should be awarded to it.

The petition and the request for emergent relief for reinstatement to the hockey team were transmitted to the Office of Administrative Law (OAL) on January 27, 2011, for determination as a contested case. The parties were advised that the emergent matter would be heard at the OAL on February 1, 2011.

At a telephone conference on January 31, 2011, petitioner advised that he had also filed a Verified Complaint and Order to Show Cause in the Superior Court, Law Division, Hunterdon County, under Docket No. L-49-11, which was scheduled to be heard on February 2, 2011, before the Honorable Peter A. Buchsbaum, J.S.C. Due to the matter pending in the Superior Court, the petition for emergent relief was rescheduled to the afternoon of February 4, 2011.[2]

On the morning of February 4, 2011, the Order to Show Cause was heard in the Superior Court. That afternoon, the parties appeared at the OAL and provided a copy of the order entered by Judge Buchsbaum denying plaintiff's (petitioner's) request for

[1] The gravamen of the underlying discipline concerned an incident involving three hockey players who gave another teammate a "swirly" [sticking the head in the toilet bowl and flushing] for violating a "team pact" to not cut their hair for a certain number of games, in which it is alleged that the petitioner, although not a direct participant, incited the others to action.

[2] The adjournment in the OAL was due to the postponement of the Order to Show Cause in the Superior Court to the morning of February 4, 2011, and to accommodate counsel's trial calendar.

temporary restraints and immediate reinstatement to the hockey team. The other claims set forth in petitioner's Verified Complaint remain pending in the Superior Court.

At the OAL hearing, respondent argued that the matter should be dismissed because, although the Commissioner of Education has primary jurisdiction, it is not the sole jurisdiction, and having chosen to proceed in Superior Court, petitioner was barred from re-litigating the same issue in the OAL. Petitioner argued that Judge Buchsbaum stated that he did not have primary jurisdiction but that the Commissioner and the OAL did, although the Commissioner's and the OAL's jurisdiction was not sole and exclusive. Therefore, the issue was not precluded from being heard in this forum.[3] Counsel also argued the matter on the merits.

ISSUE

Is this matter properly before the OAL (and the Commissioner of Education) when the Superior Court has chosen to exercise its jurisdiction over the issues presented on emergent relief?

LEGAL DISCUSSION

Generally, an election to pursue either the judicial or the administrative remedy where jurisdiction is concurrent will ordinarily bar subsequent pursuit of the alternate remedy. See Hermann v. Fairleigh Dickenson Univ., 183 N.J. Super. 500 (App. Div.), certif. denied, 91 N.J. (1982); Aldrich v. Manpower Temp. Servs., 277 N.J. Super. 500 (App. Div. 1994), certif. denied, 139 N.J. 442 (1995); M.E.F. v A.B.F., 393 N.J. Super. 543, 557–59 (App. Div.), certif. denied, 192 N.J. 479 (2007). If the agency does not have exclusive jurisdiction, and a party chooses to litigate the matter in court, the party will not be allowed to later assert that the trial court should have transferred the administrative matters to the agency. Allstate Ins. v. Orthopedic Evaluations, 300 N.J. Super. 510, 517–19 (App. Div.), certif. granted and summarily remanded, 151 N.J. 67 (1997).

[3] Due to the emergent nature of the proceedings, no transcript of the Superior Court proceedings was provided.

The recent unpublished decision in P.P., a Minor, by his Parent and Guardian, A.S. v. Board of Education of the Pinelands Regional School District, No. A-2683-09T2 (N.J. App. Div. January 11, 2011) <http://lawlibrary.rutgers.edu/search.shtml>, involved the appeal from school disciplinary action commenced as an action in lieu of prerogative writs in the Superior Court. The Law Division dismissed the first count (alleging that the Board's actions exceeded its authority under governing statutes and regulations) as time-barred, as it was filed more than forty-five days beyond the time limit set forth in R. 4:69-6, and dismissed the second count (alleging a violation of the student's procedural due process rights) without prejudice, and transferred it to the Commissioner of Education, concluding that it had primary jurisdiction. The Commissioner (after a hearing in the OAL) then dismissed Count Two as also being time-barred under the rules. On appeal, the Appellate Division reversed as to the second count and remanded that issue to the Law Division so that the plaintiff's due process claim could be litigated.

The court noted:

> Our Legislature has enacted on extensive scheme for enforcement of our public education laws. N.J.S.A. 18A:6-9 provides that "[t]he commissioner shall have jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws . . . ." Chapter 37 of Title 18A, in turn, provides a comprehensive scheme for the discipline of children attending public schools. This includes a non-exhaustive list of the grounds for suspending or expelling a student, N.J.S.A. 18A:37-2; procedures for discipline involving assaultive conduct by a student, N.J.S.A. 18A:37-2.1 to -2.5; procedures for the immediate suspension of a student, N.J.S.A. 18A:37-4; procedures for disciplinary action against students found with firearms, N.J.S.A. 18A:37-7 to -12; and procedures for disciplinary action based upon "bullying," N.J.S.A. 18A:37-13-15.
>
> The Commissioner, in turn, has adopted numerous regulations implementing the statutory scheme. See N.J.A.C. 6A:16-1.1 to -7.10. . . .
>
> We have noted "our institutional respect for the Department's subject matter interest and for the Commissioner's first-instance jurisdiction 'to hear and

> determine . . . all controversies and disputes arising under the school laws[.]'" Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 424 (App. Div. 2002) (quoting N.J.S.A. 18A:6-9). "The Commissioner's authority is plenary." Ibid. (citing Abbott v. Burke (I), 100 N.J. 269, 301 (1985)).
>
> Rule 4:69-5 provides that "[e]xcept where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted." Had plaintiff properly raised a challenge to his suspension via a timely administrative appeal, the Commissioner's decision would have been directly reviewable by this court based upon a full agency record. R. 2:2-3(a)(2). As plaintiff chose not to do so, we will not now intervene. We affirm the dismissal of Count One of plaintiff's complaint.

The Appellate Division recognized that when a plaintiff chooses to seek relief in the Superior Court, he is bound to that election. In P.P., the result was that the plaintiff's first count was dismissed in its entirety. Rather than having a full hearing with the Commissioner of Education, he had opted for the remedies available in the Superior Court.

As to the second count, alleging due process claims, the Appellate Division remanded the matter to the Law Division, finding that the judge's invocation of primary jurisdiction in the agency and referral to the Commissioner was not inappropriate.

> "Under the doctrine of primary jurisdiction, when enforcement of a claim requires resolution of an issue within the special competence of an administrative agency, a court may defer to a decision of that agency." Campione v. Adamar, Inc., 155 N.J. 245, 263 (1998) (citations omitted). "Thus, it may be appropriate, in order to avoid piecemeal adjudication or duplicative, anomalous or contradictory results, for a court to defer in its jurisdictional exercise, even if only temporarily, while the administrative agency with the primary interest sorts out the issues and the claims." Archway Programs, Inc., supra, 352 N.J. Super. at 425 (citations omitted).
>
> . . . .

> The doctrine of primary jurisdiction is designed to foster "the resolution of technical questions of facts through the agency's specialized expertise, prior to judicial consideration of the legal claims." Unalachtigo Band of the Nanticoke-Lenni Lenape Nation v. State, 375 N.J. Super. 330, 345–46 (App. Div.) (citations and quotations omitted), certif. denied, 184 N.J. 210 (2005). The Law Division judge reasonably and undoubtedly believed that he would benefit from the development of a full factual record before the Commissioner. Of course, for the reasons stated, he was denied that opportunity. In any event, we cannot conclude that the Law Division judge mistakenly exercised his discretion in referring the matter to the Commissioner. See Alliance for Disabled In Action, Inc. v. Cont'l Props., 371 N.J. Super. 398, 408 (App. Div. 2004) (noting the trial judge's decision to invoke the doctrine of primary jurisdiction is subject to review under an abuse of discretion standard), aff'd, 185 N.J. 331 (2005).
>
> However, under the doctrine of primary jurisdiction, the court is not divested of its jurisdiction ultimately to decide the legal claims plaintiff has raised based, in theory, upon the agency fact-finding. Boss v. Rockland Elec. Co., 95 N.J. 33, 42 (1983). By dismissing Count Two of the complaint without prejudice, it would appear that the Law Division judge anticipated that the legal issues might ultimately need to be resolved in court.

Because the plaintiff in P.P. never had the opportunity to present his claim that the Board's policy violated constitutional guarantees, Count Two was reinstated in the Law Division.

Issue preclusion (also considered to be collateral estoppel) "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). The four requirements of collateral estoppel are: (1) the identical issue was decided in a prior adjudication; (2) there was a final judgment on the merits; (3) the party against whom the bar is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom the bar is asserted had a full and fair opportunity to litigate the issue. Bd. of Trs. of Trucking Employees of North Jersey Welfare Fund, Inc. v. Centra, 983 F.2d 495, 505 (3d Cir. 1992). Issue preclusion

prevents a litigant from contesting an issue that was already decided in a different case or controversy and that may or may not involve the same parties to the previous action.

In this request for emergent relief, all four elements are present. The parties are the same; the issue in dispute is the same; the petitioner had the full and fair opportunity to litigate the issue; and there was a decision in the Superior Court as to the emergent relief sought.

Additionally, this forum does not have authority to change the ruling made by Judge Buchsbaum. Any arguments as to jurisdiction, fairness, and applicability of that Order must be made to the Superior Court. To do otherwise could result in inconsistent decisions: if an independent finding were made in this forum that the petitioner was entitled to reinstatement to the varsity hockey team, then the parties would be left with a Superior Court decision denying such relief, and an administrative law decision granting such relief.[4] Such an inconsistency is precisely what the Court Rules try to avoid: once a forum is selected, the parties are bound by that forum's decision. To do otherwise would encourage forum shopping.

Had Judge Buchsbaum dismissed the Order to Show Cause rather than hearing it on its merits, then this forum would have jurisdiction. Accordingly, I **CONCLUDE** that the petitioner, having chosen to assert his right to be heard on the emergent matter in Superior Court and having proceeded to a decision in that court, is precluded from relitigating this issue in this forum.

[4] Having determined that this forum is without jurisdiction to hear the emergent application, no decision has been rendered on its merits.

It is **ORDERED** that petitioner's request for emergent relief is **DISMISSED**. 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.

Susan Scarola

February 7, 2011
DATE

SUSAN M. SCAROLA, ALJ

mph

109-11

GARY D. GRAY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a grounds and maintenance employee of the District since 1999, contends that the Board violated *N.J.S.A.* 18A:30-2.1 when it docked him for nine vacation days during a period of time when he was out of work and receiving worker's compensation during the 2009-2010 school year. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: the facts in this matter are not in dispute, and the matter is ripe for summary decision; *N.J.S.A.* 18A:30-2.1(b) provides that leave taken by an employee because of a work-related injury shall constitute satisfactory service; petitioner's reliance on *Fabrizio v. Board of Education of Farmingdale,* EDU 10050-99, Initial Decision (January 9, 2001) is well founded in this case; respondent's action in docking the petitioner for vacation time against his entitlement for the subsequent year has the same effect as assessing an employee vacation time while being out on work-related leave, and is violative of *N.J.S.A.* 18A:30-2.1. Accordingly, the ALJ concluded that petitioner is entitled to his full allotment of vacation time for the 2009-2010 school year and must be credited with the nine days of vacation that he was docked.

The Commissioner concurred with 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.

March 14. 2011

OAL DKT. NO. EDU 12189-09
AGENCY DKT. NO. 312-11/09

GARY D. GRAY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RANCOCAS VALLEY REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the Board and petitioner'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 making his determination herein.

The Board's exceptions merely recast and reiterate its arguments advanced before the Administrative Law Judge (ALJ) below. As all of these were fully considered and addressed by the ALJ in her Initial Decision, they will not be revisited here.

Upon full consideration, the Commissioner agrees with the ALJ – for the reasons comprehensively presented in her decision – that that the action of the Board in refusing to credit petitioner with his full complement of vacation days during the 2009-2010 school year was violative of *N.J.S.A.* 18A:30-2.1, necessitating that these vacation days be restored and credited to his future vacation entitlement.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. The Board is hereby directed to immediately restore the nine vacation days impermissibly withheld from petitioner for the 2009-2010 school year.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|14|11

Date of Mailing: 3|14|11

* 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 SUMMARY DECISION

OAL DKT. NO. EDU 12189-09

AGENCY DKT. NO. 312-11/09

GARY D. GRAY,

Petitioner,

v.

RANCOCAS VALLEY REGIONAL HIGH SCHOOL BOARD OF EDUCATION,

Respondent.

Michael C. Damm, Esq. for petitioner (Selikoff & Cohen, LLC, attorneys)

Stephen J. Mushinski, Esq., for respondent (Parker McCay P.A., attorneys)

Record Closed: December 8, 2010 Decided: January 25, 2011

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

Petitioner Gary D. Gray seeks a determination from the Commissioner of Education (Commissioner) that respondent Rancocas Valley Regional High School Board of Education violated N.J.S.A. 18A:30-2.1 and that it must provide him with nine vacation days that the respondent docked him during the 2009-2010 school year.

PROCEDURAL HISTORY

On November 9, 2009, petitioner filed this petition with the Commissioner of Education seeking an Order that he be returned nine vacation days that the respondent docked him. On November 24, 2009, respondent filed an Answer. The Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on December 14, 2009, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 for determination as a contested case. Over the course of several status conferences counsel discussed whether there would be a hearing or cross motions for summary decision. Once it was determined that counsel would file cross motions of summary judgment, a schedule was set for briefing. The last reply brief was received on December 8, 2010. The record closed on that date.

STIPULATIONS OF FACT

1. The Board is a body corporate and politic of the State of New Jersey empowered by law to administer the Rancocas Valley Regional High School District.

2. The petitioner began his employment with the Board as a grounds/maintenance person since in or about July 1999, working twelve months a year, and has been employed continuously since then. The school year for a twelve month employee is from July 1 to June 30 of each year.

3. On or about December 2, 2008, petitioner injured his right shoulder during the course of his employment with the Board as a grounds/maintenance person when he slipped and fell going down a flight of steps. On or about January 22, 2009, petitioner incurred another injury to that same shoulder while on the job working for the Board, doing demolition work inside of a school building.

4. The injuries to petitioner's right shoulder were found to be compensable under the workers' compensation law. Petitioner was held out of work on account of those injuries by the workers' compensation doctor with whom he was designated to

treat on December 4 and 5, 2008 for the first injury, and for the second injury from on or about January 23, 2009 through July 5, 2009. Petitioner was authorized and did return to work on July 6, 2009. During the time petitioner was held out of work, he received full salary benefits pursuant to N.J.S.A. 18A:30-2.1. The Board was reimbursed for the payment of full salary benefits to petitioner during this time period through its insurance.

5. During the time petitioner was held out of work by the workers' compensation doctor, the medical records show that he treated with the doctor, underwent surgery to his right shoulder and attended physical therapy.

6. For the 2009-2010 school year, petitioner was entitled to fifteen vacation days under Article XXI of the collectively negotiated agreement between the Board and the Rancocas Valley Regional High School Education Association (Exhibit "A" annexed to counsels' Stipulations of Fact).

7. On or about August 14, 2009, petitioner received his payroll statement and noticed that the Board was not crediting him with fifteen vacation days for the 2009-2010 school year. When petitioner questioned this, he was informed, in or about the first week of school in September 2009, that because he was out of work receiving workers' compensation benefits from January 23, 2009 through July 5, 2009, he did not accrue any vacation time for the 2009-2010 school year during that period. Petitioner was informed that he would receive a reduced complement of vacation days for the 2009-2010 school year based on the time that he was actually on the job during the 2008-2009 school year. The superintendent confirmed this by letter dated October 15, 2009 (Exhibit "B" annexed).

8. The petitioner was charged nine days against the fifteen day 2009-2010 vacation day entitlement, leaving him with six vacation days for the 2009-2010 school year. This was based on the calculation that since he only worked five out of twelve months, this was the equivalent of 42% of the school year and 42% of the school year times the fifteen day vacation day entitlement is 6.3 rounded to six days. Thus, petitioner received six vacation days for the 2009-2010 school year. His annual sick leave entitlement and personal day entitlement were not impacted.

9. While petitioner maintains he should not have been charged any vacation time, he calculates based on a 260 day work year, he actually worked approximately seven out of twelve months, and that this is the equivalent of 52.11% of the school year. Petitioner disagrees with the Board's calculation set forth in Paragraph Eight above.

10. S.K. is an employee of the Board who suffered two on-the-job work-related injuries. He was out of work and received full salary benefits pursuant to N.J.S.A. 18A:30-2.1 for those two injuries from December 6, 2005 to February 10, 2006 and from September 10, 2007 to November 30, 2007, respectively. Upon his return to work on both occasions and effective the succeeding school years, he was not docked any vacation days as a result of being out of work due to workers' compensation leave.

11. J.N. is an employee of the board who suffered two on-the-job work-related injuries. He was out of work and received full salary benefits pursuant to N.J.S.A. 18A:30-2.1 for those injuries from October 21, 2005 to November 11, 2005 and from November 27, 2007 to December 31, 2007, respectively. Upon his return to work on both occasions and effective the succeeding school years, he was not docked any vacation days as a result of being out of work due to workers' compensation leave.

12. T.E. is an employee of the Board who suffered an on-the-job work injury and was out of work during the 2007-2008 school year from October 10, 2007 until June 30, 2008 and the 2008-2009 school year, from July 1, 2008 to March 5, 2009. From October 10, 2007 to October 9, 2008, she received full salary benefits pursuant to N.J.S.A. 18A:30-2.1 and fully salary from October 10, 2008 to March 5, 2009. T.E. was not docked vacation days for the 2008-2009 school year as a result of being out of work due to workers' compensation leave during the 2007-2008 school year. As a result of being out of work due to workers' compensation leave during the 2008-2009 school year, for the 2009-2010 school year the Board changed the procedure for calculating vacation days and she was docked for a total of seven vacation days using the same formula utilized involving the petitioner.

13. The petitioner suffered a work injury while employed by the Board in or about the early part of 2006, and was out of work and received full salary benefits under N.J.S.A. 18A:30-2.1 from May 2006 to July 17, 2006 covering parts of both the 2005-2006 and 2006-2007 school years. Upon his return to work and effective the succeeding school years, he was not docked any vacation days as a result of being out of work due to workers' compensation leave.

14. The action taken to reduce petitioner's vacation day entitlement for the 2009-2010 school year was due to his absences resulting from his on-the-job work injuries on December 4 and 5, 2008 and from January 23, 2009 to June 30, 2009.

15. A grievance filed by the Rancocas Valley Regional High School District Education Association on behalf of the petitioner with respect to this matter has been held in abeyance pending a determination by the Commissioner of Education of the within Petition of Appeal (Exhibit "C" annexed).

16. A Verified Petitioner of Appeal was filed on behalf of the petitioner on November 9, 2009 with the Commissioner of Education.

17. An Answer to the Verified Petition of Appeal on behalf of the Board was sent to the Commissioner's office and filed by way of letter dated November 24, 2009.

18. There is no dispute as to timeliness of the Petition of Appeal or Answer.

19. The parties agree that this Stipulation may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

LEGAL ISSUES

1. Whether this matter can be decided on Summary Decision.

2. Whether the respondent violated N.J.S.A. 18A:30-2.1, when it docked petitioner nine vacation days.

3. Whether respondent should be ordered to restore petitioner's vacation days.

CONCLUSIONS OF LAW

1. Can the case be decided by summary decision?

Pursuant to the rules governing practice in the Office of Administrative Law, a motion for summary decision may be granted, if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. This provision mirrors the language of Rule 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. The 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.

> 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.

The parties have stipulated to all of the relevant and material facts in the case. Therefore, based on the Briefs and Affidavits presented by the parties, I **FIND** that there is no genuine issue of material fact and **CONCLUDE** that the case can be decided on Motion for Summary Decision.

2. Whether the respondent violated N.J.S.A. 18A:30-2.1, when it docked him nine vacation days.

As set forth above, petitioner contends that respondent violated N.J.S.A. 18A:30-2.1 when it refused to give him his full complement of vacation days for the 2009-2010 school year while he was recuperating from his work injuries and receiving full salary

and benefits. N.J.S.A. 18A:30-2.1 ensures that an employee receives full salary during an absence caused by an accident that arose in the course of his employment without being charged sick leave. N.J.S.A. 18A:30-2.1(b) provides:

> Leave taken by an employee pursuant to subsection a. of this section shall constitute satisfactory service as provided pursuant to N.J.S.A. 18A:29-14 and any other provision, statutory or contractual, relating to employment, adjustment or other increments and shall not constitute inefficiency or other good cause for the withholding of an employment or adjustment increment.

Petitioner argues that the law's mandate that leave taken pursuant to it "shall constitute satisfactory service..." means that an employee who sustains a work-related injury and who is absent receiving full salary benefits for the one-year period is not to be penalized in any way for those absences. He quotes the Statement accompanying the enactment of N.J.S.A. 18A:30-2.1, which sets forth, "This bill will assure that employees are not penalized in any manner for taking sick leave as a result of work-related accidents." In contrast, respondent argues that there is no reference to vacation time in the statute, only sick leave, employment, adjustments and increments. Respondent recognizes that it cannot reduce petitioner's salary, entitlement to sick leave or withhold his increment, as a result of his work related absence. However, it argues this does not preclude respondent from adjusting his vacation days; and therefore, in keeping with the rules of statutory construction, the agency should not, "under the guise of interpretation, extend a statute to give it a greater effect than its language permits." GE Solid State, Inc. v. Director, Division of Taxation, 132 N.J. 298, 306 (1993).

The parties disagree over the applicability of Fabrizio v. Bd. of Educ. of Farmingdale, EDU 10050-99 Initial Decision (January 9, 2001) adopted, Commissioner of Education (February 26, 2001) http://lawlibrary.rutgers.edu/oal/search.html. In that case, Fabrizio sought the return of sick and vacation time after a worker's compensation judge determined that her work injuries were compensable. Fabrizio appealed the Board's refusal to restore sick and vacation time after the worker's compensation judge ruled in her favor. Judge Duncan held that, "[R]espondent may not treat petitioner differently from any other employee who was in a full-pay status during

the year" and therefore, "respondent may not charge petitioner with the use of sick days or vacation time because of her absence from work." Respondent argues that reliance on Fabrizio is misplaced however, because Fabrizio had actually earned sick and vacation days, which were later assessed against her during the work-related leave. In the present case, respondent contends, petitioner was assessed earned vacation time, but rather, due to his absence during the 2008-2009 school year, he did not earn his full complement of sick days for the 2009-2010 school year at the outset. Respondent's argument fails to take into account that the practical effect of the Board's action is the same, which is to deny an employee who was in full-pay status during the year the full carryover that all other employees received for the 2009-2010 year. Petitioner received benefits under N.J.S.A. 18A:30-2.1 during the two days in December 2008 and for the period from January 23, 2009 through July 5, 2009. To dock petitioner vacation time against his entitlement for the subsequent school year has the same effect as assessing an employee vacation time while being out on work related leave. It is a penalty that the law was designed to prevent.

For the foregoing reasons, I **CONCLUDE** that respondent violated N.J.S.A. 18A:30-2.1 when it declined to give petitioner his full allotment of vacation days for 2009-2010.

3. Whether respondent must restore petitioner's vacation days.

During the time that petitioner was absent from work receiving worker's compensation benefits pursuant to the statute, his time constituted satisfactory service. The statement accompanying the enactment of the law makes it clear that petitioner is to receive no less than any employee that was able to work during that time. He was therefore entitled to the same vacation time during this period just as any employee in full-pay status would have been entitled. Pursuant to N.J.S.A. 18A:30-2.1, petitioner was entitled to his full allotment of vacation time for the 2009-2010 school year and must be credited with the nine days of vacation time that he was docked.

ORDER

I hereby **ORDER** that the petitioner's request for reinstatement of nine days of vacation time for the 2009-2010 school year 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.

January 25, 2011
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: January 25, 2011

Date Mailed to Parties: January 26, 2011

cmo

110-11

AGENCY DKT. NO. 12-1/11

EDWARD A. KLISZUS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY, CLARISSA B. GILLIAM GARDNER, RHONDA WILLIAMS BEMBRY, AND VERONICA BOLCIK MCKENNA	:	DECISION
RESPONDENTS.	:	

The proposed settlement of the above-captioned matter – which was executed by counsel for the petitioner and all respondents, and submitted by the above referenced parties on February 24, 2011 – is approved. Accordingly, the petition is hereby dismissed, subject to compliance with the applicable terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|11|11

Date of Mailing: 3|14|11

ANDREW BABIAK, ESQ.
Attorney at Law
920 West State Street
Trenton, New Jersey 08618
(609) 599-2900 x117
Attorney for Petitioner,
Dr. Edward A. Kliszus

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CONTROVERSIES & DISPUTES

EDWARD A. KLISZUS, Petitioner, v. **BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY, CLARISSA B. GILLIAM GARDNER, RHONDA WILLIAMS BEMBRY AND VERONICA BOLCIK MCKENNA,** Respondents.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Agency Dkt. # OAL Docket #EDU **STIPULATION OF SETTLEMENT**

Pursuant to *N.J.A.C.* 1:1-19.1(a), Petitioner, Edward A. Kliszus (hereinafter "Dr. Kliszus"), and Respondents, Board of Education of the City of Hackensack (hereinafter, the "Board"), Clarissa B. Gilliam Gardner, Rhonda Williams Bembry, and Veronica Bolcik McKenna, and/or by and through their under-signed counsel, have agreed to amicably settle and resolve all claims in the above-captioned matter as follows:

(1) The Board shall remove from Dr. Kliszus's personnel file any and all copies of the annual performance evaluation for the 2009-2010 school year.

(2) The Board shall not place a copy of the 2009-2010 annual performance evaluation for Dr. Kliszus in his personnel file now or at any time in the future.

(3) The Board shall not use the 2009-2010 annual performance for Dr. Kliszus for any purposes related to Dr. Kliszus's continued employment and/or prospective employment.

(4) Dr. Kliszus agrees to the dismissal of his Petition without prejudice.

The parties' agreement to settle this dispute shall not constitute an admission of liability or wrongdoing on the part of the Petitioner or the Respondents.

The parties acknowledge that each has had the opportunity to consult with an attorney of their own choosing prior to agreeing to the terms specified above, and that he/she/its approval is given freely voluntarily, and without coercion or duress. This document cannot be altered, amended, modified or revoked except by an instrument executed in writing by the parties. This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors, and assigns.

This Stipulation may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signatures of all the parties hereto are required for this agreement to be binding on any party. An original signature transmitted by facsimile shall be deemed an original for purposes of this Stipulation.

Andrew Babiak, Esq.
Counsel for Petitioner,
Edward A. Kliszus

Dated: Feb. 16, 2011

Richard Salkin, Esq.
Counsel for Respondents

Dated: Feb. 17, 2011

111-11

BOARD OF EDUCATION OF THE TOWNSHIP OF MAURICE RIVER, CUMBERLAND COUNTY; BOARD OF EDUCATION OF THE TOWNSHIP OF COMMERCIAL, CUMBERLAND COUNTY; BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, CUMBERLAND COUNTY; AND BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENTS.	:	

SYNOPSIS

The petitioning Boards of Education send their high school students to Millville High School, and challenged the process in which the respondent calculated tuition for the 2006-2007 school year. They allege that improper methodology used in the calculations resulted in an overcharge of $1,543 per student. Petitioners also sought an order declaring *N.J.A.C.* 6A:23A-8.7 invalid. All parties filed motions for summary decision.

The ALJ found, *inter alia,* that: there is no dispute that, although respondent first estimated the tuition using the "A-41" method – which resulted in a higher per pupil tuition cost of $6,147– a settlement was later reached with the respondent using an actual cost per student of $4,657, and petitioners received tuition credits to reflect the difference; therefore nothing further may be awarded to petitioners, and the issue is moot; and there is no jurisdiction to hear petitioners' challenge of the validity of *N.J.A.C.* 6A:23A-8.7. Accordingly, the ALJ denied the petitioners' motion for summary decision and dismissed the petition.

Upon careful review and consideration, the Commissioner adopted the Initial Decision as the final decision for the reasons set forth 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 14. 2011

OAL DKT. NO. EDU 2892-09
AGENCY DKT. NO. 64-4/09

BOARD OF EDUCATION OF THE TOWNSHIP OF MAURICE RIVER, CUMBERLAND COUNTY; BOARD OF EDUCATION OF THE TOWNSHIP OF COMMERCIAL, CUMBERLAND COUNTY; BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, CUMBERLAND COUNTY; AND BOARD OF EDUCATION OF THE BOROUGH OF WOODBINE, CAPE MAY COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENTS.	:	

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.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|14|11
Date of Mailing: 3|14|11

* 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 GRANTING
PARTIAL SUMMARY JUDGEMENT
OAL DKT. NO. EDU 2898-09
AGENCY DKT. NO. 64-4/09

MAURICE RIVER TOWNSHIP BOARD OF EDUCATION, COMMERCIAL TOWNSHIP BOARD OF EDUCATION, LAWRENCE TOWNSHIP BOARD OF EDUCATION, AND WOODBINE BOROUGH BOARD OF EDUCATION,

Petitioners,

v.

CITY OF MILLVILLE BOARD OF EDUCATION AND NEW JERSEY DEPARTMENT OF EDUCATION

Respondents.

Frank DiDomenico, Esq., for petitioners,

Arnold Robinson, Esq., for respondent City of Millville Board of Education (Robinson, Andujar and Webb, attorneys)

Christopher Huber, Deputy Attorney General, for respondent New Jersey Department of Education (Paula T. Dow, Attorney General of New Jersey, attorney)

Record Closed: January 20, 2011 Decided: January 26, 2011

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

STATEMENT OF THE CASE

This matter arises from a dispute between petitioners Maurice River Township Board of Education, Commercial Township Board of Education, Lawrence Township Board of Education, and Woodbine Board of Education (petitioners), who send their high school students to Millville High School, and the Millville Board of Education (respondent). Petitioners are challenging the process in which the respondent calculated tuition for the 2006-2007 school year. They also seek an order declaring N.J.A.C. 6A:23A-8.7 invalid.

PROCEDURAL HISTORY

On April 1, 2009, the petitioners filed a Verified Petition with the Commissioner of the Department of Education (Department). On April 15, 2010, the respondent filed an Answer to Petition. On May 11, 2009, the case was transmitted to the Office of Administrative Law where it was filed as a contested case.

On March 25, 2010, the petitioners filed a motion for summary decision. On April 5, 2010, the Department filed a motion for summary decision. On May 25, 2010, respondent filed a cross-motion for summary decision. On August 12, 2010, oral argument was held. The parties requested additional time to resolve one remaining issue. Several conference calls were held to address this issue. On January 20, 2011, a conference call was held and it was indicated that this decision would resolve all outstanding issues. Petitioner agreed to resolve any outstanding issues remaining in Count Two of the Petition.

STATEMENT OF FACTS

The sending districts (petitioners) allege that respondent improperly changed its tuition calculation method under N.J.A.C. 6A:23A-17.1 (formerly N.J.A.C. 6A:23-3.1) by

using what is known as the "software method" to calculate a tentative tuition rate of $6,200 per student for the sending districts for the 2006-2007 school year and the "A41 method" to calculate an actual tuition rate of $6,147 for that year. The petitioners contend that this methodology change was improper and resulted in an overcharge of $1,543 per student, as the actual tuition charge should have been $4,657 if the respondent had used the "software method" to calculate the actual tuition rate. As a result, petitioners seek the respondents to credit them for the tuition overpayments. Petitioners further allege that the respondents have failed to give tuition credits.

Bruce Kell, the business administrator for the respondent, described the process for tuition calculation. Pursuant to N.J.A.C. 6A:23-3.1, he used the A-41 method to calculate an estimated tuition of $6,200 per student for the 2006-2007 school year. The software method was not used. Petitioners paid this estimated sum pending the State certifying the actual tuition due. If the respondent had used the software method, the tuition cost per student would have $4,657 per student.

Three years later, respondent determined the actual cost per student to be $6,174 for the 2006-2007 school year. The respondent agreed to charge the sending districts an actual cost per student of $4,657 for the 2006-2007 school year (R-1). On July 14, 2009, the petitioners received tuition credits to reflect the difference between the tentative tuition of $6,200 that the sending districts paid and the actual tuition charge of $4,657 (R-2).

Respondents no longer receive parity aid or its equivalent under the School Funding Reform Act (SFRA), N.J.S.A. 18A:7F-43 to -63 funding formula (R-1). Petitioners argue that they have not received any additional aid from the State of New Jersey which would remedy the short fall from the phase out of parity aid.

There is no evidence that respondents receive any parity aid or its equivalent under the SFRA, and there is no support for the proposition that the petitioners are entitled to some sort of credit based on any aid respondents do receive from the State under the SFRA. The petitioners argue that they have not received any additional aid

from the State of New Jersey which would remedy the short fall from the phase out of parity aid.

CONCLUSIONS OF LAW

The facts involving this motion are not in dispute. Therefore, this matter is ripe for a determination as to the motion to dismiss.

The School Funding Reform Act (SFRA), N.J.S.A. 18A:7F-43 to -63, is the most recent legislative effort to provide New Jersey's school children with a thorough and efficient education. In Abbott v. Burke, 199 N.J. 140, 175 (2009) (Abbott XX), the Supreme Court held that the SFRA is constitutional under the thorough and efficient clause of the State constitution and relieved the State from the Court's prior remedial orders regarding the provision of parity aid and supplemental funding for disadvantaged Abbott districts so that the State may apply one funding formula to all school districts under the SFRA.

The Commissioner of Education is tasked with promulgating rules and regulations necessary to effectuate the provisions of the SFRA. N.J.S.A. 18A:7F-34. Pursuant to those rules, a receiving school district shall phase-out over four years the reduction of the actual cost per pupil by the amount of Abbott Parity Remedy Aid, Education Opportunity Aid and Discretionary Educational Opportunity Aid received in the 2007-2008 school year. N.J.A.C. 6A:23A-8.7.

The first issue to be determined is whether the Office of Administrative Law has the jurisdiction to determine the validity of N.J.A.C. 6A:23A-8.7.

There are several cases in which an ALJ and the Commissioner have found that an ALJ does not have jurisdiction over a challenge regarding the validity of an education regulation. For example, in Jersey City Adm'rs and Supervisors Assoc. v. State-Operated Sch. Dist. of the City of Jersey City, 92 N.J.A.R.2d (EDU) 150, the ALJ and the Commissioner found that petitioners challenged the validity of former N.J.A.C.

6:7-2.1 and 2.2. According to the Commissioner, any challenge to the "standards embodied in the regulatory scheme promulgated for State-operated school districts . . . lies with the Appellate Division of the Superior Court, not with this forum." (Id. at 13).

Similarly, in Elizabeth Bd. of Educ. v. New Jersey Dep't of Educ., EDU 5493-03, Initial Decision (September 26, 2003), adopted, Comm'r (October 20, 2003) <http://lawlibrary.rutgers.edu/oal/search.html>, the ALJ and Commissioner found that a facial challenge to an education regulation could not be brought before the OAL. In his final decision the Commissioner stated,

> [t]he Commissioner concurs with the ALJ that the District's challenge to the definition of 'maintenance budget' in [former] N.J.A.C. 6A:10-1.2 is a facial challenge to the regulation and that the OAL does not have jurisdiction to determine directly or indirectly the validity of N.J.A.C. 6A:10-1.2, as such determination is solely within the jurisdictional purview of the Appellate Division or the Supreme Court. [Id. at 1-2 (citing R. 2:2-3(a); Pascucci v. Vagott, 71 N.J. 40, 51-52 (1976); Wendling, supra, 279 N.J. Super. at 485).]

Here, as in Jersey City and Elizabeth, petitioners challenge the validity of N.J.A.C. 6A:23A-8.7 in Count II of their petition. However, as concluded by the ALJ and Commissioner in those cases, the OAL does not have jurisdiction over facial challenges to an administrative regulation. See also, 37 N.J. Practice, Admin. Law and Practice §§ 3.2 & 7.10 (Lefelt, Miragliotta & Prunty) (2d ed. 2000). Therefore, I **FIND** that there is no jurisdiction to hear the petitioner's challenge of the validity of N.J.A.C. 6A:23A-8.7.

Petitioners also challenge the decision by the respondents to use the A-41 method instead of the software method, and are also seeking tuition credits for the overpayment. I **FIND** that both of these issues are moot.

It is not in dispute that although respondent first estimated the tuition using the A-41 method, a settlement was reached with the respondent using an actual cost per student of $4,657, which is the amount calculated if the software method had been used. There is also no dispute that the respondents have been given the petitioners tuition for difference. There is nothing further to award the petitioners.

An issue is moot when a decision that is being sought in a particular matter will, when rendered, have no practical effect on the existing controversy. In re Conroy, 109 N.J. Super. 453, 458 (App. Div. 1983). In such cases, the issues that have become moot or academic prior to judicial scrutiny" are generally considered to be ... improper subject[s] for judicial review." Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976).

Petitioners' motion for summary decision is **DENIED** because they have already received credit for tuition overpayments they allegedly made for the 2006-2007 school year. The petitioners have already received the relief they now seek before the OAL with respect to Count I of their petition.

It should further be noted that there has been no showing that the actions of the respondents in making their calculations are not arbitrary, capricious or unreasonable. The arbitrary, capricious, or unreasonable standard by which the validity of an agency action is judged consists of three inquiries: (1) whether the agency action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings upon which the agency based application of legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors. Pub. Serv. Elec. And Gas Co. v. New Jersey Dep't of Envtl Protect., 101 N.J. 95, 103 (1985).

DECISION AND ORDER

Therefore, it is **ORDERED** that the petitioners' motion for summary decision is **DENIED**. Respondents' motion for summary decision is **GRANTED** in full as to Count One and in part as to Count Two. Petitioners have voluntarily agreed to withdraw the remainder of Count Two. The 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.

January 26, 2011
DATE

DONALD J. STEIN, ALJ

Date Received at Agency: FEB - 1 2011

Date Mailed to Parties: FEB - 1 2011

cmo

APPENDIX

LIST OF EXHIBITS

For Petitioners:

P-1 Letter from Attorney withdrawing Count Two

FRANK DiDOMENICO
ATTORNEY AT LAW
8 LASALLE DRIVE
VINELAND, NEW JERSEY 08360-4224

PHONE (856) 794-8155 • FAX (856) 794-8393

MEMBER NJ AND PA BAR

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January 20, 2011

RECEIVED
2011 JAN 20 P 4: 25
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

VIA FACSIMILE (609) 689-4100
Honorable Donald J. Stein, ALJ
Office of Administrative Law
Quakerbridge Plaza, Bldg. 9
Quakerbridge Road, P.O. Box 049
Mercerville, NJ 08625 0049

RE: Maurice River Township Board of Education, et al. v. Millville Board of Education, et al
OAL Docket No.: EDVPT 02898-2009S
Agency Docket No.: 64-4/09

Dear Judge Stein:

I am writing to Your Honor as a result of the conference call conducted on January 20, 2011.

Your Honor issued an oral decision that you do not have jurisdiction to declare NJAC 6A:23A-8.7 invalid.

Based upon that oral opinion, please accept this letter as the petitioners' request that Count 2 of the petition be withdrawn. Therefore, all relief as set forth in paragraphs A through D of the Second Count are withdrawn.

I am also forwarding a copy of this letter to Christopher Huber, DAG.

FRANK DiDOMENICO
ATTORNEY AT LAW

I thank you for Your Honor's assistance.

Respectfully submitted,

FRANK DiDOMENICO

FD/to

cc: Christopher Huber, Deputy Attorney General via fax (609) 777-4036
Arnold Robinson, Esquire via fax (856) 825-4762
Patricia Powell via fax (856) 825-1248
Lisa DiNovi via fax (856) 447-0521
Frank Badessa via fax (856) 785-2354
Alan Parmelee via fax (609) 861-0723

#112-11

112-11

AGENCY DKT. NO. 50-2/11

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

Upon review of the tenure charges filed in the above-captioned matter, the Commissioner notes that the record includes several exhibits which include images of minor children (Statement of Evidence, Exhibits 2-38). Petitioner has moved to seal the exhibits and respondent has indicated that she has no objection.

New Jersey Court Rule 1:38-11(a) allows court records to be sealed for good cause, and *R.* 1:38-11(b)(2) instructs that good cause exists where a person's interest in privacy "substantially outweighs the presumption that all court and administrative records are open for public inspection . . . ." The Commissioner finds that the privacy of the minors depicted in the above referenced exhibits is of high importance, and that disclosure of the images to the public serves no public purpose in the instant tenure case. Thus, as regards the exhibits, the presumption of public access to court and administrative records is overcome.

Accordingly, the above-referenced exhibits are hereby SEALED

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/11/11

Date of Mailing: 3/14/11

* 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).

#113-11

K.Q. and L.Q., on behalf of minor child, C.Q.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GATEWAY REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners alleged that the failure of the respondent Board to comply with State regulations and its own policy governing random drug testing rendered its actions arbitrary and capricious, such that the record of C.Q.'s drug test results should be expunged. The Board contends that: the drug test result is not part of the student's record; the policy – Board Policy No. 5536, Pupil Athletics and Extracurricular Activities Drug Policy – is sufficiently legal; and that ignoring the test results is contrary to the public policy goal of deterring students from using drugs and alcohol.

The ALJ found, *inter alia,* that: the respondent's drug policy did not comply with either *N.J.S.A.*18A:40A-24(d) or *N.J.A.C.* 6A:16-4.4, as it falls short of requirements for describing the procedures involved in randomly selecting students for alcohol and drug testing, and also fails to fully comply with the requirement that procedures for challenging the test results be included in school drug testing policies; the Board's failure to alter its policy in the wake of the enactment of *N.J.S.A.*18A:11-1 resulted in the enforcement of a policy that no longer complies with State law; and the Board's action was therefore arbitrary, capricious and unreasonable. The ALJ concluded that C.Q.'s drug testing results must be expunged.

Upon consideration and review, the Commissioner found, *inter alia*, that: respondent's drug policy did not violate *N.J.S.A.* 18A:40A-24(d), as it does contain a mechanism for challenging a positive test result; the Board did not act in an arbitrary, capricious or unreasonable manner in imposing discipline upon C.Q. for failing the random drug test, as petitioners were aware of the drug testing policy, did not challenge the method by which C.Q. was randomly selected, and stipulated at hearing that C.Q. had failed the drug test; and the drug test policy is a valuable method by which to identify students with drug problems and provide them with the support and resources they need. Accordingly, the Commissioner rejected the Initial Decision as to the finding that the drug policy violated *N.J.S.A.* 18A:40A-24(d), and with regard to the ALJ's determination that C.Q.'s failed drug test should be expunged. Additionally, the Commissioner directed the Board to revise the drug policy to bring it into full compliance with the requirements of *N.J.A.C.* 6A:16-4.4.

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 17, 2011

OAL DKT. NO. EDU 2469-10
AGENCY DKT. NO. 38-3/10

K.Q. and L.Q., on behalf of minor child, C.Q.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GATEWAY REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
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 Board of Education and the petitioners reply thereto.[1] This case involves Board Policy No. 5536, Pupil Athletics and Extracurricular Activities Drug Policy (drug policy). Pursuant to the drug policy, students who participate in extracurricular activities or receive an on-campus parking permit are subject to random drug testing. The Administrative Law Judge (ALJ) found that the policy did not comply with either *N.J.S.A.* 18A:40A-24(c)[2] or *N.J.A.C.* 6A:16-4.4, and as a result found that C.Q.'s positive drug test result should be expunged.

In its exceptions, the Board argues that there may have been nominal violations of *N.J.A.C.* 6A:16-4.4, but that the drug policy meets the overall spirit and public policy goal of legislation that encourages random drug testing. Further, the Board contends that the testimony presented at the hearing established that the actual procedures that were used to select and test

[1] The record contains no transcripts from the hearing conducted at the OAL on January 18, 2011.

[2] The Initial Decision appears to mistakenly cite *N.J.S.A.* 18A:40A-24(c) as the applicable statutory provision. *N.J.S.A.* 18A:40A-24(d) is the provision stating that drug testing policies must include procedures for challenging positive test results.

C.Q. were in compliance with *N.J.A.C.* 6A:16-4.4. Additionally, the Board takes exception to the ALJ's holding that C.Q.'s failed drug test result should be expunged. The Board maintains that even if the drug policy does not completely comply with *N.J.A.C.* 6A:16-4.4, the remedy should be to bring the policy into compliance, not to expunge C.Q.'s drug test result. The Board points out that the petitioners did not challenge the accuracy of the test or the manner in which he was randomly selected, and they stipulated at the hearing that C.Q. failed the drug test. Finally, the Board argues that ignoring C.Q.'s positive drug test result is not in the best interest of C.Q. because he may not get the added support he may need should there be another offense.[3]

After consideration and review, the Commissioner finds that the drug policy did not violate *N.J.S.A.* 18A:40A-24(d) – which requires drug testing policies to contain a procedure for challenging positive drug test results – and, although the policy did not fully comply with the provisions outlined in *N.J.A.C.* 6A:16-4.4, the Board did not act in an arbitrary, capricious or unreasonable manner in imposing discipline upon C.Q. for failing the random drug test.[4]

The drug policy contains a provision that allows for pupil or parent/guardian grievances. The applicable provision states, "[a] pupil or parent/guardian who contests a positive test result on a random drug test may utilize the district's internal grievance procedure as referenced in Policy 5710 and Bylaws 0133[5] in accordance with *N.J.S.A.* 18A:11-1." Additionally, the drug policy states that a split urine sample will be taken for all tested students,

[3] In reply the petitioners simply stated that they support all of the findings of the ALJ.

[4] In its exceptions, the Board erroneously suggests that the consequence imposed on the students for failing a drug test is not a form of discipline. Although participation in extracurricular activities is a privilege, and not a right, that does not negate the fact that a board's decision to revoke a student's ability to participate amounts to a form of discipline. *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, Bergen County*, Commissioner Decision No. 383-10, decided September 13, 2010. http://www.state.nj.us/education/legal/commissioner/2010/sep/383-10.pdf

[5] Policy 5710 and Bylaws 0133 were not part of the record, nor is there any information in the record indicating their content.

and if a student or parent/guardian chooses to challenge a positive result they have the option of sending the split sample to an approved testing facility. Therefore, the Commissioner finds that the drug policy was in compliance with *N.J.S.A.* 18A:40A-24(d) because it did contain a mechanism for challenging a positive test result. With respect to the provisions contained in *N.J.A.C.* 6A:16-4.4, the Commissioner is in accord with the ALJ's finding that the drug policy should have provided more information regarding the manner in which the eligible student information was generated and provided to the physician's office and the methods used to verify and document the random selection procedure.

Notwithstanding that the drug policy itself lacked certain regulatory details envisioned by *N.J.A.C.* 6A:16-4.4, the Commissioner cannot find that it has been demonstrated on this record that the Board's handling of this case was arbitrary, capricious or unreasonable, necessitating the expungment of C.Q.'s failed drug test. When a local school board acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that the decision was arbitrary, capricious or unreasonable. *Thomas v. Bd. of Ed. of Morris Twp.*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd* 46 *N.J.* 581 (1966). Here, the petitioners were aware of the drug testing policy and that C.Q. would be subject to random testing;[6] the method by which C.Q. was randomly selected was not challenged by the petitioners; and the petitioners stipulated at the hearing that C.Q. failed the drug test. Moreover, the failed drug test result is not a part of C.Q.'s disciplinary record, and any potential ramification for C.Q. at this juncture will only be triggered if C.Q. fails another random

[6] It is not stated in the record whether or not the petitioners signed a consent form before C.Q. signed up for extracurricular activities, but the drug policy states that parents must provide written consent to random testing prior to a student engaging in extracurricular activities.

drug test.[7] If C.Q. were to fail another random drug test, it would be considered a second infraction, resulting in a longer suspension from extracurricular activities and more substance awareness counseling and education. The drug policy is not simply a means to discipline students but also a valuable method by which to identify students with drug problems and provide them with the support and resources they may need. The overall intent of the drug testing legislation is to ensure the health and safety of students by recognizing and addressing the seriousness of substance abuse among school-aged children. An order expunging the failed drug test result in the absence of any evidence questioning the validity of the result or testing method would be putting form over substance, to the detriment of C.Q.'s well-being.

Accordingly, the recommended decision of the ALJ is rejected as to the finding that the drug policy violated *N.J.S.A.* 18A:40A-24(d), and with regard to the ALJ's determination that C.Q.'s failed drug test should be expunged. The Board is directed to revise the drug policy to bring it into full compliance with the requirements of *N.J.A.C.* 6A:16-4.4.

IT IS SO ORDERED.[8]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/17/11
Date of Mailing: 3/18/11

[7] Results of any tests taken pursuant to the drug policy are destroyed after the student graduates.

[8] 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 2469-10
AGENCY DKT. NO. 38-3/10

K.Q. AND L.Q., ON BEHALF OF MINOR CHILD, C.Q.,
Petitioners,
v.
BOARD OF EDUCATION OF GATEWAY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,
Respondent.

Matthew Wolf, Esq., for petitioners (Pappas & Wolf, attorneys)

Kelly M. Estevan, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: January 18, 2011 Decided: February 1, 2011

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

K.Q. and L.Q. brought a petition on behalf of their minor child, C.Q., alleging the failure of the Board of Education of the Gateway Regional School District in Gloucester County (the District) to comply with State regulations and its own District policy

governing random-drug testing, rendering its actions arbitrary and capricious, such that the record of C.Q.'s drug-testing results should be expunged.

The Board contends that first, the drug-testing result is not part of the student's record; second, that the policy, although it predates the current regulations, is sufficient legally; and third, that ignoring results is contrary to the public-policy goal of deterring students from using drugs and alcohol.

The petition was first filed at the Department of Education on March 3, 2010. An amended version was filed on March 10, 2010, and by letter dated April 7, 2010, the Commissioner transmitted the contested case to the Office of Administrative Law (OAL). N.J.S.A. 52:14B-2(b). It was filed at the OAL on April 16, 2010, and following a November 2010 adjournment was heard on January 18, 2011. At the hearing, the petitioners determined to narrow the issues to the District's failure to follow its own policy and the allegation that the District's policy does not comply with State regulations.

FACTUAL DISCUSSION

Most of the facts are not subject to dispute. On November 30, 2009, the Gateway Regional School District conducted one of its regular, biweekly random substance-abuse tests. The District's usual process was followed. This entailed the District's creation of a list of high school students who were either involved in extra-curricular activities or were in possession of a parking permit. On the day before the testing was conducted, the list was forwarded using e-mail to the off-site office of Christopher Trotz, M.D., the school physician. At Dr. Trotz's office, Kelly Murphy, R.N., opened the list and then moved it into a computerized-randomizer program. Murphy clicked a button on the computer, which then ran the randomizer program, generating a list of twenty student names and five-additional names to be used as alternates if the twenty were not present at school on the testing day. Murphy then forwarded the list to Steven M. Hindman, principal. On the testing date, Hindman located the various students and escorted them to the testing location, which is the nurse's office at school. Murphy was present in the nurse's office on testing day and was responsible for receiving the specimens, splitting each sample, testing one, and sending a second test

to a laboratory. On December 10, 2009, Gateway Regional Superintendent Shannon Whelan received the results of the tests conducted on November 30, 2009. The results included a positive test for drugs for C.Q.

The policy under which the test was conducted was District Policy Number 5536, adopted by the Board of the District in 2007. (P-1.) In pertinent part, it defines an eligible student as, "any student grades 9-12 participating in, freshman, junior varsity and/or varsity interscholastic athletic programs, extra curricular activities/clubs, or in possession of an on-campus parking pass for the Gateway Regional School District." The paragraph entitled "Random Selection for Testing" states:

> On a biweekly basis, a maximum of twenty (20) of the eligible students that sign up for an athletic team/activity/club/parking shall be tested for illegal drug use.
>
> . . .
>
> A description of the random selection software methodology and procedure is on file in the district office.

The paragraph entitled "Testing Facility" explains that a student or parent/guardian "shall have the option to send a split sample to an approved testing facility of his/her choosing, utilizing the same screening parameters and levels identified in this policy at his/her expense."

Superintendent Whelan testified without contradiction that the description of the random-selection software is a document entitled "How the Randomizer Works—Methodology." (R-1.) The document incorporates the Microsoft Office explanation of the four-step process involved in its Randomizer product, plus some general explanation of the mathematics involved, along with information on lawsuits in drug-testing programs, provided next to the insignia of the Drug and Alcohol Testing Industry Association.

Whelan stated that the "How the Randomizer Works—Methodology" document is retained in her office, and although she cannot personally recall a situation where someone has requested the document over the phone, she believes it has occurred in

the past, and that the District has forwarded a copy in the mail. She acknowledged that the document is not physically part of District Policy 5366. Regarding the policy and split-samples, she said that a parent would have to contact the school physician's office in order to make a request for testing of the split-sample. While the petitioners did contact her office about the split-sample, Whelan did not know whether they were told about contacting the physician. She stated that she did offer to meet with the parents on two-separate occasions but they rejected the offer.

Whelan also stated that she is the only person to receive student-testing results. She maintains them in a locked cabinet until such time as the student graduates, at which point they are destroyed.

LEGAL ANALYSIS

N.J.A.C. 6A:16-4.4(a) states that each district board of education that chooses to adopt policies and procedures for the random testing of students pursuant to N.J.S.A. 18A:40A-22 et seq. for the use of controlled dangerous substances . . . or alcoholic beverages . . . shall take a number of steps including a public hearing prior to adoption of the policy and provision of written notice to all ninth through twelfth grade students. N.J.A.C. 6A16:4-4.4(b) requires each such policy to include at least the following components:

> 2. A description of the procedures for randomly selecting students for alcohol or other drug testing, which at a minimum, shall include:
>
> i. The manner in which students shall be randomly selected for alcohol or other drug testing;
>
> ii. An explanation of the sampling statistical principals supporting the random selection process;
>
> iii. An explanation of how implementation of the random selection process shall be documented; and
>
> iv. An explanation of how implementation of the random selection process shall be verified.

At the time, the regulation was first proposed on July 16, 2007, the explanatory summary stated that N.J.A.C. 6A:16-4.4(b) set forth the minimum components of written alcohol or other drug-testing policies and procedures. The social-impact statement noted that the policy was designed to impose appropriate disciplinary sanctions regarding privileged participation in extracurricular activities and possession of parking permits, while providing treatment support for individual students, and maintaining school safety and discipline. It also noted that district boards of education would make decisions on whether to establish the policy "in part, based on input from the community, as a result of the public hearing requirement . . . . This will provide the community with the opportunity to influence the district board of education's decision regarding the composition of the drug-testing policy." See 39 N.J.R. 2579(a).

With regard to each of the four elements, Policy 5536 is thin, at best, in relation to the first two components. The fact that a new master list of students is generated prior to every testing is missing, as is the inclusion of alternate-student names. The absence of the information on the critical component concerning randomization—which technology is being used to select the students—makes it difficult for parents to assess the fairness of the procedure. Although no evidence of less-than-random selection was offered at hearing, the point of the fair-hearing requirement was that parents have an opportunity for input on the overall program. Not including a key component in the broadly disseminated policy frustrates that policy goal.

Looking at factors three and four, the policy is silent on methods to be used to ensure documenting and verifying the random-selection procedure. For example, the District generates a list that is then transferred through e-mail to the physician's office. The policy contains no indication of how the accuracy of the basic list is determined. Once at the physician's office, the list must be transferred into the programming software. The policy contains no indication of what steps the District has taken to verify that the list is transferring properly, or whether the District has a process for making sure that the software is operating properly. While the policy does lay out the step-by-step handling procedures and flags what to do in the event of a chain-of-custody problem, it is silent on the procedures for verifying that the various handlers are actually

performing according to the District's requirements. These are fundamental protections aimed at ensuring the fairness of the testing procedure.

It should also be noted that N.J.A.C. 6A:16-4.4(b)(9) requires districts to spell out "the procedures for students or their parents to challenge a positive result from the alcohol or other drug tests." This echoes N.J.S.A. 18A:40A-24(c), which requires policies to include the procedures for a student or his parent or guardian to challenge a positive test result. While the policy clearly states that a student or parent/guardian shall have the option to send a split-sample to an approved-testing facility of his/her choosing, it does not include the critical information that in order to do so, the parent or student must contact the physician's office to make the necessary arrangements. In this regard, the superintendent's lack of certainty in regard to whether anyone told petitioners about this important element underscores the need to have the procedure spelled out in the policy.

Based on the above, I **CONCLUDE** that the District's policy does not comply with either N.J.A.C. 6A:16-4.4, or N.J.S.A. 18A:40A-24(c).

The remaining question is whether this conclusion compels any particular result with regard to C.Q.'s test. In general, the imposition of discipline on students is within the discretionary powers of a school board, and the decision of the local board as to the appropriate penalty should not be disturbed absent evidence that the board's action was arbitrary, capricious, or unreasonable. J.D. and E.D. o/b/o B.D. v. Bd. of Educ. of Toms River Reg. Sch. Dist., EDU 6009-07, Initial Decision (December 29, 1997), adopted, Comm'r (July 8, 1998), <http://lawlibrary.rutgers.edu/oal/search.html>.

Nonetheless, this authority is constrained by statute. Under N.J.S.A. 18A:11-1, a board is empowered to enforce the rules of the State board (paragraph b) and "make, amend and repeal rules, not inconsistent with this title. . . ." In this instan matter, the Board failure to alter its policy in the wake of the enactment of the statute and the regulations resulted in the enforcement of a policy that no longer complies with State law. Therefore, I **CONCLUDE** that the Board's action was arbitrary, capricious, and unreasonable, and the disciplinary action must be expunged.

ORDER

I hereby **ORDER** C.Q.'s testing results **EXPUNGED**.

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 1, 2011
DATE

Laura Sanders
LAURA SANDERS,
ACTING DIRECTOR AND CHIEF ALJ

Date Received at Agency: February 1, 2011

Date Mailed to Parties: February 1, 2011
/caa

WITNESSES

For Petitioner:

None

For Respondent:

Shannon Whalen

Steven M. Hindman

EXHIBITS

For Petitioner:

P-1 Policy Number 5536 "Pupil Athletics and Extracurricular Activities Drug Policy"

For Respondent:

R-1 "How the Randomizer Works—Methodology"

#114-11R

ARCHWAY PROGRAMS, INC.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	PARTIAL DECISION ON REMAND
RESPONDENT.	:	

SYNOPSIS

The controversy herein involves five audits conducted by the respondent Department on Archway's accounts for the school years from 1994-1995 through 1998-1999, 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 1994-1995 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 1995-1996, 1996-1997 and 1997-1998 school years, but leaves unresolved the amount due and owing for the 1998-1999 school year.

Upon a thorough and independent review of the record, the Commissioner found that review of the instant Partial Initial Decision – which resolves final calculations for only three of the four remaining audit years – would be nonproductive at this point in time. The Commissioner instead determined to reserve review of this Partial Initial Decision until after the OAL has concluded the fifth and final audit year. The Commissioner therefore returned the matter to the OAL for resolution of the issues surrounding the 1998-1999 audit year and issuance of a final Initial Decision in this matter; he further requested that the ALJ's final Initial Decision present the calculated monetary figure due and owing by Archway for each of the five audit years at issue.

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 18, 2011

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 OF EDUCATION,	:	PARTIAL DECISION ON REMAND
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 1994-1995 through 1998-1999, 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 legal issues concerning methodologies and allowable costs 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 legal issues, 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 1994-1995 school year – and to reserve recommendation on the remaining years – as resolution of this particular audit will have a carryover effect on the remaining later audits, and ordered that the DOE prepare a new audit of the 1994-1995 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 1994-1995 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 1994-1995 school year, and ordered Archway to return – within 60 days of this decision – a total of $2,315,855.51 to the districts which sent students to its PSH during the 1994-1995 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 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 below – Archway's appeal as a final agency determination was premature.

On February 10, 2011 the Agency received the attached second Partial Initial Decision from the OAL which purports 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 this decision were duly filed by Archway and the Department, respectively.

Upon review – pursuant to the authority granted him under *N.J.A.C.* 1:1-12.5(e) – the Commissioner declines to review the instant Partial Initial Decision of the OAL as he finds and determines that immediate review of this decision – which resolves final calculations for only three of the four remaining audit years – at this point in time will not serve to avoid unnecessary litigation or expense. The Commissioner, therefore, is returning 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. The instant Partial Initial Decision will then be reviewed at the end of the contested case. Additionally, it is hereby 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.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/18/11

Date of Mailing: 3/18/11

[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

PARTIAL

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)

Joyce D. (Atkins) Williams, Deputy Attorney General, for respondent (Paula T. Dow, Attorney General of New Jersey, attorney)

Record Closed as to this partial initial decision on February 2, 2011

Decided: February 7, 2011

BEFORE **BEATRICE S. TYLUTKI**, ALJ t/a:

On December 5, 2008, the Commissioner of Education (Commissioner) remanded to the Office of Administrative Law (OAL) 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).

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 at 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 are number 7, which applies to the 1994-95 school year audit, and number 19, which only 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 Archway's objection applicable only to 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 that the DOE prepare a new audit of the 1994-95 school year using this order and the settlements as to the other objections raised by Archway which relate to this audit.

I received a revised audit from the DOE on June 25, 2010. By letter dated August 24, 2010, Archway indicated no objections to the mathematical calculations in this audit which are consistent with my prior rulings and the decision of the Commissioner. I issued an initial decision as to this audit on September 15, 2010.

Thereafter, 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. Further, I stated that these revised audits are to be submitted to me and to Archway. Archway would then have the opportunity to review the audits and the opportunity to submit a response as to the mathematical calculations only. Once this is resolved, I indicated I would issue another partial initial decision as to these audits.

Thereafter, I received the audits for the 1995-96, 1996-97 and 1997-98 school years as submitted by the DOE (Exhibit A), 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. This exhibit is attached and fully incorporated herein. By letter dated January 24, 2011, Archway indicated no objections to the mathematical calculations in these audits. Exhibit B contains this letter and is attached and fully incorporated herein.

I **ORDER** that Archway reimburse the sending school districts the amount of their overpayments for the 1995-96, 1996-97 and 1997-98 school years within sixty (60) days after the final decision in this matter.

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

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

Within thirteen days from the date on which this recommended partial 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.

February 7, 2011
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ t/a

Date Received at Agency: 2/10/11

Date Mailed to Parties: 2/10/11

/cad

EXHIBITS

A. DOE's audits for the 1995-96, 1996-97 and 1997-98 school years

B. Letter from Steven D. Weinstein, Esq., on behalf of Archway, dated January 24, 2011

#115-11L

115-11

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 18, 2011

Beth Lynn Finkelstein, Esq.
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Trenton, NJ 08618

Adam S. Herman, Esq.
Adams, Stern, Gutierrez &
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Christopher Huber, DAG
N.J. Department of Law & Public Safety
Division of Law
Richard J. Hughes Justice Complex
P.O. Box 112
Trenton, NJ 08625

Dear Parties:

I have reviewed the parties' submissions with respect to DAG Christopher Huber's Motion for Reconsideration of Assistant Commissioner Barbara Gantwerk's January 7, 2011 decision in the consolidated matters captioned *Margaret Dolon v. Carmen Centuolo, Executive County Superintendent, Union County and Rochelle Hendricks, Acting Commissioner, New Jersey State Department of Education*, Agency Dkt. No. 708-12/10 and *Board of Education of the Town of Westfield, Union County v. Dr. Carmen M. Centuolo, Executive County Superintendent, Union County*, Agency Dkt. No. 709-12/10. The Assistant Commissioner's decision dismissed these consolidated matters (which sought: an order rescinding Executive County Superintendent Centuolo's letter of December 2, 2010, which directed that the parties void the proposed employment contract of the District's Superintendent of Schools, Dr. Margaret Dolan; an order immediately approving this contract; and an order declaring that the Acting Commissioner's November 15, 2010 memorandum to all Executive County Superintendents – instructing that superintendent contracts are not to be approved – is contrary to law, and rescinding such memorandum) for lack of jurisdiction as it appeared from the allegations in the petitions that the Acting Commissioner had already ruled on this issue, making this matter a final agency action appealable to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Upon full review and consideration, I have determined to deny the Motion for Reconsideration.

In arguing that the consolidated cases should not have been dismissed for lack of jurisdiction, the Attorney General's office, purportedly on behalf of Respondent Centuolo, states: "The sole issue in this case is whether Respondent approved the proposed employment contract before it was approved by the Westfield Board of Education on November 9, 2010." If that statement were accurate,

these matters would be appropriately before the Commissioner of Education pursuant to *N.J.A.C.* 6A:23A-3.1(f). The petition in the case bearing docket number 708-12/10, however, specifically names then-Acting Commissioner Rochelle Hendricks as a respondent in the case, attributes the ultimate responsibility for the December 2, 2010 letter to Acting Commissioner Hendricks and seeks by way of relief against the Acting Commissioner, *inter alia*, a declaration by the Acting Commissioner that her action in issuing the November 15, 2010 memorandum was illegal and *ultra vires*. The petition in the case bearing docket number 709-12/10, without actually naming the Acting Commissioner as a respondent, also alleges that the Acting Commissioner directed Respondent Centuolo to send the December 2, 2010 letter in issue. Both cases are challenging the actions of the Acting Commissioner.

Pursuant to *N.J.A.C.* 6A:3-1.15(b)2., a motion for reconsideration shall be considered based upon the following:

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 purposes of this section;
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 could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

Upon full review and consideration of the parties' submissions, the Commissioner is compelled to deny the Motion for Reconsideration as he concludes that it fails to satisfy any of the requisites for granting such relief specified in *N.J.A.C.* 6A:3-1.15(b)2. Accordingly, the Motion for Reconsideration is hereby DENIED.

Sincerely,

Christopher D. Cerf
Acting Commissioner

CDC/MKD/MH

116-11

OAL DKT. NO. EDU 10523-10
AGENCY DKT. NO. 540-9/10

A.M., on behalf of minor child, J.A.M.,	
PETITIONER,	
V.	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE TOWNSHIP REGIONAL HIGH SCHOOL DISTRICT	DECISION ON
	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 March 11, 2011 – 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 fully presented in his 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 Lenape Township Regional High School District is hereby ordered to immediately enroll minor child J.A.M. in its school. 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.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|18|11
Date of Mailing: 3|18|11

* 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 APPLICATION FOR EMERGENT RELIEF
OAL DKT. NO. EDU 10523-10
AGENCY DKT. NO. 540-9/10

A.M. ON BEHALF OF J.A.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE LENAPE TOWNSHIP REGIONAL HIGH SCHOOL DISTRICT,
Respondent.

Mark J. Molz, Esq. for petitioner

Kimberly Sukinik, Esq., for respondent (Comegno Law Group, attorneys)

BEFORE **ROBERT BINGHAM II**, ALJ:

STATEMENT OF THE CASE

Petitioner, A.M., applies for emergent relief, seeking an order compelling the respondent, Board of Education of the Lenape Township Regional High School District (Board), to enroll his daughter, J.A.M., in the Lenape Township Regional High School (Lenape). The Board contends that he and J.A.M. do not reside within the school

district, and thus do not meet the residency criteria for the provision of a free public education.

PROCEDURAL HISTORY

On or about September 13, 2010, A.M. filed a pro se Petition of Appeal requesting that the Board enroll J.A.M. at Lenape, after receiving a letter dated August 13, 2010 from the Board's attorney which indicated that J.A.M. would not be allowed to attend Lenape in the 2010-2011 school year. On or about September 21, 2010, the Board filed a Motion to Dismiss the petition. On October 4, 2010, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing as a non-emergent contested case pursuant to N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to-15. A.M. subsequently filed another pro se petition, containing supplemental documentation.[1] The due process hearing was scheduled for February 28, 2011, but rescheduled for April 5 and 7, 2011, at the parties' request, while A.M. obtained counsel.

On March 7, 2011, A.M. filed with the Commissioner of Education a pro se Petition for Emergent Relief, which was transmitted to the OAL under Docket Number EDU 10523-10, as an emergent matter. On March 9, 2011, the case was scheduled to be heard on March 11, 2011. On March 10, 2011, A.M.'s attorney filed his appearance. On March 11, 2011, an emergent hearing was held and concluded.

FACTUAL DISCUSSION

Many of the material facts are undisputed. Accordingly, I **FIND AS FACT** the following.

[1] On February 18, 2011, A.M. filed another petition requesting J.A.M.'s enrollment and attached thirty seven exhibits to prove residency. The Commissioner of Education transmitted the matter to the OAL as supplemental documentation under the same docket number as the September 13, 2010 petition, EDU 10523-10.

A.M. is a single parent of three children and his daughter, J.A.M., is sixteen years of age. His son, B.M., is eighteen years of age and no longer resides with him. The controversy over whether petitioner and his children reside within the Lenape school district dates as far back as the 2005-2006 academic school year (Exhibit R-21).[2] Central to that dispute, at least most recently, is the question of whether they have been domiciled at 310 Rancocas Boulevard, Mt. Laurel, New Jersey 08054, a location within the Board's school district.

On September 28, 2009, A.M. filed a petition to have J.A.M. and B.M. enrolled in Lenape (Exhibit R-10). They attended Lenape during the pendency of that appeal and actually completed the 2009-2010 school year. In a final decision dated June 17, 2010 (Exhibit P-15), the Commissioner of Education dismissed the petition for A.M.'s unexplained failure to appear at a scheduled OAL telephonic hearing.

By letter dated August 13, 2010 (Exhibit R-16), the Board's attorney notified A.M. that J.A.M. would not be allowed to attend Lenape for the 2010-2011 school year "based upon the dismissal of your appeal entered by the Commissioner of Education." Ibid. On or about September 13, 2010, A.M. filed a pro se Petition of Appeal requesting that the Board enroll J.A.M. at Lenape and, on September 21, 2010, the Board moved to dismiss the petition. On October 4, 2010, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing as a non-emergent contested case.

[2] On February 15, 2006, petitioner entered an agreement with the Board to withdraw his child, A.M., from Lenape following a residency investigation. A.M. and B.M. returned to Lenape during the 2006-2007 and 2007-2008 school years. However, after petitioner failed to appear at a departmental residency hearing in January 2008, A.M. and B.M. were removed and Lenape sought tuition reimbursement. Litigation in Superior Court over the agreement ensued and is ongoing. In July 2009, J.A.M. was enrolled at Lenape and, following another residency investigation, the Board concluded that petitioner did not reside at 2307 Denham Court in Mt. Laurel, but rather at 6 Illinois Avenue in Burlington. The Board notified him that J.A.M. would be removed from school. (Exhibit R-21) His appeal was ultimately dismissed by the Commissioner of Education's final decision dated June 17, 2010 (Exhibit R-15).

A.M. subsequently filed another pro se petition (Exhibit P-44),[3] appending supplemental documentation to prove residency (Exhibits P-1 to P-37). That documentation included the following: a current New Jersey driver's license (Exhibit P-1); September 17, 2009 lease for 310 Rancocas Blvd., Mt. Laurel, New Jersey 08054 (Exhibit P-4); a card for A.M.'s GEICO automobile insurance policy, effective April 4, 2010 through October 10, 2010 (Exhibit P-3); and rent receipts for the period of time between September 2009 and June 2010 (Exhibit P-5). All of those documents bore the address of 310 Rancocas Boulevard, Mt. Laurel, New Jersey 08054. A.M.'s exhibits also included copies of postmarked envelopes addressed to him at that address from Lenape, the Board, the Board's attorney, service providers and others (Exhibits P-6 through P-27). Finally, it included certifications, some undated, from alleged neighbors of A.M., purportedly confirming his residence at 310 Rancocas Boulevard (Exhibits P-28 through P-34).

On February 28, 2011, A.M. submitted additional documentation to the Board, including: a lease for tenancy dated September 1, 2010, for the premises at 310 Rancocas Boulevard, Mt. Laurel, New Jersey 08054 (Exhibit P-38); his current New Jersey driver's license, issued September 18, 2009, with an expiration date of August 31, 2011 (Exhibit P-39, same as P-1); a Comcast cable bill bearing the date of February 14, 2011 (Exhibit P-41); an AT&T bill for the billing cycle dated January 15, 2011 to February 14, 2011 (Exhibit P-42); and a Bank of America returned item notice, dated July 8, 2010 (Exhibit P-43). All are addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey 08054.

On March 7, 2011, A.M. filed a pro se Petition for Emergent Relief with the Commissioner of Education, and it was transmitted to OAL on the following day as an emergent matter. At the hearing, A.M. also produced the card for his GEICO automobile insurance policy, effective November 13, 2010 through May 13, 2011,

[3] On February 18, 2011, A.M. filed another petition requesting J.A.M.'s enrollment and attached thirty-seven exhibits to prove residency. The Commissioner of Education transmitted the matter to the OAL as supplemental documentation under the same docket number, EDU 10523-10, as the September 13, 2010 petition.

bearing the address of 310 Rancocas Boulevard, Mt. Laurel, New Jersey 08054 (Exhibit P-45).

The parties dispute A.M.'s domicile within the school district. A.M. contends that he has continually lived at 310 Rancocas Boulevard, Mt. Laurel, NJ 08054 since September 2009. The Board contends that he has not resided there and J.A.M. thus is not entitled to attend schools within the district. The parties stipulate that the Certifications in evidence are admissible, for purposes of this hearing, to be given due consideration and weight as deemed appropriate.

A.M. testified that he's been living at 310 Rancocas Boulevard, Mt. Laurel, New Jersey, since September 2009 pursuant to a one-year lease (Exhibit P-44) that converted to a month-to-month tenancy at the end of the lease term. J.A.M. and B.M. have resided there with him, and J.A.M. continues to do so, although B.M. became independent and has moved out. A.M. testified that it has been and continues to be his intention to remain at 310 Rancocas Boulevard in Mt. Laurel. Previously, during the 2008-2009 school year, he had lived at 2307 Denham Court in Mt. Laurel.

According to A.M., he had produced his lease and other documentation requested by Mr. Hagar, Lenape's Business Administrator and Board Secretary, in order to enroll J.A.M. for the 2010-2011 school year. He thereafter filed pro se the documentation that, to his best understanding,[4] was required to compel enrollment. J.A.M. has not attended school during the 2010-2011 school year because she cannot register in another district, due to their residence in Mt. Laurel, and A.M. cannot afford a private education.

On cross-examination, he admitted spending time at 6 Illinois Avenue in Burlington in 2009 and that he had received hand-delivered correspondence while at that location. The Board's 2009 residency investigation had established that he spent considerable time there (Exhibit R-21). He explained that it was his former girlfriend's

[4] A.M. has an 11th grade education and suffers from Tourette Syndrome as well as other disabilities.

address and although he'd previously spent time there, his residence is 310 Rancocas Boulevard in Mt. Laurel. He denied ever saying that he lived at the Illinois Avenue address or that he had refused mail at 310 Rancocas Boulevard. He conceded that he earlier had not provided a current automobile registration or insurance card to Mr. Hagar.

Hagar's certification (Exhibit R-21) asserted that A.M. "took no action," regarding Board counsel's August 13, 2010 letter, and "he did not attempt to enroll the students with Lenape schools." Ibid. The Department of Education, by letter dated September 22, 2010 (Exhibit R-19), had informed A.M. of the need to file a Motion for Emergency Relief if he desired J.A.M. to attend Lenape Regional schools.

Based on the record, I **FIND**:

1. A.M. has rented the premises at 310 Rancocas Boulevard in Mt. Laurel, New Jersey from September 2009 through the present time.
2. A.M. is a customer of Comcast and has taken cable service at 310 Rancocas Boulevard as recently as February 14, 2011.
3. A.M. has a current New Jersey driver's license reflecting the 310 Rancocas Boulevard, Mt. Laurel address.
4. A.M. has a current GEICO automobile insurance card reflecting the 310 Rancocas Boulevard, Mt. Laurel address.
5. Since September 2009, Lenape and the Board have sent numerous letters to A.M. at 310 Rancocas Boulevard which, with one exception, have not been marked returned by the Postal Service.
6. A.M. intends to continue his and J.A.M.'s domicile at 310 Rancocas Boulevard in Mt. Laurel.
7. A.M. is without financial means to afford a private education for J.A.M.

8. J.A.M. is unable to attend public school in any other school district due to her residence with A.M. at 310 Rancocas Boulevard in Mt. Laurel.

9. The Board has not presented current documentation indicating any residence for A.M. or J.A.M. other than the premises at 310 Rancocas Boulevard in Mt. Laurel.

10. J.A.M. resides with her father, A.M., who is domiciled in Mt. Laurel, New Jersey, within the Lenape Regional High School District.

LEGAL ANALYSIS AND CONCLUSION

Every school district has an obligation to provide a free education to persons between the ages of five and twenty who are domiciled within the district. N.J.S.A. 18A:38-1; N.J.A.C. 6A:22-3.1(a)(1). A student is domiciled in the school district when she is living with a parent whose permanent home is located within the district. Ibid. A home is permanent when the parent intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere. Ibid.

A petitioner in a controversy or dispute involving a particular course of action by a district board of education may file a motion for emergent relief. N.J.A.C. 6A:3-1.6. The standards for the consideration of an application for emergent relief are set forth in N.J.A.C. 6A:3-1.6, which provides that such relief may be granted if the judge determines from the proofs that: (1) the petitioner will suffer irreparable harm if the requested 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 interest of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The Board contends that A.M. has not met the standards for emergent relief. Specifically, the Board contends there is no likelihood of success on the merits because A.M. has relied upon documents that have expired or are unreliably stale, such as his motor vehicle registration and rental receipts. The Board casts as suspicious the certifications of alleged neighbors and further points to one item of mail that was returned. The Board argues that, in any event, all of A.M.'s documentation was late and no emergency exists. Additionally, the Board urges that the legal right underlying A.M.'s claim for the current school year is not settled because there was no Board "action," regarding enrollment for 2010-2011, from which A.M. properly appealed. Finally, the Board asserts that the taxpayers have previously funded the cost of educating A.M.'s children, but should no longer bear that burden when there is insufficient proof that he actually resides within the district.

A.M. contends that he has maintained a bona fide residence at 310 Rancocas Boulevard in Mt. Laurel since September 2009. He further contends that the Board's determination prohibiting J.A.M. from enrolling in Lenape is causing her irreparable harm, as she is losing precious time in furthering her education in her junior year. Although the Board may have had good cause to challenge A.M.'s residency in past years – a determination not made here – there appears to be none at the present time. A.M. has produced sufficient documentation of his current residence within the school district, notwithstanding his prior production of some stale information. His appearance and demeanor, including eye contact and body language, gave credibility to his testimony regarding his domicile.

After considering the testimony, documentation submitted and arguments of counsel, I **CONCLUDE** that J.A.M. would suffer irreparable harm if denied enrollment within the school district. I **CONCLUDE** that the legal right for enrollment of a child that resides within the public school district is well-settled. I **CONCLUDE** that there is a good likelihood of petitioner prevailing on the merits if there were to be a full evidentiary hearing. Further, I **CONCLUDE** that when the equities and interests of the parties are balanced, the petitioner, and J.A.M. especially, would suffer greater harm than the

respondent would suffer if the requested relief was not granted. Specifically, I am satisfied that the relatively marginal cost to the school district of enrolling J.A.M. would be significantly less by comparison to the harm that would inure to her if she was denied the opportunity to attend school and further her education.

I further **FIND** and **CONCLUDE** that respondent does not waive its ability to challenge the legitimacy of petitioner's residency within the school district for the previous school year inclusive of this school year.

Accordingly, I **FIND** and **CONCLUDE** that petitioner is entitled to emergent relief and that the applicable regulations require the Board to enroll J.A.M. immediately.

DECISION AND ORDER

Based upon the forgoing, I hereby **ORDER** that the Emergent Relief application of A.M. is **GRANTED** and the Board shall immediately enroll J.A.M. at Lenape Regional High School.

This order on application for emergency relief may be adopted, modified or rejected by the **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 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 14, 2011
DATE

ROBERT BINGHAM II, ALJ

Date Received at Agency: March 14, 2011

Date Mailed to Parties: March 14, 2011

cmo

APPENDIX
LIST OF EXHIBITS

For Petitioner:

P-1 A.M.'s New Jersey drivers license, expiration date August 31, 2011

P-2 A.M.'s New Jersey motor vehicle registration, expiration date January 2010

P-3 A.M.'s New Jersey insurance identification card (GEICO), expiration date January 10, 2010

P-4 Lease dated September 17, 2009, for 310 Rancocas Boulevard, Mt. Laurel

P-5 Rent receipts for 310 Rancocas Boulevard, Mt. Laurel, New Jersey

P-6 Envelope dated August 2, 2010, addressed to 310 Rancocas Boulevard, Mt. Laurel, New Jersey from Lenape High School

P-7 Envelope addressed to 310 Rancocas Boulevard, Mt. Laurel, New Jersey from Lenape Regional High School District

P-8 Envelope addressed to 310 Rancocas Boulevard, Mt. Laurel, New Jersey from Lenape Regional High School District

P-9 Envelope dated August 13, 2010 addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey from Comegno Law Group

P-10 Envelope addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey from State of NJ MVVSS

P-11 Envelope addressed to 310 Rancocas Boulevard, Mt. Laurel, New Jersey from Lenape Regional High School District

P-12 Envelope addressed to 310 Rancocas Boulevard, Mt. Laurel, New Jersey from Lenape

P-13 Envelope addressed to 310 Rancocas Boulevard, Mt. Laurel, New Jersey from Lenape Regional High School District

P-14 Envelope dated June 18, 2010, addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey from State of New Jersey Department of Education

P-15 Envelope dated October 15, 2009, addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey from State of New Jersey Department of Education

P-16 Envelope from AT&T addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey

P-17 Envelope from Comcast addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey

P-18 Envelope addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey from State of New Jersey Department of Education

P-19 Envelope from Bank of America addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey

P-20 Envelope dated November 24, 2009 addressed to 310 Rancocas Boulevard, Mt. Laurel, New Jersey from Lenape

P-21 Envelope dated November 24, 2009 addressed to 310 Rancocas Boulevard, Mt. Laurel, New Jersey from Lenape

P-22 Envelope addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey from State of New Jersey Department of Education, Burlington County Office

P-23 Envelope addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey from OAL

P-24 Envelope dated September 16, 2010 addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey from Board counsel, Comegno Law Group

P-25 Envelope dated September 17, 2010, addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey from State of New Jersey Department of Education

P-26 Envelope dated September 22, 2010, addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey from State of New Jersey Department of Education

P-27 Envelope dated June 29, 2010, addressed 310 Rancocas Boulevard, Mt. Laurel, New Jersey from Lenape

P-28 Certification of Bryan Clayton, signed by Brett Decillis, dated October 12, 2010

P-29 Certification of Troy Eldridge dated October 13, 2010

P-30 Certification of Kristin Reilly

P-31 Certification of Karla Beden

P-32 Certification of Eileen Taylor

P-33 Certification of John Taggert dated October 13, 2010

P-34 Certification of Mary Murtha

P-35 Not in evidence

P-36 Not in evidence

P-37 Not in evidence

P-38 Lease dated September 1, 2010, for 310 Rancocas Boulevard, Mt. Laurel, for one-year term

P-39 New Jersey driver's license for A.M., expiration date August 31, 2011 (same as Exhibit-P1)

P-40 Envelope dated February 14, 2011, addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey

P-41 Invoice from Comcast addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey bearing the date of February 14, 2011

P-42 Invoice from AT&T addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey bearing the billing cycle date of January 15, 2011 to February 14, 2011

P-43 Notice dated July 8, 2010, from Bank of America addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey

P-44 A.M.'s supplemental Petition filed with OAL on February 18, 2011

P-45 New Jersey insurance identification card (GEICO), expiration date May 13, 2011

For Respondent:

R-1 ICU Investigation Report dated November 21, 2005

R-2 Transcript of Board Hearing/Settlement Agreement on February 15, 2006

R-3 D.S. Mitchell Investigation Report dated November 16, 2007

R-4 Lenape Regional High School District letters to A.M. dated December 18, 2007

R-5 Lenape Regional High School District letters to A.M. dated January 18, 2008

R-6 D.S. Mitchell Investigation Report dated August 25, 2009

R-7 Lenape Regional High School District letter to A.M. dated July 30, 2009

R-8 Lenape Regional High School District letter to A.M. dated August 27, 2009

R-9 Certification of James Kehoe, Board's Security and Emergency Management Coordinator, dated October 13, 2009

R-10 A.M.'s pro se Residency Appeal dated September 28, 2009

R-11 Board's Answer and Counterclaim dated October 13, 2000

R-12 Two envelopes dated February 8, 2010, addressed to A.M. at 310 Rancocas Boulevard, Mt. Laurel, New Jersey, from Board counsel, Comegno Law Group, postmarked Return to Sender, Not Deliverable as Addressed

R-13 Order of ALJ Ana C. Viscomi dated April 28, 2010

R-14 Letter dated March 26, 2010, from Comegno Law Group to A.M.

R-15 Final Decision of the Commissioner of Education dated June 17, 2010

R-16 Letter dated August 13, 2010, from Comegno Law Group to A.M.

R-17 Affidavit of Lynda Miller, Board employee, dated September 20, 2010

R-18 Affidavit of Phyllis Lovendusky, Board employee, dated September 20, 2010

R-19 Letter to A.M. dated September 22, 2010, from Kathleen Duncan, Director of the Department of Education Bureau of Controversies and Disputes

R-20 Directions for appealing a local Board of Education residency determination

R-21 Certification of James H. Hager, Lenape Business Administrator/ Board Secretary, dated September 20, 2010

LIST OF WITNESSES

For Petitioner:

A.M.

For Respondent:

None

OAL DKT. NO. EDU 1883-11
AGENCY DKT. NO. 42-2/11

K.C. and S.C. on behalf of minor child K.C.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	FOR EMERGENT RELIEF
RESPONDENT.	:	

Petitioners ask that their son, high school senior K.C., be placed back in school pending a determination on the merits about the appropriateness of the discipline that was imposed upon him for making improper use of the school's computer system. Upon consideration of the record – including an audio recording of the March 1, 2011 hearing in the Office of Administrative Law (OAL) – and the Initial Decision, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioners have met the standards for the emergent relief that they seek.

Pursuant to *N.J.A.C.* 6A:3-7.4, petitioners' application for emergent relief must conform to *N.J.A.C.* 6A:3-1.6(b) and meet the substantive standards articulated therein. The four standards are: 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. *See also, Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Since the standards are conjunctive, petitioners must prevail on all four.

For the reasons articulated by the ALJ, the Commissioner finds that, as to the first of the above articulated standards, petitioners have met their burden to show that their requested relief is necessary to avoid irreparable harm to K.C. The second standard, *i.e.* K.C.'s right not to be the object of arbitrary action by respondent, is well settled.

As to the third standard necessary for a grant of emergent relief, *i.e.* a showing of a likelihood of success on the underlying merits of the case, the Commissioner sees no basis to disturb the ALJ's determination that the petitioners have presented facts that could show arbitrary action by respondent. More specifically, as the ALJ pointed out, respondent has established policies for disciplining students who violate its rules of conduct. Four levels of prohibited conduct are identified, with descriptions of qualifying infractions and penalties: Minor Infraction, Moderate Infraction, Major Infraction, and Judicial Infraction. Having adopted this disciplinary matrix, respondent's deviation from it can be regarded as arbitrary, capricious and unreasonable.

Petitioners do not contend that K.C.'s behavior could be characterized as a minor infraction. Rather, they argue that it falls under respondent's definition of a Level II moderate infraction, which definition expressly includes "violation of use of electronic devices and computer access and usage." (Petitioner's Exhibit D to the petition, at 4) That level of infraction brings a range of possible 'responses,' from counseling to suspensions of 1-3 days. (*Ibid.*) The ALJ found that K.C.'s conduct constituted a Level III severe infraction, punishable by, among other things, an in-school or out-of-school suspension of three to five days. (Petitioner's Exhibit D to the petition, at 5) Included in the definition of this level of infraction are, *inter alia,*

fighting, destroying school property, using tobacco/alcohol/drugs, gambling, inciting a riot, theft, threatening weapon use, forging documents, bullying and wearing gang insignia. (*Ibid.*)

The Commissioner notes that respondent's Level IV Judicial Infraction refers to conduct – such as weapons possession, stalking, extortion, arson, drug sales, theft, assault resulting in serious bodily harm, gang activity, etc. – punishable under New Jersey's criminal statutes. (Exhibit D to the petition, at 6) The penalties for these offenses range from exclusion from extra-curricular activities to 10-45 day suspensions or expulsion. (*Ibid.*)

In comparing K.C.'s behavior and the punishment imposed upon him with the disciplinary matrix established by respondent – specifically the conduct assigned to each level of infraction and the consequences attached to same – the Commissioner cannot fault the ALJ for determining that petitioners could show arbitrariness on the part of respondent. Further, the ALJ correctly considered the fact that respondent did not appear to follow the mandate of its own disciplinary policy, that it consider several factors before applying discipline. (Petitioner's Exhibit D at 2) Among those factors are a student's past record – which in K.C.'s case was free of infractions – the circumstances leading to the offence, information from parents, teachers and others – which in K.C.'s case included supportive statements from three teachers – the student's intent, which was undisputedly not to harm the district's computer network, and the effectiveness of alternate forms of discipline. (*Ibid.*)

Finally, the Commissioner concurs with the ALJ's thorough analysis of the fourth standard which petitioners must meet, *i.e.,* a showing that the harm to K.C. – should the requested relief not be granted – will be greater than the harm to respondent if it is granted. Indeed, the harm to K.C. has already been considerable, K.C.'s punishment is likely to serve as a

deterrent to other students, and K.C. is unlikely to pose further risk to the integrity of respondent's computer network.

Accordingly, the Commissioner adopts the Initial Decision on petitioner's motion for emergent relief. Pending a decision on the merits of this controversy, K.C. shall be immediately returned to the Academies program of the Dwight Morrow High School, with reasonable restrictions to ensure his proper use of respondent's computers.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|18|11
Date of Mailing: 3|18|11

[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

ORDER ON MOTION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 01883-11
AGENCY DKT. NO. 42-2/11

K.C. AND S.C. ON BEHALF OF MINOR CHILD, K.C.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

Respondent.

Rebecca K. Spar, Esq., for petitioners (Cole, Schotz, Meisel, Forman & Leonard, attorneys)

Mark A. Tabakin, Esq., for respondent (Weiner, Lesniak, attorneys)

BEFORE **LELAND S. McGEE**, ALJ:

STATEMENT OF THE CASE

K.C. and S.C. o/b/o K.C. (Petitioners) filed a petition for Emergency Relief contesting the City of Englewood Board of Education's decision to remove their son,

K.C., from the Academies @ Englewood in Dwight Morrow High School (The Academies). Petitioners also alleged that the City of Englewood Board of Education (Board) has failed to provide K.C. with the required educational services. The Board is unwilling to allow K.C. back in school because he violated its Student Discipline/Code of Conduct & Procedures by obtaining access to files in the school's network surreptitiously and without permission.

PROCEDURAL HISTORY

On February 17, 2011, Petitioner filed an application for emergent relief with the New Jersey Department of Education, Office of Controversies and Disputes. On the same day, this matter was transmitted to the Office of Administrative Law (OAL) for a hearing on the requested emergent relief. On March 1, 2011, the application for emergent relief was heard at the OAL, 33 Washington Street, Newark, New Jersey, and the record closed.

STATEMENT OF FACTS

The pertinent facts of this case are not in dispute and I **FIND** the following to be the **FACTS** of this case.

K.C. is a seventeen year old boy in the twelfth grade at The Academies in the Englewood School District (District). He resides in Englewood Cliffs which has a send-receive agreement with the Board. K.C. has been an A/B student throughout his high school career, and currently has a Grade Point Average (GPA) of 3.4 on a scale of 4.0. During this, his last semester of high school, he was enrolled in Advanced Placement (AP) English, AP Physics, AP Statistics, Engineering, Physical Education, and a Senior Internship.

In December 2010, during a free period at school, K.C. was using a school computer. While browsing the school's network, he accessed files and ran programs that violated the Academies' Acceptable Use Policy. In particular, K.C. used "ultrasurf"

software to circumvent the District's security; installed and tested a "denial of service program;" explored networked computers and copied unsecured files; and used password-cracking software to open an encrypted file.

There is no dispute that "[n]o damage was done to our network nor is there evidence that he specifically sought to do harm..." Further, "[o]ur investigation of the incident suggests that he has limited hacker skills."

Since K.C. was first prohibited from returning to school on January 7, 2011, he has been visited by two tutors on three occasions for a total of approximately three hours. It was not until "last week" that the Board was able to secure instructors for K.C. in AP English, AP Physics, and AP Statistics. The person identified to instruct K.C. in Statistics has previously taught the advanced placement course. It is unknown whether the person identified to instruct K.C. in English has previously taught the advanced placement course. The person identified to instruct K.C. in Physics has never previously taught the advanced placement course.

Dwight Morrow High School is the only official public high school in the District. However, there are several distinct selective "programs" of specialization within the high school system. These programs, known collectively as The Academies @ Englewood, were originally designed to be an honors-level program to attract a more diverse student body in compliance with a desegregation mandate. Through an inter-district agreement, the State of New Jersey pays for out-of-district students to attend The Academies.

The Academies are housed in the school's "south campus" facility while the "north campus" facility (the original Dwight Morrow High School building) houses the remaining students. The Academies are distinguished from Dwight Morrow facility students, by a higher level of proficiency: there is an entrance exam designed to identify higher achieving students; the students generally have a higher GPA; they have higher SAT scores; college admissions is quantifiably different due to the higher level of student achievement.

When the programs were originally created, they were treated as separate from Dwight Morrow High School. There are still two separate admissions codes used for distinguishing between the two schools on college applications. Students who graduate from The Academies receive a diploma from Dwight Morrow High School with the noted distinction of having attended a specialized program. A diploma from The Academies is distinguished by the courses required to graduate. In the case of K.C., he only needs an English course and gym in order to graduate with a diploma from Dwight Morrow High School. However, in order to graduate with a diploma from The Academies, K.C. must complete AP English, AP Physics, AP Statistics, Engineering (not offered in Dwight Morrow High School), Senior Internship (not offered in Dwight Morrow High School), and physical health. Even if K.C. completes the advanced placement courses through home schooling, he is prohibited from completing the Senior Internship or the Engineering courses. He would therefore be prohibited from receiving a diploma from The Academies. K.C.'s official transcript would reflect that he was forced to withdraw from the courses that he is prohibited from completing. They will not be counted in the calculation of his GPA.

Prior to this incident, K.C. had not been a discipline problem. After the incident, he was suspended for ten days by the principal. When he appeared for a hearing before the Board of Education, three of his teachers were present to speak on his behalf – they supported his return to school. It was the Board that determined that he should be prohibited from returning to the Academies. Alternative educational services offered to K.C. included placement in another school district or home schooling for the remainder of the school year.

Since the incident with K.C., the District has removed the files that were accessed by K.C. from the area on the network that was outside of the District's security protocols. The District also put password protections on other areas that were not previously protected.

CONCLUSIONS OF LAW

The standards which must be met by the moving party in an application for emergent relief are embodied in Crowe v. DeGoia, 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.

Irreparable Harm

The first consideration is whether K.C. will suffer irreparable harm if the requested relief is not granted. Petitioners maintain that a child "suffers irreparable harm when he is deprived of an education for even a brief period of time." Citing P.H., on behalf of M.C. v. Bd. of Ed. of Bergenfield, et al., State Board of Education slip opinion, SB #27-01 (Sept. 5, 2001)(appeal dismissed as moot in Chess v. Bergenfield Bd. Of Ed., Docket No. A-4519-05T24519-05T2).

K.C. has been out of school since January 7, 2011, and has only received three hours of in-home instruction. The rigor associated with an advanced placement course, much less three AP courses, is significant and cannot be replaced by sparse tutorial sessions. It is unreasonable to expect that K.C. will receive adequate home instruction to complete the course load that he has. Almost two months after K.C.'s removal from school, the District has found instructors for the three advanced placement courses. It is

not reasonable to presume that the time could be adequately made up with home instruction.

Irreparable harm is also rooted in the quality of the education that K.C. has received at The Academies. The District argues that it has only one high school. However, the education provided at the Dwight Morrow facility is distinctly different, by design, intent and expectation, from that offered at the Academies. If K.C. is not allowed the opportunity to receive the distinguished diploma that is issued by the Academies, his college admissions may be jeopardized. Although no testimony was offered regarding the college admissions process, conventional wisdom tells us that a student who is admitted to a college or university, is admitted based upon the then known course of study, and subject to the successful completion of that course of study. If a student is admitted based upon the distinction attendant to completing The Academies, and the student does not complete that program, it is reasonable to conclude that admission to the school may be withdrawn. Irreparable harm will result.

I **CONCLUDE** that Petitioners have satisfied the first prong of the Crowes test. Irreparable harm will result if K.C. is not allowed back into the Academies to complete this semester.

Right to Underlying Claim

As to the requirement that the right underlying the claim of a requesting party must be settled, it is clear that each school district is obligated to provide a thorough and efficient system of education to all children residing in its school district. N.J. Const. (1947), Art. VIII, 1, N.J.S.A. 18A:33-1. To carry out this policy, local boards of education have been granted discretionary authority at N.J.S.A. 18A:11-1c and d to adopt rules for the management of the public schools of the district, and to perform all acts and do all things necessary for the lawful and proper conduct of the public schools of the district.

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)).

The "arbitrary, capricious and unreasonable" standard of review imposes a heavy burden on challengers of board actions. This standard has been defined by the New Jersey courts 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 no 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.

[Piccoli v. Ed. of Educ. of Ramapo Indian Hills Regional School District, OAL Dkt. EDU 1839-98 (January 22, 1999) (citing Bayshore Sewage Co. v. Dent. of Envir. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974).]

In the present case, the District has established rules of conduct for its students. Those rules set forth policies for disciplining students who violate those rules. The District contemplates four levels of prohibited conduct: Minor Infraction, Moderate Infraction, Major Infraction, and Judicial Infraction. Upon review of K.C.'s conduct, at worst, his actions constitute a Level III infraction which is punishable by, among other things, an in-school or out-of-school suspension of three to five days. K.C. was initially given an out-of-school suspension of ten days which is consistent with a Level IV infraction.

Petitioners contend that K.C. should not have been removed from school indefinitely without having undergone "progressive" discipline. Petitioner relies on D.L.G. and B.B.G. on behalf of minor child, O.G. v. Board of Educ. Of the Township of Milburn, OAL Decision No. 489-10 (November 12, 2010) and M.R. on behalf of minor child, D.R. v. Board of Trustees of the Hoboken Charter School, OAL Decision No. 89-10 (March 22, 2010). Therein the Commissioner concluded that a student cannot be *expelled* unless it was a second infraction warranting possible suspension or expulsion, and after having served a long-term suspension for the earlier infraction.

I note that the term "expulsion" as defined by N.J.A.C. 6A:16-7.5, is the discontinuance of educational services or discontinuance of payment for educational services. Based upon this definition I disagree with Petitioners that K.C. was expelled from The Academies. However, he was permanently removed from his high school and the Board did not follow its policy of progressive discipline. In the spirit of the Court's decisions in M.R. and D.L.G., K.C. should have received some punishment short of a permanent removal. The Academies' administration deemed a ten-day out-of-school suspension sufficient punishment for the crime. K.C. has now been out of school almost two months. Based upon the foregoing and after having considered all the arguments advanced as well as the proofs offered by both sides, I **CONCLUDE** that Petitioners have satisfied the second condition of emergent relief because the right underlying petitioner's claim is settled based upon the arbitrary, capricious and unreasonable standard of review.

Likelihood of Prevailing on the Merits

Based upon the reasoning above, I further, **CONCLUDE** that the permanent removal of K.C. from school was unreasonable and that Petitioners have satisfied the third conditions of emergent relief.

Balancing of the Equities

The District contends that it must exact a penalty that sends a message to other students that K.C.'s conduct was egregious and will not be tolerated. It contends that if

he is allowed back to school, the message to the students will be that "you can engage in egregious conduct and it's ok." The District further contends that it is concerned about the security of its network. Finally, the District has an interest in protecting the integrity of the trust that is accorded students who have the privilege of attending The Academies.

I disagree with the District that allowing K.C. to return to school to complete his final semester of high school sends the "wrong message." He was removed from school during his last semester of high school which "sends the message" that even a high-achieving student at the very end of his high school career will be disciplined for misconduct. I believe that this will have the deterrent impact that the District seeks.

It is not disputed that the files that K.C. was able to access should have been maintained in a password-protected environment on the network. The District has taken precautions to protect its network in ways that it admits should have previously been implement. The District can allow K.C. back to school and restrict his access to the network except with supervision. The District indicated that it identified an AP Physics instructor; however the instruction would have to take place in the school because the work requires access to the computer system. If the District is willing to allow K.C. to have access to the system for this purpose, he can be granted the same supervised access if allowed back into school. The District noted in an email to potential receiving school districts that K.C. "is aware that any placement will involve him with highly restricted or no computer access on campus...He is aware that police charges are an option we are holding open and will exercise if there is any hint that he violates another district's acceptable use policy." If this provision is operable in another district, there is no reason that it should not be operable in his home district.

The issue of trust must be judged by the legal standard of reasonableness. Under the circumstances, I **CONDLUDE** that it us unreasonable to assume, based upon the totality of the circumstances presented in this limited proceeding, that K.C. cannot be trusted to simply complete his course of study so that he can graduate from The Academies. Under the circumstances, Petitioners satisfied the fourth condition for

emergent relief because the potential harm to K.C. if he's not allowed back to school outweighs the potential harm to the District if he is allowed back to school.

In view of the above, I **CONCLUDE** that the emergent relief requested by petitioners must be granted. Accordingly, it is **ORDERED** that petitioners' motion for emergent relief is granted.

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.

March 2, 2011
DATE

LELAND S. McGEE, ALJ

LSM

118-11

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF ROBERT F. GALGANO, CENTRAL JERSEY COLLEGE PREP CHARTER SCHOOL, SOMERSET COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In March 2010, an Order to Show Cause was served upon respondent – a non-tenured mathematics teacher – 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 on inadequate notice after two months of teaching. The respondent contended, *inter alia*, that he never executed a formal contract of employment and that the aforementioned statute was not applicable to him as a non-tenured charter school employee.

The ALJ found, *inter alia*, that: a binding contract is formed between two parties when there is a meeting of the minds evidenced by a written offer and an unconditional written acceptance; in the instant case, the November 2, 2009 letter offering respondent employment, which he signed as "accepted" on November 3, 2009, created a binding employment agreement to teach for the rest of the 2009-2010 school year; respondent ceased to perform his duties before the expiration of the term of his employment without the consent of the charter school, contrary to *N.J.S.A.* 18A:26-10; respondent's conduct in announcing first that he was offering sixty days' notice of his resignation, only to leave on a one day notice a few school days later, was grossly unprofessional as it allowed no time for the school administration to smoothly transition his students to a new teacher. Accordingly, the ALJ concluded that respondent's abrupt resignation without notice warrants the suspension of his teaching certificate for a period of one year.

Upon independent review of the record and the Initial Decision, the Commissioner found both an express contract between the parties and a contract implied in fact. He concurred with the ALJ that respondent's behavior warrants the suspension of his teaching certificate for a period of one year and forwarded a copy of the instant decision 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.

March 21, 2011

OAL DKT. NO. EDU 3805-10
AGENCY DKT. NO. 49-3/10

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF ROBERT F. GALGANO, CENTRAL JERSEY COLLEGE PREP CHARTER SCHOOL, SOMERSET COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

After review and consideration of the Initial Decision of the Office of Administrative Law (OAL) and the record for this case,[1] the Commissioner concurs with the Administrative Law Judge (ALJ) that respondent Galgano is subject to a one-year suspension of his teaching certificate for violating *N.J.S.A.* 18A:26-10 when, without the consent of his employer, he ceased to perform his duties before the expiration of the term of his employment.

It is undisputed that on November 2, 2009, petitioner sent respondent an offer of employment as a full-time mathematics teacher for the 2009-2010 academic year at a salary of $49,152. (Petitioner's Exhibit P-1) On November 3, 2009, respondent signed the offer letter, checking the term "accepted," and returned same to petitioner. (*Ibid.*) He commenced teaching on November 4, 2009, and continued, ultimately, for two months.

In December, the school's curriculum director indicated to respondent that there were some deficiencies in his performance. Relations between Galgano and his supervisors subsequently deteriorated and respondent tendered his resignation on December 22, 2009, writing that he would "stay until a replacement [was] found for [him] or until the 60-day waiting period [was] over (February 22)." (Petitioner's Exhibit P-3)

[1] The Commissioner was not provided with a transcript of the December 10, 2010 hearing.

It is undisputed that a five-page form which the school had normally used for teacher contracts (the Long Form) – which was identified at the OAL hearing as Petitioner's Exhibit P-5 – was not presented to respondent when he was hired. Knowing this to be the case, respondent asked the principal, Bekir Duz, for a copy of 'his contract' when he came to work on January 5, 2010. When Duz realized that a Long Form had never been proffered to respondent, he asked the business administrator, Veli Altas, to give one to respondent to sign. Respondent refused, advised Altas that he would not return to work, and sent an email to Duz conveying same. (Petitioner's Exhibit P-4) The stated basis for respondent's precipitous abandonment of his position was "the school's failure to provide me with a contract of employment in a timely and professional manner . . . ." (*Ibid.*) Duz testified that he did not see the email until after 4 pm on January 5. (Initial Decision at 8)

The exceptions submitted by respondent have been considered, but are not persuasive. He first contends that no contract was ever formed between the parties because the November 2, 2009 acceptance letter contained insufficient terms. Citing to *N.J.S.A.* 18A:27-6, respondent points to the absence of a specific starting date, or information about the length of pay periods. Respondent further argues that the requirement in *N.J.S.A.* 18A:27-6(4) that a contract include "[s]uch other matters as may be necessary to a full and complete understanding of the contract" was violated because the November 2, 2009 written offer included far fewer terms than the Long Form.

It is axiomatic that a contract arises from an offer and an acceptance, which in the present case occurred on November 3, 2009. If parties agree on essential terms and manifest the intention to be bound by those terms, they have created an enforceable contract. *See, Weichert Co. Realters v. Ryan,* 128 *N.J.* 427, 435 (1992); *West Caldwell v. Caldwell*, 26 *N.J.* 9, 24-25

(1958); *Johnson & Johnson v. Charmley Drug Co.*, 11 *N.J.* 526, 539 (1953); *Knight v. New England Mutual Life*, 220 *N.J. Super.* 560, 565 (App. Div.1987), *certif. denied*, 110 *N.J.* 184 (1988). The Commissioner finds that there was an express contract between the parties.

The offer letter from petitioner – which was expressly accepted by respondent on November 3, 2009 – sufficiently identified the nature of the services to be performed, the term of employment, and the salary to be paid in consideration of the services. The Commissioner sees no reason to invalidate an offer of employment for want of a written starting date, when the respondent admittedly commenced his employment the day after he signed the offer letter – with petitioner's blessing. Similarly, insofar as respondent worked – and was paid – for two months in petitioner's school, the Commissioner cannot conclude that the absence of a pay period schedule in the offer letter was fatal to the formation of the express contract.

Further, contracts are formed not just by executed writings – express contracts – but also by conduct, i.e. contracts implied-in-fact. *Wanaque Borough Sewerage Auth. v. Twp. of W. Milford,* 144 *N.J.* 564, 574 (1996) (Contracts are traditionally classified as express, implied-in-fact or implied-in-law. The contract is express if the agreement is manifested by written or spoken word, and implied-in-fact if the agreement is manifested by other conduct). Contracts implied in fact are no different than express contracts, although they exhibit a different way or form of expressing assent than through statements or writings. *Ibid.* Even without the accepted written offer of November 3, 2009, the parties in the instant case evidenced their assent to the offered employment relationship by respondent's assumption and continuation of teaching duties for several weeks, and by petitioner's payment of the promised remuneration therefor.

In summary, having manifested his assent to the offer of employment by signing and returning the offer letter, and having ratified his assent by performing in the offered position for two months and by accepting the offered remuneration, petitioner cannot now take the position that there was no contract. Nor is it of any consequence that respondent's contract with petitioner was formed differently than the contracts between petitioner and other employees.

Respondent's second argument appears to rely on language in the Long Form. More specifically, respondent refers to the last paragraph in the Long Form which reads: "This contract must be signed and returned by the Employee no later than _____. Failure by [sic] Employee to submit this Contract to the CJCP before this date nullifies this Contract K. and the offer of employment." The Commissioner finds that neither this language nor any other language in the blank Long Form controls the case, because at the time the contract between the parties was formed, that document was neither offered by petitioner nor accepted by respondent. Altas' subsequent presentation of the blank Long Form to respondent for signature does not negate the contract that had been entered into by the parties two months prior. [2]

In connection with Altas' proffer to respondent of a Long Form for signature, respondent contends that Altas advised him: "without a signed contract you cannot work here." (Initial Decision at 6) At the OAL hearing, Altas denied saying this. After consideration of this single material factual dispute, the ALJ found Business Administrator Altas credible. (Initial Decision at 6-7)

The Commissioner must defer to the ALJ's credibility finding unless it is clearly arbitrary, capricious or unreasonable. *See, e.g. D.L. and Z.Y. on behalf of T.L. and K.L. v. Board of Education of the Princeton Regional School District,* 366 *N.J. Super.* 269, 273 (App. Div.

[2] The irrelevance of the blank Long Form renders moot respondent's assertion that its language must be construed against petitioner.

2004) and *N.J.S.A.* 52:14B-10(c). A review of ALJ Bass' discussion of the bases for her credibility determination reveals nothing arbitrary, capricious or unreasonable. To the contrary, the ALJ's description of Altas' non-aggressive demeanor and her consideration of other pertinent facts – such as his lack of authority to dismiss staff and the fact that threatening respondent with dismissal was counter to the school's interests until a replacement was hired – was adequate support for her finding that Altas did not tell respondent that failure to sign the Long Form would mean immediate termination of his job.

Regarding the one-year license suspension recommended by the ALJ, respondent urges that the penalty is too severe. He observes that the period of instructional disruption caused by him was no longer than that which occurred in October 2009, before the beginning of his employment by the school, and refers to the fact that the school administrators had already been obliged to contend with an abrupt departure before his sudden resignation on January 5, 2010. The Commissioner cannot regard these facts as mitigating circumstances. Respondent was cognizant that his students' instruction had been significantly disrupted before he arrived and surely could not have failed to foresee that another disruption only two months later could have an exponentially negative effect on their education. Nor did the fact that the school administrators had to replace the first mathematics teacher early in the year lessen the inconvenience caused by respondent's subsequent abrupt departure.

Finally, respondent contends, ignoring established precedent, that *N.J.S.A.* 18A:26-10 does not apply to charter schools and that the Commissioner consequently has no authority to suspend respondent's teaching certificate. This contention was adjudicated some years ago and rejected by the Commissioner, whose decision was affirmed by the Appellate Division of Superior Court. *See, IMO Suspension of the Teaching Certificate of*

Nadira Raghunandan, Grey Charter School, Newark, Essex County, et al., Commissioner Decision No. 297-08 (July 9, 2008); *In the Matter of the Suspension of the Teaching Certificate of Melissa Van Pelt, Grey Charter School, Newark, Essex County,* Commissioner Decision No. 170-09 (May 29, 2009), *aff'd* 414 *N.J. Super.* 440 (App. Div. 2010). It will not be revisited here.

Accordingly, the recommendation in the Initial Decision that respondent's teaching certificate be suspended for one year is adopted. A copy of this decision will be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|18|11

Date of Mailing: 3|18|11

[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 03805-10
AGENCY DKT. NO. 49-3/10

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF ROBERT F. GALGANO, CENTRAL JERSEY COLLEGE PREP CHARTER SCHOOL, SOMERSET COUNTY.

Brenda Liss, Esq., for petitioner Central Jersey College Prep Charter School (Riker, Danzig, Scherer, Hyland and Perretti, attorneys)

Sanford Oxfeld, Esq., for respondent Robert Galgano (Oxfeld Cohen, attorneys)

Record Closed: January 18, 2011 Decided: February 3, 2011

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Central Jersey College Prep Charter School (CJCP), 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, Robert Galgano, replies that he never executed a formal contract of employment, and that,

accordingly, N.J.S.A. 18A:26-10 does not govern his employment relationship with CJCP.

On March 10, 2010, at the request of CJCP, the Commissioner of Education ("the Commissioner") entered an Order directing Galgano to show cause why his teaching certificate should not be suspended for unprofessional conduct, pursuant to N.J.S.A. 18A:26-10. Galgano filed an answer on March 26, 2010. On April 22, 2010, the Commissioner transmitted this matter to the Office of Administrative Law (OAL) for hearing as a contested case.

Via letter memorandum dated June 23, 2010, Galgano moved to dismiss the petition on the grounds that N.J.S.A. 18A:26-10 is inapplicable to charter-school employees. CJCP replied via letter dated July 15, 2010. Via letter order dated July 19, 2010, the motion was denied.

A hearing was conducted on December 10, 2010. Posthearing submissions were filed on January 18, 2011, at which time the record closed.

FACTUAL DISCUSSION AND FINDINGS OF FACT

CJCP is a charter school created under N.J.S.A. 18A:36A-1, whose mission is to provide a college-preparatory education to students from diverse backgrounds. The school, which has been in existence since 2006, currently serves students in grades 7–12. Bekir Duz is the chief education officer/lead person for CJCP. Duz functions as the principal of the school, but also reports directly to the Board of Trustees, much like a superintendent of schools. CJCP employs twenty-eight teachers, including five teachers of mathematics.

CJCP solicits candidates for teaching positions through NJHire, a New Jersey Department of Education website that advertises available positions in public education. A committee screens candidates. Hirees are asked to execute an "offer letter," which

upon their signature is forwarded to the Board of Trustees for final approval. Newly hired staff receives a teacher packet, which includes employment paperwork, a formal contract of employment and a teacher handbook. The contract is returned to Duz, who maintains it on file. Other paperwork, such as tax and health-insurance forms, is completed at the business office, which likewise provides the new teacher with keys, and Internet and technology information.

Galgano's appointment was a matter of some urgency, and, accordingly, certain steps in the process were omitted. He was hired mid-year to replace a terminated teacher. Galgano's predecessor was described as totally unable to control her class. According to Duz, continuing to retain her while a replacement was sought was deemed not in the best interest of his students. While a substitute covered the class, the position was advertised in NJHire, and résumés were received and reviewed, including one submitted by Galgano.

On November 2, 2009, Galgano was interviewed by a committee comprised of Duz, curriculum supervisor Deirdre Simon, and operations manager Barish Icin. CJCP's philosophy and mission were described to him, and he was afforded an opportunity to ask questions. In light of the urgent need to find a teacher, the committee did not reflect for long, and, indeed, forwarded an offer letter to Galgano via email that very day. (P-1.) The letter offered Galgano a "'mathematics teacher' position on a full-time basis for the 2009–2010 academic year," at a salary of $49,152. Galgano was instructed to sign and return the letter by the next day, November 3, 2009, which he did. On November 4, 2009, he assumed his duties at CJCP. Galgano was assigned an eighth-grade section, two ninth-grade sections, and one mathematics elective, Honors Algebra. It is uncontroverted that contrary to typical school practice, Galgano never signed a formal of contract of employment.[1]

[1] The standard form contract was admitted as P-5 in evidence. It states that the contract of employment may be terminated "upon written notice to the Lead Person of CJCP at least sixty (60) days prior to termination." It further states that the contract must be signed and returned by a date indicated, or it is null and void. But Duz clarified that he often leaves this latter provision blank. It is intended to expedite signature of a contract presented to a new employee, and is unnecessary when a contract is promptly returned signed by that employee.

On December 7, 2009, Galgano attended a faculty meeting that soured him on his newly obtained position of employment. At the close of the meeting, which was conducted by Simon, she asked several teachers, including Galgano, to remain behind. She advised them that their classroom management was subpar. Galgano testified that he was both stunned to be included in this group, and put off by Simon's management style. His teaching had never been observed, hence he did not understand the basis for her criticism. Galgano also strongly felt that any concerns about his teaching performance should have been addressed with him privately. Indeed, Galgano was not alone in his reaction to Simon's approach. He testified that afterwards he and a colleague had a "what just happened here?" sort of conversation.

Later that week, Simon observed Galgano's classroom performance. A post-observation conference took place on December 14, 2009. Galgano left that conference increasingly concerned about his professional future at CJCP. Simon told him that he was hostile and negative, and that she was uncertain he was a good fit for the school. According to Galgano, Simon stated that she felt uncomfortable being in the same room with him. Galgano took some time to reflect, and on December 18, 2009, he emailed Duz, described his interaction with Simon, and stated, "I'm not sure of how to go forward from here if you and your staff are going to second-guess your hiring decisions after such a short period of time." (P-2.)

That day, Galgano met with Duz, Simon and Icin, and reiterated the concerns expressed in his email. Simon replied that she did not feel that Galgano was living up to the school's expectations, indicating, "You are not the teacher we expected you to be." Galgano testified that the meeting offered no resolution to the concerns expressed in his December 18, 2009, email, and that at its conclusion he felt that the parties were at a "stalemate." He conferred with his wife, and expressed the feeling that his relationship with Simon was irrevocably damaged. Accordingly, he felt that he could not have a successful tenure at CJCP; that in essence, his fate was sealed. Galgano decided to resign, and did so via letter dated December 22, 2009. (P-3.) Although he had not received a formal contract, he clearly was aware that he was obligated to give sixty

days' notice, as his letter stated, "I will stay until a replacement is found for me or until the 60 day waiting period is over."

Duz did not seek to change Galgano's decision, but rather promptly turned to the business of securing a replacement. The timing was very poor, as the Christmas holiday was just days away. Nonetheless, Duz posted in NJHire, intending to release Galgano as soon as he had found a suitable alternate teacher. The holiday break intervened and Duz did not interact again with Galgano until January 5, 2010, when Galgano returned to his classes. Although January 4, 2010, was a school day, Galgano had called in sick.

Galgano testified that a colleague had advised him that sixty days' notice was required when resigning, but he wanted "the real facts," so he sent an email to Duz on January 5, 2010, asking for a copy of his contract. He sent the email with full knowledge that no signed contract existed. His colleague's advice about the required notice notwithstanding, Galgano testified that since he had not received a contract he thought he could "just walk away from the job." Accordingly, his email plainly was sent to verify his belief that, in fact, he could leave his post immediately.

Duz consulted with Veli Altas, the business administrator, and it was discovered that there was no signed contract between the parties. Duz asked Altas to secure Galgano's signature on the form contract, asserting at hearing that his sole intent was to ensure that school files were complete. Duz's testimony was credible. There would have been no other reason to seek a signed contract at that time. Although Galgano suggests that Duz's actual purpose was to formalize his obligation to remain for sixty days, Galgano had already given his commitment to do so, per his December 22, 2009, letter of resignation. On the morning of January 5, 2010, Duz was still completely unaware that Galgano intended to renege on that promise.

Altas proceeded to follow up with Galgano, per Duz's request. What transpired between them is controverted. Altas testified that he brought the form contract to

Galgano's classroom at about 9:00 a.m. Standing in the doorway, he engaged in a thirty-second conversation with Galgano, who was in the midst of teaching a class. Altas advised that he wanted a signed copy of the contract for their records, gave Galgano the document, and asked that he review and sign it.

At approximately 10:30 a.m., Altas stopped by the classroom again and inquired if Galgano had signed the contract. He had not. At 3:00 p.m., Altas passed Galgano in the hallway, and again asked about the contract. Galgano stated that he had already resigned, and Altas replied that he nonetheless required a signed contract for their files. Galgano's response, as described by Altas, sounded a bit like a non sequitur. Galgano advised Altas that he would not be signing the contract, and he said to Altas, "tell Mr. Duz that I will not be coming in tomorrow."

Galgano offered a somewhat different version of their interaction. He agreed that Altas appeared at his classroom in the morning, and asked that he sign the contract. Galgano informed Altas that he was teaching class, and that he could not immediately review the contract. He suggested that Altas return later. At about 10:40 a.m. Altas did so, and Galgano advised that he would not sign the contract. He testified that Altas replied that "without a signed contract you cannot work here." Galgano was unsurprised, as he viewed this statement as consistent with the contract language, which provided that absent a signature its terms were null and void. He took Altas' comment to mean that he was no longer permitted to work at CJCP. Accordingly, Galgano advised Altas to "please inform Mr. Duz that I will stay until the end of the day." Galgano asserted that the two did not speak again.

Altas was adamant that he did not advise Galgano that he could no longer work there, stressing that such a decision would have exceeded the bounds of his authority as school business administrator. His testimony was credible. Our courts have held that "credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses . . . that are not transmitted by the record." State v. Lourito, 157 N.J. 463, 474 (1998). A credibility determination requires an overall

assessment of the witness' 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).

Concededly, Galgano's statement that he would leave at the end of the day flows logically from a warning that he could no longer work there unless he signed the contract. But implicit in Galgano's version of the exchange is an aggressive reaction by Altas to Galgano's refusal to sign, in essence a threat that Galgano sign "or else." This is simply not consistent with the overall testimony, or with Altas' demeanor as a witness. It is clear that Altas and Duz sorely needed Galgano to honor his sixty-day notice commitment, as the students in his classroom had experienced ongoing discontinuity in instruction that year. Altas undoubtedly felt troubled by the loose end created by an unsigned contract. But directing that Galgano immediately leave if he refused to sign the contract would have been contrary to CJCP's best interests.

Nor did Altas present as an individual capable of angry threats. He was so soft-spoken that he had to be asked repeatedly to raise his voice so that counsel could hear his testimony. He exuded timidity. Furthermore, Galgano's contention that he was asked to leave by Altas is inconsistent with the tenor and content of the email Galgano sent later on January 5, 2010. Galgano advised Duz that, "in light of the school's failure to provide me with a contract of employment in a timely and professional manner, I hereby resign my teaching position effective at the close of business on Tuesday, January 5, 2010." (P-4.) There would have been no purpose in sending such an email if Altas had directed him to leave, as Galgano contended at the hearing.

I **FIND** that Altas did not tell Galgano that he could no longer work at CJCP absent a signed formal contract. I **FIND** that at no time did the discussion about the contract include a statement by Altas that justified Galgano's decision to leave at the end of the day. Galgano was looking for a way to leave as quickly as possible. Accordingly, I **FIND** that Galgano chose not to sign the contract precisely because he thought doing so would facilitate his immediate departure from CJCP.

Both Duz and Galgano described a meeting that took place on January 5, 2010, at about 2:00 p.m., at which volunteer tutoring assignments were discussed. Galgano testified that he was not offered the opportunity to participate; he urges that he was excluded because his superiors knew he would be leaving at the end of the day. Galgano testified that he was not asked to volunteer because he was "not eligible to work there anymore." But Duz convincingly testified that during the meeting he continued to think that Galgano would honor his commitment to stay for sixty days, as he did not receive Galgano's email of immediate resignation until later, sometime after 4:01 p.m. I **FIND** that Duz bypassed Galgano simply because Galgano was leaving CJCP shortly, and not because he was already aware of or had authorized Galgano's abrupt departure from the school.

Duz described the impact of Galgano's sudden resignation. Galgano failed to leave substitute plans, which Duz distinguished from lesson plans, and which he explained are a road map for the substitute, including tests and other assignments. Galgano did not deny that such plans were missing, but rather contended that he was uninformed that he was obliged to leave "substitute plans." This testimony lacked credibility, as he admitted on cross-examination that he had left work for substitutes when absent in the past, both at CJCP and at prior teaching positions. Other mathematics teachers were required to prepare work for the substitute called in to replace Galgano.[2]

It took about two weeks to secure a replacement for Galgano's classes. In the interim, his classes were taught by a substitute who was not a teacher of mathematics. Duz urged that this negatively impacted the students in Galgano's classes, students for whom instruction already had been disrupted. Importantly, while Duz asserted that Galgano's actions directly correlated to decreased test scores for his former students,

[2] It is uncontroverted that Galgano worked over the school holiday to prepare remediation plans for those students who were in danger of failing State high-school-graduation examinations. These plans most surely assisted his students, and the teacher who replaced him, but I heard no testimony that reflected that such plans could be used by the substitute teacher to guide day-to-day instruction pending retention of a permanent replacement for Galgano.

particularly those in eighth grade, Duz offered no proof that this was the case. Indeed, while he testified generally about diminished test scores in the eighth grade, he conceded that he had not disaggregated the scores by class. Duz thus could not verify whether Galgano's students were responsible for the overall poor performance in eighth-grade mathematics at CJCP. But it cannot be controverted that instruction was lost when a substitute again had to cover these classes for several weeks.

Based on the totality of the evidence, I **FIND** that Galgano resigned prior to the expiration of the term of his employment without the consent of his administrators or the Board of Trustees. I **FIND** that his actions caused disruption at CJCP, and negatively impacted his administrators, his colleagues, and, most importantly, his students.

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>; East Amwell Twp. Bd. of Educ. v. Acken, 1986 S.L.D. 2803.

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 teacher there had an understandable reason for her slightly early departure and had met with her successor in order to discuss the educational program. She had left lesson plans and final grades for her classes. 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.

None of these mitigating factors are present here. Galgano's conduct was grossly unprofessional. Although at first offering sixty days' notice of his resignation, only a few school days later he literally walked out on his students. He offered a less-than-perfect work environment and interpersonal conflict with his administrators as excuses for his conduct. While Galgano was well within his rights to decide that the climate at CJCP was not a good fit, it was nonetheless incumbent on him to afford the administration the time needed to smoothly transition his students to a new teacher. His assertion that he was within his rights to leave without notice because he was teaching without a formal contract is unpersuasive.

Galgano was contractually bound to perform his duties as a teacher of mathematics at CJCP, the absence of a more lengthy or detailed contract notwithstanding. A binding contract is formed between two parties when there is a meeting of the minds evidenced by a written offer and an unconditional written acceptance. Morton v. 4 Orchard Land Trust, 180 N.J. 118, 129–30 (2004) (citing Johnson and Johnson v. Charmley Drug Co., 11 N.J. 526, 538–39 (1953)). Here, the November 2, 2009, offer letter, signed as "accepted" on November 3, 2009, by Galgano,

created a binding employment agreement under which Galgano agreed to teach mathematics for the remainder of the 2009–2010 academic year at a salary of $49,152.

It is well settled that parties may effectively bind themselves by an informal memorandum where they agree upon the essential terms of a contract and intend to be bound by the memorandum, even though they contemplate the execution of a more formal document. The Berg Agency v. Sleepworld-Willingboro, Inc., 136 N.J. Super. 369 (App. Div. 1975). It is not necessary for a writing to contain every possible contractual provision to cover every contingency in order to qualify as a completed binding agreement. Id. at 376–77. The essential terms of the understanding between Galgano and CJCP were crystal clear, as evidenced by Galgano's conduct in assuming his duties and accepting payment for those duties.[3] Thus, while Galgano urges that he had no contract whatsoever, he had in actuality entered into a contract that bound him to teach until June 2010, unless Duz consented to a shorter notice period. Duz did so by accepting Galgano's resignation on sixty days' notice.

Moreover, Galgano's attempt to evade his obligations under N.J.S.A. 18A:26-10 by relying on technical niceties of contract law ignores that the statute simply echoes a general concept of teaching professionalism. Teaching is a unique occupation, where a change in personnel can affect many young lives. Accordingly, resigning teachers must afford as much notice as administration feels is needed to ensure that education will continue uninterrupted. N.J.S.A. 18A:26-10 confirms that a dedicated teacher must always put his students first. Galgano did not do so.

Indeed, while the poor test scores of his students cannot be blamed exclusively on Galgano's conduct, it is incontrovertible that his abrupt departure disrupted instruction for his students, who were forced again to be taught by a substitute for several weeks, and then adjust to what would be their third teacher of the year. Likewise, Galgano's unprofessional conduct negatively impacted his administrators,

[3] For this reason, Galgano's reliance on the language in P-5 stating that the long form contract must be signed and returned by a date indicated, or it is null and void, is misplaced.

who had to scramble to secure coverage for his classroom, and his colleagues, who, in addition to their own duties, had to assist in ensuring that some modicum of instruction took place in Galgano's classroom while a replacement mathematics teacher was secured.

Galgano acted "with nary a concern about the well-being of the . . . students in need of his assistance, [CJCP'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 Galgano 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.

ORDER

Based on the foregoing, it is **ORDERED** that Galgano's teaching certificates be suspended for a period of one 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.

February 3, 2011
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: February 3, 2011

Date Mailed to Parties: FEB - 4 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner

Bekir Duz

Veli Altas

For Respondent

Robert Galgano

Exhibits

For Petitioners

P-1 November 2, 2009, offer letter

P-2 Letter to Duz from Galgano, dated December 18, 2009

P-3 Letter to Duz from Galgano, dated December 22, 2009

P-4 Email to Duz from Galgano, dated January 5, 2010

P-5 Form employment contract

P-6 Certificate issued to Galgano by State Board of Examiners

For Respondent

None

119-11

W.C., on behalf of minor child, M.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed as excessive a one-day out-of-school suspension imposed upon M.C., a high school student, for violation of its written policy against misconduct. School officials alleged that M.C. was complicit when another student inquired whether he could ask M.C.'s girlfriend if she performed certain sexual acts. The Board contended that M.C., by failing to discourage the other student from asking the harassing question, committed an act of misconduct.

The ALJ found, *inter alia,* that: the Board charged M.C. with misconduct for his failure to discourage the other student from making inappropriate comments to his girlfriend; the Board has an affirmative right to require that all students understand the severity of harassing language between students, and appropriately used its discretionary powers in making the finding that M.C.'s behavior constituted misconduct; as such, the Board's action was not arbitrary, capricious, or unreasonable; the penalty of a one-day out-of-school suspension was not, however, appropriate for a first offense of misconduct; and the Board did act in an arbitrary, capricious, and unreasonable manner in assigning the penalty as it disregarded the circumstances and the chart of offenses and their corresponding disciplinary actions which is included in the Board's Code of Discipline; the appropriate penalty for a first offense for misconduct should have been teacher detention. Accordingly, the ALJ concluded that the Board's imposition of a one-day out-of-school suspension for M.C.'s misconduct should be reversed, and a penalty of teacher detention should be imposed upon M.C. in consequence for his role in this incident.

Upon consideration and review, the Commissioner adopted the Initial Decision as the final decision in this matter, noting that under the Board's disciplinary guide, even a fifth offense of misconduct does not result in discipline at the level of an out-of-school 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.

March 21, 2011

OAL DKT. NO. EDU 12066-09
AGENCY DKT. NO. 238-9/09

W.C., on behalf of minor child, M.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF JACKSON, OCEAN COUNTY,	:	DECISION
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 Jackson Township Board of Education (Board).[1] This case involves a student, M.C., who received a one-day out-of- school suspension based upon an incident that resulted in a charge of misconduct. The Board found that M.C. was complicit when another student asked him if he could ask M.C.'s girlfriend whether she performed certain sexual acts. The Administrative Law Judge (ALJ) found that the Board was not arbitrary, capricious or unreasonable in finding that M.C.'s role in the incident constituted misconduct. The ALJ, however, found that the Board acted in an arbitrary, capricious and unreasonable manner when it imposed a one-day out of school suspension instead of a teacher detention, which is the penalty listed in the student code of discipline for a first or second misconduct offense.

The Board takes exception to the ALJ's determination that the Board was arbitrary and capricious in assessing a one-day suspension to M.C. based on his involvement in the incident. In its exceptions, the Board contends that the ALJ disregarded the Board's responsibility to maintain order and discipline in the schools, and that it is the discretion of the administrators to assess disciplinary penalties. The Board contends that, in this instance, the individuals tasked with responding to improper student behavior believed that due to the totality of M.C.'s conduct, a higher penalty was warranted. The Board

[1] The record contains no transcripts from the hearing conducted at the OAL on November 12, 2010.

points out that the Assistant Principal testified that she felt that the one-day suspension was appropriate in this case because M.C. was aware that A.K. had intentions to ask C.L. a sexually inappropriate question, he did not attempt to prevent A.K. from asking the question, he did not report the situation to administrators and, in fact, M.C. actually agreed that A.K. could ask the question.

In its exceptions the Board also argues that although misconduct is a disciplinary offense that does not carry a corresponding penalty of suspension, the student handbook and the code of discipline indicate that the administration may modify disciplinary penalties on a case by case basis. The Board claims that the ALJ ignored the preamble of the code of discipline that specifically states, "[t]he following is a general guide for disciplinary action. All disciplinary actions are subject to determination by the administration and are not limited to the rules in this book." The Board maintains that this language clearly gives the administrators the authority to assign whatever discipline is appropriate in light of the circumstances of the alleged infraction. Finally, the Board argues that the ALJ erred when he found that M.C. had no obligation to discourage another student from engaging in harassing behavior or to inform an administrator of the circumstances.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ that the Board was not arbitrary, capricious or unreasonable in finding that M.C.'s role in the incident constituted misconduct. The Commissioner is also in accord with the ALJ – for the reasons fully detailed on pages 14-15 of his decision – that the Board acted in an arbitrary, capricious and unreasonable manner when it imposed a one-day out-of-school suspension instead of a penalty that corresponds to a misconduct offense in the student code of discipline.

The student handbook contains a code of discipline which provides detailed guidelines for the level of discipline a student will be subject to based on the nature and severity of a student's conduct. Pursuant to the code of discipline, students who are found to have committed misconduct are subject to the following discipline:

$1^{st}/2^{nd}$ offense – teacher detention

$3^{rd}/4^{th}$ offense – 2 after school detentions

5th offense – 1 in school suspension

In this case, M.C. was found to have committed misconduct,[2] yet he received a one-day out-of-school suspension, which is a significant deviation from the penalty listed in the disciplinary code for a student's first misconduct offense. It is without question that the disciplinary decisions of school administrators are afforded a presumption of reasonableness, and the Commissioner is mindful of the language in the preamble which provides notice that the disciplinary code is only a general guideline. However, in this case the considerable degree of deviation from the penalty for misconduct listed in the code, and the penalty that M.C. received, was not reasonable. In finding that the discipline imposed was arbitrary and capricious, the Commissioner further notes that under the disciplinary guide, even a 5th offense of misconduct does not result in discipline at the level of an out-of-school suspension. Accordingly the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|21|11

Date of Mailing: 3|21|11

[2] The facts surrounding M.C.'s involvement in the incident are thoroughly detailed in the Initial Decision and will not be repeated here.

[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 12066-09
AGENCY DKT. NO. 238-9/09

W.C., ON BEHALF OF
MINOR CHILD M.C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF JACKSON, OCEAN COUNTY
Respondent.

W.C., petitioner pro se

Joseph L. Roselle Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Zitomer, attorneys)

Record Closed: December 23, 2010 Decided: February 4, 2011

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

STATEMENT OF THE CASE

This is an appeal by petitioner on behalf of an eleventh-grade student seeking to reduce as excessive a one-day out-of-school suspension imposed for behavior allegedly committed during his ninth grade school year. Jackson Township Board of

Education ("Board") has imposed a one-day out-of-school suspension on a now sixteen-year-old student (identified herein as "M.C.") for violation of its written policy against "Misconduct." School officials allege that, while in technology class, M.C. was asked by his friend A.K. if M.C. would mind if A.K. asked M.C.'s girlfriend, C.L., if she undertook a specific sexual act, whereupon M.C. replied, "I guess you could." The Board contends that such conduct violates a school policy prohibiting harassment, and that M.C., by failing to discourage A.K. from asking the harassing question, committed an act of misconduct.

While acknowledging that some disciplinary action may be warranted, petitioner contends that the penalty is excessive and that a lesser penalty would have been sufficient. The Board maintains that the penalty was appropriate and that Commissioner of Education ("Commissioner") cannot set aside its determination unless a finding is made that the action was "arbitrary, capricious and unreasonable."

PROCEDURAL HISTORY

By notice dated June 12, 2009, the Jackson Memorial High School vice-principal notified M.C.'s parents that their child would receive a one-day out-of-school suspension for misconduct. (J-5.) The imposition of the suspension was stayed pending an appeal of the penalty by petitioner. Petitioner's parent W.C. sought a review of the decision and on or about August 4, 2009, the Board's personnel/disciplinary committee denied W.C.'s appeal, and upheld the suspension assessed to M.C. M.C. has not yet served the one-day suspension.

Petitioner's parents filed an appeal to the Commissioner on September 14, 2009, and the Board filed its answer by way of a Motion to Dismiss the Petition on or about October 30, 2009. Subsequently, on November 23, 2009, the matter was filed at the Office of Administrative Law ("OAL") for hearing as a contested case. On April 6, 2010, an Order was entered on the Motion to Dismiss, granting the motion in part and denying the motion in part, leaving the issue of whether the discipline imposed upon M.C. was

excessive. The OAL held a hearing on November 12, 2010. Upon receipt of post-hearing briefs, the record closed on December 23, 2010.

FACTUAL DISCUSSION

The parties have stipulated to the following statement of facts (J-11), and I therefore **FIND** the following as **FACT:**

1. At all times relevant, petitioner M.C. was a 9th grade student enrolled in the Jackson Memorial High School ("Jackson Memorial").
2. At all times relevant, students A.K. and C.L. were also 9th grade students attending Jackson Memorial.
3. On June 11, 2009, while A.K. and C.L. were in gym class, A.K., a male student, asked C.L., a female student, whether she performed a certain sexual act. See Joint Exhibits J-1, J-2, and J-3. Written statements of students C.L. and A.K., each dated June 12, 2009, respectively, and written statement of Steven Bado, Physical Education Teacher at Jackson Memorial High School, undated.
4. Upon questioning by District Administration, A.K. admitted asking the question to C.L., and also indicated that petitioner, student M.C., asked him (A.K.) to ask C.L, who was M.C.'s girlfriend at the time, whether she performed the sexual act. Exhibit J-2U.
5. In his written statement regarding the incident, petitioner M.C. stated that on June 10, 2009, at or about 10:40 a.m., during their Technology and Problem Solving class, he was asked by A.K. if he (A.K.) could ask C.L. if she performed a sexual act. M.C. stated that he replied "I guess you could." M.C. also stated that he saw pictures of C.L. on A.K.'s phone and deleted the photos. See Joint Exhibit J-4, written statement of student M.C., dated June 12, 2009.
6. Thereafter, on or about June 12, 2009, Dr. Lynn Coddington, the Vice Principal of Jackson Memorial High School, charged M.C. with "Misconduct" due to his alleged involvement in the incident between A.K.

and C.L. See Joint Exhibit J-5, correspondence from Dr. Coddington to M.C.'s Parent/Guardian, dated June 12, 2009.

7. Based on the charge of "misconduct," Dr. Coddington met with M.C. and assessed him a one (1) day, out-of-school suspension. Id. The imposition of the suspension was stayed by Principal Anthony Gaita, pending an appeal of the penalty by W.C., M.C.'s father.

8. On or about August 4, 2009, the Board's Personnel/Disciplinary committee denied W.C.'s appeal, and upheld the suspension assessed to M.C. See Joint Exhibit J-6, Correspondence from W.C. to Barbara Fiero, then-President of the Jackson Township Board of Education, dated June 24, 2009.

9. On or about August 4, 2009, the Board's Personnel/Disciplinary committee denied W.C.'s appeal and upheld the suspension assessed to M.C. See Joint Exhibit J-7, correspondence from Thomas Gianlanella, Superintendent, to W.C., dated August 6, 2009.

10. On or about September 14, 2009, petitioner filed the within petition of appeal with the Commissioner of Education, alleging, among other things, that the District failed to provide due process to M.C., and that the one-day suspension imposed on M.C. for his involvement in the incident was excessive.

11. On or about October 30, 2009, respondent filed a motion to dismiss the petition. Both parties filed written submissions on the issue, and on April 6, 2010, the Hon. Edward J. Delanoy, Jr., ALJ, issued an Order granting respondent's motion in part and denying the motion in part.

12. Pursuant to Judge Delanoy's April 6, 2010 Order, the sole remaining issue in the case is whether the discipline imposed upon M.C. is excessive.

13. M.C. has yet to serve the one-day suspension.

14. Board of Education Policy #5751, entitled "Sexual Harassment," defines sexual harassment, in part, as:

> 2. . . . sexually harassing conduct (which can include unwelcomed sexual advances, requests for sexual favors, or other favors, or other verbal, nonverbal, or physical conduct of a sexual nature) by

an employee, by another pupil, or by a third party that is sufficiently severe, persistent, or pervasive to limit a pupil's ability to participate in or benefit from an educational program or activity or to create a hostile or abusive educational environment."

See Joint Exhibit 7-8, copy of Board Policy #5751

15. Board Policy #5600, entitled "Pupil Discipline/Code of Conduct," incorporates by reference a "Code of Discipline," comprised of a chart of offenses and their corresponding disciplinary action(s). The Policy states, in part, that "school responses and consequences to violations of the behavioral expectations established by the Board...are graded according to the severity of the offenses, considering the developmental ages of the pupil offenders and the pupil's histories of inappropriate behaviors." See Joint Exhibit J-9, copy of Board Policy #5600 and corresponding "Code of Discipline."

16. The "Code of Discipline" chart indicates that "all disciplinary actions are subject to determination by an administrator and are not limited to the rules in this guide," and further, states that instances of sexual harassment shall be subject to a penalty of up to two (2) days of out of school suspension ("OSS") for a first offense, with further offenses subject to penalties of five (5) and ten (10) days OSS, respectively. See Joint Exhibit J-9.

17. The 2008-2009 Jackson Memorial High School Student Planner also contains a recitation of the Student Code of conduct. See Joint Exhibit J-10, copy of relevant sections of the 2008-2009 Student Handbook, at page 50.

Testimony

FOR JACKSON TOWNSHIP BOARD OF EDUCATION:

Steven Bado

Steven Bado has been employed by the Jackson Township Board of Education as a physical education/health/driver's education instructor for seventeen years. On June 12, 2009, he was instructing ninth graders in the Clayton gymnasium at Jackson Memorial High School. A freshman girl, C.L., approached him in tears. C.L. told Bado that a freshman boy, A.K., had asked her if she liked "sucking dick." Bado immediately spoke to A.K. A.K. told Bado that C.L.'s boyfriend, M.C., had requested A.K. make the inquiry of C.L. A.K. also told Bado that he was only kidding. (J-3.) Although M.C. was not present in the gym class, Bado knew M.C. from coaching him in soccer, and Bado was aware that A.K. and M.C. were friends. Bado reported the incident to the school administration.

Dr. Lynn J. Coddington

Dr. Lynn J. Coddington, currently retired, began her career as a physical education teacher, and subsequently became supervisor of the physical education department. For seventeen years, including during the 2008-2009 school year, she was a vice principal of Jackson Memorial High School. She was the supervisor responsible for the safety of the schoolchildren.

On June 12, 2009, Bado met with Coddington and told her that a young female student, C.L., had approached him in gym class and told him that she was upset regarding a sexual comment made to her by a boy, A.K. Coddington contacted the students involved in the incident, and took verbal and written statements from them on June 12, 2009. (J-1, 2.) C.L.'s statement was consistent with what she had told Bado. A.K. told her that he had been asked by C.L.'s boyfriend, M.C., to ask C.L. the sexually related question, and to let M.C. know C.L.'s answer. A.K. also told Coddington that he was only kidding regarding the question.

Coddington spoke to M.C. M.C. admitted that A.K. asked him on the previous day in technology class if he could ask C.L. the sexually related question, and M.C. told A.K., "I guess you could." (J-4.) A.K. was not forced or coerced by M.C. to ask C.L. the sexually related question. Coddington then spoke to the school principal, Doctor Gaita,

and a joint decision was made to charge M.C. with Misconduct, and to suspend him one day out of school ("OSS"). M.C. was charged with Misconduct for his failure to discourage A.K. from making the sexual comments to C.L., and because M.C.'s response to A.K. was improper. M.C. was a contributor to the incident, and admitted to his involvement. M.C. was not charged with sexual harassment, although Coddington did consider it as a possible charge. Coddington communicated the misconduct charges by letter to the parent/guardian of M.C. on June 12, 2009. (J-5.)

Coddington became aware of a history of incidents between C.L. and A.K. when she took their statements. A.K. had previously made an upsetting statement to C.L. in which M.C. was not involved.

The Jackson Memorial Student Planner ("Planner") is given to all students. (J-10.) The charge of Misconduct carries with it for the first or second offense a penalty of teacher detention. The third or fourth offense carries with it a penalty of two days after-school- detention, and for a fifth offense, the penalty is a one-day in-school-suspension. (J-10 at 49.) OSS is not a penalty listed for Misconduct. The Planner also recognizes serious and gross misconduct, (J-10 at 50-51), and the charge of serious misconduct encompasses sexual harassment. (J-10 at 50.) A charge of serious misconduct encompassing sexual harassment carries a charge for a first offense of two days out of-school suspension, and a parent conference. (J-10 at 50.)

Coddington felt the administration did have discretion to implement discipline under the Planner, except in the instance when a law is broken. Pursuant to section VI of the Planner, the Code of Discipline begins with the following preamble, "***The following is a general guide for disciplinary action. All disciplinary actions are subject to determination by the administration and are not limited to the rules in this book.***" (J-10 at 46.) In addition, the Jackson School District High School Code of Discipline states that, "The following is a general guide for disciplinary action. All disciplinary actions are subject to determination by an administrator and are not limited to the rules in this guide." (J-9 at 4.) Discipline is normally handled in a progressive manner. The Jackson School District High School Code of Discipline also states that

violations of behavioral expectations should be graded according to the severity of the offenses, considering the developmental ages of the pupil offenders and the pupils' histories of inappropriate behaviors. (J-9 at 1.) Coddington stated that M.C.'s misconduct behavior was in the form of an answer to a question.

FOR PETITIONER:

M.C.

M.C., currently age sixteen, began as a freshman at Jackson Memorial High School during the 2008-2009 school year. On June 12, 2009, M.C. was fifteen years old.

On June 11, 2009, M.C. was in his technology class working on a mousetrap car. A.K. was in the technology class with M.C. The two were not friends, but rather were acquaintances. M.C. was having difficulty getting the mousetrap car to work and he was becoming annoyed and frustrated. A.K. approached M.C. and asked M.C. if it was all right if he asked C.L. if she "sucks dicks." C.L. was M.C.'s girlfriend in school, but the two did not see each other outside of school because of C.L.'s busy schedule. M.C. was not paying attention to A.K., but rather continued to work on his mousetrap car. M.C., in attempting to terminate the conversation so he could concentrate fully on his project, made a passing remark to A.K. that, "I guess you could." (J-4.) He gave this answer to A.K. so that A.K. would leave him alone. M.C. did not think A.K. would ask C.L. the question. M.C. never told A.K. to talk to C.L.

C.L. had told M.C. that A.K. was bothering her, and M.C. asked A.K. to stop. A.K. had been interested in C.L., and he had inappropriate pictures of her on his cell phone. M.C. advised Dr. Coddington about the photographs.

FINDINGS OF FACT

In addition to the stipulated facts above, I **FIND** the following additional **FACTS:**

On June 11, 2009, M.C. was in his technology class working on a mousetrap car. A.K. was in the technology class with M.C. The two were not friends, but rather were acquaintances. M.C. was having difficulty getting the mousetrap car to work, and he was becoming annoyed and frustrated. A.K. approached M.C. and asked M.C. if it was all right if he asked C.L. if she "sucks dicks." C.L. was M.C.'s girlfriend in school, but the two did not see each other outside of school because of C.L.'s busy schedule. M.C. was not paying attention to A.K., but rather continued to work on his mousetrap car. M.C., in attempting to terminate the conversation, made a passing remark to A.K. that, "I guess you could." He gave this answer to A.K. so that A.K. would leave him alone to work on his car. M.C. did not think A.K. would ask C.L. the question. M.C. never told A.K. to talk to C.L.

On June 12, 2009, while in the Clayton gymnasium at Jackson Memorial High School, A.K. asked C.L. if she liked "sucking dick." C.L. became upset and went to Bado in tears. M.C. was not present in the gym class.

M.C. admitted to Dr. Coddington that he told A.K., "I guess you could," in response to A.K.'s inquiry. Coddington then spoke to the school principal, Doctor Gaita, and a joint decision was made to charge M.C. with Misconduct, and to suspend him one day out-of-school ("OSS"). M.C. was charged with Misconduct by Coddington and Gaita based upon his failure to discourage A.K. from making the sexual comments to C.L., and because M.C.'s response to A.K. was improper. M.C. was not charged with sexual harassment. Coddington communicated the misconduct charges by letter to the parent/guardian of M.C. on June 12, 2009.

LEGAL ANALYSIS

Establishment of an educational program requires rules and regulations necessary for the maintenance of an orderly instructional program and the creation of an educational environment conducive to learning. R.R. v. Board of Educ., 109 N.J. Super., 337 (Ch. Div. 1970). The New Jersey Legislature has recognized that

harassment, intimidation or bullying disrupts a student's ability to learn and hampers the school's ability to educate its students in a safe environment. N.J.S.A. 18A:37-13.

Courts and administrative agencies have demonstrated an increased willingness to protect victims of harassing behavior and to require school districts to carry out their obligation to stop such abuse. Most notably, in Shore Regional High School Bd. of Educ. v. P.S. ex rel. P.S., 381 F.3d 194 (3rd Cir. 2004), the Third Circuit held that a school district violated the Individuals With Disabilities Education Act because of its inability to protect a student from a pattern of bullying and harassment. Similarly, in L.W. v. Toms River Reg. Sch. Dist. Bd. of Educ., OAL Dkt. No. CRT 8431-01, http://lawlibrary.rutgers.edu/oal/final/crt8535-01.pdf, the Director of the New Jersey Division on Civil Rights held a school district liable for civil damages and penalties under the Law Against Discrimination for tolerating a hostile educational environment of intimidation and bullying based on sexual orientation.

Local boards of education have been expressly charged with protecting the health, safety and welfare of its students, and ensuring the orderly conduct of the academic process. When a local board has acted within its authority, its actions carry a presumption of validity and will not generally be disturbed, absent an affirmative showing that its judgment was arbitrary, capricious or unreasonable. Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd., 46 N.J. 581 (1966); Quinlan v. North Bergen Bd. of Educ., 73 N.J. Super. 40, 46-7 (App. Div. 1962).

The imposition of discipline on students is considered within the discretionary powers of the school board, and the decision of a local board as to the appropriate penalty to be imposed upon a student for a disciplinary infraction should not be disturbed, absent evidence that the board's action was arbitrary, capricious, or unreasonable. J.D. and E.D. o/b/o B.D. v. Bd. of Ed. of Toms River Reg. Sch. Dist., EDU 6009-97 Initial Decision (December 29,1997 adopted, Comm'r (July 8, 1998)), http://lawlibrary.rutgers.edu/oal/search.html.

In matters involving the exercise of a local board of education's discretion, 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." Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 296 (App. Div. 1960). "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 Sewage Co. v. Dept. of Envt'l. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd. 131 N.J. Super. 37 (App. Div. 1974). Therefore, petitioner must demonstrate much more than simply a difference of opinion over the action taken by respondent. In order to satisfy the arbitrary and capricious standard, petitioner must prove that respondent acted in either bad faith or in disregard to the circumstances.

The Board urges that the Commissioner's jurisdiction should be limited to determining whether it acted arbitrarily, capriciously and unreasonably. If it did not, then the Board insists that the Commissioner cannot substitute his own judgment for that of local authorities.

Under federal and state law, the Board has a duty to implement strong measures to prevent the harassment of students under its care. To carry out its responsibilities, the Board enacted Policy #5600, stating that:

> Every pupil enrolled in this district shall observe promulgated rules and regulations and submit to the discipline imposed for infraction of those rules. Regulation 5600 shall include a description of school responses and consequences to violations of the behavioral expectations established by the Board that, at a minimum, are graded according to the severity of the offenses, considering the developmental ages of the pupil offenders and pupils' histories of inappropriate behaviors pursuant to N.J.A.C. 6A:16-7.1(c)5.
>
> (J-9 at 1.)

The Board also set forth in its 2008-2009 Planner that sexual harassment was defined as:

> . . . unwelcome sexual advances, requests for sexual favors, and other inappropriate verbal or physical conduct of a sexual nature when made by any member of the school staff

to a student, or when made by any student to another student when: CHANGED

1. Submission to such conduct is made either explicitly or implicitly a term or condition of a pupil's education, or when:
2. Submission to or rejection of such conduct by an individual is used as the basis for academic decisions affecting that individual, or when:
3. Such conduct has the purpose or effect of substantially interfering with an individual's academic performance or creating intimidating, hostile, or offensive education environment.

Sexual harassment, as set forth in Section 11A, may include, but is not limited to the following:
KKK. Verbal harassment or abuse;
LLL. Pressure for sexual activity;
MMM. Repeated remarks to a person
NNN. Unwelcome touching;
OOO. Suggesting or demanding sexual involvement accompanied by
PPP. Implied or explicit threats concerning grades, job, etc.

(J-10 at 40.)

M.C. had received a copy of the Planner and was presumably familiar with its contents. The Board was also familiar with its contents. The Planner put both parties on notice that the Board would not tolerate "student conduct that in any way disrupts class work or involves substantial disorder or impedes the rights of others. Such behavior may be cause for suspension or expulsion." (J-10 at 40.) In addition, the Planner, in Section VI, entitled, "Code of Discipline" states that, "***The following is a general guide for disciplinary action. All disciplinary actions are subject to determination by the administration and are not limited to the rules in this book."*** (J-10 at 46.)

Section VI of the Planner, entitled, "Code of Discipline," allows for three areas of misconduct. They are General Misconduct, Serious Misconduct, and Gross Misconduct. (J-10 at 46-56.) A subcategory of General Misconduct is Misconduct, and it provides various penalties for its violation, including teacher detention for a

first/second offense. (J-10 at 49.) OSS is not listed as a penalty thereunder. Serious Misconduct includes the subcategory of Sexual Harassment, and provides for a first offense - 2 OSS; parent conference. (J-10 at 50.)

M.C. was charged with Misconduct for his actions under the category of General Misconduct. Nevertheless, M.C. was punished with one day OSS, a penalty seemingly more fitting under the more egregious category of Serious Misconduct, subcategory Sexual Harassment or Harassment of any Kind. The Board's justification for such a result is that it was imposed under the discretionary powers of the administration. Two issues therefore arise. First, does the conduct of M.C. in telling A.K., "I guess you could," when asked by A.K. if he could make a sexually suggestive comment to C.L., arise to the level of Misconduct? Second, if it does, did the Board properly exercise its discretion in punishing M.C. with one-day OSS, a penalty not provided for in the Student Planner for the act of Misconduct, but rather more suited for an offense under the more egregious category of Serious Misconduct, when M.C. was not charged with such a violation?

As to the first issue, M.C. admitted to, and is charged with, telling A.K., "I guess you could," when asked by A.K. if he could make a sexually suggestive comment to C.L. According to the Board, M.C. was charged with Misconduct for his failure to discourage A.K. from making the sexual comments to C.L. and because M.C.'s response to A.K. was improper, and for failing to report A.K. to a teacher or administrator. Therefore, M.C. was a contributor to the incident. I am not convinced that the Board is correct in this analysis, and I do not believe that M.C. necessarily did anything wrong in simply uttering the words, "I guess you could."

M.C. credibly testified that he was having difficulty getting his mousetrap car to work and he was becoming annoyed and frustrated. A.K. approached M.C. and asked M.C. if it was all right if he asked C.L. if she "sucks dicks." M.C. was not paying attention to A.K. but rather continued to work on his mousetrap car. M.C., in attempting to terminate the conversation, made a passing remark to A.K. that, "I guess you could." He gave this answer to A.K. so that A.K. would leave him alone to work on his car.

M.C. did not think A.K. would ask C.L. the question. M.C. never told A.K. to talk to C.L. M.C.'s words were never communicated to the female "victim" C.L., but rather were made to his male "friend" A.K.

M.C. did not have any affirmative obligation to discourage another student from any behavior that the other student may have chosen to undertake. M.C.'s role as a student is not to oversee and correct the behavior of his peers. Student discipline is the responsibility of the teachers and administration. M.C.'s role in the school is to get an education while not being disruptive, causing disorder, or impeding the rights of others. He did none of those things here. In addition, M.C.'s young age at the time of the incident should be considered a mitigating factor. Nevertheless, there must also be a balancing of the student's behavior with the knowledge that the Board is required to maintain discipline in its schools. Absent a determination that the Board's decision to charge M.C. with Misconduct is arbitrary, unreasonable and capricious, the Board must be given deference to its discretionary powers in making its finding. The Board is seeking to eliminate all forms of harassment in its schools. The Board has an affirmative right to require that all students understand the severity of harassing language between students. An aggressive approach to this issue is necessary. The Board did not act in an arbitrary, unreasonable or capricious manner in using its discretionary powers in making its finding. I therefore **CONCLUDE** that the finding of the Board that M.C.'s conduct did constitute Misconduct was correct, and that the finding did not constitute arbitrary, unreasonable or capricious behavior.

As to the second issue, an examination must be made to determine if the penalty of one-day OSS is correct. The Board charged M.C. with Misconduct. Under the terms of the Planner, as a first offender, M.C. should receive teacher detention. However, using its discretion, the Board saw fit to increase M.C.'s penalty to one-day OSS. This is a punishment that is akin to the more egregious charge of Serious Misconduct, which carries a two-day OSS penalty for a first offender under a charge of Sexual Harassment or Harassment of any Kind. W.C. on behalf of M.C. argues that this penalty was excessive, while the Board argues that it has discretion under the documents to impose

this higher penalty, and that in any event, such a determination is not arbitrary, unreasonable or capricious.

Once again, a balancing must be undertaken with the knowledge that the Board is required to maintain discipline in its schools. Absent a determination that the Board's decision to charge M.C. with one day OSS for Misconduct is arbitrary, unreasonable or capricious, the Board must be given deference to its discretionary powers in making its finding.

In imposing this penalty, I **CONCLUDE** that the Board did act in an arbitrary, unreasonable and capricious manner in using its discretionary powers in making its finding, because it acted in disregard of the circumstances and penalties called for in the Planner. M.C. and his guardians were put on notice through receipt of the Planner as to the potential penalties for violating the rules of the high school. The Board was also aware of the Planner, and the penalties set forth therein for violating the rules of the high school. The Board argues that those penalties were subject to its discretion, the penalty given to M.C. was reasonable, and that it could impose a greater penalty than that set forth in the Planner. However, the Board cannot arbitrarily change the rules in the Planner by claiming the unilateral right to disregard them under certain circumstances. Although the Board does have discretion to choose the offense, once chosen, the Board should not have discretion to choose a penalty greater than what is called for in the Planner. Allowing the Board such unfettered discretion would make the rules in the Planner irrelevant, and that is neither fair nor appropriate to the students and their families. Any Board discretion in imposing a penalty should be limited to decreasing the penalty called for under the rules of the Planner, not increasing it. It is unfair to require a student to serve a greater penalty than which is called for under the offense for which he or she is charged by the Board. I therefore **CONCLUDE** that the finding of the Board that M.C. should receive one-day OSS for Misconduct was erroneous, and was arbitrary, unreasonable and capricious. The penalty was in disregard of that called for in the Planner. The appropriate penalty or a first offense for Misconduct under the dictates of the Planner should have been teacher detention, and I **CONCLUDE** that M.C. should be punished with teacher detention.

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Board's imposition of a one-day OSS for M.C.'s violation of its policy against misconduct should be **REVERSED,** and that the appropriate penalty should be teacher detention.

ORDER

It is **ORDERED** that the relief requested by petitioner 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.

February 4, 2011
DATE

EDWARD J. DELANOY, JR., ALJ

Date Received at Agency: February 4, 2011

Date Mailed to Parties:

/bdt

APPENDIX

WITNESSES

For petitioner:

M.C.

For respondent:

Steven Bado
Dr. Lynn J. Coddington

EXHIBITS

Joint exhibits:

J-1 (A)	Handwritten Statement of Student C.L., dated June 12, 2009
J-2 (B)	Handwritten Statement of Student A.K., dated June 12, 2009
J-3 (C)	Handwritten Statement of Steven Bado, Physical Education teacher, undated.
J-4 (D)	Handwritten Statement of Student M.C., dated June 12, 20090
J-5 (E)	Discipline Notice sent to parent/Guardian of M.C., dated J00..une 12, 2009
J-6 (F)	Correspondence from W.C. to Barbara Fiero, then-Board President, dated June 24, 2009
J-7 (G)	Correspondence from Superintendent Thomas Gialanella to W.C., dated August 6, 2010
J-8 (H)	Board Policy #5751, "Sexual Harassment"
J-9 (I)	Board Policy #5600, "Pupil Discipline/code of conduct"
J-10 (J)	Relevant pages of 2008-2009 Jackson Memorial High School Student Planner

J-11 Joint Stipulation of Facts

120-11

TRACEE EDMONDSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PITTSGROVE, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro-se petitioner, a resident of Pittsgrove who is currently home-schooling her child, challenged – for the second time – the respondent Board's decision to send all first and second graders in its district to a school located in and leased from the neighboring Borough of Elmer. The instant petition offers a cause of action distinct from those articulated in the first petition, urging that respondent's use of the Elmer school facility violates New Jersey's compulsory education and residency laws. Respondent Board filed a motion for summary decision.

The ALJ found, *inter alia,* that: petitioner's new claims were subsumed in and resolved once the send-receive relationship was adjudicated as valid and lawful, and are therefore barred under the principle of *res judicata;* by failing to present all of her claims in the first action, petitioner violated the entire controversy doctrine; and petitioner failed to present a factual or legal basis upon which relief can be granted. Accordingly, the ALJ granted respondent's motion for summary decision and dismissed the petition.

Upon independent review of the record and the Initial Decision of the OAL, the Acting Commissioner concurred with the ALJ that respondent is entitled to summary decision, finding that the claims in petitioner's most recent appeal are without merit or support in the law, and precluded by both the entire controversy doctrine and by petitioner's withdrawal of her child from the public 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.

March 18, 2011

OAL DKT. NO. EDU 13022-10
AGENCY DKT. NO. 600-10/10

TRACEE EDMONDSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PITTSGROVE, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner comes before the Commissioner for the second time, challenging the respondent Pittsgrove Board of Education's decision to send all first and second graders in its district to a school located in and leased from the neighboring Borough of Elmer.[1] As a basis for her second appeal, petitioner offers a cause of action distinct from those articulated in the first petition. Upon review of the record, Initial Decision and parties' exceptions, the Commissioner grants respondent's motion to dismiss this latest petition.

At the outset, the Commissioner must concur with the Administrative Law Judge's (ALJ) conclusion that the entire controversy doctrine applies to this case. Petitioner's prior appeal, filed in May of 2010, implicated the same parties, facts and transactions. The theory of recovery now offered by petitioner could have – and should have – been asserted in the first appeal.

[1] The previous appeal brought by petitioner was a challenge to the send-receive relationship between Pittsgrove and Elmer which provided Pittsgrove with access to the Elmer school facility in question. The Commissioner dismissed the appeal on October 25, 2010 (Commissioner Decision No. 449-10).

The entire controversy doctrine:

> embodies the principle that the adjudication of a legal controversy should occur in one litigation in only one court; accordingly, all parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy. . . . The purposes of the doctrine include the needs of economy and the avoidance of waste, efficiency and the reduction of delay, fairness to parties, and the need for complete and final disposition through the avoidance of piecemeal decisions.
>
> [*Cogdell v. Hosp. Ctr. at Orange*, 116 *N.J.* 7, 15, (1989).]

In light of the foregoing, the instant appeal would be justifiably dismissed on procedural grounds.

The Commissioner also takes notice of respondent's exhibit R-15, a handwritten letter dated November 16, 2010 from petitioner to respondent stating her intention to home school her child. Such a withdrawal of a child from a school district's purview removes any issues concerning the child's education from the jurisdiction of the Commissioner. Nonetheless, the Commissioner will exercise his discretion to offer comment on the merits of this controversy.

The arguments in the current petition and the exceptions to the Initial Decision that petitioner submitted urge that respondent's use of the Elmer school facility violates New Jersey's compulsory education and residency laws. In the petition, these laws were initially identified as *N.J.S.A.* 18A:38-25 and *N.J.S.A.* 18A:38-1. *N.J.S.A.* 18A:38-25[2] states, in pertinent part, that parents and guardians shall cause children from 6-16 years of age to regularly attend 1) the public schools of their districts, 2) day schools with equivalent instruction, or 3) other

[2]**Attendance required of children between six and 16; exceptions.**
Every parent, guardian or other person having custody and control of a child between the ages of six and 16 years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments or to receive equivalent instruction elsewhere than at school.

means of equivalent instruction. Petitioner erroneously interprets this statute to require that her child be educated in her school district.

If petitioner's interpretation were correct, it would conflict with the laws – such as *N.J.S.A.* 18A:38-8 – which allow school districts to enter into send-receive relationships. The rules of statutory construction dictate that laws shall, where possible, be interpreted to harmonize:

> When reviewing two separate enactments, the Court has an affirmative duty to reconcile them, so as to give effect to both expressions of the lawmakers' will. In other words, it is our obligation to make every effort to harmonize separate statutes, even if they are in apparent conflict, insofar as we are able to do so. . . . Statutes that deal with the same matter or subject should be read *in pari materia* and construed together as a "unitary and harmonious whole."
>
> [*St. Peter's Univ. Hosp. v. Lacy*, 185 *N.J.* 1, 14-15 (2005) (citing *In re Adoption of a Child by W.P. and M.P.*, 163 *N.J.* 158, 182-83, (2000) (Poritz, C.J., dissenting) (citations and footnote omitted)).]

The gravamen of *N.J.S.A.* 18A:38-25 is not regulation of how districts provide public education, but rather an unambiguous directive to parents and guardians that they must see to it that their children are educated. Thus, petitioner's invocation of *N.J.S.A.* 18A:38-25 is rejected.

Petitioner's reliance on *N.J.S.A.* 18A:38-1 is similarly misplaced. This statute mandates, in pertinent part, that a student who is domiciled in or otherwise properly residing in a public school district on a long term basis is eligible for a free education provided by that district.[3] Rather than dictating how school districts may provide public education, this statute's

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[3] **18A:38-1. Attendance at school free of charge**
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;
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

plain language establishes criteria for determining in which school district a student may enroll. To construe it as petitioner urges would contradict the language and legislative intent, and ignore the directives of such other statutes as *N.J.S.A.* 18A:38-8.

Finally, it has been found by the Third Circuit Court of Appeals that there is nothing in New Jersey's residency or compulsory education laws . . . requiring that each school district construct and maintain its own schools in order to fulfill its obligation to educate students domiciled within the district. *See, English v. Bd. of Educ.,* 301 *F.*3d 69, 72-73 (3d Cir. 2002), *cert. denied* 537 *U.S.* 1148 (2003).

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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 . . . .

c. Any person who fraudulently allows a child of another person to use his residence and is not the primary financial supporter of that child and any person who fraudulently claims to have given up custody of his child to a person in another district commits a disorderly persons offense;

d. Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-round dwelling place within the district for one year or longer shall be deemed to be domiciled within the district for the purposes of this section;

e. Any person for whom the Division of Youth and Family Services in the Department of Children and Families is acting as guardian and who is placed in the district by the division;

f. Any person whose parent or guardian moves from one school district to another school district as a result of being homeless and whose district of residence is determined pursuant to section 19 of P.L.1979, c.207 (C.18A:7B-12).

In her exceptions to the Initial Decision, petitioner adds *N.J.S.A.* 18A:8-1[4] as support for her position. However, that statute – which directs that most municipalities will subsume congruent school districts – contains no guidance about the manner in which a school district may 1) implement its responsibility to educate its students, or 2) allocate its resources. Petitioner also cites to *Shuster v. Bd. of Education of Hardwick Tp.,* 17 *N.J. Super.* 357 (App. Div. 1952), a case in which a deed condition with no relevance to this controversy was construed, and *Joshua Crawford,* et al. *v. Lucille Davy,* et al., 2009 *N.J. Super.* LEXIS 3226 (Docket No. A-1297-07T2), an unpublished case with no precedential value.

In the latter case, a class of students from school districts that were not performing well argued, *inter alia,* that enforcement of the laws preventing them from obtaining free educations in other districts was unconstitutional. They demanded the restructuring of New Jersey's system of locally-based public schools, but the Appellate Division ruled that prior to there having been an opportunity for the full implementation and operation of the statutory evaluative and remedial measures outlined [in *N.J.S.A.* 18A:7A-10 *et seq.*], the relief that the plaintiff class demanded was premature and, consequently, non-justiciable. *Crawford v. Davy, supra,* at 37. Thus – even if the case had precedential value, and even if the plaintiff class had prevailed – the relief demanded by the class was the opposite of the relief that the petitioner in this case seeks.

In summary, the claims in petitioner's most recent appeal are without merit or support in the law, and precluded both by the entire controversy doctrine and by petitioner's

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[4] ***N.J.S.A.* 18A:8-1 Municipalities as separate school districts; exceptions.** Each municipality shall be a separate local school district except as otherwise provided in this chapter and except that each incorporated village shall remain a part of the district in which it is situated at the time of its incorporation.

withdrawal of her child from the public schools. Respondent's motion to dismiss the petition is accordingly granted.

IT IS SO ORDERED.[5]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/18/11

Date of Mailing: 3/21/11

[5] 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 13022-10
AGENCY DKT. NO. 600-10/10

TRACEE EDMONDSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PITTSGROVE, SALEM COUNTY,
Respondent.

Tracee Edmondson, petitioner, pro se

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

Record Closed: January 11, 2011 Decided: February 2, 2011

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE

Petitioner challenges the send-receive agreement between Pittsgrove Board of Education (Pittsgrove) and Elmer Board of Education (Elmer) requiring her child to attend school at building located in Elmer. For the reasons discussed below, the relief sought by petitioner is **DENIED**.

BACKGROUND AND PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was filed at the OAL on December 1, 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 certification of Henry Bermann, Superintendent provides the pertinent background. It provides:

2. In April 2010, the Pittsgrove Township Board of Education and the Elmer Board of Education expanded a previous send-receive relationship that had encompassed grades 5 through 12, effective for the 2012-2011 school year. The expansion of the send-receive relationship meant that the Pittsgrove Township Board of Education would educate students residing in Elmer in grades K-12. In addition, the Pittsgrove Township Board of Education assumed the operation of the school buildings located in Elmer as part of the expanded send-receive relationship. The Elmer School was designated by the Pittsgrove Township Board of Education to house students from Elmer and Pittsgrove in grades 1-2, including the petitioner's child.

3. On or about May 11, 2010, the petitioner filed a Petition of Appeal, entitled "Petition: Violation of Law," with the Commissioner of Education, alleging that this new arrangement rendered the Elmer Board of Education a non-operating district, resulting in a de facto regionalization of the district that required a voter referendum. The petitioner requested that the school districts cease and desist from engaging in the non-compliant merger, that Pittsgrove return the Elmer School to Elmer, and that Pittsgrove disengage from operating a non-district facility. Exhibit R-1 (Petition: Violation of Law, dated May 10, 2010).

4. On or about June 21, 2010, the petitioner filed a second Petition of Appeal, entitled "Request for Commissioner Ruling," disputing the authority of the Elmer Board of Education to permit Pittsgrove to operate the Elmer School. The petitioner requested that the Elmer Board of Education cease leasing the Elmer School to

Pittsgrove and that the Pittsgrove Township Board of Education cease as operator of the Elmer School. Exhibit R-2 ("Request for Commissioner Ruling, dated June 18, 2010).

5. On or about July 30, 2010, the petitioner also filed tenure charges against [Superintendent] myself with the Secretary of the Pittsgrove Township Board of Education. The charges, which were ultimately not certified by the Board, alleged sixteen counts of unbecoming conduct based upon the Board's decision to enter into a send-receive relationship with the Elmer Board of Education. Exhibit R-3 (Statement of Charges, dated July 30, 2010).

6. The petitioner thereafter filed three motions for preliminary injunctive relief with the Commissioner. The first motion, entitled "Motion for Stay of Action," sought a stay preventing Pittsgrove from sending students to the Elmer School. Exhibit R-4 (Motion for Stay of Action). The second motion, entitled "Motion for Expedited Hearing," sought an expedited hearing. Exhibit R-5 (Motion for Expedited Hearing). The third motion, entitled "Motion for Emergent & Interim Relief," sought tuition from the Pittsgrove Township School District for her child to be educated outside the District pending the Commissioner's final decision. Exhibit R-6 (Motion for Emergent & Interim Relief). On or about August 20, 2010, the three motions were dated, amended and submitted to Administrative Law Judge W. Todd Miller and counsel for both Pittsgrove and Elmer. Exhibit R-7.

7. In response to the original Petition of Appeal, the Respondents, Pittsgrove Township Board of Education, joined by the Elmer Board of Education, filed a Motion to Dismiss.

8. On September 10, 2010, the Administrative Law Judge . . . issued a decision granting the Respondents' Motion to Dismiss in which he concluded that:

> Elmer and Pittsgrove BOEs were lawfully permitted to expand their send-receive relationship in 2010 to include grades K-4, resulting in Elmer now sending all of its students to Pittsgrove. N.J.S.A. 18A:38-8. This event was not a

> regionalization under N.J.S.A. 18A:13-34. It was an exercise of managements' prerogative permitted by law. Therefore a referendum was not required. While I agree that Elmer is now a non-operating school district because Pittsgrove receives all of Elmer's students, that action still does not equate to regionalization or de facto regionalization. The BOEs were lawfully permitted to proceed under N.J.S.A. 18A:38-8 (the send-receive statute) rather than the regionalization statute N.J.S.A. 18A:13-34.

Exhibit R-8 (Initial Decision on Motion for Summary Decision, dated September 10, 2010).

9. On October 25, 2010, the Acting Commissioner of Education affirmed the decision of Administrative Law Judge, dismissing the Petitions of Appeal and motions for emergent relief filed pursuant thereto. Exhibit R-9 (Commissioner's Decision, dated October 25, 2010).

10. The petitioner thereafter filed a Notice of Appeal with the New Jersey Superior Court, Appellate Division. Exhibit R-10 (Notice of Appeal and Case Information Statement, dated October 29, 2010).

11. During the course of the aforementioned proceedings, the petitioner refused to send her child to the Elmer School to start the 2010-2011 school year. As a result, the Pittsgrove Township Board of Education was required to file truancy charges against the petitioner in Pittsgrove Township Municipal Court.

12. In response, the petitioner also filed charges against the Pittsgrove Township Board of Education in Pittsgrove Township Municipal Court, alleging violations of the residency, compulsory education and regionalization laws. Exhibit R-11 (Pittsgrove Township Municipal Court Summons, dated October 13, 2010).

13. On or about October 12, 2010, the petitioner also filed a third Petition of Appeal, entitled "Violation of Compulsory Education and Residency Laws," with the

Commissioner, alleging that the Pittsgrove Township Board of Education, by requiring her child to attend the Elmer School pursuant to its send-receive relationship, is in violation of the compulsory education and residency statutes. Exhibit R-12 (Violation of Compulsory Education and Residency Laws, dated October 12, 2010).

14. On or about October 26, 2010, the petitioner filed a fourth motion for emergent relief, entitled "Emergent Issues – Request/Submissions," requesting that the Pittsgrove Township Board of Education fund home instruction for her child. Exhibit R-13 (Emergent Issues – Request/Submissions, dated October 26, 2010).

15. On November 9, 2010, Pittsgrove Municipal Judge Theodore Baker found the petitioner guilty of truancy, and assessed a fine of $100 per day for the forty-one days that the petitioner had refused to send her child to school.

16. That same day, the petitioner filed a fifth motion for emergent relief, entitled "Expedited Emergent Issues – Request/Submission," seeking relief from Judge Baker's order. Exhibit R-14 (Expedited Emergent Issues – Request/Submission, dated November 9, 2010).

17. On November 16, 2010, the parties appeared again in Pittsgrove Municipal Court. At that time, the petitioner signed a letter stating that she would be home schooling her child pending the resolution of the pending action before the Commissioner. Exhibit R-15.

18. To date, the petitioner has filed a total of three Petitions of Appeal and five Motions for Emergent Relief with the Commissioner.[1] The legal claims set forth in all of these pleadings involve the same parties and arise from the same factual basis; that is, the 2010 decision of the Pittsgrove and Elmer Boards of Education to enter into an expanded send-receive relationship, which includes the lease and operation of the Elmer School by the Pittsgrove BOE and the sending of all Pittsgrove and Elmer students in grades 1-2, including the petitioner's child, to the Elmer School.

FACTUAL SUMMARY

Petitioner is a resident of Pittsgrove. She has a daughter who is in second grade. Pittsgrove and Elmer are neighboring towns. In 2010 Pittsgrove and Elmer expanded their send-receive relationship. The end result of the 2010 agreement is that Pittsgrove now services all of the children from both districts. To accomplish this task, Pittsgrove utilizes some of the existing school buildings in Elmer.

Petitioner's daughter was assigned to a school building in Elmer rather than Pittsgrove. Petitioner has refused to send her child to the Elmer school for reasons that are unclear. Petitioner simply states that Pittsgrove is her domicile and her daughter is entitled to be educated the town where she is domiciled. Indeed, Pittsgrove, (petitioner's home town) is the provider of the educational services for her daughter, albeit at a building in Elmer. Petitioner seeks payment for out-of-school instruction encompassing twenty hours per week. She refuses to send her child to Elmer and has been prosecuted for truancy.

CONCLUSIONS

In a matter previously filed[2] with this ALJ, petitioner challenged the 2010 decision of the Elmer and the Pittsgrove districts to expand their send-receive relationship to include grades K-4. (R-8). The expanded relationship resulted in all students from Elmer being educated by the Pittsgrove Board of Education. Pittsgrove agreed to assume operations of certain school buildings located in Elmer, as part of the expanded relationship.

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[1] And, as noted above, the Petitioner has also pursued this matter by filing tenure charges and charges in Pittsgrove Municipal Court.

[2] Tracee Edmondson v. Borough of Elmer Board of Education and Township of Pittsgrove Board of Education, OAL DKT. NO. EDU 6992-10 (Decided September 10, 2010). (R-8).

Petitioner asserted, inter alia, that a referendum was required prior to expanding the send-receive agreement and that the districts engaged in deception and fraud. (R-1). Petitioner argued that the districts were regionalized without voter approval, rendering Elmer a non-operating district. Petitioner sought a cease and desist order, return of the school buildings to Elmer, and for Pittsgrove to stop operating a non-district facility. (R-1).

I determined that petitioner's claims were without merit. Summary Decision was granted in favor Pittsgrove and Elmer on September 10, 2010. I observed that:

> School districts that have the necessary accommodations may receive, or may be required to receive pupils from another district not having sufficient accommodations in exchange for tuition. N.J.S.A. 18A:38-8; English v. Bd. of Educ., 301 F.3d 69, (3d Cir. N.J. 2002). Send-receive relationships are subject to the supervision of the commissioner. Bd. of Ed. Merchantville v. Bd. of Ed. Township of Pennsauken, 204 N.J. Super. 508, 499 (App. Div. 1985). Elmer and Pittsgrove entered into a send-receive relationship in 1976. It was amended in 2003 and again in 2010. The 2010 amendment left the EBOE with no students within its district. All of the students are now sent to Pittsgrove.
>
> The legislature promulgated N.J.S.A. 18A:8-43 to 51, in an effort to merge and consolidate small non-operating school districts for operational efficiency and cost cutting. The law became effective June 30, 2009, and if read literally, is only applicable to those small non-operating districts at the time of its passage. ("Non-operating district" means a school district **that is not operating schools on the effective date [June 30, 2009]**). Under this new law any district this is "non-operating" on the effective date of the legislation will be eliminated.
>
> Edmondson OAL DKT. NO. EDU 6992 at page 4-5. (R-8).

I concluded that the districts acted well within the statutory framework for establishing a send-receive relationship. N.J.S.A. 18A:38-8. The districts had a pre-existing send-receive agreement dating back to 1976. The fact that the relationship expanded to include all of the students from Elmer did not require a referendum and was otherwise in compliance with the law. On October 25, 2010, the Commissioner of Education affirmed the initial decision. (R-9).

Pittsgrove is fulfilling its constitutional requirements by offering petitioner a free public school education. N.J. Const. 1947, art. VIII, § IV par. 1. Whether Pittsgrove accomplishes this in buildings located within its own boundaries or in buildings found in adjacent towns is not particularly relevant, absent some undue hardship, unreasonable burden or similar reason. Here petitioner has repeatedly objected without stating any cogent legal or factual basis. Petitioner embarked on a substantial petition filing campaign in an effort to frustrate or stop the send-receive agreement. The initial case decided by the undersigned is on appeal with the Appellate Division. While pending appeal petitioner filed tenure charges; multiple requests for rulings with the commissioner; requests for injunctive relief; request for stays; multiple motions for emergent relief; and municipal court charges against Pittsgrove. This type of shotgun approach blurs the genuine issues in dispute and complicates the procedural aspects of the case.

RES JUDICATA

Res judicata is a legal principle this is applied when "an issue has been definitely decided by judicial decision" Black's Law Dictionary (9th ed. 2009). A claim is barred under res judicata when (1) the prior judgment is final and valid, (2) the parties in the prior action are identical to or in privity with the parties in the pending action, and (3) the claim in the later action relates to the same occurrence or transaction as the earlier action. Reid v. Reid, 310 N.J. Super. 12 (App. Div. 1998).

In the case at hand, a: 1) final judgment was rendered on the validity of the districts' expansion of their send-receive relationship; 2) petitioner was a party to that action; and 3) many of the claims previously presented (or cognizable) are the same or similar as those addressed by the prior judgment. In the prior action, petitioner challenged to entire concept (macro approach) of an expanded send-receive agreement. She attacked the process and the statutory authority. These claims were dismissed on the merits resulting in a judgment.

Unsuccessful in the former case, petitioner now attacks the smaller parts (micro approach). For example, she argues that her daughter cannot be sent to Elmer from Pittsgrove under the send-receive agreement and asserts the right to tuition reimbursement for out-of-school instruction because the send-receive agreement violates her domicile (her daughter's right to receive an education in her resident town, as opposed to adjacent town). All of these (micro) claims were subsumed in and resolved once the send-receive relationship was adjudicated as valid and lawful. Successive filings are to be avoided. I **CONCLUDE** that petitioner's new claims are barred under the principle of res judicata.

ENTIRE CONTROVERSY

The entire controversy doctrine holds that all aspects of a controversy between the same parties should be litigated in a single action. R. 4:30A. The goal is to avoid waste, duplication, inefficiency, and piecemeal decisions resulting in protracted and expensive litigation. Here petitioner should have filed all of her claims (macro and micro; substantive and procedural) in one proceeding. Again the parties and the source of the controversy, and therefore all of the claims, were cognizable in the first action. Having failed to join the present claims in the first action, petitioner violated the entire controversy doctrine. I so **CONCLUDE**.

MERITS OF PETITIONER'S CLAIM

Summary Decision

Assuming res judicata and Entire Controversy doctrine do not stand scrutiny, respondent is also entitled to summary decision. The rules governing motions for summary decision in an OAL matter are embodied 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 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.

There is no merit to petitioner's claim for tuition reimbursement. This issue was addressed squarely in English v. Bd. of Educ., 301 F.3d 69, 2002 (3d Cir. N.J. 2002), cert. denied 537 U.S. 1148 (2003). A district has an obligation to educate, at its own expense, all persons, between the ages of five and twenty who are domiciled within the district. N.J.S.A. 18A:38-1. However it does not require a district to construct and maintain its own schools in order to fulfill this obligation. Rather, a district may enter

into a send-receive relationship with another district whereby it sends its pupils to the receiving district's schools for one grade or more (N.J.S.A. 18A:38-8) in return for a tuition payment that does not exceed the "actual cost" of the students enrolled, (N.J.S.A. 18A:38-19), with "actual cost" defined in detail by the New Jersey Administrative Code. N.J.A.C. 6A:23-3.1.

I **CONCLUDE** that the Pittsgrove fulfilled its constitutional and statutory obligation providing petitioner's child a free public school education in Elmer, pursuant to a send-receive agreement lawfully executed between the two districts. In fact Pittsgrove is the community in which petitioner resides, and Pittsgrove is the provider of the educational service, but is merely using buildings formerly occupied by and located in Elmer to met its commitments. Thus petitioner's child is not being sent to another district. She is being educated by her resident board of education.

I **CONCLUDE** that petitioner has failed to present a factual or legal basis upon which relief can be granted.

ORDER

Based upon the forgoing, respondent's motion for summary decision is **GRANTED.** The action filed by petitioner is **DISMISSED** based upon the principles of res judicata, Entire Controversy doctrine, and rules governing Summary Decision.

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.

2-2-11
DATE

W. TODD MILLER, ALJ

Date Received at Agency: 2-2-11

Date Mailed to Parties: 2-2-11

/sd

DOCUMENTS CONSIDERED

Petitioner's Petition, 10/12/10

Petitioner's Emergent Issues – Request/Submission, 10/26/10

Petitioner's Emergent Issues – Request/Submission (undated, but received 11/1/10)

Respondent's Answer and Separate Defenses, 11/1/10

Petitioner's Response to Respondent's Answer, 11/3/10

Petitioner's Expedited Emergent Issues – Request/Submission, 11/9/10

Respondent's Amended Answer and Separate Defenses, 11/17/10

Respondent's Letter Brief with attachments, 11/19/10

Petitioner's Opposition to Motion to Dismiss and Motion for Summary Judgment, 12/26/10

Respondent's Letter Brief, 1/10/11

#121-11

ONOFRIO MEZZINA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner's position was eliminated in a reduction in force (RIF) prior to the start of the 2009-2010 school year. He contends that the Board's failure to renew his contract was a termination of employment and violated his tenure and seniority rights as a janitorial/maintenance employee. The Board asserts that petitioner was properly removed pursuant to a RIF and that he did not have tenure in his position.

The ALJ found that: petitioner held a unique position with requirements that replicated his education and work experience, and was very different from that of the district's janitorial employees; accordingly, petitioner's position was not within the general category of employees protected by *N.J.S.A.* 18A:17-3 and *N.J.S.A.* 18A:17-4; and petitioner did not have tenure pursuant to *N.J.S.A.* 18A:17-3 and does not have any rights to employment with respondent pursuant to *N.J.S.A.* 18A:17-4. The ALJ denied petitioner's appeal and dismissed the case.

Upon a thorough and independent review of the record, 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.

March 18, 2011

OAL DKT. NO. EDU 9558-09
AGENCY DKT. NO. 149-7/09

ONOFRIO MEZZINA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON 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 and the Board's reply thereto – filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

Petitioner's exceptions charge that the Administrative Law Judge (ALJ) reached inappropriate conclusions of law because he erroneously failed to adopt or give proper weight to a number of petitioner's proposed findings of fact which petitioner claims were supported by hearing testimony and documentary evidence. In so arguing, petitioner recasts and reiterates his advancements made below. As it is determined that petitioner's exception presentation raises no *relevant or material* arguments/issues left unaddressed by the ALJ, it merits no further discussion here.

Upon full consideration of the record in this matter – which included transcripts of the hearing conducted at the OAL on September 22 and 27, 2010 – the Commissioner, specifically concluding that the ALJ's factual findings and resultant conclusions of law are

comprehensive and fully supported by the record, agrees with the ALJ that petitioner's position was not within the general category of employees protected by *N.J.S.A.* 18A:17-3 and *N.J.S.A.* 18A:17-4; that petitioner did not have tenure pursuant to *N.J.S.A.* 18A:17-3; and, therefore, he does not have any rights to employment with the Hoboken Board of Education pursuant to *N.J.S.A.* 18A:17-4.

Accordingly, the recommended decision of the OAL is adopted for the reasons clearly articulated therein and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/18/11

Date of Mailing: 3/21/11

* 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 09558-09
AGENCY DKT. NO. 149-7/09

ONOFRIO MEZZINA,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,
Respondent.

Sheldon H. Pincus, Esq., for petitioner (Bucceri and Pincus, attorneys)

Marie-Laurence Fabian, Esq., and **Eli S. Scheiman**, Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: October 26, 2010 Decided: February 3, 2011

BEFORE **RICHARD McGILL**, ALJ:

This matter involves a petition by Onofrio Mezzina ("petitioner") in which he alleges that a determination by the Board of Education of the City of Hoboken ("respondent") not to renew his contract for the 2009-2010 school year was in reality a termination in violation of his tenure and/or seniority rights as a janitorial/maintenance employee. Petitioner seeks a determination that respondent's actions constitute a

violation of his tenure and/or seniority rights and an order requiring respondent to appoint him to a position with the scope of his tenure and seniority with back pay and benefits.

Respondent contends that petitioner was properly removed pursuant to a reduction in force and that he did not have tenure in his position. Respondent requests dismissal of the petition with a specific determination that petitioner has not acquired tenure and is not entitled to further employment with respondent.

PROCEDURAL HISTORY

Petitioner filed his petition with the Commissioner of Education on July 8, 2009, pursuant to the Commissioner's authority to hear and determine controversies concerning the school laws under N.J.S.A. 18A:6-9. Respondent filed an answer on August 3, 2009, and the matter was transmitted to the Office of Administrative Law on August 19, 2009, for determination as a contested case.

ISSUES

The issues in this proceeding are as follows: (1) whether petitioner had tenure as a maintenance employee; (2) whether respondent violated petitioner's tenure and/or seniority rights; and (3) if so, the relief to be granted.

FACTS

Petitioner testified on his own behalf, and he called as a witness Patrick Gagliardi, who was respondent's Superintendent of Schools for ten years ending in June 2007. Timothy Calligy, who is employed as respondent's Director of Facilities, testified for respondent.

Respondent's cross-examination of former Superintendent Gagliardi suggested a bias in favor of petitioner both as to the decision to hire him in December 2002 and as

to testimony in this proceeding, but respondent's witness, Director of Facilities Calligy, gave essentially the same testimony as to the actual events. Therefore, irrespective of former Superintendent Gagliardi's motivation in hiring petitioner or any bias that he has in favor of petitioner, there is no real dispute as to the actual course of events.

Based upon the evidence presented at the hearing, I **FIND** as follows:

1. Petitioner began his employment with respondent on December 11, 2002, in the position of Maintenance/Air Conditioning and Commercial Appliance Repair.

2. Petitioner's education included a trade school, where he completed a course entitled "Electronics – Radio and TV" in 1969, and Lincoln Technical Institute, where he took a course entitled "Air Conditioning and Refrigeration" in 1979.

3. Petitioner's relevant work experience included three years as an electric apprentice and more than twenty years with Frigidaire/Electrolux as a service technician and lead technician in the area of major appliances and air conditioners.

4. Petitioner held multiple certifications including Type I and Type II technician as required by 40 C.F.R. Part 82, Subpart F.

5. At the beginning of December 2002, petitioner was unemployed.

6. Petitioner's wife was the secretary of former Superintendent Gagliardi.

7. Mrs. Mezzina was also a friend of former Superintendent Gagliardi's wife.

8. Director Calligy was hired on June 18, 2001. At the time, his title was different, but his duties were the same.

9. Director Calligy was responsible for the long-range facility plan, and on a day-to-day basis, he oversees the custodial and maintenance staff.

10. The long-range facilities plan covers all systems including heating, ventilation and air conditioning (HVAC).

11. The school district was spending approximately $165,000 per year on outside contractors for work related to HVAC equipment and the boilers.

12. Former Superintendent Gagliardi and Director Calligy discussed the situation and decided to hire a person to move this function in-house.

13. Director Calligy was not particularly knowledgeable about HVAC, and he knew that Mrs. Mezzina's husband (petitioner) worked in air conditioning.

14. Director Calligy asked Mrs. Mezzina for assistance to determine the type of person who would be qualified for the job.

15. With Mrs. Mezzina's assistance, Director Calligy developed a job posting for the new position.

16. The job posting for the position of Maintenance/Air Conditioning and Commercial Appliance Repair Worker stated as follows:

PURPOSE: To promote proper maintenance of critical building systems in conjunction with a Comprehensive School Maintenance Program.

DUTIES:

1. Shall complete work assignments in accordance with the CMP.
2. Shall analyze each task in advance for tool and material requirements.
3. Shall obtain approval from the Assistant to the School Business Administrator (Facilities) prior to making purchases.

4. Shall evaluate system problems in order to determine most economical repair requirements.
5. Evaluates, with the Assistant to the School Business Administrator, (Facilities), the need to engage outside professional HVAC contractors.
6. Shall keep all workstations clean and orderly.
7. Shall routinely run applicable systems during off season to verify continued operational condition.
8. Shall be responsible for accurate accounting of Board of Education tools.
9. Shall respond to emergencies quickly and effectively.
10. Shall substitute for staff members in other categories as directed by the Assistant to the School Business Administrator (Facilities).
11. Shall perform other duties as assigned by the Assistant to the School Business Administrator (Facilities).

DESIRABLE TRAINING AND EXPERIENCE:

1. Satisfactory physical condition so as to be able to perform manual tasks requiring moderate physical strength.
2. Practical experience and training in the maintenance and repair of refrigeration and small climate control units.
3. Proven experience with a skill level in the particular area of appointment.
4. Type I Technician Certification in accordance with 40 CFR Part 82, Subpart F.
5. Type II Technician Certification in accordance with 40 CFR Part 82, Subpart F.
6. Graduation from an accredited Technical School with an emphasis on Servicing of Air Conditioning and Refrigeration units.
7. A valid New Jersey driver's license.

SALARY: Negotiable.

17. The job posting was circulated internally only.

18. No district employee met the qualifications, and none applied for the job.

19. Petitioner learned about the job posting from his wife, and he applied for the job.

20. Director Calligy interviewed petitioner and found that his resume was a good match for the qualifications set forth in the job posting.

21. Director Calligy recommended to former Superintendent Gagliardi that the school district hire petitioner.

22. Former Superintendent Gagliardi recommended respondent hire petitioner at an annual salary of $52,000.

23. On December 10, 2002, respondent passed a resolution approving the appointment of petitioner a/k/a Alfred Mezzina to the position of Maintenance/Air Conditioning and Commercial Appliance Repair at an annual salary of $52,000.

24. This figure was more than petitioner's highest salary in "the mid-40s" at Frigidaire.

25. On respondent's organizational chart, petitioner was placed in the Office of the Superintendent.

26. Petitioner had an office with a nameplate in the administration building.

27. With respect to the leave time, petitioner received twenty vacation days, fifteen sick days, three personal days and one professional day.

28. Petitioner received raises of five percent for the 2004-2005, 2006-2007 and 2007-2008 school years along with other non-union employees in the Office of the Superintendent.

29. Petitioner's main duties were to: (1) develop a comprehensive plan for maintenance and repair of HVAC systems; (2) evaluate whether to repair or replace equipment including the need for outside contractors; and (3) perform repairs that were beyond the skill set of other janitors and were previously done by outside contractors.

30. Petitioner performed other types of maintenance as well.

31. Petitioner performed hands-on maintenance work on a day-to-day basis.

32. On some days, petitioner spent more than fifty percent of his time in his office. On other days, petitioner spent five percent or less of his time in his office.

33. Petitioner maintained a daily log of his maintenance work.

34. Petitioner reported directly to Director Calligy. Petitioner spoke with Director Calligy on a daily basis, sometimes multiple times.

35. Director Calligy assigned work to petitioner and evaluated him.

36. Petitioner's evaluations ranged from satisfactory to excellent.

37. Petitioner held other non-paying titles which required specific certifications such as District Indoor Air Quality Officer and District Integrated Pest Management (IPM) Coordinator.

38. The Hoboken School Employees Association is the sole exclusive bargaining agent for all custodians and maintenance employees, and terms and conditions of their employment including pay scales are set forth in a collective bargaining agreement.

39. For a maintenance employee during the 2004-2005 school year, the salaries ranged from $24,218 for an individual with one year of service to $54,550 for one with twenty-five years of service. For the 2007-2008 school year, the corresponding range was from $27,242 to $61,361.

40. The janitorial employees were members of The Hoboken School Employees Association.

41. Petitioner was not a member of the union.

42. Petitioner received a larger salary, because he had a higher skill set.

43. Custodial and maintenance workers are not part of the Office of the Superintendent.

44. Custodial and maintenance workers do not have their own offices. They have a lunch/break room in each school.

45. Custodial and maintenance workers do not have their name on the door.

46. Leave time for custodial and maintenance workers is set forth in the collective bargaining agreement and is based on length of service. An employee would need ten years of service to receive four weeks of vacation time.

47. Petitioner's leave time would not have been consistent with the collective bargaining agreement.

48. The custodial staff worked during the February break. Petitioner did not.

49. The principal of each school evaluated the custodial and maintenance workers.

50. Respondent required petitioner to sign a contract for the position of District Wide Maintenance/HVAC Coordinator for the period from July 1, 2008, to June 30, 2009. Petitioner signed the contract on April 7, 2009.

51. Custodial and maintenance workers were not required to sign a contract.

52. Petitioner's annual salary for the 2008-2009 school year was $68,818.

53. By letter dated June 23, 2009, Superintendent of Schools John R. Raslowsky, II, advised petitioner that respondent voted not to offer him a

contract for the 2009-2010 school year and that his employment with respondent would cease at the end of the June 30, 2009, work day.

54. Respondent has two full-time janitorial positions held by non-tenured staff members.

LAW AND ANALYSIS

Tenure is a status granted by statute. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 72 (1982). The purpose of tenure laws is to protect employees from dismissal for "unfounded, flimsy or political reasons." Zimmerman v. Newark Bd. of Ed., 38 N.J. 65, 71 (1962), cert. denied, 371 U.S. 956, 83 S.Ct. 508, 9 L.Ed.2d 502 (1963).

N.J.S.A. 18A:17-3 provides for tenure for public school janitors. A school district may dismiss a public school janitor in connection with a reduction in force. Ibid. When any janitor is dismissed by reason of a reduction in force, the one having the least number of years to his credit shall be dismissed in preference to any other having a longer term of service. N.J.S.A. 18A:17-4.

Tenure statutes are construed liberally to achieve their beneficent ends. Spiewak v. Rutherford Bd. of Ed., 90 N.J. at 74. Terms like janitor and custodian are used in a generic sense with intent to include all janitorial and custodial employees. Barnes v. Bd. of Ed. of Jersey City, 85 N.J. Super. 42, 45 (App. Div.), certif. denied, 43 N.J. 450 (1964). In Brunner v. Bd. of Ed. of Camden, 1959-1960 S.L.D. 155, the school district wanted to remove a janitor who had been promoted to the position of chief janitor. The janitor contended that he had acquired tenure in the latter position. The Commissioner of Education stated as follows:

> While it is true that the specific title "chief janitor" is not mentioned in the law, the intent of the act is to extend protection in their employment to a general category of employees. . . . In the Commissioner's judgment, the position of chief janitor denotes a special assignment within the general classification of janitorial services and, therefore, it comes within the scope of the tenure statute.

Cases such as Barnes and Brunner are distinguishable in that they involved situations where an individual who was undisputably a janitor or custodian was promoted to another position. The question in this proceeding is whether petitioner was a janitorial employee within the meaning of N.J.S.A. 18A:17-3 in the first place.

For the most part, petitioner's duties were different from those of the janitorial employees. Petitioner was hired to develop a maintenance plan for HVAC systems, to evaluate whether it would be better to repair or replace HVAC equipment, and generally to perform work that was previously done by outside contractors. There was some overlap with the work of other maintenance employees, but generally they did not have duties similar to those of petitioner.

Additionally, petitioner's terms and conditions of employment were much more favorable than those of respondent's maintenance and custodial employees. On respondent's organizational chart, petitioner was placed in the Office of the Superintendent, and he had his own office in the administration building. By comparison, the janitors shared a lunch/break room in each school. When he was hired, petitioner's salary was approximately double that of a maintenance worker with one year of service and roughly equal to that of an employee with twenty-five years of service. Unlike the janitors, petitioner was not a member of the union. From the start, petitioner received vacation leave which would have required ten years of service under the collective bargaining agreement. Further, petitioner had direct communication with and was evaluated by the Director of Facilities. In contrast, the custodial and maintenance workers were evaluated by the school principals.

In sum, the unique position held by petitioner with requirements that replicated his education and work experience was very different from that of the janitorial employees. The fact that petitioner did some hands-on maintenance work does not alter this assessment. Considering all of the above, I **CONCLUDE** that petitioner's position was not within the general category of employees protected by N.J.S.A. 18A:17-3 and N.J.S.A. 18A:17-4. I **FURTHER CONCLUDE** that petitioner did not hold

tenure pursuant to N.J.S.A. 18A:17-3 and that he does not have any rights to employment with respondent pursuant to N.J.S.A. 18A:17-4.

Accordingly, it is **ORDERED** that the petition in 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, 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.

Feb. 3, 2011
DATE

Richard McGill
RICHARD McGILL, ALJ

Date Received at Agency: February 3, 2011

Date Mailed to Parties: FEB - 4 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

jb

APPENDIX

WITNESS LIST

For petitioner:

Patrick Gagliardi
Onofrio Mezzina

For respondent:

Timothy Calligy

EXHIBIT LIST

P-1 Memorandum dated December 6, 2002, from Tim Calligy to Patrick Gagliardi
P-2 Letter dated December 10, 2002, from Patrick Gagliardi to Hoboken Board of Education
P-3 Resolution of the Hoboken Board of Education from Session held on December 10, 2002
P-4 Resolution of the Hoboken Board of Education from Session held on August 30, 2005
P-5 Resolution of the Hoboken Board of Education from Session held on March 18, 2008
P-6 Employment Contract dated April 9, 2009
P-7 Letter dated May 15, 2009, from John R. Raslowsky, II, to Onofrio Mezzina
P-8 Letter dated June 23, 2009, from John R. Raslowsky, II, to Onofrio Mezzina
P-9 Letter dated February 24, 2010, from Marie-Laurence Fabian to Sheldon Pincus with attachments
P-10 Minutes of the Organization Meeting of the Hoboken Board of Education on April 27, 2010
P-11 Petitioner's Evaluation – May 23, 2007
P-12 Petitioner's Evaluation – June 10, 2008

P-13 Log of petitioner's work activities

P-14 Petitioner's Job Description and Certifications

R-1 Petitioner's resume

R-2 Interoffice Communication dated November 12, 2002, from Patrick Gagliardi to All Principals

R-3 Memo dated January 13, 2006, from David Anthony to Board Members with attached District Employee Organization Chart

R-4 Agreement between the Hoboken Board of Education and The Hoboken School Employees Association, July 1, 2005 through June 30, 2008

R-5 Resolution of the Hoboken Board of Education from Session on March 24, 2005

R-6 Resolution of the Hoboken Board of Education from Session on May 19, 2009

R-7 Minutes of a meeting of the Hoboken Board of Education on June 16, 2009

R-8 Interoffice Communication dated November 1, 2007, from John R. Raslowsky, II, to All Principals

R-9 Petitioner's Attendance History

122-11

OAL DKT. NO. EDU 1526-11
AGENCY DKT. NO. 36-2/11

H&S CONSTRUCTION & MECHANICAL, INC.

PETITIONER,

V.

WOODLAND PARK BOARD OF EDUCATION, STONE CREEK, INC., AND TEKTON DEVELOPMENT CORP.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

OAL DKT. NO. EDU 1667-11
AGENCY DKT. NO. 41-2/11

TEKTON DEVELOPMENT CORP.,

PETITIONER,

V.

WOODLAND PARK BOARD OF EDUCATION, AND STONE CREEK, INC.,

RESPONDENTS.

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 28, 2011 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon full review and consideration, the Commissioner adopts the recommended Order granting emergent relief in this matter, as he concurs with the ALJ – for the reasons clearly stated in his decision – that petitioner H&S has satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), most notably demonstrating a likelihood of prevailing on the merits of their underlying claim.

Accordingly, the application of H&S for emergent relief is hereby granted. Woodland Park is hereby enjoined from entering into the contract with Stone Creek for this project until a final determination on the merits of the entire contested case is issued. This matter shall proceed at the OAL for a recommendation as to this determination.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|23|11

Date of Mailing: 3|23|11

[1] 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

ORDER

EMERGENCY RELIEF

H&S CONSTRUCTION & MECHANICAL, INC.,
Petitioner,
v.
WOODLAND PARK BOARD OF EDUCATION, STONE CREEK, INC., AND TEKTON DEVELOPMENT CORP.,
Respondents.

OAL DKT. NO. EDU 01526-11
AGENCY DKT. NO. 36-2/11

TEKTON DEVELOPMENT CORP.,
Petitioner,
v.
WOODLAND PARK BOARD OF EDUCATION, AND STONE CREEK, INC.,
Respondents.

OAL DKT. NO. EDU 01667-11
AGENCY DKT. NO. 41-2/11

Jeffrey S. Wilson, Esq., for petitioner H&S Construction & Mechanical, Inc.

Jeffrey R. Merlino, Esq., for respondent Woodland Park Board of Education (Lindabury, McCormick, Estabrook, Cooper, attorneys)

Steven Cohen, Esq., for respondent Stone Creek, Inc. (Tesser & Cohen, attorneys)

James J. Tarnofsky, Esq., for petitioner-respondent Tekton Development Corp. (Hedinger & Lawless, attorneys)

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

H&S did not include Singer Food Service Company in its bid as its food-service equipment subcontractor because one of Singer's prequalification documents had expired. But when Stone Creek submitted the expired document, Woodland Park waived the requirement. Was this expired document likely a material defect that could not be waived? Yes. Under the test of materiality, a defect is material if waiver would undermine the standards of competition.

Tekton also included Singer in its bid as its food-service equipment subcontractor. Tekton, however, is also classified to do that work. Can Tekton likely substitute itself for Singer? No. Caselaw holds that contractors cannot substitute subcontractors after the bid has been awarded. Moreover, the bid instructions required bidders to identify their subcontractors and certify that they would use them.

PROCEDURAL HISTORY

Before January 26, 2011, a bid was advertised for the renovation and construction of a new cafeteria at Memorial Middle School and for the renovation and addition of a new kindergarten at Charles Olbon Elementary School in Woodland Park, New Jersey.

In the Instructions to Bidders, the project was referred to as "Renovations and New Cafeteria for the Memorial Middle School and Renovations and New Kindergarten Addition for the Charles Oblon Elementary School."

On January 26, 2011, the bids were opened. Stone Creek submitted the lowest bid ($2,385,800); Tekton submitted the second-lowest bid ($2,442,500); and H&S

submitted the third-lowest bid ($2,453,900). As a result, on February 7, 2011, the contract was awarded to Stone Creek.

On February 11, 2011, H&S filed a motion for emergency relief with the Department of Education to stop Woodland Park from entering into the contract with Stone Creek. According to H&S, both Stone Creek and Tekton had submitted non-responsive bids because both Stone Creek and Tekton had listed Singer as their food-service equipment contractor when Singer's Certification of Prequalification from the School Development Authority (SDA) had already expired. Ultimately, H&S seeks the award of the contract for the project as the lowest-responsible bidder.

On February 11, 2011, the Department of Education 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.

On February 14, 2011, the OAL received the transmittal.

On that date, Tekton also filed a motion for emergency relief to stop Woodland Park from entering into the contract with Stone Creek because Singer's Certification of Prequalification the SDA had expired. Tekton, however, argues that it can substitute for Singer. As a result, Tekton seeks the award as the lowest-responsible bidder.

On February 16, 2011, the Department of Education transmitted this second case to the OAL and I consolidated it with the first.

On February 28, 2011, the parties appeared at the OAL for oral argument.

DISCUSSION AND FINDINGS OF FACT

The Instructions to Bidders

On pages five and six of the bid instructions, bidders and their subcontractors in the five-major branches of work were required to be prequalified by the SDA and classified by the Division of Property Management and Construction (DPMC) under N.J.S.A. 18A:7G-33. The bid instructions identified the five-major branches of work as "general construction, plumbing and gas fitting work, heating and ventilating systems and equipment, electrical work, and structural steel and ornamental iron work." In addition, bidders and their subcontracts in the five-major branches of work were required to submit "an Affidavit of No Material Adverse Change together with a Certification of Prequalification from the SDA, a Notice of Classification and a Total Amount of Uncompleted Contracts (DPMC Form 701) from the Division of Property Management and Construction." More significantly, the bid instructions required bidders to submit this documentation for the specialty trades as well:

> Classification of Bidders
>
> A. For all School Facilities Projects, irrespective of project cost, all bidders and those subcontractors in the five (5) major branches of work (general construction, plumbing and gas fitting work, heating and ventilating systems and equipment, electrical work, and structural steel and ornamental iron work), must be prequalified by the SDA and classified by the DPMC pursuant to under N.J.S.A. 18A:7G-33 et seq. as to trade or work classification and aggregate rating limit, on which they must submit bids. The bidder shall submit as to the bidder and each of the subcontractors for the five (5) major branches of work and for all specialty trades for which classification is required, an Affidavit of No Material Adverse Change together with a Certification of Prequalification from the SDA, a Notice of Classification and a Total Amount of Uncompleted Contracts (DPMC Form 701) from the Division of Property Management and Construction.
>
> [(Ex. B to Certif. of Brendan T. Murray, pp. 5-6 (February 11, 2011).)]

On pages eleven and twelve of the bid instructions, bidders were reminded that they had to comply with these instructions and submit these documents. To be clear, the bid instructions enumerated the forms the bidders had to complete and the documents they had to submit. Once again, bidders were instructed to submit the Affidavit of No Material Adverse Change together with the Certification of Prequalification from the SDA, the Notice of Classification from the DPMC, and the Total Amount of Uncompleted Contracts from the DPMC:

> Preparation of Bids
>
> B. All bidders must use and complete the following bid forms in full:
>
> 7. Affidavit of No Material Adverse Change together with following attachments as to the bidder and the subcontractors in the five (5) major branches of work and all specialty trades for which classification is required:
> a. NOTICE OF CLASSIFICATION from DPMC, as issued by the State of New Jersey, Department of Treasury, Division of Property Management and Construction (DPMC).
> b. Total Amount of Uncompleted Contracts, DPMC Form 701.
> c. The New Jersey Schools Development Authority, Certificate of Prequalification, required for school facilities projects issued by the State of New Jersey Schools Development Authority (SDA).
>
> [(Ex. B to Certif. of Brendan T. Murray, pp. 11-12 (February 11, 2011).)]

The Form of Bid Proposal

On pages four and five of the bid proposal form, bidders were again reminded that they and their subcontractors had to be classified by the DPMC. In addition, bidders had to identify their subcontractors and certify that they would use them. Moreover, bidders were again reminded that they had to submit the same prequalification documents for their subcontractors as they had to submit for themselves. In particular, bidders had to submit their Public Works Contractor Registration Act Certificates as well as the Business Registration Certificates:

SUBCONTRACTORS

Pursuant to N.J.S.A. 18A:18A-26, in order to be eligible to submit a bid for the Project, the Bidder and its Subcontractors shall be classified by the New Jersey Department of Treasury, Division of Property Management and Construction in the following disciplines.

Identify the Subcontractors for the major trades and specialty trades listed below. By indicating the Subcontractors, the Bidder certifies that if it is awarded the bid, the named Subcontractors will be awarded the subcontracts, provided the Subcontractors are approved by the Architect. **All pre-qualification documentation required for the Bidder shall also be submitted for the Major Trade and Specialty Trade Subcontractors.**

All Subcontractors **(irrespective of trade)** must be registered by the State of New Jersey under the Public Works Contractor Act, N.J.S.A. 34:11-56.48 et seq., to work on school construction projects. The bid shall include the Public Works Contractor Registration Act Certificate and a Business Registration Certificate under P.L. 2004 c. 57.

[(Ex. 1 to Certif. of Jeffrey R. Merlino (February 16, 2011).)]

On page five of the bid proposal form, bidders who were classified by the DPMC in trade C008, General Construction, had the space to identify their subcontractors. More specifically, bidders who were classified by the DPMC in trade C008 also had to be deemed classified by the DPMC in trade C030, Plumbing; trade C039, HVAC; trade C047, Electrical; and trade C043, Control Systems. If they were not deemed classified by the DPMC in any of those trades, then they had to engage properly classified subcontractors:

C008 General Construction (The Bidder must be classified in this trade, as well as the trades listed below, or engage properly classified subcontractors):

With

C030 Plumbing (Major Trade Subcontractor)
C039 HVAC (Major Trade Subcontractor)
C047 Electrical (Major Trade Subcontractor)
C043 Control Systems (Specialty Trade Subcontractor)

(1) MAJOR TRADE SUBCONTRACTORS

C030 Plumbing Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

C039 HVAC Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

C047 Electrical Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

(2) SPECIALTY TRADE SUBCONTRACTOR

C043 Control Systems Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

[(Ex. 1 to Certif. of Jeffrey R. Merlino (February 16, 2011).)]

Similarly, on pages five and six of the bid proposal form, bidders who were classified by the DPMC in trade C009, General Construction/Alterations & Additions, had the space to identify their subcontractors. For those bidders, they also had to be deemed classified by the DPMC in trade C030, Plumbing; trade C039, HVAC; trade C047, Electrical; and trade C043, Control Systems. But they also had to be deemed classified by the DPMC in trade C104, Food Service Equipment. If they were not deemed classified by the DPMC in any of those trades, then they too had to engage properly classified subcontractors:

C009 General Construction/Alterations and Additions (The Bidder must be classified in this trade, as well as the trades listed below, or engage properly classified subcontractors):

With

C030 Plumbing (Major Trade Subcontractor)
C039 HVAC (Major Trade Subcontractor)
C047 Electrical (Major Trade Subcontractor)
C043 Control Systems (Specialty Trade Subcontractor)

(1) MAJOR TRADE SUBCONTRACTORS

C030 Plumbing Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

C039 HVAC Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

C047 Electrical Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

(2) SPECIALTY TRADE SUBCONTRACTOR

C043 Control Systems Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

(3) SPECIALTY TRADE SUBCONTRACTOR

C104 Food Service Equipment Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

[(Ex. 1 to Certif. of Jeffrey R. Merlino (February 16, 2011).)]

Addendum #3

Before January 26, 2011, Woodland Park revised its bid proposal form. In Addendum #3, bidders classified by the DPMC in trade C008, General Construction, also had to be deemed classified by the DPMC in trade C029, Structural Steel, and trade C104, Food Service Equipment; otherwise, they had to engage properly classified subcontractors:

C008 General Construction (The Bidder must be classified in this trade, as well as the trades listed below, or engage properly classified subcontractors):

With

C029 Structural Steel (Major Trade Contractor)
C030 Plumbing (Major Trade Subcontractor)
C039 HVAC (Major Trade Subcontractor)
C047 Electrical (Major Trade Subcontractor)

C043 Control Systems (Specialty Trade Subcontractor)
C104 Food Service Equipment (Specialty Trade Subcontractor)

(1) MAJOR TRADE SUBCONTRACTORS

C029 Structural Steel Subcontractor and Ornamental Iron:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

C030 Plumbing Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

C039 HVAC Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

C047 Electrical Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

(2) SPECIALTY TRADE SUBCONTRACTOR

C043 Control Systems Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

(3) SPECIALTY TRADE SUBCONTRACTOR

C104 Food Service Equipment Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

[(Ex. D to Certif. of Daniel Hernandez (February 9, 2011).)]

Given this addendum, bidders classified by the DPMC in trade C008, General Construction, or bidders classified by the DPMC in trade C009, General Construction/Alterations & Additions, both had to be deemed classified by the DPMC in trade C104, food service equipment, or engage properly classified subcontractors.

The Certificate of Prequalification from the SDA

Both Tekton and H&S are classified by the DPMC in Trade C 008 General Construction while Stone Creek is classified by the DPMC in Trade C009 General Construction/Alterations & Additions. Only contractors classified by the DPMC in Trade C008 General Construction, however, are also deemed by the DPMC to be classified in Trade C104 Food Service Equipment. Therefore, only Stone Creek had to engage a properly classified food-service equipment subcontractor—and it chose Singer.

But so did Tekton. Even though Tekton did not have to engage a properly classified food-service equipment subcontractor, it too chose Singer. As a result, both Stone Creek and Tekton listed Singer as their food-service equipment subcontractor and submitted a Certificate of Prequalification from the SDA on behalf of Singer in their bids.

Singer's certificate, however, had already expired. According to the SDA, Singer's Certificate of Prequalification had expired on December 7, 2010, and was not renewed until February 2, 2011. Although it was renewed retroactive to December 7, 2010, the certificate was still expired when Stone Creek and Tekton submitted their bids. In other words, Singer was not prequalified by the SDA when Woodland Park opened their bids on January 26, 2011.

Moreover, H&S represented that it too had considered engaging Singer as its food-equipment service subcontractor but had decided against it because Singer's Certification of Prequalification from the SDA had expired. In fact, H&S represented that Singer's renewal had been pending for three months because the State Police had questions about Singer during its background check. For these reasons, H&S challenges the award of the contract to Stone Creek.

Paradoxically, Tekton also challenges the award of the contract to Stone Creek because Singer's Certification of Prequalification from the SDA had expired.

Nevertheless, none of the parties challenge any of the other substantive or procedural requirements set forth in the specifications or the bids. They also stipulate that this project is not a SDA project. Finally, Stone Creek represents that eleven of the fifteen bidders listed Singer as their food-service equipment subcontractor and that only H&S listed itself as its food-service equipment contractor.

DISCUSSION AND CONCLUSIONS OF LAW

I.

Standards for Emergency Relief

Where irreparable harm will result without an expedited decision prohibiting some action in a contested case, emergency relief pending a final decision on the whole contested case may be ordered upon application of a party. N.J.A.C. 1:1-12.6. The standards to be met for granting such relief are contained in Crowe v. DeGioia, 90 N.J. 126 (1982). They have since been codified for cases concerning an action by a district board of education or any other party subject to the jurisdiction of the Commissioner of Education:

> 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 not suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b).]

In this case, the relevant issue is whether H&S or Tekton has a likelihood of prevailing on the merits of their underlying claims.

Public Schools Contract Law

Under the Public Schools Contract Law, every contract for the performance of any 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).

The Test of Materiality

These requirements notwithstanding, minor discrepancies and technical omissions can be waived. Id. at 314. The test is one of materiality. Originally set forth by Judge Pressler in River Vale v. R.J. Longo Construction Company, 127 N.J. Super. 207, 216 (Law Div. 1974), it was later adopted by our 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.

II.

SDA versus Non-SDA Projects

Both Woodland Park and Stone Creek argue that Stone Creek is the lowest responsible bidder who complied with the substantive and procedural requirements set forth in the specifications because the bid did not require bidders to submit a Certification of Prequalification from the SDA on behalf of their subcontractors. In support of their argument, Woodland Park and Stone Creek rely on page four of the bid proposal. According to Woodland Park and Stone Creek, the bid proposal only required bidders to submit: (1) a Notice of Classification; (2) a Total Amount of Uncompleted Contracts; (3) a Public Works Contractor Registration Act Certificate; and (4) a Business Registration Certificate. Since Stone Creek submitted these forms and offered the lowest price, Woodland Park and Stone Creek conclude that Stone Creek was the lowest-responsible bidder.

Woodland Park and Stone Creek, however, overlook the obligatory language in the bid instructions. More specifically, on pages four to five of the bid instructions, and then again on pages eleven to twelve, Woodland Park required bidders to submit a Certification of Prequalification from the SDA on behalf of their subcontractors. By its own terms and conditions, Woodland Park required bidders to submit this certification in addition to the Notice of Classification, the Total Amount of Uncompleted Contracts, the Public Works Contractor Registration Act Certificate, and the Business Registration Certificate. Although Woodland Park argues that this requirement is only for SDA projects (which this project is not) the bid documents do not make this distinction. Therefore, I **CONCLUDE** that this distinction does not apply and that bidders were required to submit a Certification of Prequalification from the SDA on behalf of their subcontractors.

Mandatory versus Non-Mandatory Requirements

In the alternative, Stone Creek argues that it is the lowest-responsible bidder who complied with the substantive and procedural requirements set forth in the specifications because the requirement that it submit a Certification of Prequalification from the SDA on behalf of their subcontractors is a minor discrepancy or technical omission that can be waived. In support of its argument, Stone Creek relies upon N.J.S.A. 18A:18A-18. According to Stone Creek, the requirement of prequalification or classification only applies to contractors or subcontractors in the five-major branches of work set forth in the statute.

In further support of its argument, Stone Creek relies upon N.J.A.C. 19:38A-2.1(d). According to Stone Creek, this requirement of prequalification only applies to contractors when they submit their bids and only applies to subcontractors when they enter into their contracts. In other words, it does not apply to subcontractors at the time of bid.

The Appellate Division, however, rejected a similar argument in P & A Construction v. Woodbridge, 365 N.J. Super. 164 (App. Div. 2004). In that case, the governing body waived a financial statement because it was not one of the five-statutorily mandated items under the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq. Although the financial statement was not one of the five-statutorily mandated items, the Appellate Division reasoned that the protections of that law would be substantially weakened if the local contacting agency could waive any other item. Id. at 176. Finding no legislative direction, the Appellate Division held that waiver of any other bid defect must be considered under the test of materiality set forth in River Vale. P & A Construction, supra, 365 N.J. Super. at 177.

In this case, Singer is not a contractor or subcontractor in one of the five-statutorily mandated branches of work set forth in N.J.S.A. 1 8A:18A-18. And the Certificate of Prequalification from the SDA is not one of the statutorily mandated items set forth in the Public Schools Contract Law either. But given the Appellate Division's reasoning and holding in P & A Construction, I **CONCLUDE** that waiver of the

Certification of Prequalification from the SDA must be considered under the same test of materiality set forth in River Vale.

Parenthetically, H&S and Tekton argue that the Appellate Division's decision in Begraft v. Franklin Board of Education, 133 N.J. Super. 415 (App. Div. 1975), is dispositive. In that case, the board of education disqualified a bidder which submitted its statutorily mandated qualifications after the date the bids were received but before the date the contract was awarded. Id. at 417. In affirming that decision, the Appellate Division explained that the board of education was without authority to accept the bid because the bid defect could not be waived. As a result, the Appellate Division held that qualification after the date for submission of the bid does not satisfy the requirements of the statute or the bid. Ibid.

Although this case concerns the submission of qualifications after the date the bids were received but before the date the contract was awarded, it still does not concern the submission of statutorily mandated qualifications. Again, such statutorily mandated qualifications cannot be waived. Therefore, I **CONCLUDE** that Begraft does not apply and waiver of the Certification of Prequalification from the SDA must still be considered under the test of materiality set forth in River Vale.

The First Prong of the Test: Assurance of Performance

In considering this test of materiality, Stone Creek argues that its submission of an expired Certification of Prequalification from the SDA on behalf of Singer was a minor discrepancy or technical omission that can be waived because it did not deprive Woodland Park of its assurance that the contract would be entered into, performed, and guaranteed according to its specifications. In support of its argument, Stone Creek relies on N.J.S.A. 18A:18A-31. According to Stone Creek, the statute requires boards of education to give bidders the opportunity to cure any minor discrepancy or technical omission.

Stone Creek, however, overstates its reach. Under the statute, boards of education must give bidders the opportunity to present additional information to

substantiate their qualifications or classifications—but only after they have first established them:

> Where there have been developments subsequent to the qualification and classification of a bidder which in the opinion of the board of education would affect the responsibility of the bidder, information to that effect shall forthwith be transmitted to the department for its review and reconsideration of the classification. Before taking final action on any such bid, the board of education concerned shall notify the bidder and give him an opportunity to present to the department any additional information which might tend to substantiate the existing classification.
>
> [N.J.S.A. 18A:18A-31.]

In this case, Stone Creek did not first establish Singer's qualifications. Thus, there was no obligation for Woodland Park to notify Stone Creek and provide it with an opportunity to explain why Singer was still qualified. Had Singer's Certification of Prequalification from the SDA expired after Stone Creek submitted its bid, then Woodland Park would have been obligated to provide Stone Creek with the opportunity to submit the renewal before taking final action on the award. Therefore, I **CONCLUDE** that N.J.S.A. 18A:18A-31 does not apply.

The Second Prong of the Test: Standards of Competition

Stone Creek also argues that its submission of an expired Certification of Prequalification from the SDA on behalf of Singer was a minor discrepancy or technical omission that can be waived because it did not adversely affect competitive bidding by giving an advantage to one bidder over the other or by undermining the common standards of competition. In support of its argument, Stone Creek relies upon Tec Electric v. Franklin Lakes Board of Education, 284 N.J. Super. 480 (Law Div. 1995). According to Stone Creek, the case held that prequalification documents are immaterial defects that can be waived.

That case, however, is different. In that case, the prequalification document at issue was the Affidavit of No Material Adverse Change and it only had the potential to

affect the classification by the DPMC. More significantly, it did not have the potential to affect the competitive-bidding process:

> With regard to the second criterion of the River Vale materiality test, the failure to submit a Prequalification Affidavit offered Tec no opportunity adversely to affect competitive bidding. The information contained in the Prequalification Affidavit concerns the bidder's current DBC classification rating, which in turn denotes a contractor's financial capacity, as well as availability of equipment and personnel, to do the job. It does not and could not influence the amount of plaintiff's or any other contractor's bid.
>
> [Tec Electric, supra, 284 N.J. Super. at 487.]

In this case, there is likelihood that the submission of the expired Certification of Prequalification from the SDA did affect the competitive-bidding process because there is likelihood that it did affect the amount of the bids. As H&S represented, it had considered engaging Singer as its food-service equipment subcontractor but chose not to because Singer's Certification of Prequalification from the SDA had expired. Although Stone Creek represents that eleven of the fifteen bidders listed Singer as their food-service equipment subcontractor as well, and only H&S listed itself as its food-service equipment contractor, it does not change the likelihood that it affected the amount of H&S's bid.

There is also likelihood that it lessened the pool of subcontractors. In a persuasive decision, the Appellate Division noted that to waive such conditions for some affords them an unfair-bidding advantage because it opens the pool of subcontractors for some while lessening the pool for others:

> As to the second prong of the River Vale analysis, we are in complete agreement with the trial court's findings:
>
> [B]oth [d]efendants were afforded an unfair bidding advantage insofar as they were not required to submit the subcontractor documentation in their initial bid submissions. Whether or not the burden of doing so is considered to be laborious, the requirement of obtaining Certificates and supporting documents from all subcontractors must surely lessen the pool of subcontractor candidates from which a

> bidding contractor can choose in preparing the final bid submission. I therefore find it indisputable that a general contractor who is not required to obtain these documents prior to bid submission is placed in a position over its competitors.
>
> [Vanas Construction Co. v. Jersey City, A-1649-10, 2010 N.J. Super. Unpub. LEXIS 3087 (App. Div. Dec. 23, 2010).]

Finally, there is likelihood that it could create the perception of favoritism–a perception that our laws seek to avoid. See Bil Jim Construction Co. v. Manchester Twp. Bd. of Educ., 236 N.J. Super. 603 (Law Div. 1989) (where the court vacated the award and rejected all bids because the specifications failed to designate which classification was required for the contract and left the board with unbridled discretion after the bids were opened to determine which classification was required).

Although the specifications in this case designated the classifications, they also designated the qualifications. Both, however, were required for the contract. So to leave the board with the discretion after the bids were opened to waive those qualifications could create the perception of favoritism. Therefore, I **CONCLUDE** that Tec Electric does not apply.

And given my discussion of the test of materiality and its application to this case, I **CONCLUDE** that the submission of the expired Certification of Prequalification from the SDA by a bidder on behalf of Singer is a material defect that cannot be waived.

Therefore, I also **CONCLUDE** that both H&S and Tekton have a likelihood of prevailing on the merits of their underlying claims that Stone Creek is not the lowest-responsible bidder under N.J.S.A. 18A:18A-4(a) and should not be awarded the contract for this project.

III.

Meanwhile, Tekton argues that it is the lowest-responsible bidder because it is deemed classified in Trade C104 Food Service Equipment and can substitute for

Singer. Both H&S and Stone Creek, however, argue that it cannot. In support of their argument, H&S and Stone Creek rely upon O'Shea v. New Jersey Schools Construction Corporation, 388 N.J. Super. 312 (App. Div. 2006).

In that case, the Appellate Division held that a general contractor may not substitute a major-trade subcontractor after a bid has been awarded because it is contrary to public-bidding laws and their underlying policies. Id. at 314.

In doing so, the Appellate Division reiterated that public-bidding statutes exist for the benefit of the taxpayers, that the underlying purpose of those statutes is to secure the benefits of public competition, and that the public-bidding statutes are to be strictly construed to achieve those ends. Id. at 319.

More specifically, the Appellate Division noted that the need to furnish the names of subcontractors along with the bid of a general contractor is also found in the public-bidding statutes of State government, State agencies, State colleges, county colleges, and the New Jersey Building Authority. Id. at 323. In particular, the court referenced boards of education and N.J.S.A. 18A:18A-18. O'Shea, supra, 388 N.J. Super. at 323. More significantly, the court reasoned that inconsistent treatment by the various State agencies would lead to uncertainty in the contracting community, open the door to mischief, and undermine competition in the processes. Ibid.

Although this case does not concern the substitution of a major-trade contractor, the same reasoning applies. Moreover, the bid instructions required bidders to identify their subcontractors and certify that they will use them—without making a distinction between major-trade subcontractors and specialty-trade subcontractors. Therefore, I **CONCLUDE** that Tekton cannot substitute for Singer.

Tekton had relied on the unpublished Appellate Division decision, Contract for Science Wing Addition and Alterations v. Dobco, A-5395-07, 2010 N.J. Super. Unpub. LEXIS 443 (App. Div. March 4, 2010), in support of its argument. In that case, the Appellate Division held that the contractor could substitute one of its subcontractors

because the subcontractor became unavailable after the award of the contract. It also distinguished O'Shea:

> Contractors can make changes to the subcontractors listed in their bids for performance reasons, especially when protecting the public interest. In O'Shea v. N.J. Schools Constr. Corp., 388 N.J. Super. 312, 315 n. 1 (App. Div. 2006), where we overturned a policy allowing substitution after the award of bids, we stated that our "opinion [did] not affect a general contractor's remedies if a subcontractor breaches after a contract between the general contractor and the subcontractor has been signed." In [Stano v. Soldo Constr. Co., 187 N.J. Super. 524, 534 n.3 (1983)], we refused to hold that invalidation of a contract would follow in all instances "where a proposed subcontractor named in the bidding papers becomes unavailable for some reason after the award[.]" Finally, in Serenity Contracting Group v. Borough of Fort Lee, 306 N.J. Super. 151, 157 (App. Div. 1997), certif. denied, 153 N.J. 214 (1998), we declared that there were no bidding statutes that "suggest[] a legislative design to supplant all exercises of principled business judgment by the contracting public entity that conform with the express provisions of the Law and its underlying policies."
>
> [Science Wing, supra, A-5395-07 at 31-32.]

This case, however, is different. Indeed, the distinction is the difference. In this case, there were no performance reasons or contractual breaches which would have necessitated substitution. More pointedly, Singer could not become unavailable after the award of the contract because it was already unavailable at the time of the bid. Therefore, I **CONCLUDE** that Science Wing is unpersuasive and does not apply.

As such, I also **CONCLUDE** that Tekton does not have a likelihood of prevailing on the merits of its underlying claim that it is the lowest-responsible bidder under N.J.S.A. 18A:18A-4(a) and should be awarded the contract for this project.

IV.

Finally, H&S argues that it is the lowest-responsible bidder because it is classified in Trade C104 Food Service Equipment, named itself as the food-service equipment contractor, and does not need to substitute for Singer.

Since none of the parties challenge any of the other substantive or procedural requirements set forth in the specifications or the bids, I **CONCLUDE** that H&S has a likelihood of prevailing on the merits of its underlying claims that it is lowest-responsible bidder under N.J.S.A. 18A:18A-4(a) and should be awarded the contract for this project.

ORDER

Given my preliminary findings of fact and conclusions of law, I **ORDER** that H&S's and Tekton's applications for emergency relief are **GRANTED** and that Woodland Park is **ENJOINED** from entering into the contract with Stone Creek for this project until a final decision on the whole contested case is ordered.

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.

March 8, 2011
DATE

BARRY E. MOSCOWITZ, ALJ

dr

123-1

123-11L

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 25, 2011

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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 Borough of Ramsey, Bergen County v. Ramsey Teachers Association*, Agency Dkt. No. 48-2/11. Therein petitioner seeks a declaration as to whether or not the Board exceeded its authority pursuant to *N.J.S.A.* 18A:29-4.1 in adopting an April 28, 2009 Resolution approving a Memorandum of Agreement and Addendum to Memorandum of Agreement which adopted salary schedules for four school years, namely 2007-08, 2008-09, 2009-10, and 2010-11. The Board's submission further seeks various consequential reliefs dependent on such declaration. Please be advised that even assuming, *arguendo*, that the Board's 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,

Christopher D. Cerf
Acting Commissioner

CDC/MKD/MH
County Superintendent

124-11

C.R. on behalf of minor child T.K.G., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF HOPEWELL, CUMBERLAND COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her son, T.K.G., was not eligible for a free public education in the Hopewell Township school district during the 2009-2010 school year. Petitioner asserts that T.K.G. has been raised by K.R., his grandmother, since birth and has always been domiciled at K.R.'s home in Hopewell Township. The respondent Board contends that T.K.G. has been "kept in the home" of K.R. for reasons not involving economic hardship. After petitioner secured an order from Superior Court on May 21, 2010, granting K.R. primary residential custody, the Board conceded that subsequent to the court order, T.K.G. is domiciled in Hopewell and entitled to attend school in the district. However, respondent demands tuition reimbursement for T.K.G.'s school attendance in Hopewell from September 2009 through May 21, 2010.

The ALJ found that: C.R. is T.K.G's mother, but K.R. has been his guardian since birth; T.K.G. is and always has been domiciled in Hopewell Township with his grandmother, K.R.; *N.J.S.A.* 18A:38-1(a) provides that public schools shall be free to any school aged person who is domiciled within the school district; and the Superior Court issued an order on May 21, 2010 designating K.R. as the primary residential custodian, thereby memorializing what had always been true in fact. Accordingly, the ALJ granted the petitioner's residency appeal.

Upon a full and independent review, the Commissioner concurred with the ALJ that T.K.G. has always resided in Hopewell Township. Further, by virtue of the fact that K.R. has served as T.K.G.'s *de facto* parent since his birth, he is domiciled with her and is entitled to attend the district schools free of charge. Accordingly, the petition was granted and the respondent Board's counterclaim for tuition was denied.

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 24. 2011

124-11

OAL DKT. NO. EDU 8145-10
AGENCY DKT. NO. 60-4/10

C.R. on behalf of minor child T.K.G., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF HOPEWELL, CUMBERLAND COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

The record of this matter[1] and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions were fully considered by the Commissioner in making his determination herein. The Commissioner concurs with the Administrative Law Judge's determination that T.K.G. is now, and was in September 2009, eligible for a free public education in respondent's district. The instant residency dispute presents unusual facts, but is easily resolved upon examination of the legislative intent underlying the relevant statutes and regulations.

The following facts are undisputed. T.K.G. was born in Maryland in 2004 while his mother, C.R., was in college. At that time C.R.'s domicile was her parents' home at 51 P. Terrace, Hopewell, New Jersey. A few days after T.K.G.'s birth, C.R.'s mother, K.R., took him back to New Jersey, and raised him at 51 P. Terrace from that day forward. When C.R. graduated from college in 2006, she returned to her parents' home in Hopewell and resided there until July 2007, when she leased an apartment at 83 C. Drive, Bridgeton, New Jersey.

[1] No transcript of the January 11, 2011 hearing in the OAL has been provided to the Commissioner.

In September 2008, T.K.G. was enrolled in a day care center that sent him for a few hours each day to a preschool class run by the Bridgeton Board of Education. As conceded by respondent in its exceptions, Hopewell did not have a pre-school program at the time. (Respondent's Exceptions at 2) C.R. used her Bridgeton address to enroll T.K.G. in the Bridgeton daycare/preschool program and brought him there in the mornings. K.R. picked him up in the afternoons.

In the following September – 2009 – C.R. registered T.K.G. for school in Hopewell. Where the registration form asked for the names of T.K.G.'s parents/guardians, she entered her and her fiance's names. (Respondent's Exhibit R-2) Where the form asked for the student's telephone number and address, she entered K.R.'s telephone number and address. (*Ibid.*) In response to the question on the form about what sort of residence T.K.G. lived in, including whether T.K.G. lived in "[an]other family member's" home, C.R. checked the space that indicated that none of the printed options applied to T.K.G. (*Ibid.*)

Subsequent to the registration of T.K.G., respondent assigned its truant consultant, Donald Wulff, to investigate T.K.G.'s residency. Wulff conducted nine early morning surveillances of K.R.'s residence in Hopewell and C.R.'s apartment in Bridgeton – over a period of four weeks. On three of the nine mornings, C.R. was observed bringing T.K.G. to K.R.'s home. On six of the occasions, as the ALJ noted, there was no evidence that T.K.G. was residing anywhere other than at K.R.'s home in Hopewell. Nonetheless, on March 8, 2010, respondent determined that T.K.G. was ineligible for a free education in Hopewell and sent notice to petitioner (at the Hopewell address) of same.

In consequence of respondent's determination, petitioner secured a court order dated May 21, 2010 memorializing K.R.'s residential custody of T.K.G. (Petitioner's Exhibit

P-1) Counsel for respondent has conceded that subsequent to the date of the Superior Court order, T.K.G. is "domiciled" in Hopewell and consequently entitled to attend school in the district. However, respondent demands tuition reimbursement for T.K.G.'s school attendance in Hopewell from September 2009 through May 21, 2010.

"Domicile" of a minor for purposes of entitlement to a free education in a given school district pursuant to *N.J.S.A.* 18A:38-1, is defined by *N.J.A.C.* 6A:22-3.1(a)(1)(i):

> (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 . . . .
> 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.

While CR is TKG's biological parent, the record reveals that notwithstanding the absence of a court order, K.R. – T.K.G.'s grandmother – has served as T.K.G.'s *de facto* parent and/or guardian since his birth. She raised the child during the crucial bonding years of infancy. Moreover, the evidence as a whole supports petitioner's contention that when she moved to the Bridgeton apartment in 2007, T.K.G. – who at that point was over three years old – stayed in Hopewell with K.R. At the OAL hearing on January 11, 2011, C.R. testified that her son was being brought up by her parents in Hopewell, but that she enjoyed visitation, bringing T.K.G. to

her apartment for overnight stays.[2] This testimony is harmonious with the results of Wulff's surveillance. (Initial Decision at 5)

The Commissioner will not punish a family which decided at the beginning of a child's life that his grandmother, rather than his biological mother, should be his primary parent. Requiring that T.K.G. leave his residence, or that the family pay tuition for his education in the district where he has always resided, would be punitive.

Further, as T.K.G.'s residence has always been in Hopewell, no attempts to 'school shop' can be attributed to C.R. or K.R. *See, e.g. G.A. v. Borough of Somerville*, 96 *N.J.A.R.*2d (EDU) 1012, 1015 (Where petitioner, a domiciliary of Somerville, had been the *de facto* guardian of several siblings since their arrivals in 1993, 1994 and 1995 from the Philippines, had received notices in 1995 that her siblings were ineligible for free public educations in Somerville, and had subsequently secured legal guardianship of the minor siblings, no back tuition was due to respondent; no 'school shopping,' a phenomenon which the 1994 amendments to *N.J.S.A.* 18A:38-1 were meant to curb, was suggested by the facts of the case).

The facts of this case lead to the conclusion that T.K.G.'s family has always intended that K.R. be T.K.G.'s primary parent and that T.K.G. reside with her. This conclusion is further corroborated by the fact that – as mentioned in respondent's exceptions – T.K.G. remains with his grandparents while C.R. has moved a considerable distance away after remarrying in June 2010.

In its exceptions, respondent asserts that the ALJ made an error of law in finding that K.R.'s *de facto* guardianship satisfies *N.J.A.C.* 6A: 22-3.1(a)(1)(i). That regulation states:

---

[2] She had so testified at the formal hearing before the respondent Board on March 8, 2010.

> 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 . . . . 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.

Respondent reasons that since *N.J.A.C.* 6A:22-1.2 (Definitions) states that

> "Guardian" means a person to whom a court of competent jurisdiction has awarded guardianship or custody of a child, provided that a residential custody order shall entitle a child to attend school in the residential custodian's school district subject to a rebuttable presumption that the child is actually living with such custodian . . . .

K.R. was not a guardian of T.K.G. prior to May 21, 2010, and T.K.G. could consequently not have been domiciled in Hopewell before that date.

However, New Jersey law was never meant to penalize innocent parties, elevate form over substance or overlook the substantial state interest in ensuring the education of all its children. *Gunderson v. City of Brigantine Bd. of Educ.*, 95 *N.J.A.R.*2d (EDU) 39, 42, *adopted* (Comm'r 1994), *aff'd* 95 *N.J.A.R.2d* 132 (St. Bd. 1995) (student who lived with petitioner, but whose only living parent refused to sign an affidavit assigning custody to petitioner, was entitled to a free education in the school district in which petitioner resided). T.K.G.'s family was clearly not school shopping when it enrolled him in respondent's school. The Commissioner is confident that a family court judge would have awarded K.R. residential custody prior to T.K.G.'s enrollment in school in 2009 – had the family realized that such an order would be needed and applied for same – and finds that the ALJ correctly concluded that T.K.G. is and has always been domiciled in Hopewell.

Accordingly, the petition is granted and the counterclaim is denied.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|24|11

Date of Mailing: 3|24|11

[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 8145-10
AGENCY DKT. NO. 60-4/10

C.R. o/b/o MINOR CHILD, T.K.G.,
Petitioner,
v.
BOARD OF EDUCATION OF THE HOPEWELL TOWNSHIP, CUMBERLAND COUNTY,
Respondent.

C.R., petitioner, pro se

Robert Malestein, Esq., for respondents

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

Record Closed: January 11, 2011 Decided: February 7, 2011

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

STATEMENT OF THE CASE

Petitioner challenged the Board of Education's residency determination that her child, T.K.G., was not entitled to free education in the Hopewell Township School District.

PROCEDURAL HISTORY

The appellant requested a fair hearing and the matter was filed at the OAL on August 5, 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 January 11, 2011, and the record closed.

FACTUAL DISCUSSION

C.R. testified in support of her petition. Her son, T.K.G., was born out of wedlock on April 25, 2004, in the State of Maryland. His father has never at any time been a part of his life. At the time of his birth, his mother, C.R., was a full-time student at the University of Maryland, Eastern Shore.

On the date of T.K.G.'s birth, C.R.'s legal residence was with her parents, E.R. and K.R., at 51 [P.] Terrace in Hopewell Township, New Jersey. Upon departing the hospital, T.K.G. was transported by his grandmother, K.R., to her home at 51 [P.] Terrace. T.K.G. has resided with his grandparents at 51 [P.] Terrace since that time. 51 [P.] Terrace is the only home T.K.G. has ever known.

C.R. continued her education at the University of Maryland, Eastern Shore as a full-time student and graduated in May 2006 with a degree in business administration. Thereafter, she returned home and took up residence with her mother and father at 51 [P.] Terrace.

In July 2007, C.R. leased an apartment at 83 [C.] Drive in Bridgeton. By that time, she had accepted employment as a customer service specialist with Pepco Holdings, Inc., a company which operates, inter alia, the Atlantic City Electric Company. T.K.G. continued to reside with his grandparents at 51 [P.] Terrace.

In September 2008, T.K.G. was enrolled at the Glory Tabernacle Daycare Center in Bridgeton, New Jersey. As part of the daycare program, T.K.G. was daily transported by the daycare center to the Geraldine Foster Preschool. He was returned to the daycare center each afternoon. His mother, C.R., dropped him off at the daycare center in the morning, and his grandmother, K.R., picked him up in the afternoon.

In September 2009, C.R. registered T.K.G. to begin school at the Hopewell Crest School in Hopewell Township. On the registration form (R-2), she listed 51 [P.] Terrace as T.K.G.'s address. She also placed K.R.'s telephone number on the registration form. One question on the form asked her to indicate if the child was residing at the home of "other family members." The form specifically references "aunt, grandfather, etc." C.R. checked the box denoted "None of the above apply." In her testimony, she explained that she marked that box because T.K.G. had always resided in K.R.'s home at 51 [P.] Terrace in Hopewell Township. K.R. has been his guardian since birth; accordingly, C.R. did not think she would be considered an "other family member."

For reasons unspecified, the school district became suspicious that T.K.G. did not reside in Hopewell Township. To pursue this issue, the school assigned its Truant Consultant, Donald Wulff, to the case. Wulff served with the Bridgeton Police Department for ten years and retired in 2007 on a disability pension. He has been employed as Hopewell Township's Truant Consultant for two years on a part-time basis. He was assigned the case on October 26, 2009, and provided with background and a picture of T.K.G.

Wulff commenced surveillance of the parties on October 29, 2009. He maintained surveillance for a period of nine days over the next month. His findings were as follows.

On October 29, 2009, he arrived at 51 [P.] Terrace at 6:30 a.m. At 7:10 a.m., a red Dodge pulled up and certain unidentified persons exited the vehicle. Wulff's view of the vehicle was obstructed, and he could not identify the persons exiting the vehicle.

On October 30, 2009, Wulff drove past 83 [C.] Drive in Bridgeton at 1:00 a.m. At that time, he observed a red Dodge Charger belonging to C.R. situated in the parking. At 6:30 a.m., he resumed surveillance of 51 [P.] Terrace, but the red Dodge was not there. He drove to 83 [C.] Drive. At 7:30 a.m., he saw C.R. and T.K.G. exit the building, enter the Dodge Charger, and depart. Wulff then drove to 51 [P.] Terrace where he observed T.K.G. exiting the red Dodge Charger.

On November 3, 2009, he arrived at 83 [C.] Drive at 6:30 a.m. The red Dodge Charger was in the parking lot. He made no observation of T.K.G. at that location. At 8:00 a.m., C.R. exited the building, got into the Dodge and drove away.

On November 4, 2009, Wulff appeared at 83 [C.] Drive at 6:30 a.m. He observed the red Dodge Charger in the parking lot. At 7:40 a.m., appellant and T.K.G. exited the building, got into the Dodge and drove away. At 2:15 p.m., he drove to 51 [P.] Terrace. A bus came to the area, but no one got off. Wulff could not specify that the vehicle he saw was T.K.G.'s bus.

On November 12, 2009, Wulff appeared at 51 [P.] Terrace at 7:15 a.m. He did not see anyone drop T.K.G. off. At 7:45 a.m., K.R. and T.K.G. emerged from the home. K.R. walked T.K.G. down the driveway, and he got on the school bus.

On November 13, 2009, Wulff appeared at 51 [P.] Terrace at 7:00 a.m. At 7:25 a.m., the red Dodge pulled in and C.R. exited the vehicle alone. C.R. entered the

house. At 7:50 a.m., K.R. and T.K.G. emerged from the house and walked to the bus stop, where T.K.G. got on the bus.

On November 17, 2009, Wulff appeared at 83 [C.] Drive at 7:00 a.m. The red Dodge was not present. At 7:10 a.m., he arrived at 51 [P.] Terrace, but the Dodge was not there either. He made no further observations on that date.

On November 18, 2009, Wulff appeared at 83 [C.] Drive at 6:45 a.m. The red Dodge was in its usual parking place. At 7:15 a.m., C.R. and T.K.G. exited the building, got into the Dodge and drove to 51 [P.] Terrace.

On November 23, 2009, Wulff appeared at 51 [P.] Terrace at 7:00 a.m. He did not observe the red Dodge, nor did he see T.K.G. being dropped off at the location. At 7:45 a.m., K.R. and T.K.G. exited the house and walked down to the bus stop where T.K.G. got on the school bus. November 23, 2009, was the last date on which Wulff conducted his surveillance.

In summation, Wulff observed the two locations on nine different dates. On three occasions, he observed petitioner transport T.K.G. from 83 [C.] Drive to 51 [P.] Terrace. On the other six occasions, there was no evidence that T.K.G. was residing anywhere other than at 51 [P.] Terrace.

In her testimony, C.R. explained that T.K.G. resides with her parents at 51 [P.] Terrace. On certain nights, she has what she termed "visitation" with him. October 30, 2009, November 3, 2009, and November 18, 2009, were three of those nights.

On March 8, 2010, the Board of Education determined that T.K.G. was not entitled to free education in the Hopewell Township School District. Thereafter, on May 21, 2010, C.R. and K.R. obtained an Order from the Superior Court of New Jersey, Chancery Division, Family Part, confirming that they share joint legal custody of T.K.G., with K.R. having primary residential custody (P-1). Counsel for the District conceded that the Board could not rebut the presumption that T.K.G. is entitled to attend school in Hopewell Township subsequent to the date of the Superior Court Order.

In her testimony, K.R. affirmed that she and her husband, E.R., have cared for T.K.G. from the time of his birth. The joint custody Order did no more than formalize the status quo.

LEGAL DISCUSSION

Respondent Board of Education relied upon N.J.S.A. 18A:38-1(b) in support of its determination that T.K.G. was ineligible to attend school in the Hopewell Township District. That statute states, in pertinent part:

> 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 Board asserts that T.K.G. is being "kept in the home" of K.R. for reasons not involving economic hardship. Therefore, argues the Board, T.K.G. is not entitled to a free education in the Hopewell Township School District.

The Board's argument ignores the provisions of N.J.S.A. 18A:38-1.(a). That statute 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;

In this case, T.K.G. is now and has always been domiciled at 51 [P.] Terrace, in Hopewell Township, New Jersey. The uncontroverted testimony demonstrates that, from the time of his birth, he has physically resided at that address. Having now attained the age of five years, T.K.G. is entitled to a free education in the Hopewell Township school system.

N.J.S.A. 18A:38-1(b) is intended to discourage parents from school shopping, that is, unilaterally depositing a child in a strange school district, thereby imposing upon that district a financial burden for which the district would not otherwise be obligated. But application of that portion of the statute presupposes that the child resided with its parent in a different school district to begin with. Such is not the case here. T.K.G. has been domiciled in Hopewell Township from the time of his birth. His grandmother was his de facto guardian from the time he left the hospital. The Superior Court recognized that state of affairs when it issued its order of May 21, 2010, designating K.R. as the guardian of primary residential custody. In so acting, the Superior Court did nothing

more than memorialize what had always been true in fact: T.K.G. is domiciled at 51 [P.] Terrace in Hopewell Township.

The Board conceded at hearing that T.K.G. was domiciled with K.R. as of the date of the May 21, 2010, Court Order. Nothing in the record tends to prove that any other conclusion should be reached for the period prior to that date.

The issue of domicile is addressed in N.J.A.C. 6A:22-3.1(a)1i, which states as follows:

> (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.
>
> 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.*
>
> [Emphasis added.]

In this case, C.R. is T.K.G.'s mother, but K.R. has been his guardian since birth. The regulation specifies that when the parents or guardians are domiciled in different school districts and there is no court order or written agreement between them, the domicile is deemed to be that of the "parent or guardian" with whom the student lives the majority of the school year. In this case, that guardian is K.R. 51 [P.] Terrace in

Hopewell Township is the only domicile T.K.G. has ever known. Based upon the standards set forth in the regulation, T.K.G. is unquestionably domiciled at that address.

Petitioner's residency appeal must be **GRANTED**.

ORDER

I **ORDER** that the relief sought in petitioner's residency petition be **GRANTED**.

I **ORDER** that T.K.G. be afforded a free public education in the Hopewell Township school system.

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.

February 7, 2011
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency: 2-7-11

Date Mailed to Parties: 2-7-11

/sd

WITNESSES

For petitioner:

C.R.

K.R.

For respondent:

Donald Wulff

EXHIBITS

For petitioner:

None

For respondent:

R-1 Wulff Report, 11/23/09

125-11

OAL DKT. NO. EDU 8158-10
AGENCY DKT. NO. 126-6/10

CAROLYN GIBSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER 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 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|24|11

Date of Mailing: 3|24|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8158-10

AGENCY DKT. NO. 126-6/10

CAROLYN GIBSON,

Petitioner,

v.

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

Respondent.

Beth L. Finkelstein, Esq., for petitioner

Dana M. Lane, Esq., for respondent (Hill Wallack, LLP)

Record Closed: January 28, 2011 Decided: February 1, 2011

BEFORE **LISA JAMES-BEAVERS,** ALJ:

STATEMENT OF THE CASE

Carolyn Gibson (petitioner) claimed that her tenure rights were violated when the district reorganized and eliminated her position. At the same time, the Board of Education of the City of Trenton (respondent) created new positions with unrecognized job titles, which she claimed were to circumvent her tenure rights. She sought an Order for the Board to place her in one of those newly created positions.

The parties agreed to a settlement of all issues in dispute and prepared a settlement agreement, which I have attached and fully incorporated herein.

PROCEDURAL HISTORY

Petitioner filed her petition with the Commissioner of Education on June 21, 2010. Respondent filed an answer on July 22, 2010. The Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed on July 29, 2010, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 for determination as a contested case. At a prehearing conference on November 23, 2010, counsel advised that they were close to reaching a settlement on the case. On January 4, 2011, they advised me that the settlement had been approved and would be voted upon at the next Board meeting. I received the settlement on January 28, 2011 and closed the record.

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.

3. The settlement is in the public interest as it conserves the Board's resources and delivers a final result whereby Gibson and the Trenton Board of Education agree to resolve the case amicably rather than incur the expense and risk the unpredictable outcome of a hearing.

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.

February 1, 2011
DATE

Lisa James-Beavers
LISA JAMES-BEAVERS, ALJ

Date Received at Agency: FEB - 8 2011

Date Mailed to Parties: FEB - 8 2011

cmo

HILL WALLACK LLP
202 Carnegie Center
CN 5226
Princeton, NJ 08543-5226
(609) 924-0808
Attorneys for Trenton Board of Education

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

CAROLYN GIBSON,

Petitioner

vs.

CITY OF TRENTON, BOARD OF EDUCATION, MERCER COUNTY,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY

OAL DOCKET NO.: EDU 08158-2010S
AGENCY REF. NO.: 126-6/10

STIPULATION OF SETTLEMENT

WHEREAS, the Board of Education of the City of Trenton ("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 Trenton Public School District; and

WHEREAS, Carolyn Gibson ("Petitioner") was employed by the Board in or about May of 2002 through June 30, 2010; and

WHEREAS, Petitioner served the Board in the positions of Assistant Superintendent for Human Resources, Division Assistant Superintendent and Assistant Superintendent for School Based Operations; and

WHEREAS, Petitioner was serving as Assistant Superintendent for School Based Operations in the spring of 2010 when that position was abolished, effective July 1, 2010, in conjunction with an administrative reorganization; and

WHEREAS, the Board created several new Executive Director positions, effective July 1, 2010, including the positions of Executive Director of Curriculum/Instruction and Assessment and Executive Director of Management Information Systems; and

WHEREAS, the Board also combined the positions of Assistant Superintendent for Human Resources and In-House Legal Counsel into a new position entitled Executive Director of Human Resources, Negotiations and Legal Affairs; and

WHEREAS, Petitioner filed an administrative Petition with the Department of Education in June of 2010, alleging that her termination of employment with the Board was unlawful due to her entitlement to one of the above named Executive Director positions; and

WHEREAS, the Board responded to the Petition, denying Petitioner's entitlement to any of the above-named Executive Director positions; and

WHEREAS, the matter was transferred to the Office of Administrative Law as a contested case for hearing, assigned to Administrative Law Judge Lisa James-Beavers; 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 and the public interest, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by 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. Dismissal of All Claims

This Stipulation is expressly contingent upon and subject to approval by the Commissioner of Education of New Jersey. The parties agree and consent that upon approval of this Stipulation of Settlement by the Commissioner, all claims by and between the parties are to be dismissed. Petitioner further waives any right to and, will not seek reinstatement in any position with the Board. Petitioner agrees to never apply for any future position of employment with the Board. Upon approval of this Stipulation and no later than thirty (30) days from the receipt of the Commssioner's approval, the Board will forward to Petitioner a check in the amount of $145,249.24, with Petitioner responsible for all related tax payments. This amount represents twelve months of salary ($133,729.00) and health benefits ($11,520.24). Both parties agree, however, that in the event this Stipulation is not approved by the Commissioner of Education, 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. Public Interest

Settlement of this matter is in the public interest as it avoids the financial, legal and administrative burden which will result from continued litigation where all parties agree to these terms of settlement. The parties are in agreement that it is in the best interests of all parties and the Trenton public schools for this matter to be resolved in this manner. Therefore, the parties agree to move forward with a prompt settlement and avoid further unnecessary litigation.

3. Release

In exchange for the mutual promises and consideration set forth in this Stipulation, each party and her or its successors, heirs and assigns, as well as the agents successors or assigns of the Trenton Board of Education, hereby irrevocably and unconditionally waives, releases and forever discharges any claims or rights, whether known or unknown, which either party has or may have against the other regarding Petitioner's employment with the Board, or which could have been raised in the within matter. Specifically excluded from this release are Gibson's rights arising under the Teachers' Pension and Annuity Fund (TPAF) and related statutes and regulations, and any rights she may have for indemnification by the Board through her last day of employment, June 30, 2002, pursuant to *N.J.S.A.* 18A: 16-6 and 6.1.

4. Board Approval

The Board President has been duly authorized by the Board at its Executive Session on December 6, 2010 to execute this Stipulation on behalf of the Board of Education. The Board will execute a Resolution adopting the terms of settlement, which shall be attached to this Stipulation and forwarded to Administrative Law Judge Lisa James-Beavers for review, approval and transmittal to the Commissioner of Education for final approval.

5. Assent to Terms

Both parties hereby acknowledge having entered into this Stipulation with a full understanding of their rights and that they were fully informed of the implications of this Stipulation by legal counsel. Neither party enters into this Stipulation under duress. Both parties enter this Stipulation by their free will and volition. Both parties were given the opportunity to fully consider the terms and conditions of this settlement. Either party may revoke their consent to this Stipulation of Settlement within seven (7) days from the execution thereof by delivering written notification of revocation to the other party. It is understood that if this Stipulation is revoked, it will not be effective or enforceable.

6. Entire Agreement

This Stipulation of Settlement represents the entire understanding of the parties as to the settlement 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.

7. Severability

In the event that a court or agency of competent jurisdiction shall deem any part of this Stipulation of Settlement to be contrary to law, the remaining portions of the agreement shall remain in full force and effect.

8. Governing Law

This Stipulation of Settlement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties have knowingly and voluntarily executed and delivered this Stipulation of Settlement on the dates set forth below.

PETITIONER

CAROLYN GIBSON

Carolyn Gibson

Carolyn Gibson

DATED:

RESPONDENT

TRENTON BOARD OF EDUCATION

By: Nicola Tatum
Nicola Tatum, Board President

DATED: 1/10/11

ATTEST:

By: Jaye S Howard
Jayne Howard, Board Secretary

DATED: 1/10/11

Ann L. Cahill

ANN L. CAHILL
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 11/1/2014

RESOLUTION AUTHORIZING APPROVAL OF SETTLEMENT AGREEMENT WITH CAROLYN GIBSON

WHEREAS, the Trenton Board of Education has reviewed the Stipulation of Settlement Agreement between Carolyn Gibson and the Board of Education in regard to OAL Docket No. EDU 08158-2010S; and

WHEREAS, the Board has voted on this date to approve the Stipulation of Settlement Agreement; and

WHEREAS, the Board designates and authorizes the Board President to execute the Stipulation of Settlement on the Board's behalf; now therefore be it

RESOLVED that the Trenton Board of Education approves the Stipulation of Settlement Agreement between Carolyn Gibson and the Board of Education

Nicola Tatum
Board President

Jayne S Howard
Jayne S. Howard
School Business Administrator/Board Secretary

December 6, 2010

ADOPTED

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Jayne Howard, Board Secretary, certifies that this is a true copy of the original Board Resolution on file with the Trenton Board of Education.

Jayne S Howard

126-11

DONNA FIRMAN,

PETITIONER,

V.

NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL, HISTORY REVIEW UNIT,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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 alleged incident in which a young girl, A.L., was left on her bus in March 2010 because petitioner failed to conduct the mandated visual inspection at the end of her route. Petitioner asserted that she was a substitute driver on the route, that she did not know the children and they did not know her, and that she made every stop assigned on the directional sheet – which did not contain the name or bus stop of A.L. Respondent filed a motion for summary decision.

The ALJ found, *inter alia*, that: on March 22, 2010, a young girl, A.L., was placed on a school bus driven by petitioner; petitioner parked the bus at the end of her route at a pizza shop and failed to perform the mandated visual inspection of the vehicle's interior before exiting, as is required by *N.J.S.A.* 18A:39-28; A.L. remained on the bus after it was parked; the child – crying but otherwise unharmed – was discovered on the bus after petitioner returned and heard a noise coming from the back of the bus; petitioner offered explanation for how the child was left on the bus, but presented no evidence in opposition to the facts showing that A.L. was left on the bus at the end of the route. Accordingly, the ALJ granted summary decision in favor of respondent, ordered a six-month suspension of the petitioner's school bus endorsement – which is the mandatory penalty for a first offense pursuant to *N.J.S.A.* 18A:39-28 – and dismissed the petition.

Upon full review and consideration of the record, the Commissioner concurred with the ALJ that the Office of Criminal History Review is entitled to summary decision in this matter. 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 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.

March 24, 2011

OAL DKT. NO. EDU 04415-10
AGENCY DKT. NO. 81-4/10

DONNA FIRMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL, HISTORY REVIEW UNIT,	:	DECISION
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 concurs with the Administrative Law Judge that the Office of Criminal History Review Unit is entitled to summary decision. Accordingly, the petition of appeal 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 endorsement and to notify petitioner's employer that she is ineligible for the period of suspension for continued employment as a school bus driver.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|24|11
Date of Mailing: 3|24|11

* 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 04415-10S

AGENCY DKT. NO. 81-4/10

DONNA FIRMAN,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW UNIT,

Respondent.

Donna Firman, petitioner pro se

Bryant Lawrence Horsley, Jr., Deputy Attorney General, for respondent (Paula T. Dow, Attorney General of New Jersey, attorney)

Record Closed: February 3, 2011 Decided: February 7, 2011

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

The New Jersey Department of Education, Office of Criminal History Review Unit, intends to suspend Donna Firman's bus driver's license "S" endorsement due to an incident in which it is alleged that Firman, while serving as a school bus driver for the North Hanover Board of Education, left a child (A.L.) on the school bus which she drove. The child was discovered by Firman after she exited the bus at a pizza shop, and later

returned and heard a "faint squeak" coming from near the back of the bus. Firman then walked to the back of the bus and encountered a child in her seatbelt, crying and afraid. The incident occurred on March 22, 2010. The young girl had been a passenger on the bus, which transported her from her program at Discovery School to home. The route was known as the North Hanover School District Route 7 Midday. Firman urges that she was not the regular driver on the route, she did not know the children and they did not know her, and that she made each stop assigned on the applicable directional sheet (which directional sheet did not contain the name or bus stop of the child A.L.). Firman states that she asked the last child exiting the bus if he was the last child on the bus, and the child responded affirmatively. Firman then called out several times to see if any children remained on the bus, and receiving no response, proceeded to the pizza shop on an emergent basis to use the bathroom because she felt ill. The child was left on the bus for approximately four to five minutes. The child was unharmed.

On April 8, 2010, respondent advised Firman by letter that it intended to suspend her "S" endorsement to operate a school bus, pursuant to N.J.S.A. 18A:39-28, which provides for such a suspension in a first instance of a driver's failure to conduct the required visual inspection of the bus at the end of a transportation route to assure that no pupil is left on the bus.[1] Firman requested a hearing to challenge the suspension, and the matter was transferred to the Office of Administrative Law, where it was filed on May 13, 2010.

The respondent has now moved for summary decision, pursuant to N.J.A.C. 1:1-12.5. In support of the motion, it has presented a brief, and relied on the sworn petition of appeal submitted by Firman herein.

In arguing on behalf of its motion, the respondent contends that the sole factual issues material to the matter are that the child was left on the school bus on March 22,

[1] N.J.S.A. 18A:39-28,
"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. Violation, suspension, revocation of school bus endorsement
"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."

2010, and that Firman was the driver of the bus that day. It argues that the materials offered in support of the motion amply establish these facts and that Firman has failed to demonstrate the existence of any genuine dispute of material fact that might defeat summary decision and require a full evidentiary hearing. Firman did not file a response to the motion.

SUMMARY DECISION

Summary decision, or as it is known in judicial matters as 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 procedure is equally applicable in judicial as well as executive-branch administrative cases. N.J.A.C. 1:1-12.5. The standards for determining motions for summary judgment were defined by Justice William Brennan, then a New Jersey Supreme Court Justice, in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). The Supreme Court later 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.

The very essence of the summary decision procedure is that in the appropriate case, the issues necessary to decide the case, that is, the material facts to which the applicable law must be applied to decide the matter, are not themselves the subject of any genuine dispute and therefore, there is no need for a testimonial proceeding. If, instead, the examination of the affidavits, certifications, and documentary evidence offered for and against the motion shows that there is a genuine dispute about any of these material facts, the motion must fail. As such, the appropriate question to be considered is, what are those material facts and are they in genuine dispute? To determine the first question, it is necessary to look at the words of the statute upon which the respondent bases its attempt to suspend Firman's endorsement.

The statutes that underlie the proposed suspension are very simple in form and there are few facts that must exist to form the basis for action thereunder. N.J.S.A. 18A:39-28 only requires that a driver perform a visual inspection at the end of a route. The reason for this is stated as the need to assure that no pupil is left on the bus. Thus, evidentially it is necessary to establish that Firman was the driver of the bus in

question, and she admits this in her sworn petition of appeal. If a child is left on the bus at the end of the route, the driver is to be suspended. Evidentially, that a child is left on a bus at the end of a 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. The evidence offered by the Department of Education, in the form of its brief and Firman's petition of appeal, demonstrates that the child was placed on the bus, was transported on the bus, and was later found, in tears, in the pizza shop parking lot after the bus had been parked. There is clearly a prima facie showing that the child was not properly removed from the bus after the morning run. Taken together, this evidence leads to a seemingly inevitable conclusion that the child was left on the bus after it was parked, obviously without having been discovered there by the driver whose duty it was to inspect the bus and assure that no child was left behind.

It is the responsibility of a party opposing a motion for summary decision to present certifications or other evidence to establish the existence of genuine disputes of material fact. In the context of a motion for summary decision, the failure of the opposing party to offer any evidence whatsoever to support a dispute of material fact in opposition to the motion can itself support the grant of the motion. It is only where a properly plead motion is opposed by evidence of genuine dispute of the material issues that the motion is doomed. A mere denial is insufficient to defeat a properly supported motion. Although Firman did not respond to the motion, her sworn petition of appeal does not raise evidence of a genuine dispute of material issues, only an explanation for what happened. This explanation includes that she was not the regular driver on the route, she did not know the children and they did not know her, and that she made each stop assigned on the applicable directional sheet (which directional sheet did not contain the name or bus stop of the child A.L.). Firman contends that she asked the last child to exit the bus if he was the last child on the bus, and that the child responded affirmatively. Firman then called out several times to see if any children remained on the bus, and receiving no response, proceeded to the pizza shop on an emergent basis to use the bathroom because she felt ill. The child was then left on the bus for approximately four to five minutes. The child was unharmed. Firman has not offered anything to suggest that there is any genuine issue as to the material facts of this case. She admits to failing to thoroughly check her bus.

Based upon the evidence offered by the respondent, and giving all reasonable inferences to the opposing party, Firman, I **FIND** that on March 22, 2010, Donna Firman was the substitute bus driver on the North Hanover School District Route 7 Midday bus route. Firman and the children did not know each other. Firman drove a school bus upon which a young girl A.L. had been placed. The child and her stop were not listed on the directional sheet, and the child therefore never got off the bus. I **FIND** that Firman parked the bus at a pizza shop to use the bathroom, and failed to properly inspect the bus, as required by N.J.S.A. 18A:39-28. As a result, she failed to discover that the young girl remained on the bus after it was parked and otherwise emptied. The child was subsequently found on the bus by Firman. The child was in tears, but otherwise not harmed. I **FIND** that the evidence presented by Firman does not establish any facts in material dispute. 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, the arguments offered by the respondent amply support summary decision in its favor. And given the mandatory nature of the penalty for a first time violator of the mandate, the six-month suspension is the only outcome where the violation is proven. N.J.S.A. 18A:39-29a. The motion for summary decision is hereby **GRANTED** and it is hereby **ORDERED** that the 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.

February 7, 2011
DATE

EDWARD J. DELANOY, JR., ALJ

Date Received at Agency: February 8, 2011

Date Mailed to Parties: FEB - 8 2011

/bdt

WITNESS LIST

For the Petitioner:

None

For the Respondent:

None

EXHIBIT LIST

For the Petitioner:

None

For the Respondent:

None

127-11

OAL DKT. NO. EDU 10244-10
AGENCY DKT. NO. 485-8/10

IN THE MATTER OF THE TENURE HEARING OF PATRICIA MCNELIS, NEW JERSEY STATE DEPARTMENT OF CHILDREN AND FAMILIES, OFFICE OF EDUCATION, PASSAIC COUNTY.	COMMISSIONER OF EDUCATION DECISION

The record of this matter, the proposed "Settlement 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.

The Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following observations. First, Section L of the agreement states that the Commissioner will refer this tenure matter to the State Board of Education for its review and possible action on respondent's teaching certificate(s). The parties are advised that it is the State Board of Examiners who will review the case and possibly take action.

Second, Section H of the Agreement references an action, *i.e.* respondent's resignation, that may 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.

The foregoing notwithstanding, the Commissioner finds that the settlement is harmonious with the standards articulated in *N.J.A.C.* 6A:3-5.6 and *In re Cardonick,* 1990 *S.L.D.* 842 (State Board 1983), and 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|24|11

Date of Mailing: 3|24|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10244-10

AGENCY REF. NO. 485-8/10

IN THE MATTER OF THE TENURE HEARING OF PATRICIA MCNELIS, NEW JERSEY STATE DEPARTMENT OF CHILDREN AND FAMILIES, OFFICE OF EDUCATION, PASSAIC COUNTY.

Shona Mack-Pollock, Deputy Attorney General, for petitioner New Jersey State Department of Children and Families

AnnMarie Pinarski, Esq., for respondent Patricia McNelis

Record Closed: February 7, 2011 Decided: February 9, 2011

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

On August 23, 2010 the New Jersey State Department of Children and Families ("the Department") certified tenure charges of conduct unbecoming against the respondent, Patricia McNelis, a teacher employed by the Department. McNelis filed an answer denying the charges on September 21, 2010. Having deemed the charges sufficient, if true, to warrant dismissal or reduction in salary, the New Jersey Department of Education transmitted the charges to the Office of Administrative Law ("OAL") and filed on September 24, 2010.

On October 12, 2010 at the prehearing conference, the parties began settlement negotiation. The matter was scheduled for a Settlement Conference on November 16, 2010. The parties were unable to reach settlement and hearings were scheduled for January 7 and 11, 2011. Prior to the January 7, 2011 hearing date, the parties advised the undersigned that they had reached a proposed settlement and requested an adjournment of January 7 and 11 hearing dates to allow sufficient time for clients to review and finalize the terms of settlement. Ms. McNelis and the Assistant Superintendent of the Director of the Department approved the settlement terms.

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 the Statement of Charges and Certificate of Determination to the Department of Children and Families.

2. Pursuant to the settlement agreement, Ms. McNelis will resign from her position effective January 7, 2011.

3. Ms. McNelis agrees not to seek further employment with the Department or its contracted agencies.

4. The proposed settlement agreement is with the consent of all parties.

5. By the terms of the proposed settlement agreement, Ms. McNelis has entered into this agreement with a full understanding of her rights.

6. Ms. McNelis has been advised that the Commissioner may refer this matter to the State Board of Education for review and that the State Board has the power to suspend or revoke teaching licenses.

7. The agreement does not contain any provisions which restrict public access under the Open Public Records Act.

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.

Feb 9, 2011
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency:

Date Mailed to Parties: FEB 11 2011
db

2-11-11
Laura Standers
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY
Attorney for the Department of
Children and Families

BY: Shona L. Mack, DAG
Office of the Attorney General
Division of Law
33 Washington Street
Newark, New Jersey 07102
Telephone No. (973) 565-8179

Agency DKT. NO. EDU 10244-2010N
Agency DKT. NO. 485-8/10

SETTLEMENT AGREEMENT

IN THE MATTER OF THE TENURE HEARING OF

Patricia McNelis

AND

The New Jersey Department of Children and Families

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2011 FEB -8 A 8:34

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement, which fully disposes of all issues in controversy between them.

A. The **Tenure Charges** dated **August 19, 2010** contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3(a)6 - Conduct Unbecoming a Public Employee and N.J.A.C. 4A:2- 2.3(a)11 Other sufficient cause with suspension effective May 14, 2010, to present and N.J.S.A. 18A:60-2 – Just Cause.		

information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3 as amended effective April 14, 2007.

E. Appellant waives all other claims against Respondent Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein.

F. Except for the assessment of **Patricia McNelis's** disciplinary record in any subsequent personnel disciplinary hearing, nothing in this agreement shall be deemed to be an admission of liability on behalf of either party. This agreement shall not constitute a precedent in matters involving other employees.

G. Appellant waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of **Children and Families** , their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past

action or practice in any subsequent claims, except workers compensation claims that arose during the course of employment.

H. Further, **Patricia McNelis**, Appellant, pursuant to N.J.A.C 4A:2-6.3, agrees to submit a General Resignation effective, **January 7, 2011**, and will not seek future employment with the Department of Children and Families or its contracted agencies, none of which include local school boards or private schools.

I. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

J. Settlement of this matter is justified and in the public interest because Ms. McNelis has agreed to resign and thus there is no need for a contested hearing on her appeal. Appellant's resignation and the accompanying withdrawal of the tenure charges is an equitable exchange for eliminating the time, uncertainty and expense connected with a tenure hearing and it achieves the Department's desired result.

K. Appellant and Respondent consent to the terms of this agreement.

L. McNelis acknowledges that she has been advised that the Commissioner may refer this matter to the State Board of Education for review. She has been further advised that the State Board has the power to suspend or revoke teaching licenses.

M. This agreement will become effective only if approved 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.

B. The parties have agreed to the following:

1. The total number of days of suspended pay, the Respondent has imposed on Appellant to date is as follows: from 7/26/10 through 1/7/10 (date of scheduled hearing) is 120 days.

2. The total number of days of backpay, if any, to be paid by the appointing authority to the Appellant is as follows: none.

3. Any other days from the time of last suspension day until reinstatement shall be treated as follows: not applicable.

C. The Appellant **Patricia McNelis, agrees to resign from her position as a tenured Teacher 1 with the New Jersey Department of Children and Families** and withdraws his/her appeal and request for a hearing, and the Respondent Appointing Authority **New Jersey Department of Children and Families** agrees that the following result will occur with regard to each tenure charge:

Charge(s)	Disposition
N.J.A.C. 4A:2-2.3(a)6 - Conduct Unbecoming a Public Employee and N.J.A.C. 4A:2-2.3(a) 11 Other Sufficient Cause to be amended to reflect N.J.A.C 4A:2-6.3 and N.J.S.A. 18A:60-2 Just Cause– General Resignation .	

The parties acknowledge that under N.J.A.C. 17:2-4.5(b) and (c), no pension or seniority time may be credited for periods for which the employee is not paid by the employer.

D. **New Jersey Department of Children and Families** (Respondent) shall amend Appellant's personnel records to conform to the terms of the settlement. All internal records of the Department of **Children and Families** will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by appellant or as consistent with the law. Any

Paula T. Dow
Attorney General of New Jersey
Attorney for the Department of Children and Families

1/31/11
DATE

Shona L. Mack P Mack
By: Shona L. Mack, Esq., Deputy Attorney General

2-2-11
DATE

Daisy Barreto
Daisy Barreto, Director,
ON BEHALF OF Department of Children and Families

1-11-2011
DATE

Patricia A. McNelis
Patricia McNelis, Respondent

1-21-2011
DATE

Annemarie Pinarski, Esq., Employee Representative

ON BEHALF OF Patricia McNelis

CERTIFICATION

I, Patricia A McNelis, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I also understand that if this Settlement Agreement is approved by the **Commissioner of Education**, my claim against the Respondent will terminate.

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.

1-14-2011 Patricia A. McNelis

DATE **Patricia McNelis, Respondent**

128-11

P.B. on behalf of minor child, Y.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that Y.S. does not reside in Ewing and is not eligible for a free public education in the Ewing school district. The respondent contended that Y.S. resides with her mother, Y.B., in Trenton and is dropped off in Ewing before the start of each school day. Petitioner supplied the school district with a Joint Residential Custody Order, entered September 9, 2010 and effective August 1, 2010, the application for which requested joint residential custody because "the child resides at both residences". Respondent Board maintains that this order does not establish that Y.S. resides in Ewing and therefore is entitled to enrollment in the district.

The ALJ found that: the witness for the respondent Board was credible in his testimony, while P.B.'s testimony was contrived and non-credible; at all times that surveillance of Y.S. was conducted by the District, Y.S. was residing with her mother in Trenton; P.B. has not established any family or economic hardship pursuant to *N.J.S.A.* 6A:22-3.2 that would allow Y.S. to reside with her in Ewing. P.B. failed to carry her burden of proof that Y.S. is entitled to a free public education in Ewing Township; and the District waived any claim for tuition in this case. Accordingly, the ALJ ordered that Y.S. may be excluded from enrollment in the Ewing School District.

Upon a full and independent review, the Commissioner concluded that Y.S. is not eligible for a free public education in Ewing. The joint custody order notwithstanding, the record shows that Y.S. has resided at all times with her mother in Trenton, and contains multiple examples of efforts by petitioner and Y.B. to enroll Y.S. in respondent's school district on false pretenses. Further, there is no basis for the Commissioner to reject the ALJ's credibility findings. Accordingly, the Commissioner adopted the Initial Decision 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.

March 24, 2011

OAL DKT. NO. EDU 10545-10
AGENCY DKT. NO. 537-9/10

P.B. on behalf of minor child, Y.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

Upon review of the record[1] and Initial Decision in the instant residency controversy, the Commissioner concludes that Y.S. is not eligible for a free public education in respondent's district. The facts set forth in the record and summarized by the Administrative Law Judge (ALJ) in the Initial Decision indicate that in 2003 a surveillance investigation disclosed that Y.S., whom Y.B. had enrolled in respondent's district in 2001, was being driven on each school day from Y.B.'s Trenton home to the Ewing residence of P.B., the mother of a former spouse of Y.B. Y.S. was consequently disenrolled from respondent's district in June 2003 and did not appeal the disenrollment.

However, in September 2009, when Y.S. was ready to enter high school, Y.B. again enrolled her in respondent's district. On this occasion Y.B. produced a purported lease between herself and P.B. for occupation of P.B.'s premises in Ewing. However, two subsequent

[1] The Commissioner was not provided with a transcript of the hearing in the Office of Administrative Law (OAL) and the parties have filed no exceptions.

surveillances showed that Y.B. and Y.S. still resided in Trenton and that Y.S. was again being driven to Ewing each school day. Respondent disenrolled Y.S. but allowed her to finish the school year. Y.B. did not appeal the disenrollment.

Y.B. again attempted to enroll Y.S. in respondent's district in August of 2010 but her application was denied. A few weeks later Y.B. presented respondent with a family court order – dated September 9, 2010 – assigning joint residential custody to Y.B. and P.B. On the basis of the court order, P.B. filed the instant appeal of the enrollment denial with the Commissioner.

After hearing the parties' testimony and considering the documentary evidence, the ALJ found respondent's residency/attendance officer – who had ordered the above referenced surveillances and testified about same – to be credible. In contrast, he found that P.B.'s testimony was both internally inconsistent and contrived. More specifically, he did not believe P.B.'s testimony that Y.S. resides in her home in Ewing.

The Commissioner must defer to the ALJ's credibility finding unless it is clearly arbitrary, capricious or unreasonable. *See, e.g. D.L. and Z.Y. on behalf of T.L. and K.L. v. Board of Education of the Princeton Regional School District,* 366 *N.J. Super.* 269, 273 (App. Div. 2004) and *N.J.S.A.* 52:14B-10(c). A review of ALJ Spence's discussion of the bases for his credibility determination reveals nothing arbitrary, capricious or unreasonable. To the contrary, the record contained multiple examples of efforts by petitioner and Y.B. to enroll Y.S. in respondent's school district on false pretenses.

An order awarding residential custody does not, in and of itself, determine a minor child's domicile. If a district can show that a child does not actually reside with the person who has been named as his or her residential custodian, the district in which the purported

custodian resides will not be obliged to provide the child with a free education. *See, e.g. B.C., on behalf of M.W. v. Board of Education of the City of Atlantic City, Atlantic County,* Commissioner's Decision No. 381-09, decided November 18, 2009 (if a petitioner claims that a child is entitled to attend school in a school district on the basis of a court order granting custody/guardianship to the domiciled petitioner, the school district may present evidence that the child is not in fact domiciled in the school district). In the instant case, respondent has met its burden to rebut the presumption of residence/domicile – created by the joint custody order – by offering credible evidence that Y.S. does not reside with P.B.

Accordingly, the Commissioner adopts the Initial Decision of the OAL and dismisses the petition. Respondent may disenroll Y.S. However, no tuition shall be due respondent, as it has waived same. (Respondent's Exhibit R-15)

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|24|11

Date of Mailing: 3|24|11

[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 10545-10
AGENCY DKT. NO. 537-9/10

P.B., ON BEHALF OF MINOR CHILD, Y.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,
Respondent.

P. B., on behalf of Y.S., petitioner, pro se

Jeffrey F. Belz, Esq., for respondent

Record Closed: December 31, 2010 Decided: February 15, 2011

BEFORE **JOHN J. SPENCE, JR.**, ALJ:

STATEMENT OF THE CASE

P.B., on behalf of minor child, Y.S. (petitioner), challenges the determination made by the Ewing Township Board of Education (District) that Y.S. did not reside in Ewing. The District alleges that the minor child, Y.S., was residing with her mother, Y.B., in Trenton, New Jersey, and that Y.S. was being dropped off in Ewing before the

start of each of her school days. At issue is whether Y.S. is entitled to be enrolled in the District free of charge under N.J.S.A. 18A:38-1 for purposes of receiving a thorough and efficient program of education.

PROCEDURAL HISTORY

On May 13, 2010, the District notified Y.B., mother of minor child, Y.S., that Y.S. was disenrolled from the Ewing Township School District. On September 10, 2010, petitioner, P.B., appealed the decision of the District. On September 27, 2010, the case was transmitted to the Office of Administrative Law (OAL) for determination as a contested case. The matter was heard on December 13, 2010, and the record closed on December 31, 2010.

FACTUAL DISCUSSION

David Mikalauskas testified that he has been the District's residency and attendance officer for almost twenty-one years. It is his responsibility to "verify that children who are enrolled in Ewing Schools actually reside in Ewing". He estimated that sixty to seventy students per year are disenrolled in Ewing for "non-residency" and that most of the non-resident students come from Trenton.

It is uncontested that Y.B. is the biological mother of Y.S. It is admitted that P.B.'s son became the stepfather of Y.S. when he married Y.B., although they are "no longer together". P.B. acknowledged that there is no blood relationship between her and Y.S., but maintains that she considers herself Y.S.'s grandmother.

Mr. Mikalauskas testified that Y.S. was first enrolled in Ewing by her mother, Y.B., by way of a "new student" Registration Form dated August 10, 2001 (R-1). He described this document as a "Host Family Application" where it is alleged that one family is living with another family in Ewing. Y.B. stated on this first grade application that her daughter, Y.S., was residing at 386 Green Lane. This is the street address for P.B. in Ewing, but for unexplained reasons, Y.B. listed this street address as being in

Trenton. It is uncontested that Y.B. owns and resides at a home located at 10 Fell Street, Trenton, New Jersey.

The witness stated that the residency status of Y.S. first came to his attention when a complaint was filed in April of 2003 alleging that Y.S. was being "dropped off" prior to school at P.B.'s Green Lane address (R-2). As a result of this complaint the District conducted a "residency investigation" where an investigator goes to the home in question early in the morning to determine whether the student in question spends the night at that home or whether the student is dropped off in Ewing from an area outside of Ewing. Eleven days of surveillance were conducted and on nine of those days Y.S. was transported early in the morning before school from an address outside of Ewing to Ewing. On the other two days Y.S. was listed as "tardy" and "late" (R-3). As a result of this investigation the District issued a "disenrollment letter" to Y.B., dated June 6, 2003 (R-4). No appeal was taken and Y.S. voluntarily left the Ewing District.

The witness testified that approximately six years later, on September 2, 2009, Y.B. completed a Ewing Registration Form on behalf of her daughter, Y.S. (R-5). In support of this application, Y.B. produced a lease dated August 28, 2009, between Y.B. and P.B. for the property owned by P.B. at 386 Green Lane, Ewing, New Jersey (R-6). Based on this lease the District enrolled Y.S. in the Ewing system for the 2009-2010 school year.

Mr. Mikalauskas stated that on September 15, 2009, he received an anonymous tip on the District's "residency Hot-Line" that Y.S. did not live at 386 Green Lane, but was being "dropped off" in the morning prior to school and being picked-up after school (R-7). As a result of this information the District conducted an additional investigation which produced two separate reports showing a total of nineteen days of surveillance from September 29, 2009, to October 21, 2009, and from April 19, 2010, to May 13, 2010 (R-8 and R-9). The witness testified that these reports show that on every day that surveillance was conducted, Y.S. was observed being transported early in the morning by her mother, Y.B., or another individual, from Y.B.'s home at 10 Fell Street in Trenton to P.B.'s residence in Ewing or to Ewing High School.

The witness stated that as a result of the investigation he sent another disenrollment letter to Y.S.'s mother, Y.B. He further testified that Y.B. "appealed" this disenrollment but P.B. did not join in the appeal and P.B. neither testified nor offered evidence at the hearing conducted before the District on May 13, 2010 (R-10). The witness testified that the transcript of that hearing shows that at that time Y.B. did not contest the facts developed by the surveillance (R-10).

Y.B. testified before the District that it was necessary for Y.S. to reside at P.B.'s Ewing address because of overcrowded conditions at her Trenton home caused by the temporary visit of Y.B.'s parents from Puerto Rico while her father underwent medical treatment in New Jersey. Y.B. offered no testimony that she needed the help or assistance of P.B. in raising her child, Y.S. The sole reason offered by Y.B. for the alleged move of Y.S. to Ewing, was that of overcrowding. Y.B. made no allegation at the hearing before the District that she had any financial difficulties or other hardship that would prevent her from caring for her daughter, Y.S. (R-10)

At the conclusion of this residency hearing the District determined that Y.S. was domiciled with her mother, Y.B., in Trenton, New Jersey and ordered Y.S. disenrolled form the Ewing District (R-11). Although no appeal of the disenrollment was taken, the District allowed Y.S. to remain in the Ewing system until the end of the school year in June 2010.

Mr. Mikalauskas testified that sometime in late August 2010, Y.B. again attempted to enroll her daughter, Y.S. in the Ewing system but based on the District's determination of May 13, 2010, he denied the application. Apparently Y.B. did not appeal this denial, but on September 10, 2010, P.B. filed a Pro Se Residency Appeal with the New Jersey Department of Education (R-12). As a result of this appeal the District allowed re-enrollment on behalf of Y.S. for the school year starting in September, 2010. The witness testified that subsequent to the District's most recent decision to deny re-enrollment P.B. has supplied the District with a Joint Residential Custody Order entered September 9, 2010, and effective August 1, 2010 (R-13). The

application for the Order shows that P.B. and Y.B. request joint residential custody "since the child (Y.S.) resides at both residences". The District maintains that this Order does not establish that Y.S. resides in Ewing and is therefore entitled to enrollment in the District.

Although the District initially made a claim against P.B. for reimbursement or restitution for tuition, the District's written closing statement reads in part that it "is waiving any claim for tuition in the matter" (R-15).

P.B. stated that she was not present at the residency hearing conducted before the District on May 13, 2010. She testified before me that she considers Y.S. her granddaughter even though Y.S. is not a "biological" relative. She stated that initially Y.B. would not let Y.S. stay with her on a full-time basis. She testified that as time passed Y.S. and her mother, Y.B., began to get into "disputes" and Y.S. asked P.B. if she could "come and live" with P.B. P.B. said that since she was retiring soon she would permit Y. S. to live with her.

On cross examination P.B. acknowledged that she executed the Lease Agreement for her Ewing property between her and Y.B. on August 28, 2009, and testified that at that time Y.S. was "residing" back and forth between both the Ewing and Trenton addresses. She stated that she was not aware that this was just prior to the start of the 2009-2010 school year. P.B. stated that she would never deny Y.S. She further testified that Y.B. gave her "money" but would not say it was the $750 rent called for in the lease. No evidence of rent payment by Y.B. to P.B. was offered. When questioned further about the need for the lease P.B. altered her testimony somewhat by saying Y.B. needed another place to live because there were "problems" between her son and Y.B.

P.B. was again inconsistent when she stated that she told Y.S. she could move in with her when she retired. It was P.B.'s testimony that she retired March 1, 2010, and that is when she obtained the custody order. However, that order was entered September 9, 2010. On further cross examination P.B. stated that Y.S. "stays" with her

mother in Trenton on weekends and with her on weekdays. P.B. testified that she goes "away" for the summers and was not sure where Y.S. "stays" in the summer and therefore admitted it was possible she spends the summers with her mother in Trenton.

P.B. described Y.B.'s home in Trenton as having three bedrooms and other than unnamed "personal conflicts or issues" between mother and daughter, could not give any reason why Y.B. could not take care of Y.S.

On cross examination P.B. stated that she and Y.B. obtained the custody order for Y.S. by "filling out" paperwork in the Clerk's office and without giving testimony or seeing a judge.

FINDINGS OF FACT

When facts are contested, as in this matter, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness' story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Circ. 1963). There is no mechanical formula for determining the truth, to the extent it can be discerned, and many factors may be considered and weighed. These include the demeanor of the witness and the manner of testifying, the interest the witness may have in the outcome, and the reasonableness and coherence of the testimony. Corroboration, knowledge, and common experience also play a role in assessing credibility. Dawson v. R.W. Vogel, Inc., CRT 4501-00, Initial Decision (April 15, 2002), adopted as modified, Dir., Division on Civil Rights (August 28, 2002) http://lawlibrary.rutgers.edu/oa./search.html. Applying these standards to this matter convinces me that Mr. Mikalauskas offered truthful testimony concerning the residency of Y.S.

Conversely, I did not believe P.B.'s testimony regarding Y.S.'s residency. Her testimony appeared to me to be contrived so as to be self-serving. I believe P.B.'s

obvious affection for Y.S. has influenced her testimony in an effort to permit Y.S. to attend school in Ewing.

After considering all the testimony and documentary evidence in this matter, I **FIND** that the following has been proven by a preponderance of the credible evidence:

1. At all times that the District conducted surveillance of Y.S. she was residing with her mother, Y.B., in Trenton.

2. Y.S.'s mother, Y.B., does not reside in Ewing.

3. Y.S. was being transported from Y.B.'s home in Trenton, to P.B.'s home in Ewing during the 29009-2010 school year.

4. P.B. has not established any family or economic hardship pursuant to N.J.S.A. 6A:22-3.2 which would allow Y.S. to reside with her in Ewing.

5. P.B. has supplied no legal basis for why it was necessary to obtain the Joint Residential Custody Order other than a desire to support the effort to obtain acceptance into the Ewing school system.

6. Y.B. and Y.S. were not living in the Ewing school district.

LEGAL ANALYSIS

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. v. Manville Bd., 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. Matter of 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).

The acts, statements and conduct of the individual, as viewed in light of all circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)2.

Where a person has more than one residence, the following factors are useful in determining his domicile: the physical characteristics of each place, the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to return. Mercadante v. City of Paterson, 111 N.J. Super. 35, 39-40 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). A choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991).

The Unanue court identified three elements which must be considered when trying to ascertain if a change of domicile has occurred; (1) whether there had been an actual and physical taking up of an abode in a particular state; (2) whether the subject had an intention to make his home there permanently or at least indefinitely; and (3) whether the subject had an intention to abandon his old domicile. (Unanue, supra at 376).

Here it is undisputed that at all times that surveillance of Y.S. was conducted by the District, Y.S. was transported from outside of Ewing into Ewing to attend school in Ewing and then transported back to her mother's residence in Trenton.

Based upon the circumstances surrounding this matter, I **CONCLUDE** that the petitioner, P.B., failed to carry her burden of proof that Y.S. is entitled to a free public education in the Township of Ewing during the relevant time periods. I further **CONCLUDE** that the District has waived any claim for tuition.

ORDER

It is, therefore, **ORDERED** that, without proof of current domicile/residency, Y.S. may be excluded from further attending the Ewing public schools, at the discretion of the 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.

2/15/11
DATE

John J. Spence Jr.
JOHN J. SPENCE, JR., ALJ

Date Received at Agency: 2/15/11

Date Mailed to Parties: FEB 15 2011

/cad

WITNESSES

For Petitioner:

P.B., on behalf of minor child, Y.S.

For Respondent:

David Mikalauskas, residency/attendance officer

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Residency Verification/Registration Form
R-2 Attendance/Residency Complaint
R-3 Residency Investigation
R-4 Disenrollment Letter
R-5 Residency Verification/Registration Form
R-6 Rental/Lease Agreement
R-7 Attendance/Residency Complaint Form
R-8 Summary of Surveillance Report
R-9 Summary of Surveillance Report
R-10 Transcript of May 13, 2010 Hearing
R-11 Ewing Township Board of Education Resolution
R-12 Pro Se Residency Appeal Form
R-13 Residential Custody Order
R-14 Decision of State Board of Education dated November 5, 2003
R-15 Respondent's Closing Statement

#129-11

OAL DKT. NO. EDU 13271-10
AGENCY DKT. NO. 610-10/10

NISHA WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE TRENTON COMMUNITY CHARTER SCHOOL, MERCER 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 Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter,[1] with the following observation. The settlement agreement references a number of actions which may already have taken place[2], and has therefore preceded 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. The foregoing notwithstanding, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have either

[1] The same settlement agreement was also approved in the matter of *Nisha Williams v. Board of Trustees of the Trenton Community Charter School, Mercer County*, Agency Dkt. No. 722-12/10, OAL Dkt. No. EDU 8-11S.

[2] The Commissioner notes that there is an obvious error on page 2, paragraph "1.", wherein reference is made to the date upon which the respondent will resume payment of the petitioner's salary. It appears that "January 24, 2010" is a typographical error and should read January 24, 2011.

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: 3/24/11

Date of Mailing: 3/24/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13271-10

AGENCY DKT. NO. 610-10/10

NISHA WILLIAMS,

Petitioner,

v.

TRENTON COMMUNITY CHARTER SCHOOL, MERCER COUNTY

Respondent.

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

Gregory G. Johnson, Esq., for respondent (Yoss Wong Fleming, attorneys)

Record Closed: January 28, 2011 Decided: February 4, 2011

BEFORE **JOHN R. FUTEY**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 30, 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. In this matter petitioner Nisha Williams (hereinafter "Williams") seeks an order restraining respondent from requiring her to undergo a psychological examination and from seeking copies of her medical records.

In a subsequently filed due process by her under OAL Dkt. No. EDU 8-11, Agency Dkt. No. 722-12/10, Williams challenged the decision by respondent, the Board of Trustees of the Trenton Community Charter School, Mercer County (hereinafter "Trenton") to suspend her without pay and requiring her to undergo a psychiatric evaluation despite the fact that her physician had cleared her to return to work. This matter was transmitted with the request for Emergent Relief relative to the above and was received at the OAL on January 3, 2011. It referenced the related matter of EDU 13271-10.

As a result, an emergent relief hearing was scheduled for January 10, 2011, at the OAL, Trenton, New Jersey. On that date the parties met and extensively negotiated all of the issues which were raised in both of the above-captioned matters.

At the hearing, the parties agreed to a global settlement of all the issues in both matters and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1.) It was received at the OAL on January 28, 2011, at which time the hearing record closed, after Trenton has authorized a Resolution which empowered its President and Secretary to sign the Agreement on its behalf. (R-1). That Resolution was received concurrent with the fully executed Agreement.

I have reviewed the record, the terms of settlement, and the Resolution 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. It also disposes of all issues raised pursuant to EDU 13271-10 and EDU 8-11.

Therefore, I **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.

February 4, 2011
DATE

JOHN R. FUTEY, ALJ

Date Received at Agency: FEB -8 2011

Date Mailed to Parties: FEB 10 2011

/mev, mamf

EXHIBITS

Jointly submitted

J-1 Settlement Agreement

R-1 Resolution of the Trenton Community Charter School Board of Trustees with raised seal of the school and signatures of the President and Board Secretary, dated January 24, 2011

Original

RECEIVED
2011 JAN 28 A 10:53

P-1
in
1-28-11

Arnold M. Mellk, Esquire
Edward A. Cridge, Esq.
WILLS, O'NEILL & MELLK
10 Nassau Street, P.O. Box 614
Princeton, New Jersey 08542
(609)-924-0700
Attorneys for Petitioners

NISHA WILLIAMS Petitioner, v. TRENTON COMMUNITY CHARTER SCHOOL BOARD OF TRUSTEES, Respondent.	:	BEFORE THE NEW JERSEY COMMISSIONER OF EDUCATION Agency Ref. No. 722-12/10 OAL Dkt. No. EDU 00008-2010S Civil Action

SETTLEMENT AGREEMENT

In consideration of the mutual covenants and promises made herein, this Settlement Agreement (hereinafter "Agreement") is made between Nisha Williams, with an address at 3501 Woodhaven Road, Apt. 126, Philadelphia, Pennsylvania, 19154 (hereinafter "Petitioner") and the Trenton Community Charter School Board of Trustees, with an address at 363 West State Street, Trenton, New Jersey 08618 (hereinafter "Respondent").

WHEREAS, Petitioner notified Respondent in April 2010 that she was hospitalized and unable to return to work. Respondent granted Petitioner an unpaid leave of absence from May 11, 2010 to June 30, 2010. Further, Respondent directed Petitioner to undergo a psychiatric examination pursuant to N.J.S.A. 18A:16-2; and

WHEREAS, Petitioner has contested Respondent's directive to undergo such an examination by filing a Verified Petition with the Commissioner of Education, captioned Nisha Williams v. Trenton Community Charter School Board of Trustees, Agency Ref.

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ATTORNEYS AT LAW
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No. 610-10/10, OAL Dkt. No. EDU 13271-2010S (hereinafter the "First Petition"); and

WHEREAS, Petitioner on November 17, 2010 informed Respondent had she had been medically cleared by her doctor to return to work from a leave of absence approved by Respondent on or about May 11, 2010; and

WHEREAS, Notwithstanding Petitioner's so informing Respondent, Respondent has maintained its directive that Petitioner undergo a psychiatric evaluation pursuant to N.J.S.A. 18A:16-2; and

WHEREAS, Respondent has not resumed payment of Petitioner's salary pending her compliance with the aforesaid directive; and

WHEREAS, Petitioner has filed a Petition with the Commissioner of Education requesting emergent relief directing and compelling Respondent to immediately resume payment of her salary and grant her other relief, captioned Nisha Williams v. Trenton Community Charter School Board of Trustees, Agency Ref. No. 722-12/10, OAL Dkt. No. EDU 00008-2010S (hereinafter the "Second Petition"); and

WHEREAS, the parties wish to resolve and settle the claims and issues raised in the First Petition and Second Petition;

NOW, THEREFORE, Petitioner and Respondent agree as follows:

1. The Respondent shall remit to Petitioner back pay retroactive to November 17, 2010, through the present date, and shall resume payment of Petitioner's salary on or before January 24, 2010.
2. Upon receipt of the aforesaid back pay, Petitioner shall withdraw the First Petition.
3. Petitioner agrees to undergo a psychiatric evaluation which comports with the requirements of N.J.S.A. 18A:16-2. Pursuant to N.J.S.A. 18A:16-3, Petitioner shall designate

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her own physician who is New Jersey Board Certified in Psychiatry, subject to the approval of said physician by Respondent, to conduct the aforesaid examination, and Petitioner shall bear the cost of the aforesaid examination.

4. Petitioner shall cooperate with her physician in connection with the aforesaid examination, and shall facilitate the procurement by said physician of such medical records of Petitioner as said physician shall deem necessary to the preparation of said physician's evaluation of Petitioner. Respondent shall not be entitled to copies of any such records which are used by said physician in the preparation of his report; rather, Respondent shall be entitled only to a copy of said physician's report.

5. Petitioner shall provide Respondent with the identity of her physician within five days of the approval of this agreement by Respondent, which shall approve or deny said physician within five days of its receipt of same. In the event that Respondent does not approve of Petitioner's physician, Respondent shall specify the reasons for such denial of approval, and the parties will conference with the Court as promptly as possible with respect to further proceedings.

6. Petitioner agrees that she will make herself available for the aforesaid examination within 10 days of the approval of her physician by Respondent. Petitioner shall not be chargeable for any delay in the conduct of the examination, or the production of the physician's report, which is attributable to the time necessary for Petitioner's physician to obtain Petitioner's medical records. Petitioner will use best efforts to facilitate the prompt procurement of said records by her examining physician.

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P.O. BOX 214
PRINCETON, NJ 08542

7. Within five days after her submission to the aforesaid examination, Petitioner shall withdraw the Second Petition.
8. The signatories to this Agreement represent that they are fully authorized to execute this Agreement on behalf of Petitioner and Respondent.

IT IS SO AGREED

PETITIONER NISHA WILLIAMS

Nisha N. Williams
Nisha Williams

Date: 1/25/11

RESPONDENT TRENTON COMMUNITY CHARTER SCHOOL BOARD OF TRUSTEES

By: Edwin H. Lloyd
Edwin Lloyd

Title: President, Board of Trustees

Date: January ~~21~~ 22, 2011

Lana Silverstein
LANA SILVERSTEIN
A NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MARCH 7, 2016

WILLS, O'NEILL
& MELLK
ATTORNEYS AT LAW
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P.O. BOX 314
PRINCETON, NJ 08542

R-1
m
1-28-11

TRENTON COMMUNITY CHARTER SCHOOL
RESOLUTION TO ACCEPT SETTLEMENT AGREEMENT FOR OAL DOCKET NUMBER EDU 0008-2010S

WHEREAS, the Trenton Community Charter School Board of Trustees has reviewed the aforementioned settlement agreement bearing docket number EDU 008-2010S; and

WHEREAS, the Trenton Community Charter School Board of Trustees has authorized the President of the Board of Trustees to enter into this agreement on behalf of the Board of Trustees; and

WHEREAS, the Trenton Community Charter School Board of Trustees has authorized the Board Secretary to sign the agreement and affix the Trenton Community Charter School's Seal upon this resolution;

NOW, THEREFORE BE IT RESOLVED that the Trenton Community Charter School Board of Trustees, upon the recommendation of the Principal, and in consultation with the Board Attorney has agreed to the conditions of the settlement at their Board of Trustees Meeting held on January 22nd, 2011.

January 24th, 2010
DATE

Edwin N. Lloyd
Edwin Lloyd, Chairperson

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2011 JAN 28 A 10:53
OFFICE OF ADMINISTRATIVE LAW

IN WITNESS WHEREOF, the undersigned has executed this resolution on: January 24th, 2011.

School Business Administrator/Board Secretary

#130-11

OAL DKT. NO. EDU 8-11S
AGENCY DKT. NO. 722-12/10

NISHA WILLIAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE TRENTON COMMUNITY CHARTER SCHOOL, MERCER 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 Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter,[1] with the following observation. The settlement agreement references a number of actions which may already have taken place[2], and has therefore preceded 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. The foregoing notwithstanding, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have either

[1] The same settlement agreement was also approved in the matter of *Nisha Williams v. Board of Trustees of the Trenton Community Charter School, Mercer County*, Agency Dkt. No. 610-10/10, OAL Dkt. No. 13271-10.

[2] The Commissioner notes that there is an obvious error on page 2, paragraph "1.", wherein reference is made to the date upon which the respondent will resume payment of the petitioner's salary. It appears that "January 24, 2010" is a typographical error and should read January 24, 2011.

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: 3/24/11

Date of Mailing: 3/24/11

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8-11S

AGENCY DKT. NO. 722-12/10

NISHA WILLIAMS,

Petitioner,

v.

TRENTON COMMUNITY CHARTER SCHOOL, MERCER COUNTY

Respondent.

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

Gregory G. Johnson, Esq., for respondent (Yoss Wong Fleming, attorneys)

Record Closed: January 28, 2011 Decided: February 4, 2011

BEFORE **JOHN R. FUTEY**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on January 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. In this matter petitioner Nisha Williams (hereinafter "Williams") challenged the decision by respondent, the Board of Trustees of the Trenton Community Charter School, Mercer County (hereinafter "Trenton"), to suspend her without pay and requiring her to undergo a psychiatric evaluation despite the fact that

her physician had cleared her to return to work. This matter was transmitted with the request for Emergent Relief relating to the above and was received at the OAL on January 3, 2011. It referenced the related matter of EDU 13271-10, which had been previously transmitted on November 30, 2010. In that matter, Williams sought an order restraining Trenton from requiring her to undergo a psychological examination and from seeking copies of her medical records.

As a result of all of the above, an emergent relief hearing was scheduled for January 10, 2011, at the OAL, Trenton, New Jersey. On that date, the parties met and extensively negotiated all of the issues which were raised in both of the above-captioned matters.

At the hearing, the parties agreed to a global settlement of all the issues in both matters and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1) It was received at the OAL on January 28, 2011, at which time the hearing record closed, after Trenton had authorized a Resolution which empowered its President and Secretary to sign the Agreement on its behalf. (R-1.) That Resolution was received concurrent with the fully executed Agreement.

I have reviewed the record, the terms of settlement, and the Resolution 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. It also disposes of all issues raised pursuant to EDU 13271-10 and EDU 8-11.

Therefore, I **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.

February 4, 2011

DATE

JOHN R. FUTEY, ALJ

Date Received at Agency: FEB - 8 2011

Date Mailed to Parties: FEB - 8 2011

/mev, mamf

EXHIBITS

Jointly submitted

J-1 Settlement Agreement

R-1 Resolution of the Trenton Community Charter School Board of Trustees with raised seal of the school and signatures of the President and Board Secretary, dated January 24, 2011

Original

RECEIVED
2011 JAN 28 A 10:53
OFFICE OF ADMINISTRATIVE LAW

8-1
in
1-28-11

Arnold M. Mellk, Esquire
Edward A. Cridge, Esq.
WILLS, O'NEILL & MELLK
10 Nassau Street, P.O. Box 614
Princeton, New Jersey 08542
(609)-924-0700
Attorneys for Petitioners

NISHA WILLIAMS Petitioner, v. TRENTON COMMUNITY CHARTER SCHOOL BOARD OF TRUSTEES, Respondent.	:	BEFORE THE NEW JERSEY COMMISSIONER OF EDUCATION Agency Ref. No. 722-12/10 OAL Dkt. No. EDU 00008-2010S Civil Action

SETTLEMENT AGREEMENT

In consideration of the mutual covenants and promises made herein, this Settlement Agreement (hereinafter "Agreement") is made between Nisha Williams, with an address at 3501 Woodhaven Road, Apt. 126, Philadelphia, Pennsylvania, 19154 (hereinafter "Petitioner") and the Trenton Community Charter School Board of Trustees, with an address at 363 West State Street, Trenton, New Jersey 08618 (hereinafter "Respondent").

WHEREAS, Petitioner notified Respondent in April 2010 that she was hospitalized and unable to return to work. Respondent granted Petitioner an unpaid leave of absence from May 11, 2010 to June 30, 2010. Further, Respondent directed Petitioner to undergo a psychiatric examination pursuant to N.J.S.A. 18A:16-2; and

WHEREAS, Petitioner has contested Respondent's directive to undergo such an examination by filing a Verified Petition with the Commissioner of Education, captioned Nisha Williams v. Trenton Community Charter School Board of Trustees, Agency Ref.

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ATTORNEYS AT LAW
10 NASSAU STREET
P.O. BOX 614
PRINCETON, NJ 08542

No. 610-10/10, OAL Dkt. No. EDU 13271-2010S (hereinafter the "First Petition"); and

WHEREAS, Petitioner on November 17, 2010 informed Respondent had she had been medically cleared by her doctor to return to work from a leave of absence approved by Respondent on or about May 11, 2010; and

WHEREAS, Notwithstanding Petitioner's so informing Respondent, Respondent has maintained its directive that Petitioner undergo a psychiatric evaluation pursuant to N.J.S.A. 18A:16-2; and

WHEREAS, Respondent has not resumed payment of Petitioner's salary pending her compliance with the aforesaid directive; and

WHEREAS, Petitioner has filed a Petition with the Commissioner of Education requesting emergent relief directing and compelling Respondent to immediately resume payment of her salary and grant her other relief, captioned Nisha Williams v. Trenton Community Charter School Board of Trustees, Agency Ref. No. 722-12/10, OAL Dkt. No. EDU 00008-2010S (hereinafter the "Second Petition"); and

WHEREAS, the parties wish to resolve and settle the claims and issues raised in the First Petition and Second Petition;

NOW, THEREFORE, Petitioner and Respondent agree as follows:

1. The Respondent shall remit to Petitioner back pay retroactive to November 17, 2010, through the present date, and shall resume payment of Petitioner's salary on or before January 24, 2010.
2. Upon receipt of the aforesaid back pay, Petitioner shall withdraw the First Petition.
3. Petitioner agrees to undergo a psychiatric evaluation which comports with the requirements of N.J.S.A. 18A:16-2. Pursuant to N.J.S.A. 18A:16-3, Petitioner shall designate

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40 NASSAU STREET
P.O. BOX 314
PRINCETON, NJ 08542

her own physician who is New Jersey Board Certified in Psychiatry, subject to the approval of said physician by Respondent, to conduct the aforesaid examination, and Petitioner shall bear the cost of the aforesaid examination.

4. Petitioner shall cooperate with her physician in connection with the aforesaid examination, and shall facilitate the procurement by said physician of such medical records of Petitioner as said physician shall deem necessary to the preparation of said physician's evaluation of Petitioner. Respondent shall not be entitled to copies of any such records which are used by said physician in the preparation of his report; rather, Respondent shall be entitled only to a copy of said physician's report.

5. Petitioner shall provide Respondent with the identity of her physician within five days of the approval of this agreement by Respondent, which shall approve or deny said physician within five days of its receipt of same. In the event that Respondent does not approve of Petitioner's physician, Respondent shall specify the reasons for such denial of approval, and the parties will conference with the Court as promptly as possible with respect to further proceedings.

6. Petitioner agrees that she will make herself available for the aforesaid examination within 10 days of the approval of her physician by Respondent. Petitioner shall not be chargeable for any delay in the conduct of the examination, or the production of the physician's report, which is attributable to the time necessary for Petitioner's physician to obtain Petitioner's medical records. Petitioner will use best efforts to facilitate the prompt procurement of said records by her examining physician.

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10 NASSAU STREET
P.O. BOX 414
PRINCETON, NJ 08542

7. Within five days after her submission to the aforesaid examination, Petitioner shall withdraw the Second Petition.
8. The signatories to this Agreement represent that they are fully authorized to execute this Agreement on behalf of Petitioner and Respondent.

IT IS SO AGREED

PETITIONER NISHA WILLIAMS

Nisha N. Williams
Nisha Williams

Date: 1/25/11

RESPONDENT TRENTON COMMUNITY CHARTER SCHOOL BOARD OF TRUSTEES

By: Edwin N. Lloyd
Edwin Lloyd

Title: President, Board of Trustees

Date: January ~~21~~ 22, 2011

Lana Silverstein

LANA SILVERSTEIN
A NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MARCH 7, 2016

WILLS, O'NEILL
& MELLK
ATTORNEYS AT LAW
10 NASSAU STREET
P.O. BOX 914
PRINCETON, NJ 08542

R-1
m
1-28-11
gf

TRENTON COMMUNITY CHARTER SCHOOL
RESOLUTION TO ACCEPT SETTLEMENT AGREEMENT FOR OAL DOCKET NUMBER EDU 0008-2010S

WHEREAS, the Trenton Community Charter School Board of Trustees has reviewed the aforementioned settlement agreement bearing docket number EDU 008-2010S; and

WHEREAS, the Trenton Community Charter School Board of Trustees has authorized the President of the Board of Trustees to enter into this agreement on behalf of the Board of Trustees; and

WHEREAS, the Trenton Community Charter School Board of Trustees has authorized the Board Secretary to sign the agreement and affix the Trenton Community Charter School's Seal upon this resolution;

NOW, THEREFORE BE IT RESOLVED that the Trenton Community Charter School Board of Trustees, upon the recommendation of the Principal, and in consultation with the Board Attorney has agreed to the conditions of the settlement at their Board of Trustees Meeting held on January 22nd, 2011.

January 24th, 2010
DATE

Edwin H Lloyd
Edwin Lloyd, Chairperson

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2011 JAN 28 A 10:53
STATE OF NEW JERSEY
CAPITAL CITY

IN WITNESS WHEREOF, the undersigned has executed this resolution on: January 24th, 2011.

School Business Administrator/Board Secretary

132-11

OAL DKT. NO. EDU 11898-10
AGENCY DKT. NO. 599-10/10

S.A., on behalf of minor children, C.A., J.A. And S.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSVILLE, SALEM COUNTY,	:	DECISION
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 the parties by OAL on February 8, 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 counterclaim 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 children 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: 3|25|11

Date of Mailing: 3|25|11

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

#133-11

133-11

OAL DKT. NO. EDU 183-11
AGENCY DKT. NO. 5-1/11

M.F., on behalf of minor child, L.S.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY AND SUPERINTENDENT MICHAEL NITTI,	:	DECISION
RESPONDENTS.	:	

The record, Stipulation of Settlement, and 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 observes that the Superintendent of Schools of the Township of Ewing signed the Stipulation of Settlement on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating this individual to sign the agreement on its behalf, nor, in the alternative, is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Stipulation of Settlement consistent with the concerns set forth above.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/28/11
Date of Mailing: 3/29/11

* 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

SETTLEMENT

OAL DKT. NO.EDU 183-11S

AGENCY DKT. NO. 5-1/11

M.F. O/B/O L.S.F.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY, AND SUPERINTENDENT MICHAEL NITTI

Respondent.

M.F., petitioner, pro se

Jeffrey F. Belz, Esq., for respondent Ewing Township Board of Education

Record Closed: January 25, 2011 Decided: February 14, 2011

BEFORE **DENNIS P. BLAKE**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 7, 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. Prior to the hearing scheduled for January 11, 2011, the parties reached a settlement, which was submitted to the OAL on January 25, 2011.

The parties 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 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.

February 14, 2011

DATE

DENNIS P. BLAKE, ALJ

Date Received at Agency:

Date Mailed to Parties:

/mev

EXHIBITS

Jointly Submitted

Settlement Agreement

M.F. o/b/o L.S.F.

v.

Ewing Bd. of Ed. and Michael Nitti, Superintendent

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2011 JAN 25 P 12:32

OAL DKT: EDU 183-2011

Settlement Agreement

This matter having come before the Commissioner of Education by M.F. o/b/o L.S.F. on an emergent petition, and the parties having resolved the entire matter in dispute, the parties agree to the following:

1) L.S.F. shall be allowed to participate in

F.D., on behalf of minor child, F.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* appeal on behalf of his son, contending that F.D. received an unjustified grade in Algebra 2. The respondent filed an answer and requested that the petition be dismissed. Petitioner received appropriate notice of a hearing in this matter on February 1, 2011, but failed to appear and provided no explanation for his nonappearance. Having received no explanation from the petitioner for his non-appearance, 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.

March 29, 2011

135-11

OAL DKT. NO. EDU 11353-10
AGENCY DKT. NO. 533-9/10

F.D., on behalf of minor child, F.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	DECISION
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 February 24, 2011, 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.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3|29|11

Date of Mailing: 3|29|11

* 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).

137-11

#137-11

JOSE R. NEGRON,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner – the Superintendent of the school district – alleged that his contract will automatically renew upon its expiration on June 30, 2011 because respondent Board did not take the necessary steps to terminate his employment. The Board contended that its June 29, 2010 motion to renew the Superintendent's contract for a period of one year – which motion was defeated by the Board – served to non-renew petitioner's employment, and filed a motion for summary decision.

The ALJ identified two main issues in this case: 1) whether an extension of a superintendent's contract must be supported by a majority vote of the full membership of the board to be binding and effective, and 2) whether a board of education is legally authorized to bind successor boards by approving an extension for a term that commences after the existing board has been replaced. The ALJ found, *inter alia,* that: a majority of the full membership of the board would be required to amend or extend petitioner's contract for one additional year, even if this is not expressly enumerated in the statute, and accordingly the June 29, 2010 resolution of the Board is neither effective nor binding; boards of education do not have the statutory authority to approve appointments or contractual extensions if they are to take effect at a date beyond the current board's natural lifetime; the contract extension in the instant case was to commence more than two months after the 2011 board was elected, and accordingly was void. The ALJ concluded that the petitioner's contract is not renewed; the one year extension is invalid; and petitioner's employment is terminated at the conclusion of his current contract.

Upon independent review and consideration, the Commissioner concurred with the ALJ that the June 2010 resolution extending petitioner's contract was not passed by a majority of the full board. Further, the Commissioner found, *inter alia*, that: even if the board did not expressly vote on his non-renewal, petitioner was not automatically reappointed pursuant to *N.J.S.A.* 18A:17-20.1; and, should the instant litigation continue, the ALJ was correct in concluding that the current board has no authority to authorize an employment action which would begin during the tenure of a different board. The Commissioner granted respondent Board's motion for summary decision and dismissed the petition, stipulating that petitioner's employment will terminate on June 30, 2011 unless the parties agree otherwise.

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 28, 2011

OAL DKT. NO. EDU 11522-10
AGENCY DKT. NO. 567-9/10

JOSE R. NEGRON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

After review of the record, Initial Decision of the Office of Administrative Law (OAL) and parties' exceptions, the Commissioner concurs with the Administrative Law Judge (ALJ) that a June 29, 2010 resolution – proposing employment for petitioner from July 1, 2011 to June 30, 2012 and containing provisions differing from those set forth in his present contract – was not passed by the respondent board of education because the number of votes in favor of it was less than a majority of the full board. Nor can petitioner claim that, because respondent did not expressly vote on his non-renewal, he was automatically reappointed pursuant to *N.J.S.A.* 18A:17-20.1. Accordingly, the Commissioner grants respondent's motion for summary decision and dismisses the petition.

The facts are sufficiently set forth in the Initial Decision. Petitioner's first employment with respondent began on October 1, 2007 and, pursuant to his contract, was to continue until June 30, 2011. On June 29, 2010, resolutions concerning his employment were presented to the respondent board at a meeting which all nine board members attended. The

controversy centers around a resolution which proposed that the board approve an extra year of employment for petitioner, *i.e.* from July 1, 2011 to June 30, 2012, with terms that differed from those in his present contract. Of the nine board members present, four voted yes, two voted no and three abstained. Thus, the resolution did not receive approval from the majority of the board.[1]

For the reasons set forth in the Initial Decision, the Commissioner rejects petitioner's position that only a majority of a quorum of the board was needed to pass the resolution. Nor does petitioner's reliance – in his exceptions – on *Matawan Regional Teachers Association v. Matawan-Aberdeen Reg. School Dist. Bd. of Educ.*, 223 *N.J. Super.* 504 (App. Div. 1988) support his position. In that case the Appellate Division noted [in dictum] that *N.J.S.A.* 18A:11-1 – a statute addressing various general powers of boards of education – is silent about the number of votes needed to exercise such powers. The court concluded that, in the absence of express language about voting requirements, the common law rule would apply. That common law rule, articulated in such cases as *Barnert v. Paterson,* 48 *N.J.L.* 395 (Sup. Ct. 1886), instructs that when a board's charter and state law do not provide to the contrary,

> "a majority of the board . . . constitutes a quorum and the vote of a majority **of those present**, there being a quorum, is all that is required for the adoption or passage of a motion or doing any other act the board has the power to do."
> *Barnert v. Paterson, supra,* at 400. [Emphasis added.]

Since, in the present case, "those present" were undisputedly nine in number, the common law rule required that on June 29, 2010, five members vote in favor of the proposed contract for it to pass.

[1] Abstentions are counted neither as 'yes votes' nor as 'no votes.'

Further, the Commissioner finds it significant that *N.J.S.A.* 18A:11-1 addresses "General mandatory powers and duties." As the ALJ thoroughly explained, *N.J.S.A.* 18A:17-15 and numerous other statutes relate more specifically to employment actions by the board, *e.g.* appointments, dismissals, renewals and transfers. Those statutes uniformly require action by a majority of the full board. There is no reason that a decision to employ petitioner for the 2011-2012 school year should deviate from that ubiquitous standard for personnel actions.

It appears that petitioner characterizes the proposal concerning his employment – set forth in the June 29, 2010 resolution – as a novation to his existing contract, as opposed to a new contract. He reasons that a novation may somehow avoid the scrutiny and consent of a majority of the respondent board that is mandated by *N.J.S.A.* 18A:17-15 – the statute which governs the appointment of superintendents. The Commissioner finds, however, that whether the proposal concerning petitioner's employment is regarded as a novation or as a discrete contract for a term less than the three to five years articulated in *N.J.S.A.* 18A:17-15, the purpose underlying the statute – *i.e.* careful scrutiny and consent by a majority of the full board to the employment of a top school administrator – would have been no less applicable to the June 29, 2010 employment proposal than to petitioner's first contract.

Nor is petitioner's reliance on *N.J.S.A.* 18A: 11-11 persuasive. That provision requires that the public be given adequate notice before certain school administrators' contracts are changed. (Petitioner does not dispute that respondent provided the required notice.) Nothing in the statute or legislative scheme suggests that the statute was meant to address anything other than notice. The Commissioner finds therefore that *N.J.S.A.* 18A:11-11 does not expressly or by implication govern voting requirements.

In his exceptions, petitioner also protests that the ALJ did not address his claim that even without the resolution, his employment continues past June 30, 2011 pursuant to *N.J.S.A.* 18A:17-20.1. That statute dictates that a superintendent's contract will be automatically renewed if the board does not give him or her notice of nonrenewal – in writing – prior to the expiration of the first contract term. In petitioner's case, the written notice would have had to be given 120 days before June 30, 2011, *i.e.* March 2, 2011.

Consideration of the record leads to the conclusion that petitioner had ample notice – in writing – of the nonrenewal of his employment. First, a resolution to extend his employment was rejected by the board, and petitioner concedes in his exceptions that he was so notified by respondent's Board Secretary. Second, the board passed two resolutions subsequent to June 29, 2010 that affirmed the nonrenewal.[2] The Commissioner will not ignore this obvious notice because it was framed as a denial of renewal rather than an affirmation of nonrenewal.

Finally, because the Commissioner has determined that the resolution to extend petitioner's employment failed and no automatic renewal occurred, the question of whether respondent's current board can authorize an employment action which would begin during the tenure of a different board need not be reached. Nonetheless, should the instant litigation continue, the Commissioner finds that the ALJ 1) was correct in concluding that the current board has no such authority, and 2) appropriately relied on *Gonzales v. Bd. of Educ. of the Elizabeth School Dist.*, 325 *N.J. Super.* 224 (App. Div. 1999).

[2] The record shows that on September 15, 2010 respondent voted 5 to 0, with two abstentions, in favor of a resolution clarifying that its June 29, 2010 action had failed to carry. On September 30, 2010 respondent voted 5 to 0, with two abstentions, to rescind the June 29, 2010 resolution in the event that four "yes" votes had been sufficient to pass it. In light of the Commissioner's findings, it is unnecessary to address these resolutions.

In sum, the Commissioner adopts the Initial Decision with the modifications set forth *supra.* Respondent's motion for summary decision is granted, the petition is dismissed, and petitioner's employment will terminate on June 30, 2011 unless the parties agree otherwise.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/28/11

Date of Mailing: 3/29/11

[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 11522-10
AGENCY DKT. NO. 567-9/10

JOSE R. NEGRON,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,
Respondent.

Maria M. Lepore, Esq., for petitioner

Marc H. Zitomer, Esq, for respondent (Schenck, Price, Smith & King, LLP, attorney)

Record Closed: December 6, 2010 Decided: February 9, 2011

BEFORE **JEFFREY A. GERSON,** ALJ:

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The South Plainfield Board of Education (Respondent) consists of nine (9) members. Pursuant to board policy 9325.4 (voting bylaw), respondent may take official action only at meetings where a quorum is present. Further, all adopted motions require a majority vote of those present and voting (minimally, a majority of the quorum),

except as provided by code or statute.[1] Accordingly, a minimum of three (3) votes are needed for a majority of the quorum and a minimum of five (5) votes are needed for a majority of the full membership of the board.

On September 10, 2007, respondent entered into a superintendent's employment contract with Jose Negron (Petitioner) for a term beginning on October 1, 2007, and ending on June 30, 2011. Thereafter, on June 29, 2010, a year prior to the expiration of petitioner's contract, respondent voted on a resolution to renew petitioner's contract for the period of July 01, 2011, through June 30, 2015. This resolution failed by a vote of two (2) in favor, four (4) against, and three (3) abstentions. Following the defeat of said resolution, respondent, on the same day, voted on a second resolution to extend petitioner's contract for one (1) additional year at the expiration of petitioner's current contract. Entitled "Resolution to Amend the Superintendent's Employment Contract", the language read as follows:

> WHEREAS, the South Plainfield Board of Education and Mr. Jose Negron ("Superintendent") are parties to an employment contract for the period of October 1, 2007 through June 30, [2]011; and
>
> WHEREAS, the parties desire to amend the contract of the Superintendent and extend the current Agreement for a period of one year, such that the Superintendent's current contract would expire on June 30, 2012; and
>
> WHEREAS, the termination provisions in the current contract would likewise be extended such that the Board of Education must notify the Superintendent of its desire to renew his employment contract by June 30, 2011, in accordance with the provisions of New Jersey law, and
>
> WHEREAS, Mr. Negron has agreed to return his 3% salary increase for the 2010/2011 school year and has agreed to pay 1.5% of his salary for his health care benefits for both 2010/2011 and 2011/2012 school years; and

[1] http://www.plainfieldnjk12.org/Board_of_Education/Policies/9325%204%20Voting%20Method.pdf. Abstentions are not counted as either affirmative or negative votes.

> WHEREAS, the parties desire that all other terms and conditions as set forth in the current Agreement remain the same as those currently contained therein; and
>
> WHEREAS, the Executive County Superintendent has approved this addendum;
>
> NOW, THEREFORE, be it resolved, that the South Plainfield Board of Education hereby amends the current employment contract in effect between the Superintendent and the Board, and extends the employment of Mr. Jose Negron for an additional one year period, through June 30, 2012, on the same terms and conditions as set forth in the parties' current contract, except for those changes mentioned above, subject to any future modifications to such contract as the parties may mutually agree upon.[2]

The abovementioned resolution received four (4) votes in favor, two (2) votes against, and three (3) abstentions. Accordingly, said resolution received a majority vote of the quorum, but not a majority vote of the full membership of the Board. Thereafter, on July 1, 2010, petitioner personally delivered a letter to the Business Administrator/Board Secretary which *inter alia* accepted the extension of his contract for one (1) additional year. In response, on September 15, 2010, respondent voted on a resolution to reaffirm and clarify what it claims amounted to a June 29, 2010, decision not to extend petitioner's contract for one (1) additional year. The resolution passed with five (5) votes in favor, zero (0) votes against, and two (2) abstentions.[3] Finally, fifteen (15) days later, on September 30, 2010, respondent voted on a resolution to rescind the June 29, 2010, resolution, assuming *arguendo* that four (4) votes were sufficient to adopt it. This resolution likewise passed by a vote of (5) in favor, zero (0) against, and two (2) abstentions.

On September 26, 2010, petitioner filed a petition of appeal with the Commissioner of Education. *Inter alia*, petitioner requested a declaration that

[2] Petitioner's Cross-Motion for Summary Decision; Exhibit C.

[3] The crux of respondent's argument was that five (5) votes were required to pass the June 29, 2010, resolution, but only four (4) votes were actually cast in favor of the extension.

respondent's July 1, 2010, resolution passed and was binding on respondent. This matter was transmitted to the OAL on October 15, 2010.

ISSUES

1. Must an extension of a superintendent's contract be supported by a majority vote of the full membership of the board of education to be binding and effective?
2. Is a board of education legally authorized to bind successor boards by approving an extension for a term that commences after the existing board has been replaced?

RELEVANT AUTHORITY

N.J.S.A. 18A:17-15. Appointment of Superintendent

The board of education of a Type I district and of any Type II district, now having or hereafter authorized to have a superintendent of schools, may, by contract appoint, for a term of not less than three no more than five years and expiring July 1, a superintendent of schools by the recorded roll call majority of the full membership of the board.

. . .

(Emphasis added)

N.J.S.A. 18A:17-20.1. Reappointment of Superintendent

At the conclusion of the term of the initial contract or any subsequent contract as hereinafter provided, the superintendent shall be deemed reappointed for another contracted term of the same duration as the previous contract unless either: a. the board by contract reappoints him for a different terms which term shall be not less than three nor more than five years, in which event reappointments thereafter shall be deemed for the new term unless a different term is again specified; or b. the board

notifies the superintendent in writing that he will not be reappointed at the end of the current term, in which event his employment shall cease at the expiration of that term, provided that such notification shall be given prior to the expiration of the first or any subsequent contract by a length of time equal to 30 days for each year in the term of the current contract.

See also N.J.S.A. 18A:17-20.2 (Dismissal of Superintendent); N.J.S.A. 18A:11-11 (Public Notice Requirement); N.J.S.A. 18A:27-4.1 (Appointment, Removal, Renewal and Removal of Certificated and Non-Certificated Personnel); N.J.S.A. 18A:17-5 (Appointment of Secretary of Board); N.J.S.A. 18A:17-13 (Appointment of Assistant Secretary); N.J.S.A. 18A:17-14.1 (Appointment of School Business Administrator); N.J.S.A. 18A:17-16 (Appointment or Removal of Assistant Superintendent); N.J.S.A. 18A:17-20.5 (Appointment of Administrative Principal); N.J.S.A. 18A:17-25 (Appointment of Business Manager); N.J.S.A. 18A:17-24.3 (Appointment of Shared Superintendent or Business Administrator); N.J.S.A. 18A:17A-1 (Appointment of Executive Superintendent); N.J.S.A. 18A:25-1 (Transfer of Teaching Staff Members); N.J.S.A. 18A:25-6 (Suspension of Assistant Superintendents, Principals and Teaching Staff); N.J.S.A. 18A:27-1 (Appointment of Teaching Staff); and N.J.S.A. 18A:29-14 (Withholding of Salary Increments).

DISCUSSION

THE JUNE 29, 2010, RESOLUTION TO EXTEND PETITIONER'S CONTRACT DID NOT PASS BECAUSE IT WAS NOT SUPPORTED BY A VOTE OF THE MAJORITY OF THE FULL MEMBERSHIP OF THE BOARD

When construing a statute, a court considers not only the provision in question, but the entire legislative scheme. Fiore v. Bd. of Consol. Freightways, 140 N.J. 452, 466 (1995). Of particular relevance to the issue at hand, statutory construction calls for statutes within the same Act to be interpreted by reading them in *pari materia*. Marino v. Marino, 200 N.J. 315, 330 (2009).

> "Statutes are considered to be in *pari materia* when they relate to the same person or thing, to the same class of person or things, or have the same purpose or object." 2B

> Sutherland on Statutory Construction § 51:3 (7th ed. 2008) (footnotes omitted); accord[,] State v. Crawley, 187 N.J. 440, 453, 901 A.2d 924 (2006). As this Court has explained:
>
> > Statutes that deal with the same matter or subject should be read in *pari materia* and construed together as a "unitary and harmonious whole." This maxim of statutory construction is especially pertinent when, as in this case, the statutes in question were passed in the same session.
> >
> > [St. Peter's Univ. Hosp. v. Lacy, 185 N.J. 1, 14-15, 878 A.2d 829 (2005) (citation omitted).]
>
> Resort to this maxim, like other tools used by courts to assist them in divining legislative intent, is helpful when the Legislature's intent is unclear. That is, [s]tatutes in *pari materia* are to be construed together when helpful in resolving doubts or uncertainties and the ascertainment of legislative intent." In re Return of Weapons to J.W.D., 149 N.J. 108, 115, 693 A.2d 92 (1997); see[,] Febbi [v. Bd. of Review, Div. of Employment Sec., 35 N.J. 601, 606 (1961)], supra, 35 N.J. at 606, 174 A.2d 481 (stating that Legislature's intent is to be derived from considering entire statute and reading all sections together as a unified whole).
>
> However, before undertaking an in *pari materia* analysis to discern legislative intent, the court must first decide whether the two statutes in question actually "concern the same object." 2B Sutherland, supra, § 51:3. Considerations such as whether both statutes were included in one enactment, whether the proofs required overlap, and whether they are "designed to serve the same purpose and objective," are particularly relevant to this question. Ibid.; see, Mimkon v. Ford, 66 N.J. 426, 433, 332 A.2d 199 (1975) (stating that statutes in *pari materia* should seek same overall legislative purpose).
>
> [Marino, supra, 200 N.J. at 330.]

Essentially, the task is to harmonize the individual sections and read the statutes in the way that is most consistent with the legislative intent. Fiore, supra, 140 N.J. at 466.

The controversy here revolves around respondent's June 29, 2010, resolution to extend petitioner's contract for one (1) additional year. Respondent contends that the resolution did not pass because it was not supported by a vote of the majority of the full membership of the board. In support of its argument, respondent avers that N.J.S.A. 18A:17-15 stands for the proposition that the extension is a one (1) year appointment and must be supported by a majority vote of the full membership of the board. As petitioner has correctly pointed out, appointments and reappointments of superintendents are limited to "term[s] of not less than three nor more than five years". See N.J.S.A. 18A:17-15; N.J.S.A. 18A:17-20.1 (emphasis added). Accordingly, respondent's contention that the extension is a one (1) year appointment is without merit and contrary to applicable law. Petitioner, on the other hand, contends that a simple majority of the quorum is required to carry resolutions dealing with extensions of superintendents' contracts. Despite petitioner's convictions, no case law or statute is provided to in support of this proposition. Furthermore, respondent argues that a board's employment of a superintendent "is one of the most vital and responsible duties that a board of education can perform." Thomas v. Bd. of Educ. of the Twp. of Morris, 89 N.J. Super 327, 334 (App. Div. 1965), aff'd, 46 N.J. 581 (1966). According to respondent, to require anything less than a majority of the full membership of the board to extend a contract would conflict with the recognized importance of such appointments while undermining the protections afforded to significant personnel actions.

After consideration of the facts and the law pertinent to the issues in this matter, I agree with respondent's proposition that a majority of the full membership of the board is required to amend/extend petitioner's contract for one (1) additional year. Although a one (1) year extension is not an appointment in its own right, once negotiated, the extension becomes an integral part of the unified whole; the appointment. Thus, an argument exists that extensions should be supported by a vote of the majority of the full membership of the board. In support of this proposition, consider that at a minimum the extension in our case is limited to a maximum term of two (2) years by the same statute that limits the current three (3) year appointment to five (5) years. N.J.S.A. 18A:17-15.[4] Accordingly, extensions fall within the limitations of N.J.S.A. 18A:17-15, although not

[4] Restated, because petitioner's original contract is for three (3) years, the extension is limited to two (2) years.

explicitly enumerated in the plain language of the statute. Additionally, if extensions were not governed by a majority vote of the entire board, the minority would be able to circumvent the protections envisioned for appointments. Specifically, if only a majority of a quorum was required to amend/extend a contract, the length and terms of the contract initially negotiated can be significantly altered at a later date by an amendment passed by as few as three (3) members in a nine (9) member board.

Notwithstanding the logical deductions above, it cannot be overlooked that neither the plain language of N.J.S.A. Title 18A, nor any other statute, expressly addresses the issue at hand. Namely, the requirement, or lack thereof, of a majority vote for amendments/extensions of a superintendent's contract. Accordingly, a look to the rules of statutory construction to clarify legislative intent and garner support for its aforementioned proposition is warranted. As the following paragraphs will illustrate, when N.J.S.A. Title 18A employment related personnel statutes are read in *pari materia*, the legislative intent to require a vote of the majority of the full board becomes clear.

First and foremost, all statutes in N.J.S.A. Title 18A pertaining to personnel appointments, renewals, transfers, suspensions and removals prescribe a vote of the majority of the full membership of the board. See, N.J.S.A. 18A:17-15 (Appointment of Superintendent); N.J.S.A. 18A:27-4.1 (Appointment, Removal, Renewal and Removal of Certificated and Non-Certificated Personnel); N.J.S.A. 18A:17-5 (Appointment of Secretary of Board); N.J.S.A. 18A:17-13 (Appointment of Assistant Secretary); N.J.S.A. 18A:17-14.1 (Appointment of School Business Administrator); N.J.S.A. 18A:17-16 (Appointment or Removal of Assistant Superintendent); N.J.S.A. 18A:17-20.5 (Appointment of Administrative Principal); N.J.S.A. 18A:17-25 (Appointment of Business Manager); N.J.S.A. 18A:17-24.3 (Appointment of Shared Superintendent or Business Administrator); N.J.S.A. 18A:17A-1 (Appointment of Executive Superintendent); N.J.S.A. 18A:25-1 (Transfer of Teaching Staff Members); N.J.S.A. 18A:25-6 (Suspension of Assistant Superintendents, Principals and Teaching Staff); N.J.S.A. 18A:27-1 (Appointment of Teaching Staff). In fact, even the retention of salary increments is required to pass by a majority of the full membership of the board. N.J.S.A. 18A:29-14 (Withholding of Salary Increments). Conversely, not a single statute in Title 18A prescribes a vote by the majority of the quorum, or anything less than the

majority of the full membership of the board. Accordingly, it appears that legislative intent was to require a vote of the majority of the full membership of the board when dealing with all personnel employment related actions. This would be especially true for employment related actions of the superintendent; the highest ranking official of the school.

N.J.S.A. 18A:17-15, prescribes a vote of the majority of the full membership of the board when appointing superintendents. Petitioner argues that because extensions are not expressly accounted for in the plain language of the statute, a vote of the majority of the quorum would suffice. Notwithstanding the in *pari materia* argument in the preceding paragraph (which includes the complete absence of quorum language), neither N.J.S.A. 18A:17-20.1 (Reappointment of Superintendent) or N.J.S.A. 18A:17-20.2 (Dismissal of Superintendent) enumerate any standard for board voting. If petitioner's argument was supportable, a vote of the majority of the quorum would suffice when reappointing or dismissing superintendents. This could not have been the legislative intent. Therefore, the omissions in these two statutes support the in *pari materia* reading that a vote by the majority of the full membership is required even if not expressly enumerated in the statute.

Finally, N.J.S.A. 18A:11-11 sets forth that

> [a] board of education shall not renegotiate, extend, amend, or otherwise alter the terms of a contact with a superintendent of schools, assistant superintendent of schools, or other school business administrator[5], unless notice is provided to the public at least 30 days prior to the scheduled action by the board. The board shall also hold a public hearing and shall not take any action on the matter until the hearing has been held. The board shall provide the public with at least 10 days' notice of the public hearing.
>
> [N.J.S.A. 18A:11-11 (emphasis added).]

[5] The inclusion of the assistant superintendent as well as the school business administrator in N.J.S.A. 18A:11-11 gives further support for the in *pari materia* comparison of the personnel employment statutes above.

Recognizing the vital public purpose that superintendents serve, the Legislature intended extensions of their contracts to, at a minimum, be afforded the extra protections of notice and a public hearing. Accordingly, it would be hypocritical for the Legislature to provide extra protections with one hand (N.J.S.A. 18A:11-11) while simultaneously taking them away with the other (majority of quorum suffices). Such a reading would strain legislative intent and undermine the importance of contract extensions for superintendents.

Finally, though no case was found that directly deals with the issue presented, Cummings v. Bd. of Educ. of Pompton Lakes does support the validity of the conclusion reached. Cummings v. Bd. of Educ. of Pompton Lakes, 66 S.L.D. 155, 155 (August 29, 1966). In Cummings, a board of education consisting of nine (9) members voted on a resolution to extend a superintendent's contract one (1) year before it had expired. The vote was four (4) in favor, two (2) against, and one (1) abstention. "Questions with respect to the validity of the vote were raised subsequently on the grounds. . .that the resolution had failed to be approved by a majority of the whole number of members of the Board." Ibid (emphasis added). On advice of counsel, the board reconsidered its action and voted on the matter again, passing it by a vote of six (6) to one (1). Id. at 155-56. Although the cited language was discussed in passing and not supported by authority, it was nevertheless addressed in the decision. Conversely, there was no case where an extension or any personnel action was approved by a simple majority of the quorum. Accordingly, I **CONCLUDE** that the June 29, 2010 resolution is neither effective nor binding.

THE JUNE, 29, 2010, RESOLUTION TO EXTEND PETITIONER'S CONTRACT IS VOID BECAUSE THE 2010 BOARD WAS NOT STATUTORILY AUTHORIZED TO BIND THE 2011 BOARD BY EXTENDING PETITIONER'S CONTRACT

It is well established that a board of education is a non-continuous body whose authority is limited to its own official life and whose actions can bind its successors only in those ways and to the extent expressly provided by statute. Gonzalez v. Bd. of Educ. of the Elizabeth School Dist., 325 N.J. Super. 244, 252 (App. Div. 1999), certif. denied, 163 N.J. 77 (2000); Cummings, supra, 66 S.L.D at 156. "No statutory authority is found under Title 18A expressly authorizing a local board to make . . . prospective

appointments." Gonzalez, supra, at 252. Similarly, no statutory authority exists for prospective extensions of superintendents' contract. Cummings, supra, at 158.

In Gonzalez, the central issue raised on appeal was whether a public school board had the power to appoint a superintendent whose term would begin during the life of the succeeding board. The appellate court answered in the negative, finding that such an appointment was void *ab initio*. Gonzalez, supra, at 248. The facts of the case were as follows: On June 29, 1994, respondent, Board of Education, notified Mr. Dunn, the Superintendent, that his contract, expiring two years later on June 30, 1996, would not be renewed. Soon thereafter, Mr. Dunn was relieved of his duties[6]. Ibid. On July 13, 1994, petitioner, then an assistant superintendent, was appointed acting superintendent. By resolution of February 8, 1995, respondent appointed petitioner superintendent for three (3) years, commencing July 1, 1996, the date Mr. Dunn's contract expired. Gonzalez, supra, at 249. However, on May 1, 1996, after the annual school board election, the newly constituted board directed that Mr. Dunn resume his duties as superintendent and returned petitioner to his prior position as assistant superintendent. Thereafter, on June 6, 1996, the board appointed Mr. Dunn to a five (5) year term as superintendent, beginning July 1, 1996. Ibid. Essentially stripped of his superintendent's title and contract, petitioner filed a grievance with the Commissioner of Education, demanding restoration to the position of superintendent. After making its way through the regular procedural channels, including the Office of Administrative Law, the case came before appellate court.

In finding for the respondent, board of education, the court reiterated that statutory authority was required for the 1995 board to bind the 1996 board. Restated, to adopt a resolution appointing the superintendent to a term that was to begin during the life of the board which came into being on May 1, 1996, the 1995 board had to act pursuant to express statutory authorization. However, according to the appellate court, no such statutory authorization existed anywhere in Title 18A. Gonzalez, supra at 252. Petitioner contended, albeit in vain, that such authority was found in N.J.S.A. 18A: 17-

[6] As the court pointed out, although Mr. Dunn was relieved of his duties, no vacancy occurred in his position until his contract naturally expired. This was the case because Mr. Dunn was statutorily entitled to the position for the duration of the contract term. Gonzalez, supra, at 248.

20.1, which required a local school board to notify its superintendent that he will not be reappointed at least one (1) year[7] before the expiration of the his term. Petitioner reasoned that by enacting said statute, the Legislature intended to authorize a school board to appoint a new superintendent at the time of such notification, with the term of the newly-appointed superintendent to begin upon expiration of the current superintendent's contract. Gonzalez, supra at 248. The court disagreed, construing the statue as accommodating superintendents under contract, "not as giving license to a board to reach forward beyond its official life by making an appointment effective after expiration of the incumbent superintendent's term." Gonzalez, supra at 254. Finally, mindful of petitioner's argument that a decision in favor of respondent would "leave new boards with a narrow two-month window, between May (the date the new board is elected) and July (the expiration of the superintendent's contract) to find a new superintendent", the court proclaimed that nothing prevented the current board from searching during its term, but leaving the ultimate decision to its successor. Ibid. The court concluded that "[i]n any event, it's is our view that such concerns, if justified, should be expressed to the Legislature, the body politic having the power to address them by appropriate amendment to the statute." Gonzalez, supra at 254-55.[8]

While Gonzalez displays the hard-nosed approach which the appellate court took with regard to prospective appointments, Cummings demonstrates that the same logic applies to extensions of contracts. Cummings, supra, 66 S.L.D. at 155. In Cummings, the incumbent superintendent was under contract which expired on June 29, 1966. However, on June 29, 1965, with one year left on the contract, the board voted to extend the superintendent's contract for additional years. Ibid. In coming to his/her ultimate decision, the Commissioner of Education noted that "it is well established that a board of education is a non-continuous body whose authority is limited to its own official life and whose actions can bind its successors only in those ways and to the extent expressly provided by statute". Id. at 156. Noting that the school board elections were to take place in February 1966, the Commissioner deduced that the superintendent's

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[7] The statute was amended in 2008 to require notification "by a length of time equal to 30 days for each year in the term of the current contract." N.J.S.A. 18A:17-20.1.

contract was to expire and a vacancy was to be filled during the term of the 1966, not the 1965 Board. Accordingly, the Commissioner reasoned that "[t]here was no necessity for the 1965 Board to act on this matter, and to do so usurped the prerogative of the 1966 Board." Ibid. Finding no statute in support, the Commissioner invalidated the extension, concluding that "the Board then in power had no authority to reach forward beyond its own official life and into the terms of its successor to make a decision not due until then." Ibid (citations omitted).

In the case at hand, on June 29, 2010, with one year left on petitioner's contract, the 2010 board voted to extend said contract from July 1, 2011, to June 30, 2012. According to respondent's website, school board elections are set to take place on April 19, 2011[9], at which point three board members may be replaced.[10] It is undisputable that petitioner's contract was naturally expected to expire on June 30, 2011, during the lifetime of the 2011 board. Therefore, the decision to extend petitioner's contract needed to be made by the 2011 board between April 19, 2011 (the date of the school board elections) and June 30, 2011 (the date petitioner's contract expired) unless express statutory authority provided otherwise. As has been discussed at length in Gonzalez and Cummings, a board is a non-continuous body and is not authorized to bind successor boards unless expressly authorized by statute. Boards of education do not have the statutory authority to approve appointments or contractual extensions if they are to take effect at a date beyond the current board's natural lifetime. The contract extension in the case at hand was to commence two and a half months after the 2011 board was elected. Accordingly, the extension voted on by the 2010 board was void, even if a simple majority of the quorum was sufficient to pass the resolution.

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[8] As has been articulated in the previous footnote, the statute was amended to require thirty (30) days notice for each year of the superintendent's current contract. To date, no express authority has been given to the boards of education to bind successor boards in N.J.S.A. 18A:17-20.1.

[9] http://www.plainfieldnjk12.org/Board_of_Education/2010-11%20BOE%20Meeting%20Calendar.pdf

[10] http://www.plainfieldnjk12.org/Board_of_Education/Meet_The_Board.shtm

CONCLUSION:

The June 29, 2010, resolution to extend petitioner's contract did not pass because it was not supported by the majority vote of the full membership of the board. However, even if a simple majority of the quorum was sufficient, the extension was void because the 2010 board was without authority to bind the 2011 board.

ORDER

Petitioner's contract is not renewed and the one year extension is invalid. Petitioner's employment is terminated at the conclusion of his current contract.

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.

2/9/11
DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 2/9/11

Date Mailed to Parties: 2/9/11

sej

139-11

IN THE MATTER OF THE TENURE	:	
HEARING OF MICHAEL HARPER,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF	:	DECISION
CORRECTIONS, MID-STATE	:	
CORRECTIONAL FACILITY.	:	
	:	

SYNOPSIS

The New Jersey State Department of Corrections filed tenure charges of conduct unbecoming a public employee against respondent, a tenured teacher, and sought to terminate his employment at the Mid-State Correctional Facility. 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 – 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 with the Department, 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.

April 1, 2011

AGENCY DKT NO. 44-2/11

IN THE MATTER OF THE TENURE	:	
HEARING OF MICHAEL HARPER,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF	:	DECISION
CORRECTIONS, MID-STATE	:	
CORRECTIONAL FACILITY.	:	
	:	

For the N.J. State Department of Corrections, Dianne Moratti, DAG

No appearance by or on behalf of Michael Harper

This matter was opened before the Commissioner of Education on February 18, 2011 through the certification of tenure charges of conduct unbecoming a public employee by the New Jersey State Department of Corrections (hereinafter "Department") against Michael Harper, a tenured teacher assigned to the Mid-State Correctional Facility. The Commission seeks Mr. Harper's dismissal from his position.

By notice dated February 18, 2011, the Commissioner directed respondent, via both certified and regular mail – the certified green card, signifying delivery, having been returned to the Department on February 24, 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 received from respondent, or any attorney on his behalf, in response to the Department's charges, each count of the charges against respondent is deemed to be admitted.

The Commissioner has reviewed the tenure charges certified against respondent by the Department and the statement of evidence in support of those charges, which specify:

Charge One

***N.J.A.C.* 4A:2-2-3(a)6: Conduct unbecoming an employee.**
***N.J.A.C.* 4A:2-2.3(a) 11: Other sufficient cause**
Human Resource Bulletin 84-17 as amended (C-11): Conduct unbecoming an employee.

Charge Two

Human Resource Bulletin 84-17 as amended (E-1); Violation of a rule, regulation, policy, procedure order or administrative decision.

Charge Three

Human Resource Bulletin 84-17 as amended (D-4): Improper or unauthorized contact with an inmate, undue familiarity with inmates, parolees, their families, or friends.

The specific allegations for each of these charges is identical and reads as follows:

> The Special Investigation Division has learned that on or around 1/14/2011, you met ex-MSCF inmate Gerald Snyder SBI#354525D (on ISP) at your residence in Browns Mills, New Jersey. This was the fifth such meeting at your residence since the inmate was released on ISP (Intensive Supervision Program). SID has also learned that the inmate gave his phone number to you while he was a Teacher's Aide of your's (sic) at Mid-State Correctional Facility. You subsequently called him upon release. You also provided contraband to the inmate while he was incarcerated. At your residence, you had the ex-inmate perform construction work for you. Further, you had sexual contact with said ex-inmate at your residence.

Deeming such charges to be admitted, and noting that respondent has failed to respond to the allegations against him, the Commissioner finds that the Department has

demonstrated that respondent is guilty of conduct unbecoming and other just cause warranting the Department's requested penalty of respondent's termination from his position.

Accordingly, summary decision is hereby granted to the Department, and respondent Michael Harper is hereby terminated from his position with the New Jersey Department of Corrections, Mid-State Correctional Facility effective with the filing date of this decision.[1] A copy of this decision shall be forwarded to the State Board of Examiners for action against respondent's certificate(s) as it deems appropriate.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4|1|11

Date of Mailing: 4|1|11

[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).

140-11

IN THE MATTER OF THE TENURE	:	
HEARING OF SALVATORE PICCOLI,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF	:	DECISION
CORRECTIONS, ALBERT C. WAGNER	:	
YOUTH CORRECTIONAL FACILITY.	:	
	:	

SYNOPSIS

The New Jersey State Department of Corrections filed tenure charges of conduct unbecoming a public employee against respondent, a tenured teacher, and sought to terminate his employment at the Albert C. Wagner Youth Correctional Facility. 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 – 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 with the Department, 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.

April 1, 2011

AGENCY DKT NO. 28-2/11

IN THE MATTER OF THE TENURE	:	
HEARING OF SALVATORE PICCOLI,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF	:	DECISION
CORRECTIONS, ALBERT C. WAGNER	:	
YOUTH CORRECTIONAL FACILITY.	:	
	:	

For the N.J. State Department of Corrections, Dianne Moratti, DAG

No appearance by or on behalf of Salvatore Piccoli

This matter was opened before the Commissioner of Education on February 4, 2011 through the certification of tenure charges of conduct unbecoming a public employee by the New Jersey State Department of Corrections (hereinafter "Department") against Salvatore Piccoli, a tenured teacher assigned to the Albert C. Wagner Youth Correctional Facility. The Commission seeks Mr. Piccoli's dismissal from his position.

By notice dated February 4, 2011, the Commissioner directed respondent, via both certified and regular mail – the certified green card, signifying delivery, having been returned to the Department on February 9, 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 received from respondent, or any attorney on his behalf, in response to the Department's charges, each count of the charges against respondent is deemed to be admitted.

The Commissioner has reviewed the tenure charges certified against respondent by the Department and the statement of evidence in support of those charges, which specify:

CHARGE(s)

N.J.A.C. 4A:2-2-3(a)11. Other Sufficient Cause; A6 Conduct unbecoming a public employee; HRB 84-17, as amended: D6a – Loss or careless control of keys, pagers/beepers or cellular telephones; C17 – Possession of contraband on State property; E1 Violation of a rule, regulation, policy, procedure, order or administrative decision; C:11 Conduct unbecoming an employee.

SPECIFICATION(s)

By your own admission and the findings of an SID investigation, it has been determined that on 12/10/10 you introduced your personal cell phone into the lobby of A.C. Wagner YCF and purposely left the unauthorized item unattended in an area frequented by inmates while you entered the institution to finish your workday in violation of PSM.001.017.

Deeming such charge to be admitted, and noting that respondent has failed to respond to the allegations against him, the Commissioner finds that the Department has demonstrated that respondent is guilty of conduct unbecoming and other just cause warranting the Department's requested penalty of respondent's termination from his position.

Accordingly, summary decision is hereby granted to the Department, and respondent Salvatore Piccoli is hereby terminated from his position with the New Jersey Department of Corrections, Albert C. Wagner Youth Correctional Facility effective with the

filing date of this decision.[1] A copy of this decision shall be forwarded to the State Board of Examiners for action against respondent's certificate(s) as it deems appropriate.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4|01|11

Date of Mailing: 4|01|11

[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).

140-11

#140-11+

IN THE MATTER OF THE TENURE	:	AMENDED DECISION
HEARING OF SALVATORE PICCOLI,	:	
		COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF	:	
		DECISION
CORRECTIONS, ALBERT C. WAGNER	:	
YOUTH CORRECTIONAL FACILITY.	:	

SYNOPSIS

The New Jersey State Department of Corrections filed tenure charges of conduct unbecoming a public employee against respondent, a tenured teacher, and sought to terminate his employment at the Albert C. Wagner Youth Correctional Facility. 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. Because no reply was received, the Commissioner deemed each count of the charges against respondent admitted and, by decision dated April 1, 2011, terminated respondent from his tenured position. However, on April 11, 2011 counsel for respondent filed a Motion for Reconsideration stating that respondent had mistakenly sent his written response to tenure charges to the Deputy Attorney General assigned to the case at the OAL rather than to the Commissioner. A copy was also sent to the Director of Educational Services at the Department of Corrections.

In light of counsel for respondent's explanation – submitted with appended exhibits supporting such explanation – the Acting Deputy Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, determined to grant counsel's Motion for Reconsideration. Accordingly, the Commissioner's April 1, 2011 decision terminating respondent from his tenured employment was vacated and the matter was forwarded to the OAL for a hearing on its merits.

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.

May 6, 2011

AGENCY DKT NO. 28-2/11

IN THE MATTER OF THE TENURE HEARING OF SALVATORE PICCOLI, NEW JERSEY STATE DEPARTMENT OF CORRECTIONS, ALBERT C. WAGNER YOUTH CORRECTIONAL FACILITY.	:	AMENDED DECISION COMMISSIONER OF EDUCATION DECISION

This matter was opened before the Commissioner of Education on February 4, 2011 through the certification of tenure charges of conduct unbecoming a public employee by the New Jersey State Department of Corrections (hereinafter "Department") against Salvatore Piccoli, a tenured teacher assigned to the Albert C. Wagner Youth Correctional Facility. The Commission seeks Mr. Piccoli's dismissal from his position.

By notice dated February 4, 2011, the Commissioner directed respondent, via both certified and regular mail – the certified green card having been returned to the Department on February 9, 2011 signifying delivery – 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 was received from respondent, or any attorney on his behalf, in response to the Department's charges, by decision dated April 1, 2011 (#140-11), the Commissioner deemed each count of the charges against respondent admitted and terminated respondent from his tenured position.

On April 11, 2011, counsel for respondent submitted a Motion for Reconsideration of the Commissioner's decision pursuant to *N.J.A.C.* 6A:3-1.15(b)(2)i. This provision specifies that a motion

for reconsideration shall be considered in cases where there is a "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 purposes of this section[.]" In support of her Reconsideration motion, counsel provided the following explanation for respondent's failure to file an Answer to the tenure charges against him with the Commissioner:

> On February 4, 2011 the above referenced tenure charges were filed with the Commissioner. Exhibit A. While the notification of charges states that the respondent shall have 15 days to file a written response with the Commissioner, the notice also prominently lists Dianne Moratti, Section Chief as the attorney. Mr. Piccoli mistakenly sent a written response to the tenure charges via certified mail to Ms. Moratti. Exhibit B. He also sent a copy of his written response to Patty Friend, Director of Educational Services at the Department of Corrections. Both letters were delivered on February 17, 2011 – within the time limit required on the February 4, 2011 notice. Exhibit C. Clearly, Mr. Piccoli intended on filing a written response within the 15 day time frame. However, he mistakenly sent his response to the attorney listed on the notice rather than the Commissioner. Mr. Piccoli's mistake falls within the rule allowing reconsideration. Therefore, we respectfully request that the Commissioner vacate the April 1, 2011 Final Decision and process the tenure charges for hearing.

In light of counsel's explanation, along with the appended exhibits supporting such explanation, the Acting Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33 – has determined to grant counsel's Motion for Reconsideration.

Accordingly, the Commissioner's April 1, 2011 decision terminating respondent from his tenured position is hereby VACATED, and this matter shall proceed to the Office of Administrative Law for a hearing on its merits.

IT IS SO ORDERED.[1]

ACTING DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 5/06/11

Date of Mailing: 5/09/11

[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).

141-11

IN THE MATTER OF THE TENURE :

HEARING OF JAMES DOERBECKER, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE TOWNSHIP : DECISION

OF EDISON, MIDDLESEX COUNTY. :

SYNOPSIS

The petitioning Board certified charges of conduct unbecoming and insubordination against respondent – a tenured custodian – for allegedly engaging in inappropriate sexually harassing conduct toward his coworkers. Respondent contended that the charges against him were fabricated in a scheme to get him fired, and were not true. The Board sought to dismiss petitioner from his tenured position.

The ALJ found, *inter alia,* that: the Board's witnesses were completely credible and truthful, and that respondent's offensive behavior and inappropriate workplace conduct had become so blatant that his coworkers were unable to withstand it any longer; respondent's testimony was not credible, convincing or reliable; the Board sustained its burden of proving that respondent's conduct was sexually harassing and inappropriate; and the Board further sustained its burden to prove that respondent was insubordinate in disregarding administrative directives and in flagrantly violating the Board's sexual harassment policy. Accordingly, the ALJ affirmed the charges of conduct unbecoming a custodian and insubordination, but made no penalty recommendation in the Initial Decision.

Upon independent review of the entire record in this matter, the Commissioner concurred with the ALJ's findings, adopted the Initial Decision of the OAL as to the ALJ's finding that respondent is guilty of both conduct unbecoming and insubordination, and dismissed the respondent from his 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.

April 1, 2011

OAL DKT. NO. EDU 03525-10
AGENCY DKT NO. 53-3/10

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES DOERBECKER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF EDISON, MIDDLESEX 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 by respondent pursuant to *N.J.A.C.* 1:1-18.4, and the Board of Education's (Board) reply thereto.

The respondent's exceptions substantially reiterate the substance of his post-hearing submission at the OAL, recasting the arguments therein to support the contention that the Administrative Law Judge (ALJ) erroneously sustained the Board's charges. Respondent asserts that the ALJ erred in finding respondent guilty of unbecoming conduct because he did not engage in sexually harassing behavior toward his coworkers. Further, the respondent contends that the Initial Decision is void of any legal analysis as to why and how the ALJ found the Board's witnesses to be credible, but the respondent's testimony to be unconvincing. The respondent maintains that the Board's witnesses were not credible because they testified to different versions of the alleged incidents. The respondent also argues that the Board failed to prove that he was guilty of insubordination because he followed Dr. Bank's directive to cease and desist from engaging in any alleged inappropriate behavior.

In his exceptions, respondent also points out that the ALJ did not recommend the appropriate penalty to be imposed if the tenure charges are sustained by the Commissioner. The

Respondent argues that the penalty of removal and termination from his tenured position is too severe and disproportionate to the alleged charges. Respondent emphasizes the fact that the evidence showed that all of the custodians joked around and used foul language; he has been an employee of the Board since 1993; and he has had no prior incidents. Therefore, the respondent argues that a lesser penalty would be appropriate if the tenure charges are sustained.

The Board's reply also reiterates the positions advanced in its post-hearing submission at the OAL urging the adoption of the Initial Decision. In its reply, the Board stressed respondent's pattern of egregious conduct that occurred during the 2008-2009 school year and during the summer of 2009, citing examples of testimony that detailed respondent's inappropriate, sexually harassing conduct toward his co-workers. The Board also argues that the respondent's exceptions set forth a skewed recital of the hearing testimony, noting that the 18 Board witnesses were credible and all shared a common core in their factual allegations. With respect to the appropriate penalty, the Board argues that the nature and degree of respondent's unbecoming conduct and insubordination warrants dismissal from his tenured position of custodian. Despite the length of his employment, the Board argues that respondent's behavior deteriorated to the point where he was unable or unwilling to follow the directives of his supervisors to cease and desist from engaging in any and all inappropriate behavior. Finally, the Board contends that the evidence demonstrates that the respondent is unable to perform his job functions with even a modicum of the requisite demeanor appropriate in a school setting.

Upon a comprehensive review of the entire record in this matter, which included the transcripts of the hearing dates conducted at the OAL between August 20, 2010 and October 13, 2010, the Commissioner concurs with the ALJ that the Board has established that respondent is guilty of unbecoming conduct and insubordination.

The Commissioner finds respondent's exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and clearly taken into account by her in weighing the testimony and evidence, and in concluding that the record overwhelmingly supported the Board's charges. Based on her overall assessment of the Board's witnesses, the ALJ found that they were "persuasive, consistent and credible." On the other hand, the ALJ found the "respondent's testimony to be entirely unconvincing and completely unreliable." Notwithstanding respondent's contentions to the contrary, the Commissioner finds no basis in the record – which includes transcripts of six days of hearing – 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 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)].

The Commissioner also finds that the ALJ's fact-finding analysis and conclusions as to the truth of the Board's allegations and the characterization of respondent's behavior as insubordinate and unbecoming conduct to be fully supported by the record and consistent with applicable law.

Turning to the appropriate penalty to be imposed in this matter,[1] 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

[1] The ALJ determined that the Board "more than sustained its burden of proving by a preponderance of the competent and credible evidence that respondent engaged in conduct absolutely unbecoming a custodian" and that the respondent was insubordinate; however, the ALJ did not include a recommended penalty in the Initial Decision.

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.* 185; *In re Hearing of Kittell, Little Silver School District*, 1972 *S.L.D.* 535, 541; *In re Fulcomer,* 93 *N.J. Super.* 404 (App. Div. 1967).

The Commissioner recognizes that the charges in this matter are serious in nature and finds that the respondent's inappropriate sexually harassing conduct necessitates the termination of his tenured position. The respondent's unbecoming conduct and insubordination was not the result of an isolated incident, but rather a pattern of egregious conduct that escalated during the summer of 2009, causing a hostile, uncomfortable environment at the school.[2] Importantly, respondent's inexcusable behavior occurred in the school building while children were present, putting them at risk of exposure to the sexually harassing and offensive conduct. The record also demonstrates that respondent has been unwilling or unable to improve his inappropriate behavior for the betterment of the school environment. His responses to the charges against him range from complete denial of the alleged behavior to allegations that such behavior was inconsequential in nature and/or provoked by others, a position which is completely inconsistent with the testimonial evidence. Finally, the Commissioner does not find that the record before him provides any indication that the respondent will improve his behavior, or adhere to the mandated policies regarding sexual harassment.

[2] The details and history of respondent's inappropriate behavior toward his coworkers are extensively outlined in the Initial Decision and need not be repeated here.

Accordingly, the Initial Decision of the OAL is adopted as to the ALJ's finding that the respondent is guilty of both conduct unbecoming a custodian and insubordination. Respondent is hereby dismissed from his tenured position with the Edison Township School District.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4|01|11

Date of Mailing: 4|01|11

[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 03525-10
AGENCY DKT. NO. 53-3/10

IN THE MATTER OF THE TENURE HEARING OF JAMES DOERBECKER, SCHOOL DISTRICT OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY.

Mary H. Smith, Esq., for petitioner School District of the Township of Edison, Middlesex County (Wilentz, Goldman & Spitzer, attorneys)

Ronald J. Ricci, Esq., for respondent James Doerbecker (Ricci ♦ Fava, attorneys)

Record Closed: January 5, 2011 Decided: February 17, 2011

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

STATEMENT OF THE CASE

On March 18, 2010, tenure charges of conduct unbecoming a public employee and insubordination were filed against the respondent, James Doerbecker. Respondent is employed by the Board of Education of the Township of Edison ("Board" or "petitioner") as a tenured school custodian. Petitioner alleges that respondent engaged in inappropriate, sexually harassing conduct towards his coworkers.

PROCEDURAL HISTORY

On March 17, 2010, petitioner determined by a majority of its full membership that there was probable cause of the charges, sufficient to warrant a dismissal of respondent pursuant to N.J.S.A. 18A:6-11. On April 1, 2010, the director of the Bureau of Controversies and Disputes, Department of Education, determined that the charges were sufficient, and if true would warrant respondent's dismissal. The matter was referred to the Office of Administrative Law pursuant to N.J.S.A. 18A:6-16 for a hearing. The matter was filed with the Office of Administrative Law on April 12, 2010.

Hearings were held on August 6, August 20, August 23, October 6, October 7, October 8, and October 13, 2010. On the final hearing date counsel requested an opportunity to submit post-hearing briefs, to be due thirty days following the receipt of transcripts. The record closed on January 5, 2011.

ISSUES

1. Charge One—is respondent guilty of conduct unbecoming a custodian for engaging in inappropriate and/or sexually harassing conduct towards his coworkers by:

a) making sexually explicit remarks to Steven Volturo about his mother

b) making unsolicited vulgar and inappropriate comments to Mr. Volturo and other custodians on a near daily basis since February 2009, including, "Can I suck your dick (hereinafter "d-")?" and "Can I fuck (hereinafter "f-") your mother?"

c) inappropriately touching Mr. Volturo by rubbing his hands on Mr. Volturo's legs and up his shorts

d) exposing his genitals to Mr. Volturo and another custodian on July 29, 2009

e) asking Mr. Volturo, "Does your mother shave her cunt (hereinafter "c-")?"

f) using vulgar and inappropriate language in the workplace by yelling to Mr. Higgins and other custodians, "I see your cock (hereinafter "co-")," "Can I touch your co-?" "I like co-," "I like your co-," "Can I f- your wife?" "Can I f- your mother?" and "Can I f- you in the ass (hereinafter "a-")?"

g) inappropriately touching Mr. Higgins by running his fingers up Mr. Higgins's arm and side, touching his leg and squeezing his knee and repeatedly asking Mr. Higgins, "Can I suck your co-?"

h) making comments during the workday to Mr. Janeski and other custodians, such as "I like co-" and "I want to suck co-," and by grabbing his crotch while telling the other custodians, "I've got something for you"

i) Yelling to Mr. Volturo and Mr. Finnerty, another custodian, "Hey, you guys want to see something?" and having his genitals fully exposed as they turned around, thereafter asking, "You guys want to suck my d-?"

j) making inappropriate comments to Mr. Scarcella, another custodian, such as, "Can I have your baby?" and also putting his hands in Mr. Scarcella's pockets on several occasions, including once when he stuffed peas into his pocket, and another occasion when he put a pencil in Mr. Scarcella's pocket

k) stealing valve-stem covers from Mr. Higgins's car tires

2. Charge Two—is respondent guilty of unbecoming conduct by engaging in insubordinate behavior by:

a) repeatedly harassing his fellow employees in violation of Board Policy No. 4111.1/4211/1, Equal Opportunity/Non-Discrimination/Sexual Harassment Policy

b) continuing to engage in inappropriate and sexually harassing conduct after having been specifically directed by the principal to cease and desist in all inappropriate conduct towards the other custodians

SUMMARY OF TESTIMONY

Daniel P. Michaud

Daniel Michaud is the Board secretary and business administrator for the district. The custodians report to the facility manager, Paul Jenney, Jr., who reports to Michaud as the business administrator, and he in turn reports to the superintendent. He supervises all of the custodians in the district. Daily problems or issues are brought to Mr. Jenney, but when they become serious enough he intervenes. He testified that this occurs less than once a month. He has known respondent since late 1997 when an issue arose with respondent that required his attention.

Michaud most recently interacted with respondent after a complaint was filed with the superintendent by other employees and he was called into closed session to discuss the issues with respondent. This was in the summer of 2009 when John DiMuzio was the acting superintendent. Complaints had been filed by several custodians alleging inappropriate touching and sexual comments during the work day. Michaud testified this was very uncommon, especially the level that the allegations reached here. Discrimination and sexual harassment are taken very seriously in the district and there is a zero-tolerance policy against them. Michaud testified that the current sexual harassment policy, P-7, dated January 21, 2003, was in place as of September 26, 1996, and therefore when the 1997 incidents with respondent took place, this policy was in force. The procedure for carrying out the policy is set forth in P-8. The nondiscrimination policy/sexual harassment policy, P-14, differs from P-7 because there is more detail regarding discrimination. That policy was adopted in December 1974 and was revised in March 2008.

In the summer of 2009 P-14 was in effect, and it serves to inform the public and staff what the district policy is and what actions will be taken if there is a violation. There are examples in the policy of what is considered to be sexual harassment, whether verbal or physical, and Michaud felt that five of the twelve itemized examples were committed by respondent. In this case there was contact, sexual flirtations, sexually degrading comments, obscene teasing, and questions regarding sexual

conduct.[1] If there is a violation of the policy the procedure is to notify the supervisor and the complaint is investigated (P-15). Each year the affirmative action officer is appointed, and in the 2009–2010 school year the affirmative action officer was Dr. Michael Quinn.

Michaud received a telephone call from DiMuzio indicating that sexual harassment complaints by employees would be discussed at a closed-session meeting. Michaud was directed to give a "Rice notice" to respondent, which is a forty-eight-hour notice that they would be discussing him at a closed-session meeting. The notice was sent to respondent (P-21) notifying him that the matter would be discussed at the August 20, 2009, meeting, at which time DiMuzio reported the complaints that had been made by others, and indicated that an investigation would be conducted. Respondent was sent a letter (P-39) scheduling a meeting with Dr. Quinn and was sent another Rice letter on December 7, 2009, (P-40) indicating that his matter would again be discussed at a closed-session meeting, to take place on December 16, 2009. Prior to the meeting Dr. Quinn had reported that he had determined that there had been sexual harassment and that the complaints were credible. At the December 16, 2009, meeting Michaud was told to take disciplinary action against respondent. DiMuzio wanted respondent to resign, and the Board felt very strongly that it would not tolerate this conduct.

A third Rice letter was sent to respondent on January 15, 2010, (P-41) advising him that the matter would be discussed again in closed session on January 20, 2010. DiMuzio reported to the Board that respondent would not resign and that he was a tenured employee and had said the Board should bring tenure charges. Michaud reported that all of the Board members were appalled at what they had read and directed that tenure charges be brought immediately. Another Rice notice was sent to respondent on March 15, 2010, (P-42) notifying him of the March 17, 2010, Board meeting, at which time the Board voted unanimously to file tenure charges (P-43). Michaud testified that he has never seen sexual harassment by a custodian go to this level, and that tenure charges have only been filed four times in the district since 1997.

[1] Respondent stipulated that he received a copy of the policy.

Paul Jenney, Jr.

Paul Jenney has been supervisor of facilities since 1997 and has been employed by the district for thirty-five years in various capacities. He currently oversees all the custodians, and maintenance and grounds. Each building has a head custodian called a "facility manager," and there are monthly meetings with the facility managers. Jenney reports to Daniel Michaud. He testified that every year all employees attend sexual harassment training.[2] Jenney received a call from a union representative and was made aware of an incident involving respondent and other custodians. He had heard about a week earlier about problems between respondent and Steve Volturo and went to the school at that time, but was told by both that they had resolved their issue that day. He later learned that there had been previous issues between the two that he had not been made aware of. He has always believed that the custodians tried to work things out between them so that no one is "hurt," by losing their job for example, and believed that Volturo and respondent had tried to work out previous issues between the two of them first, as well.

Before August 2009 Jenney was not aware of any problems among the custodians at John Adams Middle School, where Joseph Meli is the facility manager. He spoke to Meli and asked about what else had gone on, and Meli described some of the problems he had not known about, and others he had tried to work out. When Jenney received a call from union vice president Scott Murphy on August 6 regarding the incident between Steve Volturo and respondent he did not know that the incident was of a sexual nature, and he went to school either that day or the next day to see what was going on. The men had each said that they worked it out after meeting with Dr. Banks, the principal. The next call he received was on August 13 from Murphy again, indicating that there was another conflict involving respondent and the other custodians, and that they were all in a garage attached to the school, where glass is stored. Murphy indicated that the other union representatives were there too, and told Jenney what respondent had said to the other custodians. Murphy said that they "didn't want to take it anymore." Jenney indicated that Dr. Quinn interviewed him on

[2] Respondent stipulated to having attended all the training each year.

September 22, 2009, (P-31) and that his statement accurately reflects what he said to Quinn.

Jenney did not know at the time that others besides Volturo had issues with respondent, and when he learned that those issues were of a sexual nature he called the acting superintendent because he felt the situation was beyond his authority. Respondent was elsewhere in the building and Jenney told him to stay away. He directed the other custodians, including Volturo, Gary Higgins and Robert Janeski, to write down their complaints. Custodian John Finnerty was not there, as he is not in the union. The police were called and took over the situation and prepared a report (P-20). It was then that Jenney learned about the inappropriate touching, and the references to people's mothers, and heard that respondent had said things such as, "can I f- your mother?" and "do you want to suck me?" and similar comments. Volturo also indicated that respondent had touched him and run his hand up Volturo's leg. Jenney testified that he was very upset by the allegations and felt an obligation to act because this type of conduct cannot be allowed, especially in a school building where children are present. He articulated that kids should not hear or see these things, and it makes a difference to him that this all took place in a school building. He also added that this conduct should have been exposed long ago, not handled "in house," but the complainants did not want to get respondent in trouble.

On cross-examination Jenney testified that respondent was transferred to the John Adams Middle School in December 2008 based upon seniority in the district. He had the day shift, which could be 6:00 a.m. to 2:30 p.m. or 7:00 a.m. to 3:30 p.m., as it varies at the different schools. The other shifts are approximately 3:00 p.m. to 11:30 p.m. Volturo is usually on the 3:00-p.m.-to-11:30-p.m. shift, except for holiday weeks or if someone is away, and during the summer everyone works the same shift. Jenney testified that he wanted each of the custodians to put his allegations in writing so it was clear what each said, and all of them were in different places in the same room and not talking to each other, writing up their statements at the same time.

Jenney agreed that Volturo's statement (P-17) indicates that the conduct has been ongoing since respondent arrived at that school. He never asked Volturo why he did not report this conduct sooner than August 6, 2009.

Steven Volturo

Steven Volturo was a substitute custodian from December 2002 until June 2003 and was hired full time as of July 2003. In September 2003 he was assigned to John Adams, where he had spent most of his time, although he was transferred to the James Madison School for one year at some point.

In the fall of 2008 he began working with respondent, whom he described as a hard worker and a "good guy, but certain things he did were inappropriate." Volturo testified that respondent made sexual comments to him and to the other custodians all the time, and that he also touched him, mostly during the summer, which is when they spent the most time working together. During the school year respondent worked from 6:30 a.m. until 3:00 p.m. and Volturo worked from 3:00 p.m. until 11:30 p.m., and they only overlapped when there were school functions, meaning he had to come in at 1:30 p.m. to set up for wrestling matches or dances. Volturo estimated that there were about thirty times over the year where the shifts would overlap for approximately an hour and a half, during which all custodians would be together cleaning out the cafeteria for whatever event was taking place, and as such they worked together often. Respondent would constantly say, "can I suck your d-?" and "do you want to suck my d-?" Respondent made remarks to all the custodians, not just him. Volturo stated that they worked well together, but he grew tired of the comments and tired of hearing it and would get frustrated and tell respondent to just "shut the f- up." Sometimes respondent would stop, but then start up again later in the day or the next day with his remarks, and in the summer it was much worse. During the winter hours when they would sit in the break room, respondent would touch Volturo's leg in a manner that Volturo described as a soft touch that "you don't do to a guy" or to a coworker, and he would constantly tell respondent, "knock it the f- off."

Volturo testified that the entire crew saw this behavior. He said that telling respondent to knock it off should have been enough, but respondent would not stop, and things he did passed the boundaries of what was tolerable. Volturo testified that he did not report this conduct initially because respondent has a family, and there has to be something wrong "up there" for a guy to continue to do this.

In the summer of 2009, possibly mid-July, certain things respondent did, besides the comments, completely crossed the line. One day they were cleaning a classroom and Volturo was wearing shorts and standing on a radiator cleaning and dusting the blinds, and respondent put both his hands all the way up Volturo's shorts to the top and touched his bare skin. Volturo testified that he said, "get the f- out of here" and "knock it off," but respondent simply laughed and went back to cleaning. This was observed by Finnerty, Peter Scarcella and Janeski. All three saw what respondent did and could not believe it. They were annoyed too, and each felt that enough is enough, and they told respondent over and over to knock it off. After that incident respondent also grabbed Volturo's behind and squeezed his "butt cheeks," and no matter how often Volturo told respondent to stop he would not. Respondent touched his leg on other occasions too, but none of those incidents was as bad as this incident. Another time respondent dropped his pants in a classroom and exposed himself, saying, "look guys, do you want to suck this?" Volturo testified that he just turned around and kept cleaning; he testified, "what can you say to that?" He agreed that he did not tell anyone because he did not want respondent to lose his job, but the frustration over this conduct was increasing. In another incident in the kitchen respondent asked Volturo, "does your mother shave her c-?" Volturo said that he told respondent "shut the f- up," and that Pete also said, "yeah, Jimmy, shut the f- up." He stated that they gave respondent leeway all the time, and felt as though the conduct was just becoming worse. He agreed that he was yelling at respondent, which caused Joe Meli to come into the kitchen and ask why they were yelling at respondent, to which Volturo replied, "Joe, you have no idea what has been going on here." Volturo indicated that if respondent kept up this conduct he was going to call the superintendent. He did not want respondent to get in trouble, he just wanted him to stop this behavior. Union representative Scott Murphy arrived and spoke with respondent and Volturo, and Volturo agreed that he did not tell Murphy at that time that respondent had exposed himself, and also agreed that he did not tell Meli then either.

However, he did ask to meet with Dr. Banks, and he and Meli did speak to Banks and told her about the comments. They did not tell her about respondent sliding his hands up Volturo's pants or about exposing himself because they knew he would be fired if they revealed these things. Volturo said he thought the union would get respondent to stop the conduct, and Murphy had said to respondent while Volturo was there, "if you don't stop this it could get to be a sexual harassment thing."

After the meeting with Banks and the union president Volturo thought that respondent would have gotten the message and would stop the conduct. However, within a couple of days the conduct resumed and the entire custodial staff was tired of it. Volturo testified that he then told the union everything that had happened. John Kelly, the union president, was on vacation, but Andy Hibell, the secretary, and Scott Murphy, the vice president, were there, and they called Paul Jenney down to the school also so everyone could make their statements. They were informed that the superintendent was coming down and wanted the police called, and Jenney instructed the custodians to write their statements, and they all did, including Volturo (P-17). Each sat down and wrote his statement, and there was no discussion while the statements were being written, after which the police arrived. Three police officers came and were there for approximately an hour and a half with the custodians and the union reps. Volturo was listed as the victim on the police report. Volturo stated that as they were speaking to the police he was thinking to himself that he had not wanted it to go this far and that he wished respondent had just stopped his behavior. The day after that, respondent was gone on administrative leave.

Approximately one month later Volturo was interviewed by Dr. Quinn, and he was also interviewed again sometime later, and he told Quinn everything that had happened. The night of the incident the police called him and asked whether he wanted to press charges. Volturo said that he did not want to hurt anyone, but that he did his part in reporting the incident and just wanted to leave the whole matter in the Board's hands.

Volturo agreed that the custodians all teased each other with general joking around, but that he did not make sexual remarks. Volturo also testified that he had seen respondent touch others, and that children were in the building when respondent

exposed himself. None of the children observed it, as they were in a classroom attending a "Read 180 program," which is an extra summer reading program. Respondent exposed himself in a room the custodians were cleaning, and a child could have walked by and looked in because the door was open, and there were children in classrooms approximately one hundred feet away. Respondent also made remarks when they were in the cafeteria, and children would come in and out for drinks and could have overheard him. Volturo estimated that he was touched by respondent every other day in the summer when he and respondent were working in the same classroom. Volturo testified that respondent also touched Finnerty once, and that Finnerty smacked respondent in response. Volturo had not smacked respondent, but kept telling him to "knock it the f- off."

Volturo testified that respondent's conduct was one of the most offensive and upsetting things that has ever happened to him, and that he told Dr. Banks that for someone to do this over and over he is not in his right frame of mind and might be "on something." He agreed that he might have said to respondent, "knock it the f- off, you druggie." After the initial dispute between them was resolved, however, on August 12, 2009, respondent rubbed Volturo's leg when they were in the custodian break room, and all of the custodians were there and all were frustrated with respondent's conduct. Later in the day respondent took a valve cap from Higgins's car and Higgins went to get Joe Meli, who went to see respondent, who in turn admitted taking the valve cap. Volturo said that there were no discussions that day about "we've had enough of Jimmy" with any other custodians, and it was not until the next day, August 13, 2009, that Janeski called in the union around 9:00 a.m. They had all started working at about 6:30 a.m. and decided they were calling the union. Janeski had never shared his feelings about respondent with Volturo; however, he said that he was tired of what respondent had been doing, and had made a decision to call the union.

Respondent's position has not been filled and is still open. Volturo and Janeski cover respondent's shift on a rotating basis. Volturo testified that it does not matter to him which shift he has, but if asked for a preference he would rather have the night shift because that shift pays an extra seventy-two cents an hour, and allows him to get other things done during the day, such as manage the apartments that he owns.

John Finnerty

John Finnerty is a part-time custodian substitute with the Edison Board of Education and fills in when others are on vacation or out. He is on an "on-call basis" and could be assigned anywhere. If he is on a long-term assignment he could be at one school for a few months, or a day here and a day there. He has been employed by the district since October 2008 and is not affiliated with the union.

Finnerty was assigned to John Adams Middle School from June 2009 to January 2010 and now is at Martin Luther King Elementary School. When he was at John Adams he worked a forty-hour week, as it was a long-term assignment. He worked with Higgins, respondent, Pete Scarcella, Joe Meli and others. He described John Adams as a good school to work at, indicating that he got along pretty well with most of his coworkers. Finnerty stated that he hopes to be hired full time by the district.

Finnerty described working with respondent as "aggravating," indicating that respondent was not a team player, did not work as hard as others and was always goofing around. He testified that "when it came time to work he was not always ready to work." He said he was constantly telling respondent to cut out the harassment and the goofing around and the lewd comments, indicating that respondent had "no workplace ethics." He was always touching and feeling others and grabbing their bottoms, and Finnerty felt this conduct was inappropriate for a work environment. Respondent would ask if he could "f- our mothers," and if we would "have a threesome with his wife." He would also ask whether we shaved our d- and our private parts, and also always asked "can I f- your mother?" and "does your mother shave her c-?" Finnerty testified that he heard respondent say this to Higgins and Volturo, and he kept telling respondent to stop. This conduct started immediately after Finnerty arrived at John Adams Middle School in June and persisted throughout his employment there. Respondent would say to Finnerty that he had a "nice ass," and he said sexual things to Volturo all the time. Finnerty was upset by this conduct, and indicated that it is not a usual thing to come across in a workplace. Respondent would grab his butt and massage his back, and all of this made him very uncomfortable and he constantly told respondent to stop. He also

would push respondent away with two hands and say "get away from me," because it all made him very uncomfortable. He never teased respondent back and just kept telling him to "knock it the f- off."

Finnerty indicated, for example, that he and respondent would be walking to a classroom and respondent would start rubbing his back and say, "oh baby, you like that," and Finnerty would tell him to stop and he would not. Respondent also said to him, "are you some kind of fag, because you like it so you must be gay." He felt that respondent was coming on to him in a sexually harassing way and wanted him to stop.

One day he saw Volturo standing on a heater cleaning the blinds in a classroom and saw respondent put his hand up Volturo's shorts all the way towards his genital area, and Volturo told respondent to stop. They told Joe Meli, and he would yell to respondent to knock it off, and respondent would stop for a short time and then start all over.

Towards the end of the summer respondent exposed himself when Finnerty and Volturo were in the kitchen area putting back refrigeration equipment. On that occasion respondent had his pants and underwear down by his knees and yelled, "hey guys, do you like what you see?" and also "do you want to touch it?" and "do you want to suck it?" Finnerty testified that he told respondent to pull his pants up and knock it off, to which respondent replied, "what's the matter, don't you like what you see?" Respondent then asked, "does your mother shave her c-?" and "can I f- your mother?" He had asked these same questions before, over and over again. Finnerty agreed that he did not tell anyone, not even the union, at that point because he was trying to get hired full time and did not want to complain. He pushed respondent away, and if necessary would defend himself over his job interests. Finnerty did not want to get anyone in trouble, he just wanted to do his job and get the work done for the summer, and hopefully be hired full time.

There was a summer reading program being taught two classrooms over from the kitchen, with eight to ten children in the classroom. This "Read 180" program started the second week of June and ended two weeks before the start of the school

year. The children in the class had to pass the kitchen on their left if they went to the bathroom, and any of the children could have seen respondent exposing himself. Finnerty did not know if any of the children did observe respondent's actions or hear his comments, but they were just two classrooms away.

Finnerty testified that the summer hours were the same for all custodians, 6:30 a.m. to 2:30 p.m., and that during the school year the hours were 3:00 p.m. to 11:00 p.m. During breaks and lunch all the custodians would be in the same room. Even during breaks respondent made the same type of comments to the custodians. Finnerty also saw respondent touch Gary Higgins and say, "will you have my baby?" Pete Scarcella was very upset and got angrier faster than the others, so respondent did not touch him as much as he did the others.

Finnerty was present when the union representatives came on August 13, and he saw respondent argue with Volturo in the hallway after respondent said something about Volturo's mother. The police had come to the school as well, and the custodians, the union reps and the police were all in a meeting room. Finnerty was in the break room with respondent because he was not in the union, and so did not participate in the meeting. Respondent said to him at that time, "I'm not worried about anything that could happen because I have connections with a board member," indicating that he was referring to a board member by the last name of Romano. Finnerty felt that respondent thought that he was untouchable because of his relationship with Romano and that he would not get fired or get in any kind of trouble. At that point Paul Jenney took respondent's keys and escorted him off the property. Finnerty believes respondent is on administrative leave with pay.

When asked to give a statement Finnerty did so, and he met with Dr. Quinn as part of the affirmative action investigation. He told Quinn about respondent exposing himself and what happened with Volturo, and during a second meeting with Quinn revealed everything that had happened during the school year, including the fact that he has had lunch aides approach him to complain about respondent.

On cross-examination Finnerty elaborated about the incident where respondent exposed himself, indicating that he and Volturo were near a refrigerator and respondent was directly behind him. Respondent yelled to them to turn around, which they did, and respondent had his pants down. Finnerty said he was instructed to meet with Dr. Quinn in the teachers' room and did not know why, but just went when he was told to go. He agreed that the interview notes by Dr. Quinn (P-22) say that respondent exposed himself in a classroom rather than in the kitchen; however, Finnerty testified that he would have just told Dr. Quinn that they were cleaning a room, and that Quinn must have assumed that he meant a classroom. Finnerty agreed that the August 24 statement does not mention that he was touched by respondent as well, but he explained that all Quinn asked about that day was the incident with respondent and Volturo, and that he was not asked questions about himself.

Finnerty reiterated that respondent made the comment regarding knowing Joe Romano when all the other custodians were meeting with the union reps and respondent was in the break room with Finnerty, who was not in the meeting because he was not in the union. It was at that time that respondent said, "Joe Romano will take care of me."

Finnerty agreed that he heard Volturo fire back at respondent a few times, but Volturo never said anything like respondent said to them. Higgins would also answer respondent back after respondent made comments regarding Higgins's wife and mother or coworkers, but no one ever answered respondent the way respondent talked to them. Volturo did not insult respondent back, but would just tell him to knock it off or cut it out.

Finnerty also testified that he saw respondent take the tire valve cover from Higgins's car, and he told Higgins about it because Higgins had been having tire problems and just had a new tire installed. Respondent did not admit taking it at first, but then later returned it.

In Finnerty's second interview with Quinn (P-35) he did tell Quinn about respondent touching him several times and how he pushed him away, because in this interview he was asked specific questions about himself, which he answered. The first

meeting with Quinn was to find out what had happened between Volturo and respondent, as Volturo was the complainant in the investigation and he and Volturo had witnessed the exposure incident in the kitchen. Finnerty explained that in his discussion with Quinn about the exposure incident he likely referred to "cleaning a room" rather than specifying the kitchen or a classroom. Finnerty testified that he did not want to get more involved in the whole scenario because he wanted to be hired full time, and he still wants to be hired full time.

Regarding the tire incident, Finnerty testified that he was walking by respondent, who was outside having a cigarette, and he saw respondent reach down by Higgins's tire and then put something in his pocket. He then told Higgins what he had seen.

Gary C. Higgins

Gary Higgins is a custodian at John Adams Middle School and has been employed by the Board since July 2007 when he started as a part-timer. His summer shift is 6:30 a.m. to 2:30 p.m., and during the school year his shift is 3:00 p.m. to 11:30 p.m. He came in before 3:00 once or twice a week to break down the cafeteria or the gym for band practice, orchestra or after-school sports. He works with Pete Scarcella, Steven Volturo, Tony C., Joe Meli and Sal, a part-timer, as well as Finnerty. Higgins worked with respondent during the summer of 2009 and also during the previous school year at times. They worked together at other schools and got along fine and had no issues. However, issues began to arise because of respondent's touching, his language, and uncomfortable things he did. Respondent would say to Higgins, "can I see your co-?" or "can I touch your co-?" or "can I suck your co-?" or "do you want to see my co-?" Higgins found this very uncomfortable and not funny at all. Respondent would also touch Higgins by running his hands along his arm, the back of his ear, or his leg. He told many people about this, including his wife, and thought that respondent would grow up and would stop, but he did not. Respondent's comments were made all day every day throughout the summer, and also before the summer, when their shifts overlapped for a few hours a day and on school breaks.

Higgins testified that one day during a school break he was mopping the floor and respondent was buffing, and it was an all-day, "six-hour rant" by respondent. For six hours respondent said "can I see your co-?" and "can I suck your co-?" He would stop for ten minutes at a time and then start again. Higgins testified that he kept telling him to stop. During lunch or break time all the custodians sat together, and respondent would walk past Higgins to get in or out of the room and would touch him. Higgins testified that he would try and move away, but that some days respondent touched him multiple times. One summer when he and Janeski were changing locker combinations, which they do for all 1,100 lockers every summer, respondent walked by and touched his arm and rubbed his finger across it in a sexual way. Respondent's conduct eventually made Higgins so uncomfortable that every time he would approach Higgins, Higgins would move so that respondent could not walk near him. This conduct was very upsetting to him and he told his wife about it. He knew that all the other custodians had the same problem with respondent. Higgins saw respondent touching Volturo and Finnerty. He testified that some teachers also had problems with respondent, and they told Higgins, "come in if you see him come near me; I'm very uncomfortable around him." If he saw respondent in the room of a teacher whose first name was Magna he would go in and get respondent away from her and try and break up the conversation. Higgins testified that he would do that for anyone. The teachers were clearly uncomfortable around respondent. The kids in the school are approximately thirteen years old, and sometimes a female student would walk by and respondent would say, "look at that, isn't she cute?" This made Higgins very uncomfortable because he has daughters and granddaughters, and he kept hoping the conduct would go away. He did not report it; he knew that Meli had spoken to respondent, and he assumed respondent's conduct would stop.

One day in early August when they were doing summer cleaning he heard Volturo screaming at respondent "don't touch me," and he asked Volturo what had happened. Higgins said that was either the day that Volturo said respondent had "whipped his d- out" or was the day that respondent put his hands up Volturo's legs and said something about his mother. He had seen respondent touch Finnerty, Volturo and Scarcella and saw each react by trying to move away from respondent. Also in early August, Finnerty came in and said to Higgins, "go check your car," which he did, and a

valve-stem cover was gone on a brand new tire. Finnerty told him that respondent had been squatting by his car, and Higgins agreed that he became very upset and spoke to Meli, who indicated that he would talk to respondent, which he did. Respondent said that he took the valve-stem cover because he needed one, but eventually he did put it back. Higgins said that he told respondent that he would have given him seventy-five cents to buy one, and told him not to touch his car. Higgins stated that this did not make him as upset as the touching, but agreed that it was the icing on the cake. He did not want to see respondent get in trouble and lose his job, because respondent had kids to feed, so he never mentioned the other problems with him.

The report Higgins wrote at the union's request (P-18) was done in the glacier shop with Volturo, Janeski and the union reps in attendance. All the custodians sat down in different spots in the room and wrote their reports at the same time. They each then spoke to the police, who were there more than an hour, and told them about the problems and issues with respondent. One of the police officers was a friend of respondent, and stated that he was not surprised when he read their reports. Higgins also was interviewed by Dr. Quinn.

Higgins testified that Volturo told him about respondent exposing himself in the summer of 2009, and stated that that was before the incident with his car. Volturo told him that respondent exposed himself and said, "do you want to suck this?" This incident took place when respondent Volturo and Finnerty were in the kitchen.

After respondent was sent home on August 13 Finnerty came into the room where the meeting with the police and the union had taken place and repeated to the others what respondent had said about being "untouchable," even if the Board heard what had been going on.

Robert Janeski

Robert Janeski is the head of warehouse and grounds for the Board and has been employed at the district for twelve years. Prior to working at warehouse and grounds he was a custodian, the night lead at John Adams Middle School, which means

he handled all calls from the main office, to coordinate activities in the building. Prior to that he was a custodian at John Adams for five years, and prior to that was a custodian at other schools. He testified that during the school year he spent varying amounts of time with respondent, which could have been from one hour a day to three hours on days when he would come in early to set up for different things. However, he and respondent worked together every day in the summer, and also worked together at a prior job.

Janeski testified that when he worked with respondent at the school, respondent would come out with a lot of sexual comments, which he made to everyone, such as, "I want to suck your c-." He would also always grab himself and say, "here is what I've got for you," and everyone got tired of it. He would tell Joe Meli that the sexual conduct and comments were getting out of hand, and Joe would speak to respondent and things would improve for a day or two, and then the comments would start up again. The conduct was very bad in the summer, when Janeski saw respondent touch several others inappropriately, including Volturo and Higgins. He saw respondent come up behind Volturo, and put both hands up his shorts and go up towards his genitals, and Volturo told him to knock it off. He saw respondent touch Volturo's leg every day, and in the break room Volturo constantly told respondent to knock it off. He also saw respondent touch Higgins one day when they were changing all the locker combinations together. Respondent would walk by Higgins and Higgins would move away as respondent approached. Respondent ran his hand up Higgins's side and under his arm in a very slow sexual manner, and Higgins told respondent to stop. Meli had seen the inappropriate touching himself, and would talk to respondent and tell him to knock it off.

One day there was an argument between respondent and Volturo, and there was a classroom three or four rooms down the hall with children in it attending summer school. Respondent made comments during the school year also, when children were around, especially in the break room. Janeski testified that the locker rooms for the gym were across from the break room, and the kids' lockers were right outside the door, and any kid easily could have heard respondent's comments because they were very loud sometimes. Janeski spoke to Meli because of this conduct around kids. Janeski agreed that they all attended sexual harassment training, and according to the policy

they were given respondent's conduct was inappropriate and he should be fired for engaging in it. Janeski reported that any time respondent got into trouble with management respondent would make comments that he was untouchable, saying, "I don't have to worry, nothing will happen to me." Janeski had a few teachers talk to him about respondent's "elevator eyes," which was a term defined in the sexual harassment policy. Michelle Anthony said that she felt very uncomfortable with the way respondent would look at her, and some other teachers said the same thing. He saw what they meant, because he would see respondent looking teachers up and down.

Janeski remembers the argument between respondent and Volturo on August 6 because that is his birthday. The union rep came in and all of them went to Dr. Banks's office. On August 13 the police were called, and Janeski was called by the union to file a grievance. They had all had enough of respondent; the comments and touching were not stopping and his conduct was getting completely out of hand. They told the union reps what had been going on, and the Board office was called to have the affirmative action person come over. Three police officers arrived along with Mr. Jenney, and all the custodians wrote statements at the direction of the Board office. Janeski wrote his statement (P-19), and was later contacted by Quinn and spoke to him twice.

On cross-examination Janeski agreed that Meli was in the room with respondent and others at times, and could see the touching for himself. Respondent would grab his genitals and say to Janeski and whomever else was there, "I got something for you guys."

Peter Scarcella

Peter Scarcella is a custodian at John Adams Middle School, where he has worked for ten years. He has worked with the district continuously since 1984, except for 1990 to 1993 when he lived out of state. He became full time in 1995 and worked with respondent. Respondent's first remarks to him were things such as, "can I have your baby?" They worked together every day in the summer from 6:30 a.m. to 2:30

p.m., and Scarcella felt very awkward when respondent made these types of comments. He also said other things that Scarcella initially referred to as "curse words."[3]

Scarcella testified that respondent asked him, "do you shave your balls?" and "does your mother shave her c-?" and would also say, "can I f- your mother's c-?" Respondent also touched him one day when they were standing in the break room and respondent was eating some peas; respondent put his peas in Scarcella's pocket with his hand. Scarcella testified that he was extremely mad, as he had his cell phone and his keys in there, and he told respondent to knock it off. He had no idea why respondent did what he did. He said another time respondent put a carrot in his pocket. He kept telling respondent, "do not touch me," and it was very uncomfortable when respondent did touch him. He also saw respondent touch Volturo when they were in a classroom dusting. Respondent put his hands up Volturo's pants leg and kept doing it even after Volturo told him to stop. He also saw respondent run his fingers up Higgins's arms and frequently make inappropriate comments to Volturo, Higgins and Finnerty.

On August 6 there was an incident in the cafeteria kitchen where respondent was arguing with Volturo, and Scarcella heard respondent say to Volturo, "can I f- your mother's c-?" Janeski told respondent to shut up, that what he was saying was not right.

Scott Murphy

Scott Murphy has been employed by the Board for fifteen years, initially as a custodian at John Adams Middle School and Martin Luther King Elementary School, and then with the grounds department. He is currently employed in maintenance.

On August 6, 2009, Murphy received a telephone call regarding a situation involving respondent and was asked to go to John Adams Middle School along with the union president to handle an altercation. At the time Murphy was vice president of the

[3] While all of the witnesses testifying were reluctant to use and hesitated at length before using the language respondent had used, Scarcella was extremely reluctant to use the actual words that had been spoken to him by respondent and hesitated even more than the others.

union, and when he arrived at the school he met with Volturo, who told him about the sexual comments made by respondent, including, "do you want to suck my co-?" and "does your mother shave her c-?" Murphy asked Volturo whether he wanted to file a complaint, and Volturo replied that he did not want respondent to be in trouble, he just wanted him to stop the conduct. When Murphy questioned respondent, his reply was that they all goof around; however, he did not admit or deny what Volturo had said. Murphy told respondent that his behavior was not appropriate for the workplace and respondent agreed to stop, and they shook hands. Murphy also reported that on another occasion Volturo told him that respondent had exposed himself.

During a meeting with Dr. Banks on August 6, Dr. Banks explained the sexual harassment policy, and stated that if she heard any more about this conduct on respondent's part it would have to be formally addressed. On August 13, Murphy received a call from Janeski, who said that there were still problems at John Adams with respondent. When Murphy arrived at the school he was met outside by Janeski and Volturo, and they all went into the glacier shop. At that time, Janeski, Volturo and Higgins all told Murphy that the sexual comments and harassment by respondent had continued. Murphy was told about the incident where respondent put his hand up Volturo's shorts and the comments he always made, and Murphy called in John Kelly, the president of the association at the time, for help with the matter. Kelly was not available, and so Andrew Hibell, the secretary of the association, was called and came to assist. While they were all in the glacier shop Volturo also told Murphy about the incident where respondent exposed himself. All of the custodians present that day said that they had had enough of respondent and wanted to file a report. Murphy testified, however, that Volturo was adamant that he did not want respondent to lose his job or get in trouble, he just wanted the conduct to end.

Murphy stated that the policy was to call the facility manager; however, Joe Meli was not there at the time, nor was Dr. Banks, the principal, and so Paul Jenney, the next in line, was called. Mr. Jenney came to John Adams and was told what had transpired, and Mr. Hibell directed the custodians to each write down what had happened to preserve the details. Murphy said that he knew it was a serious matter, so he had Volturo, Janeski and Higgins all write their statements separately at a large

table. He then briefed Jenney on the situation and called Superintendent DiMuzio, who called the Board attorney, who in turn instructed DiMuzio to call the police.

The police arrived and were told what happened and they took a report. The superintendent was there, and Jenney was instructed to put respondent on paid administrative leave, which was done. Respondent was informed of his rights and was told to call the union if he needed a lawyer.

Andrew Hibell

Andrew Hibell has been employed by the Board since 1994 as a custodian. He has had numerous positions within the union as well, and was involved in the situation with respondent. On August 13, 2009, he received a call from Murphy, the union vice president, asking him to come to John Adams Middle School. He was working at the time at Lincoln Elementary School, so he left there and brought the treasurer, Taglini, with him to John Adams. Respondent and Finnerty were outside the school, and Volturo, Higgins, Janeski and Murphy were in the glass shop. The four men started to tell Hibell what had been going on with Volturo, relaying all the sexual comments that respondent continually made. Janeski spoke of respondent rubbing up against him, and Higgins relayed that respondent rubbed up to him, and told Hibell the story involving the theft of his valve-stem cover. Hibell felt that all of the allegations were serious and that he needed to call someone. He attempted to contact Joe Meli, who was at a meeting, and then Dr. Banks, who was away, and ultimately reached Paul Jenney, who was their supervisor. Jenney said that he would be right over, and that he would call Superintendent DiMuzio. Hibell had the sexual harassment policy in his briefcase and reviewed it with those in the glass shop (Volturo, Higgins, Janeski and Murphy). He asked the three custodians to write down the events of that day on pads they were given, and all of them sat around a large butcher-block table which is used to cut glass. They were all sitting on different sides of the table, as Hibell had instructed them to separate in the room so that they wouldn't be writing their statements together. When Jenney arrived he was given the statements, and then DiMuzio arrived and was told what was going on. DiMuzio then advised Murphy and Hibell that he would be

suspending respondent on administrative leave with pay immediately, and that the police would be called because of the exposure incident.

Hibell reported that none of the custodians wanted to file a complaint, they just wanted respondent's conduct to stop. When the police arrived they spoke with the custodians and then asked for copies of the statements the men had written. Respondent was advised that he was suspended and seemed shocked to hear that, but he turned in his keys and swipe card and left.

Jodi Dunkelman

Jodi Dunkelman has been a math teacher at the District for nine years and works at the John Adams Middle School. She was involved in an affirmative action investigation in March 2009 involving respondent. Dunkelman reported that she continually felt awkward and strange when respondent looked her up and down and stared at her chest when she walked by him. She reported that others said it happened to them as well. She would typically arrive at school early and walk to the faculty room and she would pass respondent in the hallway, at which point she got a "full body scan" from him. No other school employee made her uncomfortable in this manner, and she reported this conduct to Meli, who said he would speak to the principal, Dr. Banks. Dr. Banks called her down, and she told Banks that she had started taking a different route in the school to avoid respondent, because for weeks he had been acting in this manner that made her uncomfortable on each occasion that she passed by him. After reporting the conduct to Banks, any time she saw respondent in the hallway he would take an extremely exaggerated stance and stare at the lockers, and Dunkelman felt that this exaggerated conduct was to let her know that he knew she had complained about him.

Krystle Horan

Krystle Horan has been employed by the Board for seven years and is an English teacher at John Adams Middle School. She was involved in an affirmative action investigation in March 2009 involving respondent after numerous occasions

where respondent made her feel extremely uncomfortable. She reported that when she walked by, respondent would scan her body, and she had learned that her friend Jodi Dunkelman had experienced the same conduct by respondent. She spoke to Dr. Banks when called in and explained what was going on, and indicated that no other employee in the district made her feel uncomfortable. After reporting respondent's conduct, any time she would walk by him thereafter he would exaggerate his conduct and look at the floor. She stated that she would not have brought it up had she not spoken to Jodi and learned that both were experiencing the same thing.

Lisa Ciatto

Lisa Ciatto has been employed for ten years as a special education teacher at the John Adams Middle School. In March 2009 she was involved in an affirmative action investigation involving respondent. She received a note telling her to go see the principal, and the principal asked her about respondent. She reported to Dr. Banks that when she sees respondent in the hallway, he looks her up and down.

Michel Parillo-Anthony

Michel Parillo-Anthony has been employed as a math teacher for seven years at John Adams Middle School. In March 2009 she was involved in an affirmative action investigation involving respondent. Joe Meli approached her and asked her if respondent's conduct made her feel uncomfortable, and she indicated that on two occasions she stopped to talk to him and he made her feel creepy because of where his eyes fell on her. She stated that he was looking at her abdomen and groin area. The first time she stopped to talk to him she had asked him to get her some pencils, and the second time was to congratulate him because she had heard his wife had a baby. On both those occasions he made no eye contact with her but just stared down at her lower body. Parillo-Anthony said that no other district employee made her feel creepy, and that she reported these two incidents to Dr. Banks.

Magdalena Zaremba

Magdalena Zaremba was employed by the Board for two years as a science teacher at John Adams Middle School. She was laid off pursuant to a reduction in force while she was involved in an affirmative action investigation in March 2009 involving respondent, after talking with her colleagues about how uncomfortable she felt around respondent. Any time she walked by him he would eye her up and down and not even say hello and that made her feel extremely uncomfortable. After this had been going on for a month or two she learned that other colleagues were saying the same thing, and she decided to go to the principal. Zaremba reported that it was a much bigger issue with her colleagues, but that it happened multiple times a day with her, every day, and that no other employee made her feel uncomfortable. She reported these incidents to Dr. Banks and also spoke with Joe Meli and Gary Higgins, who was the night custodian. She told Higgins because she runs the drama club and is sometimes at school late. She asked Higgins to "save" her if he ever saw respondent near her, and Higgins agreed to do so. Zaremba only spoke with respondent if she needed something. She did speak to Dunkelman and Horan about their experiences with respondent, and also knew that Ciatto had a problem with respondent as well. After she spoke with Dr. Banks, she avoided respondent.

Joseph Meli

Joseph Meli has been employed by the Board since 1993 and was a custodian until approximately 2002, when he became the facility manager. He has been at John Adams Middle School the whole time. His duties currently are to oversee the maintenance program and the custodial staff. He testified that respondent was assigned in November or December 2008 to John Adams after a job opened up there. Respondent was the most senior custodian in the district at the time, and so he bid for the job and received it. It was a 6:30-a.m.-to-3:00-p.m. shift and respondent was the only one on that shift. Pete Scarcella worked from 11:00 a.m. to 7:30 p.m. and Steve Volturo, Bob Janeski and Gary Higgins worked from 3:00 p.m. to 11:30 p.m. Meli testified that those on the 3:00 p.m. shift usually arrived around 2:15 or 2:30 p.m. and would sit around talking and having coffee in the custodians' room before the start of

their shift. He reported that respondent was there at those times and that remarks were made that were not appropriate in a school setting. He testified that respondent said more vulgar things than the others would say in their joking around, and that he would object to vulgarities, which would still continue.

Meli received several complaints against respondent from the other custodians about respondent taunting them and instigating problems, and about respondent's friction with Scarcella, who had a hearing problem, about which respondent would taunt him. Respondent also made inappropriate remarks to Janeski and would do "touchy-feely" things and make remarks while touching him. Volturo also complained about respondent, indicating that he was constantly asked whether his mother shaves her "c-" and other vulgarities. Meli indicated that he could hear the vulgar comments being made in the kitchen from his office thirty-five to forty feet away, and that there were children in a class down the hall about the same distance away who had to pass the kitchen to go to the bathroom and easily could have heard respondent's language when walking by. Volturo also told Meli about the incident where respondent put his hands up Volturo's pants while he was cleaning, which Volturo was extremely angry about. Meli also received complaints from teachers that respondent was always staring at their breasts, which he reported to Banks, who indicated she would handle the complaints.

Finnerty told Meli one day that respondent had taken another custodian's air caps from his tires, and when Meli asked respondent why he had done that, respondent said that he needed them. Meli reached a point where he tried to limit the interaction between respondent and the other custodians, and to that end allowed respondent to leave ten or fifteen minutes early just to avoid interacting with the others around the table.

There was an incident in August 2009 where the police came, and respondent was not at work after that date. There have been no complaints from the custodians since respondent left regarding inappropriate remarks or vulgarity.

When Meli was interviewed by Dr. Quinn (R-2) he reported that he had seen respondent touching coworkers in the break room and rubbing up against them and

touching their backs. The custodians complained, and Meli indicated that he told the respondent to stop that conduct, that it was not appropriate. He never witnessed what had gone on, but heard constantly from custodians about respondent's conduct. He did hear vulgarities related to "mother" comments from respondent, and never heard any comments like that from the other custodians. They always responded to what respondent said, but never with the same type of comments respondent had uttered. Each time he talked to respondent about ceasing the vulgar comments and unwanted touching he felt that the conduct would stop, but it never did. Meli agreed that he is not responsible for the teachers; however, when they complained to him he felt that it was harassment, and so he believed he should report it to Dr. Banks, who did supervise the teachers.

Dr. Michael Quinn

Dr. Michael Quinn was employed as the affirmative action officer for the district from 2008 until 2010. Prior to that he held a number of positions in the district, and prior to that had practiced law for a few years and did management consulting. He attended a full-day training session for affirmative action officers at the Department of Education, and also received in-house training from the district's law firm regarding sexual harassment. He also was involved in training some staff at the district.

Quinn became aware of an August 2009 incident with respondent when he returned from vacation. DiMuzio, the superintendent, asked him to investigate it, reporting that it was a serious incident and that he wanted Quinn to attend to it right away. Quinn made appointments with all the complainants, spoke to Paul Jenney, and reviewed the police reports and all statements. (P-17 through P-20.) He interviewed victims Volturo, Higgins and Janeski and witnesses Finnerty and Scarcella. He also interviewed Meli. Each witness was spoken to alone in a conference room and asked what happened. Quinn typed up the reports and DiMuzio indicated that he would wait until the investigation was complete to review them. After some difficulty attempting to schedule a meeting with respondent, Quinn was finally able to do so and to present the charges at a meeting attended by respondent, his attorney, the Board attorney and Quinn. Quinn noted, however, that after he typed up the reports he saw a lot of

contradictions between what respondent had provided and what the others had all said, so he set up additional interviews. In his report (P-38) he concluded that the charges were all valid regarding the language, the touching and the exposure. He also referred to Finnerty and Scarcella as unbiased witnesses and extremely credible. After his investigation was concluded he presented his findings to DiMuzio. Quinn was troubled by the fact that all of this took place in a school, and that children were in the building and could have overheard or seen what had transpired.

On cross-examination, Quinn agreed that he reported the exposure incident to have taken place in "a room," and that on the following page (R-17) the kitchen is referenced. Quinn understood "room" to be a classroom, but indicated that he had "the impression" that the exposure incident occurred when the custodians were cleaning the classroom. He also felt that the exposure incident and the incident where respondent ran his hands all the way up Volturo's legs were the most serious allegations, and that Finnerty and Volturo corroborated each other regarding the exposure incident.

In respondent's interview (R-27) he admitted some of the allegations, but also said that the others pulled pranks on him as well, such as hiding his keys. He said that taking the valve-stem cover was a prank.

Quinn also testified that after he typed up the statements from notes that he had taken during the interviews, he did not go back and have each person review the typed statements for accuracy.

John DiMuzio

John DiMuzio was employed by the Board for forty-one years and three months, beginning as a teacher and retiring as acting superintendent on July 1, 2010. In August 2009 he was the acting assistant superintendent. He received a call from Paul Jenney, who told him that there was a problem at John Adams Middle School. He met Jenney and Hibell there, and Jenney reported that respondent had exposed his genitals to others. DiMuzio immediately called Board counsel, who advised that respondent should be placed on administrative leave pending a police investigation, and that if charges

were not filed an affirmative action investigation would be conducted. DiMuzio told the Board of the allegations and respondent was suspended with pay as of August 13, 2010 (P-28). DiMuzio instructed Quinn to bring in all the parties involved and prepare a report, and when DiMuzio saw it he was stunned as to what had transpired. He felt that he should ask the Board to proceed with tenure charges, and after the Board members reviewed the report they were also stunned, and agreed that tenure charges should be filed. DiMuzio agreed that the exposure was the most serious of the allegations against respondent, but respondent had also put his hands up a custodian's pants, and that conduct, combined with the other findings and the exposure, was sufficient for tenure charges to be brought.

Maryann Banks

Maryann Banks was employed at the Edison Board of Education from December 1990 through December 2009 in various positions, and she left the District when she was in the dual role of principal and assistant superintendent. She is now a superintendent in Vineland, New Jersey. While she was the principal at John Adams Middle School the facility manager, Meli, spoke to her in March 2009 and indicated that several female teachers were uncomfortable around respondent. The teachers were reluctant to come forward, and so shared their discomfort with Meli, who in turn told her about it. Banks indicated that she asked for the names of the teachers and Meli provided them, and Banks interviewed each one individually. All of them had the same complaints against respondent, in that each was very uncomfortable with the way he looked at them, which they described as "a full body scan." The teachers also told her that the respondent stared at their breasts and groin areas, and one had indicated that he made her feel "creepy." Banks testified that she has known all of the teachers for years and finds them to be credible. She called respondent in to meet with her and the union rep, and he came in with two union reps. Respondent told her that he was unaware that he made anyone uncomfortable, and indicated that his conduct was not intentional, which Banks indicated was irrelevant because if the victim was uncomfortable then the conduct needed to be addressed. Banks instructed respondent to be aware of his conduct going forward, which he indicated he would. Banks advised him that she would refer it to the district affirmative action officer if the conduct recurred.

She didn't refer it at the time because she felt that respondent understood the seriousness of his conduct, which had also been emphasized to him by the union reps.

In the summer of 2009 Banks learned of an argument between the respondent and Volturo, and she met with Volturo, who said he had "had it" with the way respondent spoke to him and to the others, constantly making inappropriate comments. Volturo told her that he was uncomfortable telling her, to which she replied that she needed to know what had been going on. Volturo repeated to her the comments respondent made to him and to the other custodians regarding asking whether their mothers shave their privates, and used the crude references in their conversation. Banks told Volturo that she should have been made aware of this conduct sooner, and Volturo replied that he did not want to get respondent in trouble, he just wanted him to stop what he was doing.

Banks testified that about a week later she learned about a police complaint being filed against respondent by Volturo and called Volturo in to ask him about it. At the time, Volturo stated that he had not wanted to tell her everything during their previous meeting about respondent exposing himself and about another incident where respondent put his hands up Volturo's shorts. Banks testified that she was horrified at these allegations and indicated that she should have been told immediately because all of this constituted sexual harassment, and that she would now get the district's affirmative action officer involved. Volturo again reported to her that he did not tell her everything because he knew that respondent had a history of drug and alcohol problems and had just had a baby, and he didn't want to get him in trouble. Banks testified that she found Volturo to be credible.

Banks also found the five teachers who complained about respondent to all be credible, and indicated that none appeared to be fabricating anything they had said. Banks testified that after the incident where the police were called she expressed extreme displeasure to Volturo that she had not been made aware of everything that had been taking place, to which Volturo replied that they were trying to handle it amongst themselves because no one wanted to get respondent in trouble, they just wanted him to stop, but eventually they could not take his conduct anymore. Volturo indicated to her that this is why he initially did not tell her the details of the touching

incidents and the exposure incident. Banks reiterated that she found Volturo to be credible.

James Doerbecker

James Doerbecker began working for the Board when he was fifteen years old, doing summer cleanup work. He worked part time until 1993, when he became a full-time custodian. He worked at several different schools, and then started at John Adams Middle School in approximately December 2008. At that time his wife was pregnant and not working and he was the primary income earner. With a new baby coming he wanted a day shift, and so he requested the available day-shift position at Adams (6:15 a.m. to 2:45 p.m.). Respondent wanted to be home with his kids and to help his wife. In a typical day at the school, respondent would check the boilers, get his coffee, turn the inside lights on, turn the outside lights off, and put coffee on for the secretaries. He would then open up the bathrooms, put the heat on in the trailers if it was winter, and clean up the kitchen and bathrooms. After that he would set up the cones in the parking lot and, if there was time, would buff the front-lobby floor. He also would sweep the front entrance, get the newspapers, and empty outside garbage cans. After lunch respondent cleaned the entire cafeteria, moved tables around, swept, mopped and usually finished around 2:30 p.m. The only other custodian there with him was Pete Scarcella, who worked from 10 a.m. to 6:30 or 7:00 p.m. The other custodians arrived as early as 1:00 or 2:00 p.m., sometimes on overtime for a shift that started at 3:00 p.m. There were times that the chairs in the cafeteria needed to be moved for a wrestling match or a dance.

Respondent testified that after his daughter was born in January 2009 he went to a rehabilitation facility in West Palm Beach for drugs and alcohol. He had been to outpatient drug and alcohol rehabilitation but this was the first time he was inpatient. He testified that alcohol and drugs were "killing him" and that he wanted to not have them control his life any longer. He also used cocaine and got drunk at night, but after his daughter was born he called a friend and indicated he needed help. His friend was acquainted with Joseph Romano, the vice president of the Edison Board of Education, and Romano, whom he already knew, told respondent that if he didn't do something the

Board was going to fire him. As a result, respondent went to rehab, and his medical coverage paid for his rehab. He used his vacation time and sick time and was docked a few days as well. Respondent's rehab lasted from approximately January 20 through February 19, and he returned to work on his regular shift at the end of February.

In March 2009 respondent was called to Dr. Banks's office and told to bring a union rep with him, which he did. He had no idea what the meeting was about, and when he went to Banks's office he was told of the teachers' allegations. The union rep instructed him to stare at the walls or the floor when a teacher walked by from that day on. Respondent felt that Banks believed him, but she told him that if he made the teachers uncomfortable again, charges would be brought. Respondent testified that he did not know which teachers had complained, and that he does not know their names, only their faces. He changed his behavior because the union rep instructed him to look at the floor when a teacher passed by, even though he felt he had been accused of something he did not do.

Respondent testified that he did not spend much time near Volturo during the regular school year because Volturo did not come in until 2:30 or 3:00 p.m., and he would be doing his work and leaving as Volturo was arriving. Respondent also testified that he did not see Higgins or Janeski that much either, because they would be arriving when he was leaving.

Respondent indicated that Joe Meli never told him during the school year of complaints against him by other custodians, and there were no conflicts that arose that were addressed by the Board, the union or Meli. Respondent also testified that he did not talk to Volturo or Janeski or Higgins much, other than to say hello, and that he had a good relationship with Scarcella, who he says laughed at the peas and carrots being put in his pockets. However, he also agreed that Scarcella told him that his cell phone was ruined because of respondent's actions, and so he told Scarcella that he would buy him a new one. When Scarcella reached for his cell phone in his pocket he found peas instead.

Respondent testified that he never said any of the things to Volturo, Janeski, Scarcella or Higgins that they allege he said. He testified that he has never used those words to anyone, and never touched any of their bodies in any manner, anywhere. He agreed that rubbing an individual's arm slowly would be sexually inappropriate. Respondent stated that he is not attracted to men and would not have done any of what those men alleged. Respondent testified that none of the events alleged by the others ever happened.

Respondent then testified that in the summer, all of the custodians except Janeski made "mother jokes" to each other, and all of them said to each other, "can I f- your mother?" He agreed that he would say that to the others as well, after they started it, and that all of them thought it was funny except for Meli, who is "old school" and told them to stop. Respondent testified that all the custodians used profanity to each other, but never in front of any children. He said that he never called any of the female students "cute," and that he would not say it and is offended by that testimony. Respondent indicated that the summer class was held in either room 101, 103 or 105 and that the classroom door was always closed.[4] He indicated that no children were nearby, that he knows of, when "Volturo said these things," and that he did not think any of the children could hear it when "Steve said those things." Respondent testified that he never exposed himself "in a classroom" and never said "want to suck this?" He also testified that he never exposed himself in the kitchen or anywhere.

Respondent then testified that he asked Volturo if his mother shaves, but used the "p" word not the "c" word, and that this took place in a storage area and not on the day Volturo claims respondent exposed himself. He also never asked Volturo if he could "f- his mother." With regard to the August 6, 2009, incident, respondent testified that Volturo made comments regarding respondent's wife, and in return he made a comment to Volturo regarding his mother shaving, but he insisted that he did not use the "c-" word. He stated that Volturo then flipped out and was yelling and screaming, and that Meli was outside in another classroom and heard the commotion. After the union rep arrived and each man was spoken to separately, they shook hands, and

[4] Respondent did not explain how he was unable to specify in which classroom the summer reading class took place, yet was able to testify that the door was always closed.

Dr. Banks told respondent to knock it off and nothing else. He was not disciplined for that incident and was never made aware of any allegations that others had made against him regarding sexual comments. Respondent asserted that the incident where respondent allegedly ran his hands up Volturo's legs never happened. As to the tire valve cover, he said he took it "as a joke," and that when Meli said to put it back, he did. He denied that he ever said he needed it.

Respondent agreed that he was sent home on August 13, 2009, after turning in his keys and swipe card, and no criminal charges were brought against him. He gave a statement to Dr. Quinn (R-27), and asserted that he never said "can I f- your mother?" or "does your mother shave her c-?" He said he used a word other than the "c-" word. Respondent denied all of the things that Higgins, Volturo, Janeski, Scarcella and Finnerty alleged happened, and denied ever touching anyone at John Adams Middle School. He testified that he does not touch men. Respondent said that he wants to fight for his job because he did not engage in any of the conduct alleged, and that Meli never came to him with any of these allegations. He believes Volturo, Higgins, Janeski, Scarcella and Finnerty all fabricated their allegations and lied about everything they said against him.

Patricia Doerbecker

Patricia Doerbecker has been married to respondent for seven years. She was not working when her husband worked at John Adams Middle School; however, she returned to work in October 2009. Her husband had discussed with her his applying for the day shift at Adams so that he could be home and have more family time. She indicated that respondent takes his job very seriously; however, she knew that the custodians at Adams didn't all get along.

DISCUSSION AND FINDINGS OF FACT

Doerbecker contends that the charges against him should be dismissed because they are a product of a scheme or plan fabricated by the other custodians to get him fired because they want a chance to be assigned to the day shift. Doerbecker

contended throughout the hearings that the others were determined to get him in trouble. According to Doerbecker, none of the acts described in the charges happened as alleged, and the allegations are not true.

The petitioner, the Edison Board of Education, asserts that Doerbecker should be dismissed from his position as custodian in its school system because of his unbecoming conduct and insubordination.

The burden of proof is on the Edison Board of Education. The Board must prove its case by a preponderance of the credible evidence, which is the standard in administrative proceedings. Atkinson v. Parsekian, 37 N.J. 143 (1962). Precisely what is needed to satisfy this standard must be decided on a case-by-case basis. 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). 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).

In the present case the facts are all contested. And, where the facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It 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). Credible testimony has been defined as testimony that must proceed from the mouth of a credible witness and must be such as our common experience, knowledge and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973). The fact finder is not bound to believe the testimony of any witness. In re Perrone, 5 N.J. 514 (1950).

There is no mechanical formula for determining the truth, to the extent it can be discerned, and many factors may be considered and weighed. These include the demeanor of the witnesses and the manner of testifying. Corroboration, knowledge, and common experience also play a role in assessing credibility. Dawson v. R.W. Vogel, CRT 4501-00, Initial Decision (April 15, 2002), adopted as modified, Dir., Div. of Civil Rights (Aug. 28, 2002) <http://lawlibrary.rutgers.edu/oal/search.html>.

It is well established that in administrative hearings hearsay evidence is admissible. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. However, at the conclusion of the analysis, for a court to sustain an administrative decision that affects a substantial right of a party, there must be a residuum of legal and competent evidence in the record to support it. Weston v. State, 60 N.J. 36 (1972); see also In re Cowan, 224 N.J. Super. 737 (App. Div. 1988); Hemsey v. Bd. of Trs., Police and Firemen's Ret. Sys., 393 N.J. Super. 524 (App. Div. 2007). Hearsay evidence is accorded whatever weight the administrative law judge deems appropriate. The nature, character and scope of the evidence, the circumstances of its creation and production, and, in general, its reliability must all be considered. N.J.A.C. 1:1-15.5(a).

Based on my common sense, intuition and experience, and overall assessment of the victim-witnesses, it is my opinion that the Board witnesses were completely credible and absolutely truthful, and I **FIND** that respondent's offensive behavior and wholly inappropriate workplace conduct had become so frequent and widespread that his coworkers were simply unable to withstand it any longer.

Having had the opportunity to listen to the testimony, review the documentary evidence and observe the witnesses, I **FIND** the following:

Charge One

Respondent is guilty of engaging in inappropriate and/or sexually harassing conduct towards his coworkers by:

a) making sexually explicit remarks to Steven Volturo about his mother

b) making unsolicited vulgar and inappropriate comments to Mr. Volturo and other custodians on a near daily basis since February 2009, including "can I suck your dick (hereinafter "d-")?" and "can I fuck (hereinafter "f-") your mother?"

c) inappropriately touching Mr. Volturo by rubbing his hands on Mr. Volturo's legs and up his shorts

d) exposing his genitals to Mr. Volturo and another custodian on July 29, 2009

e) asking Mr. Volturo "does your mother shave her cunt (hereinafter "c-")?"

f) using vulgar and inappropriate language in the workplace by yelling to Mr. Higgins and other custodians, "I see your cock (hereinafter "co-")," "Can I touch your co-?" "I like co-," "I like your co-," "Can I f- your wife?" "Can I f- your mother?" and "Can I f- you in the ass (hereinafter "a-")?"

g) inappropriately touching Mr. Higgins by running his fingers up Mr. Higgins's arm and side, touching his leg and squeezing his knee and repeatedly asking Mr. Higgins, "Can I suck your co-?"

h) making comments during the workday to Mr. Janeski and other custodians such as "I like co-" and "I want to suck co-," and grabbing his crotch while telling the other custodians, "I've got something for you"

i) yelling to Mr. Volturo and Mr. Finnerty, another custodian, "Hey, you guys want to see something?" and having his genitals fully exposed as they turned around, thereafter asking, "you guys want to suck my d-?"

j) making inappropriate comments to Mr. Scarcella, another custodian, such as, "Can I have your baby?" and also putting his hands in Mr. Scarcella's pockets on several occasions, including once when he stuffed peas into his pocket, and another occasion when he put a pencil in Mr. Scarcella's pocket

k) stealing valve stem covers from Mr. Higgins's car tires

Charge Two

Respondent is guilty of engaging in insubordinate behavior by:

a) repeatedly harassing his fellow employees in violation of Board Policy No. 4111.1/4211/1, Equal Opportunity/Non-Discrimination/Sexual Harassment Policy

b) continuing to engage in inappropriate and sexually harassing conduct after having been specifically directed by the principal to cease and desist in all inappropriate conduct towards the other custodians

I **FIND** respondent's testimony to not be credible. I **FIND** respondent's testimony to be entirely unconvincing and completely unreliable.

I **FIND** the Board witnesses to be persuasive, consistent and credible. All of the victim-witnesses' various written statements were consistent with each other and consistent with their testimony before this tribunal as to their accounts of respondent's behavior.

Respondent is accused of conduct unbecoming a custodian by engaging in inappropriate and sexually harassing conduct towards his fellow employees. I **FIND** his conduct as a whole to be sexually harassing and absolutely inappropriate.

I **CONCLUDE** that the Edison Board of Education has more than sustained its burden of proving by a preponderance of the competent and credible evidence that respondent engaged in conduct absolutely unbecoming a custodian by engaging in inappropriate, sexually harassing conduct towards his coworkers in 2009. I further **CONCLUDE** that the Board has sustained its burden of proving by a preponderance of the competent and credible evidence that respondent was insubordinate in having disregarded administrative directives and violated Board policy by flagrantly ignoring directives to cease and desist from engaging in his inappropriate workplace conduct and flagrantly violating the sexual harassment policy.

ORDER

It is hereby **ORDERED** that the charges of conduct unbecoming a custodian and insubordination are **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, 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.

February 17, 2011
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency:

Date Mailed to Parties: FEB 18 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

dr/db

APPENDIX

WITNESSES

For Petitioner:

Daniel P. Michaud
Paul Jenney, Jr.
Steven Volturo
John Finnerty
Gary C. Higgins
Robert Janeski
Peter Scarcella
Scott Murphy
Andrew Hibell
Jodi Dunkelman
Krystle Horan
Lisa Ciatto
Michel Parillo-Anthony
Magdalena Zaremba
Joseph Meli
Michael Quinn
John DiMuzio
Maryann Banks

For Respondent:

James Doerbecker
Patricia Doerbecker

EXHIBITS

For Petitioner:

P-1 Meeting Minutes by Dr. V. Capraro, March 19, 1997

P-2 Letter from Dr. V. Capraro to J. Doerbecker, April 14, 1997

P-3 Portion of Public Board of Education Meeting Minutes, April 24, 1997

P-4 Portion of Reorganization Meeting/Public Board Meeting Minutes, April 29, 1997

P-5 Sensitivity Training Seminar sign-in sheet and Sexual Harassment Seminar Materials for Employees of Edison Township Board of Education, April 29, 1997

P-6 Letter from D. Michaud to J. Doerbecker May 1, 1997

P-7 Policy 4111.1/4211.1, Harassment, Intimidation, and Bullying, Revised June 16, 1997

P-8 Procedure 4111.1/4211.1, Harassment, Revised June 16, 1997

P-9 Sexual Harassment Workshop sign-in sheet and Edison Board of Education Sexual Harassment Prevention Training Materials, January 12, 1999

P-10 Sexual Harassment Seminar sign-in sheet and Edison Board of Education Sexual Harassment Prevention Training Materials, March 2, 2000

P-11 Memorandum from V. Capraro to J. Doerbecker re: Withholding of Increment, January 29, 2002

P-12 Attendance Sheet, Harassment/Diversity Training Session and Diversity Awareness and Anti-Harassment/Anti-Retaliation Training Materials, January 5, 2006

P-13 Letter from C. Toth to J. Doerbecker, June 7, 2006

P-14 Policy 4111.1/4211.1, Equal Opportunity/Non-Discrimination/Sexual Harassment Policy, Revised March 24, 2008

P-15 Procedure 4111.1/4211.1, Equal Opportunity/Non-Discrimination/Sexual Harassment Complaint Procedure, Revised March 24, 2008

P-16 Affirmative Action Investigation Meeting Minutes, April 1, 2009

P-17 Statement of S. Volturo, August 13, 2009

P-18 Statement of G. Higgins, August 13, 2009

P-19 Statement of R. Janeski, August 13, 2009

P-20 Edison Township Police Department Report, August 13, 2009

P-21 Letter from J. DiMuzio to J. Doerbecker, August 13, 2009

P-22 Memorandum from M. Quinn to J. DiMuzio, August 24, 2009, with interviews of S. Volturo, G. Higgins, R. Janeski, J. Finnerty, P. Scarcella and J. Meli, all dated August 24, 2009

P-23 Letter from M. Quinn to J. Doerbecker, August 31, 2009

P-24 Letter from R. Ricci to J. DiMuzio, September 4, 2009

P-25 Memorandum from M. Quinn to J. DiMuzio, September 8, 2009

P-26 Letter from J. Busch to R. Ricci, September 10, 2009

P-27 Interview with J. Doerbecker, September 15, 2009

P-28 Letter from J. DiMuzio to J. Doerbecker, September 16, 2009

P-29 Interview with S. Murphy, September 17, 2009

P-30 Interview with M. Banks, September 17, 2009

P-31 Interview with P. Jenney, September 22, 2009

P-32 Interview with A. Hibell, September 23, 2009

P-33 Second interview with M. Banks, September 25, 2009

P-34 Second interview with G. Higgins, September 25, 2009

P-35 Second interview with J. Finnerty, September 25, 2009

P-36 Second interview with R. Janeski, September 25, 2009

P-37 Second interview with S. Volturo, September 25, 2009

P-38 Memorandum from M. Quinn to J. DiMuzio, November 9, 2009

Attachments

1. Memorandum from M. Quinn to J. DiMuzio, August 24, 2009, with interviews of S. Volturo, G. Higgins, R. Janeski, J. Finnerty, P. Scarcella and J. Meli, all dated August 24, 2009
2. Interview with S. Murphy, September 17, 2009
3. Interview with M. Banks, September 17, 2009
4. Interview with P. Jenney, September 22, 2009
5. Interview with A. Hibell, September 23, 2009
6. Second interview with M. Banks, September 25, 2009
7. Second interview with G. Higgins, September 25, 2009
8. Second interview with J. Finnerty, September 25, 2009
9. Second interview with R. Janeski, September 25, 209
10. Second interview with S. Volturo, September 25, 2009

P-39 Letter from J. DiMuzio to J. Doerbecker, November 12, 2009

P-40 Letter from J. DiMuzio to J. Doerbecker, December 7, 2009

P-41 Letter from D. Michaud to J. Doerbecker, January 15, 2010

P-42 Letter from D. Michaud to J. Doerbecker, March 15, 2010

P-43 Letter from D. Michaud to J. Doerbecker, March 18, 2010

Attachments:

1. Certificate of Determination of the Board Secretary Regarding the Adoption of Tenure Charges, March 18, 2010
2. Resolution, March 17, 2010

For Respondent:

R-1 Evaluation Form for Custodians and Maintenance Personnel

R-2 Interview with Joseph Meli

R-3 School plan

R-4 School plan

142-11

CHARLOTTE ROBINSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured secretary – contended that the Board terminated her employment without affording her due process in violation of her tenure rights, and sought back pay and emoluments. After the filing of the petition in September 2009, the Board filed a motion for summary decision seeking to enforce a settlement agreement that was entered into by the parties in 2008, arguing that it lawfully terminated petitioner's employment because she had violated the terms of the settlement agreement. In November 2010, the Board also filed formal tenure charges against the petitioner in a separate action, and sought to consolidate this matter with the tenure charges.

The ALJ recited background history of this controversy, *ie:* in March 2008, the parties settled tenure charges against petitioner which alleged excessive absenteeism relating to petitioner's alleged substance abuse; and the terms of the settlement included acknowledgment by petitioner that she would be subject to termination of her employment and tenure if she violated the agreement. The ALJ found that: the Board is seeking to enforce the terms of the 2008 settlement agreement, which was adopted as a final decision by the Commissioner of Education and as such is governed by the New Jersey Rules of Court 4:67-6(a); therefore, the Office of Administrative Law (OAL) does not have jurisdiction to enforce the settlement agreement, which action should have been brought in the trial division of the Superior Court. Accordingly, the ALJ concluded that this controversy was brought in the wrong forum and must be dismissed, and denied the request to consolidate the instant case with formal tenure charges which were filed by the Board against the petitioner.

The Commissioner found that: the ALJ wrongfully dismissed this matter, as the Commissioner does have jurisdiction to decide whether the termination of petitioner's employment was a violation of her tenure and due process rights under *N.J.S.A.* 18A:6-1 et seq.; the Commissioner has jurisdiction over all controversies arising under the school laws pursuant to *N.J.S.A.* 18A:6-9; petitioner is not seeking to enforce the 2008 settlement agreement but rather is seeking an order finding that the Board violated her tenure and due process rights, which is well within the Commissioner's jurisdiction; the Board's use of the settlement agreement as a defense to the claims made by petitioner does not automatically convert petitioner's case into an attempt to enforce a settlement agreement. The Commissioner determined that the proper course of action is to consolidate this matter with the tenure charges currently pending at the OAL, and accordingly remanded the case for further proceedings consistent with the concerns set forth herein.

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.

April 4. 2011

142-11

OAL DKT. NO. EDU 6760-09
AGENCY DKT. NO. 242-9/09

CHARLOTTE ROBINSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] Upon such review, the Commissioner finds that the Administrative Law Judge (ALJ) erroneously determined that the Commissioner does not have jurisdiction to hear this matter.

A brief discussion of the background is required in order to understand the dynamics of this case and to assess whether jurisdiction appropriately lies with the Commissioner. The petitioner filed a Petition of Appeal in this case in September 2009, claiming that the Board's termination of her employment was a violation of her tenure and due process rights under *N.J.S.A.* 18A:6-1 et seq. After the matter was transmitted to the OAL, the Board filed a motion for summary decision seeking to enforce a settlement agreement that was entered into by the parties in 2008. The Board argued that it was entitled to summary decision as it lawfully terminated petitioner's employment because she had violated the terms of the 2008 settlement agreement. In January 2011, the ALJ denied the Board's motion for summary

[1] The parties did not file exceptions to the Initial Decision.

decision finding that the OAL does not have jurisdiction to enforce settlement agreements, and that there were material facts in dispute with respect to whether the provisions in the settlement agreement had been violated by the petitioner.

In November 2010, the Board filed formal tenure charges against the petitioner in a separate action, and in January 2011 the Board filed a motion to consolidate this matter with the tenure charges. Petitioner did not object to such consolidation. Without any further proceedings, the ALJ issued the Initial Decision dismissing the petition in this case finding that the OAL does not have jurisdiction to hear this matter because the Board is seeking to enforce the prior settlement agreement, and that the entire controversy was brought in the wrong forum. The ALJ further held that since the petition is dismissed, the motion for consolidation is rendered moot.

The Commissioner finds that the ALJ wrongfully dismissed this matter because the Commissioner does have jurisdiction to decide whether the termination of petitioner's employment was a violation of her tenure and due process rights under *N.J.S.A.* 18A:6-1 et seq. It is well settled that the jurisdiction "to hear and determine ... all controversies and disputes arising under school law" rests with the Commissioner. *See N.J.S.A.* 18A:6-9. Petitioner, who instituted this action, is not seeking to enforce the 2008 settlement agreement but rather is seeking an order finding that the Board violated her tenure and due process rights when it terminated her employment, a controversy which falls squarely under the jurisdiction of the Commissioner pursuant to *N.J.S.A.* 18A:6-9.

In the Initial Decision, the ALJ relied on New Jersey Court Rules, *R.* 4:67-6 – which requires parties who are seeking enforcement of judgments to bring an action in New Jersey Superior Court – to find that the Commissioner does not have jurisdiction in this

case. In so finding, however, the ALJ disregarded the claims advanced by the petitioner and simply dismissed petitioner's case based on a defense asserted by the Board. 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. Certainly, the Board's use of the 2008 settlement agreement as a defense to the claims made by the petitioner does not automatically convert petitioner's case into an attempt to enforce a settlement agreement, potentially precluding the Commissioner's jurisdiction. (*But see N.J.A.C.* 6A:3-3.1(b)). In this case a statutory entitlement under the tenure laws is implicated, and as such, it is properly before the Commissioner of Education.

Instead of issuing an Initial Decision dismissing petitioner's case for lack of jurisdiction, the proper course of action would have been to consolidate this matter with the tenure charges that are currently pending before the OAL. Accordingly, the Commissioner hereby remands this matter to the OAL for further proceedings consistent with the concerns set forth above.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4|04|11
Date of Mailing: 4|04|11

[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

AND ORDER

OAL DKT. NO. EDU 6760-09

AGENCY DKT. NO. 242-9/09

CHARLOTTE ROBINSON,

Petitioner,

v.

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

Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Kenneth A. Skroumbelos, Esq., for respondent (Hill Wallack, attorneys)

Record Closed: February 22, 2011 Decided: February 28, 2011

BEFORE **JOHN SCHUSTER III**, ALJ:

In this matter Charlotte Robinson (petitioner) filed an appeal seeking reversal of her termination of employment as a tenured secretary for the Trenton Board of Education (respondent). By way of background, in August 2007, respondent filed tenure charges against petitioner alleging excessive absenteeism related to petitioner's alleged substance abuse. In March 2008, the parties settled that matter and a written

settlement agreement was prepared, executed and approved at the Office of Administrative Law (OAL). The Commissioner of Education adopted the settlement as a final decision the following month. As part of that settlement, the parties entered into Health Improvement Program Contract. That contract in part states "in the event of a violation of this agreement by ROBINSON, following the principles articulating in Yaniello,[1] supra, ROBINSON acknowledges that she will be subject to the termination of her employment and tenure." The contract between the parties also required petitioner to furnish a doctor's note regarding absences from work when requested by respondent or "be subject to termination of her employment and tenure." Petitioner was absent from work on April 22, 23 and 24, 2009, and produced a doctor's note for that period but without diagnosis. Petitioner was advised to have the note supplemented but petitioner failed to do so. As a result, petitioner was terminated and the appeal was filed.

Respondent's position is that pursuant to the express terms of the settlement agreement and the Health Improvement Program Contract, which is a part thereof, it has a right to terminate petitioner for a violation of the agreement and contract without the necessity of complying with the tenure procedures. In support of that position, respondent brought an action in the Superior Court to enforce the settlement agreement and thereby validate its action in summarily terminating petitioner. It was represented to the undersigned the Superior Court matter was dismissed without prejudice based on a finding that the OAL was the appropriate venue to seek enforcement of the settlement agreement since the settlement agreement originated from this Court.

Respondent then filed a summary decision motion in this Court seeking to enforce the 2008 settlement agreement and validating its action in terminating petitioner. Respondent's motion for summary decision was denied and respondent subsequently filed for interlocutory review with the State Department of Education. On or about that same time, respondent filed formal tenure charges against petitioner. An

[1] Yaniello is an unreported Appellate Division decision bearing Docket No. A-3482-96T1.

application was then submitted to the OAL to consolidate the two matters. The Department of Education has now determined not to grant interlocutory review.

The issue remains as to whether this court has jurisdiction to hear this matter. Respondent is seeking to enforce the terms of the 2008 settlement agreement which was adopted as a final decision by the Commissioner of Education in April, 2008. New Jersey Rules of Court 4:67-6(a) is applicable to all actions brought to enforce an order or determination entered by a state agency. Pursuant to (6) when a non-monetary remedy is sought an action shall be brought in the trial division of the Superior Court. See also New Jersey Practice Volume 37, Administrative Law and Practice Section 7.29. I **CONCLUDE** the Office of Administrative Law does not have jurisdiction to enforce the 2008 settlement agreement. I further **CONCLUDE** this entire controversy was brought in the wrong forum for determination and therefore must dismiss this action. As a result of this dismissal the application for consolidation becomes moot.

ORDER

For the reasons set forth herein I **ORDER** this action be **DISMISSED** without prejudice. I further **ORDER** the request for consolidation be **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.

February 28, 2011
DATE

JOHN SCHUSTER III, ALJ

Date Received at Agency: 2/28/11

Date Mailed to Parties: 2/28/11

/cad

147-11

J.F.L. on behalf of minor child M.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

On May 11, 2009, the petitioner filed an appeal challenging a two-day in-school suspension imposed upon his son by respondent Board, and sought expungement of the discipline from M.L.'s student record. The suspension occurred on December 11 and December 12, 2008. The Board filed a motion to dismiss the matter, asserting that the petition was not timely filed pursuant to *N.J.A.C.* 6A:3-1.3(i).

The ALJ found that: in this case, the ninety-day period in which a petition of appeal may be filed began to run, at the very latest, on January 8, 2009 – the date upon which petitioner was sent written notice that the suspension was upheld; the petition was filed beyond the ninety-day time period and is not timely; and no exceptional or compelling circumstances were presented to justify relaxation of the rule. Accordingly, the ALJ granted the Board's motion to dismiss the appeal.

Upon full consideration, the Commissioner concurred with the ALJ for the reasons detailed in the Initial Decision, 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.

April 12, 2011

OAL DKT. NO. EDU 619-10
(EDU 2996-09 on remand)
AGENCY DKT. NO. 96-5/09

J.F.L. on behalf of minor child M.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

Upon review of the record of this matter and the Initial Decision on remand of the Office of Administrative Law (OAL),[1] the Commissioner concludes that the record supports the determination of the Administrative Law Judge (ALJ) that petitioner's appeal was untimely. The Commissioner therefore concurs that respondent's motion to dismiss the appeal should be granted, and adopts the Initial Decision dismissing the petition as the final decision in this case.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4|12|11
Date of Mailing: 4|12|11

[1] No exceptions to the Initial Decision have been filed by the parties.

[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 GRANTING
MOTION TO DISMISS
OAL DKT. NO. EDU 619-10
AGENCY DKT. NO. 96-5/09

J.F.L. ON BEHALF OF M.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF AUDUBON, CAMDEN COUNTY,
Respondent.

Matthew S. Wolf, Esq., for petitioner (Pappas and Wolf, attorneys)

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

Record Closed: February 28, 2011 Decided: March 4, 2011

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

STATEMENT OF THE CASE

In this matter, J.F.L. on behalf of M.L. (petitioner) appeals the two-day suspension imposed by the Borough of Audubon School District (Board) of his son and seeks the expungement of the record.

PROCEDURAL HISTORY

On May 11, 2009, petitioner filed a Verified Petition appealing the two-day suspension (P-1). On May 27, 2009, in lieu of an Answer, the Board filed a motion to dismiss asserting the petition was not timely filed (R-1). On September 17, 2007, the Board filed an Answer to Petition. On June 12, 2009, the case was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case.

On January 7, 2010, a motion to dismiss was granted in favor of the Board. On February 22, 2010, the Commissioner of Education remanded the case back to the OAL. On March 9, 2010, the case was transmitted back to the Office of Administrative Law (OAL) where it was filed as a contested case.

Numerous telephone conferences were held, and the attorney for the petitioner requested additional time to file opposition to the motion for summary decision. On February 24, 2011, the brief was received from the petitioner. On Febraury 28, 2011, a reply brief was received from the Board.

STATEMENT OF FACTS

M.L. was given an in-school suspension on December 11, 2008 and December 12, 2008 after an incident occurred involving him drawing a swastika on a desk and making an offensive remark to another student. On December 12, 2009, petitioner was advised of the in-school suspension and appealed the suspension to the Board of Education on December 30, 2009. On January 8, 2009, the Superintendant issued a letter sustaining the suspension (R-1). On January 15, 2009, the petitioner sent an appeal to the Board (P-1). The Board took no action on this letter. On May 11, 2009, petitioner filed an appeal with the Commissioner of Education, which was more than 140 days after the suspension and more than 120 days after the decision by the Superintendant.

Petitioner asserts that the ninety days should not run because the Board took no action on the January 15, 2009 letter. The Board asserts that they would have to render a decision by February 6, 2009, and that would be the latest time to begin the ninety-day period. The right to appeal then would have ended on May 7, 2009.

CONCLUSIONS OF LAW

N.J.A.C. 6A:3-1.3(i) provides that a petitioner filing an appeal from the action or inaction of a board of education must 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. . . ." The ninety-day rule expresses a public policy that favors a measure of repose to school districts. It allows for the proper and efficient administration of the school laws. 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. Kaprow v. Bd. Of Ed. Of Berkeley Township, 131 N.J., 572, 582 (1993).

Although this provision does not address the type of notice that may be considered "adequate notice" under the rule, the New Jersey Supreme Court has held that "adequate 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 Township Bd. of Educ., 131 N.J. 572, 597 (1993). Therefore, the ninety-day limitation period for commencing an action begins to run when the "plaintiff learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action." Id. at 587, citing Burd v. New Jersey Tel. Co., 76 N.J. 284, 291 (1978). Stated differently, the ninety-day period begins when a petitioner learns of facts that would enable him or her to file a timely claim. Kaprow v. Berkeley Township Bd. of Educ., supra, 131 N.J. at 588-89.

The ninety-day requirement has been strictly followed and applied almost without exception. Regardless of whether the Board has complied with statutory, administrative or regulatory requirements, the petitioner is required to file the petition no later than

ninety days after the receipt of notice of the decision. Portee v. Newark Board of Educ., 94 N.J.A.R. 2d (EDU) 381, 383.

The ninety-day rule may only be relaxed under exceptional circumstances or if there is a compelling reason to do so. Kaprow v. Berkeley Township Bd. of Educ., supra, 131 N.J. at 590; DeMaio v. New Providence Bd. of Educ., 96 N.J.A.R. 2d (EDU) 449, 453. As a general rule, relaxation will not be permitted unless strict adherence would be inappropriate, unnecessary or where injustice would occur. Ibid. In this regard it has been held that the ninety-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." Bogart v. Board of Educ. of the City of East Orange, OAL Dkt. No. 6245-82 (January 26, 1983), aff'd by Commissioner (March 14, 1983).

On January 8, 2009, the petitioner was sent written notice that the suspension was upheld. At that time, the ninety-day period within which to file his appeal began to run. The petitioner did not file an appeal until May 11, 2009. Even arguing that the January 15, 2009, letter to the Board tolled the ninety-day period, it did not toll the time period forever. Even if the Board had until February 6, 2009, to respond, the ninety-day period expired four days before the petition was filed.

The crux of the petitioner's argument is that since that Board did not respond to petitioner's January 15, 2009 letter, there was no final action to begin the ninety-day period. The Board asserts that time period begins upon the action or lack of action of the Board of Education, and for purposes of this motion, the Board was required to take action by Febraury 6, 2009, which would then begin the ninety-day period.

N.J.A.C. 6A:32-7.7(b) states that if the appeal is made to the district board of education, a decision shall be rendered within twenty days. Even if the Board failed to take action, the decision would become final on February 6, 2009. Therefore, the petition is not timely and filed beyond the ninety-day time period. No exceptional or compelling circumstances have been presented to justify the relaxation of the rule.

No matter which date is used, January 8. 2009 (Superintendant letter), January 15, 2009 (petitioner's appeal to the Board), or February 6, 2009, the appeal would still not be timely.

Therefore I find that the petition of appeal was not filed within ninety days of the notice of his termination and conclude that the petition should be and is hereby dismissed with prejudice.

DECISION AND ORDER

The Board's motion to dismiss the appeal of the petitioner 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.

March 4, 2011
DATE

DONALD J. STEIN, ALJ

Date Received at Agency: March 4, 2011

Date Mailed to Parties: March 4, 2011

cmo

APPENDIX

EXHIBITS

For Petitioner:

P-1 January 15, 2009 appeal letter from Petitioner to Board

For Respondent:

R-1 January 8, 2009 letter from Superintendant to Petitioner

148-11

ANNA ADAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner alleged that her tenure rights were violated when she was involuntarily transferred from her position as Assistant Director for Human Resources/Personnel to the position of Supervisor of Physical Education and Health – a supervisory position within her area of certification – in October 2006. Petitioner filed her appeal in 2009. The respondent filed a motion to dismiss, contending that petitioner's claim is time-barred.

The ALJ found, *inter alia,* that: based on the petitioner's own admissions, the 90-day limitations period for filing an appeal began in October-November 2006 when petitioner was involuntarily transferred and, soon after, learned that her position had been given to another person; petitioner did not file her appeal until November 2009, considerably later than the statutory 90 days after the district's action in transferring her to the position of Supervisor of Physical Education and Health; and there is no evidence to support petitioner's assertion that she was led to believe that she could informally seek relief and not be concerned about the time limitation for filing her petition. Accordingly, the ALJ concluded that petitioner's appeal was untimely filed pursuant to *N.J.A.C.* 6A:3-1.3(i), and dismissed the petition.

Upon review and consideration, the Commissioner concurred with 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.

April 12, 2011

148-11

OAL DKT. NO. EDU 1023-10
AGENCY DKT. NO. 330-11/09

ANNA ADAMS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

Upon review of the Initial Decision of the Office of Administrative Law and the record,[1] the Commissioner adopts the Initial Decision as the final decision in this case – for the reasons set forth by the Administrative Law Judge. Accordingly, summary disposition is granted to respondent and the petition is dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4|12|11
Date of Mailing: 4|12|11

[1] Neither party has 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 1023-10

AGENCY DKT. NO. 330-11/09

ANNA ADAMS,

Petitioner,

v.

PATERSON BOARD OF EDUCATION,

PASSAIC COUNTY,

Respondent.

Joel M. Miklacki, Esq., for petitioner

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

Record Closed: January 27, 2011 Decided: March 9, 2011

BEFORE **CARIDAD F. RIGO,** ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Anna Adams alleges violation of her tenure as a result of an involuntary transfer to a supervisory position within her area of certification. Respondent Paterson Board of Education, in lieu of an answer to the petition, filed a

motion to dismiss based upon the expiration of the allowable time period for filing petitions for alleged violations of tenure rights.

Petitioner filed her petition alleging tenure violations on December 30, 2009. The matter was transmitted to the Office of Administrative Law, where on January 6, 2010, it was filed for determination as a contested case. The matter was initially assigned to Administrative Law Judge Sandra Robinson, and for administrative reasons the matter was transferred to the undersigned judge in September 2010. The matter was scheduled to be heard on September 13, 17, and 21, 2010; however, the parties acknowledged that the threshold issue was the timeliness of petitioner's appeal, and that issue had to be resolved prior to determining if there was a violation of petitioner's tenure rights. It was agreed that the timeliness issue could be decided on the parties' written submissions.

ISSUE

Was petitioner's claim timely filed?

FACTS

Petitioner, a tenured employee, alleges that in 2002 she was transferred to the position of Assistant to the Director of Human Resources by the respondent district. In 2003 she was promoted to the position of Assistant Director of Operations for Human Resources/Personnel, a tenured position in a non-bargaining unit. In 2006 petitioner applied for and was offered the position of Supervisor of Physical Education and Health; however, she declined the position. Petitioner alleges that she declined the position because it would have been a transfer to a non-tenured position with a salary freeze. Petitioner further alleges that despite her decision to reject the offer, later in October 2006 she was involuntarily transferred from her position as Assistant Director of Operations for Human Resources/Personnel to the position of Supervisor of Physical Education and Health, the same position she had declined. Petitioner further alleges

that this position was non-tenured and froze her existing salary until it was in line with the guidelines set forth in the Paterson Administrators Association agreement.

Petitioner further alleges that in October 2006 her former position of Assistant Director of Personnel was abolished, and a new position with identical duties and responsibilities was created and titled Assistant to the Director of Human Resources. In December 2006 respondent abolished all assistant director positions, including petitioner's prior position as Assistant Director of Operations for Human Resources/Personnel.

Petitioner further alleges that on November 2, 2006, Olga Reyes, a/k/a Olga Freda, was hired as petitioner's replacement in the title of Assistant to the Director of Human Resources. In June 2008 Ms. Freda's position was renamed Supervisor of Human Resources in Charge of Operations. According to the petitioner, the newly named position of Supervisor of Human Resources in Charge of Operations is administrative, while Ms. Freda's prior position as Assistant to the Director of Human Resources was clerical. Petitioner further alleges that one of Ms. Freda's primary job functions is to assist in the supervision of the Human Resources Department, which was petitioner's primary job function as Assistant Director of Operations for Human Resources/Personnel. According to petitioner, the job description for her prior position as Assistant Director of Operations for Human Resources/Personnel is identical to Ms. Freda's job description as Supervisor of Human Resources in Charge of Operations.

Petitioner contends that under the above-stated scenario she holds tenure and seniority rights to the position Ms. Freda is currently holding.

Respondent, only for purposes of the pending motion to dismiss, assumes that the above factual scenarios are true and does not contest the factual allegations.

ARGUMENTS OF COUNSEL

Petitioner contends that respondent's motion to dismiss should be denied. Petitioner argues that her claim is not barred by the 90-day rule of N.J.A.C. 6A:3-1.3(i) because her tenure right is an absolute statutory entitlement and therefore the 90-day rule is inapplicable, and that N.J.A.C. 6A:4-4.4(a) permits a relaxation of the 90-day rule to prevent injustices.

Petitioner contends that the violation of her tenure rights is a continuing one and it started when she was involuntarily and unilaterally transferred from her tenured position to her current non-tenured position.

Petitioner argues that the doctrine of equitable estoppel precludes respondent from asserting the 90-day rule. According to petitioner, respondent engaged in conduct that misled her to believe that the Board was going to address her grievances without her seeking court action or intervention.

Petitioner also argues that N.J.A.C. 6A:4-4.4(a) provides that the Commissioner may in his or her discretion relax any rule if its strict adherence is deemed inappropriate, unnecessary or would result in injustice.

Lastly, with respect to the threshold issue of the 90-day rule, petitioner presents that public policy favors disposition of matters based on the merits, and that dismissals based on procedural grounds should not be condoned.

Respondent argues that the petitioner's claim is completely barred by the 90-day rule as set forth in N.J.A.C. 6A:3-1.3(i). Respondent asserts that if petitioner claims that her tenure rights were violated when she was involuntarily transferred to the position of Supervisor of Physical Education and Health on or about October 16, 2006, then petitioner was required to bring her claim forward within 90 days of October 16, 2006. Instead, petitioner filed her claim on November 13, 2009.

LEGAL DISCUSSION

The threshold issue in this matter is whether petitioner's appeal was timely filed pursuant to N.J.A.C. 6A:3-1.3(i). The regulation states:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice or 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.

In Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572, 582 (1993), the New Jersey Supreme Court held that the Commissioner and the State Board of Education have the authority to establish a time limitation for the resolution of disputes arising under the school laws, and addressed the public-policy reasons behind the 90-day rule:

> 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. . . . N.J.A.C. 6:24-1.2(c) represents a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws.

In the instant case, petitioner first applied for the position of Supervisor of Physical Education and Health in 2006, and she was offered the position; however, on October 6, 2006, she declined the position, claiming that the position did not provide a salary increase, and that it would have been a transfer to a non-tenured position with a salary freeze. Later in October 2006 she was involuntarily transferred to the position of Supervisor of Physical Education and Health. And, on November 2, 2006, petitioner became aware that Olga Reyes, a/k/a Olga Freda, was hired as her replacement as Assistant to the Director of Human Resources. Therefore, petitioner was on notice no later than November 2, 2006, that she had perhaps been wronged.

Public policy, which favors providing school districts with "a measure of repose," must be weighed against the right of petitioners to be notified that the school district has taken a position adverse to them. Thus:

> Adequate 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. Moreover, adequate notice under the regulation must be sufficient to further the purpose of the ninety-day limitations period.
>
> [Kaprow, supra, 131 N.J. at 587.]

The Court explained the dual purposes of the limitations period as follows:

> The first is 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. The second purpose is "to penalize dilatoriness and serve as a measure of repose" by giving security and stability to human affairs.
>
> [Ibid.]

In Kaprow, the petitioner was notified by a secretary of the respondent board that someone else was given her job. The Court held that such informal notice satisfied the notice of a "final order, ruling, or other action." Id. at 588. Here, the District's actions were open and readily known by the petitioner. Petitioner admits in her certification that she was aware of the District's actions as early as October 2006.

Petitioner further admits that in July 2008 she contacted the State District Fiscal Monitor and advised him of her concerns that the District had violated her tenure and seniority rights. Yet again, petitioner failed to pursue this matter.

The 90-day requirement has been strictly followed and applied almost without exception. In North Plainfield Education Association v. Board of Education of North Plainfield Borough, 96 N.J. 587 (1984), the New Jersey Supreme Court found that the petitioners were on notice that they had not advanced on the salary scale when they

received their first paycheck for the subsequent school year. The Court held that it should have been obvious to the petitioners that they did not receive the benefit that they thought they should have and they were required to file their claim for a salary-scale credit within the 90 days following their receipt of their first paycheck.

The 90-day rule may only be relaxed under exceptional circumstances or if there is a "compelling" reason to do so. Kaprow, supra, 131 N.J. at 590. Cases that are excepted from the rule include cases involving "(1) important and novel constitutional questions; (2) informal or ex parte determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975). The facts herein do not meet any of these exceptions, nor do they merit a relaxation of the rule.

Petitioner further asserts that the time limitation should be waived because she was waiting for the results of the investigation of the State District Fiscal Monitor. The fact that she reported the alleged wrong to the State Monitor confirms that she was aware of her claim. I **FIND**, based on petitioner's own admissions, that the 90-day limitations period began in October–November 2006 when petitioner was involuntarily transferred and soon thereafter received notice that Olga Reyes, a/k/a Olga Freda, was given her position. Petitioner basically sat on her rights from October–November 2006 until November 2009, thereby far exceeding the 90-day limitations period. I further **FIND** that there is no evidence to support the assertion that petitioner was reasonably led to believe that she could continue to informally seek relief and not be concerned about the time limitation for filing her petition. She has failed to demonstrate that she was lulled into a false sense of security that continuing to argue and investigate her position would in some way extend the 90-day time limitation.

CONCLUSION

Having considered the arguments presented and the applicable regulations, policy and case law, I **CONCLUDE** that petitioner's claim was not timely filed and that the circumstances present here do not warrant a relaxation of the 90-day rule.

ORDER

It is hereby **ORDERED** that respondent's motion to dismiss is **GRANTED** and 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.

March 10, 2011
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: March 9, 2011

Date Mailed to Parties: March 10, 2011

lr

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

149-11

LENORE DOUGLAS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner's position as an Educational Media Specialist was eliminated – along with all other media specialists throughout respondent's district – in a reduction in force (RIF) at the end of the 2009-2010 school year. Petitioner holds both an educational services certificate, under which she was employed by respondent Board, and an instructional certificate with an endorsement as an elementary school teacher. She did not contest the RIF, but asserted that – by virtue of having taught students in her former school about the Bill of Rights and the Civil War over a period of approximately six weeks during her tenth year as a librarian – she has bumping rights over non-tenured employees holding instructional certificates with the elementary endorsement.

The ALJ found that: petitioner's testimony was not credible; during her tenure career in the Carteret school district, petitioner served as an educational media specialist and was not required to teach any subjects to elementary school students; petitioner failed to present any documentary evidence to support her claim that she was instructed to teach the Bill of Rights and the Civil War to grades K-4 students over a six week period during the 2009-2010 school year; although petitioner would certainly have tenure and bumping rights pursuant to her educational services certificate, she does not have bumping rights attached to her instructional certificate because she has never worked under the auspices of that teaching certificate; and petitioner is a tenured librarian, but not a tenured teacher. The ALJ denied petitioner's appeal and dismissed the case.

Upon a thorough and independent review of the record, 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.

April 12, 2011

OAL DKT. NO. EDU 10326-10
AGENCY DKT. NO. 479-8/10

LENORE DOUGLAS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX 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 March 16, 2011 in response to an Initial Decision mailed on March 2, 2011 – were untimely pursuant to *N.J.A.C.* 1:1-18.4 and, therefore, were not considered herein.[1]

Upon full consideration, the Commissioner concurs with the ALJ – for the reasons clearly presented in his Initial Decision – that petitioner does not have bumping rights over non-tenured elementary school teachers with instructional certificates.

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]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4|12|11
Date of Mailing: 4|12|11

[1] Counsel's faxed submission on behalf of petitioner states "[a]lthough the decision of the ALJ indicates that it was mailed to me on March 2, 2011, it was not delivered until Monday, March 7, 2011." As counsel – who is not a novice in this forum – should be well aware, the 13-day regulatory period for the filing of exceptions commences running with the mailing of the Initial Decision to the parties; the date the parties received such decision is of no import pursuant to this rule. Additionally, counsel's 24-page faxed submission included a copy of his 21-page post hearing brief before the Administrative Law Judge (ALJ). Parties are hereby reminded that all briefs submitted before the ALJ are already a part of the record before the Commissioner and, therefore, submission of duplicate copies is unnecessary.

[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 10326-10
AGENCY DKT. NO. 479-8/10

LENORE DOUGLAS,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,
Respondent.

Stephen E. Klausner, Esq., appearing for petitioner

Michael J. Heron, Esq., appearing for respondent (Lenox, Socey, Formidoni, Brown, Giordano, Cooley & Casey, attorneys)

Record Closed: January 28, 2011 Decided: March 1, 2011

BEFORE **JEFFREY A. GERSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Lenore Douglas (Douglas) was hired by the Carteret Board of Education (Board) on or about July 31, 2000, as an Educational Media Specialist. She had an educational certificate issued by the Commissioner of Education.

As of June 30, 2010, the Board struggling through budgeting difficulties, eliminated the positions of all media specialists throughout the district. Douglas does not contest the reduction in force but contends that she has bumping rights over non-tenured employees with instructional certificates with an endorsement as elementary school teachers.

TESTIMONY

Douglas testified that in her tenth year as a librarian for the Board, she was requested to do instructional work, specifically, teaching kindergarten through fourth grade students about the Bill of Rights and the Civil War. She contended in her testimony that she taught the two subjects for a combined total of approximately six weeks. She further contended that it was at the instruction of the district administrator and a principal that she conducted these lessons.

During her testimony, Douglas attempted to differentiate her responsibilities as a librarian from the additional responsibilities she contended she was assigned that incorporated her teaching certificate. Peculiarly, the actual existence of the instructional certificate with the elementary school endorsement which Douglas possessed had not been disclosed to the board of education even after a request in March 2010 for disclosure of all certificates. It was not until after Douglas was riffed that she focused on her instructional certificate contending that in the weeks prior to her being riffed, she had been instructing the K-4 students in the school district on both the Bill of Rights and the Civil War.

At the conclusion of Douglas' testimony and the resting of her case, the school board made a motion to dismiss contending that Douglas had not established any aspect of her contention with credible evidence.

The only document marked in evidence by Douglas was P-1, which she purported to be the lesson plan supporting her contention that she was teaching both

the Bill of Rights and the Civil War. During her cross-examination, she disclosed that P-1 was not prepared until after she was riffed and was composed to fortify the claims made in this litigation.

Douglas offered no corroboration of her claims that she was instructed to teach the Bill of Rights and the Civil War to K-4 students. She eviscerated her own credibility by contending that she had documentation establishing her claims that she failed to bring to the hearing and that a computer at school which had evidence supporting her claims had been deleted.

THE LAW

Pursuant to N.J.S.A. 18A:28-5, a teacher acquires tenure by 1) working in a position for which a teaching certificate is required, 2) holding the appropriate certificate, and 3) serving the requisite period of time. Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). A teaching staff member who serves for the statutory probation period under an instructional certificate gains tenure in the designated position of "teacher." Ellicott v. Frankford Board of Education, 251 N.J. Super. 342 (App. Div. 1991). As distinguish from tenure, seniority accrues in specific "categories" within the broad position of "teacher," which are fixed by regulation and dependent upon the specific endorsements held on the instructional certificate. N.J.S.A. 18A:28-10, -13; see N.J.A.C. 6A:9-9.2. In the event of a reduction in force, a tenured teachers re-employment rights extend to both the position in which the teacher attained tenure and all other positions within the scope of the teachers' instructional certificate and endorsements thereto, regardless of whether the teacher has actual experience in those areas. Dennery v. Board of Education of Passaic County Regional High School District No. 1, 131 N.J. 626 (1993).

There are three basic types of certificates that an educator may acquire: instructional, administrative, and educational services. N.J.A.C. 6A:9-5.2(a). Specific "endorsements" are designated under each type of certificate to coincide with educational subjects or positions that share, attributes and thus are grouped under a

particular certificate. Employment in a specific teaching position requires that the teacher hold the endorsement required for that position under the appropriate certificate. In this case, Douglas held two different certificates, one was instructional and other was educational services. During her tenure career with Carteret, Douglas served as an educational media specialist and was not required to teach any subjects to any elementary school students. Although Douglas would certainly have tenure and bumping rights pursuant to her educational service certificate and any endorsements thereto, she does not have bumping rights attached to her instructional certificate with an endorsement as an elementary school teacher because she has never worked under the auspices of that teaching certificate. She is a tenured librarian but not a tenured school teacher. The skills are not transferrable.

CONCLUSION

After nine years of service as a librarian, Douglas claims, very unconvincingly, that she was assigned instructional duties almost contemporaneously with a reduction in force which terminated all media specialist in the district. Douglas' contentions are quite clearly contrived and in the absence of any documentary evidence to support her marginally credible testimony, the conclusion is that Douglas does not have bumping rights over non-tenured elementary school teachers with instructional certificates.

ORDER

It is **ORDERED** that Lenore Douglas' appeal contending that she has bumping rights over non-tenured instructional elementary school teachers 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.

MARCH 1 2011

DATE

JEFFREY A. GERSON, ALJ

March 1, 2011

Date Received at Agency:

Date Mailed to Parties: MAR 02 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

jb

APPENDIX

WITNESSES:

For Petitioner:

Lenore Douglas

For Respondent:

None

EXHIBITS:

For Petitioner:

P-1 Lesson Plan

For Respondent:

None

150-11SEC

150-11

S.L.G. and M.S. obm D.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
CHARLES L. GRANATA, BONNIE GRANATIR, and ANTONIO CALCADO, LIVINGSTON BOARD OF EDUCATION, ESSEX COUNTY,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

The School Ethics Commission (Commission) found that respondents, members of the Livingston Board of Education, violated *N.J.S.A.* 18A:12-24.1(b) and (g) of the Code of Ethics for School Board Members when they released a complaint to the media that included confidential information relative to D.S., a student in the district. The Commission recommended the penalty of censure for each of the three respondents. The respondents filed no exceptions, nor did they appeal the Commission's underlying finding of violation.

The Commissioner, whose jurisdiction – in the absence of an appeal – is limited to reviewing the Commission's recommended sanction, adopted the Commission's recommendation that respondents be censured. Accordingly, the Commissioner ordered that the above named respondents be censured as school officials 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.

April 11, 2011

150-11SEC

AGENCY DKT. NO. 47-2/11
SEC DKT. NO. C 18-10

S.L.G. and M.S. obm D.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
CHARLES L. GRANATA, BONNIE GRANATIR, and ANTONIO CALCADO, LIVINGSTON BOARD OF EDUCATION, ESSEX COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.A.C.* 6A:28-10.12 for final determination on the Commission's recommended penalty, have been reviewed. Respondents did not file exceptions, nor was the Commission's underlying finding of violation appealed to the Commissioner pursuant to *N.J.A.C.* 6A:4.

Upon review, the Commissioner concurs with the penalty recommended by the Commission. Accordingly, IT IS hereby ORDERED that the above-named respondents be censured as school officials found to have violated *N.J.S.A.* 18A:12-24.1(b) and (g) of the Code of Ethics of School Board Members.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/11/11
Date of Mailing: 4/12/11

* 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.

S.L.G. AND M.S.[1]	:	**BEFORE THE SCHOOL**
AS PARENTS OF D.S., AND D.S,	:	**ETHICS COMMISSION**
	:	
v.	:	
	:	
CHARLES L. GRANATA, BONNIE GRANATIR,	:	
AND ANTONIO CALCADO	:	**DOCKET NO. C18-10**
LIVINGSTON BOARD OF EDUCATION	:	**DECISION**
ESSEX COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed on May 24, 2010 by S.L.G. and M.S., as parents of D.S., a minor, as well as D.S., asserting that Charles L. Granata, Bonnie Granatir, Antonio Calcado and Stanley Graboski,[2] members of the Livingston Board of Education ("Board") violated the School Ethics Act ("Act"). Specifically, the complainants assert that the respondents violated N.J.S.A. 18A:12-24.1(b) and (g) of the Code of Ethics for School Board Members when they released to the media student information concerning D.S. that was a part of a prior complaint which they filed against S.L.G. in March 2010, which was docketed by the Commission as C12-10.

On June 17, 2010, a Motion to Dismiss was filed on behalf of the respondents. Pursuant to N.J.A.C. 6A:28-8.2(a), a responsive statement was filed on behalf of the complainants on July 7, 2010. The parties were notified by letter dated June 21, 2010 that this matter would be placed on the agenda for the Commission's meeting on July 27, 2010 in order to make a determination regarding the respondents' Motion to Dismiss the complaint. At its meeting on July 27, 2010, the Commission denied the respondents' Motion to Dismiss the complaint. Pursuant to N.J.A.C. 6A:28-10.8(a), the Commission voted to retain this complaint for hearing at a later date.

By letter dated October 14, 2010, the parties were notified that this matter would be scheduled for hearing at the Commission's meeting on November 23, 2010. However, the respondents requested an adjournment of this hearing, which was granted. The hearing was thereafter rescheduled for the Commission's meeting on January 25, 2011.

The parties attended the meeting on January 25, 2011. The complainants were represented by Robert J. Fettweis, Esq. and the respondents were represented by David B. Rubin, Esq. After hearing all testimony, the Commission voted during the public portion of its meeting to find that the respondent violated N.J.S.A. 18A:12-24.1(b) and (g) of the Code of Ethics for

[1] Initials are used herein to protect the identity of the student in this matter.

[2] By letter dated October 20, 2010, the attorney for the complainants notified the Commission that the complainants dismissed all claims as to respondent Stanley Grabosksi.

School Board Members and to recommend a penalty of censure for the respondents, for the reasons set forth below.

SUMMARY OF THE RECORD

The complainants called John McEnroe as a witness. Mr. McEnroe is a former guidance counselor with the Livingston School District ("District") who retired as of July 1, 2010. He testified that he knew D.S. and was aware that he was interested in studying Hebrew. Although the District did not offer Hebrew as a course, an organization named Educere offered the course online. D.S. could take that online course, and then continue with his Hebrew studies at the community college. D.S. completed the online Hebrew course as reflected in Exhibit C-5, getting an "A" in the course.

Mr. McEnroe explained the need for Exhibit C-6, which is a "To Whom it May Concern" letter written by Mary Oates from the District. According to Mr. McEnroe, such a letter may be necessary to accompany a student's transcript when, for instance, a grade is not reflected on the transcript. McEnroe testified that he also sent letters to colleges for the purpose of recommending students and to clarify what may be in the transcript. Mr. McEnroe explained that other students had taken online courses and although they would get credit for the course, the grade would not appear on the student's transcript. Mr. McEnroe acknowledged under cross examination that the situation with D.S. was not handled any differently from the way it had been handled with other students.

Complainant S.L.G. testified that she is an attorney residing in Livingston; her husband is M.S., a co-complainant in this matter. She has a daughter in Middle School and her son, D.S. is now in college. In the 2008-2009 school year, D.S. was a junior at the Livingston High School and her daughter was in sixth grade. S.L.G. stated that Livingston is a five-member Board. She served as a Board member from 2001 to 2010. On two occasions she was the president and on one occasion she was the vice president. On April 20, 2010, she lost her bid for reelection.

S.L.G. testified that during the 2009-2010 school year, her relationship with fellow Board members was strained. She affirmed that during this time, the Superintendent had announced that he was not seeking renewal of his contract. S.L.G. attested that there was great disappointment about the Superintendent's announcement and a feeling that she was the reason he was leaving.

According to S.L.G., she filed her nominating petition for reelection on February 25, 2010 and Respondent Charles Granata was very vocal in supporting anyone running against her. Toward the end of March 2010, four members of the Board, Antonio Calcado, Stanley Graboski, Charles Granata and Bonnie Granatir, filed a complaint against her with the School Ethics Commission. S.L.G. testified that the complaint mentioned the issue with her son's online course. S.L.G. stated that she worked hard to repair her relationship with the Board and she was concerned that the search for a new Superintendent would be impacted by the filing of the March 2010 complaint. S.L.G further stated that, at the time, D.S. was involved in the college application process and she did not want articles in The Alternative Press about him. Therefore, S.L.G explained that she gave a public apology in an effort to keep her son "out of the picture."

However, the March 2010 complaint was filed and it included the issue with her son and the Superintendent. S.L.G. stated that the complaint made it seem that D.S. "was trying to take some flimsy course" and she, as a Board member, was trying to get him credit for it.

S.L.G. identified Exhibit C-1 as the Livingston Board's Student Records Policy #8330 and Exhibit C-2 as Livingston Board's Public Records Policy #8310. S.L.G. stated that she never provided written consent to the respondents in this matter to transfer any information about D.S.

S.L.G. testified about D.S.'s interest in developing fluency in Hebrew; she insisted that if he dropped his Spanish course, he must take Hebrew for credit. On October 27, 2008, S.L.G. sent an email to Liz Sanchez, the World Language Supervisor inquiring about options for taking Hebrew for credit. Ms. Sanchez responded on October 28, 2008, informing S.L.G. that Educere had an online Hebrew I course. (Exhibit C-3). Later, Ms. Sanchez informed S.L.G. that the Superintendent approved the request and that S.L.G could contact Educere to make all necessary arrangements. (Exhibit C-4). S.L.G. testified that she understood "approval" to mean that it would go on D.S.'s transcript, although she acknowledged that the email from Ms. Sanchez did not so state. D.S. dropped Spanish and completed the Hebrew course online. Exhibit C-7 is an email chain between S.L.G. and Lisa Yost, a learning coach from Educere, affirming that D.S. completed the course as of June 2009 and that a transcript would be forwarded to Livingston High School. S.L.G., upon receiving a copy of the transcript, notified Ms. Yost that because the transcript heading was "Whitmore Secondary School," she had concerns that it would not duly convey to colleges that D.S. "took a legitimate world language course in his junior year." (Exhibit C-7). Thereafter, S.L.G. had a conversation with the Superintendent and learned the school's position about not including grades for online courses within a student's transcript.

S.L.G. testified that The Alternative Press was an online news organization started by a Livingston High School graduate, Michael Shapiro, to focus on local issues. It was, according to S.L.G., an alternative to the The West Essex Tribune. She identified Exhibit C-8 as an email from Mr. Shapiro dated December 21, 2009 to all Board members asking questions about "tension" on the Board. Without naming D.S., the email makes reference to S.L.G.'s child and a decision made by the Superintendent that negatively impacted her child. Shapiro invited comment from the Board on "the situation." (Exhibit C-8) S.L.G. identified Exhibit C-10 as the comments submitted to The Alternative Press from Board members Charles Granata and Stan Graboski. The comments were forwarded to S.L.G., who stated that she made it "a policy to refrain from comment to the Alternative Press about any of my fellow Board members or their styles." (Exhibit C-9)

S.L.G. testified that, upon receiving the emails in Exhibit C-10, she was concerned that an article about her son would be run by The Alternative Press. In "a frantic move," she agreed to meet with Mr. Shapiro "off the record" to provide her perspective. She provided names of persons she termed "Board watchers" who had observed her in the nine years she served on the Board. Exhibit C-14 is an email from S.L.G to a member of the community asking if she would be willing to speak to The Alternative Press.

S.L.G. stated that on January 10, 2010, she received an email, identified as Exhibit C-15, from Mr. Shapiro, which included another list of questions. S.L.G. believed that The Alternative Press was moving forward on the issue with her child; she had heard that articles from The Alternative Press were being circulated. She agreed to issue an apology in the hope that the articles would stop. S.L.G. identified Exhibit C-19 as an agreement dated January 11, 2010 signed by her, Calcado, Granata, Graboski and Granatir. The statement attached to the agreement is an apology from S.L.G. (Exhibit C-19) The next day, S.L.G. received an email from The Alternative Press stating that "we have decided to put our investigation on hiatus" and there was no need to respond to the outstanding questions. (Exhibit C-20) According to S.L.G., two days later, Respondent Granata announced to The West Essex Tribune that S.L.G. was the reason the Superintendent was leaving.

S.L.G. affirmed that after filing her papers for reelection in February 2010, on March 22 or 23, 2010, Calcado, Granata, Granatir and Graboski filed a complaint against her. She identified Exhibit C-22 as an article published on March 25, 2010 by The Alternative Press which was captioned: "Four Members of Livingston Board of Education File Formal Ethics Complaints Against a Fifth Member, [S.L.G.]; [S.L.G.] Calls Complaints Baseless and Vows to Vigorously Contest Them." S.L.G. also identified Exhibit C-23 as an article published on April 1, 2010 by The Alternative Press captioned: "Four Board Members Release Statement Regarding Ethics Complaint, Allege [S.L.G.] was Notified of Intent to File Ethics Charges in Advance of Complaints Being Filed." (Exhibit C-23). As to Exhibit C-23, S.L.G. affirmed that when this was published, she had not yet received a copy of the complaint.

According to S.L.G., Calcado, Granata, Granatir and Graboski issued a press release on April 12, 2010 which was directed to a number of media sources: The Star Ledger, The Alternative Press, The West Essex Tribune, the Livingston Navigator and the Livingston Press. S.L.G. testified that she found the press release at Exhibit C-24 on Patch.com. Along with the press release, Calcado, Granata, Granatir and Graboski provided a copy of the complaint they had filed against S.L.G. Thereafter, The Alternative Press sent S.L.G. an email seeking a response to the complaint. (Exhibit C-25) S.L.G. testified that The West Essex Tribune also asked her for a response to the complaint.

S.L.G. identified Exhibit C-26 as the "redacted" version of the complaint which Calcado, Granata, Granatir and Graboski provided to The Alternative Press. This version of the complaint, with addenda, was, and according to S.L.G., still is, posted online. According to S.L.G., the complaint itself, as well as Addendum C of the complaint, although redacted, included information about her son. She testified that she was "fit to be tied," not only because it included information about D.S., but because it was not an accurate description of events. S.L.G. identified Exhibits C-27, C-28 and C-29 as articles that appeared in The West Essex Tribune, Newark Star Ledger and The Alternative Press, respectively, on April 15 and 16, 2010, after the complaint was released.

On cross-examination, S.L.G. acknowledged that she was upset when she learned that the Hebrew course would not be reflected on her son's transcript and she discussed the matter with the Superintendent. She admitted that she attempted to show the Superintendent that there was precedent for allowing the course to appear on the transcript by providing him with a copy of

another student's transcript and acknowledged that on June 29, 2009, she provided the Superintendent, via email, with a copy of the other student's transcript. She insisted that the transcript had no identifying information. In response to further questioning on this issue, S.L.G. testified that she had the permission of the student's parents to be in possession of the transcript. In this connection, she explained that, as a member of the Livingston Municipal Alliance Committee, she was reviewing students' applications for scholarships. As to whether she used the student's transcript for the intended purpose, S.L.G replied that she was in possession of it and the Superintendent had the ability to use it anyway. S.L.G. acknowledged that the student's transcript reflected enrollment at another school for an entire year, rather than enrollment for a single course. She denied that when she spoke to the Superintendent about this matter, he gave her options for addressing the disagreement, such as appealing the matter to the Board or developing a new policy.

S.L.G. further acknowledged that she gave a statement to The West Essex Tribune; although she did not write the article, she is quoted therein. She identified that statement as included in Exhibit R-2, published April 8, 2010. She admitted that she did not discuss every issue raised in the C12-10 complaint, but stated that it was her understanding that much of what was in the complaint did not meet "the statute of limitations" and she did not need to "drag up things" that did not meet the limitations period. Therefore, the statement implied that the central theme of the complaint was the issue of how she dealt with parents.

Pursuant to N.J.A.C. 6A:28-8.3(d), upon completion of complainants' case, the respondents' counsel moved to dismiss the complaint. After hearing arguments from the parties, the Commission asked the parties to leave the room so that it could deliberate. The Commission denied the Motion to Dismiss. Upon resumption of the hearing, the respondent's counsel called his witnesses, as summarized below.

Dr. Brad Draeger is the Superintendent of the Livingston School District; he was familiar with the circumstances surrounding the transcript issue relative to D.S. He discussed the matter with the Assistant Superintendent. He said that the granting institution would provide the course transcript, but that no child had ever had an outside course reflected on his/her transcript. Although there was no policy so stating, this was the District's practice. Dr. Draeger recalled a discussion by telephone with S.L.G., after which S.L.G. sent him another child's transcript showing credit for courses taken outside the District. Dr. Draeger distinguished the student's transcript as one which reflected an entire year of outside study. Dr. Draeger testified that he made it clear to S.L.G. that he was treating her as a parent and he would not deviate from past practice. He provided S.L.G. with two options: either appeal his decision to the Board or work on a new Board policy. Dr. Draeger testified that the phone call with S.L.G. became heated when he maintained that he would not do for her what he does not do for others. The call did not end pleasantly.

On cross-examination, Dr. Draeger acknowledged that as Superintendent, he would have had access to the transcript that was sent to him by S.L.G. He confirmed that at the time, the Board did not have a policy about dealing with outside courses, although he stated that one is evolving in light of changing graduation requirements. Dr. Draeger further acknowledged that he "alerted" Granata and Granatir that a Board member was requesting an exception for her child

and he informed that Board member to appeal his decision or formulate a policy. He mentioned that the child was a High School student and he was treating the parent/member as he treated other parents. He did not recall whether the student's name was used.

Respondent Bonnie Granatir was called to testify that Exhibit C-24 offered by the complainants was not the version of the press release that the complainants in C12-10 prepared and she had no way of knowing whether this was still available on the internet. The "abbreviated" version prepared by herself, along with Calcado, Granata and Graboski is at Exhibit R-3. According to Granatir, this is the version she gave to The Alternative Press. She testified that the press release was drafted by Charles Granata; the others edited it and they agreed to the final, abbreviated version.

Complainants' Exhibits

C-1	Livingston Board of Education Student Records Policy #8330
C-2	Livingston Board of Education Public Records Policy #8310
C-3	Email, Liz Sanchez to S.L.G., 10/28/08 and prior email in the chain
C-4	Email, Liz Sanchez to S.L.G. 11/11/08 and prior email in chain
C-5	Whitmore School Secondary Transcript for DS
C-6	Letter, Mary Oates "To Whom it May Concern" dated 6/29/09
C-7	Email, Lisa Yost to S.L.G., 6/24/09 and prior emails in chain
C-8	Email, The Alternative Press to S.L.G. et al., 12/21/09
C-9	Email, S.L.G. to The Alternative Press, 1/5/10
C-10	Email, The Alternative Press to S.L.G., 1/6/10 and prior emails in the chain
C-14	Email, S.L.G. to Alisa Hare, 1/8/10 and prior emails in chain
C-15	Email, Michael Shapiro to S.L.G., 1/10/10
C-19	Settlement Agreement, 1/11/10 and attached statement.
C-20	Email, The Alternative Press to S.L.G., 1/12/10
C-22	Article, The Alternative Press, 3/25/10
C-23	Article, The Alternative Press, 4/1/10
C-24	Press Release 4/12/10
C-25	Email, The Alternative Press to S.L.G., 4/13/10
C-26	"Redacted" complaint, as released to the Press, dated 4/12/10
C-27	Article, West Essex Tribune, 4/15/10
C-28	Article, Newark Star Ledger, 4/15/10
C-29	Article, The Alternative Press, 4/16/10

Respondents' Exhibits

R-2	Articles, West Essex Tribune, 3/25/10; 4/1/10, 4/8/10 and 4/15/10
R-3	Press Release, 4/12/10

FINDINGS OF FACT

The Commission finds the following facts to be material and undisputed in this matter:

1. Respondents Charles L. Granata, Bonnie Granatir and Antonio Calcado are three members of a five-person Board of Education.

2. S.L.G. was a member of the Board from 2001 until 2010. During the 2008-2009 school year, she had one child, D.S., attending Livingston High School.

3. On January 11, 2010, S.L.G., together with Charles L. Granata, Bonnie Granatir, Antonio Calcado and Stanley Graboski, signed an agreement which stated, in relevant part,

> All Board members will discontinue individual communication with The Alternative Press and any other media outlet with respect to this issue.
>
> All Board members will retract any statements which have been made to The Alternative Press which have yet to be printed.
>
> In the event that The Alternative Press or any other media outlet runs an article regarding the issue of [S.L.G.'s] son's high school transcript, the Board will issue a joint statement defending the confidentiality of all students. (Exhibit C-19 at paragraphs 2, 3 and 5).

4. In February 2010, S.L.G. filed her nominating petition to run for re-election in April 2010. She did not win reelection to the Board.

5. On March 25, 2010 Antonio Calcado, Stanley Graboski, Charles L. Granata and Bonnie Granatir, members of the Livingston Board of Education, filed a complaint against S.L.G. alleging that she violated the School Ethics Act. This complaint was docketed by the School Ethics Commission as C12-10.[3] It included eight charges.

6. On April 8, 2010, an article appeared in The West Essex Tribune which included a statement from S.L.G. The statement referred to the complaint as "frivolous." S.L.G. stated, in part:

---

[3] A Motion to Dismiss was filed on behalf of S.L.G. in C12-10. The Commission voted to grant S.L.G.'s Motion to Dismiss all allegations in the complaint, with the exception of the allegations set forth in Count 1 that the respondent violated N.J.S.A. 18A:12-24.1(e) and N.J.S.A. 18A:12-24.1(g). A hearing on the remaining claims was scheduled for October 26, 2010. On October 19, 2010, the complainants notified the Commission that they were withdrawing the complaint. Consequently, the remaining allegations in C12-10 were administratively dismissed.

> This dispute could be best classified as a disagreement over the interpretation of a Board member's role when advocating for students and community members.
>
> I can say with confidence that it stems from my strong commitment to advocate for community members' concerns and in no way contradicts the high ethical standards the community should demand from me as an elected official.

The statement referenced concerns that S.L.G. had received from parents and how she responded to them. (Exhibit R-2)

7. On April 12, 2010, Antonio Calcado, Stanley Graboski, Charles L. Granata and Bonnie Granatir, issued a press release to the following sources: The Star Ledger, The Alternative Press, The West Essex Tribune, the Livingston Navigator and the Livingston Press. (Exhibit R-2) The press release stated, in relevant part:

> Four members of the Livingston Board of Education who recently filed formal ethics complaints against the fifth member [S.L.G.] will release the full complaint to the media today. The media outlets listed above will receive the entire substance of the charges sent on March 23 to the School Ethics Commission in Trenton. Although the complainants have repeatedly stated that they wished the case to be settled privately before the Ethics Commission, the documents are being issued in order to end speculation regarding the basis and substance of the charges, and to dispel inaccuracies that have been published relating to the charges. The four members stress their disappointment that [S.L.G.] has chosen to divulge selected portions of the complaint, which have been taken out of context. (Exhibit R-2)

8. Along with the press release, the respondents released a redacted version of the complaint docketed as C12-10 to the media, as set forth in Exhibit C-26.

9. The complaint that was released to the media included the following allegation:

> It appeared to individual Board members that the respondent, acting as an individual, engaged in antagonistic, retaliatory behavior directed at the Superintendent of Schools beginning in June 2009, pursuant to her dissatisfaction with an educational decision that the Superintendent made on behalf of her child. *** (Exhibit C-26 at p. 5)

10. Page 6 of the complaint referred to Addendum C, which stated:

> It was reported to several Board members by [S.L.G.] that sometime in May 2009, she approached the Superintendent and asked him to consider adding a grade (for a foreign language course taken via an online educational service) to [STUDENT'S NAME REDACTED]'s transcript.
>
> Apparently, the Superintendent advised [S.L.G.] that he did not feel that the course should be added to the transcript, as the district could not verify that the final examination met the criteria of an equivalent in-house Livingston HS course. Further, he explained that the district lacked a policy governing the granting of transcript credit for such courses. He told [S.L.G] that in the interest of fairness he had made the same decision in [STUDENT'S NAME REDACTED]'s case that he would have made for any other student in the same situation.
>
> According to [S.L.G.] (and verified by the Superintendent), [S.L.G.] did not accept the Superintendent's verdict. She had heated discussions with him, pleading her case for the grade to be added to the transcript. The Superintendent declined to change his decision, offering two avenues of appeal to [S.L.G.]: bring the matter before the full Board for an appeal (as any [NAME OF GROUP REDACTED] has the right to do), and/or propose that the Board bring the process of granting transcript credit for online courses to a full Board policy discussion. [S.L.G.] rejected both suggestions.*** (Exhibit C-26 at p. 22).

11. The Board has a Student Records Policy #8330 which states, with respect to the access of student records:

> In order to fulfill its legal responsibility as a Board, the Board has access through the Superintendent or designee to information contained in a student's record. Information shall be discussed in executive session unless otherwise requested by the parent or adult student. (Exhibit C-1 at p. 4, paragraph 6).
>
> Organizations, agencies, and persons from outside the school if they have the written consent of the parent or adult student, except that these organizations, agencies, and persons shall not transfer student record information to a third party without the written consent of the parent or adult student. (Exhibit C-1 at p. 5, paragraph 12).

12. The Board's Policy #8330 further states, "In providing access to student records in accordance with N.J.A.C. 6A:32-7.5, individuals shall adhere to requirements pursuant to

N.J.S.A. 47:1A-10, the Open Public Records Act (OPRA) and 34 CFR Part 99, the Family Educational Rights and Privacy Act (FERPA)." (Exhibit C-1 at p. 6).

13. The Board's Public Records Policy #8310 states, as to public records, "confidential and exempt records" which are exempt from public review include, "information concerning individual pupil records or information regarding grievance or disciplinary proceedings against a pupil to the extent disclosure would reveal the identity of the pupil." (Exhibit C-2 at p. 2).

ANALYSIS

The complainants bear 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 complainants allege that the respondents violated N.J.S.A. 18A:12-24.1(b) and (g). The complainants argue that when the respondents released the complaint docketed as C12-10 to the media on April 12, 2010, they publicly disseminated confidential information relative to D.S., then a student at the Livingston High School. Moreover, they contend that the information in the complaint was both inaccurate and misleading, as it suggested that the Hebrew course taken by D.S. was substandard and not pre-approved by the Superintendent. The complainants further assert that the respondents filed the complaint and released its contents to the media in an attempt to defeat S.L.G.'s re-election campaign, as there had been a strained relationship between S.L.G and the other four members of the Board during the 2009-2010 school year. They argue that, notwithstanding the redactions, the complaint released to the media clearly identified D.S. as the student referenced in Addendum C.

The respondents concede that the redacted version of the complaint was released to the media on April 12, 2010, but they argue that this release was necessary to counter the statement that S.L.G. made to The West Essex Tribune, published on April 8, 2010, which left a reader with the impression that the charges in C12-10 solely concerned S.L.G.'s advocacy for community members. Thus, they reason that S.L.G. "opened the door;" that is, when S.L.G. misrepresented to the public the nature of the complaint, respondents were compelled to release a full copy of the complaint so that no one would be misled. In this connection, respondents argue that as parties to the C12-10 complaint, they had a "qualified privilege" to release the complaint to the community, since the community shared a common interest in knowing the truth about the substance of the complaint.[4] Finally, respondents contend that the redacted version of the complaint deleted S.L.G.'s son's name and minimally references the transcript issue focusing primarily on S.L.G.'s reaction to the issue.

[4] Respondents argued that, "Our courts have recognized a qualified privilege 'if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information another sharing the common interest is entitled to know.' Gallo v. Princeton Univ., 281 N.J. Super. 134, 143 (App. Div.) (quoting Restatement (Second) of Torts § 596), certif.. denied, 142 N.J. 453 (1995); see also Murphy v. Johns-Manville Prods. Corp., 45 N.J. Super 478 (App. Div.), certif.. denied, 25 N.J. 55 (1957).***" (Respondents' Brief, January 13, 2011 at p. 3).

The Commission first considers 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 Commission finds that the undisputed facts on this record establish that by releasing the complaint to the media on April 12, 2010, the respondents took action to make public, reveal or disclose information that was confidential in accordance with board policies, procedures or practices. Specifically, the complaint referenced S.L.G.'s "dissatisfaction with an educational decision that the Superintendent made on behalf of her child." *** (Exhibit C-26 at p. 5). Even the redacted version of Addendum C provided the following information about S.L.G.'s child: (1) he attended Livingston High School (S.L.G. testified that she had only one child in the high school at the time); (2) he took an online foreign language course; (3) his grade for the online course did not appear on his transcript; (4) the Superintendent advised S.L.G. that he did not feel that the course should be added to the transcript; (5) S.L.G. did not accept the Superintendent's decision about D.S.'s transcript; and (6) the Superintendent offered S.L.G. two avenues of appeal regarding this transcript dispute.

The Commission further finds that, even granting that the respondents enjoyed a "qualified privilege" to share information with the media and the community, such a privilege may not be carried out in disregard of a student's regulatory and statutory rights to confidentiality. If the respondents felt compelled to clarify "misrepresentations" made by S.L.G., they could have released a summary of the complaint which did not reveal information about the student's academic record. Thus, the Commission finds that the complainants established that the respondents violated the confidentiality provision of N.J.S.A. 18A:12-24.1(g). In so doing, the Commission finds no cause to reach to the complainants' allegations that the respondents also violated the "inaccuracy" provision of N.J.S.A. 18A:12-24.1(g).

The Commission next considers the complainants' allegation that the respondents violated N.J.S.A. 18A:12-24.1(b), which provides:

> I will make decisions in terms of the educational welfare of children and will seek to develop and maintain public schools that meet the individual needs of all children regardless of their ability, race, creed, sex, or social standing.

The Commission's regulations require that:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(b) shall include evidence that the respondent(s) willfully made a decision contrary to the educational welfare of children, or evidence that the respondent(s) took deliberate action to obstruct the programs and policies designed to meet the individual needs of all children, regardless of their ability, race, color, creed or social standing. N.J.A.C. 6A:28-6.4(a)2.

The Commission finds that this record supports the conclusion that the respondents willfully made a decision contrary to the educational welfare of D.S. As Board members, the respondents are entrusted with confidential information about students. Notably, when the respondents released the C12-10 complaint to the press, they redacted the student's name so as to indicate that they recognized that the complaint contained information about a student's record. Yet, they failed to consider, or they failed to take the time to consider, that the redaction was insufficient, under these circumstances, to protect the student's identity, for the reasons set forth above under the analysis of N.J.S.A. 18A:12-24.1(g). In this connection, the Commission does not rule out the complainants' contention that the release of the complaint was strategically timed for days before the April election. Unfortunately, it appears to the Commission that in the respondents' eagerness to redress the conduct of S.L.G., they acted with indifference to her son's rights. Accordingly, the Commission finds that the complainants established that the respondents violated N.J.S.A. 18A:12-24.1(b).

Finally, the Commission notes that there was much testimony provided in this matter about the circumstances surrounding the release of the complaint. While that testimony provided a context, ultimately, it offered almost no information that was of legal consequence to the Commission's determination. Thus, although the Commission did not find S.L.G.'s testimony as to these background events to be convincing and while the Commission acknowledges that counsel for the respondents deftly impeached what minimal credibility S.L.G. offered, the Commission is nevertheless constrained to find that the determinations herein are essentially driven by the undisputed fact of the release of the complaint.

DECISION

The Commission finds that respondents, Charles L. Granata, Bonnie Granatir, Antonio Calcado, violated N.J.S.A. 18A:12-24.1(b) and (g) of the Code of Ethics for School Board Members.

PENALTY

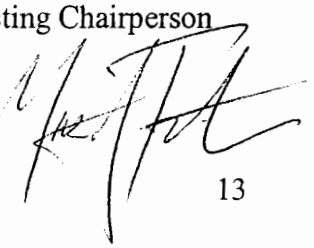
If a violation of the Act is found, the Commission may recommend to the Commissioner of Education the reprimand, censure, suspension or removal of the school official. Here, the Commission recommends that the Commissioner impose a penalty of censure on each of the three respondents. In I/M/O Edward Vickner, Ewing Township Bd. of Ed., Mercer County, C36-01(May 28, 2002), Commissioner of Education Decision No. 272-02SEC, decided July 16, 2002, the Commission found that a Board member violated N.J.S.A. 18A:12-24.1(e) and (g) when he sought out and disclosed student information to the Board after being advised by the Superintendent that the information was confidential. The Commission recommended a penalty of censure, which was approved by the Commissioner. While, in the instant matter, the Commission did not find a violation of N.J.S.A. 18A:12-24.1(e), it did find a violation of N.J.S.A. 18A:12-24.1(b), along with N.J.S.A. 18A:12-24.1(g). By recommending a penalty of censure, the Commission seeks to impress upon these respondents the seriousness of their breach of duty to abide by the Code of Ethics for School Board Members.

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.

Acting Chairperson

Mailing Date: February 23, 2011



Resolution Adopting Decision – C18-10

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 January 25, 2011; and

Whereas, at its meeting on January 25, 2011, the Commission found Respondents Charles L. Granata, Bonnie Granatir, Antonio Calcado violated N.J.S.A. 18A:12-24.1(b) and (g) of the Code of Ethics for School Board Members; and

Whereas, the Commission recommends to the Commissioner of Education a penalty of censure for these respondents; and

Whereas, at its meeting on February 22, 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.

Acting Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on February 22, 2011.

Joanne Boyle
Executive Director

151-11

IN THE MATTER OF THE TENURE HEARING	:	
OF NATALIZIA BUSNELLI-ALJALLAD	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN OF	:	DECISION
SECAUCUS, HUDSON COUNTY.	:	

SYNOPSIS

The petitioning Board certified charges of conduct unbecoming, incapacity and other just cause against respondent – a tenured secretary employed as administrative assistant to the Superintendent of Schools – for, *inter alia*: sexually harassing a school resource officer employed at Secaucus High School, making false statements about the activities of sitting Board members, and slandering and defaming members of the Board by falsely implicating them in crimes of official misconduct. Respondent admitted making false statements to the school resource officer, but contended that – while it was technically wrong to lie – her behavior was essentially harmless and should not have provoked the reaction of those around her.

The ALJ found, *inter alia,* that: the respondent fabricated a complex tale in which she implicated two Board members in serious misconduct in an attempt to garner attention from and cultivate a relationship with the school resource officer by leading him to believe that he was being investigated by members of the Board; respondent's testimony was not credible, while witnesses for the Board were credible; and the Board carried its burden to prove that respondent is guilty of unbecoming conduct. Accordingly, the ALJ ordered that respondent be dismissed from her tenured employment.

Upon independent review of the record the Commissioner concurred with the ALJ's findings, noting that the proven charges in this matter denote outrageously inappropriate behavior clearly inimical to the professional obligations of a confidential secretary in the office of the Superintendent of Schools. 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.

April 12, 2011

151-11

OAL DKT. NO. EDU 6890-10
AGENCY DKT NO. 119-6/10

IN THE MATTER OF THE TENURE HEARING :
OF NATALIZIA BUSNELLI-ALJALLAD :
SCHOOL DISTRICT OF THE TOWN OF :
SECAUCUS, HUDSON COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

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 – 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 herein.

Respondent's exceptions essentially recast and reiterate her arguments advanced before the Administration Law Judge (ALJ) below. As it is determined that such arguments were considered and adequately addressed in the Initial Decision, they will not be revisited here.

Upon a considered review of the entire record in this matter – which included transcripts of the hearing conducted at the OAL on October 15, October 26, December 6, December 22, and December 29, 2010 – the Commissioner concurs with the Administrative Law Judge (ALJ) that the District has sustained its burden of establishing respondent's unbecoming conduct as specified in Charges 1, 2, 3, 4 and 6 and that respondent's removal from her tenured position is the appropriate penalty.

In so determining, the Commissioner has given full consideration to all evidentiary proofs comprising the record and is cognizant of the importance of the ALJ's assessment of the credibility of the witnesses. This being the case – and 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 upon 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 concludes that the record amply supports the ALJ's ultimate determination with respect to respondent's credibility, *i.e.* – "I did not deem Aljallad's testimony to be credible, in large part because she is an admitted and shameless prevaricator," (Initial Decision at 10) – and her concomitant fact-finding analysis and conclusions as to the truth of the District's allegations.

Turning to the appropriate penalty to be imposed in this matter, the Commissioner is mindful that "[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.* 185; *In re Hearing of Kittell, Little Silver School District*, 1972 *S.L.D.* 535, 541; *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967).

The Commissioner finds that the proven charges in this matter denote outrageously inappropriate behavior clearly inimical to the professional obligations of a confidential secretary in the office of the Superintendent of Schools. Also particularly

disquieting is that, notwithstanding that respondent's actions here disrupted the lives – both professionally and personally – of a number of individuals, she has expressed no remorse or contrition nor does she appear able or willing to understand and appreciate the egregiousness of her behavior.[1] These factors lead to the inevitable conclusion that – should respondent be returned to her position – the Commissioner could not harbor any confidence that she would conform her behavior to that dictated for one in such a position which – by its very nature – demands the utmost candor and trustworthiness.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. Natalizia Busnelli-Aljallad is hereby dismissed from her tenured position with the School District of the Town of Secaucus.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/12/11

Date of Mailing: 4/12/11

[1] Indeed, as recognized by the ALJ, "[a] theme in Aljallad's defense is that although it was technically wrong to lie, it was essentially harmless behavior that should not have provoked the reaction of those around her." (Initial Decision at 10)

[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 06890-10
AGENCY REF. NO. 119-6/10

IN THE MATTER OF THE TENURE HEARING OF NATALIZIA BUSNELLI–ALJALLAD, SCHOOL DISTRICT OF THE TOWN OF SECAUCUS, HUDSON COUNTY.

Stephen R. Fogarty, Esq., for petitioner (Fogarty and Hara, attorneys)

Philip Feintuch, Esq., for respondent (Feintuch, Porwich and Feintuch, attorneys)

Record Closed: February 14, 2011 Decided: March 16, 2011

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Natalizia Busnelli-Aljallad (Aljallad) is employed by petitioner, the Secaucus Board of Education (the Board), as a secretary under tenure, pursuant to N.J.S.A. 18A:17-2. On April 14, 2010, tenure charges were filed with the Board and served on Aljallad. She filed a response, under oath, on April 28, 2010. On June 7, 2010, the Board determined that probable cause existed to credit the evidence in support of the charges, and that the charges, if so credited, warranted Aljallad's dismissal from her

employment. The Board suspended Aljallad without pay, in accordance with N.J.S.A. 18A:6-14.

On June 8, 2010, the Board certified charges of unbecoming conduct, incapacity, and other just cause against Aljallad pursuant to N.J.S.A. 18A:6-10 et seq. An answer was filed and the matter transmitted to the Office of Administrative Law (OAL) as a contested case on June 29, 2010. Hearings were conducted on October 15 and 26, 2010, and December 6, 22 and 29, 2010. A motion to dismiss made by counsel at the conclusion of the Board's case was denied on the record.

Via letter dated November 3, 2010, Aljallad moved for an order directing the Secaucus Police Department to release the personnel records of School Resource Officer (SRO) Reinaldo Cruzado. I directed that these records be released, subject to a protective order, on November 24, 2010. Cruzado had already completed his testimony, but my order indicated that if Aljallad wished to recall him after reviewing his personnel file, I would entertain a proffer of the anticipated testimony. I did not hear further from respondent's counsel until the final day of hearing, December 29, 2010, when he advised me that the police department had not complied with my order. I informed counsel that my order is not self-executing, but that if he wished to move in Superior Court to enforce it, I would continue to entertain a request to recall Cruzado, provided that his testimony was scheduled prior to February 14, 2011, the date upon which briefs were to be submitted. I heard nothing further from counsel.[1] Post-hearing briefs were submitted on February 14, 2011, at which time the record closed.

[1] In his post-hearing brief, Aljallad's counsel alludes to impediments to his ability to present his case. These include the inability to secure Cruzado's personnel records, as well as the failure of two additional witnesses to appear pursuant to subpoena. As to these witnesses, I advised counsel on the record that their subpoenas likewise could be enforced in Superior Court. He did not ask that I provide him with an opportunity to pursue enforcement.

FACTUAL DISCUSSION AND FINDINGS OF FACT

The Charges

The Board filed eight tenure charges against Aljallad, all of which arose from her interactions with Cruzado, who was assigned to Secaucus High School during the 2009-2010 school year. The charges allege that Aljallad engaged in conduct unbecoming a school district employee. Charges one, two, and three assert that Aljallad sexually harassed Cruzado in violation of the Law against Discrimination (LAD), N.J.S.A. 10:5-12 and local policy. Charges four, five, and six allege that Aljallad made false statements to Cruzado about the activities of sitting Board members, in violation of N.J.S.A. 2C:28-4(a), and local policy. Charge eight accuses Aljallad of slandering and defaming two members of the Board by falsely implicating them in crimes of official misconduct. Charge seven, in which the Board asserted that Aljallad did not have the mental capacity to perform the requirements of her position of employment, was withdrawn by counsel for the Board, on the record.

On February 2, 2010, Aljallad was charged criminally with filing a False Report with Law Enforcement. N.J.S.A. 2C:28-4. By letter dated March 26, 2010, the Hudson County Prosecutor's office advised that it was dismissing the criminal complaint, and returning the matter to the Board to be addressed administratively. These tenure charges followed.

The Testimony

During the 2009-2010 school year, Aljallad was employed under tenure as a clerical employee in the Office of the Superintendent of Schools, Cynthia Randina. The job description for administrative assistant to the superintendent of schools provided that Aljallad's function was to "perform secretarial duties for the Superintendent of Schools involving confidential information related to students and staff, Board of Education members, the community and professional committees." She was bound by the Board's code of ethics, which obligated her to "keep the trust under which

confidential information may be given," and "endeavor to establish good working relationships with other employees." (P-23.)[2] Randina emphasized that her office requires a support staff that she can trust implicitly with highly sensitive information.

Cruzado is employed as a police officer by the Secaucus Police Department, but was assigned for several years full-time to Secaucus High School, where he served as a SRO until the end of the 2009-2010 school year.[3] He had previously worked with school children in his role as a DARE (Drug Abuse Resistance Education) Officer in the elementary schools, and was delighted when offered the SRO position. Although Cruzado technically remained employed by the police department he also reported to the high school administration. His responsibilities involved assisting school personnel in keeping the children safe, and supporting administration's efforts to maintain discipline and order in the school. Cruzado testified that he worked to build a strong rapport with the students, and that his goal was to "move them in the right direction" as citizens. He loved his work, and the regular hours afforded by this assignment allowed him time to enjoy his family, which includes a wife and two teenage daughters.

Cruzado first encountered Aljallad in November 2009, when his wife asked that he pick up documents related to her pending assignment as an English as Second Language (ESL) teacher at the district administrative offices. Aljallad was at the reception desk, and handed Cruzado an envelope with the documents he had been sent to retrieve. They had a casual conversation, and she commented that "I see the connection, you are Georgina's husband." After this brief encounter, she "friended" Cruzado on Facebook, the social-networking website. Cruzado confirmed that he has a Facebook account and, like many people, thousands of "friends." He thus thought little of it, and accepted Aljallad as a Facebook "friend." She made light conversation with

[2] Also admitted into evidence were two other Board policies, including a policy prohibiting inappropriate staff conduct (Policy 4281) (P-24) and one providing that the "sexual harassment of any employee of the district is strictly prohibited" (Policy 4352). (P-25.) Policy 4281 prohibits inappropriate interactions with students, and stresses that staff must at all times protect the health safety and welfare of students.

[3] Cruzado worked at the high school under a Shared Services Agreement between the school district and the local police department. Under the terms of this agreement, the school district reimbursed the police department for a portion of Cruzado's salary in return for his full-time assignment within the district schools.

him through Facebook, commenting on people they knew in common from Hoboken High School, and stating "see you around."

The two did not interact again face-to-face until December 11, 2009. Cruzado was at his desk at the entrance to the high school when Aljallad entered the building. She asked for directions to the school office, which he supplied. About an hour later, as she was about to exit the school, Aljallad stated to Cruzado, "Ray, you passed the test." Cruzado was a bit taken aback, and asked what she meant. She declined to elaborate, but indicated that she would fill him in on her meaning at a later date. Cruzado found her comment strange. Accordingly, he called Aljallad at the Board office. Aljallad again declined to elaborate, advising that she could not talk on the school phone line. This left Cruzado quite concerned; as it was unimaginable to him that Aljallad had information to share that could not be discussed at school. Cruzado immediately relayed the incident to his wife, via text message.

Cruzado next saw Aljallad on December 14, 2009, when she returned to the high school and gave Cruzado a bag containing Avon men's cologne, and a business card with her contact information. Aljallad advised him that he could call her at lunch. That same day, at 12:15 p.m., Cruzado contacted Aljallad on her cell phone. Aljallad informed him that two Board members, Michael Makarski and Frank Trombetta, were concerned that Cruzado was a "threat to the ladies" at the school. The "threat" she was alluding to clearly was sexual, the implication being that Cruzado was inappropriate in his interactions with female students and staff. Aljallad advised that the two Board members had directed her to go to the high school and see if Cruzado "crossed a line with her." Aljallad gave Cruzado the clear impression that these Board members were acting on their own, and not under the authority of the full Board. Aljallad advised that she informed them that Cruzado was a perfect gentleman.

Cruzado was appalled. He viewed this allegation as entirely baseless, and indeed, he had never been advised by his superiors that there were any concerns about his job demeanor or performance. His instincts as a police officer told Cruzado that he should report the situation to his police chief, but Aljallad implored him not to, urging that her position of employment might be jeopardized. Accordingly, Cruzado asked if she

could forward an email to him that detailed the instructions she had been given by the two Board members. Cruzado again immediately advised his wife about his conversation with Aljallad.

Aljallad emailed Cruzado the next day, December 15, 2009. Aljallad confirmed the substance of their phone conversation, and elaborated further on the instructions she had allegedly received from the two Board members, who she referred to as "those 2 idiots." She reiterated that she had advised them that Cruzado was a gentleman, stating in her email that she had advised that Cruzado "did not once drop [his] eyes on me or anyone else that was walking by for that matter." But Aljallad noted that the Board members nonetheless asked her to check on Cruzado at least once a week, and to even have lunch with him in the cafeteria "just to make sure that [he was] not just on [his] best behavior the first time around." Regarding the Board members, Aljallad wrote, "[t]hey are out of their minds." Regarding the notion of lunching together, she wrote, "that would not look well at all." Aljallad added:

> Now get this one . . . in addition to the above, they want me to befriend your wife to see if you guys have any marital problems and if so, if it is caused by infidelity or you seeing any other women on the side.

Aljallad had invited Cruzado's wife to join her for a drink, so she reassured Cruzado as follows: "[p]lease don't think that I asked Georgina out for a drink because I was going to drill her. I really do want to befriend her, but for all the right reasons."

Cruzado testified that he was extremely disconcerted, particularly that his wife had been drawn in to what he believed to be an unauthorized investigation. He replied to Aljallad with thanks for the information she had shared. Cruzado's email described the behavior of the Board members as "improper and illegal." Aljallad replied with a further email, again disparaging the public officials she claimed had directed her to investigate Cruzado, as follows:

> [y]ou know what it is with these guys, the power of being a board member goes right to their heads. They think that they can control people and play with their lives. They should really look at themselves in the mirror and see what

> they are made of. I guess they do this to feel better about themselves. I see no other reason for it.

Cruzado testified convincingly that he fully believed Aljallad's story, and thus concluded that the Board members were engaged in official misconduct. He asked Aljallad not to communicate further with him, having become uncomfortable with their email exchange. She agreed not to, but then followed with a December 17, 2009, email in which she shared a "YouTube" video, but renewed a promise to send no further emails. On December 23, 2009, Cruzado filed a formal police investigation report in which he charged Board members Makarski and Trombetta with official misconduct and conspiracy to commit official misconduct, in violation of N.J.S.A. 2C:5-2 and N.J.S.A. 2C:30-2. The report stated that the two were acting without the authority of the full Board, and had secured Aljallad's cooperation by threatening her continued employment.

On December 24 and December 27, 2009, Cruzado received additional emails from Aljallad.[4] The December 27, 2009, email served to further reinforce Cruzado's belief that Board members were engaged in illegal activity. Aljallad informed Cruzado that their requests that she participate in their investigation were ongoing, stating "[e]ven though they have asked me to do more stuff . . . I refuse to do so." In light of this latest email, Cruzado testified that it did not occur to him to put the brakes on the police investigation he had initiated. Although Cruzado had sought to terminate his email communications with Aljallad, he replied to this latest email because he felt sorry for her. He felt Aljallad was being used. Cruzado filed a supplementary investigation report with the police department in which he shared this latest email exchange.

A meeting at the police department took place on January 19, 2010. Cruzado was present, as was the Police Chief Dennis Corcoran, Superintendent Randina, School Business Administrator Edward Walkiewicz, and counsel for the Board. It was readily confirmed that an investigation of Cruzado had not been initiated with the

[4] The December 24, 2009, email again acknowledged that Cruzado wished to stop their email exchange, and stated "consider this your last one." But Aljallad wrote again on December 27, 2009. She elaborated further in both emails on the break-up of a high school romance, and on the later break-up of her marriage. She wrote in the December 27, 2009, email that she was "starting to get that funny feeling" that Cruzado was ignoring her.

knowledge or direction of the full board or school district administration. School district personnel were informed that the matter had been referred to the County Prosecutor, who had recommended that it be investigated administratively. Police officials agreed that Cruzado would cooperate with that investigation, and the police department supplied its file to school officials.

On January 21, 2010, Randina and Walkiewicz interviewed Cruzado, Georgina Cruzado, Trombetta, Makarski, and Aljallad. During her interview, Aljallad informed school administration that she had entirely manufactured the tale that two Board members had directed her to investigate Cruzado's conduct. Consistent with Aljallad's admission, Trombetta and Makarski steadfastly denied any involvement in Aljallad's activities. Aljallad stressed in her own defense that she never lied to administration. Indeed, School Business Administrator Ed Walkiewicz, testified that he was somewhat taken aback by Aljallad's demeanor during their January 21, 2010, interview. Walkiewicz explained that they had been provided with the emails she had sent to Cruzado, and Aljallad replied immediately that she had "made the whole thing up." Randina and Walkiewicz informed Aljallad that her actions were a serious breach of her professional obligations, and they left the room to afford her an opportunity to reflect and consider if she wished to add any information in her own defense. When they returned she was casually looking at a magazine, and stated that she had nothing to add.

Aljallad's version of the events leading to the tenure charges differs from Cruzado's as to some unimportant details, but not as to most of the salient points. Aljallad testified that she had attended a football game with a friend. Cruzado passed by, and her friend made a face "of disgust," expressing dislike for him. The friend advised that her daughters, who attend Secaucus High School, had complained that Cruzado looked at them in a way that made them uncomfortable; so much so, that they took pains to change their route within the school building to avoid him. The friend recounted that she had heard similar complaints from other parents. According to Aljallad, this troubled her enough to embark on a private investigation of Cruzado's activities, but not enough to report her friend's concerns to Randina.

Aljallad confirmed that, on December 11, 2009, she went to the high school to deliver Avon products, and that Cruzado opened the door for her, and walked her to the office, making small talk about such things as an upcoming birthday celebration for his daughter. She testified that she did not say "you passed the test" to Cruzado as she exited the school; rather, in Aljallad's version, she sent him a Post-It note with this phrase written on it, via inter-office mail. When asked what she meant by "you passed the test," Aljallad testified that, to her observation, he was well mannered. Aljallad confirmed that she was "testing" his conduct as they walked together to the office and chatted. She asserted that she conducted this "test" because of her friend's allegations.

Aljallad indicated that she communicated via Post-It note because she knew this would provoke a reaction from Cruzado, and that she simply wanted to let him know what people were saying about him. Aljallad wanted him to take the allegations seriously, so when they finally spoke, she did not tell Cruzado that she was investigating complaints from parents, rather she told him that she had monitored his demeanor with students because she had received complaints from "a couple of Board members." Why she would seek to assist a man she barely knew, and one accused of serious wrongdoing, was unexplained by Aljallad. Aljallad readily admitted that she lied about the two Board members; that her account was, to use her words, "a fabrication."

Aljallad verified that Cruzado asked her to put the story in writing, and that she did so, via email on December 15, 2009. Aljallad likewise confirmed that she then sent additional emails, in which she spun a tale that became increasingly complex and convoluted. Her testimony readily brought to mind the well-known quote, "Oh, what a tangled web we weave/When first we practice to deceive!"[5] Indeed, Aljallad stated rather emotionlessly that the details she added with each new email, such as the Board member requests that she lunch with Cruzado, or befriend his wife, were simply "part of the fabrication."

Accordingly, it is uncontroverted, and I **FIND**, that Aljallad fabricated a complex tale in which she implicated two sitting Board members in serious misconduct;

[5] From the poem, "Marmion," by Sir Walter Scott.

suggesting that without authorization of the full Board, and using threats against Aljallad's continued employment they directed her to investigate Cruzado's professional and personal behavior.

The only critical testimonial discrepancy surrounds Aljallad's contention that she never named Trombetta and Makarski, and that Cruzado merely assumed they were the Board members in question. Cruzado was firm in his testimony that he obtained these names directly from Aljallad. She just as vehemently denied it, and did so when she met with Randina and Walkiewicz as well. 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). In making a credibility determination, it is appropriate to consider contradictory testimony, or testimony impeaching the witness's truth and veracity.

I did not deem Aljallad's testimony to be credible, in large part because she is an admitted and shameless prevaricator.[6] But she also offered evasive answers at hearing, and ones inconsistent with prior statements. For example, in one email she asserted that a Board member made a "pass" at her at a Unico dinner. She stated that he did so via text message but then asserted in discovery that the "pass" was via voice message. Aljallad then changed her story again, testifying that no Board member had made a pass at her at all, and that her statement to that effect was again, "part of the fabrication." Similarly, Aljallad testified that she was investigating only Cruzado's conduct with students, and was not attempting to ascertain if he would look at her in a sexual way. But she could not explain away the comment in her email that Cruzado did not "drop [his] eyes on [me]."

Moreover, although in an email response to her dated December 27, 2009, Cruzado mentions Board members Trombetta and Makarski by name, at no time did Aljallad correct him, or make any effort whatsoever to disabuse him of the notion that these two particular Board members had directed her investigation. The credibility of

[6] A theme in Aljallad's defense is that although it was technically wrong to lie, it was essentially harmless behavior that should not have provoked the reaction of those around her.

Cruzado's assertion that Aljallad named the two Board members who had allegedly directed her conduct is buttressed by his wife's testimony. She indicated that her husband immediately identified Trombetta and Makarski as the Board members in question. Accordingly, I **FIND** that Aljallad named Makarski and Trombetta as the Board members she claimed were directing her investigation of Cruzado's activities.

Several board witnesses, including Board President Eleanore Reinl, urged that there was a flirtatious feel to Aljallad's email exchanges with Cruzado, and that this was offensive.[7] I likewise **FIND** that the emails were flirtatious. Her December 15, 2009, email spoke to whether Cruzado looked at her in a sexual way. The phrase "drop your eyes on me" could have no other meaning. She hints that she and Cruzado meet regularly for lunch, deceitfully blaming the suggestion on the two Board members. Aljallad contemplated that these lunches could lead to romance as is plain by her statement that such lunches "would not look well at all." Her email goes on to ask if he is open to infidelity. She told Cruzado that Board members directed her to uncover this highly private information, but, by her own admission, that statement also was a lie. It was Aljallad's idea and her idea alone to inquire whether Cruzado made a practice of being unfaithful to his wife. She let Cruzado know that she is attractive to other men with her statement that a Board member made a "pass" at her. Aljallad's emails shared details about her romantic past. She persisted in sending emails despite being asked to stop by Cruzado.

Aljallad's demeanor at hearing buttressed my impression that she fabricated her story about the Board members to get to know Cruzado better, in a flirtatious way, and not because she was concerned about his conduct at the high school. Aljallad was surprisingly glib about her interactions with Cruzado. She described the first time she met Cruzado with the statement "one fine day he walked into the Board office." When asked point blank whether she was interested in Cruzado romantically, Aljallad did not firmly deny it, or assert with any indignation that pursuing a married man would be

[7] Cruzado's wife, Georgina, certainly agreed. She did not believe Aljallad's story about the Board members from the start, and immediately suspected that Aljallad was using this tale as a vehicle to get closer to her husband.

wrong. Rather, she stated, somewhat smugly, that she did not find him attractive, and that he really was not her "type."

I **FIND** that Cruzado was greatly disturbed by Aljallad's behavior, and that her advances were unwelcome. Indeed, instead of responding in kind, he perceived he was the victim of an illegal investigation, reported the matter to his police superiors, and promptly shared the situation with his wife. Cruzado testified convincingly that the entire episode with Aljallad negatively impacted his life. He resigned as SRO, feeling that he would no longer be able to credibly serve in the position. He returned to a less desirable position within the police force. The episode created an unnecessary strain on his marriage.

Randina and Walkiewicz attested to the disruption created at the school district, with hours spent investigating, interviewing witnesses, and meeting with police representatives. Aljallad's conduct distracted the highest level of administration from its educational mission. The Board was forced to devote time better spent on educational-policy decisions to discussion and deliberation about Aljallad's actions. Makarski and Trombetta testified compellingly that Aljallad actions disrupted their lives personally and professionally. They are both local politicians, for whom public confidence in their integrity is essential. Trombetta is also a local businessman, who strives to protect his business reputation. He found it difficult to focus on work. He has a family, including a wife and children, and this incident was embarrassing and upsetting to them as well. Likewise, Makarski testified that he works in public relations with governmental entities, and that it is essential that he maintain a spotless reputation. I **FIND** that Aljallad's actions disrupted school district operations, and embarrassed Board members Makarski and Trombetta.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to N.J.S.A. 18A:6-10, " . . . no tenured employee in the public school system of the State shall be dismissed except for inefficiency, incapacity, unbecoming conduct, or other just cause." The specific rights of secretarial employees are set forth at N.J.S.A. 18A:17-2(c) as follows:

> Any person, who has acquired . . . tenure in any secretarial or clerical office, position or employment under the board of education of a school district . . . shall not be dismissed or suspended or reduced in compensation except for neglect, misbehavior or other offense . . . .

The Board bears the burden of proving its charges of unbecoming conduct against Aljallad by a preponderance of the 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).

"Unbecoming conduct" is a broadly defined, elastic term, encompassing any conduct that has a tendency to destroy public respect for government employees and confidence in the operation of public services. Karins v. Atl. City, 152 N.J. 532 (1998). A finding of unbecoming conduct does not require a violation of any specific rule or regulation, but rather may be based on an 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." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). The school district's legitimate expectation that its employees conduct themselves in a manner that will instill public confidence becomes heightened where, as here, the staff member is employed as a confidential secretary in the office of the superintendent of schools. The superintendent's secretary directly interacts with members of the public. Moreover, she is privy to the most critical policy-making decisions and has access and exposure to the policymakers as well. It is a position of trust. Weisel v. Hooks, 277 N.J. Super. 78, 86 (Ch. Div. 1984).

I **CONCLUDE** that the Board has demonstrated that Aljallad is guilty of unbecoming conduct. The first three tenure charges pertain to Aljallad's harassment of Cruzado, and charges two and three are couched in terms of violations of Board policy and the New Jersey Law against Discrimination (LAD), N.J.S.A. 10:5-12.[8] The Board alleges—and proved—that Aljallad made unwanted romantic advances toward

[8] The Commissioner has concurrent jurisdiction over LAD claims. Hinfey v. Matawan Bd. of Educ., 77 N.J. 514 (1978).

Cruzado, and created an uncomfortable work environment for him. Board policy prohibits such conduct, and I **CONCLUDE** that the Board has proven the allegations in charges one and three against Aljallad.

Aljallad's argument that her conduct did not violate Board policy because Cruzado is not a school employee is unavailing. The clear intent of the Board's policy is that its schools be free of discrimination. Although Cruzado continued to receive a paycheck from the police department, his workplace was Secaucus High School, and like all who work there, he was entitled to enjoy an environment that was comfortable and free of harassment. Nor does Aljallad successfully argue that her conduct was simply harmless flirting that took place after school hours and had no impact on the functioning of the school district. Aljallad did not simply flirt and her behavior was hardly harmless. She informed Cruzado that he was suspected of serious improprieties with students. Her "flirtation" thus directly impacted the school district because it implicated Cruzado in school related misconduct, distracting him from his job responsibilities and ultimately causing him to abandon his position as SRO.

Aljallad's conduct was inappropriate, regardless of whether it created a "hostile work environment" as that term is defined by Lehmann v. Toys "R" Us, 132 N.J. 587 (1993). In re Young, EDU 09771-09, Initial Decision (September 3, 2010), adopted, Commissioner (October 15, 2010), <http://lawlibrary.rutgers.edu/oal/search.html>. But I **CONCLUDE** that the Board has amply demonstrated that Aljallad's conduct would not have occurred but for Cruzado's gender, and was severe or pervasive enough to make a reasonable person believe that his conditions of employment had been altered and were hostile and abusive. Lehmann, supra, 132 N.J. at 603. Indeed, in an effort to pursue a romantic relationship with Cruzado, Aljallad led him to believe that those in the highest authority in the school district were questioning his integrity and job performance. Her conduct negatively altered Cruzado's work environment, and I **CONCLUDE** that the Board has proven the allegations contained in charge two.

Likewise, I **CONCLUDE** that Aljallad's conduct in fabricating lies about Board members Makarski and Trombetta constitutes conduct unbecoming a staff member, as alleged in charge four. Aljallad wove a web of lies that made it appear that sitting Board

members were abusing their role. Aljallad represents the Board and its individual members in her interactions with the school community and the public at large. Her conduct was completely lacking in respect for those she represents. As the charge successfully asserts, she engaged in this inappropriate conduct solely to flirt with Cruzado. The Board has proven the allegations of charge four.

The factual allegations that form the underpinnings of charge four are reasserted in charges five and six, which allege that Aljallad violated N.J.S.A. 2C:28-4(a), and the school district code of ethics, Policy Number 4215. The Commissioner of Education is without jurisdiction to address criminal charges and accordingly, I **CONCLUDE** that charge five must be dismissed.[9]

Alljalad urges that while the school district code of ethics speaks generally about the sort of behavior expected of school support staff, it does not squarely prohibit the conduct alleged in charge six.[10] I agree that the Board strains a bit to make the code of ethics specifically applicable here. The Board argues, for example, that Aljallad failed to maintain confidentiality by divulging personnel information about Mrs. Cruzado to her husband. But that is not a factual allegation contained in any of the charges. Likewise, the Board urges that the code of ethics obliged Aljallad to come to Randina with her concerns about Cruzado's misconduct, rather than conduct an investigation herself. But Aljallad did not really believe that Cruzado was a "threat to the ladies" at the school. Rather, as proven by the Board in the first three tenure charges, she fabricated this allegation because she wished to engage Cruzado in a romantic relationship. Nor did Aljallad's conduct violate any specific Board or administrative rules or regulations that were made a part of the record before me. Board Policy 4281 requires all staff to protect the well-being of students. But again, Aljallad did not fail to report concerns about student safety, precisely because she never harbored any such concerns.

[9] It is reiterated that criminal charges under N.J.S.A. 2C:28-4(a) were filed in the appropriate forum, and dismissed.

[10] Lying about the activities of Board members is so patently unethical that including a specific prohibition against such conduct in an ethical code could easily be viewed as redundant.

However, the code of ethics does require that staff members "endeavor to establish good working relationships with other employees." It is plain that Aljallad did just the opposite in her interactions with Cruzado, who was functioning as a school employee at the time. Accordingly, I **CONCLUDE** that the Board has proven the charges contained in charge six.

Finally, I **CONCLUDE** that charge eight must be dismissed, as the Commissioner does not have jurisdiction to address claims of libel and slander. These are tort claims that must be brought in the proper forum by those directly aggrieved by Aljallad's actions. The Board clearly has demonstrated that Aljallad falsely implicated Makarski and Trombetta in improper conduct, and caused them extreme embarrassment. Her conduct in this regard was unbecoming, as proven in charge four. But the assertion that Aljallad's conduct rose to defamation must be addressed elsewhere.

The Board urges that dismissal is the only appropriate penalty for Aljallad's conduct. I agree. Aljallad's actions were inconsistent with any accepted notion of professional behavior. Aljallad has argued, successfully, that the Board cannot sustain its charges of criminal violations and defamation. But in its remaining charges, the Board has amply proven that Aljallad is not fit to remain employed in the Secaucus School District. Indeed, both the tenure charges and counsel's discussion in their post-hearing submissions need have gone no further than the conduct itself, which I **CONCLUDE** was so outrageously inappropriate, and so inimical to Aljallad's role as a confidential secretary, that it is incontrovertible that she is guilty of conduct warranting her dismissal from her tenured position as a confidential secretary. My conclusion in this regard is buttressed by Aljallad's lack of sincere remorse for her actions, which she repeatedly has urged constituted minor lying and flirtation blown far out of proportion by Cruzado. Aljallad appears completely unable to grasp the gravity of her conduct. As a result, I am left with no confidence that, if returned to her position, she will be able to conduct herself as a trustworthy confidential secretary in the future.

Finally, Aljallad's post-hearing submission raises an easily disposed of procedural argument. She urges that the Board violated the requirements of the Open Public Meetings Act (OPMA) by failing to notify her of its discussion of the tenure

charges so that she could opt for a public discussion. N.J.S.A. 10:4-12; Rice v. Union County Reg'l High Sch. Bd. of Educ., 155 N.J. Super. 64 (App. Div. 1977). The consideration of tenure charges is a well-established exception to the requirements of the OPMA, and indeed, N.J.S.A. 18A: 6-11 states explicitly that [t]he consideration and actions of the board as to any charge shall not take place at a public meeting." Accordingly, I **CONCLUDE** that the actions of the Secaucus Board relative to the charges against Aljallad were procedurally sound.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Natalizia Busnelli-Aljallad be **DISMISSED** from her tenured position of employment with the Secaucus Board 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, 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.

March 16, 2011
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: March 16, 2011

Mailed to Parties: March 16, 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Petitioner:

Cynthia Randina
Reinaldo Cruzado
Georgina Cruzado
Edward Walkiewicz
Frank Trombetta
Michael Makarski
Eleanore Reinl

For Respondent:

Natalizia Busnelli-Aljallad

EXHIBITS

For Petitioner:

P-1 Letter dated October 25, 2005
P-2 Letter dated May 12, 2006
P-3 Letter dated July 30, 2008
P-4 Job Description
P-5 Emails dated December 15, 2009
P-6 Email dated December 15, 2009
P-7 Email dated December 24, 2009
P-8 Email dated December 17, 2009
P-9 Police Investigation Report dated December 23, 2009
P-10 Email dated December 27, 2009
P-11 Email dated December 27, 2009
P-12 Supplementary Police Report dated December 28, 2009
P-13 Supplementary Police Report dated January 20, 2010
P-14 Statements of Cynthia Randina and Edward Walkiewicz

P-15 Not admitted
P-16 Supplementary Police Report dated January 22, 2010
P-17 Criminal Summons and Complaint
P-18 Not admitted
P-19 Supplementary Police Report dated February 2, 2010
P-20 Criminal Summons and Complaint
P-21 Not admitted
P-22 Letter dated March 26, 2010
P-23 Board Policy Number 4215
P-24 Board Policy Number 4281
P-25 Board Policy Number 4352
P-26 Interrogatories
P-27 Answers to Interrogatories
P-28 Interrogatories
P-29 Answers to Interrogatories
P-30 Supplemental Answers to Interrogatories
P-31 Answer to the charges

For Respondent:

None

152-11

OAL DKT. NO. EDU 233-11
AGENCY DKT. NO. 716-12/10

IN THE MATTER OF THE TENURE HEARING	:	
OF DEBORAH PAONE, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF NEW HANOVER,	:	DECISION
BURLINGTON COUNTY.	:	

The record, settlement agreement, and 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 observes that the President of the New Hanover Township Board of Education signed the settlement agreement on behalf of the Board. The settlement agreement was not signed by the Board's attorney, who is the Board's duly authorized representative in litigation, nor does the file contain a copy of the Board's resolution approving the settlement and designating the President of the Board to sign the agreement on its behalf.* Therefore, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the settlement agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/12/11
Date of Mailing: 4/12/11

* The settlement agreement included the Board's resolution certifying the tenure charges against the petitioner as an attachment, but it did not include a resolution approving the settlement.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 233-11

AGENCY DKT. NO. 716-12/10

IN THE MATTER OF THE TENURE HEARING OF DEBORAH J. PAONE, SCHOOL DISTRICT OF THE TOWNSHIP OF NEW HANOVER, BURLINGTON COUNTY.

Joan Kane Josephson, Esq., for petitioner (Parker McCay, attorneys)

Steven Blader, Esq., for respondent (Szaferman, Lakind, Blumstein and Blader, PC, attorneys)

Record Closed: February 16, 2011 Decided: February 24, 2011

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

This matter was transmitted to the Office of Administrative Law on January 10, 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 with Release and Waiver, together with a Board Resolution, indicating the terms thereof, which are 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.

February 24, 2011
DATE

DONALD J. STEIN, ALJ

Date Received at Agency: MAR - 2 2011

Date Mailed to Parties: MAR - 3 2011

cmo

SEPARATION AGREEMENT
with
RELEASE and WAIVER
between
Board of Education of New Hanover Township
and
Deborah J. Paone

2011 FEB -8 A 10:57

WHEREAS the Board of Education of New Hanover Township (Burlington County) (hereinafter the "Board") and Deborah J. Paone agree that it would be in the best interest of both parties to this Agreement to have Deborah J. Paone's employment terminate; and

WHEREAS Deborah J. Paone has agreed to resign effective at the end of the day on January 5, 2011; and

WHEREAS the parties desire to sever the employment relationship; now therefore the parties

RESOLVE and agree to the following terms.

1. **Resignation.**

1.1. Deborah J. Paone hereby submits (and attaches hereto as Exhibit A) her signed letter of resignation, terminating all employment with the New Hanover Township Board of Education, effective at the end of the day on January 5, 2011.

1.2. Ms. Paone resigns her tenured position of Business Administrator/Board Secretary effective January 5, 2011.

1.3. Both parties by the terms of this Separation Agreement and General Release wish to end the tenured employment of Ms. Paone.

1.4. The tenure charges which were certified against Ms. Paone by the Board of Education have been submitted to the State Department of Education for withdrawal

1.5. As soon as possible after receipt of this executed Agreement and the signed letter of resignation, the Board will act at a public meeting to approve the Agreement and accept the letter of resignation.

1.6. Following acceptance by the Board, the resignation cannot be modified or withdrawn, unless Ms. Paone revokes this entire Agreement. (The sole method of revoking this Agreement, and the effect of doing so, are described in section 8 of this Agreement.) If Ms. Paone does not revoke this Agreement in accordance with section 8 of this Agreement, the resignation shall be final and binding, and cannot be rescinded or withdrawn.

2. **Mutual releases and waiver of right to sue.**

2.1. By entering into this Agreement each party releases the other with respect to all claims and rights that either party may have against or involving the other at the present time. This release includes a release of all claims Ms. Paone may have or wish to pursue against the Board and all claims against all agents of the Board. (For purposes of this Agreement, the term "agent of the Board" includes all members of the Board of Education and all employees of the Board.)

2.2. The parties agree that neither party will bring any action or file any suit or claim against the other or against any agent of the Board. Any matters, claims, suits or charges which may be pending at any level shall be withdrawn as soon as this Agreement is signed by the Parties.

2.3. This release includes a waiver of all rights to sue or bring a claim for any reason, including rights secured by Board policy, contract, employment laws, civil rights laws and all other state and federal laws. It is further understood that either party may refer any potential criminal matter to the appropriate legal authorities at any time.

2.4. Ms. Paone also specifically waives the right to sue for any and all claims under the federal Age Discrimination in Employment Act, which protects workers over age 40 from discrimination in the workplace based on age. This waiver applies to events and circumstances which arose prior to the effective date of this Agreement.

2.5. The releases and waivers provided by each of the parties, as described in this section of the Agreement, apply only to facts known by that party on the date of this Agreement.

2.6. Ms. Paone further agrees that her signature on this Agreement constitutes an acknowledgment that she is relinquishing all tenure rights and any other present and future rights to employment and re-employment with the Board as of the close of business on January 5, 2011.

3. **The Department of Education Office of Fiscal Accountability and Compliance (OFAC)**

3.1 On November 30, 2010 OFAC issued a report entitled the New Hanover Township School District Business Administrator Performance Failure.

3.2 The report was referred to the NJDOE Office of Licensure and Credentials and the Attorney General, Division of Criminal Justice for review by both respective offices.

3.3 The Board will not act on its own initiative to bring about any action. However, Ms. Paone understands that the Board will have an obligation to cooperate in the event of any proceeding against her. Ms. Paone reserves all of her rights to assert that no action should be taken against her.

4. **Health benefits after separation.**

4.1. Ms. Paone will be eligible for standard COBRA rights for the continuation of health benefits, after her separation from employment. The Board will reimburse Ms. Paone for (3) three-months' payments of COBRA benefits in a lump sum at her separation from employment and upon the execution and implementation of this agreement. Any additional COBRA rights will be at Ms. Paone's expense.

5. **Inquiries.**

5.1. All inquiries regarding Ms. Paone's employment will be referred to the Superintendent, who will provide (either verbally or in writing, as requested): the position(s) held by Ms. Paone, her most recent annual salary, her dates of service in the District, and her reason for separation from employment (i.e., resignation) only. The District will not release copies of documents from Ms. Paone's personnel file without written authorization from Ms. Paone and payment of such copying fees as may be required.

6. **Time for review and consideration of this Agreement.**

6.1. Ms. Paone has a period of 21 calendar days during which she can review this Agreement prior to signing it. This review period will run from the date it is received by Ms. Paone. Ms. Paone may sign this Agreement at any time during the 21 day review period and up to 5 days thereafter. This Agreement will then be signed by the Board President, following approval by the Board. This Agreement will become final on the eighth day after signing by both parties, unless revoked by Ms. Paone in accordance with section 11 of this Agreement.

6.2. If Ms. Paone does not sign this agreement before the end of the review period described in the preceding section, the offer of settlement will be automatically withdrawn by the Board and this Agreement will have no force or effect.

7. **Right to revoke.**

7.1. For a period of seven calendar days after this Agreement is signed by both parties, Ms. Paone will have an opportunity to revoke this Agreement by providing the Board written notice of her decision to revoke.

7.2. The written notice of the decision to revoke must be provided to the Superintendent.

7.3. In order to be effective, the written notice of the decision to revoke must be received by the Superintendent on or before the seventh day following the signing of this Agreement. If the parties have signed on different days, the seven day period will begin following the date of the later signature.

7.4. If this Agreement is revoked during this period, this Agreement will have no effect and the parties will not be bound to any of its terms. This means that Ms. Paone's resignation will be automatically withdrawn and neither party will have any obligation to carry out the settlement terms established by this Agreement.

7.5. If Ms. Paone does not revoke this Agreement, both parties will become bound by the terms of this Agreement on the eighth day following signing by both parties. After the eighth day this Agreement will be irrevocable.

7.6. In addition to the right to revoke delineated in 7.1 through 7.5, Ms. Paone can revoke this Agreement if the Commissioner of Education or the Administrative Law Judge refuse to accept the withdrawal of the tenure

charges filed on behalf of the New Hanover Board of Education. Such revocation of this Agreement will become effective by written notice to the Board by Ms. Paone within seven days after she receives notice that the withdrawal of tenure charges has been rejected.

8. **Attorney consultation.** The Board hereby specifically advises Ms. Paone to consult with an attorney prior to signing this Agreement, and recognizes that she has done so.

9. **Opportunity to consult attorney; voluntariness.** The parties acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement. The parties further acknowledge that each party fully understands the terms of this Agreement, and that each party is signing this Agreement freely and voluntarily, without any coercion, duress or pressure from the other party.

10. **Circumstances Justifying Settlement (N.J.A.C. 6A:3-5.6)**

    10.1. The nature of all charges would require many days of hearing to present the charges, and to defend against them, resulting in significant loss of administrative time and an expenditure of considerable funds for legal fees by the Board.

    10.2. This settlement serves the public interest by achieving finality and certainty with a responsible outcome.

11. **Entire agreement.** This document contains the entire agreement of the parties and may not be altered, amended or modified except by instrument in writing signed by the parties.

Please read this Agreement carefully before signing.

New Hanover Township **Board of Education**

by: Charles Rachel, President

Witness:

print name: Brian J. McBride

date 2-1-2011

Deborah J. Paone

Deborah J Paone

Witness: _____

print name: STEVEN BLADER

date 1-24-11

Exhibit A

January 5, 2011

Brian J. McMcBride, Superintendent of Schools
New Hanover Board of Education
122 Fort Dix Street
Wrightstown, NJ 08562

Re: Resignation

Dear Mr. McBride:

Please be advised that I hereby resign from my employment in the District, effective at the end of the day on January 5, 2011. Please provide this letter to the Board of Education for its approval.

Note, however, that this resignation is void if the Administrative Law Judge or the Commissioner of Education refuse to accept the Board's withdrawal of the tenure charges filed against me.

Thank you for your attention.

Very truly yours,

Deborah J. Paone

RECEIVED
2011 FEB 16 A 9:1
OFFICE OF ADMINISTRATIVE LAW
STATE OF NEW JERSEY

NEW HANOVER TOWNSHIP BOARD OF EDUCATION
RESOLUTION

WHEREAS, this Board of Education has received sworn charges dated November 30, 2010 filed in writing with the Board Secretary against Deborah J. Paone, Business Administrator/Board Secretary in the employ of this Board of Education, together with a supporting statement of evidence also executed under oath; and

WHEREAS, said documents were transmitted to the said Deborah J. Paone within seventy-two hours of the date upon which they were filed and the said Deborah J. Paone having filed response, dated December 13, 2010, to the said written statements of charges and supporting statements of evidence; and

WHEREAS, this Board of Education met on Thursday, December 16, 2010 at 7:00 p.m. at the New Hanover Township School Library, and has carefully considered said charges, the supporting statement of evidence, and the sworn answer thereto submitted by Deborah J. Paone.

NOW, THEREFORE, BE IT RESOLVED by this Board of Education as follows:

1. There is probable cause to credit the evidence in support of said charges.

2. The said charges, if credited, are sufficient to warrant dismissal pursuant to N.J.S.A. 18A:6-11.

And, **NOW, THEREFORE, BE IT FURTHER RESOLVED,** that the Board Secretary, as the agent of the Board of Education, is herewith directed to notify Deborah

J. Paone of this determination of the Board by certified mail directed to her last known address and that the Board Secretary further forward such written charges together with the responses of Deborah J. Paone and with the certificate of such determination to the Commissioner of Education for a hearing pursuant to N.J.S.A. 18A:6-16.

And, **BE IT FURTHER RESOLVED** that the said Deborah J. Paone is herewith suspended from her duties as a Business Administrator/Board Secretary in the employ of the New Hanover Township Board of Education effective immediately without pay pursuant to N.J.S.A. 18A:6-14.

The above resolution moved by Richard Slater, seconded by Carli Haas and carried by the following roll call vote:

Voting:

Yes: Richard Slater, Christopher Sirak, Rose Marie Winrow, Carli Haas Jamie Clugsten, Christine Smith, Charles Roohr

No: None

Abstain: None

I certify the above and foregoing to be a true copy of a resolution adopted by the New Hanover Board of Education on December 16, 2010.

Kathleen Mandeville

Kathleen Mandeville
Interim School Business Administrator/
Board Secretary

CERTIFICATION OF DETERMINATION AND PROOF OF SERVICE PURSUANT TO N.J.A.C. 6A:3-5.1 and 6A:3-5.2

1. I, the undersigned, am Board Secretary to the New Hanover Township Board of Education.

2. On Thursday, December 16, 2010 at a Board meeting called pursuant to the Open Public Meetings Act, N.J.S.A. 10:4-6 et. seq. the New Hanover Board of Education determined that there is probable cause to credit the tenure charges and evidence in support of the tenure charges dated November 30, 2010 against Deborah J. Paone and that the evidence in support of said charges is sufficient, if true in fact, to warrant dismissal pursuant to N.J.S.A. 18A:6-11.

3. This Board meeting was held Thursday, December 16, 2010, 7:00 p.m. at the New Hanover Township School Library. Also at said time and place the Board of Education moved to suspend Deborah J. Paone without pay pursuant to N.J.S.A. 18A:6-14.

4. The determination of certification of charges to the Commissioner of Education and suspension without pay were made by a majority vote of the whole number of members of the district Board of Education. A copy of the Resolution adopted by the District Board of Education is attached hereto.

5. Subsequent to said meeting, on Thursday, December 16, 2010, I personally served on Deborah J. Paone notification of the determination made by the Board of Education by certified mail, return receipt requested, to her last known address as follows:

Deborah J. Paone
31 Oakford Avenue
New Egypt, NJ 08533

Written notification of the determination has also been served, by legal counsel, on Deborah J. Paone's attorney by certified mail, return receipt requested.

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.

Kathleen Mandeville

Kathleen Mandeville
Interim School Business Administrator/
Board Secretary

Dated: December 17, 2010

153-11

OAL DKT. NO. EDU 3247-10
AGENCY DKT. NO. 35-3/10

BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

Having reviewed the record, Initial Decision of the Office of Administrative Law (OAL) and proposed "Stipulation of Settlement" (Settlement), the Commissioner is constrained to reject the Initial Decision. The Settlement recites, in Paragraph 5, that it is "subject to final approval by each party by way of a public adopted resolution at a duly convened meeting, certified copies of which shall be appended hereto as Attachments . . . ." While a resolution by the Orange Board of Education approving the settlement was presented to the Commissioner, the required resolution by the Hanover Board of Education was not. Nor, in the alternative, did counsel for the Hanover Board execute the settlement document.

Accordingly, the Initial Decision is rejected and the matter is remanded to the OAL for those proceedings necessary to perfect the settlement or adjudicate the controversy.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4|13|11
Date of Mailing: 4|13|11

[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

SETTLEMENT

OAL DKT. NO. EDU 03247-10

AGENCY DKT. NO. 35-3/10

BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY,

Petitioner,

v.

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

Respondent.

Nicholas Celso, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Zitomer, LLC, attorneys)

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

Record Closed: February 22, 2011 Decided: March 3, 2011

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 19, 2010, 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.

The attached Settlement Agreement and Resolution were submitted on February 22, 2010, 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.

3/3/11
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: March 7, 2011

Date Mailed to Parties: March 7, 2011
dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Schwartz Simon
Edelstein & Celso LLC
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, NJ 07962
(973) 301-0001; FAX (973) 993-3152
Attorneys for the Petitioner,
Board of Education of the
Township of Hanover

BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY, Petitioner, vs. BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION AGENCY DOCKET NO.:35-3/10 OAL DOCKET NO.:EDUOT 03247-2010N ADMINISTRATIVE ACTION **STIPULATION OF SETTLEMENT**

The above named parties, wishing to compromise their claims and amicably resolve the underling dispute, hereby stipulate that the within matter shall be deemed to be fully resolved, subject to the following terms and conditions.

1. In consideration of petitioner's withdrawal of the Petition of Appeal, respondent shall remit as full and final payment of all sums due and owing in conjunction with the subject dispute payment in the amount of $6,842.65 (Six Thousand, Eight Hundred Eighty-Four Dollars and Sixty-Five Cents).
2. Upon receipt and clearance of respondent's check, petitioner shall forthwith file a letter with the Court withdrawing the Petition of Appeal.
3. The within settlement does not constitute an admission of wrongdoing by either party.

4. Upon fulfillment of the within terms and conditions, the parties mutually release one another, their employees, agents and successors, form all other claims arising out of the subject dispute.

5. This Settlement is further subject to final approval by each party by way of a public adopted resolution at a duly convened meeting, certified copies of which shall be appended hereto as Attachments "A" and "B" respectively.

For Petitioner
Hanover Twp. Bd. of Ed.

NICHOLAS CELSO, III, ESQ.
Attorney for Petitioner

For Respondent
City of Orange Twp. Bd. of Ed.

MELVIN RANDALL, ESQ.
Attorney for Respondent

ORANGE BOARD OF EDUCATION PUBLIC SCHOOL DISTRICT

Administrative Office
451 Lincoln Avenue, Orange, New Jersey 07050

NOVEMBER 9, 2010 **G10-054**

RESOLUTION TO ACCEPT THE TUITION SETTLEMENT AGREEMENT BETWEEN ORANGE BOARD OF EDUCATION AND HANOVER TOWNSHIP SCHOOL DISTRICT

WHEREAS, Hanover Township Board of Education filed a Petition of Appeal with the Commissioner of Education against the Orange Board of Education asserting a tuition reimbursement claim that the School District is responsible for the educational services of two (2) former Orange Township Board of Education students; and

WHEREAS, Hanover Township Board of Education demands from the Orange Board of Education the sum of Thirteen Thousand Six Hundred Eighty-Five Dollars and 30/100 cents ($13,685.30) representing tuition payments from October 13, 2009 through April 1, 2010; and

WHEREAS, the Orange Township Board of Education contested the sum claimed by the Hanover Township Board of Education a settlement of $6,842.65 was reached as indicated in the settlement agreement; and

WHEREAS, the parties have decided to amicably resolve the controversy herein. and hereby stipulates that the within matter shall be deemed to be fully resolved, by subject to the following terms and conditions, as listed on the attached stipulation of settlement Agency Docket # :35-3/10 and OAL Docket # EDUOT 03247-2010N

NOW, THEREFORE, BE IT RESOLVED, that the Orange Board of Education hereby approves the attached Stipulation of Settlement between parties.

Said Resolution was adopted and approved on this 9th day of November, 2010.

ROLL CALL CHECKLIST		
	YEA	NAY
Stephanie Brown	✓	
Reginald T. Jackson	✓	
Maxine G. Johnson	✓	
Eunice Y. Mitchell S	✓	
David Wright	✓	
Arthur J. Griffa School Board Vice-President M	✓	
Patricia Arthur School Board President	✓	

Attested to by: _____
School Business Administrator/
Board Secretary

SEND ALL INVOICES TO →

PURCHASE ORDER

ORANGE BOARD OF EDUCATION
451 LINCOLN AVENUE
ORANGE N J. 07050
TEL (973) 677-4190 • FAX (973) 673-0535

THIS NUMBER MUST APPEAR ON ALL INVOICES, PACKAGES & CORRESPONDENCE

101547

copy 1

Req# R12044

Ship to

ORANGE BOARD OF EDUCATION
451 LINCOLN AVENUE
ORANGE, N. J. 07050 ATTN:BUSINESS OFF.

To

HANOVER TOWNSHIP BOARD OF EDUCATION (HANT)
61 HIGHLAND AVENUE
WHIPPANY NJ 07981-1399

Account Code	Amount
11-000-100-561-L-00-	$6,842.65

Date: 11/16/10 Dept: MR.JAMES

Qty	Unit	Description	Unit Price	Amount
1		TUITION SCHOOL YEAR 2009 AGENCY DOCKET NO:35-3/10 OAL DOCKET NO:EDUOT 03247-2010N IN CONSIDERATION OF PETITIONER'S WITHDRAWAL OF THE PETITION OF APPEAL, RESPONDENT SHALL REMIT AS FULL AND FINAL PAYMENT OF ALL SUMS DUE AND OWING IN CONJUNCTION WITH THE SUBJECT DISPUTE PAYMENT IN THE AMOUNT OF $6,842.65. HANOVER TOWNSHIP BOARD OF EDUCATION FILED A PETITION OF APPEAL WITH THE COMMISSIONER OF EDUCATION AGAINST THE ORANGE BOARD OF EDUCATION ASSERTING A TUITION REIMBURSEMENT CLAIM THAT THE SCHOOL DISTRICT IS RESPONSIBLE FOR THE EDUCATIONAL SERVICES OF TWO (2) FORMER ORANGE TOWNSHIP BOARD OF EDUCATION STUDENTS. INPUT BY J.C.	6842.650	$6,842.65

Please sign ~~see~~ voucher & return.

Thank you,

Janice Clark
A/P

Total for Lines $6,842.65

THIS VOUCHER MUST BE SIGNED AND RETURNED FOR PAYMENT

VENDOR'S DECLARATION

I hereby declare that the goods, materials, equipment, services, or labor listed on this purchase order have been duly furnished or performed, that no gratuities have been given or promised by any person with the knowledge of the vendor in connection with the order, and that the above bill is true and correct.

SIGNATURE (x)

OFFICIAL POSITION DATE

PRICE CERTIFIED AND CHECKED BY

NOT VALID UNLESS SIGNED BY THE BOARD SECRETARY/BUSINESS ADMINISTRATOR

VOUCHER COPY - SIGN AT X AND RETURN FOR PAYMENT

154-11

154-11L

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

April 20, 2011

Armando V. Riccio. Esq.
Capehart & Scatchard, P.A.
Laurel Corporate Center
8000 Midlantic Drive
Suite 300 South
Mount Laurel, New Jersey 08054

Richard A. Friedman, Esq.
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
150 West State Street
Trenton, New Jersey 08608

Re: *In the Matter of the Tenure Hearing of Emma Painter, Kingsway Regional School District, Gloucester County. Agency Dkt. No.387-12/07.*

Dear Counsel,

I have reviewed the materials filed in connection with the Kingsway Regional School District's motion to reinstate the tenure charges against Emma Painter. Upon review of the submissions, I find that the tenure charges in this matter should be reinstated based on the Appellate Division's November 8, 2010 decision reversing Ms. Painter's criminal conviction and remanding the matter for retrial. The Commissioner's September 29, 2009 decision dismissing the tenure charges as moot was based solely on the Order of Forfeiture of Employment in the criminal matter which found that Ms. Painter's employment with the District was forfeited based on her criminal convictions. In light of the Appellate Division's November 8, 2010 decision, the Order of Forfeiture is no longer controlling; therefore, it is now necessary to reopen the related tenure charges.

Accordingly, the District's motion to reinstate the tenure charges against Ms. Painter is hereby granted.

Sincerely,

Christopher D. Cerf
Acting Commissioner

c: County Superintendent
State Law Library

CDC/MKD/JKH

155-11

OAL DKT. NO. EDU 12160-08
AGENCY DKT. NO. 314-10/08

BOARD OF EDUCATION OF UNION TOWNSHIP, HUNTERDON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE,	:	DECISION
RESPONDENT.	:	

The record of this matter and Stipulation of Settlement transmitted by the Office of Administrative Law have been reviewed. Because the agency is a party to this matter, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), the settlement agreement is deemed to be the final decision.[1]

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4|21|11

Date of Mailing: 4|21|11

[1] It is noted that pursuant to term 4 of the parties' agreement, the Board of Education of the Township of Union approved the settlement agreement at its meeting of December 20, 2010. (Extract of Board meeting minutes, appended to settlement).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12160-08
AGENCY DKT. NO. 314-10/08

BOARD OF EDUCATION OF UNION TOWNSHIP, HUNTERDON COUNTY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE,
Respondent.

Paul N. Barger, Esq., for petitioner (Parker McCay, attorneys)

Bryant Lawrence Horsley, Jr., Deputy Attorney General, for respondent (Paula T. Dow, Attorney General for the State of New Jersey, attorneys)

Record Closed: March 28, 2011 Decided: March 28, 2011

BEFORE **ISRAEL D. DUBIN**, ALJ:

This matter arises out of petitioner contesting respondent's withholding of funds in the amount of $11,498.90. The matter was transmitted to the Office of Administrative Law for determination as a contested case on December 11, 2008. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Following a series of settlement conferences, the parties agreed to a settlement and executed a Settlement Agreement and Release containing the terms of their settlement (Exhibit J-1). The Board of Education also adopted a Resolution approving the settlement.

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 therefore conclude that this settlement agreement meets the requirements of N.J.A.C. 1:1-19.1 and should be approved; that the parties should be directed to comply with the settlement terms; and that these proceedings should be concluded. 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.

March 29, 2011
DATE

ISRAEL D. DUBIN, ALJ

Date Received at Agency: MAR 31 2011

Date Mailed to Parties: MAR 31 2011

/mev

EXHIBITS:

Jointly submitted:

J-1 Settlement Agreement and Release

RECEIVED
2011 MAR 28 A 10:
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT AND RELEASE

THIS AGREEMENT IS MADE on this 3RD day of November 2010 by and between the Union Township Board of Education (hereinafter the "Board") and the New Jersey Department of Education, Office of Fiscal Accountability and Compliance (hereinafter "OFAC"):

WHEREAS, in August 2006, members of the community filed a complaint with OFAC for excessive attorney's fees and the initiation of legal actions against members of the community. Upon completion of its initial investigation of the matter, OFAC's Investigations Unit issued a draft Summary Report of Examination; and

WHEREAS, on March 23, 2007, Board counsel provided a detailed response with a number of proposed corrections to the OFAC report; and

WHEREAS, OFAC issued a final Report of Examination on June 5, 2007, finding, inter alia, that the Board's decision to indemnify individual Board members' attorney's fees in actions brought against private citizens and the Board's decision to pay for an out-of-district placement was not a proper use of public funds; and

WHEREAS, the Board appealed OFAC's initial determination on August 9, 2007 on the basis that OFAC did not review all facts relevant to the Board's argument, and that OFAC is not the appropriate body to adjudicate whether the Board's actions were arbitrary and capricious; and

WHEREAS, by letter dated October 11, 2007, OFAC summarily

denied the Board's appeal; and

WHEREAS, on November 2, 2007, the Board filed a second level appeal with OFAC, appealing the Report of Examination, dated June 5, 2007 and first-level Decision on Appeal, dated October 11, 2007; and

WHEREAS, OFAC issued a Second Level Decision on Appeal, dated July 31, 2008, dismissing the Board's arguments in a summary opinion; and

WHEREAS, the Board appealed the Second Level Decision, on or about October 28, 2008, with the New Jersey Department of Education; and

WHEREAS, the matter was referred by the New Jersey Department of Education to the Office of Administrative Law as a contested matter, where it was assigned to the Honorable Israel Dubin, A.L.J..

NOW, THEREFORE, in consideration of the mutual covenants and promises set forth below, the Board and OFAC agree to the following terms and conditions:

1. The Board hereby agrees to forfeit approximately ONE THOUSAND, SIX HUNDRED EIGHTY FOUR and 42/100 DOLLARS ($1,684.42) in State aid from the New Jersey Department of Education as a result of payments made by the Board for legal fees incurred in connection with the affirmative legal claims filed by Board members against private citizens.

2. The Board hereby agrees not to dispute the approximately ELEVEN THOUSAND, FOUR HUNDRED NINETY EIGHT and 90/100 DOLLARS ($11,498.90) in State aid which was previously withheld in December 2008 regarding the payments made for an out-of-district student with a Section 504 Plan.

3. OFAC and the New Jersey Department of Education hereby agree not to take any action, legal or otherwise, against the Board, any past or present Board member or District employee, relating in any way to the findings contained in OFAC's June 5, 2007 Report of Examination. OFAC and the New Jersey Department of Education further agree that they have concluded any and all investigations related to the findings contained in OFAC's June 5, 2007 Report of Examination. OFAC and the New Jersey Department of Education retain the right to conduct investigations of the Board, or any past or present Board members, regarding any matters falling outside the scope of the instant matter and OFAC's June 5, 2007 Report of Examination.

4. The Board hereby agrees to take all necessary action to make this agreement binding upon the Board.

5. This Settlement and Release Agreement constitutes the full and complete agreement of the parties and may be changed or modified. 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 treated as if it were drafted contemporaneously by the parties.

6. This agreement is made without any admissions of liability or responsibility by any party hereto and shall not be admissible in any legal proceeding except to enforce its terms.

7. The Board and OFAC each hereby verify, affirm and represent that they have each had the opportunity to discuss the terms of this agreement with counsel, and are entering into this agreement voluntarily and with a full understanding of its meaning.

IN WITNESS WHEREOF, the parties hereto have executed this agreement.

Dated: Dec. 20, 2010 By: _____
Peter Ashley, President
Union Township Board of Education

Dated: November 3, 2010 By: Robert J. Cicchino
Robert Cicchino, Director
Office of Fiscal Accountability and Compliance

Bryant L. Horsley, Jr. 03/25/11
Bryant L. Horsley, Jr., DAG
Attorney for Respondent,
N.J. Dept of Ed., Office of Fiscal Accountability and Compliance

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, HUNTERDON COUNTY, NEW JERSEY AS RECORDED IN THE OFFICIAL MINUTE BOOK.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF UNION IN THE COUNTY OF HUNTERDON CONVENED IN PUBLIC SESSION DECEMBER 20, 2010 AT 7:00 P.M. IN THE LIBRARY OF THE UNION TOWNSHIP MIDDLE SCHOOL.

THE FOLLOWING MEMBERS OF THE BOARD OF EDUCATION WERE PRESENT:
MR. KEVIN KUO, MR. VINCENT DIROBERTO, MR. JOHN CORCORAN, MR. MIKE SROKA, MRS. ELIZABETH STOTHOFF, MRS. KAREN WISNOSKY, MR. PETE ASHEY, MR. DENNIS GLACKEN, AND MR. JAMES TEIPEL

THE FOLLOWING MOTION WAS OFFERED BY MR. VJ DIROBERTO, SECONDED BY MR. DENNIS GLACKEN:

TO ACCEPT THE OFAC SETTLEMENT DATED NOVEMBER 3, 2010.

THE MOTION WAS PASSED BY UNANIMOUS VOTE

I, AMY M. BARKMAN, SECRETARY OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, IN THE COUNTY OF HUNTERDON, 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, 2010 HAS BEEN COMPARED BY ME WITH THE ORIGINAL MINUTES AND OFFICIALLY RECORDED IN MY OFFICE IN THE MINUTE BOOK OF SAID UNION TOWNSHIP BOARD OF EDUCATION AND IS A TRUE, COMPLETE COPY THEREOF AND OF THE WHOLE OF SAID ORIGINAL MINUTES SO FAR AS THE SAME RELATED 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 ON THIS 17TH DAY OF MARCH 2011.

AMY M. BARKMAN
BUSINESS ADMINISTRATOR/BOARD SECRETARY

RECEIVED
2011 MAR 25 P 12:51
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

156-11

WAYNE SPELLS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured principal at Cambridge Park School and director of Special Programs in respondent's district – appealed the May 2008 vote of the Board to withhold his employment and adjustment increments for the 2008-2009 school year, based on the district superintendant's determination that petitioner had not properly overseen the administration of the district's Terra Nova testing during the 2006-2007 school year. Petitioner contended that the Board failed to follow its own policy for withholding increments, and therefore the increments should be restored. The Board contended that the withholding of the increments was not arbitrary, capricious or unreasonable.

The ALJ found, *inter alia*, that: an individual contesting a salary increment withholding has the burden of proof to demonstrate that the Board's decision was arbitrary, capricious, and without a reasonable substantive basis; the primary factual dispute is which of two Board policies – Policy 2132 or Policy 4117.51 – apply in the instant matter; Policy 2132, which sets forth a minimal process for evaluation of tenured administrators, applies here; the applicable policy procedurally requires only the preparation of a summary-review document by June 30 if an increment withholding is being recommended, and this requirement was met; petitioner received two written notices concerning the Board's intention to discuss his performance, and was offered and took the opportunity to offer a written rebuttal in the performance evaluation; and petitioner had an opportunity to persuade the Board to restore the increments through the grievance process hearing. The ALJ concluded that petitioner had not demonstrated that the Board acted arbitrarily or that he was substantially prejudiced. Accordingly, the ALJ affirmed the Board's action to withhold petitioner's increments.

Upon independent review and consideration, the Commissioner concurred with the ALJ that Policy 2132 applied to the petitioner and that respondent satisfied the requirements set forth therein. Additionally, the Commissioner found that several due process safeguards articulated in Policy 4117.51 were provided to petitioner, notwithstanding that they appeared on their face to be intended for the protection of teachers. Accordingly, respondent's action in withholding petitioner's salary increments for the 2008-2009 school year was upheld, and the petition 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.

April 21, 2011

OAL DKT. NO. EDU 11499-08
AGENCY DKT. NO. 249-8/08

WAYNE SPELLS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner's challenge to respondent's decision not to award him salary increments for the 2008-2009 school year comes to the Commissioner by way of cross applications for summary decision. After review of the record, Initial Decision of the Office of Administrative Law (OAL) and parties' exceptions, the Commissioner is constrained to adopt the Initial Decision as the final decision in this case. The facts have been set forth in detail in the Initial Decision and will be referenced herein as needed.

It is undisputed that respondent's decision not to award petitioner increments was in consequence of mistakes or oversights he had made in the administration of Terra Nova testing[1] during the 2006-2007 school year. Supervising the administration of the tests was petitioner's responsibility, and it is undisputed that the flawed administration of same had a significant educational impact on the students in the district. Petitioner's sole claim before the

[1] A series of standardized achievement tests used nationally and designed to assess K-12 student achievement in reading, language arts, mathematics, science, social studies, vocabulary, spelling, and other areas.

The procedures set forth in Policy 4117.51 require an informal meeting within ten school days of whatever incident triggers the potential for withholding an increment. If the meeting does not resolve the problem, the administrator is required, within ten school days, to present the teacher with a written notice of:

> 1. The incident, deficiency or behavior complained of;
> 2. The corrective action which the administrator deems necessary;
> 3. In cases of deficiency in teaching performance, a warning that failure to correct the deficiency within ninety (90) calendar days may result in a recommendation for withholding of the employee's increment;
> 4. In cases of unacceptable, but non-flagrant behavior, a warning that repetition of such conduct may result in a recommendation for withholding the employee's increment.
>
> [Emphasis added.]
>
> (Joint Exhibit J-10a.)

The employee is required by the policy to acknowledge receipt of the warning by affixing initials to a copy of it, and has the right to respond in writing. If he or she fails to correct the deficiency in teaching performance within the ninety-day period or repeats the unacceptable behavior:

> the administrator may recommend to the chief school administrator that the employee's increment be withheld for the following academic year. Any such recommendation shall be in writing, giving the specific reasons for the recommendation and representing to the chief school administrator that the subject employee is being held to the same standards as all other employees under the administrator's supervision. A true copy of the administrator's written recommendation shall be transmitted on the same date to the employee and to the Matawan Regional Teachers Association. The affected employee shall have a period

> of ten (10) school days to submit to the chief school administrator's office a written response to the administrator's recommendation . . . .
>
> i[Emphasis added.]
>
> (Joint Exhibit J-10a-11a.)

The remainder of Policy 4117.51 states that if the administrator determines to recommend to the board that the increment be withheld, "the employee shall be furnished with a true copy of the chief school administrator's recommendation, the reasons therefore and a notice that he/she may have a hearing before the Board prior to its vote" on the recommendation. Upon a vote to withhold, the board is required within ten school days to give written notice of the action to the employee, together with the reasons therefor, and to provide notice of his/her right of appeal to the Commissioner of Education. The Matawan Regional Teachers Association also must receive a copy of the notice. (Joint Exhibit J-11a.) The foregoing notwithstanding, Policy 4117.51 states that where "flagrant conduct" is involved, all the articulated procedures – save those described in this paragraph – do not apply. (*Ibid.*)

The Commissioner is not persuaded that, between the two policies under scrutiny, Policy 4117.51 governs this controversy. First, in all references to the 90-day correction period it is teaching that is specifically identified as the category of performance that receives the protection of a probationary period before imposition of a penalty. Thus, even assuming, *arguendo,* that Policy 4117.51 applied to petitioner, respondent was not obliged to follow the Policy 4117.51 guidelines pertaining to correction periods.

Second, the procedures in Policy 4117.51 A and B – calling for a meeting after an employee's offending conduct and a second meeting if the offending conduct reoccurs – also expressly refer to teachers and teacher performance. (Joint Exhibit J-10a) Similarly, the

language of Policy 4117.51 D – which advises that uncorrected performance deficiencies may result in a recommendation for increment withholding – also specifically identifies teaching performance as the subject of the provision. (Joint Exhibit J–10a-11a) Moreover, Policy 4117.51 requires that a recommendation for increment withholdings be copied both "to the employee and to the Matawan Regional Teachers Association" (MRTA), and that notice of any affirmative vote by the board be sent to both the employee and the MRTA. (Joint Exhibit J–11a)

In sum, while Policy 4117.51 uses the word "employees" liberally, it is teaching performance and teachers that are identified in the specific provisions that describe the main procedures to be followed before and after a recommendation to withhold increments. Additionally, even if Policy 4117.51 did apply, its Section G instructs that "[s]teps A through D of [its] procedures need not be followed in the event of flagrant conduct." (Joint Exhibit J-11a) While flagrant conduct is not defined in the policy, the Commissioner would be hard-pressed to find that respondent was unreasonable in viewing as flagrant the deficient administration of an important state diagnostic test. In this regard, the Commissioner is mindful of the words of respondent's superintendent O'Malley who stated – in his letter to petitioner advising of the board's action – that the defective Terra Nova testing had a significant educational impact on the students in the district. *See,* Joint Exhibit J-32a.

The Commissioner also notes that respondent took several of the measures prescribed by Policy 4117.51 to ensure that petitioner was informed that the administration's concerns about his performance were significant enough to warrant presentation to the respondent board. As mentioned in the Initial Decision, petitioner received written notice as early as February 27, 2008 that his job performance would be discussed by respondent on

March 3, 2008 and that he could opt for a public discussion of same. (Joint Exhibit J-12a) Petitioner did not opt for a public discussion but was allowed to communicate his position to the board attorney for input during respondent's closed session on March 3rd. In the Initial Decision the Administrative Law Judge (ALJ) found that at this point petitioner knew that the focus of the concerns with his performance was the deficient administration of the Terra Nova testing. (Initial Decision at 4) Petitioner does not appear to dispute this.

On April 17, 2008 petitioner was sent another written notice that his job performance would be discussed in closed session at an April 23, 2008 board meeting. (Joint Exhibit J-13a) Further, it is undisputed that on May 16, 2008 petitioner met with his immediate supervisor to go over his annual evaluation, which evaluation memorialized his inadequate management of the Terra Nova testing. The record suggests that at that meeting the testing problems were discussed, and that petitioner was permitted to add a rebuttal to the evaluation document. (Joint Exhibit J-14a-18a)

Additionally, it is undisputed that before the May 19, 2008 board meeting, Superintendent O'Malley verbally advised petitioner that the board would be taking action on his recommendation to withhold increments from petitioner.[2] Thus, before the respondent board actually voted to withhold increments from petitioner, there had been multiple written and verbal notices to petitioner about the contemplated action and reasons therefore. Petitioner had been provided the opportunity to be heard – both by conveying his position to the board attorney at the March 3, 2008 board meeting and by attaching a rebuttal to his evaluation.

Consistent with procedure F of Policy 4117.51, on May 20, 2008, Superintendent O'Malley sent a letter to petitioner advising that the respondent Board had voted

[2] The parties agree that such a conversation took place, but do not agree how far in advance of the board meeting it occurred.

not to award him increments for the 2008-2009 school year. The letter provided the reasons for the action:

> ...your inefficiency in properly supervising and implementing the Terra Nova testing for the District, in your position as Principal/Director of Special Programs. As you know, only a portion of the Terra Nova test was completed by the students, since your instructions to the staff on proctoring the examination [were] incomplete and inaccurate. Obviously, the failure of the District to receive meaningful Terra Nova testing results jeopardized the educational performance and evaluation of the District's students.
>
> (Joint Exhibit J-19a)

Statutory authority, case law and respondent's policies instruct that increments are not automatic and may not be granted where performance is lacking. *See, e.g., N.J.S.A.* 18A:29-14; *North Plainfield Education Ass'n v. Board of Education,* 96 *N.J.* 587, 593 (1984); Policy 4117.51 at 1. In contesting a salary increment withholding, it is the employee that has the burden of proof of demonstrating that the decision was unreasonable, arbitrary, without rational basis or induced by improper motives. *Kopera v. West Orange Board of Education*, 60 *N.J. Super* 288, 294 (App. Div. 1960). In light of the foregoing discussion about the content of Policies 4117.51 and 2132, the Commissioner cannot conclude that respondent was arbitrary, capricious or unreasonable in determining that the latter policy, rather than the former, was the appropriate policy to follow in evaluating petitioner and assigning consequences to a less than satisfactory performance.

Thus, the Commissioner concurs with the ALJ that Policy 2132 applied to the petitioner and that respondent satisfied the requirements of same. The Commissioner further finds that several due process safeguards articulated in Policy 4117.51 were provided to petitioner, notwithstanding that they appeared on their face to be intended for the protection of teachers. Consequently, the Commissioner cannot conclude that respondent acted arbitrarily,

capriciously or unreasonably in deciding not to award increments to petitioner for the 2008-2009 school year.

Petitioner's motion for summary decision is accordingly denied and respondent's motion for summary decision is granted. The petition is dismissed and respondent's action to withhold increments from petitioner is upheld.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4|21|11

Date of Mailing: 4|21|11

[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 11499-08
AGENCY DKT. NO. 249-8/08

WAYNE SPELLS,
Petitioner,
v.
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondent.

David Nash, Esq., for petitioner (New Jersey Principals and Supervisors Association)

David B. Rubin, Esq., for respondent

Record Closed: December 21, 2010 Decided: January 19, 2011

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

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

Wayne Spells (Petitioner), a tenured principal and director of special programs at Cambridge Park School in the Matawan-Aberdeen Regional School District, appeals the loss of employment and adjustment increments for the 2008-2009 school year. He

contends that the Board of the Matawan-Aberdeen Regional School District (the Board) failed to follow its own policy for withholding increments, and therefore, the increments must be restored. The Board argues that the issue is not whether it employed the proper procedure, but whether the Board acted in a manner that was arbitrary, capricious, or unreasonable.

On May 19, 2008, the Board adopted a resolution to withhold Spells's increments for providing incomplete and inaccurate instructions to staff proctoring the district's Terra Nova standardized testing. In the testing, students completed only a portion of the examination. By letter dated August 14, 2008, Spells appealed the increment-withholding decision to the Commissioner of Education. The Department of Education determined to transfer the matter to the Office of Administrative Law, where it was filed on October 2, 2008. The petition comprised two claims—the procedural defect and a challenge to the factual accuracy of the basis for the withholding. At some point prior to the hearing scheduled for April 2009 before Administrative Law Judge Douglas Hurd, a briefing schedule on cross-motions for summary decision was set. With the appointment of ALJ Hurd to the Superior Court, the matter was assigned to ALJ Israel Dubin, who on September 2, 2010, denied the cross-motions for summary decision. The matter was then assigned to the undersigned for hearing on November 16, 2010. On that date, counsel for the two parties advised that they had discovered neither could provide a witness with knowledge concerning the adoption or history of the policies in question. Additionally, they agreed that they were now prepared to stipulate to enough additional facts to render the matter appropriate for summary decision. The hearing having been adjourned, the stipulations were received on November 30, 2010, and on December 16, 2010. In those stipulations, the petitioner withdrew his challenge to the merits of the Board's action, and limited his claim to the Board's failure to follow the required procedures. Since the documentary appendices are essentially exhibits, they have been treated as joint exhibits. With the receipt of briefs on December 21, 2010, the record closed.

FACTUAL DISCUSSION

What follows is a summary of the facts, as stipulated by the parties. Petitioner Wayne Spells is a tenured administrator employed by the respondent as principal of Cambridge Park School and director of Special Programs for the school district. He has served as president of the Matawan Regional Administrators Association (MRAA), the collective negotiations representative for principals, directors, and certain other district administrators, since 2007. The MRAA is a local affiliate of the New Jersey Principals and Supervisors Association.

On May 19, 2008, the Board voted to withhold Petitioner's increment for the 2008-2009 school year, pursuant to N.J.S.A. 18A:29-14, on the recommendation of Superintendent Dr. Richard O'Malley, based on O'Malley's determination that petitioner had not properly overseen the most recent administration of Terra Nova testing.

At the time the Board took this action it had in effect a policy manual containing numerous written policies addressing many aspects of school district operations. The policies were organized into separate categories, or series, grouped together by general subject matter. The "2000" policy series was entitled "Educational Administration." The "4000" series was entitled "Certified Personnel." The 2000 series included Policy 2132, entitled "Evaluation of Administrative Personnel," adopted on April 21, 1977, and revised on October 16, 1996. The 4000 series included 4115/4116 entitled, "Supervision/Evaluation" and 4117.51, "Withholding an Increment." Policy 4117.51 was adopted by the Board on November 22, 1976, and last revised on October 16, 1996. Neither party is able to produce a witness with personal knowledge of the original intent of the policies, or the intentions of the Board at the time of the revisions. Nor can either party produce a witness who can recall any instance of an administrator's increment having been withheld.

In the period leading up to the Board vote, several actions were taken. On February 27, 2008, Deputy Superintendent Joel Glastein sent petitioner a written notice advising him that the Board of Education would discuss his job performance at its Committee of the Whole meeting on March 10, 2008, at 7 p.m. The letter also stated

that petitioner should inform Glastein in writing no later than 3 p.m. on March 10, if he wished to have the matter discussed in public session rather than in executive session. (See J-12.) Petitioner did not submit a written request but appeared at the meeting with John Litchtenberg, a representative of the New Jersey Principals and Supervisors Association. Petitioner asked to address the Board members in closed session. The Board's Attorney, Michael Gross, informed the two that petitioner would not be allowed to address the Board's closed session. Gross instead offered an opportunity to convey to him any information they wanted communicated to the Board concerning their position on the testing issue that petitioner understood would be the subject of discussion. Petitioner and Litchtenberg communicated information to Mr. Gross. The parties stipulated that if Gross were to testify, he would have stated that he shared petitioner's information with the Board.

By written notice dated April 17, 2008, Deputy Superintendent Glastein again advised petitioner that his job performance would be the subject of discussion in closed session at an April 23, 2008, Board meeting. (J-13a.) Petitioner was again offered the opportunity to make a written request to have the matter discussed in public session. At that Board meeting, Superintendent O'Malley advised the Board in closed session of his intention to recommend that petitioner's increment be withheld at the Board's May 19, 2008, action meeting. (The parties have a factual disagreement on whether petitioner was advised by Gross and O'Malley on April 23 that he need not stay for the meeting since he would not be the subject of discussion. Petitioner contends this occurred; the Board denies that it did.)

On May 16, 2008, petitioner met with his supervisor, Kimberly Honnick, to review his annual performance evaluation. The review (J-14a through 17a) was generally favorable but did note "an error made on the development of the Terra Nova test schedule" during the 2006-07 school year. Petitioner was given the opportunity to present a written rebuttal, which was annexed to the evaluation. (J-18a).

Some time before the May 19, 2008, Board meeting, Superintendent O'Malley orally advised petitioner that the Board would be taking action to withhold his increment at that meeting. (The parties disagree on precisely when the conversation took place.

The Board contends that petitioner received the advice on May 18, 2008, and was afforded an opportunity to meet with Superintendent O'Malley to discuss the matter further. Petitioner contends the conversation occurred an hour before the meeting).

At the time that Superintendent O'Malley recommended that the Board of Education withhold petitioner's increment, O'Malley believed that Policy No. 4417.51 was inapplicable to petitioner. However, neither the policy nor any issues concerning its applicability were specifically discussed with the Board members themselves.

Following the meeting, petitioner by letter dated May 20, 2008, was notified that on May 19, 2008, the Board had voted to withhold the employment-and-adjustment increments for the 2008-09 year, and provided the reasons for the action. On receipt of the letter, Petitioner, on his own behalf and that of the MRAA, filed a grievance pursuant to the collective-negotiations agreement between the MRAA and the Board, culminating in a hearing before the Board on June 30, 2008, attended by Petitioner and Lichtenberg, his NJPSA representative. At the hearing, petitioner contended that no disciplinary action was warranted but that if the Board wished to impose a sanction, the sanction should be a letter of reprimand.

The collective-negotiations agreement defined "grievance" to mean "a claim by an administrator that there has been misinterpretation, misapplication, or a violation of Board Policy, this Agreement, or an administrative decision affecting him/her." At no time during the grievance process did petitioner specifically identify Policy No. 4117.5 as a "Board Policy" he believed had been violated, nor was it specifically mentioned by petitioner or his NJPSA representative at the June 30, 2008, grievance hearing. (See J-20a to J-32a, the agreement and grievance documents.) It should be noted that the parties disagree on the meaning of the grievance document. Were petitioner to testify, his contention would be that the phrases "due process," "a corrective action plan" and "improperly singled out for the blame" were intended as references to provisions of Policy No. 4117.51 that were violated in the withholding of his increment. (The Board contends that petitioner's position on this point is not credible, and that if petitioner believed that Policy 4117.51 were applicable, he would have referred to it specifically either in the grievance document or during the grievance hearing.)

At no time was petitioner given specific-written notices that the superintendent intended to recommend that his increment be withheld, nor did the superintendent make a specific-written representation to the Board that petitioner was "being held to the same standards as all other employees in a similar classification," as referenced in paragraph E of "Procedures" incorporated in Board Policy 4117.51.

Board Policy 4117.51 states that it is applicable to certified personnel. The prior policy, 4115/4116, also applicable to certified personnel, is written almost entirely in relation to teachers. However, the first page of 4117.51 does not use the word "teacher." Rather its directives speak to how withholding is to be addressed for "employees." It includes a single phrase about correcting teaching performance deficiencies, but all of the other language addresses conduct and behavior in general. The regulations that accompany 4117.51 utilize the term "employees," although an entire paragraph addresses the process if withholding is related to "deficiency in teaching performance" and there are three references to providing documents to the Matawan Regional Teachers Association.

Policy Number 4117.51 provides in pertinent part that:

> . . .
>
> As a general policy, the Board will ***not*** withhold (emphasis in the original) a salary increment on the basis of a single poor evaluation or a single incident except in flagrant cases. A staff member should generally be given a minimum of ninety (90) calendar days to correct deficiencies in teaching performance and prior notice concerning unacceptable, non-flagrant behavior, before an increment is withheld.
>
> The chief school administrator shall represent to the Board that the standards to which the employee has been held are not exceptional or unusual and apply to all employees in a similar classification.
>
> Prior to voting on a recommendation to withhold a salary increment, the Board shall offer the employee the right to a hearing before the Board or a committee thereof to oppose the proposed withholding . . . .

> To insure due process protection, procedures as outlined in the accompanying regulations, will be utilized in connection with any withholding of increment action by this Board of Education.
>
> [(J-9a.)]

The regulations adopted in relation to Board Policy No. 4117.51 require an informal meeting within ten-school days of whatever incident triggers the potential for withholding an increment. If the meeting does not resolve the problem, the administrator is required within ten-school days to present the teacher with a written notice of:

> . . .
>
> 1. The incident, deficiency or behavior complained of;
> 2. The corrective action which the administrator deems necessary;
> 3. In cases of deficiency in teaching performance, a warning that failure to correct the deficiency within ninety (90) calendar days may result in a recommendation for withholding of the employee's increment;
> 4. In cases of unacceptable, but non-flagrant behavior, a warning that repetition of such conduct may result in a recommendation for withholding the employee's increment.
>
> . . .
>
> [(J-10a.)]

The regulations go on to state that the employee shall acknowledge receipt of the warning by affixing initials to a copy of it, and shall be given an opportunity respond in writing. If the administrator determines that the situation warrants it,

> . . .
>
> the administrator may recommend to the chief school administrator that the employee's increment be withheld for the following academic year. Any such recommendation shall be in writing, giving the specific reasons for the recommendation and representing to the chief school administrator that the subject employee is being held to the same standards as all other employees under the administrator's supervision. A true copy of the administrator's written recommendation shall be transmitted on the same date to the employee and to the Matawan

> Regional Teachers Association. The affected employee shall have a period of ten (10) school days to submit to the chief school administrator's office a written response to the administrator's recommendation . . . .
>
> [(J-10a; J-11a.)]

The policy goes on to state that if the administrator determines to recommend to the Board that the increment be withheld, "the employee shall be furnished with a true copy of the chief school administrator's recommendation, **the reasons therefore and a notice that he/she may have a hearing before the Board prior to its vote" on the recommendation. Upon a vote to withhold, the Board is required within ten school days to give written notice of the action to the employee, together with the reasons therefore, and to provide notice of his/her right of appeal to the Commissioner of Education**. (Emphasis added.) The Matawan Regional Teachers Association also must receive a copy of the notice. (J-11a.)

In contrast, Policy No. 2132 has few specifics. Individual goals are to be set for the school year; and by August 31 a summary-review document should be prepared by the chief school administrator in conference with the individual administrator and his or her supervisor. If an increment withholding is being recommended, the review document should be finalized by June 30.

The primary factual dispute is the question of which policy applies. Unfortunately, neither side has a witness with recollection of the intent of the 1996 Board that approved both policies, or of any tenured administrator having been subjected to withholding. As a plausible argument can be made for application of either policy, deciding which applies becomes a matter of evaluating actual wording and overall context. "Withholding an Increment" (Policy 4117.51) is older and its first page is written in all-encompassing language, except for the reference to providing ninety-calendar days to conduct deficiencies in teaching performance. It was first adopted on November 22, 1976, and then subjected to two revisions, one in 1989, the second on October 16, 1996. "Evaluation of Administrative Personnel," (Policy 2132) was first adopted on April 21, 1977, about five months after Policy 4117.51, and was revised only once on October 16, 1996, the same date that Policy 4117.51 was revised. The policies

are structured identically—first a general statement of policy and then a follow-up delineation of procedures. Policy 4117.51 comprises an initial-policy statement on criteria and process for teacher evaluation, followed by a policy statement on increment withholding, and then a very-detailed process that addresses teaching deficiencies, and even for single, flagrant violations, provision of documents to the Matawan Teachers Association. Similarly, "Evaluation of Administrative Personnel" consists of an initial statement of policy as to the need for evaluation and the kinds of criteria appropriate, followed by a procedural document. The policy statement recites that the chief school administrator shall report to the Board his recommendations for changes of position, retention, dismissal, or salary increments as may be appropriate and require Board approval. The procedural follow-up lays out a detailed procedure for actions impacting non-tenured personnel, accompanied a brief separate section affecting tenured administrators. This section simply requires a summary-review document completed by June 30, if an increment withholding is being recommended. I am persuaded by the parallel construction of the policies; the very-detailed nature of the processes for teacher evaluation; and for non-tenured administrator evaluation; that the absence of detailed process in a document revised simultaneously with the others means that the minimal process for tenured administrators reflected a deliberate decision by the Board. Therefore, I **FIND as FACT** that Policy 2132 applied to tenured administrators, and that the process required was not greater than that required by the education statutes in general.

LEGAL ANALYSIS AND CONCLUSION

In a salary-increment challenge, the burden is on the petitioner to establish by a preponderence of the credible evidence that the action of the Board was arbitrary, capricious, and without a reasonable substantive basis. Sturn v. Bd. of Educ. of the Borough of S. Plainfield, 92 N.J.A.R.2d (EDU) 661 (Dept. of Education). Scotch Plains-Fanwood Bd. of Educ. v. Scotch Plains-Fanwood Educ. Assoc., 270 N.J. Super. 444, 451 (App. Div. 1994) (quoting Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294-96 (App. Div. 1960)).

In general, then, N.J.S.A. 18A:11-1(c) gives Boards broad authority in making, amending, and repealing rules for the employment, regulation of conduct and discharge of their employees. But once a board has established such rules, logic and case law suggest those policies are then binding on the board. Sturn v. Bd. of Educ. of the Borough of S. Plainfield, Initial Decision (September 10, 1992) at 9, adopted in 92 N.J.A.R.2d (EDU) 661 (Dept. of Education) (citing Matawan Teachers Ass'n v. Matawan-Aberdeen Reg. Sch. Dist., 223 N.J. Super. 504 (App. Div. 1988)). Thus, if the Board's decision to withhold Spells's increment is inconsistent with its own policies, then the action should be viewed as arbitrary and capricious.

Petitioner has argued that his situation falls within Shifrinson v. Marlboro Township Board of Education, EDU 636-83, Commissioner's Decision (June 4, 1984). In Shifrinson, the Marlboro Board failed to provide a right to a hearing before the Board prior to a vote on withholding an increment, despite its own clear policy requiring a hearing before the action. The Board's failure to follow its own policy rendered its action arbitary.

Here, the applicable policy required nothing procedurally beyond the preparation of a summary-review document by June 30 in conference with individual administrators and their supervisors by June 30. I **CONCLUDE** that this requirement was met. Moreover, with regard to the broader question of fair notice, opportunity to be heard, and substantial prejudice, which underpin decisions such as Rice v. Union County Regional High School Board of Education, 155 N.J. Super. 64 (App. Div. 1977), courts have held that an opportunity to be heard after a Board has taken its employment action is procedurally sufficient. See, for example, Cole v. Woodcliff Lake Bd. of Educ., 155 N.J. Super. 398 (1978).

The core question is whether petitioner knew the reasons for the Board's proposed action and was substantially prejudiced by the Board's procedure. Shifrinson, supra, EDU 636-83 (quoting Fitzpatrick v. Montvale Bd of Educ., 1969 S.L.D. 4). Here, it is clear that petitioner received two-written notices concerning the Board's intention to discuss his performance, was offered and took the opporunity to offer written rebuttal in the performance evaluation, and had at least oral notice before the actual Board

meeting, such that he was clearly well aware that his performance was the subject of Board discussion. Moreover, through the grievance-process hearing, petitioner received an opportunity to persuade the Board to restore the increment. Under these circumstances, I **CONCLUDE** the petitioner has not demonstrated that the Board has acted arbitrarily or that he was substantially prejudiced by the process employed.

ORDER

Therefore, I **ORDER** the Board's action 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, 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 19, 2011
DATE

Laura Sanders
LAURA SANDERS,
ACTING DIRECTOR AND CHIEF ALJ

Date Received at Agency: January 19, 2011

Date Mailed to Parties: January 19, 2011

/caa

LIST OF EXHIBITS

Joint Exhibits

J-1a Policy Series 2000 Educational Administration No. 2132, Evaluation of Administrative Personnel, page 1 of 2

J-2a Policy Series 2000 Educational Administration No. 2132, Evaluation of Administrative Personnel, page 2 of 2

J-3a Regulations Series 3000 Educational Administration No. 2132, Evaluation of Administrative Personnel, page 1 of 2

J-4a Regulations Series 3000 Educational Administration No. 2132, Evaluation of Administrative Personnel, page 2 of 2

J-5a Policy Series 4100 Certified Personnel No. 4115/4116, Supervision/Evaluation, page 1 of 4

J-6a Policy Series 4100 Certified Personnel No. 4115/4116, Supervision/Evaluation, page 2 of 4

J-7a Policy Series 4100 Certified Personnel No. 4115/4116, Supervision/Evaluation, page 3 of 4

J-8a Policy Series 4100 Certified Personnel No. 4115/4116, Supervision/Evaluation, page 4 of 4

J-9a Policy Series 4100 Certified Personnel No. 4117.51, Withholding an Increment

J-10a Regulations Series 4100 Certified Personnel No. 4117.51, Withholding an Increment, page 1 of 2

J-11a Regulations Series 4100 Certified Personnel No. 4117.51, Withholding an Increment, page 2 of 2

J-12a Letter to Wayne Spells from Joel M. Glastein, dated February 27, 2008

J-13a Memorandum to Wayne Spells from Joel M. Glastein, dated April 17, 2008

J-14a Administrator Evaluation Form (and Annual Performance Improvement Plan) for Wayne Spells for School Year 2007-08, dated May 16, 2008

J-15a Administrator Evaluation Form (and Annual Performance Improvement Plan) for Wayne Spells for School Year 2007-08, page 2

J-16a Administrator Evaluation Form (and Annual Performance Improvement Plan) for Wayne Spells for School Year 2007-08, page 3

J-17a Administrator Evaluation Form (and Annual Performance Improvement Plan) for Wayne Spells for School Year 2007-08, page 4

J-18a Administrator Evaluation Form (and Annual Performance Improvement Plan) for Wayne Spells for School Year 2007-08, Addendum, dated May 21, 2008

J-19a Letter to Wayne Spells from Richard O'Malley, dated May 20, 2008

J-20a Agreement between Matawan-Aberdeen Regional Board of Education and Matawan Regional Administrators Association [EXCERPT], July 1, 2005, through June 30, 2008, Revised: August 15, 2005

J-21a Agreement between Matawan-Aberdeen Regional Board of Education and Matawan Regional Administrators Association [EXCERPT], July 1, 2005, through June 30, 2008, Revised: August 15, 2005, Table of Contents - page i

J-22a Agreement between Matawan-Aberdeen Regional Board of Education and Matawan Regional Administrators Association [EXCERPT], July 1, 2005, through June 30, 2008, Revised: August 15, 2005, Table of Contents - page ii

J-23a Agreement between Matawan-Aberdeen Regional Board of Education and Matawan Regional Administrators Association [EXCERPT], July 1, 2005, through June 30, 2008, Revised: August 15, 2005, Table of Contents - page iii

J-24a Agreement between Matawan-Aberdeen Regional Board of Education and Matawan Regional Administrators Association [EXCERPT], July 1, 2005, through June 30, 2008, Revised: August 15, 2005, page 4

J-25a Agreement between Matawan-Aberdeen Regional Board of Education and Matawan Regional Administrators Association [EXCERPT], July 1, 2005, through June 30, 2008, Revised: August 15, 2005, page 5

J-26a Agreement between Matawan-Aberdeen Regional Board of Education and Matawan Regional Administrators Association [EXCERPT], July 1, 2005, through June 30, 2008, Revised: August 15, 2005, page 6

J-27a Agreement between Matawan-Aberdeen Regional Board of Education and Matawan Regional Administrators Association [EXCERPT], July 1, 2005, through June 30, 2008, Revised: August 15, 2005, page 7

J-28a Agreement between Matawan-Aberdeen Regional Board of Education and Matawan Regional Administrators Association [EXCERPT], July 1, 2005, through June 30, 2008, Revised: August 15, 2005, page 8

J-29a Grievance Report—Date Occurred: May 20, 2008, Date Filed: May 21, 2008

J-30a Letter from Susan Irons to Wayne Spells, undated

J-31a Grievance Report—Date Occurred June 30, 2008, Date Filed: July 3, 2008

J-32a Letter from Richard O'Malley to Wayne Spells, undated

J-33a Petition of Appeal for Wayne Spells, dated August 14, 2008, page 1

J-34a Petition of Appeal for Wayne Spells, dated August 14, 2008, page 2

J-35a Petition of Appeal for Wayne Spells, dated August 14, 2008, page 3

J-36a Petition of Appeal for Wayne Spells, dated August 14, 2008, page 4

J-37a Petition of Appeal for Wayne Spells, dated August 14, 2008, page 5

J-38a Affidavit of Way Spells, dated August 14, 2008

159-11

IN THE MATTER OF THE TENURE	:	
HEARING OF LOUIS MELILLO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY	:	

SYNOPSIS

In 2004, the School District of the City of Elizabeth brought tenure charges of conduct unbecoming against respondent – a tenured custodian – and sought respondent's dismissal from employment. Respondent denied all charges, contending that the students who made the allegations of unbecoming conduct had fabricated their stories in a scheme to get him fired because he had caught them derelict in their work duties, had sent them home for not doing their work, and had their pay reduced. Following dismissal of criminal charges filed against respondent in the same matter, a hearing was held at the OAL; subsequently, all tenure charges against respondent were also dismissed. The Commissioner's final decision, issued in November 2010, remanded the case back to the OAL for proceedings to resolve the parties' disputes concerning back pay and emoluments.

The ALJ found that: tenured school employees who have been exonerated of tenure charges are entitled to be reinstated with back pay and emoluments, but have a duty to mitigate damages by seeking similar employment; any award of back pay may be reduced for failure to mitigate; respondent was under a duty to mitigate and seek suitable employment; respondent was employed from August 2004 to July 2005 in construction work; respondent did not seek further employment after being laid off from his construction job in July 2005, and continued on suspension with pay even after the Commissioner's final decision in November 2010 dismissing all tenure charges; however, the Board overlooked the fact that mitigation is an affirmative defense, and therefore the Board had the burden of proof. The ALJ concluded that respondent is entitled to full back pay and emoluments, minus what he earned while working in construction, and ordered that the Board: 1) pay the net amount of $16,781.14 as reimbursement of wrongfully withheld wages; 2) award respondent all increments to which he would have been entitled; 3) credit respondent for the sick days he has earned since his suspension; and 4) award respondent with vacation days he has accrued, beginning with August 2004.

The Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34, concurred with the ALJ that the Board failed to meet its burden of establishing that respondent's back pay should be subject to mitigation, and with the ALJ's determinations with respect to earned sick time and reimbursement for pay respondent was entitled to for the period during which he was inappropriately suspended. Additionally, the Assistant Commissioner found, *inter alia*, that: respondent is entitled to a credit for the vacation time he accrued but did not use prior to his suspension, not a monetary reimbursement; and respondent should have returned to work immediately following the dismissal of tenure charges in November 2010 and is consequently not entitled to any additional sick or incremental pay beyond November 30, 2010. The respondent shall be awarded back pay and increments due totaling $52,411.64, and shall be credited with 96 sick days through November 30, 2010 and 15 vacation days earned but not used prior to his suspension. No additional vacation time is warranted since respondent is being paid for the entire amount of time he was wrongfully suspended.

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 12620-10
(EDU 11502-04 ON REMAND)
AGENCY DKT NO. 363-10/04

IN THE MATTER OF THE TENURE	:	
HEARING OF LOUIS MELILLO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY	:	

The record of this matter and the Initial Decision of the Office of Administrative Law – as well as the respective exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the respondent and the Board of Education (Board), and the respondent's reply thereto – have been reviewed by the Assistant Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34. On November 4, 2010, the Commissioner remanded this matter to OAL to fully resolve the parties' disputes concerning back pay and emoluments.[1]

The Board submitted exceptions arguing that the ALJ inappropriately found that the respondent's back pay should not be subject to mitigation. The Board contends that the ALJ erroneously found that the Board failed to present prima facie evidence that there were other comparable employment opportunities available to the respondent. The Board argues that the ALJ's finding with respect to mitigation was ludicrous because it was the respondent's obligation to put forth a good faith effort to mitigate the damages. In its exceptions, the Board points out that the respondent testified that he did not make any attempts to work during his suspension.

[1] In the November 4, 2010 decision, the Commissioner dismissed the tenure charges against the respondent.

The Board also takes exception to the ALJ's specific findings regarding respondent's increments and accrued vacation time. The Board contends that the ALJ wrongfully awarded the restoration of an increment from August 1, 2004 - June 30, 2005 even though an increment was not withheld during that period. Finally, the Board argues that respondent should not be reimbursed for his accrued vacation days, but rather he should be credited with those days.

The respondent submitted exceptions generally supporting the ALJ's findings with respect to the back pay and emoluments. In his exceptions, the respondent additionally argues that in light of the delay occasioned by waiting for the remand decision, the respondent should receive an additional 14 sick days and 2 personal days which accrue as sick days for the 2010-2011 school year. In reply to the Board's exceptions, the respondent contends that the ALJ properly found that it is the Board who has the burden of establishing the failure to mitigate, and that no such evidence was presented by the Board in this case. Again, in reply the respondent reiterated his position with respect to back pay and emoluments previously stated in his exceptions.[2]

Upon review of the record on remand, the Assistant Commissioner concurs with the ALJ for the reasons stated in the Initial Decision that the Board failed to meet its burden of establishing that the respondent's back pay should be subject to mitigation. The Assistant Commissioner further agrees with the ALJ's determination with respect to respondent's earned sick time, and the reimbursement for pay that he is entitled to for the period during which respondent was inappropriately suspended.

[2] The remaining arguments made by the respondent in reply are beyond the scope of remand, and are more directed at the Board's counsel and the number of delays that have occurred in this case. It should be noted that both parties have used their respective exceptions as a method to complain about the manner in which this case has been litigated.

In the Initial Decision the ALJ found that the respondent's increment for 2004 – 2005 should be restored. Based on the record on remand, it does not appear that the respondent's increment was withheld prior to July 1, 2005; therefore, no increment shall be restored for that time period. The ALJ also awarded respondent with the vacation time he accrued beginning August 2004. Since the respondent is being paid for the entire amount of time he was wrongfully suspended, no additional vacation time is warranted. It is also not clear from the Initial Decision whether the ALJ's recommendation was meant to be a credit for vacation time or if it was meant to be a reimbursement for that accrued time.[3] The Assistant Commissioner finds that respondent is entitled to a credit for the vacation time he accrued but did not use prior to his suspension, not a monetary reimbursement.

Finally, the Assistant Commissioner finds that the respondent should have returned to work immediately following the November 4, 2010 final decision dismissing the tenure charges.[4] *See, N.J.S.A.* 18A:6-14. Moreover, the Assistant Commissioner cannot even fathom why respondent has not returned to work, especially considering the amount of time that it has taken for the tenure proceedings to culminate. The portion of the November 4, 2010 decision that remanded this case to the OAL was strictly limited to the parties' disputes concerning back pay and emoluments, and should not have delayed respondent's return to work. As a result, the Assistant Commissioner finds that the respondent is not entitled to any additional sick or incremental pay beyond November 30, 2010.[5]

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[3] It is clear from the respective exceptions that the parties each interpreted the ALJ's finding differently.

[4] According to the record on remand the respondent has not yet returned to work; however, the record is devoid of any justification for such.

[5] On remand it appears that the Board provided the ALJ with all of the relevant back pay and emolument calculations up until November 30, 2010 with the expectation that the respondent would be back at work by that date.

Accordingly, the respondent shall be awarded $16,781.14, which amounts to his salary for the period when he was improperly suspended, reduced by the amount he earned while working in construction during that time period. The respondent shall also be awarded the increments he would have received between July 1, 2005 and November 30, 2010, which amounts to a reimbursement of $35,630.50.[6] As a result, the respondent shall receive a total of $52,411.64 in monetary reimbursements. Finally, the respondent shall be credited with the 96 sick days that he accrued during the suspension up until November 30, 2010, and the 15 vacation days that he had accrued but had not used prior to the suspension.

IT IS SO ORDERED.[7]

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4|25|11

Date of Mailing: 4|25|11

[6] These calculations were provided by the Board on remand, and the respondent agreed they were accurate for purposes of the remand.

[7] 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 12620-10
AGENCY DKT. NO. 363-10/04
(EDU 11502-04 ON REMAND)

IN THE MATTER OF THE TENURE HEARING OF LOUIS MELILLO, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.

Karen A. Murray, Esq., for petitioner City of Elizabeth Board of Education

Sheldon H. Pincus, Esq., for respondent Louis Melillo (Bucceri and Pincus, attorneys)

Record Closed: February 10, 2011 Decided: March 8, 2011

BEFORE **CARIDAD F. RIGO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent Louis Melillo, a school head custodian, was suspended with pay by the City of Elizabeth School District on July 16, 2004. On or about September 15, 2004, the school district served Melillo with tenure charges. The charges were certified and Melillo was suspended without pay, effective October 15, 2004. On or about December 3, 2004, a grand jury returned a four count indictment against Melillo. On or about August 26, 2005, a Stay was granted temporarily suspending the proceedings on the

tenure charges until the criminal case was resolved. On September 28, 2005, Melillo was acquitted of all criminal charges and his suspension without pay was converted to a suspension with pay. Subsequent to the criminal case being resolved, a hearing on the tenure charges was held at the Office of Administrative Law (OAL) under OAL Dkt. No. EDU 11502-04. In an Initial Decision dated September 20, 2010, I determined that Mr. Melillo was not guilty of any of the tenure charges filed against him. On November 4, 2010, the Commissioner adopted the Initial Decision, and remanded the matter "for such proceedings as are necessary to fully resolve the parties' disputes concerning back pay and emoluments." The remanded case was filed at the OAL bearing docket number EDU 12620-10.

The parties filed supplemental briefs addressing the issue of back pay and emoluments. The parties, in principal, do not disagree that respondent is entitled to back pay and emoluments. However, they disagree on the specific amounts. The Elizabeth Board of Education (Board) argues that Melillo had the duty to mitigate his damages, and he should not be awarded the full amount of his back pay unless or until he demonstrates that he took reasonable efforts to mitigate his damages. Melillo counters that the Board has not met its burden of establishing a failure to mitigate. Melillo argues that the Board bears the burden of proving the existence of comparable jobs that Melillo could have taken while the instant matter was pending. And, since the Board failed to address this issue prior to this remand, it cannot now present such an argument.

ISSUES

Is respondent entitled to back pay and emoluments and, if so, how much?

LEGAL DISCUSSION

Tenured school board employees who have been exonerated of tenure charges are entitled to be reinstated with back pay and emoluments. N.J.S.A. 18A:6-14; N.J.S.A. 18A:6-30. However, the employee has the duty to mitigate his or her damages, and any award of back pay may be reduced for failure to mitigate. White v.

N. Bergen Twp., 77 N.J. 538 (1978); Mullen v. Jefferson Twp. Bd. of Educ., 81 N.J. Super. 151 (App. Div. 1963).

> [M]itigation . . . is the deduction of other income received from the amount of back pay otherwise recoverable. . . . [W]here other income is not actually received, the amount of back pay awarded may be reduced by the amount the discharged employee could or should have received by reasonable and sincere efforts to find other employment.
>
> [Zielenski v. Guttenberg Bd. of Educ., 1981 S.L.D. 759, 762.]

What constitutes a reasonable and sincere effort to locate other employment in order to mitigate has been "liberally construed" as an "honest attempt" to find comparable employment. Siegel v. Garfield Bd. of Educ., 94 N.J.A.R.2d (EDU) 319. The term "comparable employment" has been interpreted to mean that the position is of a like character, which requires analysis of the particular responsibilities and skills of the job that the individual was denied. Goodman v. London Metal Exch., 86 N.J. 19, 36–37 (1981). In this regard, an employee's duty to mitigate requires him or her to seek similar employment in order to reduce the amount of his or her damages. Similar employment refers to the nature of the job activity, location and rate of compensation. Id. at 36.

Respondent argues that the Board must sustain its burden of proof on the issue of mitigation. Respondent relies on Roselle v. La Fera Contracting Co., 18 N.J. Super. 19, 28 (Ch. Div. 1952). Respondent further asserts that the Board belatedly argues mitigation, and the issue of a lack of mitigation was not raised previously.

I note the dialogue during Melillo's cross-examination by Ms. Murray on the subject of mitigation. (Tr. of March 11, 2010, at 10–14.) In summary, Melillo testified that he did not collect unemployment. He said he worked for Furino Construction as a laborer from August 2004. Melillo testified that he worked for Furino forty hours a week for approximately eleven months, after which he was laid off due to lack of work.[1] Melillo testified that he did not seek any further employment and remained unemployed.

[1] Subsequent to a request by this judge, respondent, on February 10, 2011, provided a certification stating that he worked for Furino Construction for approximately eleven months and earned gross wages of $29,783.36.

It is understood that to date, Melillo is still unemployed and has not returned to work at the Elizabeth Board of Education. Petitioner offered no other evidence on the subject of mitigation or Melillo's employment. I **FIND** that respondent was employed from August 1, 2004, until July 2005 at Furino Construction.

An employer is permitted to reduce its damages by showing that the employee has earned wages from another employer. Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141N.J. Super. 437, 455, 358 A.2d 805 (App. Div.), certif.. denied, 71 N.J. 503, 366 A. 2d 658 (1976); Roselle v. La Fera Contracting Co., 18 N.J.Super. 19, 28, 86 A. 2d 449 (Ch. Div. 1952).

Also during respondent's cross-examination on March 11, 2010, the following was the dialogue on the subject of mitigation:

> MS. MURRAY: Have you made any attempts to work between 2004, July and the present?
>
> MR. MELILLO: No.
>
> MS. MURRAY: And why is that?
>
> MR. MELILLO: Because I already am employed by the Elizabeth Board of Education.
>
> MS. MURRAY: But you have not been working at the Board, you've just been collecting a paycheck?
>
> MR. MELILLO: Yes.
>
> [Tr. at 10, lines 1–25.]

The Mullen case addressed whether the doctrine of mitigation was applicable in cases where a person holding a position with a local school board is entitled to full payment of salary for the entire period of the illegal dismissal, without mitigation. The court in Mullen found that the Legislature had intended that "all claims made by illegally dismissed persons under N.J.S.A. 18A:5-49.1 [now N.J.S.A. 18:6-30] be subject to the common law rule of mitigation of damages." Mullen, supra, 81 N.J. Super. at 159. The court also relied, in part, upon the common law principle that a "public employee's claim

for back pay may justly be subjected to mitigation." Id. at 158. Respondent was under a duty to mitigate and seek suitable employment.

Respondent stated that he did not seek further employment after being laid off from Furino Construction in July 2005. When mitigating damages, individuals must exercise reasonable diligence and ordinary care. W. Orange Supplemental Instructors Ass'n v. W. Orange Twp. Bd. of Educ., 92 N.J.A.R.2d (EDU) 288. Respondent is essentially a laborer, and such work should have been fairly easily obtained, at least on a temporary and/or seasonal basis. It is clear from the above cited dialogue that Melillo made no effort to get other employment while he was suspended. To date, respondent continues on suspension with pay even though on November 4, 2010, the Commissioner of Education adopted this administrative law judge's findings and dismissed all of the tenure charges filed against the respondent. The Commissioner's decision was mailed on November 12, 2010.

However, in the case of O'Lone v. Dep't of Human Services, 357 N.J.Super. 170, 180 (App.Div. 2003), where the issue was whether an employer may deny a back pay claim based solely on the employee's failure to seek substitute employment during the period of separation from public service, without considering the availability of such employment. In O'Lone, as in this case, the facts revealed that O'Lone did not apply for a single job. O'Lone made no serious effort to obtain substitute employment. The court in O'Lone concluded that although O'Lone failed to seek substitute employment it was not a sufficient basis for denying him back pay, the availability of other comparable employment has to be established.

Mitigation is an affirmative defense and the initial burden of proving the appropriateness of its application rests with the employer. See Goodman, supra, at 32; O'Lone , supra, at 18. The appointing authority bears the initial burden of presenting evidence of the employee's failure to mitigate. It is the employer that must make an initial showing that comparable employment opportunities were available or that there were other suitable jobs. Only then does the burden of going forward shift to the employee who may introduce evidence that comparable employment did not exist, that

reasonable and diligent efforts on his/her part had not been successful, or that the circumstances did not justify acceptance of a dissimilar job. Goodman, Ibid.

I **FIND**, that the Board has overlooked the well founded principle that mitigation is an affirmative defense and it is the Board that has the burden of proof. I **FURTHER FIND** that the Board has failed to present prima facie evidence that there were other comparable employment opportunities available to the respondent.

Therefore based on the above, I am constrained to **CONCLUDE** that respondent is entitled to his full back pay and emoluments minus what he earned while working at Furino Construction.

ORDER

It is therefore **ORDERED** that the Board of Education of the City of Elizabeth restore to the respondent the amount of $46,564.50, which covers the period he was improperly suspended, less $29,783.36, which is the amount he earned while working for Furino Construction. The net amount to be paid to respondent is $16,781.14 as reimbursement of wrongfully withheld wages.

It is further **ORDERED** that petitioner is to be awarded the increments for the periods of August 1, 2004, June 30, 2005, July 1, 2005 to June 30, 2006; July 1, 2006, to June 30, 2007; July 1, 2007, to June 30, 2008; July 1, 2008, to June 30, 2009; July 1, 2009, to June 30, 2010; and July 1, 2010, to November 12, 2010.

And, it is further **ORDERED** that respondent be credited with the sick days he has earned since his suspension.

And, it is further **ORDERED** that respondent be awarded the vacation days he has accrued beginning August 2004.

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.

March 8, 2011
DATE

CARIDAD F. RIGO, ALJ

Date Received by Agency: March 8, 2011

Date Mailed to Parties: march 11, 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

Exhibits

From Petitioner:

None.

From Respondent:

Certification of Louis Melillo dated February 2, 2011

Exhibit-A 2005 W-2 from Furino Construction

160-11

OAL DKT. NO. EDU 03640-11
AGENCY DKT. NO. 64-3/11

A.T., on behalf of minor child, S.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
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.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/28/11
Date of Mailing: 4/28/11

* 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
EMERGENCY RELIEF
OAL DKT. NO. EDU 03640-11
AGENCY REF. NO. 64-3/11

A.T. ON BEHALF OF S.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,

Respondent.

A.T., appearing pro se

Rodney T. Hara, Esq., for respondent (Fogarty and Hara, attorneys)

Record Closed: April 11, 2011 Decided: April 11, 2011

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

Petitioner, A.T., has filed an application for emergency relief pursuant to N.J.A.C.1:1-12.6, through which he challenges his son's grade level placement. Petitioner seeks an order compelling the respondent, Rutherford Board of Education (the Board), to immediately return his son, S.T., to a first grade classroom. Effective December 2010, S.T. was removed from first grade and enrolled in a half-day kindergarten/half-day first grade program, due to

administrative concerns about his academic readiness. Petitioner additionally seeks supplemental tutoring to compensate for the time missed since his transfer from the full-time first grade classroom.

The background facts are essentially uncontroverted and I **FIND** as follows:

S.T. is a six-year-old student, who completed kindergarten at a non-public school, and was enrolled in the Rutherford Public Schools as a first grader in September 2010. The Board's enrollment policy stipulates that a student seeking to enroll in the first grade "must be 6 years old on or before October 1, 2010, or be 6 years old by December 31, 2010, and have a transfer card indicating successful completion of kindergarten." S.T. turned six years of age on October 6, 2010. His parents felt that S.T. had a successful kindergarten experience, and he was initially enrolled in a first grade classroom in Rutherford. The district submitted the certification of Lincoln School Principal, Jeanna Velechko, who stated that S.T. was permitted to enroll as a first grader because he had attended kindergarten, but that since he technically missed to age cut-off for first grade, "his performance would be monitored to determine whether his placement was appropriate."

As early as October, 2010, S.T.'s classroom teacher began to document concerns about his academic performance, including an inability to remain on task, follow instructions, work well with the class group, hand in assignments on time, and participate appropriately in class discussions. Student progress reports were forwarded to his parents noting these concerns on October 26, 2010, and again on November 8, 2010.

By November 12, 2010, S.T.'s case had been brought to the attention of the district Intervention Referral Services Committee (IRSC) due to concerns about S.T.'s academic and social functioning in the classroom. The IRSC "is a

professional problem-solving group whose purpose is to assist teachers in varying instructional strategies and to enable more individualized and effective alternatives for learners," and is a multi-disciplinary team of school professionals that includes a reading specialist, social worker and psychologist. S.T.'s teacher reported failing grades and an inability to work independently to the IRSC. It was noted that S.T. is capable, but not working to capacity. Socially, he appeared to be unhappy, sad and lonely, and he lacked peer relationships.

The IRSC met on November 30, 2010, and determined that it was in S.T.'s best interest to either return to kindergarten, or be enrolled in split day program where he would attend both kindergarten and first grade. He was determined not be developmentally ready for first grade, and accordingly, under either plan would be registered in kindergarten. The Committee stated that its preference was the split day program, and S.T.'s parents were given until December 6, 2010 to make a choice. To insure that the view of the IRSC was the correct one, Ms. Velechko arranged for additional testing of S.T., and she carefully reviewed his academic performance. She found that he was performing below average, and was struggling at the first grade level.

A.T. advised that he did not wish his son to be returned to kindergarten, and desired that he remain in the first grade. The change to a split day program was made over his parents' objections. Petitioner appealed to the Superintendent of Schools, Elaine Baldwin, who, in a letter dated December 7, 2010, stated that S.T.'s progress would continue to be monitored, and that if his performance improved he would be moved to first grade. Baldwin stated that, "[i]n the spring, a determination will be made regarding [S.T.'s] grade placement for the 2011-2012 school year."

S.T.'s parents thereafter arranged for private testing through Mae Balaban and Associates; they urge that this testing found that S.T. is capable of functioning at a first grade level. They further assert that the district's impression

of their son is unfair, as he arrived at school in September exhausted after a trip to India, and suffering from an infection, negatively impacting his academic performance. A referral to the child study team was rejected by the district via letter dated January 11, 2011. That letter reported that S.T. was now doing well in his kindergarten program, was following classroom rules and routines, was attentive and engaged well with his peers and showed no evidence of a learning disability which warranted child study team intervention. But Velechko reports in her certification that S.T.'s difficulties in the first grade classroom remain ongoing. He continues to have difficulty working independently, his math performance continues not to meet first grade expectations, and he has weaknesses in reading comprehension. Developmental Reading Assessments completed by the district likewise show that S.T. is lagging behind his peers. Although his transition to his new split day program, which included a change to a different first grade classroom, has gone smoothly, S.T. continues to appear more socially comfortable with kindergarten peers.

An appeal to the Board seeking to overturn the administrative recommendation was rejected by the Board at its meeting of February 14, 2011.

In accordance with N.J.A.C. 1:1-12.6, emergency relief may be granted "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..." My determination in this matter is further governed by the standard for emergent relief set forth by our Supreme Court in Crowe v. DeGioia, 102 N.J. 50 (1986), as follows:

> The judge may order emergency relief ....if the judge determines from the proofs that:
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted.
>
> 2. The legal right underlying the petitioner's claim is settled.

3. The petitioner has a likelihood of success 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 relief is not granted.

The moving party must satisfy all four prongs of the Crowe v. DeGioia standard to establish an entitlement to emergent relief. Id. at 132-35.

I **CONCLUDE** that petitioner has not satisfied the standard for emergent relief, as he cannot demonstrate a likelihood of success on the merits of his claim. Nor is the legal right underlying petitioner's claim settled in his favor; rather, he will have weighty burden at hearing. The Commissioner has consistently held that local boards of education may promote or place students in public school grade levels according to their own rules and regulations. Shenkler v Ho-Ho-Kus Bd. of Educ., 1974 S.L.D. 772, aff'd 1975 S.L.D. 1157; Boulogne v Bd. of Educ. of the City of Jamesburg, 1964 S.L.D. 107; Wilcox v Bd. of Educ. of the Borough of Oceanport, 154-55 S.L.D. 75. See also: N.J.S.A. 18A: 4-24, which provides that while the Commissioner may inquire into whether a local district is providing a thorough and efficient education, "nothing in this section shall affect the right of each district to prescribe its own rules for promotion." Thus, generally, the Commissioner will defer to local board discretion in the area of grade level placement.

The Commissioner's view is consistent with the generally accepted notion that he will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008) <http://lawlibrary.rutgers.edu/oal/search.html>, citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966). The Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be

"patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960).

Our courts have held that "[w]here 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 Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, at plenary hearing petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M. v. Moorestown, supra, EDU 2780-07, Initial Decision (February 6, 2008) <http://lawlibrary.rutgers.edu/oal/search.html>.

This record presents no evidence that Rutherford school personnel were motivated by anything other than S.T.'s educational best interest. The Board made its determination that S.T. is not developmentally ready for first grade based on the advice of its educational professionals, who conferred as a committee and reviewed both informal observational data and testing data in making a determination. Based on the evidence before me, I **CONCLUDE** that petitioner has not demonstrated a likelihood of prevailing on his claim that the Board's action here was arbitrary, capricious or unreasonable.

Nor has petitioner demonstrated irreparable harm. S.T. will continue to attend school pending a plenary hearing. It is clear that the issue of S.T.'s placement for the 2011-2012 school year can and will be the subject of further thoughtful discussion between the parties. I concur with the district that an immediate return to first grade runs a greater risk of irreparably harming S.T. than does continuing him on his present course pending a full exploration of the merits of petitioner's claims.

Accordingly, I **ORDER** that the petition for emergency relief be **DISMISSED**. A plenary hearing will be conducted at a date and time convenient for the parties.

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.

April 11, 2011

DATE

ELLEN S. BASS, ALJ

163-11

KIMBERLY LOBELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WARREN HILLS REGIONAL SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner's position as a Teacher of Psychology was eliminated in a reduction in force (RIF) at the end of the 2009-2010 school year. Petitioner contended that her tenure rights were violated when her position was abolished and the Board retained non-tenured chemistry teachers despite petitioner's claim to those positions. On the date that petitioner's position was abolished by the Board – May 11, 2010 – petitioner held a standard instructional certificate with an endorsement as a Teacher of Psychology. On May 26, 2010, petitioner was issued an instructional certificate with an endorsement as a Teacher of Chemistry.

The ALJ found that: the controlling case on this issue is *Francey v. Board of Educ. of the City of Salem*, 286 *N.J. Super.* 354 (App. Div.1996), in which the court found that a tenured teacher's right to re-employment may not be expanded by teaching certificates or additional instructional endorsements acquired after the date that the teacher's position was abolished through a RIF; pursuant to the findings in *Francey*, tenure rights are fixed on the date the Board passes its resolution effectuating a RIF; petitioner's position was abolished by the Board on May 11, 2010, which preceded – by approximately two weeks – the date of issuance of petitioner's second certificate to teach chemistry; accordingly, petitioner's after-acquired certificate affords her no rights to the chemistry positions presently held by non-tenured teachers in the district. The ALJ granted the Board's motion for summary decision and dismissed the petition with prejudice.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ that *Francey* is the controlling case, and found that the petitioner's tenure rights became fixed on May 11, 2010, and the endorsement in chemistry acquired after that date is not afforded any tenure protections. 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.

#161-11

OAL DKT. NO. EDU 8788-10
AGENCY DKT. NO. 155-7/10

KIMBERLY LOBELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WARREN HILLS REGIONAL SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law 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's reply thereto.

In her exceptions, the petitioner argues that the Administrative Law Judge (ALJ) wrongfully found that her tenure status at the time of the Board's May 11, 2010 decision to abolish her position did not extend to the Teacher of Chemistry endorsement that the petitioner applied for on April 27, 2010.[1] The petitioner recognizes that generally teachers may not count after acquired endorsements within the scope of tenure protections; however, she argues that this rule is not absolute. In her exceptions, the petitioner points out that the Commissioner has found that tenure protections can apply to endorsements issued after a notice of a reduction in force (RIF) if the process to obtain the new endorsement was initiated prior to the RIF. *See, Albert v. Board of Education of the Scotch Plains-Fanwood Regional School District, Union County*, 1997 S.L.D. (August 6, 1997). The petitioner further argues that the facts in this case are similar to those in *Albert*, and as such the analysis of *Albert* controls. Based on *Albert*, the petitioner

[1] It is undisputed that the petitioner had obtained tenure as a teacher in psychology, and that on May 11, 2010 the Board abolished her position pursuant to a valid reduction in force.

contends that her tenure status includes the Teacher of Chemistry endorsement – which she applied for on April 27, 2010 prior to the Board's May 11, 2010 resolution approving the RIF – despite the fact that the endorsement was not issued until May 26, 2010.

In reply, the Board reiterates the positions advanced in its submission at the OAL, urging the Commissioner to adopt the ALJ's determination that the petitioner's after-acquired certificate to teach chemistry did not afford her any tenure rights. The Board argues that the petitioner's tenure rights were fixed when the Board approved the RIF, and at that time petitioner did not hold an endorsement in chemistry. The Board also contends that the petitioner's reliance on *Albert* is misguided, and that the ALJ properly distinguished *Albert* from the present case. The Board further argues that *Albert* was decided on very specific facts, was based on equitable considerations, and is not binding on this case. The Board maintains that the seminal case on this issue is *Francey v. Board of Educ. of the City of Salem*, 286 *N.J. Super.* 354 (App. Div. 1996). Under *Francey*, a tenured teacher's rights to reemployment may not be expanded by teaching certificates or additional endorsements acquired after the date the teacher's position was abolished through a reduction in force.

Upon review, the Commissioner concurs with the Administrative Law Judge that the Board is entitled to summary decision. On the date that the Board passed the resolution abolishing petitioner's position, the petitioner did not hold a Teacher of Chemistry endorsement, and as a result the Commissioner finds that she did not have any tenure rights with respect to teaching positions in chemistry.

Notwithstanding the existence of *Albert*, the Commissioner further finds that *Francey* is the controlling case on this issue. In *Francey,* the court found that only the endorsements held by the teacher at the time of the Board's decision to implement the RIF are

afforded tenure protections. *Francey, supra,* 286 *N.J. Super.* at 357, 361. Further, tenure rights are fixed as of the date of the RIF decision; therefore, any subsequent endorsements obtained by a teacher are not afforded any tenure protections. *Id.* at 358.

In this case, it is undisputed that when the Board voted to abolish petitioner's position on May 11, 2010, the petitioner did not hold a Teacher of Chemistry endorsement. As a result, the petitioner's tenure rights became fixed on May 11, 2010, and the endorsement in chemistry acquired after that date is not afforded any tenure protections. Finally, it is not necessary to analyze this case in conjunction with *Albert* because the bright line rule established by the Appellate Division is controlling.[2] Accordingly, the petition of appeal is dismissed.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/27/11

Date of Mailing: 4/28/11

[2] Although consistency in administrative rulings is generally preferred, an administrative agency is not irrevocably committed to its own precedents. 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).

[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
GRANTING MOTION FOR
SUMMARY DECISION

KIMBERLY LOBELLO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF THE WARREN HILLS REGIONAL SCHOOL DISTRICT, WARREN COUNTY,
Respondent.

OAL DKT. NO. EDU 8788-10
AGENCY DKT. NO. 155-7/10

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

Stephen R. Fogarty, Esq, for respondent (Fogarty & Hara, attorney)

Record Closed: March 4, 2011 Decided: March 15, 2011

BEFORE **JEFFREY A. GERSON,** ALJ:

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On or about July 16, 2010, Kimberly LoBello, a full-time teacher of psychology with the Warren Hills Regional School filed a petition with the Commissioner contending that her tenure rights had been violated when her position was abolished and the school

board retained one or more non-tenured chemistry teachers in derogation of LoBello's claim on those positions.

The Board contends that LoBello's certification as a chemistry teacher was issued after a reduction in force (RIF), which abolished LoBello's position as a teacher of psychology and resulted in her termination. The issuance of the endorsement as a chemistry teacher was, according to the Board, an after-acquired endorsement which extends no further rights to LoBello then the rights she had when she was notified of her termination.

FACTS

The **FACTS** in this matter are not in dispute and a signed Stipulation placed in evidence at the hearing set forth the stipulated facts as follows:

1. Petitioner Kimberly LoBello (hereinafter referred to as "LoBello") was employed by the Respondent, Warren Hills Regional School District Board of Education (hereinafter referred to as the "Board"), as a full-time teacher of psychology, beginning with the 2005-2006 school year. (See Joint Exhibit A.)

2. LoBello was hired under a provisional instructional certificate, issued "05/05" under her family name "Kimberly L. Waters," authorizing her as a "teacher of psychology." (See Joint Exhibit B.)

3. On or about May 26, 2006, LoBello submitted an application for a standard instructional certificate as a "teacher of psychology." (See Joint Exhibit C.)

4. In 2006, a standard instructional certificate with an endorsement as a "teacher of psychology" was issued to LoBello. The certificate did not have an endorsement as a teacher of chemistry.

5. LoBello continued to be employed by the Board on a full-time basis through annual-employment contracts for the 2006-2007, 2007-2008, 2008-2009, and 2009-2010 school years. (See Joint Exhibit D.)

6. LoBello was employed as a "teacher of psychology" during the 2005-2006 school year and as a "teacher of psychology and forensic science" during the 2006-2007, 2007-2008, 2008-2009, and 2009-2010 school years.

7. During the above timeframe, LoBello gained tenure in the position of 7-12 Subject Area Teacher.

8. The Board's job description for the position of 7-12 Subject Area Teacher list the first qualification for holding the position as "[a] teaching certificate issued by the New Jersey State Department of Education with the appropriate endorsement or HQT status according to teaching assignment." (See Joint Exhibit E.)

9. At the time of her initial employment, LoBello indicated she would pursue a standard certificate with endorsements as both a teacher of psychology and as a teacher of chemistry. When LoBello was not issued a chemistry-teacher endorsement in 2006 at the time she obtained her standard certificate with an endorsement for psychology, the Board did not know whether she had ever followed up on the chemistry endorsement.

10. On April 30, 2010, the Board sent LoBello a RICE notice informing her that her employment status would be discussed in executive session at the Board meeting to be held on May 11, 2010. (See Joint Exhibit F.)

11. On May 11, 2010, the Board abolished LoBello's position, effective June 30, 2010, pursuant to a valid reduction in force for reasons of economy and efficiency. (See Joint Exhibit G.)

12. By correspondence dated May 12, 2010, LoBello was informed that she would not be re-employed for the 2010-2011 school year. (See Joint Exhibit H.)

13. On or about the date the position was abolished, the Board contacted the Department of Education, Office of Licensure and Credentials, with a request for an expedited review of LoBello's credentials to determine what certificates and endorsements she held. (See Joint Exhibit I.)

14. On June 14, 2010, the Board received a copy of a standard teaching certificate authorizing LoBello as a "teacher of chemistry." The certificate was issued to LoBello under her family name, "Kimberly L. Waters," and stated that it was issued "May 2010." (See Joint Exhibit J.)

15. LoBello applied for the chemistry teacher certificate on or about April 27, 2010. (See Joint Exhibit K.)

16. On July 28, 2010, the Board submitted a government records request, under the Open Public Records Act (OPRA), for a document from the Office of Licensure and Credentials memorializing "the SPECIFIC date of issue of a standard teaching certificate issued to Kimberly L. Waters in May 2010, authorizing her as a 'teacher of chemistry.'" (See Joint Exhibit L.)

17. On August 9, 2010, the OPRA custodian from the Department of Education responded to the Board's request with a letter stating as follows: "Our records indicate that a standard Teacher of Chemistry certificate was issued to Kimberly L. Waters on May 26, 2010. The certificate was printed on May 27, 2010 and mailed on May 28, 2010." (See Joint Exhibit M.)

18. The Board currently employs two non-tenured teachers of chemistry for the 2010-2011 school year. (See Joint Exhibit N.)

In summary, LoBello was initially employed under a Provisional Instructional Certificate authorizing her as a "teacher of psychology". She subsequently became tenured in that position and remained employed with Warren Hills Regional until May 2010.

On April 30, 2010, LoBello received a RICE notice informing her that her employment status would be discussed at a Board meeting on May 11, 2010; on that date, the Board abolished LoBello's position; and on or about April 27, 2010, three days prior to the RICE notice, LoBello had applied for credentials as a chemistry teacher.

At the time LoBello's position as a teacher of psychology was abolished, the Board attempted to contact the Office of Licensure and Credentials to determine whether a chemistry-teacher endorsement had been issued to LoBello. It was not until mid-June 2010 that the Board actually received a copy of a standard teaching certificate authorizing LoBello as a "teacher of chemistry". Subsequent investigation revealed that the teacher of chemistry certificate was issued on May 26, 2010, approximately two weeks after LoBello was terminated and her position abolished.

THE LAW

A tenured teacher's right to re-employment may not be expanded by teaching certificates or additional instructional endorsements acquired after the date the teacher's position was abolished through a reduction in force. Francey v. Bd. of Educ. of City of Salem, 92 N.J.A.R.2d (EDU) (Vol. 4A) 449 (Comm'r), aff'd, 96 N.J.A.R. 2d (EDU) 347 (State Board), aff'd, 286 N.J. Super. 354, 360-61 (App Div. 1996).

The facts in Francey are directly on point for this matter although the time period between the abolishing of Francey's position and her subsequent expansion of her teaching certificate was substantially longer. Nonetheless, the principle enunciated in Francey has been uniformally applied by the Commissioner.

LoBello cites the matter of Albert v. The Board of Education of Scotch Plains, 1997 S.L.D. (August 6, 1997) in which Albert had submitted an application for certification to the Department of Education prior to the Board's action to reduce its staff and the Board was aware of such circumstance at the time of the action. The Albert matter can be distinguished from the facts in this matter in that the Board was aware of Albert's application at the time of their action. Albert was never terminated although her

position was "reduced." The Commissioner's Decision itself stated that "we stress in so doing that our determination is predicated on the specific facts in the record of this case . . . ." The Warren Hills Regional School District acted quite responsibly by seeking to determine LoBello's status at the time of the RIF and in no way acted in a detrimental manner as that inferred in Albert.

The Appellate Division upheld the Francey decision, finding the interpretation of the Commissioner and the State Board with respect to the tenure statutes to be in accord with the underlying Legislative objective. The Court went on to quote the following portion of the Commissioner's rationale in the Francey decision as follows:

> The date of employees' RIF can be the only reasonable date certain on which the employees' rights can be reckoned for future entitlements purposes. To deprive Boards of this certainty permitting RIF staff to continually revised and expand their entitlements at will would at the very least impose an unreasonable administrative burden on the district, and, of more concern would likely lead to amassing of endorsements following RIF, reduced to ciaos any attempt by the District to ascertain its legal responsibilities upon the arising of a vacancy, and unduly restrict Boards in their efforts to provide a thorough and efficient education by choosing the most qualified staff for open positions."
>
> [Francey, supra, 286 N.J. Super. at 360-61.]

Francey makes it clear that tenure rights are fixed on the date the Board passes its resolution effectuating the reduction in force. In this matter, that date was May 11, 2010, which preceded the date of LoBello's issuance of a certificate to teach chemistry by approximately two weeks. LoBello's after-acquired certificate to teach chemistry affords her no rights to the chemistry positions presently held by non-tenured teachers in Warren Hills Regional School District.

ORDER

It is **ORDERED** that the Motion for Summary Decision by respondent, Warren Hills Regional School District Board of Education, is hereby **GRANTED**;

And it is further **ORDERED** that the Cross-Motion for Summary Decision of petitioner, Kimberly LoBello, is hereby **DENIED**;

And it is further **ORDERED** that the Verified Petition be and hereby is **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, 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.

March 15, 2011

DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 3/15/11

Date Mailed to Parties: march 16, 2011

sej

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

BOARD OF EDUCATION OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
G.F., on behalf of minor children, G.F. and S.F.,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board sought an order placing respondent's children in the Maple Shade school district for the balance of the 2010-2011 school year, contending that Maple Shade is the school district of residence of respondent and placement in its schools is in the best interest of the children. Respondent, a former resident of Maple Shade, was designated "homeless" in November 2008 and since then has been relocated three times by the Burlington County Board of Social Services (BCBSS). In February 2010, the family was moved by the BCBSS to the municipality of Mount Laurel. Respondent enrolled his children in that school district for the current school year, and objected to their placement in the Maple Shade school district.

The ALJ found, *inter alia*, that: from February 16, 2010 to the present, respondent and his children have continuously resided in the municipality of Mount Laurel; during this period, they have continuously been classified as "homeless" by the BCBSS; petitioning Board learned for the first time at the hearing in this matter that respondent and his family have resided in Mount Laurel since February 2010; petitioning Board has withdrawn its claim to have respondent's children enrolled in Maple Shade based on its understanding that it is no longer responsible for the educational costs of respondent's children; although a family may fall under the rubric of "homeless," it nonetheless achieves domicile for school law purposes after a continual year of residence in one district; accordingly, petitioning Board is responsible for the education of respondent's children until February 16, 2011, and thereafter Mount Laurel became their domicile pursuant to *N.J.S.A.* 18A:38-1d. The ALJ ordered the petition dismissed, and further ordered that the Maple Shade School District is no longer responsible for the education of respondent's children.

Upon review and consideration, the Commissioner adopted the OAL's 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.

April 27, 2011

OAL DKT. NO. EDU 12486-10
AGENCY DKT. NO. 570-9/10

BOARD OF EDUCATION OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
G.F., on behalf of minor children, G.F. and S.F.,	:	DECISION
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.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4|27|11

Date of Mailing: 4|28|11

* 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 12486-10
AGENCY DKT. NO. 570-9/10

BOARD OF EDUCATION OF THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY,
Petitioner,
v.
G.F. ON BEHALF OF G.F. AND S.F.,
Respondent.

Damon Tyner, Esq., for petitioner (Parker McCay, attorneys)

G.F., respondent, pro se

Record Closed: March 10, 2011 Decided: March 14, 2011

BEFORE **JOHN SCHUSTER III**, ALJ:

STATEMENT OF CASE AND PROCEDURAL HISTORY

In this matter the Board of Education of the Township of Maple Shade, Burlington County (petitioner or district) seeks an order placing G.F.'s (respondent) children in the Maple Shade School District for the balance of the 2010 - 2011 school

year. Respondent has objected to that placement. On September 23, 2010, the district filed a verified petition of appeal with the State Department of Education seeking the aforesaid relief. An answer was filed with the Department on November 4, 2010. The matter was then transmitted to the Office of Administrative Law (OAL) on November 10, 2010 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 March 10, 2011 at which time the parties appeared, stipulations submitted and testimony and documentary evidence was given. At the conclusion of the hearing the record closed.

FINDINGS OF FACT

Based on the joint stipulation submitted and confirmed by the testimony of the respondent the following are the relevant facts in this matter. Respondent resided in the municipality of Maple Shade from July 2004 through October 2008 and during that period of time respondent's children were enrolled in the Maple Shade School District. In November 2008, respondent was designated as "homeless" and was moved by the Burlington County Board of Social Services to the municipality of Mount Holly. The children remained in the Maple Shade School District until May 2009 when the Burlington County Board of Social Services moved the family unit to the municipality of Westhampton. The children were then enrolled in the Westampton School District and petitioner paid Westampton Board of Education the cost for the educational services provided by that district. The children remained in the Westampton School District for the entire 2009-2010 school year even though on February 16, 2010 the Burlington County Board of Social Services relocated the family unit to the municipality of Mount Laurel. While the children remained enrolled in the Westampton School District Maple Shade provided transportation to that district. In August 2010, in anticipation of the 2010-2011 school year, respondent enrolled his children in the Mount Laurel School System. The Maple Shade District did not approve of that enrollment as they wanted respondent's children to attend school in its system. In order to enforce that desire petitioner brought this action. I further **FIND** that on February 16, 2010 respondent and his family were moved by the Burlington County Board of Social Services to the Rodeway Inn located on Route 73 in Mount Laurel. I further **FIND** that on or about

January 1, 2011 and continuing until the present, respondent's have resided in another motel at the insistence of the Burlington County Board of Social Services which motel is also located in Mount Laurel, but is not disclosed in this initial decision for privacy concerns. I **FIND** that from February 16, 2010 until the present (March 10, 2011) respondent and his children had continuously resided in the municipality of Mount Laurel. I also **FIND** during this period they have continuously been classified as "homeless" by the Burlington County Board of Social Services. I also **FIND** that petitioner learned for the first time on March 10, 2011 that respondent has resided in Mount Laurel since February 16, 2010. This is evidenced by a document marked into evidence as R-1 which is statement from the Rodeway Inn that the arrival date of the respondent was that date. In addition I **FIND** that petitioner has withdrawn its claim to have respondent's children enrolled in the Maple Shade School District based on its understanding that the Maple Shade District is no longer responsible for the educational cost of respondent's children.

LEGAL ANALYSIS

The applicable law on the issue herein is codified in N.J.S.A. 18A:38-1d. That statute provides that:

> Public schools shall be free to the following persons over 5 and under 20 years of age:
>
> a. (N/A)
> b. (N/A)
> c. (N/A)
> d. Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-round dwelling place with in the district for one year or longer shall be deemed to be domiciled within the district for the purpose of this section.

As applied to respondent, Maple Shade has been his domicile from July 2004 to October 2008. On or about November 2008, he became a resident in Mount Holly and in May 2009, became a resident of Westampton. Since he was in neither location for an entire year and was classified as being in homeless status, Maple Shade continued

to be his municipality of domicile. On February 16, 2010, respondent was relocated to the municipality of Mount Laurel and has resided in that municipality since that date. Therefore pursuant to the aforesaid statute Mount Laurel has now become respondent's domicile.

N.J.S.A. 18A:38-1d provides that any student whose parent is not domiciled in a district because of being in homeless status, but has had an all year round dwelling place in the district for at least one year shall be deemed domiciled in that district which entitles that student to a free public education in that district of domicile. Therefore, although a family may fall under the rubric of "homeless" it nonetheless achieves domicile for school law purposes after a continual year of residence in one district. See Board of Education Egg Harbor Township v. Board of Education Mainland Regional High School District, et als., http://lawlibrary.rutgers.edu/oal/html/initial/edu06680-09.

CONCLUSION

I **CONCLUDE** that petitioner is responsible for the education of respondent's children until February 16, 2011. I **CONCLUDE** that on that date respondent and his children resided for one full year in the municipality of Mount Laurel and that municipality became their domicile even though they maintained homeless status.

ORDER

For the reasons set forth herein, I **ORDER** petitioner's request to have respondent's children attend the Maple Shade Schools be **DIMSISSED** because of the withdrawal of that claim based on mootness. I further **ORDER** the Maple Shade District to no longer be responsible for educating respondent's children.

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 14, 2011
DATE

JOHN SCHUSTER III, ALJ

Date Received at Agency: 3/14/11

Date Mailed to Parties: MAR 15 2011

/cad

WITNESES

For Petitioner:

None

For Respondent:

G.F.

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Statement from Rodeway Inn

163-11

#163-11LM

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

May 2, 2011

Kerri A. Wright, Esq.
Porzio, Bromberg & Newman, PC
100 Southgate Parkway
P.O. Box 1997
Morristown, New Jersey 07962-1997

J[redacted] K[redacted]
[redacted]

Re: *J.K., on behalf of minor child, P.B. v. Board of Education of the Township of Springfield, Union County. OAL Dkt. No. EDU 9972-09, Agency Dkt. No. 219-08/09.*

Dear Parties,

The record of this matter and the Order of the Office of Administrative Law (OAL) denying the Springfield Board of Education's motion for summary decision has been reviewed. The Commissioner granted the Board's request for interlocutory review of the Order on April 20, 2011.

In its motion for interlocutory review, the Board contends that the ALJ failed to apply the proper standard for an unopposed motion for summary decision. The Board argues that since the petitioner did not respond to the motion, all of the material facts were essentially undisputed. Further, the ALJ should have presumed an absence of a material factual dispute instead of concluding that there were credibility determinations that needed to be made. The Board also takes exception to the ALJ's finding that *N.J.S.A.* 18A:37-13 provides a private right of action to seek tuition reimbursement for the parents' unilateral decision to remove their son from Jonathan Dayton High School and place him in another school. Additionally, the Board argues that the case law on which the ALJ relied does not provide a legal right to the relief sought by the petitioner. The Board, therefore, urges the Commissioner to enter an Order granting summary decision and dismissing the petition.

In reply, the petitioner maintains that the Board is not entitled to summary decision because she has credible facts to be presented at the hearing, and that she deserves to have her story told. The petitioner also contends that the Board is completely at fault in this matter for not protecting her son within the confines of the school walls.

Upon careful and independent review of the record in this matter, the Commissioner concurs with the ALJ that the Board is not entitled to summary decision. In so doing, however, the Commissioner finds that the ALJ did not conduct the appropriate summary decision analysis mandated by *Brill v. Guardian Life Insurance Co. of America*, 142 *N.J.* 520 (1995). Under *Brill*, *supra*, the motion judge is obligated to conduct a thorough review of the record with all of the

evidence viewed in the light most favorable to the non-moving party to determine whether there exists a genuine issue of material fact. *Brill*, *supra*, 142 *N.J.* at 540.

As a threshold matter, the Commissioner finds that the failure of the ALJ to state in her Order that the petitioner did not file a response to the Board's motion for summary decision was improper given the analysis that is to be conducted by the motion judge when ruling on summary decision.[1] The petitioner's failure to dispute the statement of material facts submitted by the Board is an important component in the evaluation of "whether the evidence presents a sufficient disagreement" necessitating a hearing on the matter. *Brill*, *supra*, 142 *N.J.* at 536. Moreover, the ALJ did not appear to fully conduct the analysis required under *Brill*, *supra*, to properly evaluate the existence of a genuine issue of material fact, but instead denied the motion based on insufficient facts mainly attributable to the petitioner's pro se status.[2]

Despite the fact that the petitioner did not respond to the Board's motion, the documents that were attached to the Board's certification in support of its motion for summary decision show that there are genuine issues of material fact. Specifically, the pleadings filed by the petitioner coupled with the petitioner's answers to interrogatories illustrate that there are factual disputes regarding the extent of the bullying, and the actions taken by the Board to intervene and to properly investigate the matter. In light of the relief sought in this case, these factual disputes are not of an insubstantial nature but rather are genuine issues of material facts that prevent summary decision. In many cases, a non-moving party's failure to respond to a motion for summary decision would automatically result in a grant of summary decision in the absence of any counterstatement of facts. Here, the petitioner was fortunate and undoubtedly benefited from the fact that a complete copy of her interrogatory responses was submitted to the court with the Board's motion.

Additionally, like the ALJ, the Commissioner is not persuaded that the Board's motion for summary decision should be granted based on the Board's jurisdictional arguments. Accordingly, the Board's motion for summary decision is denied.[3] This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

Sincerely,

Christopher D. Cerf
Acting Commissioner

CDC/MKD/JKH

c: County Superintendent
State Law Library
Honorable Leslie Z. Celentano, A.L.J.

[1] There is nothing in the record to indicate why the petitioner did not file a response to the motion.

[2] Petitioner was represented by counsel during part of the case, but it appears that she was no longer represented by counsel when her response to the motion for summary decision was due. The record also indicates that during a conference call with the parties, the ALJ informed the petitioner that she needed to provide a response to the motion.

[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.

165-11

#164-11

IN THE MATTER OF THE TENURE	:	
HEARING OF DANNY CASTRO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF UNION, HUDSON COUNTY.	:	

SYNOPSIS

The petitioning Board certified charges of excessive absenteeism and conduct unbecoming against respondent – a tenured attendance officer – for a disproportionate number of absences spanning the period from the 2001-2002 to the 2009-2010 school year, and for insurance fraud stemming from an incident in which respondent's medical insurance was billed for treatment of a person posing as respondent's estranged wife. The respondent argued that he was not excessively absent, and that his major absences were a paid leave that resulted from respondent's two arrests – which were later dismissed – and an unpaid leave to handle family problems; additionally, he argued that the insurance fraud charge was based on hearsay, and the Board has no competent evidence to prove the charge. The Board sought removal of respondent from his tenured position.

The ALJ found, *inter alia,* that: the respondent's testimony at hearing contradicted statements he had previously made, and was not credible; the testimony of the Board's superintendent was credible and forthright; as an attendance officer, respondent's frequent absences set a poor role model for student attendance; the insurance fraud charges were not based on hearsay evidence, as respondent – by his own admission – was at the doctor's office on March 2, 2010 when a woman posing as respondent's wife received treatment charged to respondent's medical insurance; and the Board carried its burden to prove that respondent is guilty of excessive absenteeism and unbecoming conduct. Accordingly, the ALJ ordered that respondent be dismissed from his tenured employment.

Upon independent review of the record, the Commissioner concurred with the ALJ's findings, noting that the conduct proven in this proceeding amply warrants respondent's dismissal from tenured employment. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the respondent was dismissed from his 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.

May 2, 2011

OAL DKT. NO. EDU 12493-10
AGENCY DKT NO. 613-10/10

IN THE MATTER OF THE TENURE	:	
HEARING OF DANNY CASTRO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF UNION, HUDSON 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 and the Board of Education's (Board) reply thereto.[1]

In his exceptions, the respondent argues that the Administrative Law Judge (ALJ) erroneously sustained the Board's charges of excessive absenteeism and unbecoming conduct, and that the taking of respondent's tenure is too severe a penalty. The respondent maintains that the ALJ improperly calculated the respondent's absences between 2001 and 2009, and that the time that the respondent was absent because he was suspended should not count towards the analysis. The respondent also argues that there was no testimony that his absences adversely affected the delivery of services by the school system. With respect to the allegation of unbecoming conduct based on the alleged insurance fraud, the respondent contends that the ALJ improperly arrived at conclusions not supported by any facts presented at the hearing. Finally, the respondent asserts in his exceptions that the Board's case relating to the fraud allegations was based entirely on hearsay evidence.

[1] The record contains no transcripts from the hearings conducted at the OAL on January 25- 26, 2011, and March 2, 2011.

In reply, the Board urges the adoption of the Initial Decision, asserting that the respondent's exceptions essentially reiterate the arguments made by the respondent throughout the proceedings. The Board maintains that the respondent's argument that his suspensions should not be considered towards the calculation of absences because the board prevented him from working is disingenuous. The Board emphasized the fact that the respondent was suspended from work because he was criminally charged with serious offenses, including stabbing someone, impersonating a police officer and drug offenses. Additionally the Board points out that the respondent was an attendance officer, and he could not properly investigate truancy when he himself was continuously absent from work. In reply, the Board also contends that the ALJ properly relied on the direct and circumstantial evidence to support her conclusion that the Board proved the respondent committed insurance fraud. The Board stresses that in addition to other evidence, the ALJ relied on the respondent's own admissions and responses to interrogatories, as well as respondent's incredible hearing testimony to support her conclusions.

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 excessive absenteeism and unbecoming conduct. The Commissioner finds respondent's exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and clearly taken into account by her in weighing the testimony and evidence, and in concluding that the record overall supported the Board's charges. The Commissioner also finds no basis in the record to reject either the ALJ's recitations of testimony or her determinations of witness credibility. The ALJ found that the respondent's "testimony could only be characterized as incredible." On the other hand, the ALJ found that the

superintendent was "credible and forthright in his responses and showed no personal animus towards the respondent." The ALJ had the opportunity to assess the credibility of the witnesses who appeared before her 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)].

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 from tenured employment.

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 his tenured position with the Union City School District.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/2/11

Date of Mailing: 5/3/11

[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 12493-10
AGENCY DKT. NO. 613-10/10

IN THE MATTER OF THE TENURE HEARING OF DANNY CASTRO, BOARD OF EDUCATION OF THE CITY OF UNION, HUDSON COUNTY.

Susanne Lavelle, Esq., for petitioner Board of Education of the City of Union

Phillip Feintuch, Esq., for respondent Danny Castro (Feintuch, Porwich and Feintuch, attorneys)

Record Closed: March 2, 2011 Decided: March 18, 2011

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On September 29, 2010, the Board of Education of Union City, New Jersey, (Board, or District, or UCBE), filed tenure charges against respondent Danny Castro. On October 21, 2010, the Board certified the charges against the respondent. Mr. Castro was charged with excessive absenteeism from the 2001–2002 school year through the 2009–2010 school year. In addition, he was charged with unbecoming

conduct—insurance fraud, namely, that there was "strong circumstantial evidence that another female (probably Maria Concepcion) identified herself as Leslie Ventura, Castro's spouse, exhibited an insurance card and obtained an examination, but that on the same date and place, Castro accompanied the fraudulent Leslie Ventura to the appointment and had full knowledge of the fraud and conspired to commit the fraud."

On October 26, 2010, the respondent filed a Certification in Opposition to Tenure Charges. On November 12, 2010, the matter was forwarded from the Department of Education to the Office of Administrative Law, where it was filed. A prehearing conference was held on November 29, 2010, at which time a discovery schedule and hearing dates were determined and an Order was issued. The matter was scheduled for hearing on January 25, and 26, 2011, and heard on those dates. The District served a subpoena on Leslie Ventura, the estranged wife of Mr. Castro, to testify at the hearing. Ms. Ventura ignored the subpoena, and on January 25, 2011, the attorney for the District applied to the Superior Court for an order enforcing the subpoena. Ms. Lavelle reported that the process server attempted to serve the order, but Ms. Ventura evaded service. I granted an application by the District to add an additional hearing date in order to give them an opportunity to enforce the Superior Court Order. However, I denied their application to stay the resumption of payment of salary to Mr. Castro after the expiration of 120 days from the date tenure charges were certified by the Board, because there was no proof presented that the respondent was responsible for Ms. Ventura's failure to appear at the hearing. The matter was continued to March 2, 2011.

The Board sent a letter prior to the last date of the hearing requesting that Mr. Castro's salary not be resumed at the end of the 120 days, because the respondent falsely claimed that he was going to be in Florida the week of February 14, 2011, and could not be present at the OAL. The District alleged that Mr. Castro was in fact in Union City during the week of February 14 and therefore he should be denied the resumption of pay. At the hearing I stated that I would rule on the District's application in the Initial Decision. On the date of the hearing, the District was unable to produce

Ms. Ventura. Ms. Lavelle stated that Ms. Ventura had evaded service and the Superior Court had issued a warrant for her arrest, but she had not been apprehended as of the date of the hearing.

At the conclusion of the District's case, the District moved for the admission into evidence of Exhibits 1 through 22, except for Exhibit 12. The respondent objected to the admission of Exhibit 11, based on the fact that there was no testimony that the document was valid. He also objected to Exhibits 13 and 14 for the same reason, and because there was no testimony as to what the documents meant and who they were from. The District countered that Exhibit 11 was being introduced into evidence not for the truth of the statements in the document, but to show that it memorialized the testimony of Ms. Pirro that she had a conversation with Ms. Ventura. Exhibit 13 was being offered solely to show that Ms. Ventura had responded to a request made by Ms. Pirro during a conversation with her to provide proof that she was out of the country on March 2, 2010. The District claimed that Exhibit 14 was being introduced for the same reason. At the hearing I stated that I would rule on the admission of these documents in my decision.

ISSUES

1. Did the actions of the respondent rise to the level of conduct unbecoming such that Mr. Castro should lose his tenured position?

2. Did Mr. Castro's history of absenteeism warrant removal from his tenured position?

3. What penalty, if any, should be imposed on the respondent?

FINDINGS OF FACT

A. The following facts have been stipulated by the parties: (See Joint Stipulation of Facts with Exhibits)

1. Danny Castro was hired by the UCBE on October 1, 2001, as an attendance officer.

2. Danny Castro achieved tenure in his position on October 1, 2002.

3. On June 3, 2002, Castro was suspended with pay as the result of an arrest in NYC. These charges were eventually dismissed.

4. On March 27, 2004, Danny Castro was suspended with pay as the result of an arrest in Union City. These charges were eventually dismissed.

5. From October 31, 2006, through June 30, 2007, Castro requested and was granted an unpaid leave of absence.

6. Danny Castro's wife's name is Leslie Ventura.

7. On March 2, 2010, Danny Castro and Leslie Ventura did not live together.

8. On March 2, 2010, Danny Castro had an appointment with Kirti Dave, O.D.

9. On March 2, 2010, Danny Castro had medical, dental, vision and prescription health coverage through his employer, UCBE.

10. From October 1, 2001, to the present, Leslie Ventura was Danny Castro's covered spouse on all of his Board-provided medical, health, dental and vision insurance.

B. The following are facts found as a result of the review of testimony and exhibits entered into evidence:

1. The respondent is a ten-month employee. He is entitled to ten sick days and two personal days per year.

2. In the 2001–2002 school year, Mr. Castro was absent a total of 18 days: 1 sick, 1 personal, and 16 due to suspension.

3. In June 2002 Mr. Castro was arrested and charged with assault (stabbing) and impersonating a police officer. These charges were dismissed and the record sealed.

4. In the 2002–2003 school year Mr. Castro was absent a total of 17 days: 2 personal, 9 sick, 1 bereavement, and 5 for marriage.

5. In the 2003–2004 school year Mr. Castro was absent a total of 70 days: 2 personal, 7 sick, and the remainder was a suspension with pay as a result of outstanding criminal charges.

6. In March 2004 Mr. Castro was arrested on charges of possession of a controlled dangerous substance. These charges were also dismissed.

7. For the 2004–2005 school year Mr. Castro was absent a total of 22 days: 2 personal, 5 for family illness, and 15 sick. This exceeded his sick-day allowance by 5 days.

8. Mr. Castro was docked 1 day for excessive absences during the 2004–2005 school year in the June 15 pay period. He was sent a letter by the superintendent of schools' office stating that he had exhausted his sick-day bank. The letter stated that he was to sign the letter and return it to the Board's office. Failure to do so could constitute insubordination and he could be subject to further disciplinary action. Mr. Castro never signed or returned the letter.

9. For the 2005–2006 school year Mr. Castro was absent a total of 16 days: 10 sick, 2 personal and 4 unpaid.

10. Mr. Castro was sent similar excessive-absence letters from the assistant superintendent, Gerald Caputo, on February 23, 2006, docking him one day's pay; on April 26, 2006, docking him two days' pay; and on May 10, 2006, docking him one day's pay.

11. Mr. Castro did not sign and return any of the letters sent by the assistant superintendent.

12. For the 2006–2007 school year Mr. Castro was absent a total of 11 days. He took 9 sick days and 2 personal days from September 22, to October 31, 2006. On October 4, 2006, Mr. Castro requested an unpaid leave of absence from October 31, 2006, until June 30, 2007, in order to attend to personal family matters. The leave was granted.

13. For the 2007–2008 school year Mr. Castro was absent a total of 15 days: 11 sick, 2 personal and 2 unpaid leave. He was over the allowed days off by 3 days.

14. On March 17, 2008, Mr. Caputo sent Mr. Castro a letter docking him a total of three days' pay for excessive absenteeism.[1] The respondent did not sign or return the letter to the superintendent's office.

15. For the 2008–2009 school year Mr. Castro was absent a total of 13 days: 2 personal and 11 sick.

16. On June 8, 2009, a letter was sent to Mr. Castro docking him one day for excessive absenteeism. Mr. Castro did not sign or return the letter.

17. For the 2009–2010 school year Mr. Castro was absent a total of 13 days: 2 personal and 11 sick.

18. Mr. Castro was not disciplined at the time he failed to return any of the excessive-absence letters from the assistant superintendent. However, there was nothing in the letters saying that he could not be disciplined at a later time.

19. While Mr. Castro was entitled by law to 10 sick days per year and could carry over sick days, employees were supposed to use those days for sickness only. They were encouraged to accumulate their sick days and come to work on a regular basis, because it benefitted both the student body and the District to have all employees present at their jobs so that the school system could run efficiently and no one had to cover another person's work.

20. On March 10, 2010, Mr. Castro, accompanied by a female posing as Leslie Ventura, went to the office of Dr. Dave Kirti or Kirti Dave to obtain an eye examination. Mr. Castro and his female companion filled out an

[1] On cross-examination it was pointed out that at the time of the March 17, 2008, letter, Mr. Castro had only been excessively absent 2 days, so he should have been docked two days' pay rather than three. He was absent again on March 25, 2008.

information sheet. Mr. Castro listed his address as 521 15th St., Union City, N.J.,[2] his date of birth as May 13, 1967, his telephone number as 201-616-2433 and his referral person as Robert Ruiz, who is a friend of Mr. Castro. The person posing as Ms. Ventura listed her telephone number as 201-616-2433, her address as 521 15th St., Union City, the referral person as Robert Ruiz, and her birthdate as July 18, 1975, which is Ms. Ventura's birthdate.

21. The person posing as Ms. Ventura used Mr. Castro's medical-insurance card to pay for the examination. Since the person was not a named insured under Mr. Castro's policy, she was not entitled to use the card.

22. At the time of the March examination, Ms. Ventura was in the Dominican Republic with Mr. Castro's daughter, Mia Castro.

23. During the week of February 14, 2011, Mr. Castro was not in Florida as he represented to the court that he would be.

ARGUMENTS OF THE PARTIES

Excessive Absences

The respondent argued that he was not excessively absent. His major absences were the result of his two arrests, which were later dismissed, and he received his full salary for those absences. These absences should not be held against him, since the charges were eventually dropped. The other major absence occurred when he took an unpaid leave to handle family-related problems. Based on this argument Mr. Castro

[2] This is the address that Mr. Castro had submitted to the Board of Education when he completed a change-of-address form.

was only absent an excess of three days in the period from 2001, when he commenced employment, to June 2010.[3]

The respondent also pointed out that while the letters docking him for excessive absenteeism said that he could be disciplined further if he did not sign and return the letters, in fact, he was never disciplined. Therefore, the District had waived its right to discipline the respondent for failing to return the signed letters. Further, the respondent pointed out that he was not charged with failure to sign and return copies of the letters. In addition, the respondent claimed that it was never brought to his attention that he could lose his job as a result of absenteeism. In support of this position, Mr. Castro asserted that he never was denied an increment as a result of absenteeism.

The District's position was that the leave days were to be used only when necessary and should be accumulated if possible. By Mr. Castro's taking all of his allotted sick days, it became necessary for other people to pick up the slack and this affected the operation of the school system. In addition, since he was not performing his job, when he was absent, the students he might have picked up to attend school would not be attending. The District argued that since Mr. Castro had been out for extended periods of time due to arrests and family leave, he should have been especially zealous about being on the job the rest of the time.

As for the fact that the District had not taken action against Mr. Castro when he failed to return the letters, the District claimed that the letters did not specify a date by which disciplinary action had to be taken. The District never waived its right to discipline the respondent, and the present tenure charges are an exercise of that right.

Insurance Fraud

[3] According to the respondent he was out for sickness, in excess of the allowable amount of 10 days per year, by three days. This is figured by taking the amount in excess of the allowable amount (8 days) and subtracting the extra sick days that were not used in a given year (5 days) and bringing them forward.

The respondent argued that the insurance-fraud charge relied solely upon what Ms. Ventura reported to Ms. Pirro, which was that someone other than she was examined by the optometrist using Mr. Castro's medical card on March 2, 2010. However, he asserts that there is no evidence that this in fact occurred. Since Ms. Ventura did not testify, there is no evidence as to what actually happened. Ms. Ventura could have been examined and used the medical card on March 2, 2010, or someone could have gotten a hold of the card and used it on the March date. The respondent urged that he only stipulated to the fact that he had an appointment with the doctor on that date, but he never went to the doctor. He had no need for an examination, because he has 20/20 vision. Further, there was no competent proof of when or if Ms. Ventura left the country and when she returned. The documents marked for identification by the District would lead one to speculate that she left the country on February 13, 2010, but the alleged incident occurred on March 2, 2010. In addition, the passport stamp that was submitted to corroborate that Ms. Ventura was in the Dominican Republic did not have any indication that it was from Ms. Ventura's passport. Ms. Ventura could have gone to the doctor on March 2, 2010, and then concocted this story. Since the District has the burden of proof and has not presented competent evidence that Mr. Castro committed insurance fraud, the District's case must fail.

The District argued that it had in fact proved its case. In the first place, it had been stipulated that Mr. Castro had an appointment with the eye doctor on March 2, 2010. Before Ms. Bustamante, the doctor's secretary, changed her story, she told Ms. Lavelle that Mr. Castro had asked her for an examination for his wife and him. Exhibits 19 and 20, submitted by the District from the optometrist, clearly showed that the persons who filled out the medical forms knew Mr. Castro's and Ms. Ventura's dates of birth, phone number, and address and the respondent's position with the Board of Education. In addition, both Mr. Castro and Ms. Ventura gave Robert Ruiz as the person who referred them to the doctor. Mr. Castro admitted on the stand that Mr. Ruiz was a friend of his. There were just too many coincidences to make Mr. Castro's story that he never went to Dr. Dave ring true.

While Ms. Bustamante claimed that she did not remember seeing Mr. Castro on March 2, 2010, she did testify that it was the procedure of the office for either her or the doctor to call the patient and his wife into the examining room based on the form that was completed by the patient. It is incredible that Mr. Castro would not know the identity of the woman sitting next to him at the doctor's office who was called in as his wife. In addition, Mr. Castro's statement that he did not know whether his daughter was in Santa Domingo with her mother in February–March 2010 did not make sense. He had testified that he took his daughter to or from school daily. How could he not know her whereabouts? Further, it would not make sense that Ms. Ventura would have gone to the doctor three months later, if she had been at the same doctor on March 2, 2010.

The District also pointed out that the letter from Ms. Ventura, the boarding passes and the passport stamp were submitted, as per Ms. Pirro's testimony, in response to her request to Ms. Ventura to supply proof that she had been out of the country at the time of the March 2, 2010, examination. Ms. Lavelle pointed out that, while the date of issue of the airline tickets may have been February 13, the boarding pass to Santa Domingo clearly showed February 28, which corroborates the passport stamp and boarding pass and confirms that Ms. Ventura was out of the country at the time of the doctor's appointment. Further, the District asserted that on September 9, 2010, when Mr. Castro was confronted at a meeting with Mr. Caputo,[4] assistant superintendent of schools for the District, about the insurance fraud, the respondent stated that if a mistake was made, it was by him, not by Maria Concepcion.[5] The District hypothesized that if a person was informed that someone else had used his medical card and supplied personal information such as his name, address, and phone number, that person would have gone to the police to report an identity theft. Yet Mr. Castro never reported the theft to the police or the insurance company. According to the District, Mr. Castro's story and explanation were entirely incredible.

[4] See Exhibit 17.
[5] Maria Concepcion was the person who allegedly posed as Mr. Castro's wife at the doctor's appointment. At first it was alleged that Ms. Concepcion was his girlfriend. Later it appeared that Ms. Concepcion was his mother.

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)). While tenure was designed to protect employees "from dismissal 'for unfounded, flimsy or political reasons,'" Wright v. Board of Education of East Orange, 99 N.J. 112, 118 (1985) (citing Zimmerman, supra, 38 N.J. at 71), 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 on a single incident, "if sufficiently flagrant." In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967) (citing Redcay v. State Bd. of Educ., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E. & A. 1944)).

N.J.S.A. 18A:38-33 provides tenure for school district attendance officers and states that once they have obtained tenure, they shall "not be dismissed or reduced in compensation except for inefficiency, conduct unbecoming an officer, or other just cause."

One of the charges against Mr. Castro is excessive absenteeism. It has been found that excessive absenteeism can constitute "incapacity," "unbecoming conduct," and/or "just cause" and thus can warrant dismissal. See State-Operated Sch. Dist. of Jersey City v. Pellechio, 92 N.J.A.R.2d (EDU) 267. This is so even when the absenteeism occurs for legitimate reasons, such as long-term poor health. Id. at 270

(dismissal appropriate despite teacher's chronic asthma); State-Operated Sch. Dist. of Paterson v. Watson, 93 N.J.A.R.2d (EDU) 362 (dismissal of custodian warranted despite the fact that many absences were attributable to his having to care for an ailing mother). The determination of what constitutes excessive absenteeism initially falls within the prerogative and discretionary authority of the local board of education. Pellechio, supra, 92 N.J.A.R.2d (EDU) 267. There are no absolute standards. In re the Tenure Hearing of Meade-Stephens, 92 N.J.A.R.2d (EDU) 550. However, the sheer number of a teacher's absences may warrant dismissal. Watson, supra, 93 N.J.A.R.2d (EDU) 362. Teacher absenteeism is usually considered more grievous because it involves the close relationship between the teacher and the students and the importance of the teacher being regularly present in the classroom. In Passaic Board of Education v. Viani, 92 N.J.A.R.2d (EDU) 76, 79, the Commissioner observed that a Board seeking to dismiss a tenured custodian must demonstrate the extent of harm caused by the custodian's performance on the provision of a thorough and efficient education in an adequately equipped, sanitary and secure facility.

In this case we have a hybrid situation. Mr. Castro is not a classroom teacher whose absence would have a direct impact on students. However, Mr. Castro is responsible for making sure that students attend class so that they can receive an education. Therefore, his extended absences could have an adverse effect on students' education. While it is true that Mr. Castro's excess absences are reduced greatly if one subtracts the days absent for suspensions, a family-related wedding and a leave of absence, this does not tell the whole story. One would think that after taking so much time for suspensions with pay and a leave of absence Mr. Castro would be especially careful to keep his allowable time off to a minimum. This was not the case. Instead, he not only took all the time off he was permitted to take, but exceeded that amount. There was no showing that Mr. Castro had a chronic health condition that caused him to be out sick on a regular basis. In addition, when Mr. Castro was excessively absent and his pay was docked, he ignored the letters that directed him to acknowledge receipt of the letters and to return them to the District. Rather than this being a sign that the District had waived its right to discipline Mr. Castro, I see it as an

indication that the respondent was in effect thumbing his nose at the administration. In addition, as an attendance officer Mr. Castro's job was to make sure that students lived up to their responsibility to attend school on a regular basis. He certainly could not be seen as a role model where attendance was concerned.

The fact that Mr. Castro's increments were not withheld is not proof that the District had abandoned its right to take disciplinary action against Mr. Castro. There was testimony from Mr. Caputo that when Mr. Castro was present at his job he performed well. This might have been the basis for the pay increments. However, the letters docking his pay clearly stated that the District could choose to discipline Mr. Castro for his absences. Therefore, the respondent's argument that he was not informed that he could lose his job because of excessive absences is without merit.

The other charge lodged against Mr. Castro 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/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 administrative directives." Scarpignato v. Edgewater Bd. of Educ., Comm'r of Educ., 83 S.L.D. 335, aff'g 83 S.L.D. 311, aff'd, State Bd. of Educ., 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 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, 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. 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].

The charge of conduct unbecoming in this matter involves insurance fraud. If we were to believe Mr. Castro's testimony, he made an appointment for an eye examination, but either did not go to the appointment or did not recall going there. In addition, at the time of the appointment on March 2, 2010, he did not know the whereabouts of his wife and child. Mr. Castro's rendition of the facts is incredible. While the respondent stipulated that he made an appointment to see the doctor, he claimed on the stand that he did not recall going to see the doctor and in fact had no need to see an eye doctor, since he had 20/20 eyesight. That contradicts his affirmative response to #13 of the request for admissions: "On March 2, 2010, Mr. Castro went to

an appointment with an eye doctor by the name of Dave Kirti or Kirti Dave."[6] It also contradicts his affirmative response to the question: "On March 2, 2010, did you have an appointment with an eye doctor named Dave Kirti located at 4414 Bergenline Avenue, Union City?" Further, Mr. Castro answered "yes" to the question: "Did you present your medical insurance card to the doctor's staff at the time of your appointment?"[7] Therefore, it appears that at the time he answered the interrogatories and request for admissions, Mr. Castro did recall his going to the doctor's office on March 2, 2010. If he was at the doctor's office on that date, then he would have known the identity of the person who was called in with him as his wife and who filled out identical personal information on the medical information form. He certainly would have known if his estranged wife, Ms. Ventura, was the person with him at the appointment or if someone else was posing as his wife. Mr. Castro's testimony also flies in the face of Mr. Caputo's testimony and the contents of the letter from Mr. Caputo to Mr. Castro memorializing their meeting. According to Mr. Caputo's testimony, when he confronted Mr. Castro with the insurance-fraud allegations, Mr. Castro admitted that he went to the eye doctor on March 2, 2010, and explained that his "ex-wife" must have also gone to the doctor. When Mr. Caputo presented Mr. Castro with evidence that Ms. Ventura was out of the country at the time of the appointment and the Board suspected that his girlfriend, Maria Concepcion, posed as Leslie Ventura and used her insurance card, "Castro stated that if a mistake was made, it was made by him and not 'her.'" These statements were certainly not indicative of someone who did not go or did not remember going to the eye doctor on March 2, 2010, and did not know who went with him to the doctor's office on that date.

Mr. Castro's assertion that he did not know his daughter's and wife's whereabouts on March 2, 2010, is equally incredible. Mr. Castro claimed that he had no contact with his estranged wife because there were mutual non-contact orders issued by a judge. However, he also testified that he either picked up or dropped off his daughter at school during the week. Even if we assume that the child was off from

[6] Exhibit 22.
[7] While the responses to the interrogatories and request for admissions were not signed by the respondent, there was no objection by his attorney to have the answers marked into evidence.

school from February 28 through March 19, 2010, it seems entirely unlikely that his daughter would not have mentioned to her father during one of the rides to or from school that she was going away to a foreign country with her mother. In addition, in answer to interrogatory #13i, as to whether Mr. Castro had spoken to Ms. Ventura about the allegations that were the subject of this complaint, Mr. Castro said that he had spoken to her on the telephone. It is clear that Mr. Castro did have some form of communication with Ms. Ventura, and it is therefore entirely likely that he knew her whereabouts and that of their daughter on March 2, 2010.

Where facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings as to the disputed facts. Credibility is the value that a finder of the facts gives to a witness's testimony. It 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), cert. denied, Palermo v. United States, 377 U.S. 953, 84 S. Ct. 1625, 12 L. Ed. 2d 498 (1964). There is no mechanical formula for determining the truth, to the extent it can be discerned, and many factors may be considered and weighed. These include the demeanor of the witness and the manner of testifying, the interest a witness may have in the outcome, and the reasonableness and coherence of the testimony. Corroboration, knowledge, and common experience also play a role in assessing credibility. Dawson v. R.W. Vogel, Inc., CRT 4501-00, Initial Decision (April 15, 2002), adopted as modified, Dir. (Aug. 28, 2002) <http://lawlibrary.rutgers.edu/oal/search.html>. "Credible testimony" must proceed from the mouth of a credible witness and must be such as our common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); see also Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). A fact finder "is free to weigh the evidence and to reject the testimony of a witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Estate of Perrone, 5 N.J. 514, 521–22 (1950); see D'Amato by

McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). In other words, a trier of fact may reject testimony as "inherently incredible" and may also reject testimony when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Similarly, "'[t]he 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.), certif. denied, 10 N.J. 316 (1952) (citation omitted). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Dep't of Cmty. Affairs, 182 N.J. Super. 415, 421 (App. Div. 1981). A fact finder is expected to base decisions of credibility on his or her common sense, intuition, or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973). In an administrative proceeding, testimony may be disbelieved, but it may not be disregarded. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962).

In the present case, Mr. Castro's testimony could only be characterized as incredible. His statements on the stand that he either did not go to the doctor's office on March 2, 2010, even though he stipulated that he made an appointment for that date, or that he did not recall going to the doctor, fly in the face of his prior admissions, answers to interrogatories and statements to Mr. Caputo, which he now denies making. He has given no explanation as to why Mr. Caputo would make the statement on the stand and in writing in the September 14, 2010, letter,[8] that Mr. Castro had stated that he had gone to the eye doctor on March 2, 2010, and if a mistake was made about the insurance card it was made by him and not by Maria Concepcion. The respondent had an opportunity to discredit Mr. Caputo's testimony during cross-examination and show some type of prejudice or motive for the assistant superintendent to make such statements; he did not do so. My observation of Mr. Caputo on the stand was that he was credible and forthright in his responses and showed no personal animus toward the respondent.

[8] Exhibit 17.

The respondent has asserted that the District's case is based entirely on hearsay evidence allegedly submitted by Ms. Ventura and therefore the Board of Education has failed to meet its burden of proof. Judicial rules of evidence do not apply to administrative agency proceedings, except for rules of privileges or where required by law. N.J.R.E. 101(a)(3); DeBartolomeis v. Bd. of Review, 341 N.J. Super. 80, 82 (App. Div. 2001); N.J.S.A. 52:14B-10(a); N.J.A.C. 1:1-15.1(c). Hearsay is admissible subject to the "residuum rule," which mandates that the administrative decision cannot be predicated on hearsay alone. Weston v. State, 60 N.J. 36 (1972).

> [A] fact-finding or legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it.
>
> [Id. at 51.]

The Uniform Administrative Procedure Rules governing administrative agency proceedings codify this doctrine by requiring that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b). In assessing hearsay evidence, it should be accorded "whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability." N.J.A.C. 1:1-15.5(a).

I disagree with the respondent's position that the fraud charges are based entirely on hearsay evidence. In fact, Mr. Castro, by his own admission, in answers to interrogatories and requests to admit, stated that he was at the doctor's office on March 2, 2010. In addition, his statement to Mr. Caputo at the meeting in September 2010

the residuum rule to corroborate the fact that Ms. Ventura was not the person who was at the doctor's office on March 2, 2010. Admission of the passport stamp is more problematic. While there was testimony that it was supplied in response to a request from Ms. Pirro, there is no identifying information on the document. While, as Ms. Lavelle stated, it strained credibility to think that Ms. Pirro took someone else's passport, stamped with the exact date of entry into Santo Domingo as Ms. Ventura claimed, and submitted it as that of Ms. Ventura, I will exclude Exhibit 14 because it is not clearly identified as Ms. Ventura's passport. The other documents will be admitted into evidence under the residuum rule. They are not being used to prove the ultimate fact that Mr. Castro was at the doctor's office on March 2 and permitted someone other than his wife to use his insurance card, but they are being used as corroboration of the testimony and exhibits that clearly show that Mr. Castro was at the doctor's office and was accompanied by someone who posed as Leslie Ventura.

The District also made an application to have the court exclude seven days (representing the week of February 14, 2011) from the period of the permissible suspension without pay, because it alleges that Mr. Castro misrepresented to the court that he was going to be on vacation the week of February 14, 2011, and therefore could not appear at a hearing. The District argues that Mr. Castro did this in order to exceed the 120-day suspension without pay so the District would have to commence payment of salary to him. The respondent's testimony on this issue was evasive at best. He testified that he was unable to go on his vacation to Florida during the week of February 14 because he got sick on February 16. As Ms. Lavelle pointed out, the February 16 date was subsequent to the time that he was already supposed to be in Florida. Mr. Castro claimed, as proof of his illness, that he was in the emergency room at Christ Hospital on February 19, 2011, because he was experiencing chest pains.[9] However, this was on the Saturday following the Monday when he was supposed to be in Florida. In addition, Mr. Castro claimed that he did not go to Florida because of a respiratory infection, not heart problems.

[9] Mr. Castro referred to an Emergency Room report from Christ Hospital, but he never had it marked for identification or placed into evidence.

CONCLUSIONS

Based on the Findings of Fact and reasoning outlined in the Arguments and Analysis of the Law above, I **CONCLUDE** that the District has sustained its burden of proving the tenure charges against the respondent.

In addition, I **CONCLUDE** that Exhibits 11 and 13 should be admitted into evidence.

I further **CONCLUDE** that the five-day period of February 14–18, 2011, should be excluded when counting the exhaustion of the 120 days following which the respondent would be placed back in pay status.

ORDER

It is hereby **ORDERED** that the tenure charges against Danny Castro be sustained and that the respondent be terminated from his position.

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.

could be considered an exception to the hearsay rule as an admission against interest and a statement by a party.

Determining the application of the residuum rule to the use of hearsay evidence first "requires identifying the 'ultimate finding of fact' that must be supported by a residuum of competent evidence." In re Tenure Hearing of Cowan, 224 N.J. Super. 737, 750 (App. Div. 1988) <http://lawlibrary.rutgers.edu/oal/search.shtml> (quoting Weston, supra, 60 N.J. at 52). In this case the "ultimate finding of fact" is whether Ms. Ventura was out of the country on the day in question. Deciding this fact will determine whether another woman posed as Ms. Ventura for an eye examination in March 2010. Under the residuum rule, the hearsay statements by Ms. Ventura and the documents that she submitted at the request of Ms. Pirro could be employed to corroborate competent evidence presented in the stipulation of facts, answers to interrogatories, requests to admit and statement by Mr. Castro to Mr. Caputo that Mr. Castro was at the doctor's office on March 2, 2010, and that he was accompanied by someone who posed as, but was not, his wife, since Ms. Ventura was out of the country at the time.

Mr. Castro objected to the introduction into evidence of Exhibit 11 (letter from Ms. Ventura), Exhibit 13 (airline tickets) and Exhibit 14 (passport stamp). While Mr. Castro could not confirm that the signature on the letter was that of Leslie Ventura, there was testimony from Ms. Pirro that she spoke to Ms. Ventura in August 2010 and that the information in the letter was a rehashing of what Ms. Ventura stated over the telephone to Ms. Pirro. The airline tickets and boarding passes were submitted in response to a request by Ms. Pirro to provide corroborating information. The names of Ms. Ventura and her daughter were clearly listed on the tickets and boarding pass. This information substantiated that Ms. Ventura was out of the country and could not have been present at the doctor's appointment on March 2, 2010. Since Mr. Castro admitted that he was at the doctor's office on that date and the evidence showed that someone filled out a medical information card with the address, telephone number, date of birth and insurance information of his wife and him, the airline information can be used under

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.

3/18/11
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: March 18, 2011 db

Date Mailed to Parties: March 18, 2011 db

db

APPENDIX

WITNESSES

For Petitioner:

Dayane Bustamante
Jerry Caputo
Danny Castro
Susan Pirro

For Respondent:

Danny Castro

EXHIBITS

Joint Stipulation of Facts

J-1 Stipulations

For Petitioner:

1 UCBE Attendance Records for School Year 2001–02

2 UCBE June 7, 2002, letter to Castro from Carl Johnson; UCBE June 24, 2002, letter to NY County Criminal Court from Carl Johnson

3 UCBE Attendance Records for school year 2002–03

4 UCBE Attendance Records for school year 2003–04

5 March 27, 2004, UCPD Investigation Report, March 31, 2004; UCBE letter to Castro from Caputo; July 22, 2004, letter from Chasen Leyner (Board Counsel) to Abrams (Castro attorney); August 2, 2004, letter to Castro from Caputo; UC Municipal Court Disposition

6 UCBE Attendance Records for school year 2004–05; UCBE June 13, 2005, letter to Castro from Caputo

7 UCBE Attendance Records for school year 2005–06; UCBE February 23, 2006, letter to Castro from Caputo; UCBE April 26, 2006, letter to Castro from Caputo; UCBE May 10, 2006, letter to Castro from Caputo

8 UCBE Attendance Records for school year 2006–07; October 4, 2006, letter from Castro to Caputo; October 19, 2006, letter from Caputo to Castro

9 UCBE Attendance Records for school year 2007–08; UCBE March 17, 2008, letter to Castro from Caputo

10 UCBE Attendance Records for school year 2008–09 and school year 2009–10; UCDBE June 8, 2009, letter to Castro from Caputo

11 August 10, 2010, handwritten letter from Leslie Ventura to Susan (Pirro)

12 Handwritten letter purported to be from doctor re: patient appointment on July 22, 2010 (identified; not in evidence)

13 Boarding passes for Leslie Ventura and Mia Castro

14 Pages of Leslie Ventura United States Passport (identified; not in evidence)

15 Claim Forms for Danny Castro (5559087) and Leslie Ventura (5573118)

16 Change of Name and/or Address for Danny Castro

17 UCBE letter dated September 14, 2010, to Castro from Caputo

18 September 10, 2010, Rice letter from Caputo to Castro

19 Dr. Kirti Dave response to 1/5/11 Subpoena Duces Tecum

20 Dr. Kirti Dave response to 1/11/11 Subpoena Duces Tecum

21 Danny Castro's Answers to UCBE Interrogatories

22 Danny Castro's Answers to UCBE Request for Admissions

For Respondent:

None

UCBE v. Danny Castro
OAL Docket No.EDU-12493-10

Stipulations

1. Danny Castro was hired by the UCBE on October 1, 2001 as an attendance officer.

2. Danny Castro achieved tenure in his position on October 1, 2002.

3. On June 3, 2002, Castro was suspended with pay as the result of an arrest in NYC. These charges were eventually dismissed.

4. On March 27, 2004, Danny Castro was suspended with pay as the result of an arrest in Union City. These charges were eventually dismissed.

5. From October 31, 2006 through June 30, 2007, Castro requested and was granted an unpaid leave of absence.

6. Danny Castro's wife's name is Leslie Ventura.

7. On March 2, 2010, Danny Castro and Leslie Ventura did not live together.

8. On March 2, 2010, Danny Castro had an appointment with Kirit Dave, OD.

9. On March 2, 2010 Danny Castro had medical, dental, vision and prescription health coverage through his employer, UCBE.

10. From October 1, 2001 to present, Leslie Ventura was Danny Castro's covered spouse on all of his Board provided medical, health, dental and vision insurance.

165-11

N.N. on behalf of E.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY, and KATHLEEN TAYLOR, SUPERINTENDENT.	:	DECISION

SYNOPSIS

Petitioner alleged that her eighteen year old daughter, E.N., was not given state required physical education courses in high school, and demanded tutoring for E.N. as well as damages. The petition was not filed until after E.N. had already graduated from high school. The Board filed a motion for summary decision, contending that beginning with her freshman year E.N. had submitted medical documentation calling for the limiting of her participation in physical education. The Board further argued that E.N. and her mother had rejected various attempts to modify E.N.'s physical education program, and had advocated for E.N. to be exempt from the physical education requirement. An exemption was consequently noted as an accommodation in E.N.'s 504 Plan, which was signed by both E.N. and N.N.

The ALJ found, *inter alia,* that: E.N. was excused from physical education classes all four years of high school due to a medical condition; E.N. graduated from high school in 2010, having satisfied the number of credits required for graduation; petitioner previously filed a due process claim, which was settled in 2009 and which settlement memorialized the physical education accommodation in E.N.'s 504 plan; a second due process petition, seeking various evaluations and approval for other special education services, was filed in January 2010 and did not directly challenge the exemption from physical education; the petitioner's current claims are barred by the principle of *res judicata* and the entire controversy doctrine; and the petition was filed well beyond the 90-day limit set forth in *N.J.A.C.* 6A:3-1.3 and is therefore untimely. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon consideration and review, the Commissioner found that petitioner's claims are barred 1) on multiple jurisdictional grounds, 2) on the basis of the doctrines of *res judicata* and equitable estoppel, and 3) because respondent's actions were not arbitrary, capricious, or unreasonable. 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.

May 2, 2011

165-11

OAL DKT. NO EDU 11178-10
AGENCY DKT. NO. 543-9/10

N.N. on behalf of E.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY, and KATHLEEN TAYLOR, SUPERINTENDENT.	:	DECISION
	:	

After review of the record, the Initial Decision of the Office of Administrative Law (OAL) and petitioner's exceptions, the Commissioner concurs with Administrative Law Judge (ALJ) that the petition must be denied.

At the outset, petitioner has no standing to pursue a petition on behalf of E. N., who has reached the age of eighteen. Second, as ALJ Miller noted, the petition was filed beyond the time allowed in *N.J.A.C.* 6A:3-1.3(i). Third, on May 24, 2009, petitioner signed off on a 504 plan for E.N. which expressly provided that E.N. might be exempted from Physical Education. She is consequently equitably estopped from challenging the exemption over a year after her consent, and months after the successful completion of her daughter's secondary education. Fourth, on April 9, 2009, a final decision was issued by ALJ Gorman of the OAL approving a settlement between the parties wherein they agreed to implement the above referenced 504 Plan. Thus, as explained in the Initial Decision, the doctrine of *res judicata* bars petitioner from re-litigating the issue.

Finally, under New Jersey school law the requirement that students take physical education classes is not absolute. The relevant statutes, *N.J.S.A.* 18A: 35-5 and 18A:35-7, provide that:

> Each board of education shall conduct as a part of the instruction in the public schools courses in health, safety and physical education, which courses shall be adapted to the ages and **capabilities** of the pupils in the several grades and departments . . . .
>
> (*N.J.S.A.* 18A:35-5) [Emphasis added.]
>
> Every pupil, except Kindergarten pupils, attending the public schools, insofar as he is **physically fit and capable of doing so**, as determined by the medical inspector [licensed physician], shall take such courses, which shall be a part of the curriculum prescribed for the several grades, . . . , and the standing of the pupil in connection therewith shall form a part of the requirements for promotion or graduation.
>
> (N.J.S.A. 18A:35-7) [Emphasis added.]

There is ample evidence in the record that during her high school years, E.N.'s physical capabilities were affected by a medical condition, which would prohibit her from participating in most physical education activities. Specifically, respondent received notes from E.N.'s doctor asking that she not participate in physical activities that involve her hands.

In response to the doctor's requests, respondent offered E.N. a modified physical education class – which petitioner and E.N. rejected. Respondent then offered E.N. the opportunity to remain in her regular physical education class but perform exercises not related to the regular class curriculum. Because petitioner and E.N. rejected this option, respondent agreed to a waiver of physical education for E.N.

The Commissioner cannot conclude that respondent's action in allowing the waiver was arbitrary, capricious or unreasonable. The above-referenced statutes clearly

recognize that not all students will have the capability to perform the physical education curriculum, and respondent explained that waivers are not uncommon where students have limiting medical conditions.

E.N. was allowed to and did graduate from respondent's high school without taking physical education courses. Petitioner offers no basis to support her suggestion that E.N.'s diploma is invalid.

Accordingly, respondent's motion for summary disposition is granted, and the petition is dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/02/11

Date of Mailing: 5/03/11

[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 11178-10
AGENCY DKT. NO. 543-9/10

N.N. o/b/o E.N.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY, AND DR. KATHLEEN TAYLOR, SUPERINTENDENT,
Respondent.

N.N. and E.N., petitioners[1], pro se

Michael P. Stanton, Esq., for respondent (Taht, Stanton & McCrosson, attorneys)

Record Closed: March 14, 2011 Decided: March 16, 2011

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE

On September 10, 2010, N.N. filed a due process action asserting that Ocean City High School (Ocean City or district) failed to provide E.N. with appropriate physical

[1] C.N., father of E.N., was present.

education instruction during E.N.'s fours years of high school at Ocean City. The claims date back to E.N.'s freshman year. N.N states the she never consented to her daughter being excused from physical education. N.N. seeks damages in the form of payment for yoga or dance classes for E.N.

PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was filed at the OAL on October 7, 2010, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13.

Respondent filed a Motion to Dismiss the petition. N.N. and E.N. (hereinafter referred to in singular as petitioner) filed opposition and oral argument was held on March 14, 2011.

BACKGROUND

The certification of Dr. Matthew Jamison, Principal of Ocean City High School, provides the pertinent background. It provides:

1. I am the Principal of Ocean City High School and I am making this Certification to supplement the moving papers previously filed in this matter with information regarding the medical information and deferrals associated with E.N.'s physical education class.

2. I have been Principal of Ocean City High School since January 2007, which was E.N.'s freshman year and am fully aware of the facts and circumstances of this matter.

3. E.N. had medical documentation that limited her participation in physical education (P.E.) beginning with her freshman year (SY 06-07). See Exhibit "A" attached to Jamison Certification.

4. E.N. had medical documentation that more explicitly limited her participation in P.E. in her sophomore year (SY 07-08). See Exhibit "B" attached to Jamison Certification.

5. Throughout E.N.'s four years of high school, P.E. class was an issue because of E.N.'s medical diagnoses of Reynard's Phenomenon.

6. The school nurse, guidance counselors and P.E. teachers attempted to modify E.N.'s P.E. program and were met with resistance from E.N. and her mother, N.N.

7. The first accommodation was an adaptive P.E. class: E.N. and N.N. objected and refused the ccommodation.

8. The second accommodation was within E.N.'s existing P.E. class but with alternative activities: E.N. and N.N. refused, citing that it would single out E.N. and increase her purported anxiety with school and her medical condition.

9. Through the first three and three quarters of E.N.'s high school career, E.N. and her mother advocated for E.N. to be exempt from the P.E. requirement and only take the health portion of the requirement, which she did not take. See Exhibit "C" attached to Jamison Certification.

10. The school nurse and counselors/administration agreed to the P.E. exemption as being in the best interest of E.N. It is noted that when students have complicating health matters that are documented, this accommodation is often made with parent/nurse/administrative consent.

11. This exemption is also noted as an accommodatin in E.N.'s 504 Plan. See Exhibit "D" attached to Jamison Certification.

12. In the spring of E.N.'s senior year, N.N. had reversed her position on the P.E. exemption (it is noted that E.N. was not in agreement with her mother). This was done verbally and in a convoluted manner.

13. I verbally instructed N.N. that she needed to put her request for E.N. to be enrolled in P.E. class in writing for many reasons, primarily because it was counter to the 504 Plan and her medical documentation.

14. N.N. never officially requested a change/denial of the agreed 504 accommodation.

FACTUAL SUMMARY

N.N. is the mother of E.N. E.N. is eighteen years old. E.N. resides with her mother. E.N. provided her mother with consent to pursue this action.

E.N. attended Ocean City High School from 2006 to 2010 when she graduated. E.N. was excused from physical education classes all four years due to her diagnosis of Reynard's Phenomenon. And she graduated from Ocean City High School having satisfied the amount of credits necessary for graduation. E.N. had excellent grades, in spite of her diagnosis. N.N. is presently attending Atlantic Cape Community College ACCC.

CONCLUSIONS

N.N. contends that E.N. was not properly excused from physical education dating back to 2006-2007 school year. Every board of education shall provide children with physical education courses adapted to the ages and **capabilities** of the pupils. N.J.S.A. 18A:35-5. Additional requirements or rules as to medical inspection of school children may be imposed. Id. A physical education program shall be a part of the curriculum prescribed for the several grades, and shall form a part of the requirements

for promotion or graduation. N.J.S.A. 18A:35-7. Students must be is physically fit and capable of doing so, **as determined by the district's medical inspector.** N.J.S.A. 18A:40-1. Every board of education shall employ one or more physicians, licensed to practice medicine and surgery within the state, to be known as the **medical inspector.** Id.

One obvious purpose of requiring a medical examination by a licensed "medical inspector" is to prevent unqualified individuals from making medical decisions that impact children. Imagine if the gym teacher made the determination whether a child with kidney disease could participate in gym class. A licensed doctor is the appropriate school official to make significant medical decisions. Each district, therefore, is required to retain a medical inspector for such purpose.

This present case presents a reasonable deviation in the decision-making process mentioned above. In 2006 and 2007, E.N. presented a medical note from her treating physician requesting an accommodation. E.N.'s treating physician stated that she could not fully participate in gym class due to Reynard's Phenomenon. The district accepted the medical notes from petitioner's doctor, in lieu of sending E.N. to its own medical inspector. And it was reasonable to do so. E.N.'s medical history was well known by the district. Her medical problems with Reynard's Phenomenon dated back to December 2005. (Petitioner's exhibits P-12A).

This was not a maneuver by E.N. to avoid participation in a core requirement. Nor would it have been prudent to force E.N. to participate in active physical education due to her phycial disability. And finally, there was no serious medcial decision facing the district. The medical decision was made by a medical professional, albeit E.N.'s doctor. The districted accepted E.N.'s request to be excluded from active physical education classes.

The district offered an accommodation, mindful of a pyhical disability. The district suggested E.N. participate in adaptive programs or alternative activities. (Cert. of Jamison). E.N. and N.N. rejected these proposals according to Jamison. N.N.

requested that her daughter be exempted from physical education and only participate in the health portion. Id. The district acquiesced and agreed with N.N. E.N. was exempted from physical education. The district could have challenged E.N.'s refusal to participate in a modified program but It did not.

In 2009, petitioner filed a due process petition. The matter was settled on April 9, 2009. (Cert. of Stanton, exhibits A-C). The settlement codified the physical education accommodation in E.N.'s 504 plan. (Cert. of Stanton, exhibits C.) The accommodation was incorporated for E.N.'s 11th grade curriculum. Cert. of Jamison exhibit C. The 504 plan was signed by both E.N. and N.N and approved by Hon. Bruce M. Gorman, ALJ on April 9, 2009. (EDU 4063-09). The 504 plan provides that E.N [is] was exempted from physical education class but must pass the health component. (Cert. of Stanton, exhibits C; Cert. of Jamison, exhibit D).

On January 21, 2010, petitioner filed another due process petition seeking various evaluations and approval for other special education services. E.N.'s exemption from physical education that previously approved by all parties and an ALJ in 2009, was not directly challenged as part of this new action. (Cert. of Stanton, exhibits D.). This case was heard to it conclusion and an Initial Decision issued on Macrch 31, 2010 (EDU 448-10).

RES JUDICATA

Res judicata is a legal principle this is applied when "an issue has been definitely decided by judicial decision." Black's Law Dictionary (Ninth Edition 2009). A claim is barred under res judicata when: (1) the prior judgment is final and valid, (2) the parties in the prior action are identical to or in privity with the parties in the pending action, and (3) the claim in the later action relates to the same occurrence or transaction as the earlier action. Reid v. Reid, 310 N.J. Super. 12 (App. Div. 1998).

In the case at hand 1) a final judgment (settlement in EDS 4063-09) was reached regarding E.N.'s 504 plan and the plan excluded E.N. from physical education; 2) petitioner was a party to that action; and 3) the claims herein are the same as those previously presented (or cognizable) and addressed by the settlement. Here petitioner is trying to re-litigate a prior settlement. I **CONCLUDE** that petitioner's new claims are barred under the principle of res judicata.

ENTIRE CONTROVERSY

The entire controversy doctrine holds that all aspects of a controversy between the same parties should be litigated in a single action. R. 4:30A. The goal is to avoid waste, duplication, inefficiency, and piecemeal decisions resulting in protracted and expensive litigation. Here petitioner should have filed all of her claims or any other cognizable claims in one proceeding. Again the parties and the source of the controversy, and therefore all of the claims, were cognizable dating back to the 2006-2007. This is when E.N. was first excluded from physical education. Having failed to join the present claims in pettioner's prior actions, the entire controversy doctrine has been violated. I so **CONCLUDE**.

STATUTE OF LIMITATIONS

Petitoner had ninety days from the action taken to petition for relief. N.J.A.C. 6A:3-1.3. Here E.N. was excluded from physical education in 2006-2007. This is the period of time when the action accrued. I **CONCLUDE** the time period to dispute this action has substantially passed. Moreover, E.N. graduated and is now attending college.

ORDER

Based upon the forgoing, the Ocean City Board of Education's Motion for Summary Decision is **GRANTED.** The action filed by petitioner is **DISMISSED** based upon the principles of res judicata, Entire Controversy doctrine, and the Statute of Limitations.

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.

3-16-11
DATE

W. TODD MILLER, ALJ

Date Received at Agency: 3-16-11

Date Mailed to Parties: MAR 21 2011

/sd

DOCUMENTS CONSIDERED

Ocean City's Motion for Summary Decision, with attachments

Petitioner's Response, with attachments

#173-11

CATHERINE JACOBS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged her non-renewal as a teacher of English, claiming that her non-renewal was a violation of her tenure and seniority rights. Petitioner had been employed as a long term substitute for the 2005-2006 school year and had been under contract as an English teacher for each school year from 2006-2007 to 2009-2010; petitioner, however, did not teach at all during the 2008-2009 school year, when she was on a combination of 12 days of paid leave at the beginning of the year and unpaid leave for the remainder of the school year. She was additionally absent on a combination of paid and unpaid leave from March 26 to May 31, 2007. Petitioner argued that her active teaching time between September 2005 and June 2010 provided respondent with sufficient opportunity to evaluate her performance, and tenure should be granted. Respondent Board asserts that petitioner had not acquired tenure in her employment with the Hamilton Township school district, and filed a motion for summary decision.

The ALJ found that: petitioner was employed as a long term substitute during the 2005-2006 school year, and therefore falls under the tenure calculation exception of *N.J.S.A.* 18A:16-1.1; a brief period of sick leave, such as petitioner's leave of absence for the nine weeks in 2007, does not deprive a Board of Education of the opportunity to evaluate a teacher's performance; and petitioner's paid and unpaid leave of absence for the entire 2008-2009 academic year precludes application of that year towards tenure as petitioner provided no services to respondent during this period. The ALJ concluded that petitioner had not completed three consecutive calendar years, nor three consecutive academic years, nor the equivalent of more than three academic years within a period of any four consecutive academic years – any one of which is necessary under *N.J.S.A.* 18A:28-5 for the acquisition of tenure; accordingly, the ALJ ordered the petition dismissed.

Upon a thorough and independent review of the record, the Acting Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33 – found that summary decision is appropriately granted to the respondent Board, as she agreed with the ALJ's conclusion that the petitioner had not acquired tenure pursuant to *N.J.S.A.* 18A:28-5. 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.

May 6, 2011

OAL DKT. NO. EDU 9827-10
AGENCY DKT. NO. 181-7/10

CATHERINE JACOBS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed by the Acting Deputy Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33. Petitioner's exceptions – filed in accordance with the directives of *N.J.A.C.* 1:1-18.4 – were fully considered by the Acting Deputy Commissioner in reaching her determination herein. The Board did not file reply exceptions.[1]

On exception, petitioner maintains that the Administrative Law Judge (ALJ) erred in determining that she was not entitled to receive tenure acquisition credit for the 2008-09 school year. Citing *Kletzkin v. Board of Education of the Borough of Spotswood, Middlesex County*, 136 *N.J.* 275 (1994), she points out that the tenure statute is remedial in nature and should be liberally construed. Petitioner claims that the purpose of the probationary period a teacher must serve prior to the acquisition of tenure pursuant to *N.J. S.A.* 18A:28-5 is to

[1] It is noted that on April 27, 2011, counsel for the Board sent a fax – addressed to Judge Schuster but transmitted to the agency's fax machine – requesting an extension to file a response. Counsel's request was not submitted until 23 days after the agency's receipt of petitioner's exceptions, way in excess of the regulatory deadline – pursuant to *N.J.A.C.* 1:1-18.4 – for the filing of reply exceptions; provided no reason for the untimely request; and did not indicate the length of additional time sought. Given the fact that the Commissioner's decision in this matter is due on or before May 6, 2011, counsel's request was denied.

allow a board of education adequate time to observe, assess, and evaluate the teacher's performance. Here, she avers:

> during five sequential contracts of employment, Petitioner provided Respondent with 27 months and 25 days of "active duty".... Her performance during that time resulted in Respondent's offering yet another sequential contract of employment for the 2010-2011 school year. Thus, this case presents a long-time employee who has provided service to the Respondent of sufficient extent to ensure adequate – and positive – assessment who now, by virtue of a Board-approved maternity leave is left with no more seniority or security than a new teacher on her first day. Remedial legislation should not be interpreted in a way which effectuates such an inequitable result. (Petitioner's Exceptions at 3)

Moreover, in denying petitioner tenure credit for the 2008-09 school year, notwithstanding that she had a contract of employment for this year, petitioner contends that the ALJ failed to recognize that, pursuant to such contract, she was entitled to twelve sick and personal days which she utilized prior to being placed on an unpaid leave for the remainder of the year. Although recognizing that an extensive unpaid leave may not be credited for tenure purposes, petitioner contends that she is entitled to credit for any time during which she was contractually entitled to be paid. A holding which finds that the use of collectively bargained-for contractual sick days is excluded from tenure calculation, she charges, contravenes the Court's finding in *Kletzkin, supra,* that continuous employment exists notwithstanding the mere occasional absence of a teacher by reason of illness or excuse. As such, petitioner maintains that she should be credited with twelve days of tenure acquisition credit during the 2008-09 school year and, therefore, deemed to have acquired tenure pursuant to *N.J.S.A.* 18A:28-5(c). (*Id.* at 4)

Upon full review and consideration, the Acting Deputy Commissioner finds that summary decision is appropriately granted to the Board as she agrees with the ALJ's conclusion that petitioner has not acquired tenure pursuant to *N.J.S.A.* 18A:28-5. In so determining, the

Acting Deputy Commissioner is cognizant that tenure is a statutory right[2] specifically conditioned on a teacher's full satisfaction of precise conditions articulated in *N.J.S.A.* 18A:28-5, which – in pertinent part – specifies:

> The services of all teaching staff members employed in the positions of teacher...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 any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) Three *consecutive* academic years[3], 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)

There is no assertion or evidence in the record that petitioner claims entitlement to tenure based on (a) above. In order to satisfy (b) petitioner would have to have been employed for three *consecutive* academic years. As the Acting Deputy Commissioner concurs with the ALJ that petitioner's service as a long term substitute during the 2005-06 school year is clearly precluded from the calculation of tenure pursuant to *N.J.S.A.* 18A:16-1.1, and further agrees with the ALJ's rejection – for the reasons presented on pages 3-4 of his decision – of petitioner's attempt to categorize this service year as anything other than "substitute" service, petitioner cannot claim tenure entitlement pursuant to this subsection. In order to satisfy (c) – the final alternative to

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[2] As elucidated by the N.J. Supreme Court in *Spiewak v. Rutherford Bd. Of Educ.*, 90 *N.J.* 63, 81 (1982) pursuant to *N.J.S.A.* 18A:28-5, "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.* 18A:28-5 or related statutes such as *N.J.S.A.* 18A:16-1.1."

[3] An academic year runs for ten months between September 1 and June 30 of a school year. *Kletzkin. supra.* Also see *N.J.S.A.* 18A:1-1 which defines an academic year as the period between the time school opens after summer vacation until the next succeeding summer vacation.

obtain tenure – petitioner would have to be "employed" for thirty months and one day over four consecutive academic years. *See Kletzkin, supra*, at 277. Even assuming, *arguendo*, a service history most favorable to petitioner, as correctly recognized by the ALJ on page 5 of his decision, petitioner did not satisfy the *minimum* service requirement of this provision so as to allow acquisition of tenure. In so finding, the Acting Deputy Commissioner is compelled to reject out of hand petitioner's exception argument that the twelve days of paid sick and personal leave time she utilized in the 2008-09 academic year prior to her unpaid leave for the remainder of the year should be counted for tenure acquisition. As was made clear by the Court in *Kletzkin, supra,* "[a] teacher who performs services under a contract for the year is employed for purposes of the statute." (at 279) As recognized by the ALJ, petitioner "provided no services to respondent" during this academic year. (Initial Decision at 4) Consequently, the Acting Deputy Commissioner finds and concludes that because petitioner has failed to satisfy any of the alternative statutory requisites for the acquisition of tenure, she has not acquired tenure status pursuant to *N.J.S.A.* 18A:28-5.

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.[4]

ACTING DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 5/06/11

Date of Mailing: 5/06/11

[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 9827-10
AGENCY DKT. NO. 181-7/10

CAHTERINE JACOBS,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,
Respondent.

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

William R. Burns, Esq., for respondent (Destribats, Campbell, Magee, Staub & Burns, attorneys)

Record Closed: March 21, 2011 Decided: March 22, 2011

BEFORE **JOHN SCHUSTER III**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, Catherine Jacobs (petitioner) brings an action by way of verified petition before the Commissioner of Education challenging her non-renewal of

employment from the Board of Education of the Township of Hamilton, Mercer County (respondent) claiming her non-renewal was a violation of her tenure and seniority rights. The verified petition was filed with the State Board of Education on July 28, 2010. Respondent filed an answer and counter claim on August 23, 2010. The counter claim seeks an order from the Commissioner of Education holding petitioner has not acquired tenure in her employment with the respondent. This matter was transmitted to the Office of Administrative Law (OAL) as a contested case on September 10, 2010 pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-t o -13. Subsequently cross motions for summary decision have been filed by the parties.

FINDINGS OF FACT

- September 1, 2005 to June 30, 2006, petitioner was employed by respondent as a long term substitute.

- September 1, 2006 to June 30, 2007, petitioner was employed by respondent as a English teacher and she served in that position for the full academic year except she was on a combination of paid and unpaid leave from March 26, 2007 to May 31, 2007.

- From September 1, 2007 to June 30, 2008, petitioner was employed by respondent as an English teacher.

- From September 1, 2008 to September 12, 2008, petitioner was on paid leave.

- From September 13, 2008 to June 30, 2009, petitioner was on unpaid leave.

- From September 1, 2009 to June 30, 2010, petitioner was employed by respondent as an English teacher.

- Petitioner was not employed by respondent after June 30, 2010.

LEGAL ANALYSIS

Petitioner argues that the 2005-2006 academic year should count towards the acquisition of tenure rights because even though the contract of employment between the parties characterized petitioner as a long term substitute, she did not teach the same subject as the teacher she replaced. Petitioner also argues that when the absent teacher returned to her duties, petitioner was retained as a regular member of the teaching staff. Petitioner also argues that her nine weeks of leave during the 2006-2007 academic year should not count against her tenure calculation. Petitioner's position is when you calculate all the time between September 2005 and June 2010 that petitioner was actively performing teaching duties respondent had sufficient time to evaluate her performance and tenure should be granted.

Respondent counters that petitioner's long term substitute position in the 2005-2006 academic year is not a position that counts towards tenure. It also argues that at least some, if not all, of petitioner's leave of absence during the 2006-2007 academic year should not count toward tenure because petitioner was not working during that period and therefore could not be observed by respondent. Respondent also argues that the 2008-2009 absence of petitioner from her teaching position should not count toward tenure because she did not work at all during that entire academic year.

The parties entered into a contract for the 2005-2006 academic year. That contract provided that petitioner would serve as a "long time substitute English". That contract also provided "you are replacing an employee who is on 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." Petitioner was hired as a substitute replacing Angela Mazza who taught Spanish. Even though petitioner was hired to teach English, she still replaced Ms. Mazza. It is not uncommon for school districts to regularly move teachers between assignments as is the district's prerogative for the operation of an efficient educational system. There is no requirement that a replacing teacher must teach the same subject as the teacher on

leave. The tenure statute contains an exception for temporary employees. N.J.S.A. 18A:16-1. However that exception is limited to employees hired to take the place of an absent teacher. "The courts are not free to expand that exception by judicial fiat." Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 77 (1982). Petitioner is asked the expansion of that exception by interpreting the statute to mean that the long term substitute is required to teach the same courses as the teacher on leave. The statute as written does not restrict a school district from reassigning teachers for legitimate purposes but only provides that the exception to the tenure statute is for temporary employees who take the place of a teacher on leave. In this case Ms. Mazza was on leave for two years, from September 1, 2005 to June 30, 2007. Ms. Mazza returned to her former position on September 1, 2007. With respect to petitioner's argument that tenure should be applied to her position during the 2005-2006 academic year because when the absent teacher returned to her position, petitioner was retained as an English teacher. Actually petitioner was given a full-time position commencing on September 1, 2006 the year before Ms. Mazza returned from her leave of absence. That year then became her first teaching position which qualified her for tenure and seniority rights.

With respect to respondent's position that petitioner's leave of absence for the nine weeks between March 26 and May 31, 2007, should not count towards her tenure calculation, I **CONCLUDE** that a brief period of sick leave does not deprive a Board of Education of the opportunity to evaluate a teacher's performance. See Kletzkin v. Board of Ed. of Boro of Spotswood, 136 N.J. 275 (1994).

With respect to the 2008-2009 academic year, petitioner was on paid leave for twelve days and unpaid leave for the remainder of the year. She did not provide any teaching services during that year. I **CONCLUDE** that year should not be applied towards her tenure and seniority rights as she provided no services to respondent. I **FIND** that petitioner did provide services during the 2009-2010 academic school year as she was employed by respondent and performed the duties of an English teacher during that year.

Tenure is acquired by working one of three ways set forth in N.J.S.A. 18A:28-5. They are:

> (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing Board for such purpose.
>
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year.
>
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years.

Even though petitioner was employed for the 2005-2006 academic year, she was employed as a long term substitute and therefore falls under the tenure calculation exception of N.J.S.A. 18A:16-1.1. Her first year of employment for tenure and seniority purposes was the 2006-2007 academic year and that continued in the 2007-2008 academic year. Petitioner did not work in the 2008-2009 academic year and therefore that year did not qualify for tenure and seniority purposes. She resumed her employment on September 1, 2009 and continued until June 30, 2010. Consequently for purposes of acquiring tenure the calculations of petitioner's teaching duties are for the periods September 2006 to June 2008 and September 2009 to June 2010. Therefore, petitioner has not had three consecutive calendar years nor three consecutive academic years nor the equivalent of more than three academic years within a period of any four consecutive academic years. At best petitioner has had three academic years within a period of four consecutive academic years but not more than that amount as required by N.J.S.A. 18A:28-5(c).

CONCLUSION

For the reasons set forth above, I **CONCLUDE** that petitioner has not acquired tenure and seniority rights pursuant to N.J.S.A. 18A:28-5.

ORDER

I therefore **ORDER** petitioner's verified petition be **DISMISSED** and respondent's counter claim declaring that respondent has not acquired tenure 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.

March 22, 2011
DATE

JOHN SCHUSTER III, ALJ

Date Received at Agency: 3/23/11

Date Mailed to Parties: 3/23/11

/cad

178-11

RAY WATERS AND THE HORACE MANN INSURANCE COMPANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TOMS RIVER, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner Ray Waters initially sought a defense and indemnification from the Board under *N.J.S.A.* 18A:16-6 when he was named in a Superior Court lawsuit brought by a former student advancing certain allegations against petitioner while he was employed as an art teacher in the Toms River School District. When the Board determined not to provide a defense, the Horace Mann Insurance Company (Company) provided defense counsel to Waters under a policy held by the New Jersey Education Association and Waters subsequently entered into a settlement agreement which resulted in the lawsuit being dismissed as to all claims against Waters. In the instant matter, petitioners sought reimbursement from the respondent Board for costs incurred in defending petitioner Waters. The Board contended that Waters cannot be indemnified because he suffered no loss, and that it has no obligation to reimburse an insurance company for defending an employee.

The ALJ found, *inter alia,* that : the intent of *N.J.S.A.* 18A:16-6 was to defray the employee's expenses; the subrogation clause in the insurance policy clearly states that the Company shall be subrogated to all the Insured's rights of recovery against any person or organization; petitioners' contention that the statute does not require an employee to personally go out of pocket to claim indemnification, and that it is sufficient that Waters petitioned for reimbursement, is in line with the Appellate Division's holdings in *Sekuler v. Montgomery Township Board of Education,* A-000091-96T1 (App. Div. May 8, 1997) certif. denied, 151 *N.J.* 464 (1997); and the interpretation urged by the Board is overly mechanistic and not within the statute or existing case law. Accordingly, the ALJ granted the petitioners' request for relief and ordered the respondent Board to reimburse petitioners for all costs and fees expended on behalf of Ray Waters in connection with the defense and settlement of the Superior Court lawsuit.

Upon a thorough and independent review, the Commissioner concurred that summary decision is appropriately granted to petitioners, 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.

May 11, 2011

OAL DKT. NO. EDU 2611-10
AGENCY DKT. NO. 56-3/10

RAY WATERS AND THE HORACE MANN INSURANCE COMPANY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TOMS RIVER, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Board's exceptions replicate its arguments advanced before the Administrative Law Judge (ALJ) below. As it is determined that such arguments were fully considered and addressed in the Initial Decision, they will not be revisited here.

Upon full consideration and review, the Commissioner agrees with the ALJ that the law applied to the undisputed facts in this matter clearly dictates that summary decision is appropriately granted to petitioner.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons clearly presented therein. The Board is hereby directed to

reimburse petitioners for all costs and fees expended on behalf of Mr. Waters in connection with the defense and settlement of the Superior Court lawsuit at issue herein.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5|11|11

Date of Mailing: 5|11|11

* 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 2611-10
AGENCY DKT. NO. 56-3/10

RAY WATERS AND THE HORACE MANN INSURANCE COMPANY,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF TOMS RIVER, OCEAN COUNTY,
Respondent.

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

Jared J. Monaco, Esq., for respondent (Gilmore & Monahan, attorneys)

Record Closed: March 16, 2011 Decided: April 4, 2011

BEFORE **LAURA SANDERS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners Ray Waters and The Horace Mann Insurance Company seek reimbursement from the Toms River Public Schools Board of Education (respondent, or the Board) for costs incurred in defending Waters in a Superior Court lawsuit.

Respondent filed a motion to dismiss in lieu of an answer. The respondent contends that it has no obligation to reimburse an insurance company for defending an employee.

Petitioners filed with the Commissioner of the Department of Education (the Department) on March 24, 2010. Following respondent's reply, which was received on April 12, 2010, the Department transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on April 30, 2010. Following a conference call on July 27, 2010, it was agreed that the case would proceed on summary decision. Petitioners' brief responding to the original motion to dismiss was received at the OAL on October 4, 2010, and respondent's reply was received on October 28, 2010. By letter dated November 10, 2010, petitioners advised that they did not choose to reply to the October 28, 2010, letter brief. The record was closed on November 11, 2010. On March 3, 2011, the file was transferred from Administrative Law Judge Israel Dubin to the undersigned, pending Judge Dubin's retirement. The record was reopened by letter dated March 3, 2011, requesting additional information concerning the insurance policy. The last response having been received on March 16, 2011, the record closed on that date.

FACTUAL DISCUSSION

C.D. was a student at Toms River High School North, where Waters was an art teacher. In 2003, the student was placed in Waters' honors art class. In a lawsuit filed in Superior Court (Respondent's Brief, Exhibit A), the student alleged that following his placement in the class, Waters made inappropriate and unwelcome sexual suggestions and advancements toward him, including but not limited to asking him to dinner, offering to have him move in with Waters and questioning his virginity. The student further alleged that during a class trip, Waters made other inappropriate comments and suggestions. The student left school for a while, then returned, and according to the complaint, faced harassment and humiliation from other students over rumors circulating as a result of the prior year's incidents. C.D.'s lawsuit named not only Waters but also the Board of Education, high school principal John Coleman and schools superintendent Michael J. Ritacco, among others, alleging negligent supervision and violation of the New Jersey Anti-Bullying Statute. He sought damages.

The law firm of Gilmore & Monahan, P.A., represented the Board. By letter dated April 23, 2007, Michael B. Berman, Esq., on behalf of Waters, sought a defense and indemnification from the Board under N.J.S.A. 18A:16-6. When the Board determined not to provide a defense, the Horace Mann Insurance Company provided defense counsel to Waters under a policy held by the New Jersey Education Association. (P-2.) The policy (P-3) provides under Section VIII(K), entitled "Subrogation," as follows:

> In the event of any payment under this contract, the Company shall be subrogated to all the **Insured's** rights of recovery therefore against any person or organization and the **Insured** shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The **Insured** shall do nothing after loss to prejudice such rights.

On November 20, 2009, Superior Court Judge Craig L. Wellerson granted summary judgment for the Board, ordering that the complaint and any cross-claims against the Board, Coleman and Ritacco be dismissed with prejudice. Waters entered a separate settlement agreement resulting in the lawsuit being dismissed as to all claims against Waters. On February 15, 2010, the Board received correspondence from Waters' attorney requesting attorney's fees and costs in the amount of $59,023.82, pursuant to N.J.S.A. 18A:16-6. By letter dated March 24, 2010 (Respondent's Brief, Exhibit D), the Board refused to provide indemnification, citing Wellerson's order and the fact that an insurance policy and not Waters himself had paid the costs and fees associated with the matter.

LEGAL ANALYSIS

For purposes of determining whether a matter is appropriate for summary decision, an adjudicator should deny a summary-decision motion only where the party opposing the motion has come forward with evidence that creates a "genuine issue as to any material fact challenged." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995). On a motion for summary decision the court must grant all the favorable inferences to the non-movant. Id. at 536. The inquiry is "'whether the evidence

presents a sufficient disagreement to require submission to [a fact finder] or whether it is so one-sided that one party must prevail as a matter of law.'" Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 446 (2007); Brill, supra, 142 N.J. at 536.

Although the Board's initial response to the petition repeated the argument that Wellerson's order included Waters' cross-claim against the Board, the parties did not address this argument in their cross-motions for summary decision. Therefore, this argument, which might otherwise have required a return to the Superior Court for clarification of what exactly Wellerson ordered, has been treated as abandoned. This leaves no factual issues for determination. Rather, the parties disagree as to what the law requires in the present instance, rendering the matter appropriate for summary decision.

While the Board of Education acknowledges the existence of a prior decision by the Commissioner of Education allowing reimbursement of defense fees to an insurance company that provided counsel to a teacher in a civil law suit, Lonky v. Board of Education of Bayonne, EDU 07205-07, Final Decision (July 7, 2008) <http://lawlibrary.rutgers.edu/oal/search.shtml>, the Board contends that it does not apply here, because there is no reimbursement agreement between Waters and the Horace Mann Insurance Company. The Board relies upon Meisenbacher v. Board of Education of Newark, 1 N.J.A.R. 162 (1980), for the dual propositions that Waters cannot be indemnified because he suffered no loss, and that the insurance company has no rights against the Board because it is not a Board employee. Meisenbacher was counsel for a Newark schools employee, Ray James, in a successful defense of an assault claim. Meisenbacher then petitioned for his legal fees and costs of defense, and the ALJ and Commissioner concluded that Meisenbacher lacked standing to apply for payment under the statute. The ALJ stated "most emphatically" that James was free to apply for reimbursement, from which he could then pay his counsel.

The petitioners contend that the statute does not require an employee to personally go out of pocket to claim indemnification; it is sufficient that Waters has petitioned for reimbursement.

N.J.S.A. 18A:16-6 states in pertinent part:

> 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.

Analyzing the statute, the Commissioner of Education in Lonky, supra, EDU 07205-07, Final Decision (July 7, 2008) <http://lawlibrary.rutgers.edu/oal/search.shtml>, stated:

> By its very terms, central to qualifying for protection afforded under this statute is that *the conduct triggering the legal action against him or her must have 1) arisen out of the performance of his/her duties, and 2) occurred in the course of performing those duties.* In the context of the defense of a civil action, the outcome of the litigation is irrelevant, the statute protects both successful and unsuccessful litigants as long as the above two criteria are satisfied.

Petitioners also cite an unpublished Appellate Division decision, Sekuler v. Montgomery Township Board of Education, A-000091-96T1 (App. Div. May 8, 1997) (attached), certif. denied, 151 N.J. 464 (1997), involving N.J.S.A. 18A:16-6.1, reimbursement for legal expenses upon a favorable final disposition in a criminal proceeding. Sekuler had paid some out-of-pocket legal expenses prior to the insurance policy's provision of defense coverage, but had not sought reimbursement directly from his employer. The panel found sufficient that a demand for the full amount of legal expenses paid by Sekuler had been filed by counsel otherwise supplied through the New Jersey Education Association (NJEA) policy.

> While Sekuler has not personally incurred the cost of his defense, the expenses and costs have been defrayed by the NJEA to whom he has a reimbursement obligation. We consider it too literal a reading of the statutory provision to

> require that the payment be first made from plaintiff's own pocket before he was entitled to reimbursement. To be sure, the NJEA could have established a mechanism to provide that monies be disbursed directly to the attorney from Sekuler to satisfy the literal language of the statute if that were necessary.
>
> [Sekuler, supra, A-000091-96T1 (App. Div. May 8, 1997), at 5.]

The language of N.J.S.A. 18A:16-6 makes clear that indemnification extends to civil settlements that release funds but contain no admission of guilt. No one has argued that Waters was not going about his duties as an art teacher when the events that gave rise to the allegations occurred. While Waters has not gone out of pocket for the expenses for which he now seeks reimbursement, in the face of the Board's refusal to provide a defense, Waters was faced with four choices: raise the money himself; persuade a defense counsel to take the case and cover the upfront costs in hopes of indemnification; forgo hiring counsel to provide a defense; or draw upon the insurance policy.

As a member of the NJEA and an employee of a school board, Waters was an insured under the policy, and the subrogation clause states clearly that "the Company shall be subrogated to all the **Insured's** rights of recovery therefore against any person or organization and the **Insured** shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights." (P-3.) Waters signed the recovery petition at issue here on March 19, 2010, and is the first named petitioner in the instant matter. The intent of the statute was to defray the employee's expenses, and the Appellate Division decision in Sekuler essentially treats the insurance policy as a financial mechanism through which employees can raise the funds for otherwise potentially ruinous defense costs. This is consistent with Meisenbacher, which determined that the law firm alone had no standing under the statute, but pointed out that the teacher himself was entitled to payment, and the client's right to recover defense costs was intact. Therefore, I **CONCLUDE** that the interpretation urged by the Board is overly mechanistic and not within the statute and existing case law.

ORDER

The petitioners' request for relief is **GRANTED** and respondent is hereby **ORDERED** to reimburse petitioners for all costs and fees expended on behalf of Ray Waters in connection with the defense and settlement of the lawsuit.

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.

April 4, 2011
DATE

Laura Sanders
LAURA SANDERS
ACTING DIRECTOR AND CHIEF ALJ

Date Received at Agency: 4/4

APR - 5 2011

Date Mailed to Parties:

/caa

EXHIBITS

For Petitioners—R.W. and the Horace Mann Insurance Company:

P-1 Petitioner's Brief in Support of Cross-Motion for Summary Decision

P-2 Letter from petitioners' counsel to ALJ, dated March 11, 2011

P-3 Certificate of Insurance, New Jersey Education Association, Educators Employment Liability Insurance

For Respondent—Toms River Public Schools Board of Education:

R-1 Brief in Support of Summary Decision

R-2 Letter from respondent's counsel to ALJ, dated March 14, 2011

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-000091-96T1

RECEIVED
MAY 08 1997
WILLS O'NEILL & MELLK

FILING DATE
APPELLATE DIVISION
MAY 8, 1997
Clerk

PAUL SEKULER and
WILLS, O'NEILL & MELLK,

Plaintiffs-Appellants,

v.

MONTGOMERY TOWNSHIP BOARD
OF EDUCATION,

Defendant-Respondent.

Submitted: April 22, 1997 Decided: MAY 8 1997

Before Judges Dreier, D'Annunzio and Newman.

On appeal from Superior Court of New Jersey,
Law Division, Somerset County.

Wills, O'Neill & Mellk, attorneys for appellants
(Arnold M. Mellk, of counsel and on the brief).

Carroll & Weiss, attorneys for respondent
(David W. Carroll, of counsel and on the brief).

PER CURIAM

Plaintiffs, Paul Sekuler and his attorneys, Wills, O'Neill & Mellk, appeal from the dismissal of their complaint in lieu of prerogative writs. That complaint sought to direct defendant, Montgomery Township Board of Education, to pay Sekuler's legal fees incurred as a result of his successful defense of charges made against him for an alleged sexual assault upon a female seventh-grade student. The girl claimed that Sekuler had fondled

her breast in an office storage area just before homeroom began and that he later whispered to her that she should not tell anyone what had happened. The girl reported the incident to the school nurse. Sekuler consistently and steadfastedly denied the charge, and the State never adduced any evidence to corroborate it.

Sekuler, however, was immediately suspended, and since he was a non-tenured teacher, his employment contract was not renewed. The indictment for second-degree sexual assault was dismissed without prejudice when serious questions arose concerning the student's credibility and when she refused to cooperate with the prosecution. On an appeal to this court, we were satisfied that the defendant was entitled to a dismissal with prejudice as well as to an expungement of his arrest record pursuant to N.J.S.A. 2C:52-6. State v. Sekular[1], No. A-2652-91T3, No. A-5335-91T3 (App. Div. May 5, 1993).

Plaintiffs then filed this complaint to be reimbursed the expenses of Sekuler's legal defense. On cross-motions for summary judgment, the motion judge granted defendant's motion and denied that of plaintiffs. In so doing, she did not reach the issue of whether or not the criminal charges against Sekuler "arose out of" his duties as a teacher within the meaning of the reimbursement statute. The motion judge did, however, rule that plaintiffs were not entitled to be reimbursed under N.J.S.A.

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[1] This Appellate Division opinion incorrectly identifies Paul Sekuler as Paul Sekular.

18A:16-6.1 because Sekuler had not incurred any expense for legal services in the defense of the criminal action. The motion judge considered that the statute was intended to insure that the accused employee who received a favorable disposition of the criminal charge should not suffer financial loss as a result of the charge, but that the statute did not intend to extend financial coverage to other third parties who paid for the legal fees and costs incurred in the accused employee's defense to the charge. The motion judge concluded that the intent of the statute was not to provide third-party reimbursement through an employee who has already received a defense pursuant to the terms of the union's collective bargaining agreement at no expense to himself and has, thus, not suffered any financial loss in his defense.

On appeal, plaintiffs argue that N.J.S.A. 18A:16-6.1 calls for reimbursement, notwithstanding the advancement of the legal fees and costs on behalf of the accused employee by a third party labor organization. Plaintiffs assert that the motion judge erred in construing N.J.S.A. 18A:16-6.1 too narrowly on the issue of reimbursement. We agree and reverse.

N.J.S.A. 18A:16-6.1 provides for indemnity of employees upon a favorable final disposition of a criminal action. The statute reads:

> Should any criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the costs of defending such proceeding, including reasonable counsel

> fees and expenses of the original hearing or trial and all appeals.

N.J.S.A. 18A:16-6.1 became effective January 11, 1968. The statement to the bill had this to say about its purpose.

> This bill also proposes legal help under limited circumstances in the event of a criminal action against an employee. The Board of Education would be required to reimburse the employee for defense costs and counsel fees, for the original hearing or trial, and for all appeals, provided the action is dismissed or results in a final disposition in favor of such employee. Employees who are found guilty would be responsible for paying their own expenses.

As the statement makes clear, the obvious purpose of the bill was to have the Board of Education pay for the legal expenses of the employee successful in defending a criminal action, but let that employee be responsible for paying his or her own expenses when found guilty in a criminal proceeding. Cf. N.J.S.A. 40A:14-155 providing similar rights to a police officer who, if a criminal proceeding is dismissed or determined in his favor, is to "be reimbursed for the expense of his defense."

Here, pursuant to the New Jersey Education Association's (NJEA) legal services program, Sekuler, as a member of the NJEA, met the eligibility requirements for legal representation. In so doing, Sekuler signed an agreement "to reimburse NJEA in the amount of its financial assistance, including any reasonable attorney fees and court costs which NJEA expends to recover same, should I recover monies as a result of any claim for damages, fees or costs ...." Without financial assistance through the NJEA program, plaintiff may not have been able to afford to retain his own attorney. In this instance, Sekuler, at least,

could look to the NJEA for financial help. While Sekuler has not personally incurred the cost of his defense, the expenses and costs have been defrayed by the NJEA to whom he has a reimbursement obligation. We consider it too literal a reading of the statutory provision to require that the payment be first made from plaintiff's own pocket before he was entitled to reimbursement. To be sure, the NJEA could have established a mechanism to provide that monies be disbursed directly to the attorney from Sekuler to satisfy the literal language of the statute if that were necessary.

Had Sekuler been found guilty of the criminal action, of course, there would have been no statutory obligation for reimbursement. However, because defendant was successful in defending against the criminal action, the Board of Education has the obligation to pay for the cost of defending such proceeding.

We also find no significance in the motion judge's reference to Sekuler's "still wholly unexplained" failure to claim reimbursement for fees he personally paid to the attorney he originally retained to assist him and represent him on the charge despite the fact that those fees were clearly eligible for reimbursement under the statute. The record discloses that a demand was made of the Board of Education by counsel for Sekuler in a letter of April 1, 1996, which submitted the bills of Thomas Pavics, who had originally been retained to represent plaintiff.

Moreover, the fact that the plaintiff law firm in this action has sought payment of $239,696.32 for fees and costs

expended for Sekuler's representation does not mean that the law firm is entitled to that amount. According to the discovery, the law firm was paid $141,342.50. These legal fees were based on the defense of the criminal action at $110 per hour. In the complaint filed in the prerogative writ action, Wills, O'Neill and Mellk sought their usual and customary rate of $200 per hour. They would not be entitled to receive more than what was paid to them by NJEA on Sekuler's behalf. See Valerius v. City of Newark, 84 N.J. 591, 600 (1980) (involving a police officer). In other words, the law firm cannot make one agreement with the NJEA and then seek to recover a greater amount for their legal services when they accepted Sekuler's representation on the basis of the hourly rate billed to NJEA.

We do, however, agree with the motion judge that the civil rights statutes and decisions reached by courts applying those counsel fee provisions are neither dispositive nor instructive in the analysis of the statute before us. See 42 U.S.C.A. § 1988. The civil rights statutes are designed in part to encourage litigation by individuals asserting that their civil rights have been violated. See Rodriguez v. Taylor, 569 F.2d 1231, 1245 (3d Cir. 1977), cert. denied, 436 U.S. 913, 98 S.Ct. 2254, 56 L.Ed.2d 414 (1978). The goal of the statutory provision involved here is not to encourage litigation, but to protect a person who is a defendant in a criminal action from being asked to absorb the financial loss of the defense of that action when the defense has secured a final favorable disposition.

Furthermore, the recent decision of Bower v. Board of Education of the City of East Orange, 287 N.J. Super. 15 (App. Div. 1996) (argued before the Supreme Court on January 21, 1997 and opinion not yet filed) is not instructive on the issue presented here. In Bower, the issue of reimbursement was not addressed at all, but rather, the Court focused on whether the criminal charges arose out of and in the course of the performance of the duties of the employee under N.J.S.A. 18A:16-6.

We conclude that N.J.S.A. 18A:16-6.1 requires reimbursement to Sekuler of the cost of defending the criminal action in the circumstances of this case in order to fulfill his reimbursement obligation. Because, however, the issue of whether the criminal action has arisen out of the performance of the duties of his employment has not been decided, the matter will be remanded for that issue to be addressed. On remand, the court may also address the reasonableness of the counsel fees and costs if raised by the Board.

Reversed and remanded for further proceedings consistent with this opinion.

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

Clerk

151 N.J. 464, 700 A.2d 876 (Table)

(The decision of the Court is referenced in the Atlantic Reporter in a table captioned "Supreme Court of New Jersey Table of Petitions for Certification".)

Supreme Court of New Jersey
Paul Sekuler
v.
Board of Education of Township of Montgomery

NOS. C-20 SEPT. TERM 1997, 44,269
Sept 08, 1997

Disposition: Denied.

N.J. 1997.
Sekuler v. Board of Educ. of Tp. of Montgomery
151 N.J. 464, 700 A.2d 876 (Table)

END OF DOCUMENT

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179-11

OAL DKT. NO. EDU 09209-06
AGENCY DKT. NO. 227-6/06

LOUIS MELILLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION 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 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5|11|11

Date of Mailing: 5|11|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.: EDU 09209-06

AGENCY DKT. NO.:227-6/06

LOUIS MELILLO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

Timothy R. Smith, Esq., for petitioner (Caruso Smith Edell Picini, P.C., attorneys)

Karen A. Murray, Esq., for respondent

Record Closed: March 21, 2011 Decided: March 24, 2011

BEFORE **J. HOWARD SOLOMON**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 11, 2006 for hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A hearing date of December 4, 2006 was scheduled but adjourned due to the unavailability of a witness. Several other hearing dates were scheduled and adjourned in advance at the request of both counsel due ongoing tenure charges involving the same parties which counsel represented would be dispositive of this matter. The tenure proceedings ultimately concluded on September 28, 2010 and the parties

thereafter 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 agreed to settle this matter and have prepared the attached agreement indicating the terms of settlement.

2 The settlement fully disposes of all issues in controversy and is consistent with the law.

I CONCLUDE that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement shall be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms and that it is further ordered that the proceedings in this matter hereby are **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.

3-24-11
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: 3-29-10

Date Mailed to Parties: MAR 29 2011
db

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 FDUCATION

2011 MAR -3 A 8:39

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 Louis Melillo ("Melillo"). 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 December 3, 2004, Melillo was employed as a Custodian by the Board; and

WHEREAS, Complaint Nos. W-2004-006180-2004, W-2004-006181-2004 and Indictment No. 04-12-014311 were issued for certain acts alleged to have occurred while Melillo was in the employ of the Board; and

WHEREAS, on September 28, 2005, Judge William Wertheimer, J.S.C. dismissed the above-referenced Indictment against Melillo. A copy of the Judgment of Acquittal reflecting said dismissal is attached hereto, (Exhibit 1).

WHEREAS, pursuant to N.J.S.A. 18A:16-6.1, Melillo's defense counsel sought reimbursement from the Board's for attorney's fees and costs associated with his legal defense

relative to the Complaint Nos. W-2004-006180-2004, W-2004-006181-2004 and Indictment No. 04-12-014311; 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 Forty-Two Thousand Two Hundred Sixty-Eight Dollars and Fifty Cents ($42,268.50) for attorney's fees and Four Thousand Four Hundred and Fifty Dollars ($4,450.00) for investigative fees. The aforementioned amount represents full and complete indemnification of the attorney's fees and costs incurred by Melillo in relation to Complaint Nos. W-2004-006180-2004, W-2004-006181-2004 and Indictment No. 04-12-014311. Checks for these amounts 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, Melillo 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 Melillo 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 Complaint Nos. W-2004-006180-2004, W-2004-006181-2004 and Indictment No. 04-12-014311.

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 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 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, 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.

7. Melillo 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.

CARUSO SMITH EDELL PICINI, PC

Timothy R. Smith, Esq.
Attorney for Louis Melillo

Dated: 2/16/11

Karen A. Murray, Esq.
Labor Counsel for
the Elizabeth Board of Education

Dated: 3/1/11

C
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P
Y

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Louis Melillo have discussed a resolution of OAL Docket No. EDU 09209-06; and

WHEREAS, in the interest of cost efficiency and in lieu of an appeal, 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 with the School Business Administrator/Board Secretary.

TRUE COPY APPROVED AND ADOPTED AT
THE ELIZABETH BOARD OF EDUCATION MEETING
HELD ON **February 3, 2011**

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

Elizabeth, New Jersey
February 3, 2011

180-11

OAL DKT. NO. EDU 1041-07 AND 7984-08 (CONSOLIDATED)
AGENCY DKT. NO. 436-11/06 AND 172-6/08

NORTH JERSEY COMMUNITY COORDINATED CHILD CARE AGENCY,

PETITIONER,

V.

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

RESPONDENT,

AND

NORTH JERSEY COMMUNITY COORDINATED CHILD CARE AGENCY,

PETITIONER,

V.

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

RESPONDENT,

COMMISSIONER OF EDUCATION

DECISION

The records of these consolidated matters, 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 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5|11|11
Date of Mailing: 5|11|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
CONSOLIDATED

NORTH JERSEY COMMUNITY COORDINATED CHILD CARE AGENCY, Petitioner, v. **STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON,** Respondent.	OAL DKT. NO. EDU 1041-07 AGENCY DKT. NO. 436-11/06
NORTH JERSEY COMMUNITY COORDINATED CHILD CARE AGENCY, Petitioner, v. **STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON,** Respondent.	OAL DKT. NO. EDU 7984-08 AGENCY DKT. NO. 172-6/08

Vito A. Gagliardi, Jr., Esq., for petitioner (Porzio, Bromberg & Newman, attorneys)

Roy J. Evans, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: March 24, 2011 Decided: March 30, 2011

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

In this consolidated matter, petitioner North Jersey Community Coordinated Child Care Agency, Inc. (NJCCCC) d/b/a Michael's Energy Factory and d/b/a Barney's Educational Center challenged action by respondent State-Operated School District of the City of Paterson (District) to reclaim funds stemming from the District's review of financial records of NJCCCC's programs. On or about November 27, 2006, NJCCCC filed a Verified Petition of Appeal, and later filed an Amended Verified Petition, challenging the District's determination to reclaim funds related to fiscal years 2003-2004, 2004-2005 and 2005-2006. The Department of Education transmitted the matter to the Office of Administrative Law (OAL), where it was filed under OAL Dkt. No. EDU 1041-07. Subsequently, on October 20, 2008, I issued an order granting partial summary decision in the favor of the District and dismissed NJCCCC's claims related to fiscal year 2003-2004 and 2004-2005. On June 2, 2009, I issued an order denying the District's motion for summary decision as to fiscal year 2005-2006.

NJCCCC filed a separate Petition of Appeal challenging the District's determination to reclaim funds stemming from a review of financial records of NJCCCC's programs for fiscal year 2006-2007. The Department of Education transmitted the matter to the OAL, where it was filed under OAL Dkt. No. EDU 7984-08. On June 2, 2009, I issued an order denying the District's motion for summary decision.

Subsequently, on July 14, 2009, I issued an order consolidating the matters. Following various adjournments of the hearing at the parties' request, the matter was rescheduled for hearing on March 25 and 28, 2011. Prior to the hearing, counsel for petitioners submitted under letter dated March 23, 2011, the attached Stipulation of Settlement, indicating the terms of agreement between the parties.

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.

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 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.

March 30, 2011
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency:

4-1-11
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: APR - 1 2011

jb

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Petitioner North Jersey Community Coordinated Child Care Agency, Inc. d/b/a Michael's Energy Factory and d/b/a Barney's Educational Center

RECEIVED
STATE OF N.J.
OFFICE OF LAW
MAR 24 A 9:35

NORTH JERSEY COMMUNITY COORDINATED CHILD CARE AGENCY, INC., d/b/a MICHAEL'S ENERGY FACTORY and d/b/a BARNEY'S EDUCATIONAL CENTER, Petitioner, v. PATERSON PUBLIC SCHOOLS, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OAL DOCKET NO. EDU-1041-2007N AGENCY DOCKET NO. 436-11/06-06 and OAL DOCKET NO. EDU-7984-2008N AGENCY DOCKET NO. 172 – 06/08

STIPULATION OF SETTLEMENT

This Settlement Agreement (the "Agreement") is made this 18 day of March, 2011, by and between petitioner North Jersey Community Coordinated Child Care Agency, Inc. d/b/a Michael's Energy Factory and d/b/a Barney's Educational Center ("Petitioner"), and respondent State-Operated School District of the City of Paterson ("Paterson") (collectively the "Parties").

WHEREAS, in order to settle and resolve the above matters without the expense, loss of time, disruption of activities, costs, and uncertainties of litigation, the Parties agree to settle with each other all claims asserted herein or which could have been asserted by or against the Parties as they relate to the 2003-2004, 2004-2005, 2005-2006 and 2006-2007 school years.

NOW, THEREFORE, in consideration of the mutual promises and undertakings contained herein, the receipt and sufficiency of which are mutually acknowledged, the Parties agree as follows:

1. Paterson shall pay Petitioner thirty-three thousand six hundred thirty-six dollars and fourteen cents ($33,636.14) by delivering a check made payable to "Porzio, Bromberg & Newman, P.C. in trust for North Jersey Community Coordinated Child Care Agency, Inc." to Porzio, Bromberg & Newman, P.C.

2. The Parties hereby release and hold harmless each other and their officers, employees, directors, shareholders, members, agents, representatives, parents, affiliates, and subsidiaries, and the successors and assigns of any of them, from any and all claims that were or could have been asserted by or against the Parties for the subject school years. These claims include, but are not limited to, Petitioner's claims for monies owed for the 2003-2004, 2004-2005, 2005-2006, and 2006-2007 school years.

3. This Agreement reflects a business decision by the Parties to settle their differences, disputes, and claims. Nothing contained in this Agreement is intended to be, nor shall it be construed to be, an admission of liability by any party or an admission of the existence of any facts upon which liability could be based.

4. A determination that any provision(s) of this Agreement is invalid, illegal, or otherwise unenforceable in any respect in any instance shall not affect the validity, legality, or enforceability of any other provision or provisions of this Agreement, but rather this Agreement shall be construed as if not containing the particular invalid or unenforceable provision or provisions, and the rights and obligations of the Parties shall be construed and enforced accordingly.

5. The Parties agree that this Agreement constitutes the entire agreement between the Parties relating to the subject matter of this Agreement and that there are no other agreements, understandings, representations or warranties made or given, except as expressly set

forth herein. All prior agreements, understandings, letters, and/or communications relating to the subject matter of this Agreement shall be null and void and shall be superseded by this Agreement, except as expressly set forth herein.

6. The modification, amendment, and/or waiver of this Agreement, or of any of the provisions of this Agreement, shall not become effective unless executed in writing by the party to be charged with such modification, amendment, or waiver, in each case by a duly authorized representative.

7. Should any provision of this Agreement require interpretation or construction, the Parties hereto agree that the court, administrative body, or other entity interpreting or construing this Agreement shall not apply any presumption that any provisions thereof shall be more strictly construed against one party, whether by reason of the rule of construction that the provisions of a document shall be more strictly construed against the party who itself or through its representatives prepared same, or otherwise, it being agreed that the Parties and their respective attorneys have fully participated in the preparation of all provisions of this Agreement.

8. This Agreement shall inure to the benefit of the Parties hereto, and their respective heirs, successors, and assigns.

9. This Agreement and all rights and obligations hereunder, including matters of construction, validity, and performance shall be governed by the laws of the State of New Jersey. All Parties submit themselves to the jurisdiction of the courts of the State of New Jersey for all purposes with respect to this Agreement.

10. This Agreement may be executed in counterparts.

11. The Parties acknowledge that each of them has consulted with, or had the opportunity to consult with, legal counsel of their own selection about this Agreement. The

Parties understand how this Agreement will affect their legal rights and voluntarily enter into this Agreement with such knowledge and understanding. The Parties warrant that their undersigned corporate officers are fully authorized to execute this Agreement in the name and on the behalf of the respective Parties and to give the releases and make the promises contained herein. Each of the Parties warrants and represents that no other consent, approval, authorization, or order of, and no notice to, or order filed with any court, governmental authority, person, or entity is required for the execution, delivery, or performance of this Agreement, with express exception of their understanding that this Agreement is subject to the approval of the Commissioner of Education in accordance with the governing laws and precedents.

IN WITNESS WHEREOF, the Parties hereto have caused this Settlement Agreement to be executed by their respective duly authorized representatives as of the day and year first above written:

By: Thomas E Zsiga
Name: Thomas E. Zsiga
Title: Chief Executive Officer
On behalf of North Jersey Community Coordinated Child Care Agency
Date:

By: _____
Name: Donnie W. Evans, Ed.D.
Title: State District Superintendent
On behalf of State-Operated School District of the City of Paterson
Date:

PORZIO, BROMBERG & NEWMAN, P.C.
Attorneys for Petitioner
North Jersey Community Coordinated Child Care Agency, Inc. d/b/a Michael's Energy Factory and d/b/a Barney's Educational Center

By: _____
Vito A. Gagliardi, Jr.
An Attorney of the Firm

Date: 3-21-11

SCHENCK, PRICE, SMITH & KING, LLP
Attorneys for Respondent
State-Operated School District of the City of Paterson

By: _____
Roy J. Evans
An Attorney of the Firm

Date:

IN WITNESS WHEREOF, the Parties hereto have caused this Settlement Agreement to be executed by their respective duly authorized representatives as of the day and year first above written:

By:_____
Name: Thomas E. Zsiga
Title: Chief Executive Officer
On behalf of North Jersey Community Coordinated Child Care Agency
Date:

By: Donnie W. Evans
Name: Donnie W. Evans, Ed.D.
Title: State District Superintendent
On behalf of State-Operated School District of the City of Paterson
Date: 3/18/2011

PORZIO, BROMBERG & NEWMAN, P.C.
Attorneys for Petitioner
North Jersey Community Coordinated Child Care Agency, Inc. d/b/a Michael's Energy Factory and d/b/a Barney's Educational Center

By: _____
Vito A. Gagliardi, Jr.
An Attorney of the Firm

Date:

SCHENCK, PRICE, SMITH & KING, LLP
Attorneys for Respondent
State-Operated School District of the City of Paterson

By: Roy J. Evans
Roy J. Evans
An Attorney of the Firm

Date: 3/21/2011

181-11

OAL DKT. NO. EDU 11338-10
AGENCY DKT. NO. 547-9/10

MIRIAM SALAZAR,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY	:	

In the proposed settlement of the above-captioned matter, respondent has agreed to reimburse petitioner for legal fees that she incurred in successfully defending against a Citizen's Complaint brought against her in the course of her employment with respondent. The parties have agreed that respondent shall execute its obligation by delivering to petitioner's counsel a check made out to Caruso, Pope, Smith, Edell & Picini in the amount of $1,872.46.

Insofar as respondent's representatives, petitioner and petitioner's counsel have all executed the settlement agreement, the Commissioner adopts the Initial Decision approving same as the final decision in this case. Accordingly, the petition is hereby dismissed, subject to compliance with the applicable terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/11/11

Date of Mailing: 5/11/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11338-10
AGENCY DKT. NO. 547-9/10

MIRIAM SALAZAR,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Timothy Smith, Esq., for petitioner (Caruso, pope, Smith, Edel, Picini, attorneys),

Karen A. Murray, Esq., for respondent

Record Closed: March 28, 2011 Decided: March 29, 2011

BEFORE **JESSE H. STRAUSS**, ALJ:

The Department of Education Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) on October 12, 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 reached an amicable resolution of the matter, and submitted the Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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 signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with 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.

March 29 2011
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: 3-31-11

Date Mailed to Parties: MAR 31 2011

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

2011 MAR 28 P 3:28

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 FDUCATION

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 POPE SMITH EDELL PICINI, 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 Miriam Salazar ("Salazar"). 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 December 1, 2008, Salazar was employed as a Security Guard by the Board; and

WHEREAS, on that date, a Citizen Complaint No. G2008-044719 was issued for certain acts alleged to have occurred while Salazar was in the employ of the Board; and

WHEREAS, on February 1, 2009, the Elizabeth Municipal Court dismissed the above-referenced Complaint against Salazar. A copy of the disposition reflecting said dismissal is attached hereto, (Exhibit 1).

WHEREAS, pursuant to N.J.S.A. 18A:16-6.1, Salazar's defense counsel sought reimbursement from the Board's for attorney's fees and costs associated with her legal defense relative to the Elizabeth Complaint No. G2008-044719; 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 Eight Hundred Seventy Two Dollars and Forty Six Cents ($1,872.46). The aforementioned amount represents full and complete indemnification of the attorney's fees and costs incurred by Salazar in relation to Elizabeth Complaint No. G2008-044719. A check for this amount shall be drawn to CARUSO POPE SMITH EDELL PICINI, 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, Salazar 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, 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 Salazar 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. G2008-044719.

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 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 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, 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.

7. Salazar 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.

MIRIAM SALAZAR

Miriam Salazar

Dated:

ELIZABETH BOARD OF EDUCATION

Harold E. Kennedy, Jr.
Board Secretary/School Business Administrator

Dated: 3/23/2011

CARUSO POPE SMITH EDELL PICINI

Timothy R. Smith, Esq.
Attorney for Miriam Salazar

Dated: 1/3/11

Karen A. Murray, Esq.
Labor Counsel for
the Elizabeth Board of Education

Dated: 3/23/11

C
O
P
Y

10d

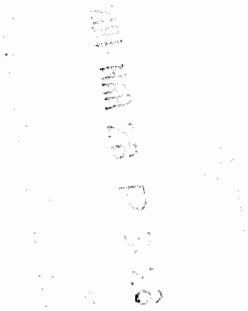
BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Miriam Salazar have discussed a resolution of an Office of Administrative Law matter (OAL Docket No. EDU 11338-2010N; Agency Reference No. 547-9/10); 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 with the Board Secretary, provided that it is fully signed by all parties.



Elizabeth, New Jersey
November 18, 2010

10-56

OAL DKT. NO. EDU 13022-10
AGENCY DKT. NO. 600-10/10

TRACEE EDMONDSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PITTSGROVE, SALEM COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

Petitioner's "Motion to Vacate Final Ruling" and respondent's reply thereto have been reviewed. Pursuant to *N.J.A.C.* 6A:3-1.15, the Commissioner will treat petitioner's filing as a motion for reconsideration of Commissioner Decision No. 120-11, since there is no provision in the procedural rules allowing motions to vacate.

N.J.A.C. 6A:3-1.15(b) allows applications for reconsideration of decisions, providing that they are filed within ten days of the issuance of said decision. The decision for which petitioner seeks reconsideration was issued on March 18, 2011, and deemed filed on March 21, 2011. Petitioner's instant application, dated April 9, 2011, is clearly out of time.

Moreover, the motion fails to meet the standards outlined in *N.J.A.C.* 6A:3 - 1.15(b)(2). Those standards allow reconsideration if a party claims that:

i. a mistake was made;[1]

[1] Disagreement with a decision or the analysis upon which the decision is based does not constitute a "mistake" for purposes of a motion for reconsideration.

ii. newly discovered evidence, which evidence could not previously have been discovered by due diligence, is likely to alter the outcome of the case;

iii. newly ascertained misrepresentation or other misconduct of an adverse party – which evidence could not previously have been discovered by due diligence – warrants reconsideration; or

iv. a relied upon judgment has since been reversed.

In the present motion, no "mistake" is alleged by petitioner. Consequently, there are no grounds for reconsideration under *N.J.A.C.* 6A:3-1.15(b)(2)(i). Nor has petitioner presented new evidence, pursuant to *N.J.A.C.* 6A:3-1.15(b)(2)(ii). Petitioner offers two events to support her position that the Commissioner's March 18, 2011 decision was tainted by bias: 1) a discussion about future uses of the Elmer school building at a public meeting in Pittsgrove in May 2010, and 2) a March 24, 2011 meeting between Elmer Board of Education members and representatives of the Department of Education concerning the Elmer school district's budget. The first event took place almost a year before the decision for which petitioner asks review and does not therefore qualify as newly discovered evidence. The second event took place after the issuance of the decision for which petitioner seeks review and cannot therefore have influenced same.

N.J.A.C. 6A:3-1.15(b)(2)(iii) gives parties the opportunity to ask for reconsideration when they have discovered misconduct or misrepresentation by their adversary about which they could not have previously known. Petitioner's allegations in this motion appear to be directed not at her adversary, the Pittsgrove Board of Education, but rather at the Commissioner of Education and possibly the Elmer Board of Education, which is not a party to

this case. Consequently, there are no grounds for reconsideration under *N.J.A.C.* 6A:3-1.15(b)(2)(iii). Finally, the motion does not appear to claim that a relied upon judgment has been reversed, pursuant to *N.J.A.C.* 6A:3-1.15(b)(2)(iv).

If petitioner disagrees with the Commissioner's decision she may appeal it to the Superior Court, Appellate Division.[2] However, for the above stated reasons, the Commissioner denies petitioner's motion for reconsideration of his March 18, 2011 decision in the instant matter.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/11/11

Date of Mailing: 5/11/11

[2] In that regard, the Commissioner brings to petitioner's attention regulation *N.J.A.C.* 6A:3-1.15(d), which instructs that a motion for reconsideration does not necessarily toll the time in which a party may file an appeal to Superior Court.

Tracee Edmondson
71 Rainbow Trail
Pittsgrove, New Jersey 08318
856.455.4116

RECEIVED BY C&D
2011 APR 11 A 7:16
CONTROVERSIES & DISPUTES

Tracee Edmondson, Petitioner	:	BEFORE THE COMMISSIONER
	:	OF EDUCATION OF NEW JERSEY
vs.		AGENCY REF:600-10/10
		OAL DOCKET NO: EDU13022-2010S
Pittsgrove Township BOE,	:	
Respondent	:	MOTION TO VACATE FINAL RULING

Petitioner moves to vacate the final judgment in the aforementioned case and seeks a new and unbiased ruling by an unbiased adjudicator (i.e. – a party other than the New Jersey Department of Education); Petitioner questions the commissioner's conduct in negotiating with the Respondent and claims the relationship could have influenced the outcome of the case. The Commissioner's conduct in negotiating with the Respondent resulted in financial assistance and fiscal management from the Commissioner to Respondent in early March 2011, which is during his final ruling on ***Edmondson v. Pittsgrove*** (OAL Docket No. EDU 13022-2010S) on March 18, 2011. (See Appendix A – Elmer Times 4/8/11 article.)

In ***DeNike vs. Cupo*** 196 NJ 502 (2008), the Supreme Court reversed the Appellate Court as follows:

> Judges must avoid actual conflicts as well as the appearance of impropriety to promote confidence in the integrity and impartiality of the Judiciary. Unfortunately, the negotiations between trial judge and lawyer in this case created an appearance of impropriety. Stated simply, the conduct here fell short of the high standards demanded of judges and fellow members of the legal profession and had the capacity to erode the public's trust. Because any lesser remedy would allow reasonable doubts to linger about the fairness of the outcome of the case, the judgment of the Appellate Division is reversed and the matter is remanded for a new trial.

In *Edmondson v. Elmer and Pittsgrove* (OAL Docket No. EDU-6992-10), the Commissioner ruled that pursuant to the definition in N.J.S.A. 18A:8-43, the "practical result of respondents' agreement" rendered "Elmer a non-operating district". New Jersey Department of Education ruled on October 25, 2010 that it was the responsibility of the executive county superintendent, who is an employee of the NJDOE and works directly for the Commissioner, pursuant to N.J.S.A. 18A:8-44 to "effectuate involuntary district mergers" as "petitioner correctly points out". The Commissioner further asserts, "The recently enacted 'Non-operating District' statute provided for executive county superintendents to eliminate non-operating districts and merge same with the districts which receive the non-operating district's students. N.J.S.A. 18A:8-44(a)." The ruling mentioned that "there is no indication that the Salem County superintendent

has made the determinations and taken the action prescribed in N.J.S.A. 18A:8-44 to 8-49" "nor is there reason for the Acting Commissioner to order the initiation of such actions, since N.J.S.A. 18A:8-44 et seq. provides the means of effectuating involuntary district mergers". As a result of EDU 6992-10, the Commissioner's negotiating with Respondent and final judgment in EDU 13022-2010S are conflicts of interest and supports concerns about public confidence in the integrity and impartiality of our system of justice.

The Commissioner has known of its responsibility to close the Elmer School since the executive county superintendent's presentation before the Pittsgrove Township Council on May 13, 2010. http://www.pittsgrovetownship.com/TWPCOM/PITTSGROVE%20TOWNSHIP%20COMMITTEE%20SPECIAL%20MEETING%20-%20MAY%2013%202010%20DEFEATED%20SCHOOL%20BUDGET%20II.pdf, page 4 paragraph numbered "7", page)? The Commissioner's representative said as follows, "Mr. Bumpus anticipates that the Elmer School will become non-operating in 2010-2011 and for 2010-2012 it will become dissolved. The building will go to the municipality and the assets will be liquidated." However, Respondent, "Mr. Bermann interjected that a long term lease is being negotiated with Elmer. It will indicate what happens to equipment, supplies, etc. They do not intend the use of the building for anything but education. Counsel has indicated that the lease will prevail if challenged. There are laws that govern the process." The Respondent was asked why it had not considered a full merger, it responded, "not ready to merge, it's always been an expanded send/receive. Mr. Bermann stated that a merge is part of newer legislation." And the New Jersey Department of Education opined that not following "newer legislation" is a "win-win". These exchanges clearly indicate collusion and conflicts of interest between the New Jersey Department of Education and Respondent. As such, the New Jersey Department of Education should have recused itself in adjudicating any matters associated with Respondent.

Specifically, the issue here is whether a litigant who believes there may have been judicial misconduct or at least conduct implicating the appearance of judicial impropriety may sit back and utilize that information whenever he deems appropriate. Alternatively, is a litigant who has such a belief obligated to come forward forthwith with the assertion of untoward conduct so as to allow the judicial system to immediately address the assertions of impropriety?

Judge Doyne, in a 79 page Opinion, found that the litigant cannot "sit back" and has an obligation to immediately come forward to assert the untoward conduct. Please be advised that the Commissioner has formally been asked to immediately address the assertions of impropriety.

Respectfully submitted,

Tracée Edmondson

DATE: April 9, 2011

c: Parker McCay

State Provides Fiscal Monitor And Help For Elmer School Board Budget

The Elmer School Board held a public hearing on the 2011-2012 School Budget during their meeting on Tuesday, March 29, 2011. News of a net difference between revenue and appropriations of minus $771,897.00 had been reported and about twenty Elmer residents and taxpayers turned out find out why. The challenge for the school board is they are not allowed by law to run a deficit and residents feared huge tax increases were coming. Earlier in March the board had asked for help from the New Jersey Department of Education. They explained the situation during a meeting that was held on March 24 with the state Commissioner of Education and Third District State Senator Stephen Sweeney. Prior to last Tuesday's meeting the business administrator, Suzanne Fox, received the following message from the NJ Department of Education: "Although the Elmer School District's 2011-12 budget is out of balance, the Department of Education will appoint a fiscal monitor and will also provide an advanced state aid payment as a loan, payable over a period of time not to exceed 10 years. In this way, the State will help the district meet current expenses."

Residents questioned the board on how the budget got so far out of balance. It was pointed out that tuition for special needs students and transportation costs had increased over $100,000 over what had been previously budgeted. The tuition line in the budget shows an increase of approximately $1.4 million from the 2009-10 expenditures to the 2011-12 appropriation. It was noted that Elmer is sending more students that make up a larger percentage of the total number of students in the Pittsgrove district than before and therefore carrying additional costs.

Another line item was the "surprise" bill from the state for the unemployment compensation of the former employees of The Learning Center. That line will amount to over $120,000 for the current 2010-2011 budget and another $160,000 for the coming year. Board member Joe Cardona explained to visitors that the board thought that all the staff from the Learning Center preschool program would move to Woodstown when they negotiated the move with the Salem County Vo-Tech Board. It is reported that only two of the six former employees moved with the equipment that the school board gave to assist the new location.

One resident asked School Superintendent Henry Bermann why the cost was only on Elmer when the district was now merged. Bermann pointed out that the two were still separate districts that were in a full send/receive agreement. He also noted that Pittsgrove pays rent for using the Front Street school building.

Pittsgrove is making some budget reductions with the retirement of five staff members that will not be replaced and some layoffs to save $300,000 in their budget. In Elmer the proposed budget is $3,626,591 which is an increase of $141,290 according to Suzanne Fox. The total local tax levy is $1,233,057 which is an increase of $67,180 that will equal a seven cent school tax increase for property owners in Elmer.

The issue of reducing the size of the Elmer School Board from nine members to five members was tabled during last week's meeting. There are three board member seats up for election on April 27th. The April 19th meeting will be moved to May for the purpose of reorganizing the board after the election.

3/24

Elmer Times 4/6/11

183-11

OAL DKT. NO. EDU 2626-11
(EDU 11997-09 ON REMAND)
AGENCY DKT. NO. 250-9/09

PASSAIC COUNTY TECHNICAL AND VOCATIONAL EDUCATION ASSOCIATION, :

PETITIONER, : COMMISSIONER OF EDUCATION

V. DECISION

BOARD OF EDUCATION OF THE PASSAIC COUNTY TECHNICAL INSTITUTE, PASSAIC COUNTY, :

RESPONDENT. :

The record of this matter, the proposed "Memorandum of 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 Agreement and adopts the Initial Decision as the final decision in this matter. 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: 5/11/11

Date of Mailing: 5/11/11

* 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 02626-11

Agency Docket No.250-9/09

(ON REMAND EDU 11997-09)

PASSAIC COUNTY TECHNICAL AND VOCATIONAL EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE PASSAIC COUNTY TECHNICAL INSTITUTE, PASSAIC COUNTY,

Respondent.

Sanford R. Oxfeld, Esq. on behalf of petitioner

Gerald Sean Keegan, Esq., on behalf of respondent

Record Closed: March 25, 2011 Decided: March 28, 2011

BEFORE **JOANN LaSALA CANDIDO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 2, 2009 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 for November

MEMORANDUM OF AGREEMENT BETWEEN THE PASSAIC COUNTY TECHNICAL AND VOCATIONAL EDUCATION ASSOCIATION AND THE PASSAIC COUNTY TECHNICAL INSTITUTE BOARD OF EDUCATION

FILED
OCT 2 2009

WHEREAS a Petition of Appeal was filed with the Commissioner of Education on behalf of the Passaic County Technical and Vocational Education Association (hereinafter the Education Association) on or about September 22, 2009, alleging that the Passaic County Technical Institute Board of Education (hereinafter, the Board) violated the school laws in certain regards and,

WHEREAS the Parties are desirous of amicably resolving this matter with neither Party admitting that its position prevailed or was wrong, it is agreed as follows:

1. Commencing July 2010, whenever a teaching member of any Academic Department covered in the position represented by the Education Association retires or leaves for any reason, rather than the Board hiring a replacement, the leaving teacher's scheduled classes will be distributed as a sixth teaching period to other teachers within the same department based on seniority, appropriate certification and the willingness to take a sixth teaching period assignment. If there becomes a point in time when all teaching staff members have six periods or no one remaining desires a sixth period, then it is understood that any member who leaves through attrition may be replaced.

2. This Agreement terminates with the termination date of the current Collective Negotiations Agreement between the parties.

3. Upon the execution of the Memorandum of Agreement, the Education Association will withdraw the within Petition of Appeal from the Office of Administrative Law.

SANFORD R. OXFELD, ESQ.
Passaic County Technical & Vocational Ed. Assoc.

GERALD SEAN KEEGAN, ESQ.
Passaic County Technical Institute Board of Education

MEMORANDUM OF AGREEMENT BETWEEN THE PASSAIC COUNTY TECHNICAL AND VOCATIONAL EDUCATION ASSOCIATION AND THE PASSAIC COUNTY TECHNICAL INSTITUTE BOARD OF EDUCATION

WHEREAS a Petition of Appeal was filed with the Commissioner of Education on behalf of the Passaic County Technical and Vocational Education Association (hereinafter the Education Association) on or about September 22, 2009, alleging that the Passaic County Technical Institute Board of Education (hereinafter, the Board) violated the school laws in certain regards and,

WHEREAS the Parties are desirous of amicably resolving this matter with neither Party admitting that its position prevailed or was wrong, it is agreed as follows:

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SANFORD R. OXFELD, ESQ.
Passaic County Technical & Vocational Ed. Assoc.

GERALD SEAN KEEGAN, ESQ.
Passaic County Technical Institute Board of Education

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOL IN THE COUNTY OF PASSAIC
45 REINHARDT ROAD, WAYNE, NEW JERSEY 07470

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE VOCATIONAL SCHOOL IN THE COUNTY OF PASSAIC, NJ, AS RECORDED IN THE OFFICIAL MINUTE BOOK.

The Board of Education of the Vocational School in the County of Passaic, New Jersey, convened in public session on June 10, 2010 at 9:40 at the Passaic County Technical Institute, 45 Reinhardt Road, Wayne, NJ.

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The following members of the Board of Education were present:

Albert A. Alexander, Rev. Kathy A. Kuykendall, Robert Gilmartin, Leon Mondelli and Damaris Solomon

The following member was absent: none

The motion was offered by Ms Solomon, seconded by Mr. Gilmartin, and adopted by the following roll-call vote:

Ayes:	5
Nays:	0
Abstain:	0

TITLE OF RESOLUTION: Memorandum of Agreement

BE IT RESOLVED, that the Board of Education of the Vocational School in the County of Passaic, upon the recommendation of the Superintendent, hereby approves a Memorandum of Agreement between the Passaic County Technical and Vocational Educational Association and the Passaic County Technical Institute Board of Education to resolve the Petition of Appeal filed with the Commissioner of Education in accordance with the terms of the Memorandum of Agreement.

I, Mae Remer, Board Secretary, of the Board of Education of the Vocational School in the County of Passaic, State of New Jersey, hereby certify that the foregoing extract from the minutes of a meeting held on June 10, 2010, has been compared by me with the original minutes as officially recorded in my office in the minute book of said Board of Education of the Vocational School in the County of Passaic, is a true, complete copy thereof and of the whole of said original minutes so far as the same related to the subject matter referred to in said extract.

In Witness, I have hereunder set my hand and affixed the corporate seal of the Board of Education of the Vocational School in the County of Passaic this 24th of March 2011.

Mae Remer

Mae Remer, Board Secretary

184-11

IN THE MATTER OF THE TENURE	:	
HEARING OF GEORGE H. FRIERY, JR.,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF	:	DECISION
BRIDGEWATER-RARITAN REGIONAL,	:	
SOMERSET COUNTY.	:	

SYNOPSIS

In January 2010, the petitioning Board certified charges of conduct unbecoming against respondent – a tenured Spanish teacher – for allegedly engaging in illegal sexual contact and interaction with a 15 year old student, which resulted in his arrest and charges on two counts of Endangering the Welfare of a Child. The Board sought to dismiss petitioner from his tenured position. Counsel for the respondent requested that the tenure charges be held in abeyance pending the disposition of the criminal charges against him.

In April 2011, the Board filed a motion for summary decision, reporting that respondent had, *inter alia*, entered a plea agreement whereby he was sentenced to 364 days in the Somerset County Jail and parole supervision for life, and been ordered to be subjected to the requirements of Megan's Law. Subsequently, counsel for respondent responded to the motion stating that the Superior Court had issued a Corrected Judgment of Conviction indicating that Mr. Friery must resign his position and forfeit his teaching license subject to Megan's Law. Accordingly, counsel pointed out that the Board's tenure charges are now moot.

Upon review, the Commissioner concurred that the Order of the Superior Court directing respondent to resign his position and forfeit his certificate renders the Board's tenure charges moot. Accordingly, the tenure charges were dismissed and the matter was transmitted to the State Board of Examiners for effectuation of the Court's Order.

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.

May 18, 2011

AGENCY DKT NO. 8-1/10

IN THE MATTER OF THE TENURE	:	
HEARING OF GEORGE H. FRIERY, JR.,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF	:	DECISION
BRIDGEWATER-RARITAN REGIONAL,	:	
SOMERSET COUNTY.	:	

For the District, Nicholas Celso, III, Esq., Schwartz, Simon, Edelstein & Celso

For Respondent, Edward Cridge, Esq., Wills, O'Neill & Mellk

This matter was opened before the Commissioner of Education on January 15, 2010, through the certification of tenure charges of unbecoming conduct against George H. Friery, Jr., a tenured teacher, by the School District of Bridgewater-Raritan Regional, Somerset County.

The Commissioner directed Respondent, by notice dated January 15, 2010, sent both certified and regular mail, to file an Answer to the tenure charges. By letter dated January 19, 2010, Edward Cridge, Esq. entered representation on behalf of respondent and requested that – as respondent was a defendant in a concurrent criminal proceeding arising from the same allegations as those contained in the tenure charges – pursuant to *Ott v. Board of Education of the Township of Hamilton*, 160 *N.J. Super.* 333 (App. Div. 1978), the tenure charges be held in abeyance pending the disposition of criminal charges pending against respondent.

On April 5, 2011, counsel for the District filed a Motion for Summary Decision reporting that:

> [o]n or about March 18, 2011, Mr. Friery entered into a plea agreement wherein he pled guilty to Endangering the Welfare of a Child in the 3rd degree and Endangering the Welfare of a Child in the 4th degree and was sentenced to serve 364 days [in the] Somerset County Jail and parole supervision for life....Additionally, Mr. Friery was ordered to be subject to the requirements of Megan's Law, to register pursuant to *N.J.S.A.* 2C:14-3b and to pay monetary penalties. (District's Summary Decision Motion at 4)

The District alleges that based on respondent's admission of guilt on these charges – which involved conduct directly related to his employment, as the victim of the criminal acts was a minor female student – respondent must forfeit his employment with the Board pursuant to *N.J.S.A* 2C:51-2 based on the underlying criminal charges. (*Id.* at 6-7) The District, therefore, requests that Commissioner enter summary decision directing respondent's removal from his employment with the District.[1] (*Id.* at 8)

By letter dated April 12, 2011, counsel for respondent replied to the District's motion stating that on March 23, 2011 the Superior Court of New Jersey, Somerset County, issued a Corrected Judgment of Conviction, which counsel attached to his letter. Such document specifically indicates that the defendant must resign as a teacher at Bridgewater Raritan High School and must forfeit his teaching license subject to Megan's law. Counsel points out that "as Mr. Friery's plea agreement required the forfeiture of his teaching certificate, it would appear as though the tenure charges certified by the Board of Education in this matter are moot."

Upon review, the Commissioner concurs with counsel for respondent that the Order of the Superior Court directing respondent to resign his position and forfeit his certificate

[1] The Commissioner is compelled to note that pursuant to the amendment made to *N.J.S.A.* 2C:51-2, *P.L.* 1995, *c.* 250, the Commissioner of Education lacks jurisdiction to order forfeiture.

renders the District's tenure charges against him moot and, therefore, such charges are hereby DISMISSED.

This matter shall be transmitted to the State Board of Examiners to ensure effectuation of the Court's Order.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/18/11

Date of Mailing: 5/18/11

[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)

185-11

MAUREEN CASTRIOTTA,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, a member of the Roxbury Township Board of Education, alleged that the Board acted improperly and beyond the bounds of its authority when it passed a resolution censuring her for unethical conduct in May 2010. She contended that a member of a local board of education can only be censured or disciplined for an ethical violation through the filing of a formal complaint with the School Ethics Commission (SEC), and sought indemnification pursuant to *N.J.S.A.* 18A:12-20 for legal expenses incurred in challenging the Board's action. The Board asserted, *inter alia*, that the action to censure one of its members was within its statutory authority under *N.J.S.A.* 18A:11-1, and was reasonable and consistent with the law. The parties filed cross 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 Board was required to utilize the statutory mechanisms set forth at *N.J.S.A.* 18A:12-29 in order to censure one of its members for misconduct that fell under the authority of *N.J.S.A.* 18A:12-24.1, the Code of Ethics for School Board Members; the Board's obligation to discipline the petitioner in accordance with statutory procedures cannot be avoided by excluding a reference to the Code of Ethics in its censure resolution; the actions of the Board deprived the petitioner of due process; and the Board's contention that the Commissioner lacks jurisdiction in this matter is without merit. Accordingly, the ALJ concluded that the Board's resolution censuring petitioner must be vacated. As to petitioner's claim to indemnification, the ALJ concluded indemnification is not warranted, as no civil or administrative action or other legal proceeding has been brought against her.

Upon independent review and consideration, the Commissioner adopted the recommended decision of the OAL with modification.

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.

May 18, 2011

185-11

OAL DKT. NO. EDU 9217-10
AGENCY DKT. NO. 139-7/10

MAUREEN CASTRIOTTA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Board excepts to four of the Administrative Law Judge's (ALJ) conclusions of law, specifically those which determined 1) "Castriotta has demonstrated that the Board has exceeded its authority in voting to censure her" (Initial Decision at 9); 2) "[T]he Board's obligation to discipline Castriotta in accordance with statutory procedures cannot be avoided by simply excluding a reference to the Code of Ethics in its censure resolution (Initial Decision at 11); 3) '[T]he actions of the Board deprived Castriotta of due process," (Initial Decision at 14); and 4) "[T]he Board's contention that [the Commissioner of Education] lacked jurisdiction is without merit." (Initial Decision at 14) (Board's Exceptions at 2)

With respect to the first and second of these legal conclusions – which the Board finds to be interrelated – it cites *Crystal v. Bd. of Educ. Of the Twp. Of Barnegat,* Commissioner's Decision No. 29-00, decided January 18, 2000, for the proposition that it is a long-

established principle that a board of education has the right to censure a member. While recognizing that *Crystal, supra,* upheld this right, the ALJ – it charges – "breaks new ground" by concluding that because *Crystal, supra,* pre-dated the Code of Ethics for School Board Members, such is no longer the case. (Board's Exceptions at 2) In so concluding, the Board proffers, the ALJ "effectively declares the jurisdiction of the School Ethics Commission (the "SEC") to be preemptive and exclusive and also deprives all local boards of the right to censure a member – even though a Board may not file a complaint with the SEC."[1] In support of her first and second legal conclusions, the Board advances, the ALJ places great reliance on the Legislature's language in the findings and declarations provision of the Ethics Act, specifically:

> school board members and local school administrators should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of these standards among them.
> [*N.J.S.A.* 18A:12-22(b)]

Stressing the term "uniform," the ALJ reaches the conclusion that "the clear intent of the Act was to have all concerns about board member ethics directed to the School Ethics Commission." (Initial Decision at 10) She further references the Act's enforcement procedures and determines that only the SEC, and not the Board, had authority to discipline petitioner for her alleged misconduct. (Board's Exceptions at 3-4) The position that the SEC preempts the right of the Board to censure one of its members, the Board argues, is not now – nor has it ever been – the law. Evidence of this can be found, it advances, in *Sea Isle City Board of Education v. Kennedy*, Commissioner's Decision No. 235-05, decided June 30, 2005, *aff'd* State Board, January 4, 2006, *aff'd* 393 *N.J. Super.* 93 (App. Div. 2007), *aff'd as modified* 196 *N.J.* 1 (2008), where the Commissioner established the guiding principle "that rights existing prior to the Act still remain unless expressly revoked."

[1] The Board charges that the ALJ's decision mistakenly states that the Board could authorize its Board President to file a complaint on its behalf. The Board points out that applicable regulations restrict the ability to file an ethics complaint to a "person," which is defined as "a human being and does not include boards of education, labor organizations or school districts[,]" and the Board's use of a designee to circumvent these regulations, as contemplated by the ALJ, is not within the intent of the regulations. (*Ibid.*)

(Board's Exceptions at 4) The ALJ's rejection of this underlying principle because there was no other school law which was applicable to disciplinary action for the type of behavior involved in this case is misplaced, it maintains, because "if rules of statutory construction establish that each and every word, clause and provision contained in a statute is purposeful, it necessarily follows that a statute's silence on a specific issue is also purposeful." (*Ibid.*) Finally, with respect to these two legal conclusions, the Board maintains that it did not discipline petitioner. "Rather, ...the censure resolution was nothing more than a public expression of dissatisfaction by a majority of the Board's membership and carries no other sanctions with it. Unlike the SEC's censure mechanism, the Board's censure is not a disciplinary action." (*Ibid.*) The Board, therefore urges that these first two legal conclusions of the ALJ be rejected.

As to the ALJ's third legal conclusion, *i.e.*, that the Board deprived petitioner of her entitlement to due process, this, it avers, is a result of her prior two incorrect conclusions. Accepting, *arguendo*, that the Board's prior exception is valid, it presents its arguments advanced below – which were reviewed in the Initial Decision – to support its claim that petitioner was provided all of the due process to which she was entitled. (Board's Exceptions at 5-6)

In conclusion, with respect to the fourth of the ALJ's legal conclusions, the Board, similarly, replicates its arguments advanced below. Specifically, it again proposes that the Commissioner lacks jurisdiction over this matter, as petitioner's claims predominantly involve charges of constitutional violations of her due process and free speech rights rather than violations of school law. (*Id.* at 6-7)

In reply, petitioner charges that the Board continues to support its improper censure of petitioner with citation to *Crystal, supra,* and *Sea Isle City, supra.* She claims that neither of these cases support the proposition that local boards retain jurisdiction to sanction one of their members for alleged violations of the School Ethics Act. By way of example, she argues, not only does *Crystal, supra,* predate the enactment of the Code of Ethics for School Board Members, but that particular

case involved "explicitly stated violations of the local board's bylaws only..." (Petitioner's Exceptions at 1-2) Moreover, petitioner observes:

> [r]espondent's actions in this case reflect the very injustices and potential abuses the State Legislature sought to prevent when it enacted the Ethics Code and gave sole jurisdiction over its enforcement to the School Ethics Commission and Commissioner....The Legislature's expressed intent in creating the Ethics Commission and vesting it with sole jurisdiction was to "...ensure and preserve public confidence..." thorough "uniform maintenance of standards."...By enacting the Ethics Code and granting the Commission and Commissioner jurisdiction over its enforcement the Legislature ensured local boards could focus on their school districts rather than expending time adjudicating ethics allegations. Perhaps more importantly, the Legislature ensured the public confidence would be protected by having a well versed impartial body preside over alleged ethics violations in a system replete with due process protections. ...It also ensured free and open political discourse would not be hindered by majority members of local boards who might have design to use the formal governmental authority of the Board to silence political adversaries by publicaly [sic] damaging their reputation with humiliating and biased public censures. Consistent with their intended design the Legislature ensured ethics standards would be enforced uniformly by one adjudicative agency rather than haphazardly by local boards across the State whose individual members may not be well versed in the Ethics Code or interpretive legal decisions concerning the Code. (*Id.* at 2-3)

Here, petitioner argues, the Board takes the position that "its intentional avoidance of the use of the word ethics in its carefully crafted censure resolution holds it outside the jurisdictional mandate of the Ethics Commission." However, she posits, as noted by the Supreme Court in *Board of Education of the Boro of Union Beach v. N.J. Educ. Ass'n.*, 53 *N.J.* 29:

> [t]he substance of a situation and not its shape must control. A doctrine designed to protect the public interest is equal to any demand upon it. It does not yield to guise or ingenuity (At 40-41) (Petitioner's Exceptions at 3)

Additionally, petitioner avers, the Board fails to address and consider the fact that in *DeLuna v. Bertram*, C31-06 (April 27, 2007) the School Ethics Commission specifically cautioned local school boards against taking action to discipline one of its members for violation of the Ethics Code, stating:

> The Commission is concerned that the Board took it upon themselves to determine that a fellow Board member had violated the Code of Ethics for School Board Members set forth at *N.J.S.A.* 18A:12-24.1, and then discipline[d] that board member based on its determination. While boards of education have the right to enforce their

> own policies, the Commission has sole authority to determine if the Code of Ethics for School Board Members, *N.J.S.A.* 18A:12-24.1, has been violated. However, even the Commission does not have the authority to impose discipline on a board member who has violated the Code of Ethics for School Board Members. That jurisdiction lies with the Commissioner of Education to whom the Commission makes a recommendation regarding the discipline of a school board member. The Commission cautions the Board that, in the future, if the Board suspects that the Code of Ethics for School Board Members has been violated, then a complaint should be filed with the Commission and *the Board should not make its own determination that a violation has incurred* [sic] *and impose discipline.* At p. 9 (emphasis added) (Petitioner's Exceptions at 4)

Petitioner urges that clearly the sole authority to discipline her for the allegations contained in the Board's censure resolution, which plainly sound in alleged violations of the School Ethics Code, lies solely with the Commissioner after reviewing the recommendation of the School Ethics Commission – who first conducts a full and fair hearing granting the accused a full measure of due process protections. Therefore, she maintains, the Board here was without power to censure petitioner and such censure should be vacated. (*Id.* at 5)

Turning to petitioner's primary exceptions – she excepts solely to the ALJ's dismissal of her claims for indemnification and legal fees. In so asserting she argues extensively, as she did below, that the censure hearing held by the Board qualifies as "other legal proceeding" within the intendment of *N.J.S.A.* 18A:12-20, justifying indemnification and counsel fees. As it is determined that the indemnification issue was fully considered, addressed and correctly resolved by the ALJ in her decision, further elaboration on this issue will not be presented here.

Upon comprehensive review and consideration, the Commissioner determines to adopt the recommended decision of the ALJ as modified below.

Initially, the Commissioner concurs with the ALJ that review and adjudication of allegations of Code of Ethics for School Board Members violations is solely within the jurisdictional purview of the School Ethics Commission. As such, a Board which wishes to have one of its members disciplined for misconduct falling within the ambit of *N.J.S.A.* 18A:12-24.1 is required to

utilize the statutory mechanisms set forth in *N.J.S.A.* 18A:12-29.[2] In this matter, it is undeniable that the impetus for the Board's action censuring petitioner was the letter received by its president from Superintendent of Schools Rossi charging that petitioner had "clearly and undeniably" violated the statutory Code of Ethics for School Board members, citing to numerous specific provisions of this Code which she is alleged to have violated, and requesting the Board's quick condemnation of her conduct, which the Board promptly acted on. Irrespective of the fact that the resolution censuring petitioner assiduously excluded any reference to the Code of Ethics in its wording, it is incontrovertible that the conduct petitioner was censured for would be violative of the Code and, therefore, adjudicable only by the School Ethics Commission. Consequently, the Commissioner is in full accord with the ALJ's conclusion that the Board exceeded its authority by censuring petitioner at a public meeting for perceived Ethics Code violations and, therefore, this action was *ulta vires* and must be vacated.

Next, the Commissioner finds – given that the Board exceeded its authority in taking it upon itself to adjudicate and impose discipline against petitioner for perceived Ethics Code violations – that the extent of the due process it provided her in this regard, although recognized as wholly deficient in terms of that which must be accorded an individual charged with Ethics Code violations, is irrelevant in this case.

This said, the Commissioner is compelled to clarify that the Code of Ethics for School Board Members does not operate to deprive a Board, under appropriate circumstances, of the ability to discipline one of its members, nor is *Crystal,*[3] *supra* – supporting the Board's authority in

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[2] The Board's exception argument that it cannot initiate a complaint before the School Ethics Commission because it is not a "person" as required by that body's applicable regulations is disingenuous at best. It is without question that a Board could authorize its Superintendent of Schools, who fully satisfies the regulatory requirement, to file a complaint with the Commission. Similarly rejected as wholly meritless is the Board's contention that its censure of petitioner was not "discipline" but rather merely "an expression of its dissatisfaction with her conduct." Such a claim, the Commissioner concludes, is obviously a distinction without a difference.

[3] The petitioner in this case was censured by the Board for a violation of a clearly articulated Board Policy which provided:

this regard – preempted by the Code. Specifically, *N.J.S.A.* 18A:11-1 specifically provides local boards of education with certain mandatory powers and duties. These powers and duties include the following:

a. Adopt an official seal;
b. Enforce the rules of the state board;
c. *Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government* and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised statutes; and
d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district. (emphasis added)

Pursuant to this statutory provision, the Commissioner finds and concludes that the Board is empowered to discipline one of its members who has violated a clearly constructed and adopted Board policy governing the conduct of its members. However, it is without question that such policy cannot mirror the conduct specifically prohibited by, and governed by, the Ethics Code.

Turning to the Board's challenge to the Commissioner's jurisdiction to adjudicate this matter, the crux of this case is a determination as to whether the Board exceeded its statutory authority with respect to the action taken against petitioner. Such an issue is unquestionably properly

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> No Board member will act to notify or release information concerning the business of the Board until and unless they have informed every other Board member no less than five days before such dissemination. Telephone notice by either the individual member or the Board office acting upon their request is acceptable.
>
> Any allegation that an individual governed by this policy has violated this policy will result in the issue being placed on the agenda of the next scheduled Board meeting for discussion. It will then be left to the Board to evaluate the allegation(s) and recommend any possible remedial or disciplinary action(s) allowed by the Board's rules of procedures or, absent same, Robert's Rules of Order.
>
> The Board recognizes, of course, any Board member's First Amendment rights and it is not the intent of this policy to interfere with same. Accordingly, the Board deems a member exempt from the provisions of this policy providing they issue a clear disclaimer to any media or other informational outlet that they are speaking as a private citizen and they do [not] intend their remarks to represent any position, opinion or will of the Board and that the information, data, etc., they disseminate is not privileged, executive session material that has not been declassified.
> (*Crystal, supra,* at 4-5)

before the Commissioner, and the Commissioner agrees with the ALJ that the Board's arguments to the contrary are without merit.

Finally, with respect to petitioner's request for indemnification and legal fees, the Commissioner is compelled to agree with the ALJ – for the reasons detailed on pages 15-17 of her decision – that there is no legal authority which would authorize such an award in this matter.

Accordingly, the recommended decision of the OAL is adopted as modified above. The Board's May 24, 2010 resolution censuring petitioner is hereby VACATED.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/18/11

Date of Mailing: 5/18/11

[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
SUMMARY DECISION
OAL DKT. NO. EDU 09217-10
AGENCY DKT. NO. 139-7/10

MAUREEN CASTRIOTTA,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF ROXBURY, MORRIS COUNTY,

Respondent.

Erik A. Hassing, Esq., for petitioners (Hassing and DeFilippis, attorneys)

Stephen Edelstein, Esq., for respondent (Schwartz, Simon, Edelstein and Celso, attorneys)

Record Closed: February 22, 2011 Decided: April 4, 2011

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

STATEMENT OF THE CASE

Petitioner, Maureen Castriotta, a member of the Roxbury Township Board of Education (the Board), alleges that the Board acted improperly and beyond the bounds of its authority when it passed a May 24, 2010, resolution censuring her conduct. The parties have cross-moved for summary decision.

PROCEDURAL HISTORY

Petitioner filed her appeal before the Commissioner of Education (the Commissioner) on July 1, 2010. The Board filed an answer and the contested case was transmitted to the Office of Administrative Law (OAL) on August 3, 2010.

The Board filed a motion for summary decision on November 23, 2010. Petitioner filed a cross-motion for summary decision on December 22, 2010. The Board filed a reply in opposition to the cross-motion on January 24, 2011, and petitioner filed a sur-reply on February 8, 2011. Oral argument was conducted on February 9, 2011.

Following oral argument the Board supplemented its submission with a February 18, 2011, letter citing additional case law. Counsel for petitioner responded via letter dated February 22, 2011, at which time the record closed.

ISSUES PRESENTED

The Board asserts that action to censure one of its members is within its statutory authority under N.J.S.A. 18A:11-1; that its determination to do so here was reasonable and consistent with law; and that accordingly, the petition should be summarily dismissed. It further urges that the claims raised by the petition are primarily constitutional in nature, and thus not properly before the Commissioner for adjudication. Finally, the Board seeks dismissal of petitioner's claims for indemnification, asserting that there is no basis for these claims in either law or fact.

Petitioner has cross-moved for summary decision, urging that the Board lacked the authority to censure her. She argues that a member of a local board of education can be censured or otherwise disciplined for an ethical violation only through the filing of a formal complaint with the New Jersey School Ethics Commission, and only in accordance with the procedures set forth at N.J.S.A. 18A:12-29 and N.J.A.C. 6A:28-1.1 et seq. Petitioner seeks indemnification for the legal expenses she has incurred in challenging the action of the Board, pursuant to N.J.S.A. 18A:12-20.

FINDINGS OF FACT

The facts pertinent to the pending motions are not controverted, and I **FIND**:

During the school day on April 27, 2010, a student walk-out took place at Roxbury High School. Administration, including Superintendent of Schools Michael Rossi and High School Principal Jeffrey Swanson, had been made aware that the student body intended to oppose Governor Chris Christie's proposed funding cuts. Protests of this nature had been organized by public school students Statewide. On April 27, 2010, Castriotta was a sitting member of the Board.

Rossi and Swanson decided not to attempt to prevent the walk-out, instead focusing on measures to ensure student safety and security. In a May 6, 2010, letter to the Board president, John Moschella, Rossi explained that he had thoughtfully acquiesced to the protest, writing:

> One choice was to try to stop them, either verbally and/or physically through restraint, warning or otherwise barring their access to outside. In our professional judgment, that clearly was not the best option. We chose to first and foremost keep our students safe, allow them an opportunity to express their views, get them back to class, and be done with it.

Castriotta learned of the walk-out, and vehemently disagreed with administration's approach. She thought the protest violated school policy, and she felt strongly that administration should make every effort to stop it. Concerned about what would transpire, Castriotta went to Roxbury High School on the morning of April 27, 2010.

Castriotta has insisted throughout that her conduct at the high school was polite and appropriate. Rossi and Swanson recalled the events that morning differently. In his letter to Moschella, Rossi expressed "outrage at the treatment that Mr. Swanson and I received on the morning of April 27, 2010 at Roxbury High School at the hands of Board member Maureen Castriotta." Rossi wrote that Castriotta "verbally confronted"

Swanson, advising that he was in violation of Board policy and directing him to return the students to class. Her treatment of Rossi was similar, and he recounted:

> Mrs. Castriotta tapped me on the back and started verbally berating me. Similar to her assault on Mr. Swanson, she told me that I was in violation of policy, started to pepper me with questions and accusations as to why that had happened, and also telling me how to run the event, how to supervise it by way of instructing me to get students back into class.

Rossi advised the Board president that Castriotta began to shout at him, emphasizing that she is Board member and taxpayer, and that "she will do what she wants, and she doesn't need to listen to me." According to Rossi, she verbalized her displeasure at how he was "running the district and the event." Rossi related that Castriotta approached students at the school, and engaged them in conversation.

Rossi informed the Board president that he felt that Mrs. Castriotta's actions "clearly and undeniably" violated the statutory code of ethics for school board members, citing N.J.S.A. 18A:12-24.1(c),(d),(e) and (i).[1] He urged that she was interfering with "our running of the school district, in particular during the course of the school day." Rossi was most unequivocal in his feeling that Castriotta was attempting to administer the schools, urging in his letter:

> Please look at it this way: what other day-to-day operations or special and even unplanned, impromptu events that may take place will Board members feel that they need to intervene on and seek to administer the schools? Is the football coach now subject to the same confrontation on the sidelines because a Board member does not feel they are following the policy for proper supervision of kids? Should a Board member be able to enter into a school or an outside gathering based on a particular feeling about how that specific assembly, field trip, or lesson is unfolding? There would absolutely be no end in sight! The Administrative Code in this area was created specifically to protect those who are responsible for administrating the schools from this type of confrontation.

[1] Throughout his letter Rossi erroneously refers to the statute as an Administrative Code provision.

Rossi advised Moschella that Castriotta's misconduct did not end with the incident at Roxbury High School that day. Subsequent to the walk-out, she "proceeded to make headlines" in two separate newspaper accounts, and in a cable-television video spot. Rossi felt that Castriotta discussed confidential personnel matters with the media, including the possibility that the Board would consider disciplinary action against him or Swanson for the manner in which they responded to the student protest. In support of his contention that Castriotta's actions were inappropriate and unethical, Rossi cited N.J.S.A. 18A:12-24.1(g), which provides that Board members will "hold confidential all matters pertaining to the schools, which, if disclosed, would needlessly injure individuals or the schools."

Rossi asked the Board to act quickly to condemn Castriotta's conduct, stating:

> I herein ask again that you react to this swiftly and decisively and instruct Mrs. Castriotta to steer clear of me and my staff members as we are carrying out our duties in administering the schools . . . I don't see how any reasonable and rationale [sic] Board member given the training, the code of ethics, and the statutes the guide us, would come to any other conclusion that this is reprehensible behavior.

The Board did swiftly respond to Rossi's concerns. Indeed, via letter dated May 14, 2010, the Board secretary, Anthony Mistretta, advised Castriotta that the Board intended to consider a censure resolution at its meeting of May 24, 2010. Mistretta's letter included a copy of the proposed censure resolution language, and outlined the due process rights that the Board would extend to Castriotta. She was advised that the Board had set aside forty-five minutes for discussion, that she could present witnesses and address the Board directly if she so chose. Castriotta was informed that she could be represented by counsel, but was cautioned that in the Board's view she would not be statutorily entitled to indemnification for any legal expenses incurred by her. Mistretta advised that discussion would take place publicly unless Castriotta requested otherwise. He advised that regardless, however, the resolution would be voted upon publicly.

Castriotta responded via her attorney who urged that the hearing proposed by the Board was unfair in several respects. Counsel stated that he had been afforded inadequate time to properly defend his client's interests. He asserted that the draft resolution was insufficiently specific for him to understand the factual or legal basis for the Board's proposed censure action. Counsel urged that it was patently unfair for the Board to sit as "prosecutor, judge and jury" and that Castriotta could not be afforded a fair hearing as a result. If the Board insisted upon proceeding, counsel asked, at a minimum, that he receive legally sufficient notice of the legal and jurisdictional basis for the hearing; that the hearing be adjourned to afford Castriotta time to adequately prepare; that a list of witnesses and discovery be provided by the Board in advance of the hearing; and that the hearing not be limited to forty-five minutes in duration, but rather, take as much time as needed to adequately present witnesses and other evidence.

Counsel for the Board replied via letter dated May 21, 2010. He asserted that the Board was within its legal rights to vote upon a censure resolution, and that the proceeding contemplated by the Board was fair and assured Castriotta's due process rights would be protected. He stated that the proceeding would not be adjourned. The Board proceeded as planned on May 24, 2010. A verbatim transcription of the relevant portion of the meeting accompanies the petition of appeal. In an introductory statement, counsel for the Board alluded only to violations of local policy, and made no reference to the School Ethics Act. Rossi reiterated the events much as he had described them in his earlier letter to the Board president. Counsel for Castriotta sought leave to cross-examine him, which was denied. Swanson likewise made a presentation to the Board in which he urged that he was "accosted" by Castriotta, who was "very accusatory and critical" in her tone and language. Swanson informed the Board:

> The questioning tone, the criticism which were levied on me I felt were unnecessary and inappropriate, but quite frankly, it was nothing compared to the way that she badgered and harassed Dr. Rossi because when he got there, I saw her actually poke him in the back, you know, to try and get his attention, to answer me, you, know, as if she was a scolding mother talking to child who had misbehaved.

After the administrative presentation to the Board, the floor was turned over to Castriotta. Her counsel utilized the entire time allotted for his defense to reiterate his procedural objections to the proceeding before the Board. Castriotta asked to be permitted to speak, nonetheless, and the Board afforded her an opportunity to do so. She was adamant that she never gave Rossi or Swanson any instructions or directives. Castriotta advised the Board that she simply inquired if Rossi and Swanson knew that the walk-out was going to take place, and that she politely asked why the students were not being returned to class. Accordingly to Castriotta, it was Rossi who was "antagonistic and confrontational." He accused her of trespassing. Castriotta was incredulous, and she felt that as a "school board member, a long time taxpayer and a resident of Roxbury," she had every right to be there. She advised the Board that "at no time did my behavior contribute in a negative fashion to the proper operation of the school and student's safety." Relative to the comments Castriotta made to the media, she urged that this was her right; and that indeed, she was merely commenting on a matter of public concern.

After Castriotta's presentation, the Board members publicly discussed the pending resolution. Chris Rogers was the sole member of the Board to speak on Castriotta's behalf, stressing that she is a hard-working public servant who had engaged in no inappropriate conduct. But several others agreed that Castriotta's conduct was improper. Castriotta's counsel had renewed the argument that the legal basis for the proposed censure was unclear. Board member Carol Scheneck urged that this contention was groundless because Castriotta was privy to Rossi's letter to Moschella, which "clearly states the . . . four sections of Title 18A with which it was alleged Mrs. Castriotta violated." Scheneck stated that among the statutory ethical obligations of a Board member is the duty not to micromanage the schools.

Patricia Miller, vice president of the Board, stated that "[t]his has to do with a board member who was criticizing the superintendent and the high school principal in front of staff, in front of students when there is a process in place on what a board member should do when there are questions." Liz D'Abbraccio stressed that the right of Board members to be present on school property is not unbridled.

The resolution censuring Castriotta passed 7-2. It was in precisely the same form as the resolution shared with her in advance of the meeting. The resolution stated that on April 27, 2010, Castriotta was present on the premises of Roxbury High School, uninvited and unrelated to her duties as a member of the Board; that on that day she publicly berated the superintendent of schools and high school principal and inappropriately interacted with students; that she refused to leave despite being asked to do so; that she then made public statements that the administrators should be reprimanded for their conduct during the student walk-out; and that Castriotta's actions were inconsistent with her obligations as a Board member to the detriment of the School district. The Board resolved as follows:

> WHEREAS, a majority of the Board wish to express in a public forum their dissatisfaction with Mrs. Castriotta's conduct as aforesaid;
>
> NOW, THEREFORE, be it resolved that the Members of the Roxbury Board of Education hereby censure fellow Board Member Maureen Castriotta for the aforesaid unbecoming conduct and caution her to avoid such conduct during the balance of her term on the Board; and be it further
>
> RESOLVED that a copy of this Resolution shall be sent to the Commissioner of Education and the Executive County Superintendent.

CONCLUSIONS OF LAW

Both parties seek 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." The 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.

The Censure Resolution

This matter is ripe for summary decision. There are no material disputed facts which require a plenary hearing, and I **CONCLUDE** that Castriotta has demonstrated that the Board exceeded its authority in voting to censure her. The Board was required to utilize the statutory mechanisms set forth at N.J.S.A. 18A:12-29 if it wished to censure one of its members for misconduct that fell within the ambit of N.J.S.A. 18A:12-24.1. Accordingly, the action of the Board in censuring Castriotta at a public meeting was ultra vires and should be vacated.

In 1991, the Legislature enacted the School Ethics Act, (the Act) N.J.S.A. 18A: 12-21 et seq., declaring as follows:

> To ensure and preserve public confidence, school board members and local school administrators should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards among them.
>
> [N.J.S.A. 18A:12-22(b) (emphasis supplied).]

The Act was amended in 2001 to create a Code of Ethics for School Board Members. N.J.S.A. 18A:12-24.1. The Assembly Committee report makes it plain that the intent of the lawmakers was to have alleged ethical violations processed just as any other alleged violation of the Act, and the report states:

> The bill also establishes a code of ethics for school board members and provides that complaints regarding alleged violations of the code would be processed in the same manner as other complaints filed with the School Ethics Commission. The decision of the commission concerning a violation of the code would be rendered within 90 days of receipt of the complaint. The burden of proof would be on the accusing party to establish factually a violation of the code of ethics.
>
> [Assembly Education Committee Statement to A-1755, October 16, 2000.]

The use of the word "uniform" in N.J.S.A. 18A:12-22(b) is purposeful. It is a cardinal rule of statutory construction that legislation be interpreted so that, if possible, full force and effect is given to "every sentence, clause and word thereof." Oldfield v. New Jersey Realty Co., 1 N.J. 63, 68 (1948). Unquestionably, the lawmakers believed that the primary goal of the Act, which is to "ensure and preserve public confidence," is best safeguarded by the establishment of well-understood standards of conduct, which are consistently enforced. I concur with Castriotta that the clear intent of the Act was to have all concerns about board member ethics directed to the School Ethics Commission (the Commission).

The Board unsuccessfully argues that it retains the right to privately censure Castriotta for her alleged misconduct here. Counsel took pains to note that the Code of Ethics is nowhere mentioned in the controverted resolution, urging that accordingly, it

was under no obligation to proceed under the Act's procedural requirements. But this is a disingenuous argument. Indeed, Rossi's letter to Moschella prompted the censure resolution, and cites the Code of Ethics at length. One Board member, Carol Scheneck, apparently was unaware that reference to the statute was to be avoided, because prior to voting in favor of the censure resolution she stated, "there is a specific code of ethics and there are certain things school members can and cannot say and it is right in our New Jersey statutes and administrative code."

In fairness to Scheneck, however, the nexus between Castriotta's alleged conduct and N.J.S.A. 18A:12-24.1 was unavoidable. Indeed, the citations relied upon by Rossi were directly on point. Castriotta is accused of visiting school grounds during a school day uninvited; of attempting to micromanage the schools by directing the activities of administration and interacting directly with students; and of publicly insulting the superintendent and building principal in the process. N.J.S.A. 18A:12-24.1(c) provides that a board member "will confine . . . board action to policy making, planning, and appraisal . . . ." N.J.S.A. 18A:12-24.1(d) states that a board member will "carry out [her] responsibility, not to administer the schools, but, together with . . . fellow board members, to see that they are well run." The Code of Ethics requires that Castriotta, and all members of the Board, act only in concert with the Board as a whole. N.J.S.A. 18A:12-24.1(e). She is required to "support and protect school personnel in the proper performance of their duties." N.J.S.A. 18A:12-24.1(i). Plainly, Castriotta has been accused of conduct that would violate the Act.

Thereafter, it is contended that Castriotta publicly discussed her displeasure with administration, and publicly hypothesized that the Board might consider discipline against those in charge at Roxbury High School that day. Again, this is conduct that would violate the Act. The Code of Ethics obligates her to "hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools." N.J.S.A. 18A:12-24.1(g). Accordingly, I **CONCLUDE** that the Board's obligation to discipline Castriotta in accordance with statutory procedures cannot be avoided by simply excluding a reference to the Code of Ethics in its censure resolution.

The Board's reliance on Crystal v. Barnegat Board of Education, EDU 2398-99, Initial Decision (November 30, 1999), adopted, Commissioner (January 18, 2000), <http://lawlibrary.rutgers.edu/oal/search.html>, is misplaced. Although Crystal upheld a local board to censure resolution, its decision predates enactment of the Code of Ethics. Thus, Crystal does not address the issue presented here, which is whether N.J.S.A. 18A:12-24.1 preempts a local board's censure of one of its members. Likewise, the Board cites dicta in Board of Education of Union Beach v. NJEA, 53 N.J. 29 (1968), a decision that holds that a local teachers' association cannot legally strike, but clarifies that teachers, either individually or collectively, may publicly criticize a local school board or its members "in the most searing terms, and even with a wide margin of error." Id. at 40. Union Beach lends no support to the Board's position.

The decision in Sea Isle City Board of Education V. Kennedy, EDU 2028-09, Initial Decision (May 16, 2005), rejected, Commissioner (June 30, 2005), affirmed, State Board (January 4, 2006), <http://lawlibrary.rutgers.edu/oal/search.html>, affirmed, 393 N.J. Super. 93 (App. Div. 2007), affirmed as modified, 196 N.J. 1 (2008), is similarly inapposite. Sea Isle City concerned a board member who had filed suit against his own board under the Individuals with Disabilities Education Act, (IDEA), 20 U.S.C. § 1400 et seq., and on behalf of his disabled son. The administrative law judge (ALJ) found that continued membership on the board might have violated N.J.S.A. 18A: 12-2, which precludes a board member from being interested "directly or indirectly in any contract with or claim against the board." However, the controverted conduct appeared to be permitted under the Act, N.J.S.A. 18A:12-24(j), which provides that, "[n]othing shall prohibit any school official, or members of his immediate family, from representing himself, or themselves, in negotiations or proceedings concerning his, or their, own interest." The ALJ determined that the Act superseded the provisions of N.J.S.A. 18A:12-2.

The Commissioner reversed. Finding that Kennedy had an impermissible conflict of interest, the Commissioner ordered him removed from his position as a member of the Sea Isle City Board, doing so without reference to the disciplinary procedures contained in the Act. The Board here relies heavily on the following language in the Commissioner's decision:

> Significantly, [the School Ethics Act] did *not* act to repeal any part of N.J.S.A. 18A:12-2, as it clearly could have if it had intended to have all questions of conflict addressed through the School Ethics Act, or to remove the possibility of a board member's disqualification based on inherently incompatible interests as opposed to removal based on the commission of unethical acts while in office.
>
> [Kennedy, supra, State Bd. (emphasis in original).]

Thus, the Board urges that the Act did not vitiate preexisting rights and remedies except where expressly stated in the statute.

But the Commissioner in Kennedy held that not all questions of Board member conflict of interest must be resolved under the procedures established by the Act precisely because another provision of the school laws proscribed the conduct at issue. Conversely, Castriotta's alleged misconduct arose squarely under the Code of Ethics for School Board Members, N.J.S.A. 18A:12-24.1. There is no other school-law provision applicable. This point may be emphasized by examination of the Code of Ethics itself. Ethical conduct should be readily intuited by any morally sound person, but N.J.S.A. 18A:12-24.1 makes it plain that some ethical requirements for board members must be taught.[2] As board member Scheneck aptly stated that evening, some obligations that come with being a board member also come "as a big surprise to a lot of [board] candidates." It was for this reason, and in the interest of a uniform understanding and enforcement of ethical conduct by members of public boards of education, that the Act and its accompanying disciplinary procedures were enacted by our legislature.

The statute establishes a thoughtfully delineated review process, which is further described in clarifying regulations. N.J.S.A. 18A:12-29; N.J.A.C. 6A:28-1.1 et seq. The regulations provide that, in order to achieve the goals of the Act, the Commission was created, "specifically for the purpose of enforcing those ethical standards through a procedure for reviewing complaints of ethical violations." N.J.A.C. 6A: 28-1.1(b) (emphasis supplied). Complaints filed with the Commission, including claimed violations of the Code of Ethics, are processed per the requirements of N.J.A.C. 6A:28-

[2] Undoubtedly for this reason Board members must mandatorily participate in training sessions. N.J.S.A. 18A:12-33.

10.8. A formal complaint and answer are filed, and the matter is heard either by the Commission or at the OAL. Either way, the proceeding is conducted in accordance with OAL rules, to include an opportunity to present documentary and testimonial evidence, and with an opportunity to cross-examine witnesses. Ibid. The burden of proof lies squarely and unequivocally with the complainant. N.J.A.C. 6A:28-6.4. OAL decisions are reviewed by the Commission and ultimately, the Commissioner of Education. The parties may appeal to the courts thereafter.

Accordingly, Castriotta correctly asserts that an ethics complaint filed against her with the Commission would be adjudicated with greater due process than that afforded by the Board at its May 24, 2010, meeting. The disciplinary process established by the Act—and its accompanying regulations—recognize the gravity of discipline against a Board member. Even the least-severe form of discipline, a "formal expression of disapproval" of the member's conduct, negatively impacts that member's credibility, her effectiveness as a public official, and her future political aspirations. The Board certainly intended to treat Castriotta fairly, giving her an opportunity to review the censure resolution in advance, appear with counsel, and speak on her own behalf. Its reliance on the procedures described in Donaldson v. North Wildwood Board of Education, 65 N.J. 236 (1974), would have been sound, had local consideration of disciplinary action against Castriotta been appropriate. But the Act demands more, and I **CONCLUDE**, as a result, that the actions of the Board deprived Castriotta of due process.

In light of my determination that the Board erred by failing to bring its concerns about Castriotta's conduct to the Commission for review and adjudication, its arguments in support of dismissal of the petition require only brief discussion.[3] Castriotta's challenge to the Board's resolution was properly brought before the Commissioner of Education, and I **CONCLUDE** that the Board's contention that he lacked jurisdiction is without merit. The Board posits this argument while nonetheless asserting that its right to proceed locally in censuring Castriotta arises under its general powers as a school

[3] The Board has urged that there is no mechanism for it, as an entity, to bring ethics charges against Castriotta. But it clearly can resolve to authorize its president to do so on its behalf. The president of a local school board, with the authorization of the full Board, executes many documents on the Board's behalf.

board. N.J.S.A. 18A:11-1. A determination whether this Board properly exercised those statutory powers can and should be made by the Commissioner, who is authorized to hear "all controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9. That Castriotta's claims implicate some constitutional considerations does not diminish that jurisdiction. It is well established that administrative agencies may consider constitutional issues when relevant and necessary to resolution of a question within their jurisdiction. Christian Bros. Inst. v. N.J. Interscholastic League, 86 N.J. 409, 416 (1981); Hunterdon Cent. High Sch. Bd. of Educ. v. Hunterdon Central High Teachers' Ass'n, 174 N.J. Super. 468 (App. Div. 1980), aff'd, 86 N.J. 43 (1981).

Similarly without merit is the Board's contention that summary decision should be granted in its favor because petitioner cannot demonstrate that its actions were arbitrary, capricious or unreasonable. It asserts that a determination in this regard would require no further factual inquiry, but the underlying facts are very much in dispute. The participants in the events of April 27, 2010, each accuse the other of belligerence, rudeness and disrespect. This factual dispute only serves to emphasize that a determination whether Castriotta's conduct was unethical must be based on a full and properly developed record, as required by the Act. N.J.S.A. 18A:12-29; N.J.A.C. 6A:28-10.8.

Importantly, in concluding that procedurally the Board should have brought its concerns about Castriotta before the Commission and should not have censured her locally, I reach no determination regarding whether Castriotta's presence and conduct at Roxbury High School on April 27, 2010, and her interactions with the media thereafter, violated her ethical obligations as a member of the Board of Education.

Castriotta's Right to Indemnification

Castriotta asserts that she is entitled to indemnification for the legal fees and costs incurred by her in bringing this action, urging that her rights spring from N.J.S.A. 18A: 2-20. The statute provides in pertinent part:

> Whenever a civil, administrative, criminal or quasi-criminal action or other legal proceeding has been or shall be brought against any person for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education . . . the board of education 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 . . . .

The parties argue at some length about whether Castriotta's actions arose in the course of the performance of her duties as a board member, and they correctly recognize that this would be a critical factual underpinning to any successful indemnification claim. The record developed thus far does not permit me to determine if Castriotta acted within the scope of her duties on the morning of April 27, 2010. But I **CONCLUDE** that Castriotta's claim to indemnification must fail for a more fundamental reason; that is, that no civil or administrative action or other legal proceeding has been brought against her. I am unpersuaded that the Board's censure action constituted a "legal proceeding" within the intent of N.J.S.A. 18A:12-20. A legal proceeding is one brought in a legal forum, such as before a court or administrative agency. The only legal proceeding here was brought by Castriotta herself. Indeed, Castriotta cannot have it both ways—she has contested the process used by the Board to censure her precisely because it was not a proper legal proceeding, with formal discovery and a formal hearing process, as contemplated by the Act.

Castriotta's claim for indemnification has some surface appeal. Had Castriotta been permitted to defend herself in an administrative proceeding, her request for indemnification might have been viable. But the usual policy applied by New Jersey courts is to require parties to bear their own legal fees and costs. Rule 4:42-9 requires a denial of fees in the normal course, providing that "[n]o fee for legal services shall be allowed in the taxed costs or otherwise," except in certain special circumstances enumerated in the Rules themselves, or when counsel fees are specifically permitted by statute. Our courts have held that, "sound judicial administration will best be advanced by having each litigant bear his own counsel fee except in those few situations specially designated." Gerhardt v. Continental Ins. Co., 48 N.J. 291, 301 (1966). Likewise, the Commissioner is without authority to award attorney's fees or legal costs. Balsley v. N.

Hunterdon Bd. of Educ., 117 N.J. 434 (1990); Farmer v. Camden Bd. of Educ., EDU 6790-01, Initial Decision (November 17, 2003), adopted, Commissioner, (December 23, 2003), <http://lawlibrary.rutgers.edu/oal/search.html>.[4]

I **CONCLUDE** that Castriotta's claims for indemnification should be dismissed.

ORDER

Based on the foregoing, it is **ORDERED** that the Board's motion for summary decision is **GRANTED** as to petitioner's claim for indemnification, and these claims are **DISMISSED**. As to the remaining claims in the petition, summary decision is **GRANTED** in favor of petitioner, and the May 24, 2010, resolution of the Board censuring Castriotta is **ORDERED** vacated.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

[4] The Board contends that Castriotta seeks punitive damages, but the petition does not appear to claim extraordinary damages. In any event, the Board correctly asserts that punitive damages are unavailable before the Commissioner. Dunn v. Elizabeth Bd. of Educ., 96 N.J.A.R.2d (EDU) 279, 281; Farmer, supra, EDU 6790-01.

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.

April 4, 2011
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: April 4, 2011

Date Mailed to Parties: APR - 5 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

186-11

OAL DKT. NO. EDU 2898-11
AGENCY DKT. NO. 45-2/11

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

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Administrative Law Judge's decision advises, and the record confirms, that petitioner has chosen to withdraw his petition before the Commissioner challenging the termination of his employment and, instead, pursue the remedies available to him in this regard before an arbitrator in binding arbitration.

Accordingly, this matter is deemed withdrawn as a controversy before the Commissioner of Education.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5|19|11

Date of Mailing: 5|19|11

* 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 02898-11
AGENCY DKT. NO. 45-2/11

MICHAEL ESPOSITO,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY
Respondent.

Alfred Maurice, Esq. for petitioner (Springstead and Maurice, attorneys)

Robert E. Murray, Esq. for respondent

Record Closed: April 12, 2011 Decided: April 13, 2011

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

This matter was transmitted to the Office of Administrative Law on March 11, 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.

Petitioner, who had been employed as a custodian by the respondent school district since 1999, asserts that he held his position under tenure pursuant to N.J.S.A. 18A:17-3. He challenges the action of the respondent in terminating his employment effective December 13, 2010. The school district filed an answer to the petition in which it advised that petitioner's challenge to his discharge is the subject of a request for binding arbitration, which petitioner has filed pursuant to the collective bargaining agreement between the Paterson Custodial and Maintenance Association and the

district. An arbitrator, Martin Scheinman, Esq., has been appointed to hear petitioner's claim to continued employment.

Via letter dated April 5, 2011, I was advised by Mr. Luis Rojas, Jr., the Director of Labor Relations for the school district, that petitioner has agreed to withdraw the petition pending before the Commissioner of Education, and pursue the remedies available to him before the arbitrator. An agreement confirming the understanding of the parties that this matter is withdrawn is attached to Mr. Rojas' letter, and has been executed by petitioner, a representative of his Association, and Mr. Rojas on behalf of the school district. A certification submitted by Mr. Rojas on April 12, 2011, confirms that he signed the withdrawal agreement on behalf of the school district.

In accordance with N.J.A.C. 1:1-19.2, I **CONCLUDE** that the petition in this matter is 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.

April 13, 2011
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: April 13, 2011

Date Mailed to Parties: APR 14 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

187-1(

OAL DKT. NO. EDU 8748-06
AGENCY DKT. NO. 342-9/06

TRENTON EDUCATION ASSOCIATION, ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
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. 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: 5|19|11

Date of Mailing: 5|19|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8748-06
AGENCY DKT. NO. 342-9/06

TRENTON EDUCATION ASSOCIATION,
ET AL.,
Petitioners,
v.
TRENTON BOARD OF EDUCATION,
MERCER COUNTY,
Respondent.

Richard A. Friedman, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Dana M. Lane, Esq., for respondent (Hill Wallack LLP, attorneys)

Record Closed: April 12, 2011 Decided: April 12, 2011

BEFORE **ISRAEL D. DUBIN**, ALJ:

This matter arises out of petitioners' claim that non-tenured and less senior individuals were placed in positions from which petitioners were removed due to a reduction in force. The matter was transmitted to the Office of Administrative Law for determination as a contested case on November 16, 2006. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

Following a series of settlement conferences, the parties agreed to a settlement and executed a Settlement Agreement and Release containing the terms of their settlement (Exhibit J-1). The Board of Education also adopted a Resolution approving the settlement.

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.

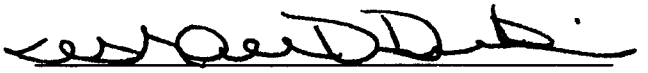
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I therefore conclude that this settlement agreement meets the requirements of N.J.A.C. 1:1-19.1 and should be approved; that the parties should be directed to comply with the settlement terms; and that these proceedings should be concluded. 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.

4/12/11
DATE



ISRAEL D. DUBIN, ALJ
APR 14 2011

Date Received at Agency:

APR 14 2011

Date Mailed to Parties:
/mev

EXHIBITS:

Jointly submitted:

J-1 Settlement Agreement and Release

HILL WALLACK LLP
202 Carnegie Center
Princeton, NJ 08543-5226
(609) 924-0808
Attorneys for Trenton Board of Education

RECEIVED
2006 DEC 12 A 11:35
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

TRENTON EDUCATION ASSOCIATION, Petitioner, et al., vs. CITY OF TRENTON, BOARD OF EDUCATION, MERCER COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY OAL DOCKET NO.: EDU 08748-2006 S AGENCY REF. NO.: 342-9/06 **STIPULATION OF SETTLEMENT**

WHEREAS, the Board of Education of the City of Trenton ("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 Trenton Public School District; and

WHEREAS, the Trenton Education Association ("TEA") is the exclusive representative for the purpose of negotiations for a unit consisting of all employees of the Board in specifically defined teaching staff positions; and

WHEREAS, the Board implemented a Reduction in Force ("RIF") in the spring of 2006 to take effect for the 2006-2007 school year; and

WHEREAS, several teaching positions, including the positions of Teacher Leader, Facilitator, Liaison, Tutor, Specialist and Coach were affected by the 2006 RIF; and

WHEREAS, TEA filed an administrative Petition of Appeal with the Department of Education in September 2006 alleging that several of its members, including individuals in the above-referenced positions were not provided with lawful position changes and/or salary differences in conjunction with the 2006 RIF; and

WHEREAS, the Board filed an Answer to the Petition of Appeal in November 2006, generally denying the allegations and setting forth affirmative defenses; and

WHEREAS, the matter was transferred to the Office of Administrative Law as a contested case for hearing, assigned to Administrative Law Judge Dubin; 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 and the public interest, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by 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. Dismissal of All Claims

This Stipulation is expressly contingent upon and subject to approval by the Commissioner of Education of New Jersey. The parties agree and consent that upon approval of this Stipulation of Settlement by the Commissioner, all claims by and between the parties are to be dismissed. Petitioners further waive any right to any additional compensation or position with Respondent that was the subject of this settlement. Upon final approval of this Stipulation, Respondent will forward settlement checks, minus regular payroll deductions, to all Petitioners actively employed by the Board. Petitioners not currently employed by Respondent will receive a settlement check and will be issued a Form 1099 for tax purposes. Each Petitioner receiving a settlement amount in conjunction with this matter has thoroughly reviewed and signed an individual Rider to this Stipulation which details the specific settlement amount for each claimant. Attached to this Stipulation and incorporated by reference herein are 46 signed Riders. Respondent agrees to provide for Petitioners seeking applications for lawful adjustments to pension credits pursuant to N.J.A.C. 17:3-4.7 the information that it is authorized or required to provide by law or regulation. However, Respondent makes no representation of a guarantee of or entitlement to any adjustment to pension credits in relation to this settlement. The parties agree, however, that in the event this Stipulation is not approved by the Commissioner of Education, 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. Public Interest

Settlement of this matter is in the public interest as it avoids the financial, legal and administrative burden which will result from protracted litigation where all parties agree to these terms of settlement. The parties are in agreement that it is in the best interests of all parties and the Trenton public schools for this matter to be resolved in this manner. Therefore, the parties agree to move forward with a prompt settlement and avoid further unnecessary litigation. This Stipulation has also been approved by the State-appointed Fiscal Monitor currently assigned to Respondent.

3. Release

In exchange for the mutual promises and consideration set forth in this Stipulation, each party and its successors, heirs and assigns hereby irrevocably and unconditionally waives, releases and forever discharges any claims or rights, whether known or unknown, which either party has or may have against the other regarding the 2006 Reduction in Force, specifically for claims which

could have been raised in the within matter to any positions for the time period up until the conclusion of the 2010-2011 school year.

4. Board Approval

The Board President has been duly authorized by the Board at its Executive Session on March 14, 2011 to execute this Stipulation on behalf of the Board of Education. The Board will execute a Resolution adopting the terms of settlement, which shall be attached to this Stipulation and forwarded to Administrative Law Judge Dubin for review, approval and transmittal to the Commissioner of Education for final approval.

5. Assent to Terms

All parties hereby acknowledge having entered into this Stipulation with a full understanding of their rights and that they were fully informed of the implications of this Stipulation by legal counsel. No party enters into this Stipulation under duress. All parties enter this Stipulation by their free will and volition. All parties were given the opportunity to fully consider the terms and conditions of this settlement.

6. Entire Agreement

This Stipulation of Settlement represents the entire understanding of the parties as to the settlement 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.

7. Severability

In the event that a court or agency of competent jurisdiction shall deem any part of this Stipulation of Settlement to be contrary to law, the remaining portions of the agreement shall remain in full force and effect.

8. Governing Law

This Stipulation of Settlement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties have knowingly and voluntarily executed and delivered this Stipulation of Settlement on the dates set forth below.

PETITIONER

TRENTON EDUCATION ASSOCIATION

By: Naomi Johnson-Lafleur
Naomi Johnson Lafleur, TEA President

DATED: 3-9-2011

RESPONDENT

TRENTON BOARD OF EDUCATION

By: Nicola Tatum
Nicola Tatum, Board President

DATED: 4.4.2011

ATTEST:

By: Jayne S Howard
Jayne Howard, Board Secretary

DATED:

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Maritza Abreu, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $1,556.20;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/22/2011

Maritza Abreu

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Michael Pettola, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $138.20;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/23/11

Michael Pettola

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Richard Howe, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $10,491.80;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date:

Richard Howe

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Ann Adomaitis, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $7,133.87;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3-21-11

Ann Adomaitis

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Dora Atkins, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $13,081.13;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/14/2011

Dora Atkins

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Louise Babuschak, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $10,491.80;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date:
3/16/11

Louise Babuschak
Louise Babuschak

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Nancy Bage, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $7,658.12;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3-16-11

Nancy Dage

Nancy Bage

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Mark Bailey, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $3,580.37;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3-15-2011 Mark T Bailey

Mark Bailey

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Bocary Bandeh, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $3,952.04;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/16/11

Bocary Bandeh

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Dave Cipolloni, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $3,580.10;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/11/11

Dave Cipolloni

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Rochelle Clerkin, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $16,879.72;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3.14.11

Rochelle Clerkin

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Sharon Davis, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $11,197.31;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date:
3/22/11

Sharon Davis
Sharon Davis

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Sharon Dawson-Coates, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $1,235.67;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/18/11

Sharon Dawson-Coates

Sharon Dawson-Coates

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Karen Delgado, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $10, 972.19;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/18/11

Karen Delgado

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Catherine Diamukes, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $10,972.19;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/15/11

Catherine Diamukes
Catherine Diamukes

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Palinda Dockery, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $10,972.19;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3-15-11

Palinda Dockery

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Kathleen Eckert, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $4,096.84;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/21/11

Kathleen Eckert

Kathleen Eckert

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Mary Gankiewicz, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $7,753.90;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/16/11

Mary Gankiewicz

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Sharon Harmon, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $891.56;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/21/11

Sharon Harmon
Sharon Harmon

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Tammy Harris, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $1,751.09;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/16/11

Tammy Harris

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I, Daniel Heisey am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $8,281.25;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/10/11

Daniel Heisey

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I James Jones, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $1,141.33;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3-14-11

James Jones

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

LAWERY- GREEN

1. I Donna ~~Lawrey~~, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $2,716.56;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/14/11

Donna Lawery-Green
Donna ~~Lawrey~~
LAWERY- GREEN

Check can be made out to
Donna Green

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Jill C. Wiley-Maurice, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $12,808.95;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/14/11

Jill C. Wiley-Maurice

Jill C. Wiley-Maurice 3/14/11

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Jaime Maniatis, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $9,487.28;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/16/11

Jaime Maniatis

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Angela Milinowicz, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $8,873.37;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3-18-11

Angela Milinowicz

MAR-16-2011 15:29 From:TRENTON EDUCATION AS To:6713409 Page:2/2

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Kevin O'Brien, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $3,988.55;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3-22-2011

Kevin O'Brien

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Robert Pearson, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $13,081.13;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/15/11

Robert Pearson
Robert Pearson

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Leslie Peckerman, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum $8,873.37;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/11/11

Leslie Peckerman

RECEIVED MAR 1 5 2011

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Heather Pino, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $6,394.31;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/15/11

Heather Pino

MAR-11-2011 11:22 From:TRENTON EDUCATION AS To:4667689 Page:2/2
RECEIVED 03/11/2011 11:43

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Donna Rawls, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $11,197.31;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3-14-11

Donna Rawls

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Gail Robinson, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $16,913.25;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/10/2011

Gail Robinson
Gail Robinson

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I George Rose, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $13,071.23;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/17/11

George Rose

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Kira Royster, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $1,534.01;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/22/11

Kira A. Royster
Kira Royster

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I David Schappell, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $10,972.19;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/14/11

David Schappell

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Carol Schwartz, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $9,622.23;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/14/11

Carol Schwartz
Carol Schwartz

RECEIVED MAR 1 7 2011

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Beverly Simms-Jackson, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $7,957.16;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: March 14, 2011

Beverly Simms-Jackson

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Ellen Stillitano, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $10,972.19;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/21/11

Ellen Stillitano

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Jeanne Ternowcheck, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $13,081.13;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 5/21/11

Jeanne Ternowcheck

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Marilyn Tucker, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $10,612.88;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/17/11

Marilyn Tucker

Marilyn Tucker

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Shirley Walker, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $7,223.91;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: March 15, 2011

Shirley Walker

RECEIVED MAR 1 5 2011

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Pamela Washington, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $4,563.16;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/14/11

Pamela Washington
Pamela Washington

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Dana Williamson, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $15,139.44;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/16/11

Dana Williamson

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Janice Williams, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $3,579.22;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/14/11

Janice Williams

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I, Judith H. Winogron, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $16,087.94;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/21/11

Judith H. Winogron

RECEIVED MAR 17 2011

Trenton Education Association, et al. v. City of Trenton, Board of Education
Docket No.: EDUOR 08748-2006S

1. I Juda Winget, am a claimant in the within matter;

2. I understand and agree as the result of the settlement of my claim, I will receive the sum of $5,710.22;

3. In consideration of the terms of the settlement agreement, and in exchange for that payment, I agree to be bound by the terms of this settlement agreement, which is attached hereto.

Date: 3/14/11

Juda Winget

Juda Winget

RESOLUTION AUTHORIZING APPROVAL OF SETTLEMENT AGREEMENT WITH TRENTON EDUCATION ASSOCIATION, ET AL

WHEREAS, the Trenton Board of Education has reviewed the Stipulation of Settlement Agreement between Trenton Education Association, et al and the Board of Education in regard to OAL Docket No. EDU 08748-2006S/Agency Ref. No. 342-9/06; and

WHEREAS, the Board has voted on this date to approve the Stipulation of Settlement Agreement; and

WHEREAS, the Board designates and authorizes the Board President to execute the Stipulation of Settlement on the Board's behalf; now therefore be it

RESOLVED that the Trenton Board of Education approves the Stipulation of Settlement Agreement between Trenton Education Association, et al and the Board of Education

Nicola Tatum
Nicola Tatum
Board President

Jayne S Howard
Jayne S. Howard
School Business Administrator/Board Secretary

Jayne Howard, Board Secretary, certifies that this is a true copy of the original Board Resolution on file with the Trenton Board of Education.

Jayne S Howard
Jayne S. Howard

April 4, 2011
ADOPTED

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW
2011 APR 12 A 11:

189-11M

OAL DKT. NO. EDU 9854-10
AGENCY DKT. NO. 483-8/10

ROBERT W. O'BRIEN, JR. AND MEGAN O'BRIEN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this matter – which included a digital recording of the proceeding conducted at the Office of Administrative Law (OAL) on December 8, 2010 – and the Administrative Law Judge's (ALJ) Order have been reviewed. No exceptions were filed.

Upon full review and consideration, the Commissioner concurs with the ALJ that the portion of the petitioners' August 23, 2010 petition of appeal which challenges the Board's adoption of its Original Uniform Policy – adopted by the Board in 2008 and of which petitioners were admittedly aware in August 2009 – is appropriately dismissed as time barred pursuant to *N.J.A.C.* 6A:3-1.3(i). The Commissioner further agrees with the ALJ that the circumstances existing in this matter present no justification for relaxation of the timelines dictated by *N.J.A.C.* 6A:3-1.3(i).

Accordingly, the recommended Order of the ALJ granting the Board's motion for partial summary decision is adopted. That portion of the instant petition of appeal contesting the

Board's adoption of its Original Uniform Policy is hereby dismissed. This matter shall proceed at the OAL for proceedings deemed necessary to bring it to conclusion.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/19/11

Date of Mailing: 5/19/11

* 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 GRANTING MOTION FOR PARTIAL SUMMARY DECISION
OAL DKT. NO. EDU 9854-10
AGENCY DKT. NO. 483-8/10

ROBERT W. O'BRIEN, JR., AND MEGAN O'BRIEN,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,
Respondent.

Robert O'Brien, Jr., and Megan O'Brien, petitioners, pro se

James T. Hundley, Esq., appearing for respondent (Hundley and Parry, attorneys)

BEFORE **JOHN R. FUTEY**, ALJ:

This is an Order issued relative to a partial summary decision motion filed by respondent, the Board of Education of the Township of Neptune (hereinafter "Neptune"). A response was submitted by petitioners, Robert W. O'Brien, Jr., and Megan O'Brien (hereinafter "O'Brien"). A reply to that response was made by Neptune, as a result of which oral argument was presented on December 8, 2010. At that time, certain concerns at the hearing were further identified which required additional briefing

by the parties. Upon receipt of those additional responses, the matter closed for purposes of the instant motion.

FACTUAL BACKGROUND

This is a challenge to Neptune's adoption of a public school clothing uniform policy on September 24, 2008. On September 26, 2007, the Neptune Township Board of Education ("respondent" or "district" or "Neptune") had adopted a resolution approving Board Policy and Regulation 5511, Dress and Grooming ("Section 5511"), which was applicable to all pupils enrolled in the District, pre-school through high school. (Neptune's Answer to O'Brien Exhibits 1 & 2.)

The Superintendent of Schools and Chief Administrator of the Neptune Township, Monmouth County, Public School District, David A. Mooij (hereinafter "Mooij"), certified that in January 2008 an ad hoc committee, comprised of board members, central office administrators, building principals, teaching staff members, and parents, was organized in the district "to investigate and make recommendations concerning the implementation of a pupil school uniform policy in the District." (Mooij Cert. ¶¶ 1 & 3.) From then until April 2008, the ad hoc committee reviewed pupil school uniform policies and regulations in other public school districts and visited another public school district that had a uniform policy. (Id. at ¶¶ 4-5.) In April 2008, "the ad hoc committee recommended that the Board adopt a mandatory school uniform requirement for all district pupils; grades pre-kindergarten through grade twelve." (Id. at ¶ 6.) However, Mooij further certified that while the Board accepted the recommendations, it decided to implement a uniform requirement for pupils attending the district's Early Childhood Center ("ECC") and elementary schools. (Id. at ¶ 7.) He then stated that the Board determined that if the uniform requirement was successful in the lower grades, "the school uniform policy would be incrementally extended to pupils attending the District's Middle School and High School." (Id. at ¶ 8.)

Neptune adopted a resolution to amend Section 5511 to include a uniform requirement for the ECC and elementary schools after a first reading on April 30, 2008, at a public meeting. (Neptune's Answer to O'Brien Exhibit 3; Mooij Cert. ¶ 9.) From

April 30, 2008, until September 24, 2008, Neptune held twelve public board meetings in which the public was permitted to and did comment. (Mooij Cert. ¶¶ 10-11.) Mooij also indicated that in September 2008 Neptune conducted a survey of parents attending Back to School Nights at the ECC, five elementary schools, the middle school and high school with results showing that parents overwhelmingly approved of the proposed pupil school uniform policy. (Mooij Cert. ¶ 12.) On September 24, 2008, Neptune adopted a resolution to amend Section 5511 after a second reading to include a school uniform requirement for pupils attending the district's ECC and elementary schools ("Original Uniform Policy"). (Neptune 's Answer to O'Brien Exhibit 4-5; Mooij Cert. ¶¶ 13.)

The Original Uniform Policy, applicable only to the ECC and elementary schools, was set forth in Section E of Section 5511. (Neptune's Answer to O'Brien Exhibit 5.) Section E contained a paragraph establishing exemptions for compliance with the policy including a "philosophical opt out provision":

> 11. A parent(s)/legal guardian(s) may request an exemption for their child wearing the school uniform by completing the Application for School Uniform Policy Exemption stating a bona fide religious or philosophical objection to wearing the school uniform.
>
> [(Neptune's Answer to O'Brien Exhibit 5 at 7.)]

On October 24, 2008, Mooij notified parents and guardians of pupils enrolled in the ECC and elementary schools about the adoption of the Original Uniform Policy. (Mooij Cert. Exhibit A.) The Original Uniform Policy became effective on February 2, 2009. Parents and guardians of pupils enrolled in the ECC and elementary schools were reminded of this effective date on January 16, 2009. (Mooij Cert. Exhibit B.)

Petitioners Robert W. O'Brien, Jr., and Megan O'Brien enrolled their child in the district's kindergarten program in August 2009 and received a copy of the Student and Parent Handbook discussing the Original Uniform Policy. (Mooij Cert. ¶ 21, Exhibit D.) Petitioners first learned of the Original Uniform Policy at their child's kindergarten orientation in August 2009. (O'Brien Answer to Inter. # 28.)

In September 2009, Neptune published an article in its newspaper notifying parents that the Original Uniform Policy would continue for the 2009-2010 school year. (Mooij Cert. Exhibit C.) That same article stated:

> [Respondent] has reconvened an ad hoc committee to review suggestions garnered from surveys that were submitted before the end of the school year and over the summer. A parent representative from each school will serve on the committee. Under consideration at this time is the addition of a darker color for the pants.
>
> The Board has determined that the Uniformity of Dress Policy at the Middle School or High School will not move forward during the 2009-2010 school year. In the event that the Board considers the implementation of the policy at the second level, significant opportunity for parental input and advance information will be afforded.
>
> [Respondent] has established an email address, uniformity@neptune.k12.nj.us that may be accessed at any time to provide comment regarding this policy.
>
> [(Ibid.)]

Thereafter, on April 28, 2010, Neptune adopted a resolution, on the first reading, to revise Section 5511. (Neptune's Answer to O'Brien Exhibit 6.) On May 26, 2010, Neptune adopted the same resolution on the second reading at a public meeting. (Neptune's Answer to O'Brien Exhibit 7.) The newly-revised Section 5511 featured three significant changes. Two such changes amended the Original Uniform Policy ("Amended Uniform Policy"): the philosophical opt out provision was eliminated from the exemptions, and uniform enforcement procedures were amended. (Neptune's Answer to O'Brien Exhibit 8 at 7.) The third change occurred in the initial language of Section 5511 in which Neptune established that the uniform policy in Section E would apply, not only to ECC and elementary school students, but also to students in the Neptune Middle School. (Neptune's Answer to O'Brien Exhibit 8 at 1.) Essentially, then, Neptune adopted an Amended Uniform Policy for students in the district's ECC and elementary schools, and adopted a new uniform policy, identical to the Amended Uniform Policy, for its middle school students which appeared to be consistent with the

previously announced determination that it would otherwise extend the policy to the upper grades if it had worked successfully in the lower grades.

On August 23, 2010, the Commissioner of the Department of Education ("Commissioner") received a petition of appeal from petitioners requesting that Section E of Section 5511 be rescinded on the basis that the Original Uniform Policy and policy adopted on May 26, 2010, were not requested by principals, staff and parents of an individual school in accordance with N.J.S.A. 18A:11-7 and -8. As to their challenge against Neptune's actions on May 26, 2010, O'Brien specifically stated

> On May 26, 2010, [respondent] adopted a new Uniformity of Dress policy that applied to all Pre-K, Elementary and Middle schools within the district. The policy claims to be in compliance with N.J.S.A. 18A:11-7 and N.J.S.A. 18A:11-8. There was no request from the Principal or staff of any District school, including the Middle School, for this policy. We have spoken to a few Principals who have confirmed that they have not requested the policy and I have a letter dated June 21, 2010 [sic] from the Board Secretary Peter Leonard that states that no documentation exists of any Principal or staff member requesting this policy.

On September 2, 2010, the Commissioner received Neptune's answer to the petition, in which it set forth six affirmative defenses: 1) failure to file petition contesting the adoption of the Original Uniform Policy within ninety days pursuant to N.J.A.C. 6A:3-1.3(i); 2) O'Brien's demand for rescission of the Original Uniform Policy is barred by the equitable defense of latches; 3) the Original Uniform Policy was adopted in compliance with N.J.S.A. 18A:11-7 and -8; 4) the Amended Uniform Policy was adopted in compliance with N.J.S.A. 18A:11-7 and -8; 5) the petition fails to set forth specific allegations and essential facts contesting respondent's May 26, 2010, resolution to eliminate the philosophical opt out provision; and 6) petitioners' demand to immediately rescind the uniform policy pertaining to the middle school is barred by the equitable defense of latches.

This matter was transmitted to the Office of Administrative Law ("OAL") on September 8, 2010, and received by the OAL the next day. On October 5, 2010, the OAL received respondent's motion for partial summary decision arguing that the portion

of the petition contesting respondent's adoption of the Original Uniform Policy should be dismissed because petitioners failed to contest its adoption in a timely manner pursuant to N.J.A.C. 6A:3-1.3(i). The OAL received petitioners' response on November 3, 2010. Petitioners, appearing pro se in this matter, asserted that a dispute of material fact exists as to whether respondent had the required requests to implement the policy pursuant to N.J.S.A. 18A:11-7 and -8, and, as such, summary decision is not appropriate at this time. On November 5, 2010, the OAL received respondent's reply in which it reiterated its arguments.

As indicated hereinabove, a status conference was held on December 8, 2010. Oral argument on respondent's motion was heard at that time as well. As a result of petitioners' responsive argument regarding the elimination of the philosophical opt out provision, this tribunal requested that petitioners submit additional responses to the timeliness issue raised in respondent's motion for partial summary decision, since they had failed to address it in their response to the instant motion initially. (Furthermore, this tribunal requested that both parties submit briefs on the issue of whether petitioners have standing to challenge respondent's adoption of a middle school uniform policy. That issue has not been framed for purposes of the instant motion for partial summary decision however.) Briefs were to be submitted on December 29, 2010. Upon the parties' request, that date was extended to January 10, 2011.

On January 6, 2011, the OAL received petitioners' supplemental response to respondent's motion for partial summary decision. Petitioners clarified that their primary concern is respondent's elimination of the philosophical opt out provision through the adoption of the Amended Uniform Policy, an adoption that they believe did not conform to the requirements of N.J.S.A. 18A:11-7 and -8. Petitioners also once again addressed whether summary decision is appropriate by arguing that a dispute of fact exists regarding whether the policies were properly adopted. They now argue that their entire complaint is not time-barred because that (i.e., of the opt out provision) adoption occurred less than ninety days prior to the filing of their petition. They further argue, in essence, that should it be determined that their petition against the Amended Uniform Policy is time-barred because the Original Uniform Policy was adopted in September 2008, then the 90-day rule should be relaxed because strict adherence may result in

injustice. The OAL received respondent's follow-up submissions regarding issues of timeliness (and standing) on January 10, 2011. Respondent reasserted its argument that petitioners are time-barred from continuing their action against its adoption of the Original Uniform Policy. Respondent, though conceding that petitioners' action against respondent's adoption of the Amended Uniform Policy is not time-barred, further argues that petitioners never raised the issue concerning the philosophical opt out provision in the petition or in the discovery conducted in the matter and, therefore, must amend their petition. Yet, it asserts such an amendment would be precluded by the 90-day rule. (As to the standing issue, respondent states that petitioners do not have standing to challenge respondent's adoption of a school uniform policy for the middle school. Once again, however, that issue is not part of the motion for partial summary decision at this time.)

LEGAL ANALYSIS

The only issue for purposes of this partial summary decision motion is whether Petitioners' Challenge to the Original Uniform Policy is time-barred pursuant to N.J.A.C. 6A:3-1.3.

Under N.J.A.C. 6A:3-1.3, a petition "for the Commissioner's determination of a controversy or dispute arising under the school laws" must be filed "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" unless "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." N.J.A.C. 6A:3-1.3(a)(i). The purpose of this limitation is two-fold: to stimulate litigants to pursue a right of action within a reasonable time and to punish laziness and provide repose. Kaprow v. Berkeley Twp. Bd. of Educ., 131 N.J. 572, 587 (1993). The 90-day countdown under N.J.A.C. 6A:3-1.3(i), therefore, begins when a petitioner "knows or has reason to know" of "the existence of facts that may equate in law with . . . a cause of action." Ibid. (quoting Farrell v. Votator Div., 62 N.J. 111, 115 (1973); citing Burd v. N.J. Tel. Co., 76 N.J. 284, 291 (1978)).

N.J.A.C. 6A:3-1.16 authorizes the Commissioner to relax procedural rules in his/her discretion "where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." Id. at 590-91. However, relaxation of the 90-day rule "is invoked rarely and not unless strict application of the rule would be inappropriate or unnecessary, or injustice would occur, or the Commissioner finds a substantial constitutional issue or other issue of fundamental public interest beyond that of concern only to the parties themselves." D.Q. o/b/o S.Q. v. State Operated School Dist. of Newark Essex Co., EDU 7544-08, initial decision, (Dec. 5, 2008), adopted, Comm'r (Jan. 21, 2009) <http://lawlibrary.rutgers.edu/oal/search.html>.

In determining when the 90-day countdown begins for board actions that are later amended, the focus should be on the challenged action and not on the date that action was last amended. In Coles v. Bayonne Bd. of Educ., EDU 10535-06, initial decision (Nov. 2, 2006), <http://lawlibrary.rutgers.edu/oal/search.html>, adopted, Comm'r (Dec. 8, 2006), aff'd, State Bd. (Apr. 9, 2007), <http://lawlibrary.rutgers.edu/oal/search.html>, aff'd, No. A-4642-06T1 (App. Div. Apr. 29, 2008), the petitioners were time-barred from challenging a school uniform policy adopted on June 19, 2006, and amended several times to incorporate new rules for non-compliance, with the last amendment occurring on August 29, 2006. The petitioners brought challenges to the policy on October 10, 2006, arguing they had religious and medical exemptions. The ALJ determined that the action was time-barred because petitioners did not challenge the subsequent amendments but rather the district's initial action adopting the uniform policy. Therefore, the 90-day period began to run on that date. When addressing the petitioners' arguments that the 90-day rule should be relaxed, the ALJ determined that no novel Constitutional question existed over which the OAL had jurisdiction; that although the interests were not purely private, all district proceedings were formal and open to the public and, as such, the interests were not justifiable to relax the rule; and that a challenge to "the Board's action in implementing the Policy [by stating that it was] in violation of the [enabling] statute and applicable school laws . . . does not justify relaxing the 90-day rule." Ibid. In affirming the Commissioner's adoption of this decision, the Appellate Division stated that since the ALJ found that petitioners challenged the adoption of the policy and not the

amendments made to it, petitioners had "failed to provide any reasonable excuse for their delay in pursuing the matter." Coles v. Bayonne Bd. of Educ., No. A-4642-06T1 *3-4 (App. Div. Apr. 29, 2008).

In the instant matter, by contrast, it is clear from the petition transmitted to the OAL and I **FIND** that petitioners are specifically challenging respondent's actions taken in adopting the Original Uniform Policy, in adopting the Amended Uniform Policy, and also in adopting a school uniform policy for the middle school. They assert that these policies were adopted in violation of N.J.S.A. 18A:11-8, which sets forth the circumstances under which districts may adopt school uniform policies. The Original Uniform Policy was adopted in April 2008 at a public meeting, and petitioners also admit that they were aware of this policy in August 2009. It is undisputed, therefore, that the challenge to the adoption of the Original Uniform Policy has been brought well beyond ninety days after the district adopted it and after petitioners admit they were aware of the policy.

In their supplemental brief, petitioners argue that the 90-day rule should be relaxed. However, the circumstances of this matter, as they have been presented, do not evince any reason for doing so. The circumstances are quite similar to those that the ALJ and the Appellate Division in Coles, supra, determined unsupportable of relaxation: no novel Constitutional question exists over which the OAL has jurisdiction; although the interests are not purely private, the district held public hearings; and a challenge to respondent's action in adopting the Original Uniform Policy by stating that it was in violation of N.J.S.A. 18A:11-8 does not justify relaxing the 90-day rule. Furthermore, petitioners have not provided any reasonable excuse for their delay in pursuing the matter. Therefore, based upon the concession by the O'Briens that they failed to file an appropriate petition to challenge the original policy within 90 days of its formal adoption, I **FIND** that petitioners' challenge to respondent's adoption of the Original Uniform Policy should be dismissed as requested by respondent.

However, the Amended Uniform Policy and the uniform policy for the Middle School were adopted on May 26, 2010, and the petition was filed on August 23, 2010,

one day before the 90-day period would have expired. Since petitioners specify that their challenge is against the way in which respondent adopted those policies, petitioners' challenge to respondent's adoption of the amended uniform policies is not time-barred and cannot be dismissed on those grounds.

The requirements for filing petitions challenging board actions pursuant to the State's school laws are found at N.J.A.C. 6A:3-1.4. Subsection (a) of that regulation requires that

> (a) A petition shall include . . . a statement of the specific allegation(s) and essential facts supporting them which have given rise to a dispute under the school laws; the relief petitioner is seeking; . . . . The petition should also cite, if known to petitioner, the section or sections of the school laws under which the controversy has arisen.
>
> [N.J.A.C. 6A:3-1.4(a).]

The petition in the instant matter specifically alleged that respondent failed to follow statutory requirements when it adopted "a Uniformity of Dress policy . . . for all Pre-K and Elementary schools" and "a new Uniformity of Dress policy that applied to all Pre-K, Elementary and Middle schools within the district." The petition provided the dates upon which these actions took place and specified what actions or omissions supported the alleged violation of law. The petition also cited the sections of law that were allegedly violated.

Respondent asserts that petitioners' failure to specifically state in the petition that they are challenging respondent's elimination of the philosophical opt out provision requires that petitioners amend their petition to bring such a challenge, an amendment that, as respondent states, would be time-barred if requested. However, respondent is confusing the issues. The remaining challenge here is against respondent's adoption of the Amended Uniform Policy and the uniform policy for the middle school. The petition specifically alleged facts regarding respondent's actions and whether they conformed to the requirements of N.J.S.A. 18A:11-8. These are the essential facts that N.J.A.C. 6A:3-1.4(a) requires to be included in the petition. Petitioners, understandably

but mistakenly so, identified respondent's actions on May 26, 2010, as one action – the adoption of a new policy for ECC, elementary, and middle school students; yet, evident in that is their challenge to respondent's action with regard to the policy as it pertains to the ECC and elementary schools. The question regarding the philosophical opt out provision arose when concerns regarding petitioners' standing to challenge respondent's actions began to surface. The facts regarding the elimination of the philosophical opt out provision are not essential to the outcome of this instant matter. Therefore, the omission of this information from the petition is not detrimental to petitioners' appeal and does not require that the petition be amended. And I so **FIND**. Hence, respondent's argument that petitioners would be time-barred from amending the petition to include a challenge to the elimination of the provision need not be addressed.

CONCLUSION AND ORDER

Based on all of the foregoing and after having given deference to the arguments advanced by both sides, I **CONCLUDE** that petitioners' challenge against the adoption of the Original Uniform Policy is time-barred under N.J.S.A. 6A:3-1.3(i) and should be dismissed. The challenge to respondent's adoption of a clothing uniform policy on September 24, 2008, is untimely, as it was brought well beyond ninety days after petitioners reasonably should have known about it, and an amendment to the district's overall uniform policy did not restart the ninety-day countdown. It is so **ORDERED.**

However, as conceded by the district, petitioners may proceed with the challenge against the adoption of the Amended Uniform Policy. The adoption eliminated a significant provision from the original policy that directly impacts the parents of students in respondent's ECC and elementary schools. In that regard, I **CONCLUDE** that petitioners were not required under N.J.A.C. 6A:3-1.4(a) to specifically establish in their petition that they were challenging the elimination of the philosophical opt out provision, as they properly specified they were challenging the adoption of the policy.

It is so further **ORDERED.**

It is therefore, **ORDERED** that the motion for partial summary decision by Neptune is **GRANTED** for all the reasons stated hereinabove. The matter shall proceed to hearing with reference to the adoption of the middle school uniform policy only.

Accordingly, the due process hearing is rescheduled for August 16, 17 and 18, 2011, at the OAL, Mercerville, commencing at 9:00 a.m. In anticipation of that hearing, the parties shall submit to this administrative law judge all of their exhibits, premarked for identification (P-1, et. seq. as to petitioners, and R-1, et. seq., as to Neptune) in loose leaf three ring binders, including index separators and a table of contents as to each, no later than August 5, 2011, along with their final and complete witness lists and a joint stipulation of facts.

It is so **ORDERED.**

This order granting partial summary decision is being submitted under N.J.A.C. 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make the final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days and unless such time limit is otherwise extended, this recommended order shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this order 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 8, 2011
DATE

JOHN R. FUTEY, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/mamf

#191-11

JOANNE BURGER,	:	
PETITIONER,	:	
V.	:	COMMISSSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured 10-month secretary working with the District's Child Study Team, appealed the Board's decision to reduce her hours of employment from full-time to .6 time as part of a reduction in force in May 2010. Petitioner alleged that the Board maintained the full-time employment of a non-tenured secretary, while reducing petitioner's employment in violation of her tenure rights pursuant to *N.J.S.A.* 18A:17-2. Respondent contended that petitioner's rights were not violated, as the non-tenured employee in question – the Administrative Assistant to the Superintendent, a 12-month position with supervisory responsibilities – did not hold the same or similar position as the petitioner, who is employed as a secretary. The respondent Board filed a motion for summary decision.

The ALJ found that: there are no genuine issues of material fact at issue, and the matter is ripe for summary decision; petitioner's job description for her position as secretary is consistent with the common understanding of the duties of a secretary, while the duties of the Administrative Assistant to the Superintendent are significantly different; the Administrative Assistant is a confidential position which includes supervisory responsibilities and the assumption of the Superintendent's duties in his absence. The ALJ concluded that the respondent did not violate petitioner's tenure rights when it reduced her time and compensation while maintaining the Administrative Assistant as a full-time employee because their positions are not substantially similar. Accordingly, the ALJ granted summary decision to the Board, and dismissed the petition.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ that respondent did not violate petitioner's tenure rights when it reduced her time and compensation pursuant to a reduction in force while maintaining the incumbent in the position of Administrative Assistant to the Superintendent. 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.

May 19, 2011

OAL DKT. NO. EDU 7616-10
AGENCY DKT. NO. 133-6/10

JOANNE BURGER,	:	
PETITIONER,	:	
V.	:	COMMISSSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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 respondent did not violate petitioner's tenure rights when it reduced her time and compensation pursuant to a reduction in force while maintaining the incumbent employee in the position of Administrative Assistant to the District Superintendent.

Both of petitioner's exceptions to the Initial Decision relate to the same premise. Petitioner argues that her own position and the Administrative Assistant position that she seeks are both secretarial positions, and that she is consequently entitled to be placed into the latter. Notwithstanding the ALJ's findings that – despite some overlap in duties – the positions require significantly different responsibilities, petitioner maintains that both positions are exclusively comprised of secretarial tasks and that the Administrative Assistant to the District Superintendent position (AADS) requires no duties that are too specialized for her to perform.

At the outset, the Commissioner cannot base a tenure decision on speculation. Thus, petitioner's contention that there is no task in the AADS job description that she could not perform cannot serve as a basis for determining whether the AADS position is substantially similar to petitioner's secretarial job.

Petitioner's exceptions appear to ignore two significant portions of the job description for the AADS. First, it is a supervisory position. The incumbent is charged with supervising all secretarial and clerical staff assigned to the superintendent's office. (Joint Exhibit J-11) Second, the AADS is charged with coordinating school-level and district-wide administrative activities (emphasis added). (*Ibid.*)[1] As the ALJ found, petitioner's job does not include such responsibilities – which are more comprehensive than the duties set forth in petitioner's job description. (Joint Exhibit J-12)

Based upon the differences in the two positions at issue – which differences are clearly set forth in the record – the Commissioner cannot classify the Administrative Assistant position as strictly secretarial, and cannot find that the two jobs demand identical responsibilities. Consequently, the Commissioner cannot conclude that respondent violated petitioner's tenure rights by not placing her in the AADS position. *See, e.g., Mount v. Board of Education of the Borough of Tinton Falls, Monmouth County,* Commissioner Decision No. 44-01 (Feb. 7, 2001).

Accordingly, the petition is dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/19/11
Date of Mailing: 5/23/11

[1] The Commissioner also notes that the Administrative Assitant position is considered a confidential position and the incumbent is not represented by petitioner's union. (Joint Stipulation of Facts #20)

[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 07616-10
AGENCY DKT. NO. 133-6/10

JOANNE BURGER,
Petitioner,
v.
BOROUGH OF MAYWOOD
BOARD OF EDUCATION,
Respondent.

Gregory T. Syrek, Esq., for petitioner (Bucceri and Pincus, attorneys)

Diane M. Shelley, Esq., for respondent (Jackson Lewis, attorneys)

Record Closed: February 24, 2011 Decided: April 4, 2011

BEFORE **LELAND S. McGEE**, ALJ:

STATEMENT OF THE CASE

Petitioner, Joanne Burger, appeals the decision of Respondent, Maywood Board of Education, to reduce her hours of employment while maintaining the full-time employment of a non-tenured secretary in violation of N.J.S.A. 18A:17-2. Petitioner further alleges that Respondent failed to take formal action against Petitioner by

adopting a resolution reducing Petitioner's employment by name in violation of N.J.S.A. 18A:27-4.1(a).

PROCEDURAL HISTORY

The Commissioner of Education (Commissioner) transmitted the matter to the Office of Administrative Law (OAL) on July 13, 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. On September 15, 2010, Respondent filed a Substitution of Attorney. A Prehearing Order was issued on October 21, 2010, and on or about December 12, 2010, the parties agreed that this matter should be resolved by way of dispositive motions. Cross-motions with briefs were filed on February 7, 2011. Responsive briefs were filed on February 15, 2011. Oral argument was heard on February 24, 2011, and the record closed.

STIPULATION OF FACTS

On February 8, 2011, counsel for the parties filed a Joint Stipulation of Facts. (Exhibit J-21.) Therefore, I **FIND** the following to be the **FACTS** of this case:

1. The Maywood Board of Education ("Respondent" or "Board") provides educational services in the Maywood District for children ranging from Pre-K through the eighth grade in its two schools, Memorial School (Pre-K–3) and Maywood Avenue School (grades 4–8).

2. Petitioner, Joanne C. Burger, ("Petitioner" or "Burger") began her employment with the Respondent in April 2003. For the period from April to June 2003, she was employed as a .5 10-Month Secretary. A copy of an employment contract between the parties for this period of time is attached hereto as Exhibit J-1.

3. Secretary positions, such as Petitioner's, in Respondent's District are employed on a 10-month basis. These positions are within the negotiations unit represented by the Maywood Education Association. A copy of the current

Contract Agreement between the Maywood Board of Education and the Maywood Education Association for the period covering July 1, 2008 through June 30, 2011 is attached as Exhibit J-14.

4. By letter dated June 27, 2003, Dr. Robert F. Otinsky, then Superintendent of Schools, advised Petitioner that she was appointed as a full-time Child Study Team Secretary for the 2003–2004 school year. A copy of the June 27, 2003 letter is attached as Exhibit J-15.

5. Respondent employed Petitioner as a full-time 10-Month Secretary for the 2003–2004 school year. A copy of an employment contract between the parties for this period of time is attached hereto as Exhibit J-2.

6. Respondent employed Petitioner as a full-time 10-Month Secretary for the 2004–2005 school year. A copy of an employment contract between the parties for this period of time is attached hereto as Exhibit J-3.

7. Respondent employed Petitioner as a full-time 10-Month Secretary for the 2005–2006 school year. A copy of an employment contract between the parties is attached hereto as Exhibit J-4.

8. Respondent employed Petitioner as a full-time 10-Month Secretary for the 2006–2007 school year. A copy of an employment contract between the parties is attached hereto as Exhibit J-5.

9. Respondent employed Petitioner as a full-time 10-Month Secretary for the 2007–2008 school year. A copy of an employment contract between the parties is attached hereto as Exhibit J-6.

10. Respondent employed Petitioner as a full-time 10-Month Secretary for the 2008–2009 school year. A copy of an employment contract between the parties is attached hereto as Exhibit J-7.

11. Respondent employed Petitioner as a full-time 10-Month Secretary for the 2009–2010 school year. A copy of an employment contract between the parties is attached hereto as Exhibit J-8.

12. The Special Education Department is run by Dr. Ray Dimetrosky, Director of Special Services. Since September, 2010, the Special Education Department has been comprised of 4 professional members, including Dimetrosky, they are: Carla Sanzaro, District Social Worker, Caroline Chervenak, Learning Consultant, and Karen Brickett, District School Psychologist. The secretarial work for all 4 members of the Child Study Team is completed by Petitioner and the second secretary in the Department, Cassandra Cerone. Cerone has been employed by the Board since November 21, 1995.

13. A list of employment responsibilities prepared by the Petitioner and a co-worker, Cerone, in or about 2009 indicating their duties as secretaries assigned to the Child Study Team is attached hereto as Exhibit J-12.

14. By letter dated May 17, 2010, from Michael Jordan, Superintendent of Schools, Petitioner was advised that the Maywood Board of Education would be discussing the terms and conditions of her employment at its meeting to be held on May 19, 2010. A copy of the May 17, 2010, letter to Petitioner from Superintendent Jordan is attached as Exhibit J-16.

15. On May 19, 2010, the Regular Meeting of the Maywood Board of Education was held and the meeting was called to order by President Conoscenti at 8:10 p.m. The minutes of this meeting indicate that Mr. Bendezu, Mr. Cilento, Mr. DeSimone, Mr. Taylor and Mr. Conoscenti were present, as were Superintendent Michael Jordan and Cecelia Perumal, Business Administrator. The minutes confirm the appointment of the Confidential Staff for the 2010–2011 school year, which include Susan Baliatico. The minutes further confirm the appointment of the MEA (Maywood Education Association) Secretarial Staff for the 2010–2011 school year, which included Joanne Burger, Joan Huss (start date July 9, 2001), Lorraine Lukach (start date April 15, 1993), and Joan McKegney (start date November 1, 1987). The minutes note that Petitioner's hours for her 10-month position will be 6. Copies of relevant portions of the May 19, 2010, Maywood Board of Education minutes of its Regular Meeting are attached as Exhibit J-17. (For convenience of review, dates of hire have been added to the list. These dates were not included in the Minutes.)

16. At its meeting on May 19, 2010, Respondent acted to reduce Petitioner's employment for the 2010–2011 school year from full-time 10-Month Secretary to

.6 10-Month Secretary with a corresponding reduction in salary and benefits. A copy of the employment contract between the parties for this period of time is attached as Exhibit J-10.

17. Susan Baliatico ("Baliatico") was employed as a full-time Administrative Assistant to the Superintendent of Schools for the 2008–2009 and 2009–2010 school years. She actually began her employment in or about May, 2008. Copies of the Contract Agreement between the Maywood Board of Education and Susan Baliatico for the period of July 1, 2008 through June 30, 2009, and July 1, 2009 through June 30, 2010, are attached as Exhibit J-18.

18. Petitioner identified Susan Baliatico as the previously unnamed comparator in her Verified Petition in her Answers to Respondent's Interrogatories. A copy of Petitioner's Answer to Interrogatory number 8 is attached as Exhibit J-19.

19. On May 19, 2010, Respondent acted to employ Baliatico as a full-time Administrative Assistant to the Superintendent of Schools for the 2010–2011 school year. A copy of the Contract Agreement between the Maywood Board of Education and Susan Baliatico for the period July 1, 2009 through June 30, 2010, is attached hereto as Exhibit J-20.

20. Administrative Assistant positions in Respondent's school district are employed on a 12-month basis and are considered "confidential" positions. These positions are not contained in the negotiations unit represented by the Maywood Education Association.

21. The job description for the Administrative Assistant position in Respondent's school district is attached hereto as Exhibit J-11.

22. A list of job duties for the Administrative Assistant to the Superintendent of Schools is attached hereto as Exhibit J-13.

LEGAL ANALYSIS AND DISCUSSION

Summary Decision

Summary decision by an Administrative Law Judge is permissible where there is no genuine issue of material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). Summary decision proceedings are subject to the same standard that applies to summary judgment matters in the Superior Court. Contini v. Bd. of Ed. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996). Under this standard, the judge must determine whether the "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." Id. at 122 (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995)). A motion for summary judgment will be granted where the pleadings and certifications do not show the existence of a genuine issue of material fact which would require disposition by a plenary trial. Ziemba v. Riverview Med. Ctr., 275 N.J. Super. 293, 298 (App. Div. 1994).

In the present case, the parties filed a Joint Stipulation of Facts. Petitioner did not dispute that it was necessary for Respondent to impose a reduction in force due to a cut in State aid in the amount of $859,000. Therefore, the material facts and legal issues are not in dispute. I **CONCLUDE** that it is appropriate to decide this matter by way of summary decision.

Tenure

Tenure statutes are "designed to aid in the establishment of a competent and efficient school system by affording to [covered employees] a measure of security in the ranks they hold after years of service." Viemeister v. Bd. of Educ. of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949). In general, they are meant to protect competent and qualified employees who have completed a probationary period from removal for

"unfounded, flimsy, or political reasons." Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 71 (1962), cert. denied, 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed. 2d 502 (1963).

To acquire the security of tenure, the precise conditions enunciated in the applicable statute must be met. See Picogna v. Bd. of Educ. of Cherry Hill, 143 N.J. 391, 400 (1996); Kletzkin v. Bd. of Educ. of Spotswood, 136 N.J. 275, 278 (1994); Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63, 72 (1982); Zimmerman v. Bd. of Educ. of Newark, supra, 38 N.J. at 72. Tenure "arises only by passage of the time fixed by the statute . . . ." Canfield v. Bd. of Educ. of Pine Hill, 97 N.J. Super. 483, 490 (App. Div. 1967) (Gualkin, J., dissenting), rev'd on dissent, 51 N.J. 400 (1968).

N.J.S.A. 18A:17-2 specifically governs the tenure of individuals who are employed by school districts in secretarial or clerical positions. In addition to specifying the statutory requirements for acquiring tenure in these positions, N.J.S.A. 18A:17-2 also provides that individuals who acquire tenure under the statute "shall not be dismissed . . . except for neglect, misbehavior or other offense and only in the manner prescribed by [N.J.S.A. 18A:6-10]."

N.J.S.A. 18A:6-10, in turn, provides that no person under tenure "shall be dismissed or reduced in compensation, . . . except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing . . . ." However, it also includes the following exception: "Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law." In other words, a local board of education may conduct a reduction in force abolishing certain positions, even where tenured positions are affected. Dezuzio v. Bd. of Educ. of Bound Brook, EDU 771-06 (August 7, 2008), adopted, Comm'r (September 18, 2008) <http://lawlibrary.rutgers.edu/oal/search.shtml> (citing Klinger v. Bd. of Educ. of Cranbury, 190 N.J. Super. 354, 357 (App. Div. 1982), certif. denied, 93 N.J. 277 (1983) (school board may abolish the positions of tenured teachers as part of a reduction in force (RIF), if done for reasons of economy)).[1]

[1] Under N.J.S.A. 18A:28-9, the statute governing the tenure of teaching staff members, boards have the authority to eliminate a position, even when held by a tenured staff member, "for reasons of economy or because of reduction in

"Tenure in a position, even if it is a secretarial position, requires the conclusion that when other assignments exist within the same position title, a riffed tenured employee who held that position title is entitled to claim that vacancy as opposed to a non-tenured applicant." Sherrill v. Bd. of Educ. of Cinnaminson, 96 N.J.A.R.2d (EDU) 727, adopted, Commissioner of Education, 96 N.J.A.R. 2d (EDU) 730, aff'd, State Board of Education, 96 N.J.A.R.2d (EDU) 731. However, unlike teaching staff members who are riffed in accordance with N.J.S.A. 18A:28-9, and janitorial employees, who are riffed in accordance with N.J.S.A. 18A:17-4, the statutes applicable to secretaries and clerical employees do not require that terminations resulting from a reduction in force or reemployment of such individuals be made on the basis of seniority, Ferronto v. Board of Education of Wymouth, EDU 8774-02, State Board of Education (Feb. 1, 2006) <http://lawlibrary.rutgers.edu/oal/search.shtml>.

In the present matter, Respondent concedes that Petitioner is a tenured employee. The gravamen of the petition of appeal[2] is that she "had the right by virtue of her tenure to continue in a full-time position of employment over (Susan) Baliatico," a non-tenured employee who was not affected by the reductions. Petitioner argues that "[t]enure is not limited to a specific position in a district. Rather it is gained as a protection throughout the school system," citing Mackey v. Board of Education of Ridgefield, 1983 S.L.D. 96, 103. She further contends that "there is no legal authority" to distinguish between Baliatico's position of "Administrative Assistant to the Superintendent of Schools" and Petitioner's title of "Secretary." Finally, Petitioner argues that the issue is whether there are distinguishable qualifications required for each of the two positions in question. If not, then Petitioner should be entitled to displace Baliatico.

Words in a statute should be given their ordinary and popular meaning unless it is evident that they are employed in a technical sense. State v. Joas, 34 N.J. 179, 187 (1961). Webster's International Unabridged Dictionary (3rd ed. 1976) defines

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the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause . . . ."

[2] The petition of appeal was part of the Commissioner's transmittal to the Office of Administrative Law.

"secretary" to mean "one employed to handle correspondence and manage routine and detail work for a superior." Likewise, the Dictionary of Occupational Titles (4th ed. 1991) published by the United States Department of Labor describes the duties of a secretary in a school setting as encompassing composing correspondence, greeting visitors and directing them to their desired destination, disbursing funds and recording financial transactions.

It is well settled that title alone is not dispositive and actual duties should control over labels. See Quinlan v. Bd. of Educ. of N. Bergen, 73 N.J. Super. 40 (App. Div. 1962); Beaute v. Bd. of Educ. of N. Arlington, OAL Dkt. No. EDU 0295-80 (July 28, 1981), adopted, Comm'r (Sept. 14, 1981), aff'd, St. Bd. (Feb. 3, 1982). Here the evidence clearly establishes that Petitioner performed duties traditionally regarded as secretarial responsibilities, including transcribing correspondence, dealing with the public, data entry, answering telephones and handling routine paperwork. Her duties required a degree of skill and knowledge in the use of office equipment and specialized techniques. In addition, the majority of her duties were shared with another employee. (Exhibit J-12.) Unlike paraprofessional assistants such as classroom or lunchroom aides, the scope of her responsibilities was not limited to assisting professionals "by relieving them of easy or repetitive tasks which do not require extensive training and expertise." Roach v. Sch. Dist. of S. Orange-Maplewood, 96 N.J.A.R.2d (EDU) 370, 374.

In Dennery v. Board of Education of the Passaic County Regional High School District #1, 131 N.J. 626, 639–40 (1993), the Court stated that when the duties of the position in which a staff member has acquired tenure are substantially identical to those of the position that the person seeks, a local school board may not sidestep tenure rights by simply renaming the position or tacking on additional meaningless requirements. The local board must extend the staff member's tenure rights to the newly-created position. In its decision, the Court referred to Viemeister v. Board of Education of Prospect Park, supra, 5 N.J. Super. 215, 218 (wherein it was held that a tenured principal should be reinstated because his position had not in fact been abolished when local school board created the position of "teaching" principal); Vogel v.

Board of Education, State Bd. of Educ. (June 5, 1985), slip op. at 5–6 (explaining that a "[b]oard's decision to abolish a position is not sacrosanct and will be disturbed if it is found that the duties of the abolished position essentially have been transferred to another position so as to defeat the rights of the tenured employee to the abolished position"); and Luppino v. Bayonne Board of Education, 1980 S.L.D. 1028, 1035–36 (ruling that duties of administrator of home instruction and principal of home instruction "were substantially the same" and change of title "did not involve the meaningful addition of extra duties").

However, the mere overlap in duties does not mean that two positions are equivalent for tenure purposes. If a newly-created position is similar to a tenure holder's abolished position but also requires additional duties or different responsibilities, then the newly-created position is not considered to be substantially similar to the former position. Santarsiero v. Bd. of Educ. of Parsippany-Troy Hills, 1984 S.L.D. 854, 879; see also Sandri v. Bd. of Educ. of Bergen Cty. Vocational Sch. Dist., 1986 S.L.D. 1501 (ruling that duties of abolished position of supervisor of guidance/shop were similar but of greater nature and scope than newly-created position of director of special needs and student services); Rufalo v. Bd. of Educ. of Livingston, 1986 S.L.D. 1699 (ruling that despite overlap of duties between post of vice principal and newly-created supervisor position, positions were "substantially different").

Petitioner contends that a dispositive issue is whether there are distinguishable "skill sets" necessary to perform the respective positions. Petitioner's analysis, in oral argument, was that, "walking in the door today," identical skill sets would be necessary for both positions. I disagree with this analysis. Based on the foregoing principles, it must be determined whether the duties of the secretarial position in which the Petitioner acquired tenure are substantially identical to those of Administrative Assistant to the Superintendent, the position that the Petitioner seeks.[3]

[3] Respondent questions whether Petitioner seeks to replace Ms. Baliatico or merely seeks to have her employment reduced to part time in order to comply with the tenure laws. For purposes of this decision, I have assumed that Petitioner seeks to replace Ms. Baliatico.

Petitioner's job description for Secretary is consistent with the "common" understanding of the duties of a secretary. However, the duties of the Administrative Assistant to the Superintendent are significantly different. First, they include supervisory responsibilities, such as the following:

> Supervises the activities of all other secretarial and clerical personnel assigned to the superintendent's office.
>
> Maintains personnel records of all certified staff.
>
> Oversees the hiring of substitute teachers; receives applications; verifies their credentials and prepares substitute teacher lists for board approval.
>
> [Exhibit J-11.]

Second, the "Job Goal" is "[t]o serve as the superintendent's confidential secretary; supervise all administrative secretarial duties in the superintendent's office; and coordinate school-level and district-wide administrative activities." Ibid. This goal is not similar in form or substance to the duties of Petitioner.

Third, Ms. Baliatico was a "confidential" employee, who admittedly was responsible to "stand in" for the Superintendent as the supervisor of the office when she was out of the office.

In Mount v. Board of Education of Tinton Falls, EDU 120-00, Initial Decision (Dec. 29, 2000), aff'd as modified, Comm'r (Feb. 7, 2001) <http://lawlibrary.rutgers.edu/oal/search.shtml>, petitioner Mount was hired to a full-time position (Transportation/Attendance Coordinator) and attained tenure in that position. Thereafter, Mount's position was reduced and subsequently eliminated. There were four secretarial positions held by non-tenured employees which Mount believed she should have been offered. The Administrative Law Judge (ALJ) held in favor of Mount. The Commissioner affirmed the determination of the ALJ with modification. While agreeing that Mount was entitled to one of the secretarial positions held by three of the employees, the Commissioner determined that she was not entitled to the position of

the fourth employee, because the position, Clerical Assistant for District Services/Special Programs and Projects, was not secretarial in nature. Finally, the Commissioner held that the Board may exercise its discretion in selecting the secretarial position to be offered to Mount.

Similarly, in Fink v. Board of Education of Hunterdon County Polytech, EDU 6435-06 (Sept. 28, 2009), adopted, Comm'r (Nov. 2, 2009) <http://lawlibrary.rutgers.edu/oal/search.shtml>, petitioner Fink was a tenured secretary who appealed the respondent Board's decision to retain a full-time, non-tenured Secretary and reduce Fink's job to a part-time position. Fink claimed eligibility for the position of full-time Secretary, asserting that the duties and responsibilities of the position of Coordinator of Adult Education are essentially those of a Secretary, and that the individual holding this position did not have tenure in the secretarial position.

The ALJ in Fink found, inter alia, that mere overlap in duties does not mean that two positions are equivalent for tenure purposes. In that case, the duties of an Adult Education Coordinator involved higher level responsibilities that differ from the clerical and supportive responsibilities of a Secretary. Therefore, the ALJ found that the two positions were not substantially similar. Further, while there may have been some slight overlap in the duties of Secretary and those of Adult Education Coordinator, Fink did not perform virtually all of the duties and responsibilities of an Adult Education Coordinator during the time that she held the position of a tenured Secretary. Accordingly, the ALJ concluded that respondent Board did not violate Fink's tenure rights, and ordered the petition dismissed. Upon a thorough and independent review of the record, the Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision as the Final Decision. The petition was dismissed.

Based upon the above analysis, I **CONCLUDE** that Respondent did not violate Petitioner's tenure rights when it reduced her time and compensation while maintaining Baliatico as a full-time employee, because their positions are not substantially similar.

Accordingly, I **ORDER** that summary decision is hereby entered on behalf of 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.

April 4, 2011
DATE

LELAND S. MCGEE, ALJ

Date Received at Agency: April 4, 2011

Date Mailed to Parties: APR - 5 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

LSM/lr

188-11

OAL DKT. NO. EDU 04485-11
AGENCY DKT. NO. 85-4/11

J.H., on behalf of minor child, J.H.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE TOWNSHIP OF MILLBURN, ESSEX COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
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 the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/18/11

Date of Mailing: 5/18/11

* 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- EMERGENCY RELIEF
OAL DKT. NO. EDU 04485-11
AGENCY DKT. NO. 85-4/11

J.H., ON BEHALF OF MINOR CHILD, J.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MILLBURN, ESSEX COUNTY,
Respondent.

Stephen M. Bacigalupo II, Esq. for petitioner (Kalac, Barger & Bacigalupo, attorneys)

Athina Lekas Cornell, Esq., for respondent (Lindabury, McCormick, Estabrook & Cooper, attorneys)

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE

Petitioner seeks an Order for Emergency Relief directing respondent the Board of Education of the Township of Millburn (Essex County)(Board) to allow Millburn Middle School eighth-grade student J.H. to take eighth grade Algebra for the remainder of the 2010-11 school year.

In their underlying petition, petitioners request the following:

An ultimate determination that J.H. should have been automatically enrolled in the accelerated eighth grade math course (i.e. Algebra); an ultimate determination that J.H.'s Accelerated Connected Math 7 third trimester and final grades were miscalculated; an ultimate determination that Principal Michael Cahill's decision/refusal to amend J.H.'s Accelerated Connected Math 7 third trimester and final grades was arbitrary and capricious; an ultimate determination that J.H. will be irreparably harmed should her Accelerated Connected Math 7 third trimester and final grades not be amended; an Order amending J.H.'s Accelerated Connected Math 7 third trimester grade from a "C+" to a "B-"; and an Order amending J.H.'s Accelerated Connected Math 7 final grade from a "B-" to a "B."

PROCEDURAL HISTORY

On April 18, 2011, petitioner filed a petition of appeal and application for emergency relief with the Commissioner of the Department of Education. The Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter on April 18, 2011, 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, for determination as a contested case. I heard the application for emergency relief on May 2, 2011.

On May 2, 2011, the Board made a motion to disqualify the firm of Kalac, Barger & Bacigalupo from representing petitioner. It contended that a conflict of interest existed because Paul Barger of that firm had represented the Board on various special education and regular education matters until March 2011. I denied the motion to disqualify after finding that none of Barger's previous interaction with Board personnel involved petitioner, J.H. or the claim raised by petitioner.

DISCUSSION

For a request for interim relief or stay, N.J.A.C. 6A:3-1.6 requires as follows:

(b) 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.

These four standards are in the conjunctive, and petitioner must satisfy all requirements in order to be entitled to the requested relief.

Petitioner's Position

During the 2009-10 school year J.H. took an Accelerated Connected Math 7 course while in seventh grade. The Middle School has a written policy whereby a seventh grade student in an accelerated math course would have to achieve a final grade of at least a "B" to be automatically enrolled in an accelerated eighth grade math course such as Algebra. The policy provides, "[s]tudents who are currently in an accelerated class as a 7th grader must achieve a final grade [of at least] B to remain in an accelerated section in 8th grade. If a 7th grade accelerated student earns a B- or below, he/she will be scheduled for a regular academic course."

J.H.'s father, also J.H., e-mailed daughter J.H.'s seventh-grade math teacher Mary Beth Cimino in June 2010 noting that J.H. had worked out her average for the third trimester, and it looked like it was a seventy-eight. Cimino replied that J.H.'s average was a seventy-eight and a final quiz would be given the next week. Cimino indicated that she would not be inclined to recommend J.H. "out" but believed that J.H.

would benefit from Connected Math 8 rather than Algebra in eighth grade. "It is not always advantageous for every students [sic] to take these classes (Algebra) before they are ready." J.H. scored a twenty-nine out of thirty on her final Accelerated Connected Math 7 quiz. Relying on the representation that J.H.'s pre-quiz average was seventy-eight, petitioner adds the quiz results to her average giving her two-hundred-forty-eight points out a possible three-hundred- eleven points or a 79.7 percent rounded off to 80 percent or a "B-" for her third trimester grade. Accordingly, petitioner contends that, after taking into account a third trimester final grade of "B-" and a first trimester grade of "B-" and a second trimester grade of "B+," the final grade for Accelerated Connected Math 7 should have been a "B." With a final "B" grade, petitioner contends that J.H. was entitled to placement in the accelerated eighth grade math course (i.e. Algebra). He also claims that Cimino led him to believe at the end of seventh grade that, despite her doubts about J.H., she would give her the benefit of the doubt. Despite the information given to petitioner by Cimino, J.H. was given a "C+" for her third trimester and a final grade of "B-." Petitioner considered the "C+" to be a "clerical error" or "miscalculation" that Principal Michael Cahill would not correct. He considers Cahill's refusal and the consequent ineligibility for the accelerated eighth-grade course to be arbitrary.

As a result of a recorded final grade of "B-," J.H. was placed in eighth-grade math rather than the accelerated Algebra class.

On or about February 15, 2011, petitioner received an e-mail from Assistant Superintendent Christine Burton advising that Cahill's decision was final and would not be overruled.

Respondent's Position

Respondent acknowledges the Board Policy set forth above regarding eligibility to move from the Accelerated Connected Math 7 course to eighth grade advanced Algebra—namely a final grade of at least a "B." Cahill contends that the decision for the placement of J.H. and all other students in the Middle School was based on the criteria

set forth in the Board Policy and newsletters he sent to parents. The criteria include a final grade of "B" or better, teacher input in the Characteristic Checklist, and a score in the top 25 percent of the class on the NJ ASK standardized assessment. Contrary to the contention of petitioner, J.H. earned a final grade of "B-" in Accelerated Connected Math 7 based on a "B-" average in the first trimester, a "B+" average in the second trimester and a C+ or 78.7 percent for the third trimester. Also, she did not receive more than seven checks in her teacher checklist, and she did not score in the top 25 percent of the class on the NJ ASK. Notwithstanding Cimino's e-mail to petitioner indicating that J.H.'s average before the last quiz was 78 percent, her breakdown of J.H.'s points in the third trimester including the last quiz shows a total of 245 points out of 311 for a 78.7 percent or "C+" average rather than petitioner's calculation of 79.7 percent.

In June 2010, the end of J.H.'s seventh-grade year, Cahill sent a Newsletter to all parents explaining the following criteria for advanced placement:

> Seventh grade students are subject to review for all five academic courses, and I will use the same process incorporating grades, teacher feedback through the checklist, and scores. I am very conservative when placing students in Algebra class in eighth grade because many students re not yet ready for the abstract thinking required to learn Algebra. This Course is doubly accelerated because it is designed for students a year older (ninth grade) and is an accelerated high school level.
> All placement decisions are communicated by the end of July in a mailing that informs parents of the courses into which your child will be scheduled for the 2010-2011 school year.

A similar letter was provided to petitioner during J.H.'s sixth-grade year explaining the criteria for advanced placement.

> ...a packet of information about your child will be assembled which will contain various indicators including overall academic performance, standardized testing, and teacher assessment.... "What information constitutes the review packet? First, a final report card. Second, a Characteristics Checklist. Our faculty has brainstormed and created a list of

> ten characteristics that describe the attributes necessary to be successful in an accelerated learning environment.... Third, New Jersey ASK 6 testing results when they become available. Placement in accelerated classes is not determined by ability or potential; it is predicated on demonstrated performance.... The check list allows teachers to view each individual in terms of how they are progressing as learners. Students are assessed separately by all their content area teachers in order for us to see a profile of the individual student. Accelerated learners are required to have seven out of the ten characteristics.

In January 2011, Burton advised that J.H. did not satisfy the criteria for placement in advanced Algebra for eighth grade based on her final grade in seventh grade and failure to score in the top 25 percent of the class on the NJ ASK score. Burton also advised petitioner of an alternative for J.H. whereby she would have the opportunity to take advanced Algebra over the summer of 2011. He declined because he was considering a summer camp for J.H.

Discussion

Petitioner contends that J.H. will suffer irreparable harm if her Accelerated Connected Math 7 third trimester and final grades are not corrected and if she is not permitted to take Algebra for the remainder of the 2010-11 school year. Her failure to take Algebra now imposes severe consequences upon J.H. in that it would delay her ability to take the prerequisite for other advanced science and mathematics courses later in high school. He argues that this choice in eighth grade cements an exclusion from calculus and physics later on. I **CONCLUDE** that petitioner has not demonstrated that J.H. will suffer irreparable harm if the requested relief is not granted. The concerns expressed by petitioner are speculative that a delay, as opposed to an inability, in taking this one course will deny her ability to pursue certain fields of study. This is particularly so since she may be able to double up on math courses in high school, especially if, as her father has represented, he has been tutoring her in Algebra. Additionally, Burton has advised that J.H. has the opportunity to take Algebra in summer school. Petitioner's aversion to this opportunity because he wants to send J.H. to summer camp is a matter of choice and belies the notion of irreparable harm. Where concerns are

speculative, relief should not be granted merely to allay the fears and apprehensions or to sooth the anxiety of the parties. Adams v. Freedom Forge Corp., 204 F.3d 475, 490 (3d. Cir. 2000). It is clear that emergency relief is not the only way of protecting J.H. from harm here. Accordingly such relief is not appropriate in this proceeding. See, Campbell Soup Co. v. ConAgra, Inc., 977 F.2d 86, 91 (3d Cir. 1992). Finally, delay in seeking emergency relief or a preliminary injunction cuts against finding irreparable injury. New Jersey Ass'n of Health Care Facilities v. Gibbs, 838 F. Supp. 881, 928 (D.N.J. 1993). Eight months of J.H.'s eighth-grade year has already expired and but two more months remain. Notwithstanding petitioner's efforts to seek relief informally through discussions with administrators of the Board, petitioner's delay in seeking emergency relief from an action about which he was aware at least as far back as August 2010, cuts against finding irreparable injury.

I **CONCLUDE** that neither is the legal right underlying petitioner's claim settled in its favor nor does the petitioner have a likelihood of prevailing on the merits of the underlying claim. In the absence of a clear showing of abuse of discretion, the Commissioner of Education will not substitute his or her own judgment for that of a board of education. In Kopera v. Bd. of Educ. of West Orange, 60 N.J. Super. 288, 294 (App. Div. 1960), the Appellate Division stated, "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 without rational basis or induced by improper motives." 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 order to fulfill its obligation to provide students with a thorough and efficient education, boards of education have been granted discretionary authority under Title 18A of the New Jersey Statutes to adopt policies and rules for the management of the public schools. Appropriate deference must be given to the professionals in a school district when assessing the appropriate placement of a student. Taking petitioner's certification in its best light, there is no showing at this stage of the proceedings, that the Board's action in denying J.H. access to the eighth-grade Algebra class was arbitrary and capricious, was without rational

basis or induced by improper motives. Petitioner contends that the "C+" for the third trimester in Accelerated Connected Math 7 was a clerical error as evidenced by Cimino's reference in an e-mail to an average of 78 percent before J.H.'s final quiz. There is a concern that Cimino's initial reference to 78 percent was in the context of petitioner's e-mail to her one day earlier where petitioner advised her that "[J.H.] just worked out her average and it looked like she had a 78 average." That number is contradicted not only by J.H.'s third trimester report card grade but also by Cimino's breakdown of the points J.H. had earned for each quiz and assignment during that trimester. A determination of the accuracy of petitioner's assertion that Cimino only changed her calculations after communicating with Principal Cahill cannot be made at this time in an emergency relief proceeding. Likewise, petitioner's likelihood of success in the merits is also questionable in view of the position of the Board that NJ ASK performance also plays a part in a decision to place a student in an accelerated class. The Commissioner has consistently held that local boards of education may place students in public school grade levels according to their own rules and regulations. Shenkler v. Ho-Ho-Kus Bd. of Educ., 1974 S.L.D. 772, aff'd 1975 S.L.D. 1157; Boulogne v. Bd. of Educ. of the City of Jamesburg, 1964 S.L.D. 107; Wilcox v Bd. of Educ. of the Borough of Oceanport, 154-55 S.L.D. 75. Such deference to local boards should be no less when determining placement in a particular class within a grade level.

After careful consideration of all of the arguments, I **CONCLUDE** that petitioner has not met all of the requirements for emergency relief and that his request for such relief must be denied.

ORDER

It is hereby **ORDERED** that respondent's motion to disqualify counsel for petitioner be **DENIED.**

It is hereby further **ORDERED** that petitioner's application for emergency relief be **DENIED.**

It is further hereby **ORDERED** that the remaining issues in this matter proceed to a plenary hearing on September 14, 2011 at 9:30 A.M.

This order on application for emergency relief may be adopted, modified or rejected by the **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 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.

5/2/11

DATE

JESSE H. STRAUSS, ALJ

id

192-11

IN THE MATTER OF THE TENURE HEARING OF JILL KUBICKI, LAWRENCE TOWNSHIP SCHOOL DISTRICT, MERCER COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The petitioning Board certified tenure charges of insubordination, failure to perform required duties, fabrication of records, prevarication, lack of professionalism and other just cause against respondent – a special education teacher employed by the district. Specifically, respondent, *inter alia*: refused to produce required back-up for some or all scores that she submitted after administering the quarterly Developmental Reading Assessment (DRA); resisted or refused utilization of district resources designed to assist teachers; failed to produce backup for final grades submitted for her students; refused to participate in the development of her performance improvement plan (PIP) and corrective action plan (CAP), and ignored the goals and directives incorporated therein; was uncooperative, unprofessional, hostile and disrespectful in her communications with colleagues, substitute teachers and parents; and refused to report to her assigned school at the beginning of the 2007-2008 school year after being informed verbally and in writing the previous Spring that she was being reassigned to a different school. Respondent denies the charges, and alleges that they are false, that her actions were taken out of context, and that her conduct was not reflective of her capability as a teacher.

The ALJ found, *inter alia*, that: the sixteen witnesses for the Board presented credible testimony, corroborative of the other witnesses' testimony; each witness described respondent as hostile, aggressive, demanding and unresponsive to reasonable requests for grades, progress reports, test scores and student information; this testimony was corroborated by the exhibits presented at hearing; respondent's own testimony over five days was repeatedly unresponsive to the questions asked by counsel and the directives of the ALJ; respondent's sudden production – two thirds of the way through the OAL hearing – of files that allegedly proved she had properly completed DRAs during the 2008-2009 school year further contradicted the credibility of her testimony; respondent replied to the charges against her with uniform denials of personal responsibility, insinuation that the behaviors in question were inconsequential, or provoked or caused by the actions of others; and, taken as a whole, the testimony and evidence presented in this matter clearly indicates that respondent's behavior was inappropriate and inconsistent with the decorum and responsibility expected of a professional educator. The ALJ concluded that the Board has met its burden of proof relative to each of the charges filed against respondent. Accordingly, the ALJ ordered that respondent be dismissed from her tenured position.

Upon independent review of the record and the Initial Decision, the Commissioner adopted the ALJ's decision as the final decision in this matter, with modification. Respondent was dismissed from her tenured employment, and a copy of this decision was forwarded to the State Board of Examiners for action against respondent's 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.

May 23, 2011

192-11

OAL DKT. NO. EDU 284-10
AGENCY DKT. NO. 7-1/10

IN THE MATTER OF THE TENURE HEARING OF JILL KUBICKI, LAWRENCE TOWNSHIP SCHOOL DISTRICT, MERCER COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

Petitioner brought tenure charges against respondent as a consequence of an alleged constellation of unbecoming behavior and other just cause, including insubordination, unprofessional conduct toward colleagues, students and parents, failure to properly execute job duties, prevarication and fabrication of records. After review of the extensive record – including transcripts of eleven days of hearings, the Initial Decision of the Office of Administrative Law (OAL), respondent's exceptions and petitioner's replies thereto – the Commissioner concludes that respondent's dismissal is warranted.

Petitioner presented sixteen witnesses – all of whom had been sequestered – whose testimony was generally consistent and corroborative. Most of that testimony, and the evidentiary documents offered by petitioner, pertained to the 2008-2009 school year.[1] The conduct described in the testimony and referenced in the documentary evidence revealed troubling themes.

For example, Kristine Deni, Director of Student Services, Pamela Hernandez, petitioner's learning disabilities teaching consultant, Maureen Hayes, Director of Humanities, Special Education Supervisor Jay Billy, principals Judith McLaughlin and William Buss, and Superintendent Philip Meara all testified that throughout the school year respondent refused to

[1] There was also, however, testimony about an incident at the beginning of the 2007-2008 school year that bore significance.

produce required back-up for some or all scores that she submitted after administering the quarterly Developmental Reading Assessments (DRA). Deni explained that the DRA is an important diagnostic tool used to ascertain students' reading progress and to adjust individual education plans (IEPs), if necessary.

The deadlines for submitting the results of the DRAs were printed on calendars distributed to the teaching staff on September 3, 2008, at the first faculty meeting of the 2008-2009 school year. The ultimate scores for the DRAs must be supported by the teacher's answers to specific questions about what the student was able to read and how the student comprehended the stories/texts used in the DRA. These supportive materials are referred to as "protocols" and "rubrics/grids." According to her supervisors, respondent produced little or no backup for most of the tests she administered; they therefore concluded that many of the DRA scores she submitted were invented.[2] This precipitated petitioner's charge of record fabrication.[3]

Second, testimony from several of petitioner's representatives revealed that petitioner resisted or refused utilization of the resources provided by the district to assist teachers. According to petitioner's witnesses, there were instruction kits, DVDs, and in-school trainings for the DRA, staff handbooks, and computer technicians available for staff who needed assistance with the use of the district's computer data programs. In addition, respondent refused offers of assistance from several of her peers and supervisors, either by direct refusal or non-cooperation. This pattern of resistance culminated at the end of the school year with her

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[2] There is evidence in the record that some, but not all, of the back-up materials were submitted in late November, and none of the protocols or rubrics were submitted after the January and April testing cycles. The fact that the November DRA backup was incomplete is corroborated by respondent's own notes from a November 26, 2008 meeting with her supervisors. (Respondent's Exhibit R-18b)

[3] Respondent produced documents at the OAL on August 19, 2010 – the seventh day of the hearing and respondent's third day of testimony – which she alleged were her copies of the DRA protocols that her supervisors had been requesting from her since October of 2008. No explanation was offered as to why the documents had not been provided to her supervisors when they were due during the 2008-2009 school year – or even via discovery in the instant proceeding.

failure to produce backup for the final grades that she submitted for her students – even when her supervisors gave her extra time to do so. In the absence of same, and with respondent's history regarding the DRAs, the school administrators could not be sure how respondent had arrived at the grades that she submitted.

Third, respondent's supervisors testified that throughout the 2008-2009 school year, respondent would not work with them to formulate such professional development tools as performance improvement plans (PIPs) and a corrective action plan (CAP). When her supervisors crafted the PIPs and CAP without her, respondent ignored the goals and directives incorporated into same. Included in the PIPs and CAP, for example, were directives to improve her professional behavior and develop clearer and more informative substitute lesson plans. Respondent reacted defensively and aggressively to her supervisors' instructions and also, paradoxically, to their offers of assistance.

Fourth, the testimony of seven of respondent's peers indicated that during the 2008-2009 school year, respondent was not forthcoming with information that her colleagues needed from her, was hostile to requests for same, and on several occasions behaved disrespectfully both to her peers and to her supervisors. This unprofessional behavior included incidents where respondent declined to open her emails, required multiple days' notice from colleagues prior to discussing issues of concern to them, and returned – unread – documents placed in her mailbox.

Fifth, the issue of communication arose as well with respect to the substitute plans that respondent was required to provide. Special Education Supervisor Jay Billy testified that as the year progressed, respondent was absent more frequently. The substitutes assigned to her classes – including retired special education teachers – reported that respondent's plans were

difficult to understand. Learning disabilities teaching consultant Pamela Hernandez testified that she also found the plans to be abstruse. Lesson plan improvement was part of respondent's CAP, see Petitioner's Exhibit P-24, but respondent contended that her plans were adequate and made no discernable effort to conform them as directed.[4]

Sixth, various witnesses testified that respondent overstepped the bounds of professional conduct in front of students and parents. One example was an occasion on which respondent criticized third grade teacher Donna Lawrance in front of the class, causing Lawrance's students to worry about their teacher. In other testimony, teachers reported unprofessional remarks by respondent during parent-teacher conferences. The record also includes testimony about parent complaints concerning respondent's demeanor toward the students. One student was apparently afraid of respondent to a degree that warranted the student's transfer to another teacher.

Finally, the testimony of principals Jonathan Dauber and Andrew Zuckerman, and Director Kristine Deni, indicated that in the Spring and Summer of 2007 petitioner was told verbally and in writing that she would be reassigned from Lawrence Intermediate School (LIS) to Lawrence Middle School (LMS) for the 2007-2008 school year. However, on September 4, 2007 she showed up at LIS and refused to report to LMS until after she had met with Deni and a union representative. Respondent's explanation for this behavior was that she had never been advised of her transfer to LMS. Petitioner's charge of prevarication is based in part upon this incident.

Teachers may be dismissed or have their compensation reduced for inefficiency, incapacity, unbecoming conduct, or other just cause. *N.J.S.A.* 18A:6-10. As an appointing

[4] Respondent not only maintained that there was nothing wrong with her lesson plans for substitutes, but also ignored a written directive from Director of Student Services Kristine Deni to meet with Jay Billy to work on improving them.

agency, petitioner must establish one or more of these causes by a preponderance of the credible evidence. *In re Polk*, 90 *N.J.* 550, 560-61 (1982).

Conduct unbecoming a public employee includes a broad range of behavior which adversely affects the morale or efficiency of the public entity or can destroy public respect for public employees and confidence in the operation of public services. *See, e.g. In re Emmons,* 63 *N.J. Super.* 136, 140 (App. Div. 1960). Insubordination has been defined as the willful and intentional disregard of the lawful and reasonable directives of an employee's duly authorized supervisor. *In the Matter of the Tenure Hearing of Charles Motley, State Operated School District of Newark, Essex County,* Commissioner Decision No. 252-99 (August 4, 1999), at 2-3, *adopted* State Board (Dec. 1, 1999). As the Administrative Law Judge (ALJ) correctly noted, conduct such as that described by petitioner's representatives has been found in prior Commissioner decisions to be unbecoming and insubordinate. *See, e.g., In the Matter of the Tenure Hearing of Carl A. Hill, Irvington Township School District, Essex County,* Commissioner Decision No. 176-07 (May 15, 2007), *adopted,* State Board (Oct. 17, 2007); *In the Matter of the Tenure Hearing of Carol Ziznewski, School District of the Township of Edison, Middlesex County,* Commissioner Decision No. 234-10 (August 3, 2010). Thus, if a weighing of the evidence in the instant case supports the substance of petitioner's charges, grounds exist for the dismissal of respondent.

The ALJ's evaluation of the evidence weighed in favor of petitioner. An important component of that evaluation was the ALJ's credibility findings. More specifically, the ALJ found that petitioner's witnesses – especially Kristine Deni, Jay Billy and Principal Judith McLaughlin – were well informed about respondent's conduct, and without motivation to

offer false testimony. Similarly, the ALJ found that the other teachers and supervisors who testified made sincere efforts to be accurate and unbiased.

The ALJ regarded the individual testimony of each of petitioner's witnesses to be corroborative of the other witnesses' testimony, notwithstanding that the witnesses had been sequestered. She noted that each witness described respondent as hostile, aggressive, demanding and unresponsive to reasonable requests for grades, progress reports, test scores, and student information. Further the ALJ found that the hearing exhibits corroborated the testimony about respondent's refusal to follow direct instruction, and her obscure and disjointed style of communication.

In evaluating respondent's credibility, the ALJ had the benefit of observing respondent during eleven hearing days and listening to five days of respondent's testimony. She found the testimony to be rich in *non sequitors* and repeatedly unresponsive to the questions asked by counsel and the directives that she issued to respondent. The ALJ also viewed as contraindicative to respondent's credibility her sudden production of files – two-thirds of the way through the OAL hearing – that would allegedly have proven that she had in fact properly completed the DRA assessments during the 2008-2009 school year. *See,* Respondent's Exhibits R-78, R-79 and R-80.

The Commissioner will not reject the ALJ's determinations concerning the 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. *S.D. v. Division of Medical Assistance and Health Services and Monmouth County Board of Social Services*, 349 *N.J. Super.* 480, 484 n.1 (App. Div. 2002). The Commissioner's review of the record reveals no such defects.

Further, the Commissioner accepts the ALJ's factual findings as amply supported by the record. Respondent's exceptions notwithstanding, the Commissioner finds that the ALJ's recitation of testimony is accurate and thorough, and that the ALJ measured conflicts, inconsistencies and potential biases in deciding which testimony to credit. In this regard, the Commissioner is unpersuaded by respondent's attempts to discredit witnesses by questioning their character.

As discussed *supra,* there was extensive testimony at the hearing depicting incidents of insubordination and unbecoming conduct that impacted both staff and students. It included 1) respondent's resistance to cooperating with her supervisors in formulating PIPs and her CAP, 2) respondent's refusal to utilize the various district software programs designed to record student information for multiple purposes – including information sharing by staff members and preparation of reports required by the State and other entities;[5] and 3) respondent's failure to ensure – by her own devices or with the offered assistance of peers and supervisors – that she properly executed all aspects of the DRA and other diagnostic tools that she was required to administer.

Some of the documentary evidence – including respondent's own memoranda and emails – supports the testimonial evidence concerning respondent's resistance to supervisory directives, refusals of assistance, and uncooperativeness with her peers. Other exhibits, such as the copies of the DRA files that were given to respondent's supervisors in 2008 and 2009, support the testimony of petitioner's representatives that respondent was not properly

[5] In the Commissioner's view, respondent's refusal to record the prior grades of her student, B.H., likely flowed from her failure to avail herself of the available information concerning the functions, procedures and purposes of the district's data-collecting software.

administering the DRA tests and was trying to hide the truth.[6] In summary, there are no grounds to reject the ALJ's credibility findings or factual findings.

In considering penalties, the adjudicator should take into account the nature and circumstances of the incidents underlying the charges, the respondent's prior record and present attitude, the effect of the identified conduct on students and staff, and the likelihood that the conduct would recur. *See, e.g., IMO Tenure Carl A. Hill, supra*, at 2. Thus, the ALJ addressed the effect of respondent's conduct on students:

> Some of the incidents described by respondent's fellow teachers occurred in the presence of the children. One class became afraid their teacher might be fired. Other children needed to be removed from respondent's classroom at the request of their parents. Additionally, it cannot be said with any certainty that the grades the children in respondent's class received for school year 2008–2009 were accurate. Nor can it be said that their DRA reading scores reflected their competence. This is unconscionable, particularly for students with IEP's whose goals and objectives must be met for them to progress with their peers. (Initial Decision at 108-09)

Similarly, the ALJ summarized respondent's effect on her colleagues and the implementation of educational objectives:

> [E]ach of the regular classroom teachers, the case managers, the social workers and the administrators reported having difficulty with respondent. Rather than act in a collegial manner with her colleagues, respondent forced them to work harder simply to best serve the needs of the children . . . . (Initial Decision at 109)

And the ALJ discussed respondent's attitude as it related to the likelihood that the conduct at issue would recur:

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[6] The ALJ did not – and the Commissioner cannot – accept respondent's exhibits R-78, R-79 and R-80 as support for her contention that she had completed the backup for the DRAs at the times they were due. Petitioner's exhibits, the testimony of petitioner's witnesses, and respondent's own Exhibit R-18b contradict that contention. Nor did respondent adequately explain why she never produced the DRA protocols and rubrics until her third day of testimony.

> Despite receiving orders and directives, being counseled and transferred, respondent showed no understanding that her behavior was not compatible with the mission of the public schools. She responded to the charges against her with uniform denials of personal responsibility and the transference of blame to others. (*Ibid.*)

In connection with these latter findings by the ALJ, the Commissioner adds his unease about respondent's dismissal of the concerns manifested in the testimony of the large number of petitioner's witnesses. Her responses included in some instances denials of the alleged behavior or suggestions that the behavior was inconsequential, and in other instances allegations that the behavior at issue was provoked or caused by others. In light of this failure to accept responsibility for any of the problems described herein, it cannot be reasonably predicted that respondent will significantly change her attitude or style. More specifically, the record offers no indication that respondent will improve her interpersonal relationships with fellow staff members, yield to the authority of her supervisors without continued resistance, or adhere to the district procedures and policies applicable to her work.

In view of the foregoing, the commissioner concurs with the ALJ that dismissal is appropriate.

Upon review of respondent's four exceptions, the Commissioner finds that they are without merit. The first exception – alleging that the ALJ did not sufficiently tie her credibility and factual findings to the record, and did not give proper weight to the evidence provided by respondent – is rejected. At the outset, there is no authority requiring that specific citations to transcripts accompany the ALJ's findings. Further, the Commissioner finds, after his own review of the record, that the ALJ's conclusions about credibility and her evaluation of the evidence as a whole are well grounded. Respondent's reiteration of her testimony – in pages 19 through 60 of her exceptions – provides no basis for different findings.

Respondent's second exception also challenges the ALJ's evaluation of the evidence and is rejected for the reasons stated above.

In her third exception, respondent contends that petitioner improperly failed to follow the procedures outlined in *N.J.S.A.* 18A:6-11 relating to charges of inefficiency. As the ALJ noted, petitioner did not charge respondent with inefficiency. Nor did the ALJ believe that it was necessary for petitioner to bring or prove inefficiency in this case. The Commissioner concurs.

There is no authority requiring a board of education to bring or prove charges of inefficiency where other grounds exist and are proven. Even assuming, arguendo, petitioner had prosecuted a charge of inefficiency, the Commissioner is free to decide the matter on other grounds. In this regard the Commissioner notes that *N.J.S.A.* 18A:6-10 sets forth the grounds for discipline of tenured employees in the disjunctive, i.e., "inefficiency, incapacity, unbecoming conduct or other just cause" (emphasis added).

Further, case law instructs that where tenured employees have been charged with both "inefficiency" and other grounds for discipline, the employees may be terminated or otherwise penalized in consequence of the alternate charges whether or not the inefficiency charge is sustained. See, e.g. *In the Matter of the Tenure Hearing of Carl A. Hill, School District of the Township of Irvington, Essex County,* State Board Decision No. 14-07 (October 17, 2007) ("Even assuming arguendo that some of the allegations relating to the appellant's performance of his duties could be characterized as inefficiency, we find that the Irvington Board has more than amply demonstrated the appellant's unbecoming conduct, and we conclude that such charges warrant the appellant's dismissal from his tenured employment."); *In the Matter of the Tenure Hearing of April Renee Bradley, School District of the City of Newark,*

Essex County, 1990 *S.L.D.* 790, aff'd as modified by the State Board of Education, 1991 *S.L.D.* 2521 (inefficiency charges dismissed but respondent terminated based upon charge of unbecoming conduct).

Here, as elaborated on above, the record amply establishes that respondent engaged in a continuing pattern of professional misconduct which included: ignoring or defying direct orders or suggestions of her supervisors; exhibiting anger, hostility and disrespectfulness in her communications with fellow teaching staff members, at times in the presence of students; and, in a number of instances, categorically refusing to perform the duties required by her position. As such, the Commissioner finds and concludes – as did the ALJ – that the District's charges of unbecoming conduct and other just cause have been amply established. Consequently, that one or more of the District's charges against respondent may be interpreted to sound in inefficiency is of no consequence in this matter. Accordingly, respondent's third exception is rejected.

Finally, respondent contends in her fourth exception that, in the event that the Commissioner upholds one or more of the charges, the doctrine of progressive discipline mitigates against imposition of the most stringent penalty – termination. However, there is no authority requiring the Commissioner to impose penalties based upon an employee's disciplinary record, *vel non.*

The one education decision upon which respondent relies, *In the Matter of the Tenure Hearing of Gilbert Alvarez, School District of the Township of Lakewood, Ocean County,* OAL Dkt. No. EDU 10067-09 (March 5, 2010) is not helpful. First, it acknowledges that the doctrine of progressive discipline can be set aside, even in cases where it would generally be used. Second, the penalty imposed by the ALJ was not adopted by the Commissioner. *In the*

Matter of the Tenure Hearing of Gilbert Alvarez, School District of the Township of Lakewood, Ocean County, Commissioner Decision No. 167-10R (June 3, 2010).

The Commissioner's analysis regarding the appropriate penalty in this case is set forth above, and respondent's fourth exception urging the imposition of a lesser penalty is rejected.

Accordingly, the Initial Decision is adopted as the final decision in this case, for the reasons set forth in the Initial Decision as modified herein. Petitioner's charges are upheld, and respondent is terminated from her employment in petitioner's district.

Further, this decision shall be forwarded to the State Board of Examiners for its consideration and possible action against respondent's teaching certificate.

IT IS SO ORDERED.[7]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/23/11

Date of Mailing: 5/23/11

[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 284-10
AGENCY DKT. NO. 7-1/10

IN THE MATTER OF TENURE HEARING OF JILL KUBICKI, SCHOOL DISTRICT OF THE TOWNSHIP OF LAWRENCE, MERCER COUNTY.

David W. Carroll, Esq., for petitioner Lawrence Township School District (Parker McCay, attorneys)

Jason E. Sokolowski, Esq., and **Richard A. Friedman**, Esq., for respondent Jill Kubicki (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Record Closed: November 23, 2010 Decided: January 7, 2011

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent Jill Kubicki is employed by petitioner, the Lawrence Township Board of Education (Board or BOE), as a special education teacher under tenure, pursuant to N.J.S.A. 18A:28-5. On October 16, 2009, tenure charges were filed with the Board by superintendent of schools Philip Meara, and served on respondent. Respondent filed no response. On January 7, 2010, the Board certified charges of insubordination,

failure to perform required duties, fabrication of records, prevarication, lack of professionalism and other just cause against respondent to the Commissioner pursuant to N.J.S.A. 18A:6-10 et seq. An answer was filed by respondent on January 28, 2010, and on January 29, 2010, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The hearing was held on May 7, 11 and 17, June 10, 15 and 29, August 19, and September 14, 20 and 21, 2010.[1] Additional documents were provided on October 8, 2010, as agreed between counsel. Briefs were submitted by petitioner and respondent on November 15, 2010, and reply briefs on November 23, 2010, at which time the record closed.

Respondent denies the charges, and alleges that they are false, that her actions were taken out of context, and that her conduct was not reflective of her capability as a school teacher.

FACTUAL DISCUSSION

Testimony for Petitioner

Jonathan Dauber was the upper school principal (grades five and six) at Lawrence Intermediate School (LIS), and knew respondent, a special education teacher who taught in the out-of-class resource room (OCR) at LIS, although he had never seen respondent performing her job.

September 4, 2007—First Day of School

Dauber had been principal at LIS for one year when this incident occurred. In the spring of the 2006–2007 school year, Kristine Deni told him that respondent was going to be reassigned to Lawrence Middle School (LMS) for the 2007–2008 school year.

[1] Hearing dates were offered in April and May, but counsel for respondent was not available on four of the six original proposed dates. Other dates were offered during the summer months, but were not acceptable due to pre-planned vacations of counsel, parties and witnesses.

Prior to the end of the 2006–2007 school year, he had a conversation with respondent about her going to LMS, and told her that if she had any questions she would need to speak with Andrew Zuckerman, the principal at LMS. Dauber said it was clear from the conversation that respondent knew about the transfer to LMS because she was asking questions about that school. He had no further communications with her about the transfer and did not know if she had ever spoken with Zuckerman.

On September 4, 2007, the first day of school for reporting faculty members and staff for the 2007–2008 school year, Dauber returned to LIS at approximately 9:30 a.m. and found respondent at LIS. He told her she was supposed to be at LMS, and that there was no teaching assignment for her at LIS for that school year. Respondent said no one had informed her of that, and then she demanded that Deni come to LIS. Dauber told her that her assignment was at LMS, but respondent would not leave, and remained in his office. Respondent was upset, and refused to go anywhere until someone came from the Central Office. She was verbally critical of him, and continued to say she was not leaving, and that as principal he should be doing something.

Rebecca Gold, the union representative, was contacted, and said she would come and address the situation. Gold, Deni and Barbara Levine (the union president) met in Dauber's office while he went to a faculty meeting. He did not see respondent at LIS again. He said that this behavior of respondent was extremely disruptive to him, to his staff and to his secretaries on their first day of school, when they had meetings to attend and things to do.

Andrew Zuckerman has been principal of LMS for the past five years. Prior to the first day of the 2007–2008 school year, he knew that respondent had been assigned to LMS because the matter had been discussed in the spring of 2007. A new in-school suspension and study skills program (ISS) was opening, and they thought respondent could do the job of overseeing the ISS room. Board action approved the transfer of respondent to LMS.

Respondent's Assignment

At the end of May/beginning of June 2007, Zuckerman sent respondent an e-mail, and they exchanged e-mails and voice-mail messages. His message was that he was looking forward to working with her and that he wanted to talk with her about her assignment. He asked her to call him, but he did not include information on the new assignment. They had no further contact until they casually met at an end-of-school-year party, and had a conversation about working together. They discussed her position, but not the specifics, and he reiterated that he just wanted to have the opportunity to speak with her about the program. She appeared to have knowledge of the transfer. He was very positive in speaking about their working together during the coming school year. Zuckerman believed his assistant principal, Al Gilson, had provided a description of the program to respondent. Zuckerman and respondent did not speak over the summer.

About two weeks before the start of the school year, Zuckerman sent a letter to his staff, including respondent, about the upcoming term. Respondent's name was included in the letter as a new staff member. Respondent later told Zuckerman that she had received the letter, but that she did not look at it before the start of the 2007–2008 school year.

On September 4, 2007, respondent was not present at the beginning of Zuckerman's staff meeting, and he did not remember whether she showed up at all that day. He remembered being told by Gold that respondent would be joining LMS at some point that day. For the entire school year, respondent remained at LMS.

Professional Communications

Zuckerman described his communications with respondent as challenging, and said that he had received "mixed messages" from her. He had to repeat or reiterate what he had said so she would understand.

Zuckerman's staff came to him stating they were frustrated in their interactions with respondent. Ms. Ammirata, in particular, relayed her difficulties with respondent to him. She and respondent shared a room, and respondent would not let Ammirata stay in the room when both had to use it. Some of the child study team (CST) members had difficulty with respondent, and so did Gilson. Zuckerman described how it would be necessary, on occasion, for a teacher to have to get a computer for a student from another room. Respondent said this was not reasonable, so Gilson provided her with a cabinet and showed her how the computer would fit into it.

Respondent was supposed to oversee the ISS program, a program that had worked well in the high school, and that was designed to provide students who received in-school suspensions with study skills and personal attention. Until there were students actually assigned to the ISS program, respondent was supposed to be developing the program. She had meetings with the assistant principal about what her role would be. Dauber thought she could do this work because this was one of her areas of strength, and also because he thought she had the ability to work in small groups. He knew some written support was provided to her about the ISS program and her other assignment in language arts.

This was not a position calling for a highly qualified teacher. After she was assigned to the resource room, respondent had access to individual students' Individual Education Plans (IEP's) as students were assigned to the ISS during the course of the school year. As students went through the program, it would get modified and fine-tuned as teachers provided the work and the students completed their tasks. No lesson plan was required for the ISS program, although one was required for the one language arts class respondent was assigned to. The assistant principal provided respondent with a written job description for the ISS program, as well as some other descriptions of what the program was.

Respondent asked if the number of her students was up to code. She also asked about air quality in her room. The BOE brought in Occupational Safety and Health Administration inspectors and maintenance to try to address respondent's medical concerns about the room. Her original room assignment was switched.

Zuckerman and the assistant principal wrote respondent's evaluation for the school year and commended her for her performance in the classroom. Respondent was asked to sign the evaluation on multiple occasions, but she chose not to. Zuckerman would have recommended renewing her contract for the following year.

He thought that respondent had discussions with the Board because she was not happy with her placement in LMS, and expressed dissatisfaction with her position throughout the school year. She said that she had never done this work before and that she was not appropriate for the program. As to specific materials provided to her, other teachers and supervisors provided respondent with the language arts curriculum and other materials for the position.

PIP

Respondent's Professional Improvement Plan (PIP) should have been provided by her when she transferred to LMS in September 2007, but she did not provide one. The assistant principal created one for her, and was working on it with her. The purpose of the PIP was to work on improving professional skills during the school year.

Zuckerman did not think respondent's behavior for that school year was serious enough to bring tenure charges, although it concerned him. For the following school year, respondent was transferred to Ben Franklin School (BFS) in a position also shared with Lawrence Elementary School (LES).

Kristine Deni, director of Student Services for the Lawrence Township Public Schools, had been with the Township since July 2006. Her position required her to implement the special education, guidance, medical, and drug and alcohol programs. She had 130 staff district-wide, including child study team staff and interpreters, and also supervised forty-seven out-of-district placements. She had two supervisors who helped her: Jay Billy for grades pre-K to 5, and Erin Servillo for grades 6–12.

Deni had worked for the Mercer County Special Services School District for twenty-eight years as an assistant superintendent for curriculum and instruction. Previously she was director of special education and an assistant supervisor. She had certificates for teacher of the handicapped, early childhood, supervisor, principal, and teacher of K–3.

Transfer to LMS

During school year 2006–2007, Deni had some contact with respondent in school when she dropped in occasionally. Respondent said she was unhappy at LIS, cried, and made comments about the principal, saying that she did not like his leadership style. This went on over time, and happened again when respondent's room had to be changed. Respondent spoke for some time about her displeasure at her assignment.

Deni had spoken with Zuckerman about the ISS program he wished to set up at LMS. As an in-school suspension program, the purpose was for students to not be removed from the school setting, but to maintain the school situation with in-school supervisors so the students could work on homework, meet with teachers, etc. They needed a certified staff member to supervise, and respondent seemed to fit the bill.

Deni had concurred with Zuckerman to try this program out with respondent since she had been unhappy with her previous principal, and this provided a chance for her to work with someone who wanted her. Respondent could put her own stamp on the program. Respondent said she was open to the change, but had questions about the program. Deni told her to call and speak with Zuckerman about the program and she thought respondent would do so. Deni met with Zuckerman about the ISS program during the summer, but she had no conversations with respondent, nor did she make any effort to contact her, nor did she provide any program materials to respondent.

The district reviewed staffing each year. They looked at the resources available and tried to come to collaborative decisions. Zuckerman wanted an ISS program and requested it from the superintendent. Zuckerman got permission to go forward, and needed a full-time instructor. He asked for respondent, but Deni did not remember why

he requested her. She thought that he may have been at LIS for a while and that Zuckerman knew her. Respondent was qualified for the position to supervise the ISS program with her certification, as a certified staff member had to be present for the supervision of students excluded from their classes. Respondent also had one pull-out language arts class assigned to her.

Respondent was a ten-month employee. Deni did not send out notice of the transfers or the BOE meeting, but the union representative provided it to respondent at the September 4 meeting. Deni said that Zuckerman had sent out a welcome letter to respondent before the school year started.

ISS/BIP

A BIP is a behavior intervention plan and is part of an IEP that may or may not be relevant to a classified student. The State provided a rubric for how to provide a BIP. The staff targeted behavior and supported positive behavior. The idea was to reinforce the students to use more socially acceptable behavior to get the desired result. A special education BIP was not the same as a BIP adapted to general education. A BIP in an IEP rose to a different level. The BIP form was presented to the teacher and was really a form of behavioral management.

The whole idea of the ISS program was to work with students on their BIP's. Not much good came from keeping students out of school if they were suspended. The in-school suspension was designed to improve their behavior. When first assigned to LMS, respondent had no students, because none had yet been assigned to in-school suspension. Deni received e-mails from respondent directed to her and Gold about the program. Deni's response was to consult with Gold and Zuckerman, and they decided that Gold would resolve respondent's personal questions, and Zuckerman would provide a program description.

When Deni visited LMS, she referred respondent to her principal and personnel director for separate issues that respondent had raised during the school year. She

also referred respondent to Gilson, the assistant principal, who had a lot of contact with her.

September 4, 2007—First Day of School

September 4, 2007, was the first day of school for teachers. That day was a combination of professional development, meetings and time to work in the classrooms. In the morning Deni received a telephone call from Dauber, who said that respondent had shown up at his school and refused to go to LMS, where she had been assigned for that school year. He asked Deni to come to a meeting. Union representatives Rebecca Gold and Barbara Levine were there. They met in Dauber's office, although he was not present.

Deni tried to persuade respondent to go where she had been assigned. Respondent said she never received notice of the change and refused to go. The meeting lasted about forty-five minutes to an hour. Deni said she had had previous conversations with respondent about the move. Also, there had been Board action, so respondent should have been aware of the change. As to the letter sent to respondent advising her of the change, respondent said she did not check her mail. Deni reminded respondent that her assignment was to LMS. Respondent said she was not qualified, at which point the union representatives called a halt to the conversation. After the union representatives spoke alone with respondent, respondent said she would go to LMS, and she subsequently reported there.

Deni characterized the events of that day as highly disruptive, as she was trying to deal with a lot of issues that day, including new staff, students, etc. Also, respondent had missed her first staff meeting. Deni thought respondent was not being truthful about having knowledge of the transfer, as she had spoken with respondent during the 2006–2007 school year about this. Deni considered respondent to be insubordinate to her, and had difficulty understanding why respondent would act this way.

Transfer to LES and BFS

Deni explained that students may be in two locations, ICS or OCR. ICS is in-class supplemental instruction and OCR is out-of-class resources. Children with an IEP could have either or both depending on the subject. Deni explained to respondent that she would be doing pull-out replacement at the resource center. This meant that when a student with an IEP had a pull-out, this had to occur at the same time as the general education instructor was teaching that subject. The special education teacher followed the IEP and collaborated with the general education instructor.

Deni consulted with the elementary school supervisor, Jay Billy, and the two principals at BFS and LES, because there was an increased need in these two elementary schools for out-of-class replacement services for students with IEP's and special education. Respondent was a teacher who was qualified to do it. She had a comfort level with younger children and had done pull-out replacement for a number of years at LIS.

Respondent had said that working at LMS made her uncomfortable. It was a recurring theme whenever she and respondent met during the previous year. Respondent would enter a conversation just to tell Deni she was uncomfortable with her assignment at LMS. Respondent also sent many e-mails saying how uncomfortable she was at LMS, even though Gilson and Zuckerman signed respondent's evaluation on June 12, 2008, and gave her a positive evaluation. After collaborating with the principals and Billy, the decision was made to transfer respondent from LMS to BFS and LES, both elementary schools with grades K–3, for the following school year. LES had approximately 206 students and BFS had approximately 400 students.

Respondent was told in person by Deni, in the presence of Zuckerman, in the late spring of 2008 that she was being transferred to BFS and LES. Respondent appeared to understand what Deni was telling her, namely, that her home school would be LES. Respondent was told that they were getting the rosters and the caseloads together and explained the new position. Deni did not recall what respondent's reaction

was to her new assignment. Deni gave nothing to respondent in writing about the transfer because the personnel department was handling it.

For school year 2008–2009, respondent was transferred to BFS and LES, sharing her time equally between LES, where Judy McLaughlin was the principal, and BFS, where William Buss was the principal. Respondent's primary assignment was LES. In order to effectuate the transfer, Board action was required and was taken. Notice was given to respondent of the transfer by Deni herself. Respondent reported the first day of the 2008–2009 school year without incident.

Other staff members had also traveled between buildings; it depended on student needs, but that school year no other special education teachers had to travel.

There were several reasons for the transfer. First, it depended on where a teacher was needed, and they needed a pull-out teacher at LES and BFS. Second, respondent had expressed discontent throughout the school year, and this was a return to the elementary school for her. Respondent had had problems with Servillo and had spoken to Zuckerman. Third, it had been a difficult year for respondent, and this was an opportunity for her to start fresh.

Prior to the 2008–2009 school year, Deni had communications with respondent, who needed further clarification about her position. Deni wrote her a note and restated her assignments and told respondent to contact her two principals, McLaughlin and Buss. McLaughlin was the principal at respondent's home school—the main school she would report to. Supervision of special education teachers was shared among four people: the two principals (McLaughlin and Buss), Jay Billy and Deni.

PIP

In September 2008, the first thing Deni and the other supervisors did was work on respondent's PIP. All certified staff received one. The implication of the PIP was that everyone needed to improve. A PIP could remain the same if the teacher remained in the same assignment, but this was not the case with respondent. To develop a PIP

with respondent, Deni had a meeting at LES on September 26, 2008, with Billy and respondent. They were trying to write a PIP to reflect respondent's new assignment, but they did not get far. Respondent wanted to end the meeting, and showed Deni a document she had submitted to LMS as her PIP, but it was not appropriate for respondent's new position. They reached a standoff. Respondent was upset and agitated. Deni told respondent they would see if they could use her old PIP and embed it in the new one.

Respondent said that the software and special services technologies tools were intermittent and were causing her problems. Respondent was directed by Deni and Billy to go to the help desk, as the district provided personal laptops and computers in the library. It seemed that respondent had difficulty understanding the thread of her materials.

Respondent was extremely uncooperative in working on the PIP. Deni said that she would process a draft, and that they could then meet again with respondent and her union representative. Memos were exchanged between Deni and respondent after the first meeting on September 10. Deni prepared a draft of a new PIP. They needed to be very clear with respondent about communications. Goal III of the PIP, improvement of professional communications, was necessitated by previous communications difficulties with respondent that had been noticed by others.

Deni set the goals as follows:

Goal I:	gain understanding of the elementary curricula and core curriculum standards
Goal II:	use assessment data to inform different strategies
Goal III:	improve professional communications

Special education teachers in the Township had to be collaborative. This meant that educational professionals needed to seek out others and to offer each other professional guidance and assistance. Respondent was not mindful of how she should

conduct herself. There was an expectation that respondent would cooperate, but her responses were hard to follow. Respondent rebuffed offers of help. She was brusque with case managers and coworkers, and there had been incidents from the beginning of September.

A second meeting about the PIP was held with respondent and the union representative on October 10, 2008, but was very short. Respondent again said that her access to the Contour Program was intermittent, and complained about the technology. Deni said they gave her guidance about the technology. The district used a Web Help Desk and had faculty services available. Billy also discussed this with respondent.

A third meeting was held on October 29, 2008, to finalize respondent's PIP. Rebecca Young, the union representative, was also present. Respondent disagreed with the draft PIP. She would not stay on topic and would not go forward. Deni followed up with a memo, something she had never had to do before, because the meeting was not on topic.

Respondent would often request that whatever had been discussed in a face-to-face meeting be placed in writing. Deni knew that respondent communicated with Billy and her principals about the PIP to improve respondent's performance. Deni said the language of respondent's reply to the proposed PIP was convoluted and difficult to understand.

DRA Background Information

The Developmental Reading Assessment (DRA) is a test given three times per year by the teacher that measures fluency and comprehension. Data are collected from all students and that data goes into the language arts folio. The general education teachers gave the test to regular education students; special education teachers gave the test to their students. The purpose of the assessment was to see where students were functioning. Scores were posted in October, January and April, and were kept in a databank district-wide.

The IEP defined the special elements of performance and set out the program for students. Seven students were assigned to respondent in her resource room over the school year. She could be teaching alone or in groups and was considered highly qualified for federal statutory purposes. The PLAAFP (present level of academic achievement and functional performance) drove the IEP: what did the student know?; what were the needs?; how was the student to go forward?

The child study team (CST) assessments were benchmarks of social skills, behavior, and academic performance. The CST relied on what teachers said to prepare the goals for the year to come. The IEP required progress reports for parent conferences and report cards. All students received a grade, but the progress report was important for determining objectives, goals, and progress. At the end of the year a new PLAAFP was written. The IEP team was even more specific than the CST: it was composed of the case manager, teachers, other therapists, and parents.

Two training sessions were conducted in 2008–2009, including one at BFS, and a PowerPoint presentation was given to faculty members by Pam Hernandez. Other training sessions were conducted by Deni in October and December. Regular and special education teachers were expected to share information. Security of records was important. Deni worked with principals to find out where to place them. Respondent had a locked file cabinet available to her.

DRA's

At the faculty meeting at LES on September 3, 2008, the calendar for the school year was provided to the teachers, including the DRA deadlines of October 31, 2008, and January 28 and April 3, 2009. The DRA had been in the district before, but the updated DRA2 was new to the district that year.[2] An additional copy of the assessments and assessment calendar had been given to respondent. The calendar was made by the Office of Curriculum and Instruction and had chronic reminders to the

[2] For convenience, the DRA and DRA2 are interchangeably referred to as the DRA.

faculty about the schedule and due dates. Additional e-mails were sent to Buss and McLaughlin concerning the DRA.

A teacher of the handicapped would know about the DRA. Each test took approximately twelve minutes to complete, and work on them was done one-on-one with the students. Although the DRA2 had some nuance changes, it was still a relatively easy test to give. It was important to get pre- and post-testing for the students, and also for the IEP, as students could improve or regress. At PIP meetings, the DRA was discussed. There were videos and training. The DRA was not tricky. Deni received complaints about the DRA from none of her teachers except the respondent.

Respondent had not given the DRA by the end of October. She would not view the video. Billy arranged for Hayes, a language arts supervisor, to demonstrate a sample DRA test for respondent in late October. Billy and Buss asked respondent to get this done. Buss extended the deadline for respondent to November 19 for her DRA's, advising her by e-mail, which he delivered to her. There were no DRA scores from respondent by November 19, despite the extension. Respondent then provided scores for four students, but provided only one score for three of the students when there should have been two scores for each student, one for fluency and one for comprehension.

A meeting was scheduled at BFS on November 26, 2008, which was attended by the union representative, Buss, Billy, Deni and respondent. Respondent provided partial DRA scores but had incomplete data to back them up. At the meeting, respondent said she provided the scores. However, she had not done what was required of the teachers and provided the two required scores.

Respondent said she had discharged her duties, but that she did not know what the protocols were or what the score sheet was. Respondent was asked to get her data and she said it was in her car. Deni was concerned that the data was in respondent's car, as these were confidential student records and were not to be transported around in the trunk of a car. Respondent left speaking loudly. She returned with a folder.

Respondent said she put the records in the car because it was a safe place. She said she did not have a file cabinet, but Deni knew there were cabinets accessible to respondent.

The meeting was not pleasant. Buss spoke in an emphatic tone to respondent about her responsibilities. Deni believed that respondent may have fabricated the test scores. When the two looked at the protocols, they did not understand how someone could come up with the scores that respondent did. The data were "spotty." Sections were not completed. They took possession of the protocols, and then asked Hayes if they were complete and Hayes said no. Although respondent's scores were incomplete, they had to use what they were given.

Respondent was not disciplined with respect to the scores. Instead, she was given feedback that the scores were not complete, with the expectation was that she would improve her compliance. (Her second and third DRA's later in the year were also not completed.)

The scoring sheets of P-15 contained incomplete protocols. Other scoring sheets were incomplete and inadequate. A sheet for student V.G.B. said he was an independent reader, but his protocol was not complete. Deni could not find any assessments that were completed. It looked to her as if respondent were trying to figure out a level of performance. She concluded that the scores must have been made up because no backup data was present.

At the meeting, respondent was agitated and hostile. She took an unprofessional tone and was huffing and puffing, stating that the other parties present were out of line. Deni said that all they wanted were the scores for the children. Deni talked to respondent about her tone and her failure to deliver the scores. The purpose of the conference was to discuss the students. They also discussed the security of the students' files. Respondent was told to keep them secure. After the November 26 meeting, Deni sent a memo as a memorialization to respondent.

Buss explained that a parent had called and was in for a conference with him. The parent stated that the respondent had complained that she did not have the tools she needed and that the administration was not supporting her.

On December 4 Deni had a meeting with respondent, the union representative, Buss and Billy concerning the DRA's. Billy did most of the direct supervision of respondent after that date, although he and Deni met frequently. McLaughlin did the evaluation, and they decided that they needed to institute a formal corrective action plan (CAP).

DRA Follow Up

Apparently, all that counted with respondent were written communications. In person she was disruptive and her behavior was escalating. Her supervisors felt she was not adhering to consistent comportment as a teacher.

Also, Deni wanted to be clear about staff members' responsibilities, and tried to meet with respondent on March 17. Respondent would not participate in the meeting, and said she needed her New Jersey Education Association (NJEA) representative present. She then took off down the hall. Children were present when this happened.

Deni was trying to get respondent to work with the administration and needed some acknowledgment from respondent that she would. Deni offered respondent time to observe successful staff members on four occasions. Deni met with the principals two times a month to see if they could get respondent to conform to school standards. Respondent was directed to use a lesson plan format weekly and to present her portfolio on a weekly basis. Respondent was told to turn in her progress notes and to get things in by their due dates. On March 18, an e-mail was sent to respondent about her CAP. Respondent never contacted the principals and never followed up on any of the recommendations for her to follow.

Other Incidents

There were many incidents involving respondent. Deni became aware of an incident in April where respondent refused to accept an IEP from a case manager and stated that the student had been "pumped and dumped." Her files were missing progress notes and she frequently ran into the case manager's offices.

There was an incident in LES about recording a grade. Student B.H., in the general education class, was assigned to respondent after the first two marking periods. The student's grades needed to be re-entered on the computer system. Respondent refused to insert the grades and said it was falsifying records. All she had to do was insert the grades the student had previously received from the previous teacher. Respondent's principal met with her and told her to insert the record and register the existing grades, but respondent refused to do it.

Respondent declined to follow her principal's instructions even though it was just a cumulative reporting of the grade. Again, numerous e-mails followed, one from Deni to respondent telling her to work with her principal. However, respondent did not do it. Respondent was then ordered to transfer the grades, and she still did not do that. The teacher had to hold the parent/teacher conference without the information. In Deni's opinion, this was insubordination. There was no excuse for respondent to refuse to transfer a grade onto the student's grading chart when the grade had previously been received by that student.

McLaughlin sent a memo to respondent telling her that she was insubordinate. Respondent's response to every request was, "Are you directing me?" Because of this, respondent needed everything to be in writing.

Deni became aware of respondent's complaint with the Department of Education (DOE) wherein she alleged she was being told to falsify student records. Two investigators conducted an inquiry and concluded that there was no directive made to respondent to falsify records and that the allegation was unsubstantiated. There were also phantom memos reported to be distributed included in a packet of information sent

by respondent. The packet was sent to the BOE, respondent's supervisors, Deni and other administrators. Although the memos indicated that Deni had been copied on some of these memos, none of them had been received by her. In fact, none of her other colleagues mentioned having received this information, nor had they received any e-mails with this information. Deni considered it unprofessional for respondent to send these e-mails to anyone, representing that they had been sent and received. Respondent was not being coerced to release her password or anything like that.

File Cabinet

Deni had purchased locking file cabinets and had them delivered to each school. A locked file cabinet was there at the start of the 2008–2009 school year and was in the resource rooms at both BFS and LES. Deni also became aware that Buss delivered a second file cabinet to respondent. On September 4, there was a file cabinet with keys waiting for use at BFS. Billy witnessed this and reported it to Deni. Respondent said she did not have a key and that it was lost, so Billy brought her a new cabinet with a key in December 2008. Billy said the keys had been on the cabinet on September 4 and did not remember when respondent first said she did not have a key.

Corrective Action Plan

A corrective action plan (CAP) was done to improve teaching performance. In March 2009 Deni was assigned to do respondent's plan. Before she wrote it up, Deni asked respondent for input. Deni did not meet with respondent to discuss the evaluation and plan, as respondent was out a great deal and her attendance was erratic. After the CAP was written and given to respondent, she asked for ten days to respond, which she never did. Deni recommended that respondent's increment be withheld for her failure to cooperate.

Board Action

The transfers of respondent from LIS to LMS and the following year from LMS to BFS and LES had been approved by the BOE. At some point a recommendation to

withhold respondent's increment was made and the BOE took action. From the BOE meeting in April 2009 to the end of the year, more concerns became apparent with respondent. She had failed to complete the progress notes. She did not participate in parent conferences and failed to prepare her substitute teachers in her room. She continued to defy directions and continued to fail. She did not address the CAP that had been provided to her.

Meeting of June 16, 2009

Deni received a telephone call from McLaughlin. Some grades were missing for M.R., a student on respondent's roster. Respondent said she had entered them and refused to re-enter them. Deni went to LES and asked where respondent was and where the substitute was. Respondent had gone to her classroom and told the substitute to go away. Respondent then erased the board that the substitute was working on. Deni located the substitute in the school and brought her to respondent's classroom. She told respondent to come with her and to bring her computer, and that the substitute would be teaching.

Philip Meara, the superintendent, had arrived. Deni told respondent that they needed the grades for her students. Respondent had her computer with her and seemed to log on and log off. She also shielded her computer and refused to put it on a desk.

Deni told respondent to use the desk computer, but respondent refused. Deni called her back to the table and noticed that something was on the screen. Respondent refused to work on the grades. Deni said, "Let us get the data," because they needed the information. The superintendent backed Deni up. The union representative (Young) and McLaughlin went to respondent's room with her to get the data. Respondent came back with some folders and data, but it appeared to not be enough information to enter the grades. At that point Meara relieved respondent of her teacher duties and told respondent to go home and get the data together. At that time they thought the only grade missing on the computer was M.R.'s. Respondent went home and brought back information on other students. Respondent said she had records "in

various locations." The records respondent provided were not sufficient to determine a grade for M.R. or to ascertain how the other students had received their grades. A memo was prepared to respondent memorializing everything that had happened.

Deni checked with the technical department to see if there was any support for the grades in the system but there was none. Deni's concern was that respondent had displayed a total lack of cooperation, even though she and others had tried to help her; that respondent showed a lack of intention to resolve the issue; that respondent had directly refused when the superintendent asked her to resolve the issue; and that respondent's folders did not show how the other students' grades were arrived at. This caused Deni extreme concern because of the previous experience with the DRA reading protocols.

There were just a few days left in the school year so the superintendent placed respondent on administrative leave. McLaughlin later followed up, but never received any response from respondent.

After discussion, the superintendent decided to bring tenure charges to the BOE and Deni supported this position. The reasons expressed were because of the issues of insubordination; refusal to comply with administrative directives; refusal to meet with supervisors and administrators as directed; refusal to participate as a team member; refusal to follow the IEP's and the goals and objectives; refusal to enter the grades; refusal to follow the corrective action plan; and failure to provide adequate lesson plans, substitute plans and progress notes for the students. And while this was happening, respondent was maintaining a constant stream of hostile and unprofessional conduct by being inappropriate in front of the parents who contacted Deni about their concerns. Respondent had also been inappropriate in an IEP meeting and refused to cooperate.

The superintendent's decision to recommend tenure charges was not based solely on the incident of June 16. It was based on a compilation of events occurring over time.

The reason for the administrative leave on June 16 was because respondent said she had the data in various places, including her home, so the superintendent allowed her time to gather the data and to call the principal to enter the grades. The administrative leave was also because many documents for other students were missing. Deni was called upon to complete the grades for student M.R., and they needed his grades and his progress notes and objectives. Respondent said she had entered the grades, but refused to do it again. Deni asked for the technical department to go back to check on the fourth-marking-period grades and noticed that some grades had been entered.

All grades were ultimately entered, but respondent never completed the progress reports. The administration was able to meet the deadline and decided to let stand the grades that respondent had entered for the children.

Pamela Hernandez, a learning disabilities teacher consultant, worked with service providers, teachers and parents as a case manager to ensure that students' IEP's were being met. She knew respondent during the 2008–2009 school year as the teacher of some of her students at BFS. At the beginning of the school year, Hernandez sent a resource room schedule to all the classroom teachers and therapists to advise them of important events and dates during the school year.

Professional Behavior

During the first week of school, Hernandez tried to meet with respondent, but respondent would not work outside of school hours. It was important for the respondent, as resource room teacher, to meet with her students as soon as possible to commence teaching. It appeared that respondent had not yet met with these students because she wanted to know about the medical issues for each child before she would start educating him or her. This information was available from the school nurse, and was also available on PowerSchool, a computer program that the entire school, including staff, had access to. This program included information on things like medical needs, IEP's, restraining orders, special pickups after school, etc. She did not know if

respondent had access to PowerSchool, but if she did not, she just had to go to Web Help to get access. Additionally, the school's secretary could give her that information.

Respondent sent Hernandez e-mails that were confusing, as respondent said she did not have the proper assessment tools. Hernandez felt that respondent had more than sufficient information to begin working as a teacher, and that respondent would have been advised of any serious medical issues affecting her assigned children. She told respondent that the children needed to see their teacher as of the first day of school. It was important for them, but respondent was not pulling the children from their classroom to her resource room. Hernandez did not know if respondent had access to PowerSchool at the beginning of the school year, but respondent did not ask. Nor did respondent ask about WebTrack, another program which was only for students with IEP's and had limited access. When Hernandez went to the Web Help Desk, the technician told her that respondent had access after the first marking period in November or December.

DRA's

With regard to the DRA's, which were given three times per year (October, January and April), the staff was advised frequently by e-mails and memos that the first DRA scores were due at the end of October. When Hernandez asked respondent to turn in her scores, it became adversarial. Hernandez received the scores from the respondent three weeks late, but became concerned because they were incomplete. Respondent said she was not trained in administering the DRA, although the supervisor of language arts had offered to show her how to give the test. The purpose of the DRA was to assess oral fluency and comprehension, and to make sure they were "in sync." One score without the other was meaningless.

When Hernandez asked respondent about the scores, respondent seemed angry to talk about it. When respondent provided scores, she did not include the protocols that back up the scoring. Requests were made to respondent for the protocols, but she never produced them. Hernandez discussed this with other staff members, including

Elizabeth Seipp, a second-grade general education teacher at BFS, Buss, and Hayes. As far as she knew, the protocols were never produced.

Hernandez was aware that respondent said she gave an envelope with the protocols to Seipp, but Seipp said she did not get them. Hernandez offered to help respondent, but respondent's response was muttering and angry. Hernandez felt she could not talk to respondent because the conversation became so tangential. She could not get a word in edgewise. Respondent would turn her back.

On one occasion, Hernandez tried to speak with respondent about the DRA's. Respondent refused. On another occasion, when respondent needed a PLAAFP, Hernandez tried to tell her how to access it, but respondent just shut her down.

Hernandez was extremely concerned about the DRA because, although respondent had provided scores, they could not be interpreted because of the lack of the protocols. They needed to know fluency and comprehension, and needed to keep a balance between the two, because it was important for more advanced learning in the fourth grade. The DRA score was used in the student's annual review of his IEP and was relevant in assessing progress. Regardless of whether the protocols were provided, the general education teacher may have used the scores provided by respondent.

The perception Hernandez had was that respondent was not a team player. Respondent could be complimentary, but when dealing with teaching and the school, her interactions were unprofessional. Other staff also complained. One teacher, Ms. Vegas, who was a team player and shared space with respondent, felt it was difficult and uncomfortable. Eventually, respondent was moved to another room.

Professional Communications

Ms. Livecchi told Hernandez that she had an upsetting encounter with respondent. She had gone into respondent's classroom to do something, and greeted

one of her students by saying, "Hi." Respondent told Livecchi never to do that again. Hernandez noted that Livecchi was visibly shaken after her encounter with respondent.

Hernandez no longer communicated directly with respondent after a while, but rather by e-mail or by leaving a memo in her mailbox. She and others found that respondent sometimes would not open her e-mails, so after that they printed the e-mails out and put them in respondent's mailbox.

One particular matter involved T., a student with special needs in respondent's OCR. His mother reported that T. was unhappy and fearful in respondent's class, and became visibly upset with emotional effects, such as not wanting to go to school. After an IEP meeting, it was decided that he should be removed from respondent's class and kept in his general education class with in-class support. Another student also had a problem with respondent, reporting that respondent was mean to him and yelled a lot.

Substitutes

Other problems related to substitutes for respondent's class. Teachers were supposed to have substitute plans, but respondent either did not leave a plan for the substitute or the plan she left was incomprehensible. As a result, the substitutes had problems filling in for her class. There was no prescribed form for the substitute's plan; the teacher made it up as long as it could be understood. The only substitute plans of the respondent that Hernandez saw were the ones the substitutes showed her, and each time she saw one, she could not understand it.

Respondent also complained that she did not like being in two schools (although BFS is only one or two miles away from LES); that it was difficult to cart her things around; that her badge did not work, etc.,

Elizabeth Seipp, a second-grade general education teacher at BFS with twelve years' experience, worked with special services, OCR, etc. During the 2008–2009

school year she had four students who worked with respondent in the classroom next door during their OCR.

DRA's

The DRA was a reading assessment given three times per year which was used to assess the students' reading and progress. The teachers had brief in-service training, and there was a video for the teachers to watch. The DRA was scripted for the teacher, who only had to read and follow the basic instructions to perform the test. Three or four tests were done per day, as the students got tested. It became routine. Seipp tested the twenty-four students in her general education class, and respondent was supposed to test her special education students in her language arts and reading class. It was Seipp's understanding that she would receive all the students' scores (including the ones from respondent) and put them on her spreadsheet.

Seipp's first interaction with respondent was when she asked respondent for the scores. The deadline for the first set of tests was in the fall. Seipp was receiving e-mail reminders from the administration that the scores were due. She kept asking respondent, "Do you have the scores?" Respondent said she had put them in Seipp's mailbox, but Seipp never saw them there. Seipp asked for the protocols because she filed them in the students' portfolios. She sent several e-mails to respondent and said she needed the scores, but she never received them from respondent.

Professional Communications

Seipp and respondent had words about the DRA scores. Seipp stuck her head out of the classroom at dismissal time, and asked about the scores. Respondent said it was Seipp's fault, that she had given her the scores. So Seipp told respondent, "You better do your job!" Seipp even asked if the grades could be sent without the protocols. Seipp never saw the protocols. Although respondent said she put them in a sealed envelope and gave them to Seipp, they were never received by her. E-mails continued to go back and forth about the DRA's, but after November 25, Seipp had no further involvement with the respondent's DRA testing.

Professional Communications

Seipp observed respondent in conversation with the parents of K.C., a classified student. The parents seemed confused by a "mystery book" being used by respondent to teach the child language arts. Seipp did not think it was tied into the curriculum and could not figure out which skills were being used in this project.

Seipp characterized respondent's communication as confusing and frustrating, as respondent often was not direct or was off topic. When Seipp asked respondent about the DRA, respondent's answers were not specific. Seipp had the feeling that respondent was not being responsive. When Seipp asked again about the DRA, she received some numbers, but they were not complete. She asked respondent for copies for her files, but never received them.

Erin Kabo, a school social worker at LES and another school, was the case manager (for classified students) on the CST.

Professional Communications

During the 2008–2009 school year, Kabo had one student assigned to respondent's class. A classified student, M.R., had been in a self-contained classroom at the beginning of the school year, but a change had been made at his IEP meeting during the year because he needed more reading help and supplementary instruction. He was placed in the resource room with respondent.

Kabo went to see respondent about this in January 2009, and respondent said she was not available. Kabo was never able to speak with respondent, so Kabo put the student's IEP in respondent's mailbox, but it was returned to her unopened. Kabo had a conversation with respondent, as respondent wondered why M.R. was going into her classroom. Kabo attempted to answer, but respondent would not let her. Respondent called M.R. a "pump and dump." Kabo e-mailed her supervisor about this. E-mails were sent to respondent to find dates and times for a meeting, but she did not respond.

The meeting was never held. M.R.'s parent decided not to come for a meeting because respondent was out and not available.

Respondent did not say that she did not have a locked file cabinet, but Kabo assumed that was why respondent gave her the IEP back. Two days later respondent walked into Kabo's office, and they finally had a conversation about M.R. Kabo did not remember respondent showing her on the computer that she had no access to the Contour Program, so respondent could have had access to M.R.'s IEP.

Kabo did not remember speaking with respondent about the Wilson program (a program that blends words and sorts out sounds), but M.R. may have been using this program. Kabo thought respondent should have a general idea of what was going on with M.R. Eventually respondent taught M.R.

Basically, their interaction followed the IEP meeting revising M.R.'s IEP from a self-contained classroom to a resource room for supplemental instruction. Kabo went to see respondent, and respondent was busy and did not see her; Kabo put the IEP in respondent's mailbox; the IEP was returned; a decision was made to get respondent a locked file cabinet; and respondent never came back to discuss the IEP with Kabo.

Kabo considered respondent's actions unprofessional and inappropriate, because respondent went storming out of Kabo's office without discussing M.R.'s case in greater detail, and because respondent said that M.R. was a "pump and dump."

Elise Hobson, a Lawrence Township learning disabilities teacher with sixteen years of special education experience, had three of her students assigned to respondent at the beginning of the school year. Three additional students were assigned during the course of the year. Bryon H., a classified student, was referred from the CST, which concluded that he needed special education for reading and language arts. Although respondent was advised at the end of November that Bryon H. would be assigned to her class, it took a while for this placement to work out, and he did not enter respondent's class until January 2009.

Professional Communications

During the entire school year, Hobson met regularly with her special education and regular teachers. At their first meeting in October, Hobson was frustrated, as it seemed that respondent was showing her materials that were above the level of the students. At the second meeting she had with respondent, Billy was present, as he wanted to observe her with respondent. This meeting was a little more successful, as respondent described her "tools not working." However, respondent showed Hobson only a little about her students. The only way to characterize respondent's statements that day was "disorganized," although they were not rude.

At student Bryon H.'s IEP meeting the next day at 7:45 a.m., respondent was very irate and was getting in Hobson's face. Respondent said she should not have this material, and seemed mad at Hobson for giving her something that respondent should have had. They then went over the IEP goals and objectives and respondent expressed appreciation for the discussion. Hobson gave respondent information on Bryon H.'s goals and objectives, but respondent gave it back because she said she had no locked filing cabinet. When someone interrupted, respondent kept on talking over him. But since the parent had not yet signed the IEP, the child was not placed in respondent's class until January. An e-mail of respondent's where she said she never received an IEP for Bryon H. was not true, because Hobson gave it to respondent.

Respondent continued to say that she could not access the tools set forth in the Contour Program where the goals and objectives were listed for the IEP. But even if she could not get into the computer, there were hard copies in Hobson's office and access was always available to respondent, although she never tried.

In e-mails concerning student Breyanna H., an excessive number of skills was listed. Respondent never pared them down, so Hobson did it for her. Hobson had received no grades for Bryon H. from respondent, and told Billy, and he followed up. Respondent responded by saying she did not have the student in her class, but this was

not true because he had been her student since January 5 and a whole month had gone by. The general education teacher ended up putting in his grade.

Hobson never saw the respondent's DRA protocols, but she had not asked for them. Hobson did not know about the accuracy of respondent's DRA's, although they did not show any progress or progression. As Maureen Hayes had trained respondent, Hobson assumed the scores would be accurate.

Respondent complained about a lot of things, such as the DRA, tools, etc. Hobson did not believe respondent when she said the tools were the problem, because everything was a problem for respondent and there was a lot of drama. Furthermore, respondent would have been provided with any information she needed if only she had asked for it. Or respondent could have gotten it from Contour.

Hobson had a difficult time communicating with respondent, and she wondered, if respondent could not communicate with her, how could respondent communicate with the students? Based on their interaction at the IEP meeting and her observations when respondent spoke with parents, Hobson felt there were problems with respondent's communications.

Donna Lawrance, a teacher with twenty-two years of experience, was teaching third grade as a general education teacher at LES for school year 2008–2009. She knew respondent was responsible for language arts for one of her students. At the beginning of the school year, the resource room teacher came to get the students from their homeroom; after that, the students went to the resource room on their own.

Professional Communications

Early in the school year (September or October 2008), student Breyanna H. was late in getting to the resource room because Lawrance's class was running behind. Usually there was a little leeway, and most resource room teachers would call to see if the student was there. Instead, respondent came to Lawrance's classroom for

Breyanna and accused Lawrance of violating the student's IEP. Respondent yelled at Lawrance in front of her students, who became upset. They were afraid she was going to get into trouble or get fired and were concerned she had done something incorrectly. In order to defuse the situation in front of her students, Lawrance jokingly said that the IEP was not important. Lawrance did not think she violated Breyanna's IEP, and explained to her students that there was not a problem. Her quip was made to defuse the situation, and not because IEP's are not important.

Lawrance did not report this incident to anyone, although she later told respondent that she did not appreciate respondent coming into her classroom like that. Lawrance wanted to make it clear to respondent that she did not want her coming into her class and saying things like that in front of the students.

Workbook Incident

In March, one of Lawrance's students left her classroom to go to language arts, and came back with respondent for her workbook. Respondent came into the classroom and said that Lawrance had not given respondent the child's workbook. Respondent had never asked for the workbook before. Lawrance asked the student to get it, the student got it, and Lawrance handed it to respondent. It was the tenor and inappropriateness of the contact that bothered Lawrance, as respondent's tone was assertive. Lawrance had to stop her teaching to deal with respondent. Lawrance was taken aback that, all of a sudden, respondent needed the workbook; she could have simply asked for it to accompany the student. Lawrance sent an e-mail to her principal about this because she realized that respondent was taking notes on people, and the memo was to cover herself.

Substitute Plans

The principal had a format for substitute teaching plans and a template to use. Teachers could use any style they liked in formulating lesson plans. Lawrance left her substitute lesson plan on her desk and told substitutes about the procedure she followed. She tried to make clear what the substitutes were to do. In the main office

there were emergency plans that were done at the beginning of the year. The principal asked for this, and also requested that the substitute lesson plans were clear enough so that the substitute would know what to do.

Respondent had been out ill and Auer, the resource room teacher, was rewriting respondent's lesson plans because the substitute could not find them. Lawrance went to help with them, and while she was looking for Breyanna's spelling program, she found a note in the child's file about what she had said to respondent about the IEP, as well as other things about her that had been written by respondent.

Flip Book

At a parent-teacher conference with Breyanna's parents, respondent spoke first and showed the parents a beautiful flip book allegedly done by Breyanna. As Breyanna had difficulty communicating, Lawrance's concern about the conference was that respondent had made it sound as if the book were the student's work. Lawrance could not reconcile this. Respondent was showing beautiful work, but Lawrance did not think the student was capable of doing this. On at least three occasions, Breyanna had not wanted to go to respondent's classroom. Breyanna said that respondent did not like what she wrote, so respondent would rewrite it and Breyanna would copy it.

DRA's

Lawrance had twenty-one students in her class and she gave the DRA to eighteen of them. The other three were to be tested in the resource room by respondent. Lawrance had watched a DVD at home and was self-taught in how to give the test. Respondent said she did not like to do things on her personal time. The scores were due at the end of the marking period (end of October/beginning of November). Lawrance was not sure if the scores were provided for the first marking period. Lawrance spoke with respondent and asked for Breyanna's scores and sent e-mails requesting them. Although respondent said she was not trained in the DRA, she later sent scores for the child. Other teachers had difficulty in getting scores from respondent, too.

Katrina Vegas was a resource room teacher at BFS for school year 2008–2009, and had been there for eight years. Vegas had first-, second- and third-grade students who were all classified, generally with learning disabilities. She and respondent shared a room for two periods in the afternoon, and had to deal with student overflow. Respondent had three periods in the afternoon. During lunch, respondent was by herself, and her last period was her preparation period.

DRA's

Respondent came over to BFS to assist with Vegas's schedule, as Vegas could not accommodate all of her students. They discussed the DRA's, and Vegas offered to help respondent, but respondent refused help from her. The DRA testing kit was in her room, to be shared with respondent. Respondent kept saying she was not trained on the DRA and that it would be invalid if she did it. Vegas learned how to do the DRA through faculty meetings, by talking to reading specialists in the building, by reading the book, and by doing it.

Professional Communications

Vegas's communications with respondent were friendly at first, but she thought respondent had a chip on her shoulder. Then respondent became very argumentative. Respondent was making comments through the students, so they would ask her why respondent hated her. One student said she was afraid of respondent and did not want respondent to teach her again. She said that respondent yelled. Respondent's students were pleased when the substitute was there and respondent was out. Vegas had a problem with respondent and difficulties with her, and their relationship became adversarial.

Originally they were both in classroom 213B, and there was one period when they both taught at the same time. Respondent did not use a teacher desk, as the room had only one, and it was small and cramped. This lasted until October, when she

received an e-mail from Deni saying the room was not up to code. Since room 213A was available and empty, respondent would go to that room for a class and then return to 213B.

At the parent conferences in November, respondent said she did not have and could not supply the goals and objectives for the students because of technical glitches and problems. Respondent spoke of technical issues all the time. She complained that she did not have adequate materials. The Contour Program was supposed to have all the IEP's for the students. The resource room teachers needed the actual report card to write the goals and objectives. Most of the time, respondent's goals and objectives were not done. Vegas offered to help her, and even to print them out for her, but respondent refused. Everyone else had them. Also, the resource room had two computers to do an IEP or goals and objectives if they could not be printed from the laptop.

Respondent's tone with her students was harsh, and the students would complain that she changed their writings. Respondent was always harsh with Vegas. Vegas looked at the progress reports on the IEP's and could see that respondent had not done them, although there were plenty of materials available to help her.

Vegas did the DRA's for her students because she knew that respondent would not do them. Sometimes the scores of the protocols were not available and it looked like respondent may have been using the DRA for education purposes. This was not good, as the DRA was supposed to be an assessment, not a teaching tool.

Substitute Plans

Vegas was aware of the difficulty with respondent's substitute plans. Respondent was absent often, and would leave no lesson plans or inadequate plans, including some plans that were not understandable. So Vegas would have to stop her class to help the substitutes form a plan of instruction for respondent's students. When Vegas asked respondent to explain her lesson plans, respondent said they were clear and would not explain them further. Vegas sent e-mails to Billy about respondent's

lesson plans and the problems with them, as the plans could not be deciphered. They definitely had verbal discussions about the plans before January 2009.

As to substitute plans, she did not know if there was a district-wide procedure. Everybody did their own, but the substitute plans should include a class list, fire-drill list, map of building, students who get picked up, and materials and teaching plans. They were also required to have emergency plans.

Professional Communications

In 2008–2009, the IEP's were made available in early September and before the school year started. The teaching assignments were received the first day of school. Vegas remembered an incident in the fall of 2008 where respondent complained about not having materials and about computer glitches. Parents were complaining. If there were a problem with the computers, then technical support was available. It was not professional to use this excuse at a parent meeting, where the goal was to focus on academics and behavior.

Student T.M. was scared to be in respondent's class and was regressing, so he was placed in Vegas's class. He was already her student for math, so she took him over for reading as well. Another student, T.I., was moved to Vegas's class with Wilson reading materials (a multi-source reading program) in September. The student was then switched to respondent, but that was not successful. After the November conference with parents, T.I. was taken out of respondent's class, and then received in-class support for language arts in her class.

File Cabinets

Vegas believed the file cabinets were available in the school. Respondent never complained to her about not having a locked file cabinet or key. The file cabinets were located in room 213B. Vegas said there was a new file cabinet and a file cabinet with a key hanging from it in the classroom at the beginning of the school year.

Eileen Auer was a resource room teacher at LES and in her third year of teaching. In 2008–2009 she was assigned to the resource room at LES and worked with respondent. Prior to the start of the school year, Auer was told she was getting extra help and was told to divide her students. Respondent was assigned three students in August, but Auer heard nothing from her prior to the start of the school year.

The first day of school was a professional day, and the second day was meetings. She and respondent initially shared a room, and had seven students: three were assigned to respondent and four to Auer. At midday, respondent had lunch and went to BFS. During respondent's lunch time, Auer was instructing

Respondent appeared upset and said she was transferred from LMS and did not know either the schedule or the children. Auer said she had e-mailed the schedule to respondent in August, but respondent said she did not open school e-mail on her personal time. Auer had been at the school in August. If respondent had come in, they might have had a chance to talk.

File Cabinet

In September 2008, the room assigned to Auer and respondent had wooden cabinets with locks, a black file cabinet, and a cabinet with two bottom drawers for files. Respondent had four boxes. Auer cleaned out space for respondent and showed her where things were kept. Respondent kept her materials in the file cabinet in Auer's classroom. A little later respondent got her own locking two-drawer file cabinet. The keys were in a baggie. Respondent said she did not have time to transfer her files, and never mentioned a file cabinet in the basement.

Professional Communications

Communications with respondent were difficult, as she was agitated, disgruntled, and defensive. Respondent kept writing things down and copying e-mails, and was taking copious notes. Respondent did not collaborate with Auer at all.

Auer and respondent had an issue with the master schedule, as respondent had left out a unit for a student. The IEP units must be documented in the master schedule and student M.S. was missing a unit. The schedule was e-mailed to respondent at the end of August, and she was provided with a list of students and subjects. Auer was directed to take the push-in students because they require more interaction with general education than the pull-out students. Every staff member could read the master schedule and had a handbook.

Many teachers felt uncomfortable interacting with respondent, as she was gruff and unpredictable. Teachers did not want to let respondent know if a student were running late, because respondent would allege that the teacher was not in compliance with the student's IEP.

Some students were shared by Auer and respondent (Auer for math, respondent for language arts and reading). A specialist in speech therapy came in during preparation time and asked if she could speak to respondent about a student, but the respondent said she needed three to five days to respond. Respondent never got back to the speech therapist and Auer thought this was inappropriate. For the resource room, communications were essential. In order to determine if the teacher in the resource room were effective, a student needed to demonstrate that the skills learned there were being transferred to the general education setting.

Substitute Plans

The district sent out a format about what needed to be in a lesson plan. The handbook also addressed substitute plans and the number of days of emergency plans that needed to be in the office. Each teacher had his/her own style of doing their own plans, but the plans should contain the basics of curriculum and content, and goals and objectives.

A substitute would come in during preparation time, and read and review the materials. Some of the substitutes were finishing college students, some were retired teachers, and some had subbed for years. When the respondent was out, the

substitutes would have problems. Auer could not read through respondent's plans, nor could she understand them. As time went on there was not enough work and it was becoming too difficult for the students. Auer began providing materials to the substitutes, and finally did the substitute plans entirely. On one occasion she told respondent that a substitute had not been able to understand her lesson, and had a hard time figuring it out. Respondent said to her, "You are not my supervisor."

On another occasion, Auer saw respondent at the school copying something at the same time a substitute was teaching in respondent's classroom. Respondent said the substitute plans were right there, but Auer did not see them in the classroom. Respondent said she did not know why there was such a problem. It turned out that respondent was copying the plans. Auer never knew if the plans were turned over to the substitute.

Parent Conference

Auer attended meetings with parents. At parent conferences and IEP meetings, Hobson was also there. One IEP meeting was very uncomfortable. The first-grade teacher had said student K.D. was on target, and asked respondent for feedback. At the meeting a decision was made to discontinue reading for K.D., but to keep language arts. When K.D. was being discussed with the parents, respondent acted as if she had had no input into the decision, although she had been asked for her opinions and had input.

No parent complained to Auer about respondent in a parent conference, although one parent was upset that she did not have a parent conference with respondent in April when respondent was absent.

Materials

Respondent kept telling the parents that she did not have materials. She would call parents during class and complain. The comments she made to parents implied that the parents might question the services provided by the school. Respondent

seemed to be always preoccupied with IEP compliance, but Auer thought it unusual for respondent to call parents on instruction time.

Respondent ate her lunch in the resource room and had a preoccupation with health and safety issues. Respondent had a lot of issues with the room: there were stains on the ceiling tile; the temperature was erratic, either too cool or too hot; and there was some white powder on objects in the room. Auer worked from a group table and used a teacher desk in the room. Respondent did not have a teacher desk in her classroom and always referred to the administration as "they."

Auer used a rolling cart with a SMART Board to separate the students and to avoid visual distraction for them. On one occasion, Auer had set up the SMART Board and respondent came and pushed it out of the way, saying it was a safety hazard. Auer told the students she needed a few more minutes to set it up, but respondent could have walked around it.

Their class divided in December or January because Auer and respondent received more students, and for the rest of the school year they were in separate rooms. As Auer was trying to instruct her students and get their materials, respondent would be collecting her students and bringing all of them into the resource room and then to her room. This was a distraction for the classroom teachers and for Auer.

DRA

The DRA2 was new to Auer at Lawrence Township. Auer read the instructions and tried out the protocols. It took about half an hour to an hour to learn, as the instructions were pretty explicit. Auer offered to show respondent her assessments and to help her with the DRA. Respondent said she was not going to look at the DRA kit or the accompanying DVD on her own time.

Maureen Hayes, in her fifth year in the Lawrence Township schools, was the director of humanities, kindergarten through sixth grade. She wrote and updated

curricula and supervised teachers. She held an elementary education certification and a supervisor's certificate, and was also a reading specialist.

DRA

For school year 2008–2009, the DRA was to be administered by the teachers for kindergarten through grade three. The DRA had a teacher's manual and a DVD instruction, which was about forty to forty-five minutes long. To learn how to give the DRA, there was voluntary professional development, including a DVD to view, a manual, and consultation with the reading specialists. There was also a DRA kit in the classroom respondent shared with Auer. Hayes did not know any teacher who could not give the DRA, as this was not a new test or skill, and a teacher with experience, such as respondent, should be able to do it.

A voluntary presentation was given on this before the school year started, and during the first week of school there was an early dismissal so both regular and resource room teachers, and reading specialists, could go over the new language arts curricula, including the assessment schedule. Classroom teachers performed twenty to twenty-five of the DRA tests on their students who were not assigned to the resource room for reading or language arts. The DRA scores were due the first of November. This was all confirmed in e-mails.

Billy told Hayes that respondent needed some extra support. An e-mail was sent to respondent to set up a training session at the end of October or the beginning of November. From the time of the DRA scheduling until the memo from Billy, respondent never asked for training and Hayes never heard from her.

Respondent met Hayes at the main office at LES. Respondent became agitated and angry; she raised her voice and walked away from Hayes, who was taken aback, as she had never been spoken to in that way before. Hayes wrote an e-mail to Billy about respondent's behavior.

In the presence of principal McLaughlin and respondent, Hayes administered a DRA test to one of respondent's students so that respondent could see how it was done. Respondent became more upset, so McLaughlin told Hayes to leave. Hayes had been able to give only one test (although she had intended to do two), because the situation had become too tense, and there were other students in the room. She identified the tests given to student Kevin, and another for student Vinnie, but his had no rubric.

At the meeting on October 29, respondent appeared to be under the impression that Hayes would be testing all of her students. When they met on October 30, respondent said she had problems administering the test. Hayes did not have a chance to do anything else because respondent and McLaughlin got into a screaming match.

Hayes saw the information provided in respondent's DRA's. In some, the rubric on the back was not filled in, so Hayes questioned how much of the exam had been done by respondent, as the rubrics were supposed to be completed and they were not.

Jay Billy was the supervisor of special education, pre-K through fifth grade (since 2007), and had eighteen years' experience in special education (sixteen to seventeen in the district). He taught special education at Mercer County Special Services. He supervised the CST and special education programs and teachers, as well as the preschool program. Billy was respondent's supervisor at LES and BFS. He knew her, but had not supervised her prior to the 2008–2009 school year, nor was he involved in the decision to transfer her to LES and BFS.

Respondent had four supervisors: her principals (McLaughlin and Buss), Deni and Billy. Each building was managed by a principal, but Billy managed the programs. Respondent was the only teacher going to two schools, but there had previously been others.

After the opening ceremonies at the start of the school year, Billy stopped in respondent's classroom and met with her. She was concerned about the students

assigned to her: she said she had not taught children that young for a long time, and that she was doing something she had not done. He told her "a teacher is a teacher is a teacher." Respondent started with seven students, three in one school and four in the other. He tried to stop in and see all the teachers, and was in and out of his buildings several times per week. He thought that respondent had taught elementary special education many years before.

PIP

A PIP was required for all teachers and needed to be done by the end of September for that school year if the teacher's position had changed. Otherwise the PIP prepared in the spring could be used. At a meeting with Deni and him, respondent was told that her PIP needed changes because her students were now younger. The PIP they had for her was not appropriate because it should have included elementary curricula as well as the goal of her working "to improve collegiality and improve relations with other teachers." Respondent did not appreciate having to attend another meeting about the PIP, nor did she like that goal. She said she did a PIP at her previous school and that that should be acceptable

The first meeting on the PIP did not go well and was cut short. E-mails were sent to him from respondent about the PIP, but Billy did not meet with respondent to discuss them, as he thought they could discuss these issues at the next PIP meeting. He had never been "supervised by a subordinate before," as respondent was doing to him. A second meeting also did not go well. Finally, he and Deni generated respondent's PIP for 2008–2009. They felt the goals were appropriate, particularly the goal to improve professional communications. He had heard that respondent was difficult with other teachers and that she was unhappy and complaining. Also, her memos could not be easily understood.

DRA's

The DRA was used to assess reading level. Respondent was not comfortable doing the DRA, so Hayes used e-mails to initiate a meeting in October with her about

the DRA, as respondent said she would not take the kit home to learn about it on her own. After a conversation with Hayes and respondent, respondent was advised that she would have to do her own DRA's. At the meeting between Hayes and respondent, respondent was rude to Hayes, and Hayes sent Billy a memo. Respondent should have known about the assessments and when they were due. The information was posted on the website and there were notices about the DRA's. The DRA's were "not brain surgery"; they were not hard to learn.

Memos and e-mails were exchanged. Respondent was advised as to her behavior and was reminded about her PIP. She was told to get her DRA's done, but she did not complete them by October 31, and was given an extension. By November 19 she submitted scores but not the entire test. Teachers Seipp and Fernandez had been requesting the scores. In the reporting of scores by respondent, Billy had concerns, because it was hard to figure out from where respondent got the reading levels.

A meeting was held on November 26 with Deni, Buss, Billy and respondent. There was confusion as to whether respondent had ever delivered the scores. She said she did not know what the protocols were. There was a lot of concern from the teachers. Respondent was asked for the protocols, and she said they were in the trunk of her car. She became angry and went to her car. Billy was not comfortable with the protocols or scores, as the rubrics were not filled out. He questioned the validity of the scores and thought some of it was "made up."

Respondent had no explanation. She obfuscated and talked around the issue. She blamed technology, etc. She had been told to produce the scores and protocols. She continued to not be able to identify where she got the scores from. He was not convinced the scores were valid. He considered that at this meeting, respondent had been sternly spoken to about her responsibilities with regard to the DRA's.

The next DRA deadline was January. Respondent submitted scores, but they were late. The test results now showed different levels for the students, but still

respondent did not produce the protocols/rubrics. When the protocols were finally produced, they showed the following

P-14 Kevin—not completed
P-15 Vinnie—no rubrics
P-16 Kyla—no rubrics
P-17 Davon—some done, looked like Hernandez's writing
P-18 Karrem—no rubrics
P-19 Breyanna—no rubrics
P-20 Paulina— no rubrics

Billy sent respondent a memo and told her to produce the protocols, but she never did. Respondent's submission of scores in March 2009 again provided no protocols, although these scores looked more complete than the ones submitted in January. Respondent never said why she did not submit protocols or give an excuse.

In February 2009 the grades and progress reports (explaining how they were reaching their goals) were due. The timing of grades and progress reports was simultaneous. Respondent was not getting them done in a timely manner. The progress reports were not turned in to him. In a memo from respondent dated February 17, 2009, respondent said she did all the tests, but the protocols were never given to anyone.

A document prepared at the end of June or early July showed that respondent's progress reports were not done. This put the district in a rush because the IEP required quarterly reporting. If not completed, the school district's finances were put at risk. Also, the parents of special education students were concerned about their children's progress toward their IEP goals. On numerous occasions, Billy asked respondent for these reports, but did not receive them.

A case manager told him that one of the teachers reported that respondent was using the DRA manual as a teaching instrument. This gave the students the information

Respondent was always aggressive and hostile to any directive and always had an excuse, saying that "something was not working." She was offered help and refused it. When Billy told her to do something, he would get a ten-page memo back. The whole process of dealing with her was difficult.

At one parent-teacher conference, respondent said she could not print in the building when a parent asked for a copy of the progress report. She fabricated this, because he checked and she had never done it. Respondent would say she did it, and that if she had not, it was because of technical problems. This was totally incredible to him—she was telling untruths to parents. He said the district was lucky parents did not notice this. He wrote a memo after this incident.

Respondent frequently complained about technology, and Billy told her to put in a web-ticket and get tech support. He did not follow up because he assumed he would hear if there were a problem. He did not sit down with respondent, because it was clear she did not want to discuss the issues with him. She had not followed through with directions given to her. Her memos to him told him how to do his job, so he did not respond in writing. Respondent was always confrontational in her written responses.

Substitute Plans and Lesson Plans

Respondent was out forty-five and a half days during the school year. Substitutes would complain and have a hard time. Buss and McLaughlin also sent him e-mails about respondent's lesson plans for her students. Information was provided to respondent, but she did not avail herself of it. A lesson planning format was sent to her on September 15, but she did not use it. Respondent was told she could call in, e-mail or fax the substitute lesson plans, but Billy continued to receive feedback from teachers that her plans were not done.

Billy had continuing concerns about the substitute lesson plans. He heard of an incident involving respondent not being professional. Buss sent him memos on this. There was no change in respondent's substitute plans during the year. Auer and Vegas were trying to figure out what needed to be done with respondent's classes when she

on the test—like a pretest—and was not appropriate. However, he did not discuss this with respondent.

The district used other assessment tools such as the Northwest Educational Assessment (NWEA), which was computer based, formed baseline assessments, and was used to guide programs. The DRA tracked progress, so it should be accurate.

A memo was sent to respondent on April 27 telling her what to do, but she was only in school fifteen days during April and May. Billy did not think that respondent did any of the things she was directed to do. A follow-up e-mail was sent on May 18. He sent another e-mail to respondent on June 2 regarding a parent conference. Again, Billy asked for the progress reports and for them to be submitted to him. Respondent did not comply. Respondent's CAP was written on March 16, 2009, by Deni, who met with respondent and gave it to her, but he did not know if they had any other meetings about it.

Grades

Respondent also had a problem entering a student's grade. Hobson asked respondent to enter the grade, but she refused to do so.

Professional Communications

Billy had difficulties in communicating with respondent, as she stopped reading his e-mails at the end of the school year. He knew this because he checked their history and respondent had not opened them. His e-mail sent to respondent on April 20 was read by her on May 28; his e-mail of April 6 was read on May 26; his e-mail of April 14 was read on May 26. On April 23, Billy sent respondent an e-mail telling respondent to check her mail daily, as teachers are supposed to check their mailboxes and e-mails at least once per day. On April 26, Billy met with respondent and told her to check her e-mail daily, but she did not. He and Buss would then hand her memos. After being told to check her e-mail daily, respondent should have checked it daily.

was out, as there were multiple complaints from substitute teachers that they could not decipher respondent's plans.

File Cabinet

Respondent had a locked file cabinet in her room. On the first day of school at BFS, he met with her and saw the cabinet, with keys hanging, there at BFS. Billy had carried the new file cabinet down to the classroom. He received no complaints from respondent until the meeting of November 26, when she said she had no keys. He knew there was a locked file cabinet available to her and that she had access to one. Respondent said she had a problem with a locked file cabinet, so he brought her another one in January.

Progress Reports

Progress reports (covering goals and objectives as well as curriculum) were part of the IEP and were done quarterly. The teachers kept data during the school year and entered it into the progress report on WebTrack. Respondent stated she had problems with technology on her IEP progress reports, and that she did them, but if she did not, it was a technical problem.

Respondent complained so often about her computer he thought she was crying wolf. These were excuses used by her. She continued to obfuscate, but never took any help that was offered to her.

Staff Interactions

A new student was added to respondent's load while she was out of school. Upon her return, respondent said to Kabo that the student was a "pump and dump," and accused Kabo of dumping the student in her class. Respondent refused to accept the student's IEP and did not provide a reason. She taught the student, but her behavior baffled Billy.

Hobson reported to him that respondent did not speak positively with parents. At an IEP meeting, respondent said decisions would be made after she left the room. The teachers worked with the principal and vice principal on the IEP's. Hobson was diligent about having all teachers appear at the meeting and have input to the IEP.

Hobson provided other information. The staff was frustrated. it seemed that respondent was continually oppositional to other special education teachers, case managers, and other teachers. Some of the problems were when respondent yelled at Seipp in the hallway; when she entered Lawrance's room; when she was rude to Hernandez; and when she told the speech therapist she would not be able to get back to her for three to five days.

The staff was totally frustrated dealing with respondent. They would avoid interacting with her because respondent had an aggressive tone, she scared some of the staff, and she did not want to work collegially. People tried to avoid contact with her because she was inappropriate.

Billy said that if a teacher could not work with other people, then the teacher could not get insight into a child's needs. He never knew a teacher to lie to parents before. It put the district at risk. Clearly, respondent did not do her job. This could cause damage to the program's reputation and incur sanctions from the State.

Other concerns were respondent's personal comments in the student's running record, and the constant blaming of deficiencies on the computer. Billy thought respondent was unprofessional. No one had ever made comments to him the way respondent did, as when she told him how to do his job.

Judith McLaughlin had been the principal at LES since 1998, and was one of respondent's supervisors in school year 2008–2009. Prior to that she was a vice principal in Ewing Township and a teacher of the second, third and fourth grades. She knew respondent but had not supervised her.

Deni had told McLaughlin in mid-summer 2008 that respondent would be coming to LES in the fall to teach the resource room part time, originally for two students. Gold had said that respondent's certificate was not appropriate for LMS, but McLaughlin assumed her certificate was good for LES. McLaughlin had a brief conversation with Billy in the late summer about respondent's schedule. She also had conversations with Buss in the late summer because LES was the home school for respondent. Both of them knew respondent, and McLaughlin knew her from staff development and from LIS.

She called respondent in August and asked if she wanted to visit the school, but respondent said no.

September 2, 2008, was the first day of school. On that date everyone returned to their home building after the general meeting, and there was a faculty meeting, attended by respondent, to welcome new staff and to discuss policies and other school business. The calendar was discussed and the district-wide assessment calendar was distributed to the faculty. The faculty handbook showed the marking periods as well as the assessment schedule.

DRA's

For the first month, respondent was acclimating herself to the school. Respondent told McLaughlin that she did not know what she was teaching. Respondent also said she had no resources or materials. Auer had been there the year before, and McLaughlin knew there were resources in the school available to help respondent, including the case managers, reading specialists and others.

In the beginning, McLaughlin let respondent teach. However, McLaughlin noted that other teachers came to her to get things from respondent, which concerned her because the teachers usually helped each other.

McLaughlin's relationship with respondent started to erode in December 2008. Respondent was supposed to give a report to the speech teacher, and said she would

get back to that teacher in five days, but she never did. Other teachers had complaints and reported that respondent was hostile and combative with them.

There was an e-mail from Buss to respondent dated November 12, 2008, where he needed to have the independent level of reading of students without the teacher's intervention. On November 19, respondent provided independent test-score levels to McLaughlin in an envelope in the mailbox.

McLaughlin was not part of the November 26, 2008, meeting. She had no conversations with Billy or Deni and their directives to respondent were contained in the memo to her. McLaughlin never told respondent to ignore Billy's or Buss's directives.

File Cabinets

Respondent had been assigned to room 218 with Auer, and there were two filing cabinets in her room. McLaughlin had concerns about respondent sharing a room with Auer, as Deni had said they could not teach in the same room. As one did more push-in classroom resource work and the other did more pull-out classroom resource work, McLaughlin thought the schedule would work. But then more children came in, and they had to split up the room.

Respondent had a preparation period at the beginning of the day and then taught reading and language arts. Respondent said she needed a written directive or she would not do anything. Because the teaching schedules of respondent and Auer overlapped, McLaughlin had to find another room for respondent, but some teachers did not want to share a room with her. Teacher Karen Hall then said she would share a room with respondent, as Hall is an in-class support teacher, not an out-of-class one.

Complaints From Parents

Dr. Elabasy (ph.) wanted a conference with respondent and the parents of a student, but respondent was not at LES for the conference. Respondent said she did not know that she had to make them up.

Teaching Observation

In March 2009, McLaughlin was assigned by assistant superintendent Crystal Lovell to observe respondent in her classroom. McLaughlin did this for all her teachers. If a teacher was tenured, sometimes someone else would do the observation. McLaughlin prepared to do an evaluation of respondent's teaching on March 3. McLaughlin asked for a pre-observation conference and reviewed the form. At a pre-observation meeting, respondent showed her the materials for the observation, but McLaughlin noted that while respondent had materials, she had no coherent lesson plan. Respondent said she would have it the next day.

McLaughlin observed M.R. in respondent's class that day. He had special education in a closed class on some occasions; on other occasions he would be pulled out of class to the resource room for reading. At first respondent said McLaughlin could not observe M.R. because she did not know and was not certified in the Wilson Reading Program and M.R. required that program. During the actual observation, the child said he could not read the materials. Although the Wilson Program is not listed in M.R.'s IEP, respondent could have used Wilson strategies, as she was certified in special education.

At the observation, respondent had a game set up, and McLaughlin watched the lesson. She saw the children becoming frustrated and thought the material was over their heads. Student B. started crying when he could not read the words. The lesson was going nowhere because the words were too hard. The observation, which McLaughlin characterized as fair and objective, was unsatisfactory.

McLaughlin went to the case manager and found out that these students needed easy words. Her concern was that the children were being taught on a level too high for them.

McLaughlin wanted a post-conference meeting with respondent where the focus would be on how to improve the lesson. At this meeting, which lasted about ten

minutes, McLaughlin did not know if respondent had a copy of the report she had prepared following the observation. Respondent went off on a tirade, so McLaughlin ended the meeting.

McLaughlin had a supervisor's and principal's certificate and did not need other certifications to review respondent's class. McLaughlin was familiar with special education and had also taught reading. Respondent told her that she was not a special education teacher, so McLaughlin made arrangements for other supervisors (Billy and Hayes) to review respondent's teaching, but it never happened because respondent was absent.

Grades

The data for students' grades came from the comprehensive assessment list and included observations, assessments, the NWEA, DRAs, math tests, daily tests, rubrics, and performance tests. Each quarter the district had assessments for the students. The assessment calendar in the handbook stated that all the assessments and grades had to be given by a specific date.

There was a problem with the entry of respondent's grades. In January, student B.H. was put on respondent's roster. There was some confusion about his IEP. At the end of the marking period, a memo was sent to the faculty about the grades. Kristen DeFiccio had put in B.H.'s grades for the first and second marking periods. However, his reading and language arts had been left blank for the marking period. She went to respondent and asked for help getting B.H.'s grades. She saw respondent walking down the stairs, but when she asked respondent for help, respondent said she was too busy and could not provide B.H.'s grades.

Respondent had to put in DeFiccio's own grades for the first and second marking periods. In an April 3, 2009, memo from respondent, respondent said she was not giving grades. Respondent wanted it in writing that she could put in all the grades for B.H. On April 14, DeFiccio put it in writing and gave it to respondent. She said she had

This was the policy of the school district and all special education teachers knew it. The procedure used by the district was known from conversations with Guerra, Auer, the secretary and Deni, and was used to make sure that there was a full report card.

Respondent sent a memo to McLaughlin but McLaughlin did not respond. Much of what was said in the memo had not happened because respondent was not willing to meet with McLaughlin without the union representative being present. At that time, McLaughlin did not try to meet with respondent, because McLaughlin was more concerned with getting B.H.'s grades.

McLaughlin received another e-mail from respondent late in the day on April 15. At this point, it was too late. B.H.'s grades were in the cumulative file and McLaughlin was scrambling to put together the report card. She did not respond to respondent's memo.

McLaughlin's relationship with respondent eroded starting in December. Respondent simply would not respond. Other teachers had complaints about her, but there was no specific incident. They had started the year off well, as McLaughlin had been looking forward to working with respondent.

Substitute Lesson Plans

Most teachers left their plans on their desks if they knew they were going to be out. The substitutes could not understand the plans that were left by respondent, so McLaughlin sent respondent an e-mail. Respondent was told to prepare the plans and leave out the extraneous information. However, respondent's plans were not coherent, so Auer had to assist. There were also emergency plans in the cabinet if the teacher was out. Respondent had submitted these plans.

McLaughlin said they tried to get special substitutes for the students, including retired special education teachers. The substitutes said that they could not understand respondent's plans. McLaughlin received a letter from one of these retired teachers, Ruth Cook, who stated that respondent's lesson plans were "inadequate." Cook had to

not yet gotten the grades back from respondent. DeFiccio was upset because there were no grades by April 15, so she sent another e-mail about getting this done.

McLaughlin's concern was to get a grade. She was also concerned that respondent was not doing her job; that she took up much time writing memos; that other teachers who worked with respondent could not get along with her; that parents were complaining; and that the substitutes did not understand respondent's lesson plans.

McLaughlin told respondent that she needed the grades. She contacted Chris Guerra from the Technical Support Unit and reversed the computer entry process. She put the grades in for the first and second marking periods. Respondent then filed a complaint with the Department of Fiscal Responsibility of the DOE. The hearing took one day and the conclusion was that there was no violation. McLaughlin also learned that respondent was pressing this further, and in May found out that respondent had sent a certified packet of information to her supervisor, Deni, Buss, McLaughlin and the BOE. McLaughlin noted that many of the memos that were revealed in discovery, and which were allegedly sent to her by respondent, had never been received by her.

In April 2009 it was necessary to input the grades for student B.H., as the regular teachers had access to PowerSchool once the child was assigned to a special education teacher. When asked for her grade, respondent stated that she was too busy to do it. Other e-mails were exchanged, and in an April 15 e-mail from McLaughlin to respondent, respondent said she would not let McLaughlin into her classroom. Respondent was not cooperative. She put her hand up and said she could not talk. She then raised her voice. McLaughlin got upset and frustrated. Respondent was telling McLaughlin what the law was. McLaughlin told respondent to put the grade on the report card.

Respondent offered several reasons for failing to enter B.H.'s grades, including that she was too busy, that she had sixteen other people to worry about, that it was against the law, and that there were technical glitches.

ask Auer and Kabo about the lesson plans, and Auer ended up doing them for the substitutes. The lesson plan complaints started in January, because respondent's attendance schedule had been becoming worse over the school year. She had been out four days in October, three days in November, and seven days in January.

After some e-mails, McLaughlin went to see respondent. Respondent said her plans were fine. McLaughlin asked respondent to classify her substitute plans and also asked respondent to get the children to come to her classroom. There was no policy about substitute lesson plans. No improvement plan was given to respondent, just directives in conversations. It was very difficult to talk to respondent even about the making of substitute plans.

McLaughlin acknowledged that there was nothing in the handbook about a particular form for the substitute lesson plan, but she said it should include the schedule, the roster, and the eight elements of an effective lesson plan. The problem with respondent's lesson plans was that they could not be followed. Lesson plans needed to be clear and concise and provided on a monthly basis. However, there was no district substitute lesson plan template, as they usually followed the regular district lesson plan format. The entire district received the lecture about what was in a substitute lesson plan at the beginning of the school year. McLaughlin did not know if there had been any problems with respondent's previous lesson plans. Respondent said that she had never changed the format of her lesson plans.

PIP

Respondent had a PIP that had been provided by Deni telling respondent to improve her planning and her substitute lesson plans. However, McLaughlin never gave an improvement plan to respondent and never gave her any ninety-day notice to improve her substitute plans.

Professional Conduct

McLaughlin expected the teachers to have their DRA protocols and to provide the scores to the teachers on time. She thought that respondent's scores looked inflated. In the fall, McLaughlin had told respondent to provide the scores to the homeroom teachers when they were due.

McLaughlin was not part of any investigation as to the rubrics. She had some input into the tenure charges, as there were several meetings towards the end of the school year. McLaughlin had to talk to other personnel such as Gold, Billy, Deni, etc. A lot of issues were going on, but her concern was trying to get respondent to do what she was supposed to do. Respondent was absent frequently. McLaughlin's concern was that she did not want the children to be harmed. Buss, Billy and McLaughlin asked to meet with the school board attorney and the superintendent about tenure charges in the late spring of 2009.

June 16 Incident/Grading

In June there was another incident. McLaughlin read every report card, and saw that grades appeared to be missing in the PowerSchool program for two students, M.R. and B.H. Then it appeared to be just for M.R. The last day of school was June 19 and the grades were due two days before the end of school.

McLaughlin told respondent that some grades were missing. Respondent taught six students or less at LES and said that she had entered their grades. On that day a substitute, Pat Rogers, stayed in respondent's classroom to make the transition with the students, as respondent had missed almost the entire marking period. Respondent walked into the classroom where Rogers was teaching, erased the board, and said she was in charge. One student asked McLaughlin to keep the substitute.

At the meeting on June 16, respondent said her computer was not working. McLaughlin called Deni. Respondent was combative and not cooperating. The building representative for the union, Rebecca Young, arrived, and so did Deni. At that time

respondent said she could not get the grades. Deni then asked for the documents used to determine the grades, but respondent could not replicate the grades she had given.

McLaughlin noted that Deni was professional, but concerned. McLaughlin went to retrieve the data to support M.R.'s grades. She was looking for current DRA's, writing pieces, spelling tests, and daily or weekly reports. Respondent gave McLaughlin a folder from her room with the papers. Respondent never said she had any other data. McLaughlin took the data to her office to look for assessment data on M.R. because she needed the backup data that respondent used to provide a grade.

At one point they went to respondent's room to find the grades, and Young came up with folders from respondent's room. There was nothing from the fourth marking period. McLaughlin felt the situation was serious. The superintendent came over. Respondent had a confrontation with Meara. He said there was no documentation for the grades. Respondent walked to the file cabinets, said it was in there, and walked away.

McLaughlin was able to go to M.R.'s regular teacher, who gave him a reading grade. But when they looked at respondent's files, there was no backup for anyone. Respondent said the substitute could give the grades.

McLaughlin never heard from respondent about the grades, but McLaughlin did call her on or about June 18 saying she still had not received the documentation. She left a message on respondent's home telephone but never received anything further from respondent.

In summary, McLaughlin described that what happened on June 16 was that she met with Deni and Meara, and respondent was ordered to show her grades. Respondent said there was a problem with her computer, and then said the documentation was in her office in a box. McLaughlin asked respondent for the documentation. When it was reviewed, respondent was told it was not sufficient, and was told to not come back to school until she had it. McLaughlin became concerned because there was no backup for any of the students' grades, and confirmed that in a

letter to respondent. Meara then placed respondent on administrative leave. McLaughlin understood that respondent could not return until her grades were done.

William R. Buss was the principal of BFS, which had 450 students from grades pre-K to third grade, plus twenty-four teachers and fifty support staff. Buss had forty-two years of experience in education, thirty-five years as a principal. He knew respondent and had worked with her at LIS, where she had taught elementary grades.

Buss had heard that there was going to be a reassignment of staff and that respondent would be working part-time at BFS. He had contact with her and sent her an e-mail welcoming her and telling her about the staff. On August 28, 2008, respondent sent him a note, so he sent her an e-mail. Respondent never contacted Hernandez, nor did she visit the school prior to the first day, when she appeared at BFS in the afternoon.

DRA's

The DRAs were given three times per year, in October (prior to the parent conferences in November), and again in January and April, and the profiles were shared with the parents. In October all the teachers with children who were assigned to respondent's class—Seipp, Vegas and Hernandez—were starting to look for data for the upcoming November parent conferences and wanted to have this information. Buss had concerns about respondent and talked to Billy about not getting the data from respondent.

Respondent and Buss sat down at the end of October or the beginning of November and spoke about what was needed for the DRA's. Buss knew that respondent had been trained and had been given the DRA kit, which explained how to perform these tests. He told respondent that she had until November 19 to get the tests done and to provide the independent level scores. Buss received information from respondent, but he had concerns that the information he received was not complete,

that it was not sufficient to determine the fluency and comprehension for each student, and that the protocols were not there.

Buss had a meeting with respondent toward the end of November to discuss the situation. Billy, Deni, the building representative, respondent and Buss were present. The conversation began with their expectations of respondent, at which time she became angry and argumentative. Buss saw that they were not getting anywhere or getting anything accomplished. The immediate focus of this meeting was where the DRA protocols were located. Respondent said she had worked on them and that they were in her car. Buss said he had put a locked file cabinet in her room so that she could keep them there. Respondent became angry when asked to go to her car and get the protocols. She said, "I don't have to take this crap." At the meeting, the appellant became argumentative. She talked over people and slammed doors. Buss did not recall any of the administrators yelling at respondent and he said he did not raise his voice.

When asked to get the protocols from her car, respondent went and got them. Buss assumed she had keys to a file cabinet, but respondent said she did not have any.

After the profiles were produced by respondent, Billy and Deni looked at them and thought that they were not complete. Billy and Deni realized that the assessment parts of the DRA were not supported by the protocols, and concluded that they had not been done. At that time, the meeting became hostile. Buss raised a concern about communication and the need for the parties to work together as a team. He was concerned that the children would pick up on the hostility and the arguments among the parties.

Respondent said she did not know what the protocols were, but Deni had previously told her. At the end of the DRA, there was a grid—a rubric—which was the protocol that gave the level that the student had attained in reading. The grid sheet showed the grade level. The rubric was the descriptive part of the protocol.

A packet of information was forwarded to respondent on December 4. On that date, respondent was told when her assessments were due, and was directed to do them. The DRA schedule was provided to respondent, so she was aware of when the entire assessment schedule was to be completed for the school year. In addition, respondent could share technology with the other teachers in the school, who could help her. Buss provided a calendar to respondent to be sure she had it and to ensure her compliance. As far as submitting the DRA scores in the winter or spring, Buss was not aware as to whether respondent did so, because by that time Billy was dealing directly with respondent.

Parent Comments

Buss recalled receiving particular complaints from other teachers who indicated they were concerned about respondent's behavior when they approached her. In addition, two parents were concerned. One child needed to be removed from respondent's classroom, as that student's parent said that respondent was not answering her questions. Respondent said that technical glitches and administrative problems were the reasons that she could not answer the questions. Buss took issue with this because technicians were assigned to each school and could handle any type of technical problem that might develop. He confirmed this in an e-mail written after the meeting.

Two different parents at two different meetings also expressed concern with respondent. One parent was not happy with the information received from respondent and thought it focused too much on technical and administrative issues instead of focusing on the child. One parent insisted that the child be removed from respondent's class as that child was receiving a special reading program

Professional Communications

Buss reported that some teachers had concerns about respondent's conversations with parents. Vegas reported that respondent blamed everything on technical glitches. Buss stated that he had received no direct complaints from students,

although Seipp expressed concern that the children in respondent's care were confused and were not sure what was expected from them. As far as investigating Seipp's concerns, which came in around the time the first DRA's were due, basically Buss watched, listened and monitored respondent's behavior.

With regard to conversations Buss had with respondent, sometimes they were clear, and sometimes she was short and disrespectful. He noted that she would "not stay on topic."

Substitute Plans

The expectation of the school was that there would be substitute lesson plans in the classroom for the substitute to find so that he or she could instruct the children in the absence of the teacher. An emergency set of plans was also maintained in the main office. One substitute asked Buss to go to respondent's classroom because he could not find the respondent's lesson plans when she was absent. Together they were able to find the plans, but they could not understand them. It appeared that respondent provided no guidance to the substitutes. The substitute lesson plans did not even list the children or the classrooms that they were to be coming from. Buss told respondent to make her plans more clear for the substitutes who were coming in. This was particularly important because respondent's absences increased during the course of the year. Respondent stated that she wrote exactly what she meant and wanted to be taught, but the substitutes could not understand or follow her plans because they were so difficult and convoluted.

Buss did not report any problem with respondent's lesson plans, but noted that substitute plans were not the same as lesson plans. Teachers were required to do lesson plans every month and current plans every day. As far as respondent's substitute lesson plans were concerned, he could not understand them, as they were extremely detailed and very difficult to follow. Buss provided a list of what he wanted to see in respondent's lesson plans, but there was no particular policy for preparation of the substitute lesson plans. Each teacher used his or her own form. He expected that they would include the children's names, the periods, the times, and the curriculum

standards that would be required. Emergency lesson plans were maintained in the main office. He did not see any individual folders for substitute lesson plans. He also noted that respondent's substitute lesson plans referred to other materials that they could not locate. Respondent was frequently absent from school. Buss raised this concern to special services supervisors Deni and Billy, especially because of the IEP's. However, no disciplinary charges were brought against respondent for her absenteeism.

File Cabinets

Deni and Billy made sure that all the special education teachers had working and locking file cabinets. Respondent and Vegas were assigned to room 213A, where both teachers had desks. Respondent also worked in room 213B. From September to the end of November, respondent had never complained to Buss about not having a locking file cabinet, and Buss was not aware that she did not have one. As soon as respondent said she did not have a file cabinet with a key, Mr. Buss specifically ordered one for her, although the original file cabinet was still in the room. He gave respondent the key on December 15, 2008, for which she acknowledged receipt.

Philip J. Meara

Phillip J. Meara was in his fifth year as the superintendent of Lawrence Township Public Schools. Previously he was a superintendent in Freehold Borough and Plumsted Township.

September 4, 2007—First Day of School

In 2007–2008, respondent had been transferred to LMS. There was an issue with her at the beginning of the school year, and the principals talked to him about it. Instead of going to LMS, respondent had gone to LIS, her previous assignment. The issue was resolved, but the director of personnel had to speak with respondent about her actions that day.

DRA's and Grading

The following school year (2008–2009), respondent was assigned to LES and BFS as a special education teacher in the resource room. Meara did not directly supervise her; rather, the principals and the director of special services did. Meara received e-mails from Deni, Billy and McLaughlin, and in general was copied on their e-mails. In April 2009, McLaughlin contacted him about an incident of insubordination, involving assessments and grades. Respondent's supervisors were having difficulty getting her to enter grades into the system because she was refusing.

By the end of April 2009, Meara had enough concerns to recommend withholding the increment that respondent was due under her contract, and a letter was sent from the Board reflecting that action. Meara reached that decision after speaking with Billy, Buss, McLaughlin, Deni and Gold and getting their input.

Meara became more involved in mid-June 2009. On May 16, McLaughlin had been looking for the grades for one student on PowerTeacher (a software program) and realized that there was no backup data available. Meara was called to LES again about concern for the respondent and her grades, and, in particular, the DRA assessment. Deni, McLaughlin, Meara and respondent met on June 16. It was the end of the school year, and at that time they could go through respondent's grading of her students. Respondent came to the meeting with her laptop and had a difficult time pulling up the grades on it. She did not want anyone to see the screen of the laptop and kept moving it around, blocking the view.

At the meeting, respondent did not know at first how many students she had. They started with one student, and respondent indicated that the grades were sent home. Meara said that, according to McLaughlin, all of respondent's fourth-quarter grades were not completed.

Respondent said she had the records in folders. McLaughlin, Deni and Meara looked at the folders, but they did not have the required information. Respondent said she might have the records at home. Meara told her to go home and get them, and put

her on administrative leave until she got them. Meara anticipated that the administrative leave would be short and would last only until respondent returned with the records, which he thought would be the next day. Instead, respondent called him and wanted to know what an administrative leave was. Meara said he meant that she was on leave until she produced the records, and that she could come back once she had the data. Respondent said everything was finished as of June 15, and she left a voicemail for Meara on June 18, which was relayed through his secretary.

As far as the records were concerned, it was Meara's initial impression that everything respondent was supposed to do had been finished by the end of the school year. He contacted McLaughlin to follow up to see if everything had been completed, as he expected would be done when he placed respondent on administrative leave. McLaughlin said the files she had received from respondent were no different from the files respondent presented the day she was sent home, and were not complete.

Meara's administrators also shared their concerns about respondent's behavior toward parents and other staff. Usually, the staff worked together as a team. It surprised him that respondent interacted so negatively with the staff at both schools and also with different staff members. It seemed to be something more serious than a personality conflict; it appeared that there was just no level of cooperation from respondent.

Meara was aware of respondent's statements of her unwillingness to do anything outside of school. As far as the DRA training was concerned, respondent said she would not do it on her own time. She also said that she would not work beyond a regular school day. Meara could not imagine someone being a successful teacher without doing some work at home, and he expected that from his teachers.

Respondent was paid through the end of the school year (June 2009). For the 2009–2010 school year, a letter was sent to respondent on August 21, 2009, in which she was continued on administrative leave/suspension. Meara had concerns about whether respondent should return as a teacher given the allegations about the grades. He decided to recommend that tenure charges be brought against her, seeking her

dismissal from the Lawrence Township public school system. He believed that what he saw indicated that she was responsible for what was happening in the school with her grades, and that if respondent were continued in her position, she would harm the children entrusted to her care.

The administration had showed him where respondent had been insubordinate. There were many instances where she had been told to do something and did not do it. Having a reading score without a protocol particularly concerned him, especially with special education children. The score for the DRA was the endpoint; the most important information was contained in the protocol. It appeared to him that respondent's DRA scores had been falsified, and to have any indication that the results were fabricated was a huge concern for him.

Meara spoke with counsel and his administrators over the summer about respondent's behavior and her failure to provide the basis for the grades that he believed she had fabricated. He relied on all these incidents to make the determination to file the tenure charges. He was concerned about the job that respondent was doing for the children. During the summer he and his staff went over everything that had happened during the year and the effect that respondent had on her students. Meara would not ever want a teacher who would harm a student. Language arts literacy relied on the DRA and the NWEA. The grade (as the endpoint) was not as important as the critical piece of information—the backup data—which simply was not there. While Meara did not personally review the information respondent provided, he listened to his administrators, who indicated that the only properly graded DRA's for respondent's students were the ones that were done by her supervisor.

Respondent was a ten-month employee. By letter of August 21, Meara told her she would be on administrative leave/suspension for the first few weeks of the school year while he considered his options. He thought that respondent might want to talk to him about the situation and he wanted to give her a chance to respond. Gold had reached out for respondent in June, but told him that respondent would not meet with him. Meara's secretary left messages for respondent, who returned a telephone call,

but no meeting resulted. As far as Meara was concerned, respondent was not responsive.

Testimony for Respondent

Background

Respondent Jill Kubicki had been a licensed teacher in the state of New Jersey for eighteen years and had an instructional teaching certificate. She was a teacher of the learning disabled and a teacher of the handicapped. She had a bachelor of arts degree in special education and elementary education and a master's degree at New York University with thirty-one credits transferred in. She provided a copy of her transcripts and a copy of her teaching certificate.

In September 1992 she was hired by the Special Education Department in the Lawrence Township Public Schools. She had previously taught in the state of New York for three years. She had taught special education, reading, language arts and math and did out-of-class resource and the resource center starting in 1992. Originally she was assigned to LIS, grades five and six, and was offered a full schedule at BFS. When she started in 1992, she worked one period at Benjamin Franklin School in an OCR class. After the first year, from 1992 until 2006 she worked at LIS. At some point during the 1990s, LIS became grades four, five and six, mostly students from Eldrich Park. At that time she was teaching OCR, reading, language arts and math.

Also, for one year she did an in-class-support science program, where she sat in the classroom with various bands across the curriculum. For an IEP, the CST went through a process that included a social worker, psychologist, learning consultant, etc. The IEP was generated at the beginning of the school year and was done by hand. At some point the IEP was done by staff at each of the seven different buildings in the Lawrence Township schools. For 2008–2009 the IEP was done by the teachers and MicroGrade (a software program), prior to PowerTeacher/PowerGrade, another computer program, which has done this for the last two to three years.

An OCR, or resource room, had a variety of resources to accommodate how a student worked best based upon an informal assessment. Over the years, the State varied the number of students who could be in a resource-room class at any given time.

For fifteen years respondent taught at LIS and was part of parent/teacher conferences. At LIS she met with the parents, and then with the resource room teacher with the schedule. The goal was to maintain the student in the least restrictive setting, so first the parents met with the homeroom teacher and then with the OCR teacher. Respondent established portfolios where the students could share their work and accomplishments. Class work and formal and informal assessments were done during the course of the year showing the students' independent work. This could be done through reading and writing and the work of the student to show progress. Respondent had done assessments such as the Brigance test, a reading sight-word recognition comprehension test, and the Gates-MacGinitie, another reading test. Respondent considered them informal tests not mandated by the State. There was also the San Diego word recognition test, and, in the 1990s, the Stevenson reading program, which also had a math component, was introduced. In 1995 the Wilson Assessment reading program was also included, but respondent's roster did not have any students for this program. She was not certified to teach Wilson, although the school district did have some teachers who were.

As to mandatory tests, these were done at the beginning of each year to put the students in the mode of success. Most used was the Brigance and some materials from Scott Foresman. As part of Brigance, respondent maintained data. This was important for the child study team to see the progress the children made.

In 2003-2004, Gates-MacGinitie was used. Respondent maintained the assessment data but shared it with no one. She used the material to make assessments of her students. During her fifteen years at LIS, she had an annual classroom observation. Carol Stenett did it, and then Mrs. Katz, the assistant vice principal, did it. Then Matthew Keller did it, and Al Gilson at LMS, and McLaughlin in 2008–2009. Before the class observation occurred, there was always a pre-observation meeting, at which she showed her goals and objectives for her behavioral approach to

students. Then there would be a post-observation meeting, which also took a full planning period. Then after the meeting, a PIP was developed. Usually her classroom observations were in February and March. The PIP's were done after the classroom observation and then filed with the Board office. Respondent's annual evaluations were all positive.

In 2006–2007 respondent had been accused of doing something she did not do and the school shut down her e-mail account. Students had written thank-you notes to Bill Gates and wanted to mail the letters and respondent used her account. The principal said she violated the Children's Internet Protection Act, but she was not disciplined. The principal sent a letter to her about this incident.

Transfer to LMS

In June 2007 respondent met with Deni during lunch to discuss her employment situation. It was a very brief meeting of less than fifteen minutes. Deni said she knew that there were difficulties with Principal Dauber and that Zuckerman had selected her to work in his school for the following year. Respondent said that there was no problem with Dauber or Deni. Deni said that respondent was accused of doing something she did not do. There was some issue about the computers and the children. Deni never used the word transfer, only that there was an opportunity at LMS, and Deni told her to speak with Zuckerman. Respondent did not understand what Deni was proposing.

Dauber said that respondent spoke about the transfer to LMS and had asked if she had spoken with Zuckerman, and she said not yet. Zuckerman called her and left a message. She said she sent a voicemail to him stating dates that she was available. However, she never met with Zuckerman. Respondent said that there was a staff party at Katmandu Restaurant at the end of the year at which respondent saw Zuckerman and all he did was wave at her.

Respondent did not recall receiving the letter sent to her in August 2007 about the transfer. She said she was away for a good portion of the summer and first saw this letter in discovery. On the first day of the 2007–2008 school year, she reported to

Lawrence High School for staff meetings, etc. After the assembly, everyone went to their assigned buildings, turned in their ID badges, keys, etc. She went to the building at LIS and put her things down in the classroom in the library. There were no students, as there were no classes that day. The principal then had a meeting with the faculty. She then went to the main office and spoke with Denise O'Sullivan, who worked in the library, and told her that she did not have a key. Dauber was behind her and he said, "You are not in this building." Dauber gave her permission to call Personnel.

At that time, respondent was sitting there and waiting. She said she was not yelling, screaming or making gestures. Someone called Personnel, and respondent spoke with Personnel staff. She asked if the transfer information could be faxed over. They said she had to talk to Student Services. The Personnel office transferred respondent to Student Services. Deni was out of the district, so respondent asked for Servillo, who was not available either. Respondent said that if a person called in, she needed a transfer faxed over and needed to know what she was supposed to do.

Levine, the union president, who taught at LIS, was there. Levine said Deni and Gold were coming by and that respondent no longer worked in the building.

At the meeting, Levine, Gold, Whitehead, Deni and respondent were present. Deni handed respondent the Board minutes of July 2007, in which it said she was transferred. They also said that she would be teaching ISS, namely, instructional student support. Deni said that respondent would be supporting students and helping them. Gold said it was a perfect place for her because respondent could create her own job description. Respondent asked what kind of program it was. Deni said the students knew about her and that she would be great at it. Gold and Whitehead told her the same thing. Respondent told Levine that maybe she should go first. Respondent said she was not qualified. Respondent said nothing else, but stood up, and the meeting was over. They said that they were out of contract and that respondent should keep her mouth shut. Respondent asked if she was qualified at a previous job and was told she was not.

Deni provided the notice to respondent at the meeting, but respondent said that it had never been mailed to her. After the meeting, respondent got in her car, went to LMS and went in. She went to the main office to let them know she was there, and got her key and identification. She was told to speak with Zuckerman, who was in the middle of a faculty meeting. Gilson walked her to the ISS room. The room was a mess. There were boxes of materials and the room seemed to have teachers' storage boxes. Respondent was told it would be tidied up.

Respondent had a conversation with Gilson concerning the Behavioral Improvement Plan (BIP) and the Functional Behavior Assessment (FBA). For the first half of September, she had no students. She was told that she would get students for ISS, but they were not all classified students, as all students were eligible for ISS.

Respondent said she knew nothing of the program in writing. She understood that there were "ripple" effects to software and that she would handle issues concerning drug abuse, sex education, etc. She wanted Gilson to know she was not in highly qualified status. In year five of the building, they were not making any annual progress.

Respondent received minimal information on the first day of school. She received no other documents from Gilson about a program. Gilson said it would take time for her to get students. First, she would get to know the people in the building. Second, she would need to understand security. Third, she would need to know the program plan and where the materials were housed. And fourth, she would need to become familiar with the computer. She spent time with the union representative talking about having no roster, and she had headaches from the building. She checked the faculty list and found she was not on it. Apparently, with the computer, she was not at an LMS portal.

Respondent cleaned out her e-mail and did research about the FBA, so she was sitting in the building with no students and found out that she was not on any building faculty. She was not certified to teach elementary education in a general education classroom, but on one day she was asked to substitute teach for a math class, which she did.

She recalled receiving a letter that was given to her in response to some of the questions she had after a meeting on September 12. On September 12, she had a conversation with Zuckerman and Gold. Zuckerman had his walkie-talkie on and left because the buzzer went off. He told her to follow Ms. Laskin, who was in OCR with some students. The letter said she would be teaching seventh-grade language arts and resource room. Respondent did exactly what Zuckerman told her to do. In September she was bouncing around between rooms. There were kinks in the schedule and she was told that she had part of Laskin's schedule in an OCR. On September 12, respondent told Gilson she wanted everything filed in writing. Gilson responded that they were still juggling rooms around. An e-mail was the only response that she received to her letter. This was a memo to Gold and Deni dated September 23, 2007. Copies were provided to everyone.

Meara came to her room and she gave a letter to him in the room next to the library. Meara opened it and smiled and asked her how she liked her room. At that time she was in room 116. Zuckerman was trying to accommodate her with her union representative. Respondent would not give her medical information to Zuckerman. The memos of September 23 were similar to the questions to Gold on September 12. Respondent was still asking the same questions. She never received a response to her letter of September 23.

Another memo to Gold and Deni dated October 7, 2007, was delivered in person to their mailboxes, but respondent then said she did not recall whether in person or by placement in their mailboxes because it was two years ago. No response was received to that letter.

After September 17, she was instructed to shadow Laskin to start with language arts resource and to continue to teach language arts resource for the rest of the school year. Her first period was ISS, second period was language arts, third was professional planning, fourth was language arts, fifth was lunch, sixth was language arts. Also, on Tuesdays she was to split-teach in another room. On her A and B days, she was scheduled to use all the space in the building. On other days, the faculty sat as a team.

With respect to language arts, she said she had three periods of ISS and three periods of language arts for the rest of the school year.

Respondent drafted documents during the school year and kept a log. She sent in her PIP by the deadline, but it had not been completed and it needed to be in place. She sent an e-mail to Servillo and Dauber on May 8, 2007, with a draft PIP. Also, on June 7, 2007, the PIP was sent to more people, including Gold, Servillo and Zuckerman. Her 2007–2008 PIP was not done. Respondent said each PIP she was required to do was accomplished.

The annual evaluation was provided to her on her last day of school. It was a large classroom and she did not have time to read it that day. She said it was generally positive. Classroom observation had been done by Gilson and Zuckerman, but he left. The pre- and post-evaluation meeting with Gilson was positive. It covered language arts literacy and OCR. Gilson had received all documents with that lesson plan.

Transfer to LES and BFS

In May or June 2008 respondent was told at a surprise meeting that she would be going to a new school in September. Zuckerman said there was going to be a meeting in his office at which Gilson, Zuckerman, Rich Smith, Deni and respondent were present. Deni said respondent was going to be transferred to LIS or BFS or both for the upcoming school year for in-class support. Respondent said she had only done this once before. The meeting was very brief and she asked no questions about her position. She received nothing in writing about what she would be doing and she was not told to follow up with anyone. She e-mailed Zuckerman and sent a follow-up e-mail. She said she never received any reply.

Between June and August she did not hear from any principal as to where she would be teaching the following year. She wrote to Deni on August 17, 2008, and received a response on August 22, 2008, in which she was told that LES would be her home school.

She sent a memo to Buss and McLaughlin. McLaughlin left her a telephone message on August 28, and Buss sent her an e-mail which she got when she returned to school in September. She sent another memo to Buss and McLaughlin in which she stated that she needed clarification about her position.

For the 2008–2009 school year she went to LES, which was to be her home school. She was advised she would be sharing room 216 with Auer, another special education teacher. Respondent spoke with Auer, who pointed to a kidney-shaped table and told respondent it was hers. One teacher's desk had Auer's things and Auer was willing to share the kidney-shaped table.

Respondent had a student schedule and roster that she received from Auer in a different type of format than she had never seen. In prior years, the assistant principal had given the roster to her and she had never received it from a fellow teacher.

Respondent did not start teaching the first day because she did not have IEP's at either LES or BFS. At LES, she received a schedule from Auer which said she was to be teaching language arts and reading for grades one, two and three, and that she had three students. At BFS, the roster that she received from a case manager by e-mail said she had language arts, math and reading for grades two and three with five students in language arts and reading, and three in math.

Respondent wanted to open her computer. When she keyed in her password, nothing came up. She spoke with John Snyder and wanted to have print access. Snyder set it up for her. She had problems accessing PowerGrade and PowerTeacher at the beginning of the school year at both schools. PowerGrade and PowerTeacher include medical alerts for students, including allergies, medical condition, etc.

She had meetings with McLaughlin on both days for professional development for the faculty. McLaughlin responded with the first names of the children and said respondent needed to return the handbook that she received at the end of the meeting

because she had one belonging to another teacher. Respondent did not receive a handbook until the end of September even though she asked each week.

Respondent said she was not at a faculty meeting on September 22, and never received any of the documents that were presented.

Respondent attended a meeting at LES on September 4, 2008, and was present for Maureen Hayes's presentation. There was only a brief discussion of the DRA's. Respondent spoke with McLaughlin about the DRA and asked what it meant. She later received a big kit for the DRA which she could take home and teach herself.

Respondent also went to BFS and spoke with Lori Tennan, a secretary, and was buzzed in because she had no keys or identification. At BFS, Hernandez and Vegas told her about her room. Respondent spoke with Hernandez at the high school that morning and met Vegas too. She and Vegas were sharing a classroom, number 213B. The classroom had two kidney-shaped tables and one teacher desk that they shared. Vegas was an OCR resource-room special education teacher as well.

Respondent sent a memo to Billy on September 5, 2008, with an attachment, about their meeting scheduled for September 13. There was a problem about her schedule at LES. Billy asked if she were angry, how her environment was, the area of the computer, and the roster given to her by a teacher. Billy said he did not know about her placement until late August, and said the attachment only went to him. The problems that were identified by respondent included her schedule; the building access problems, including no coded key or identification; the PIP that had not been done, so she had no closure on it; the OCR that was 100 percent of the time; and the work environment: the tile was stained, she had medical concerns, there was a prior problem, and Billy had not responded to her memo.

Respondent intended her e-mail with attachment of September 12, 2008, to be a tool to keep Billy advised of the situation. Finally, she did get some information on the children's medical needs, but she needed PowerTeacher and PowerGrade. She found out that one student wore glasses and one student had eye surgery, and she had not

known this before. Hernandez sent her an e-mail in response to her e-mail to Hernandez about the medical information.

Respondent received no response to her e-mails. She sent an e-mail to Billy dated September 22, 2008, asking where they stood on week three concerning her issues, which were: internet access, because she could not access a printer from her laptop at BFS; sometimes the screen would freeze; the laptop was her file cabinet; she had two passwords; she had no keys for building access; and was maintaining a list so that Billy would know what was going on. Finally, on October 15, 2008, she received a key for room 218. At BFS she received identification, but she could not recall the date in September. She also received an e-mail in December that a key was available.

PIP

All teachers must do PIP's annually. After the classroom observation was when the PIP was drafted. The reason for the PIP was because every professional needed to improve and grow. Respondent sent an e-mail to Servillo on May 8, 2007, concerning the PIP. Servillo was the Student Services supervisor, and that e-mail attached a draft PIP. An e-mail from McLaughlin indicated that PIP's were due as of June 9, 2008. She provided a PIP to Carol Koch, the operations secretary, and attached four pages. LMS had had no concern about the PIP in March 2008. Zuckerman provided the PIP and her previous PIP's. At LMS the PIP was to be produced by June 9 and submitted in June for the following school year. Respondent said there was no follow up.

In 2007, respondent generated a PIP to be turned in in May 2007 for the 2007–2008 school year. She received a memo from Koch in December 2007 stating that the PIP was missing. She sent the PIP from May 2007 to Zuckerman in December 2007. Then Zuckerman submitted his own PIP at LMS in March 2008, but this PIP was not finalized. In June 2008, at LMS, Koch asked for the 2008–2009 PIP. Respondent provided the PIP that was done for 2008 but was not finalized. There was no further communication with the supervisors. Then she was transferred to LES/BFS and there was still no PIP. During 2008–2009, she met with Deni to discuss the PIP for that school year.

The PIP from 2008–2009 was different from the PIP she submitted in a prior year. It was the draft that was sent to her from Deni after the meeting with her and Billy at LES. Deni had asked her where her PIP was. Deni stated that she would imbed some of the prior PIP in the one that Deni was preparing for her. Respondent sent Deni her feedback. Except for the cover e-mail, it was the same as the prior one. There are three goals set forth in the PIP. Neither Deni nor Billy had told her to improve her professional communications.

On October 10, 2008, at a meeting during her planning period, which took forty minutes, Deni and Zuckerman had her sign off on the PIP. Respondent had a right to disagree with the PIP but had to sign off. The district can improve the PIP even if you disagree. Respondent stated that she followed the goals for the 2008–2009 school year to the best of her ability. There was a meeting on October 22, 2008, at the request of the district. Her PIP did not change during the 2008–2009 school year.

Substitute Lesson Plans

Respondent would write out substitute lesson plans and turn them out on the dates required. The plans went to the supervisor for many years. Lessons plans were sometimes provided on a monthly basis. There was a template which was used as a guide. At LES there were no problems or disciplines. Respondent provided examples of 2008–2009 lesson plans. The district had no problems with her plans. They were placed in a binder and placed in their mailbox. She was just told to leave them on the desk, and a copy was left in the main office. She said she did this at LIS and LMS, as well as at LES and BFS. The teacher handbook did not tell teachers how to do lesson plans.

At LES, respondent left the materials on the credenza, because she did not have any desk, and also in the main office. The substitute would know where the office staff kept them. At BFS she kept them in the upper right corner of her desk. In 2008–2009, she moved to different classrooms in each school. At LES and BFS, the lesson plans for the substitutes were in the same place. The form for the substitute plans did not

change over the years. She always left them in a folder. She never received any training on how to draft a substitute plan, as each teacher used his or her own style and she used the style that she had previously used.

In January 2009 she received a memo from Billy and, for the first time, she was told there was a problem with her lesson plans. In October, McLaughlin had said there were no substitute plans, so respondent went to the office and showed her where they were. There was another person named "Kubicke" in the school that year and that caused some confusion. Once she showed McLaughlin where her plans were, she did not expect a problem. Respondent did individual folders for her students to show the work in progress. Any substitute could just go and use these folders.

Respondent did not agree with Billy's memo. She stated that she updated emergency plans monthly. She believed the lesson plans that she left for the substitutes were in appropriate places in each school. Buss said he had rules for placement of substitute plans. She never had a meeting with Billy to discuss the memo. Teachers could request a particular substitute. However, when she called out, she had no particular substitute that she liked. She thought that a certified special education teacher could cover her class when she was out. There were perhaps two that she liked, including Pat Rogers. During that school year, four to five substitutes were necessary for her due to her medical issues.

She identified her folders that complemented the lesson plans. This has always been the form for her substitute plans. She identified a memo to her dated March 30, 2009, about the substitute plans. She replied to Billy and copied Deni, McLaughlin, Buss, Nardi, and Personnel, and sent it by mail, regarding substitutes not understanding her lesson plans. Billy never responded to a meeting to discuss the memo and neither one set up a meeting to discuss her substitute plans. Respondent said documents were missing from her substitute lesson plans. Buss sent a memo regarding lesson plans to her, dated April 17, 2009. Her response was dated May 13, 2009. On April 17 she was supposed to have her annual evaluation. On April 27 things were due to the BOE office. There was a delay because of her illness and because she had other things to do. She disagreed with Buss's memo. Buss never responded to her in writing or

otherwise about this memo and there were no discussions with him about the lesson plans.

DRA's

Respondent taught grades one, two and three at LES and grade three for language arts and reading, and grade two for math at BFS. Students changed during the year. One student moved out because he was using Wilson and she was not certified in Wilson.

The DRA assessment was not reported to anyone outside the school, it was just for the district in the database. Respondent had used other assessments: the Stevenson assessment, the Dolch word list (100 words by grade level), the San Diego quick assessment (flash cards) and the NWEA, which showed instructional level.

Before 2008–2009, she had no training in DRA. She heard about it during professional development days at the beginning of the school year from Hayes, and asked her about it and the schedule at the end of the second day of school. She had never heard of the DRA assessment and had never used it before. The instructor facilitated the assessment for reading and the test assisted the teacher with instruction.

Respondent attended the faculty meeting of September 3, 2008, and spoke with McLaughlin, but spent most of her time talking about the schedule and assessment calendar. Respondent said she did not receive the handbook, ID pass or calendar. She did not recall receiving the assessment calendar in September. She got her handbook in October and got her calendar at the end of October.

When respondent checked the school website, the screen showed basic things from the year before. She did not appear to have access to the school website.

She went to a session on reading strategies, but there was no DRA training. There was no specific training in the course catalog for the DRA and she was never

notified of a DRA training course. She was not given a kit or video, but saw that there was a kit on the bookshelf, so she used that, and not the video.

Respondent spoke with Billy in October when they were talking about the PIP. She had previously spoken to him and Deni at the beginning of the year and also sent him e-mail about the DRA. She never told Billy she would not train at home. She said she also did work at home. She spoke with Hayes, but never received any training from her in August or January. Respondent did not recall receiving a memo from Hayes about the DRA, but met with her on September 4 or 5. Hayes sent respondent an e-mail about the DRA on October 21, and then Billy told her he would have Hayes help her with the DRA. Respondent e-mailed Billy and McLaughlin but respondent did not recall their response. Hayes sent Billy a memo about respondent.

Respondent was to meet with Hayes on November 1 to model the DRA. A student was there (K.D.P.), and also Auer, McLaughlin, and Hayes. A model was done on K.D.P. by Hayes. DeFiccio had already tested the student. That was the only model Hayes did. When the modeling was finished, respondent asked Hayes a question about the rubric—was it subjective or objective? She had a question about how to score it. Respondent did not recall raising her voice. She was in a hurry during the meeting, but she was not aggressive in the conversation. McLaughlin said she was unprofessional. Respondent said she was just asking a question.

Buss called for a meeting to discuss the DRA. Their meeting was brief (under fifteen minutes). He talked about the DRA. Respondent asked about benchmarks. One student had a benchmark in his IEP—she was asking about which students had or had not done the DRA. Buss said he would get back to her on that.

Respondent had to do the DRA's for the students. Buss gave her an extension to November 19 to get them done. The only thing Buss needed for her to do was to find the independent reading level for the children. Respondent conducted DRA testing on four students at BFS and three at LES. She said she followed the materials and filled it all out.

Respondent said she delivered the DRA scores for four students to Seipp and Hernandez at BFS and to Ms. Shields at LES. DeFiccio received the scores for her student. Respondent's handwriting at the bottom of the exhibits said all scores were delivered. Scores were provided to McLaughlin at LES. All respondent knew was what Hayes had told her—she did not know what a protocol was. Respondent said that the scores were accurate and that she followed Buss's instructions to her.

One particular student, Vinnie, appeared to have had three tests performed on him, and was assessed at level 6, grade 1, independent, but respondent could not remember why. She thought he wanted to have an easy book to read. Level 1 and level 2 were not completed, because it was too easy. But she did fill out the grid/rubric, which is the protocol. Respondent said she filled out the grids and protocols for each of her students, but that Exhibit P-15 was not the one she filled out for Vinnie. All pages were not complete.

The grid for another student, Kyla, was not completely filled out, but respondent said that was not the one she did. She said she would not hand in a blank grid sheet. It said Kyla tested at level 24, but this did not appear to be correct for her. Respondent had student K.N. testing at level 20, but there was no grid sheet because respondent had a question. She did not fill out one spacing on the grid until her question was answered. This was a training issue, the same one she had questioned before. For student B.H., who was tested and graded as level 20 and then level 24, the grids were not done, but respondent said she did them.

Seipp questioned the level of student P.Z., for whom there was no grid sheet. Respondent said she filled out the grid and handed it to Deni at the November 20 meeting

Meeting on November 26, 2008

Respondent was handed a note from Buss in the middle of second period telling her about the "surprise" meeting. Buss, Deni, Billy, Terry Alexa (the union representative) and respondent were present. They told her she was unprofessional

and did not hand in the protocols and they were yelling at her. Respondent said she did not yell back. Because of respondent, the entire district had to get locking file cabinets. Respondent was accused of not doing the protocols. Respondent did not know the grid sheet was the protocol. Deni was quiet and smirked, Billy and Alexa were quiet. The meeting lasted about an hour and a half. Respondent was surprised by the meeting and said it was pretty dreadful. She had never experienced this conduct. She thought she had always worked well with Buss.

At the meeting, respondent had been asked for the protocol/grid sheets and she went to her car and got the information. She kept them in her car because it was a locked secure, environment. She said she had no key to the file cabinet. Deni said the materials did not belong in her car, and respondent said she needed a locked file cabinet. Respondent handed the documents to Deni—the backup with her writing, and the grid sheets. She wanted to know what the problem was with the testing. As Deni went through each student, respondent noted the problem with K.N.'s rubric. She said the grids were filled out and provided to Deni. (In her testimony, respondent went on and on about the protocols and grid sheets.) Next, Deni saw the materials and Buss saw the back-up data. Deni said she would keep the protocols and respondent did not need to re-do the testing. There was no other investigation about the fall scores and the other teachers accepted the scores.

File Cabinets

At the beginning of the school year in September, respondent was in room 218 at LES with Auer and in room 213 at BFS with Vegas. She did not have file cabinets. She received delivery of file cabinets in October, but did not use them because they were not secure. When she was in the building, she saw no keys dangling. Respondent mentioned to Billy that she needed a file cabinet and key, and Billy just nodded. She also told him about the problems with the computer programs. On December 8, Buss gave her keys to the file cabinet at BFS, and she had a file cabinet at LES but no key until January 9. She placed her locked materials in these cabinets after those dates. Respondent also noted that she did not receive room keys until December 4 at BFS and did not receive her identification badge for some time.

DRA Winter Scores

Respondent said she delivered the January 2009 DRA scores to the teachers, including Seipp and Lawrance, when due. The teachers did not ask for data or protocols.

Grid Sheets/DRA Protocols

Respondent represented the following as to the protocols and grid sheets:

> Fall (November) 2008—She said that she completed the grid sheets for her students and kept them in her car. She handed Deni grid sheets for all seven students at the end of November.
>
> Winter (January) 2009—She said that she completed grid sheets for eight students and gave the scores to the teachers. She maintained the grid sheets in her locked file cabinet. She made copies at that time and kept them on file. She took the duplicates home with her because she was suspicious.
>
> Spring (April) 2009—She said that she completed the grid sheets and gave the scores to the teachers, and that the protocols were in file folders in locked file cabinets where they were available for other teachers, or if Billy or Buss wanted them. There were complete records for each of the students, and the bases for the memos with scores. She took copies home with her when she left and put them in binders that she had. She offered the binders to her attorney. Respondent said she used the entire form to complete the DRA's. One document was provided to her counsel as a "sample" to show the work she had done.

Respondent kept the protocols for January and April in locked file cabinets. Billy asked for them but she did not send them to Billy. Neither did she tell him where they

were. First she said she did not make copies of the protocols, and then she said she did, after the students did them. She said there are complete protocols for any student. She maintained the protocols for January and April because she did not get back the protocols from November. On June 16, after the meeting where she was asked to provide records and protocols, she offered them to McLaughlin.

In January, after she had a key to the file cabinet, she put the folders in the file. She took copies home and put them in a binder, and there one would find complete protocols on the students. She maintained January and April records, but not the ones from November because she did not get back those protocols. She indicated that she had copies and duplicates of all of the students' records, including their Dolch spelling tests and DRA's. Respondent took copies with her when she left the school and still had the copies. She stated that she offered to produce them to her attorney, but he did not want them.

Respondent copied all the student assessments, not their portfolios, and copied some samples of the students' work. There was more than one binder. She started to make copies when there seemed to be problems. Starting in February she was copying documents from January in order to have a running record of the assessments.

As to the first part of DRA testing, her memo to Billy just gave scores in a sealed envelope. She did not provide data and protocols to the teachers for November, just the scores, indicating that she was following the directions of McLaughlin at LES. At BFS she did the same thing. She gave the scores but did not provide the data or the protocols. She said she kept documents in her locked file cabinet once she had them. McLaughlin never told her that what she was doing was wrong. As to the scores for B.H., she said the student ended up at level 28. She used the DRA testing to give the students the opportunity for one-on-one time with her and the students liked that. The teachers accepted the scores that she provided.

During the hearing, respondent was directed to immediately produce these file binders to her attorney and to counsel for the Board. Respondent did not provide any explanation as to why she did not provide the binders to her counsel. On August 19,

2010, three binders, namely R-78, R-79, and R-80, were turned over to counsel by respondent.

Respondent represented that these binders were maintained at home by her and that they represented copies of the original test scores of her students, including the DRA testing, holistic writing, Dolch spelling tests and dictation tests. Respondent represented that the DRA testing scores for the winter and spring were in the binders.

Respondent said she made the copies because she needed them, and by the end of December she had her file cabinet to keep them in. By the end of January 2009 she had duplicate copies and offered them to other teachers so they could lock them in their file cabinets, but no teachers took her up on that offer. Also, if any teacher or child study team member asked for copies, she would have them in her file cabinet and they could be shared with parents. She stated that the originals were maintained in the building file cabinet, but that copies of the winter and spring scores were in the binders she produced at the hearing. In May 2009 she took possession of the duplicates that she had made and pulled the copies because she felt that she was being retaliated against and harassed and that it was an escalating routine at the school. This combination of things caused her to become concerned. She also noted that there was white powder embedded in the windows in the spring and in October when she got sick.

On June 15, Meara told her she was on administrative leave, but respondent wanted it in writing. She offered McLaughlin all the students' files, but she wanted only one, so respondent gave it to her. A suspension was not mentioned until August 2009.

Professional Interaction

Respondent knew Hernandez from BFS. In September some of the IEP's did not appear to match the roster and she could not print on the printer at BFS. She said she could only speak with Hernandez at the end of the day. Respondent said she was never reluctant to see her students, but she needed the medical information, which was not coming up on her computer. She denied ever losing her temper with Hernandez, but said that Hernandez lost her temper at her. Later in the school year Hernandez

wanted respondent to do something and grabbed her wrist. She thought Hernandez was upset and inappropriate and not modeling appropriate behavior.

As to missing reading grades, respondent thought the office computer may not have integrated the grades properly. As to an e-mail from Seipp, Seipp was frustrated. Respondent said that she gave her the grades and put them in a sealed envelope for Seipp on at least two occasions. One student, Tyler, was on a roster for reading and language arts, but at his IEP meeting in February 2009 he was removed from her class. After the IEP meeting, a student brought her an e-mail saying the student was not in her language arts class. Hernandez explained that the student's parents wanted the roster changed, but did not say that the student was having emotional and behavioral problems in her class. Respondent stated that Seipp lost her temper and that respondent was always professional in her dealings with Seipp.

Respondent talked to student K.C.'s parents about a clue book that was for the purpose of organizing skills. That parent never said she had a problem with respondent, who felt that the clue book was related to the IEP and the core curriculum standards. Buss mentioned that a parent came to him about respondent, but Seipp never said that what respondent said was confusing.

She recalled Kabo attempting to provide an IEP for student M.R. in January. After Kabo attempted to do that, respondent asked if they could meet the following morning and Kabo walked away. Respondent said she would stay to do a working lunch.

Respondent spoke with Kabo the next day in an office she shared with Kabo and Hobson. That conversation lasted a short time and concerned student M.R. She stated that she had difficulty with technology and that on her computer she had no information about this student or about his PLAAFP. This was a student who was placed in her class when she was absent. Respondent said she was not certified to teach Wilson, which she thought was in the student's IEP. The goals and objectives appeared on Kabo's computer screen, but not on respondent's. Kabo told her to talk to McLaughlin about the Wilson program and the IEP. Respondent admitted that she used the term

"plunk and dunk." She thought the student was getting double-dipped in reading. Kabo was not a subordinate or supervisor. She was a case manager for M.R. and was a colleague. Respondent said she was never hostile to Kabo, and said she let Kabo know that she had to leave and that a student was ready for her class. Respondent said she was professional during her conversations with Kabo, but this was the second incident involving two students where respondent did not have the IEP.

During the 2008–2009 school year, respondent met with Hobson according to the monthly schedule she provided. They touched base on three case assignments, which changed when B.H. was added to the roster in January. The meetings did not occur after February because of snow days, or scheduling conflicts, or because respondent was not in school. Most of the meetings were brief. Hobson observed respondent and saw that the students were making progress according to the IEP and the CST. Hobson never told respondent that she felt frustrated and never sent any materials about a student's level. Billy attended one meeting to observe Hobson but did not express any concern with these meetings.

Hobson was going over B.H.'s IEP in a conference room. Respondent had no documents and the parents had not signed off on the IEP. Because she did not have all the materials, respondent wanted to make sure everyone was in compliance with the student's plan. Respondent said she was not argumentative with Hobson. Hobson said respondent just needed the goals and objectives. They had a disagreement and needed information on Contour. B.H. began on January 5, but the student's IEP was not coming up in Contour. Hobson said she left the IEP under the computer. Respondent took the IEP and glanced at it, went to Hobson's office and asked for further information. Just before she had to teach a student, the IEP appeared. She provided grades for that student for the rest of the school year. There was an e-mail from Hobson to Billy stating that respondent had not done the grades for student B.H.

Respondent said that Hobson's testimony regarding what respondent said at a meeting for another student in February was not what respondent said. At the meeting, in the presence of Hobson, the case manager, and the child's parents, respondent said she had to leave, and that whatever was decided about the IEP would be decided after

she left. Respondent said she had no ability to collaborate on this IEP review and would be left out of the group discussion because she had to leave. Respondent also did not say that the parents were unhappy with the child going to the basement. She did not know if the parents complained, but thought the student was progressing and was going to mainstream. Respondent did not think that she was unprofessional in her conduct.

With regard to Lawrance, a few times during the year respondent had to pick up her students. She said that she never entered Lawrance's classroom or said that Lawrance violated a student's IEP. She said something when the children were present, but she was not disruptive to Lawrance. She never thought Lawrance felt threatened. She said she did not interrupt a class, because the students were in transition from one subject to another.

As far as the substitute plans were concerned, she said that Billy never spoke to her about the workbook and never thought that she was inappropriate.

At a conference in the spring with Auer and Lawrance, student B.H.'s work was discussed. No one told her that what she had said was inappropriate. No one told her that they did not want her teaching B.H.

Vegas was teaching at BFS when respondent arrived to teach. She did not discuss any problems Vegas was having with her. Vegas never told respondent that she was not doing accurate DRA assessments. No supervisor gave her notice that her students were having any problems with her teaching them. Vegas was there for some meetings with parents and professionals. At one meeting for student K.M., respondent did not say to the parents that she did not have the goals and objectives for the student. She thought the parent was pleased.

Respondent worked with Auer at LES. She met with Auer and Kearney, who taught speech and was involved with the CST. Kearney asked if they could talk during respondent's planning time. She did not recall telling Kearney that she would talk to her in three to five business days, but she did think that she had a lot to do at that point and

just told her to come back later. Collaboration time was the first thing in the morning. She thought she had gotten back to Kearney and had acted professionally towards her.

Respondent admitted that once in a while she would contact parents to reinforce positive behavior in the students, and she thought the parents were appreciative when she called. Auer never told her that the phone calls were inappropriate. When she and Auer were in the basement, Auer had a SMART Board and respondent had to go to the classroom to get to her file cabinet. The room was blocked. Respondent said she did not purposely bump the SMART Board, but the fit was tight and there were many wires on the floor. At some point respondent discussed this, but not during Auer's class. She thought it was the next day, and believed that the wires were dangerous. At the beginning of the school year, Auer did not complain about respondent coming into her class. At the beginning of January, respondent was moved to the classroom in the basement with Hall.

Testimony in Rebuttal

In rebuttal, **Billy** testified concerning the meeting on November 26 with Deni, Buss and respondent. Respondent was asked to get the DRA protocols and eventually she brought them in from the trunk of her car. She said these were all the protocols she had. A review of the documents showed they were not complete. The grids/rubrics were not filled out, except for the one done by Hayes. Respondent's explanation was that she gave the scores but did not know where they came from. Billy took these documents and kept them until he gave them to the school board's attorney. He substituted no pages, and Exhibits P-14 and P-20 appear to be the ones that he gave to his attorney.

Billy reviewed Exhibits R-78, R-79 and R-80, which are the protocols turned in by respondent during the middle of these court proceedings. Billy had given directives to respondent to turn in these protocols, but she had not, even after he had sent her reminders. Billy had never seen Exhibits R-78, R-79 or R-80 until the attorney showed them to him during the course of the hearing. This information had never been provided to Billy before in this litigation.

With regard to progress reports, which are usually done quarterly, the objective was to see progression in a child's skill level. Success was measurable because a teacher was supposed to keep a daily and weekly log to show a student's quantitative record. The resource room should keep a running record. If kept accurately, it should keep track of a student's learning. For school year 2008–2009, the progress reports should have been completed by respondent. He noticed that she was not doing this during the course of the year and wrote her memos about it. Her roster showed that progress reports were not done for various students, including D.P., B.H., and another student B.H. Also, respondent failed to complete B.H.'s report card; she did not complete the grades, and showed no grade for the first and second marking periods. The homeroom teacher gave the grades, and respondent was supposed to transfer them, but she did not do that.

Billy said that respondent had represented that the copies of the protocols she gave to him and Deni were the original documents. That was what his attorney had. When she handed him these documents, he told her they were incomplete. He sent several memos to respondent asking for the protocols because she needed to provide them to the case manager and later to him. She never provided the documents, even though she was asked to do so. She never told him that she offered these documents to the teachers and that they did not want them. Respondent was specifically directed to provide the documents to the teachers and the teachers complained, particularly Seipp, who complained to Hernandez, who complained to him. He recalled that after respondent was placed on administrative leave, he looked through her files at LES to see if she had any other DRA tools. He never located them.

In rebuttal, **Deni** testified, with regard to filing cabinets, that she needed to ensure that confidential student information would be maintained in a locked desk or file cabinet. She followed the DOE guidelines and saw that everyone had such a file cabinet. In April 2008, all locked file cabinets were given out. A search was performed for all buildings, including elementary and secondary schools, and file cabinets were placed in each one. In the 2008–2009 school year, the file cabinets remained where

they had been placed. When she learned that respondent said she had no file cabinet, Buss bought an additional cabinet and brought it to her after the November meeting.

There had been a two-year State monitoring program in progress and extensive training for all the teachers. By the 2008–2009 school year, Deni thought that all the file cabinets for special education teachers, therapists and counselors were in place. It was the culmination of a two-year effort to make sure that teachers knew that confidential documents were to be maintained in the locked cabinets. Before this two-year effort of the State, the file cabinets were not maintained as diligently. They wanted to be thorough because the State was coming out for monitoring and it had been six to eight years since the State's last visit. It was good practice to have locked filed cabinets. Zuckerman saw that respondent had a locked file cabinet. Deni knew that a file cabinet had been delivered to respondent to secure a laptop that was used by a student. Respondent insisted on having a secure place for the computer, so she was provided with a file cabinet.

At the November meeting respondent stated that she did not have a file cabinet and that the trunk of her car was a secure locked place. Respondent was reminded that she had a file cabinet located at each one of her schools, one in Room 218 at LES and one in the resource room at BFS. Deni was struck by the comments made by respondent that she had no locked filing cabinets, since Deni knew there were locked file cabinets in those rooms because they were used by the teachers who also used those rooms.

Deni had communicated with Billy, and both Vegas and Auer assured Billy that there were locking file cabinets in their rooms. Prior to the November meeting Billy said there was a file cabinet in the room.

Respondent was told where to keep her confidential documents. Billy told her to keep the documents in the locked file cabinet. Billy assured Deni that there were locked file cabinets during the previous summer. Deni knew respondent had her own locked file cabinet because Billy told her that additional cabinets were delivered to BFS for

respondent's use. All the new file cabinets had a key so they could be locked. One new cabinet was delivered to BFS in August or September and the key was attached.

With regard to respondent's complaints of inadequate computer assistance, a memo was sent to her in October 2008 giving her written directions and telling her to get a request to the Web Help Desk, where she would get the assistance that she needed.

In a memo at the end of October, respondent said she was having technical issues. She was told to use the Web Help Desk. It was clear that respondent required an administrative directive to use the Web Help Desk. Respondent said her access to the computer was intermittent and that she had trouble printing and going online. Respondent had her own laptop and access to a desktop at each school. If she had intermittent access from her own computer, she could use the desktop or go to a case manager to print. Technology was important because the school used a web-based system. Respondent did not use Web Help for the first two months of the school year even though she had been advised to work with the technicians to resolve her problems. At meetings that Deni had with respondent in September and October, respondent did not raise computer issues.

In rebuttal, **Michael Dean**, a technical coordinator (supervisor of technicians) at the Lawrence Township public schools since January 2008, said he was responsible for the Web Help Desk. He performed technical troubleshooting. Employees could log on and request service. The teachers were advised how to access Web Help. Web Help was requested by asking for "help tickets." The computer was necessary to getting the job done because many of the school programs, PowerTeacher, Contour, PowerGrade, were done by computer. Most teachers received laptops in 2008–2009 and used them. He would receive phone calls every day and would resolve teachers' problems as quickly as he could. Generally, the technician sent an e-mail to the teacher notifying the teacher that the problem had been corrected. He had a log of requests from respondent, which were resolved promptly during the school year.

FINDINGS OF FACT

In making findings of fact, it is necessary to determine the credibility of the witnesses who testified at the hearing.

Analysis of the Testimony

This case involves sixteen witnesses testifying on behalf of the petitioner, alleging serious acts of professional misconduct warranting loss of tenure, and that of respondent, who denies these acts. The credibility of the witnesses must be assessed in order to determine which party prevails.

Credibility is that quality of testimony or evidence that makes it worthy of belief. Testimony to be believed must be credible itself. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. In re Estate of Perrone, 5 N.J. 514, 522 (1950). 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).

In order to assess credibility, inferences may be drawn concerning the witness's expression, tone of voice and demeanor. MacDonald v. Hudson Bus Transp. Co., 100 N.J. Super. 103 (App. Div. 1968). In addition, the witness's interest in the outcome, motive or bias should be considered. In State v. Spruill, 16 N.J. 73, 78 (1954), the Court looked to the interest of a party in the outcome of a trial as a factor in evaluating the evidence, stating that every fact or circumstance tending to show the witness's relation to the case or the parties is admissible in order to determine the weight to be given to his evidence.

In this matter, I was impressed by the testimony of Deni, Billy and McLaughlin in particular. They were familiar with respondent's conduct and had no motivation to fabricate their testimony. They initially supported the respondent and wanted her to be successful. The others who testified, including the teachers and other supervisors,

completed the picture of respondent's conduct during the school year. They impressed me with their efforts to accurately relay what had happened without any bias or prejudice against respondent. On the other hand, respondent's testimony could not be focused. She was distracted and rambling and could not or would not remain on the subject even when directed to do so. It would be hard to conclude that all the witnesses on behalf of the Board coordinated their testimony, despite being sequestered, and that all lied, as respondent would suggest. Given that some of the charges concerned respondent's failure to properly administer the DRA's, her failure to provide those file binders, which would allegedly prove that she had in fact properly completed the assessments during the school year, to her own counsel in discovery was startling, and affected her credibility.

After having the opportunity to view the witnesses, and assess their credibility, I **FIND** the following **FACTS**, which will be addressed in the order of the specifications set forth in the Statement of Charges:

Specification 1. *September 2007 Incident at LIS* (Insubordination, Prevarication, and Lack of Professionalism)

Respondent was aware of her transfer to LIS in September 2007, but chose to ignore it and reported to LMS. She had been told personally by Deni and had received communications from Zuckerman concerning the new position. On the first day of school, respondent refused to leave LMS until Deni and the union representatives met with her. Her response to their directives was combative and confrontational. This caused disruption to the orderly administration of the educational process on the extremely busy first day of school.

I **FIND** that respondent was not being truthful in denying knowledge of the transfer; that she refused to report as directed; and that her communications with her supervisors were combative and confrontational.

Specification 2. *DRA Assessments* (Insubordination, Failure to Perform Duties, Fabrication of Assessment Results, Prevarication, and Lack of Professionalism)

Respondent was advised at the beginning of the 2008–2009 school year of the necessity for her to timely complete the DRA assessments, which were due at the end of October, January and April. Respondent had never given the DRA before. She refused to learn how to perform the assessment on her own or with the assistance of her colleagues. Hayes was assigned to demonstrate a DRA test for her, but respondent became upset and confrontational toward Hayes. Billy reprimanded respondent for the unprofessional manner in which she interacted with Hayes.

Respondent was reminded of the due dates for the DRA but was not in compliance. Seipp and Hernandez complained that the student test scores had not been completed or provided to them. Buss gave respondent an extension to November 19 to turn in the results, including the grades and reading levels (including fluency and comprehension) of the students. On that date, respondent turned in DRA levels without the protocols/rubrics that were used. Hernandez requested these from respondent and never received them. Seipp asked for them and respondent said she had provided them, but Seipp never received them from respondent.

On November 26, 2008, Buss, Billy and Deni met with respondent about the DRA scores. Respondent said she had completed the tests and had the protocols in her car trunk. She was asked to retrieve the documents and became hostile and angry. She was told that keeping the documents in her vehicle was contrary to policy and was an improper way to maintain confidential student files.

The documents revealed that only two out of seven protocols had been completely scored, one by Hayes, and one by either respondent or the classroom teacher. Respondent denied knowing what the protocols were, although she had been told by Deni and Hayes. Without the documentation and backup, it could not be determined how respondent had given the students their DRA scores; the scores that were given must have been fabricated.

I **FIND** that respondent failed to perform her duties in properly administering and grading the DRA for at least five students; that the scores for at least five students were fabricated or manufactured; that she was not being truthful when she denied being aware that the protocols/rubrics needed to be turned in; that her communications with her supervisors were confrontational; and that she was not truthful with regard to the DRA scores.

Specification 3. *Meeting with Parents—November 2008* (Insubordination, Failure to Perform Duties, and Lack of Professionalism)

Respondent had been directed to maintain a professional demeanor when communicating with parents, colleagues and administrators as noted in her PIP. At parent conferences in November 2008, respondent did not have her progress reports prepared even though the students' teachers had requested them in time for the conferences. She complained to the parents about the administration, as well as technical glitches and the computer system. One parent was so concerned that the parent had the child transferred out of respondent's class.

I **FIND** that respondent failed to follow the PIP; that she failed to have the progress reports done in a timely manner; and that her communications with parents were inappropriate.

Specification 4. Meeting with Administrators—November 2008 (Insubordination and Lack of Professionalism)

This specification is also part of Specification 2. At the meeting on November 26, respondent became angry and hostile to the supervisors and administrators who were trying to get respondent to cooperate in the production of the DRA scores and protocols. She was aware that one of the goals set for her in her PIP was to be more professional in her communications. Rather, when faced with concern from the administrators about the DRA's, she responded with diatribes and ranting. She spoke over people, muttered epithets and slammed the door on the way to the car.

I **FIND** that respondent was angry and hostile to the administrators in her attitude and tone, and that she responded angrily to them.

Specification 5. *Failure to Prepare Substitute Lesson Plans* (Insubordination, Failure to Perform Duties, and Lack of Professionalism)

Respondent was frequently absent, which necessitated adequate substitute lesson plans. By January 2009, Billy and McLaughlin had received complaints about the plans previously prepared by respondent. They were incomprehensible and difficult for the substitutes, some of whom were retired teachers, to understand. When asked to update or clarify the plans, respondent insisted that her plans had no problems. Other teachers were compelled to prepare substitute plans when respondent was out, thereby taking time from their own responsibilities. Respondent was ordered to improve her substitute plans but she never did.

I **FIND** that respondent failed to follow administrative directives to complete appropriate and comprehensible substitute lesson plans; that she continued to provide inadequate substitute lesson plans; and that she refused to recognize that her plans were inadequate or correct them.

Specification 6. *Refusal to Accept IEP* (Unbecoming Conduct, Insubordination, Failure to Perform Duties, and Lack of Professionalism)

At the end of January 2009, Kabo attempted to provide the IEP of a student who had been assigned to respondent's class during her absence. Respondent said she was unavailable to go over the IEP. When Kabo tried to give respondent a copy of the IEP, she refused to take it. When Kabo left a copy in respondent's mailbox, respondent returned it. On January 27, 2009, respondent angrily confronted Kabo and called the student a "pump and dump." Respondent refused to discuss the child's needs and left Kabo's office.

I **FIND** that respondent refused to discuss a student who had been entrusted to her care; that she ignored Kabo's reasonable requests to discuss the needs of the

student; that she failed to review the IEP or discuss it with the case manager; and that she responded inappropriately to Kabo.

Specification 7. *Continued Failure to Perform and Submit DRA's* (Insubordination, Failure to Perform Duties, Fabrication, and Lack of Professionalism)

This specification is a continuation of Specification 2. After being directed at the meeting of November 26, 2009, to perform and complete the DRA's in a timely and appropriate manner, respondent did not complete the DRA's in a timely manner. Billy directed her to have the complete results by the beginning of February. Respondent did not submit the results until March. Even after being directed in an e-mail by Billy in April to provide the protocols, she never did.

I **FIND** that respondent ignored Billy's directive to complete the DRAs in a timely manner, including the protocols; that respondent failed to complete the DRA's as directed; and that the results without the protocols suggested that those results were fabricated.

Specification 8. *Failure to Timely Submit IEP Progress Reports* (Insubordination, Failure to Perform Duties, and Lack of Professionalism)

Respondent was required to timely submit IEP progress reports. They are critical for the programs and to be in compliance with state and federal mandates. She was responsible for five students at LES and eight at BFS. Respondent was directed to enter the progress reports on the computer system and to provide the case manager with a copy. For the second quarter, respondent failed to timely submit progress reports for five students at BFS and two at LES; for the third quarter, she failed to submit progress reports for seven students at BFS and two at LES; for the fourth quarter, she submitted none at all.

I **FIND** that respondent failed to comply with the directive to complete the progress reports in a timely manner and that she failed to complete the progress reports.

Specification 9. *Preparation for and Meeting with Parents—February 2009* (Insubordination, Failure to Perform Duties, and Lack of Professionalism)

At an IEP meeting in February 2009 to discuss the placement of a child, respondent stated to the student's parent that she had had no input into any placement decisions regarding the child, and that the placement decisions would be made after she left the room. The teachers and case managers work as a team, but respondent's comments made it appear that the team had not been collaborating.

I **FIND** that respondent's comments were inappropriate.

Specification 10. *Communications Issues with Administration and Other Staff* (Insubordination, Failure to Perform Duties, and Lack of Professionalism)

It was expected by the Board that teachers would communicate in a professional manner and be collegial with their colleagues. The district emphasized cooperation and collaboration as best suited to meet the needs of the students, particularly those with IEP's. Appropriate communications were requested from respondent and it became a part of her PIP. Instead, through the course of the year, respondent engaged in communications which could be described, at best, as unpleasant. She was angry, hostile, demanding, and obfuscating. She blamed the computers and technology for problems. She refused to open e-mails despite being directed to, to the point where teachers and administrators would print out e-mails and put them in her mailbox. It became clear that this was not a personality clash, as almost every teacher or administrator she was in contact with could not communicate rationally with her. Even as respondent testified at the hearing, her answers wandered, she would not stay focused, and she would answer the question she wanted asked, not the one that was asked.

I **FIND** that respondent's comments were inappropriate and unpleasant and that she failed to follow administrative directives.

Specification 11. *Inappropriate Interruption of Another Teacher's Class* (Insubordination, Failure to Perform Duties, and Lack of Professionalism)

Respondent entered the classroom of Lawrance, and demanded a student's workbook, while the teacher was in the middle of a lesson, causing disruption to the class. Respondent acted assertively to Lawrance, when all she had to do was ask that the workbook accompany the child when she went to the resource room.

I **FIND** that respondent's comments were inappropriate and disrespectful to a fellow teacher.

Specification 12. *Issues Relating to Entry of B.H.'s Grades* (Insubordination, Failure to Perform Duties, Lack of Professionalism, and Prevarication/Fabrication)

Each quarter the district had assessments and grades for the students which had to be given by a specific date. In January, student B.H. was put on respondent's roster. His teacher had put in B.H.'s grades for the first and second marking periods. For the third making period, respondent had to carry over and put in the grades the previous teacher had given him, as well as her own grade, which the computer program permitted her to do. In an April 3, 2009, memo respondent said she was not giving grades and wanted it in writing that she could do this. Respondent was ordered in writing by McLaughlin to enter the grades, but failed to do so.

By April 15 when the grades still had not been entered by respondent, McLaughlin contacted the technical support unit and entered the grades herself. Respondent then filed a complaint with the DOE, alleging that she had been told to falsify grades. She provided copies of memos that she had allegedly sent to Deni, Billy, McLaughlin and Buss on April 15, 16, 17 and 20, 2009, but which were never sent to them, and which were only revealed to them in the discovery process for this hearing.

I **FIND** that respondent failed to comply with school policy in the entering of grades and refused to do so even after being ordered to do so by her supervisor.

Respondent provided memos to the DOE and the Board representing that the grades had been sent to the alleged recipients, when, in fact, they had not.

Specification 13. *Failure to Follow Corrective Action Plan dated March 16, 2009, and Administrative Directive of April 27, 2009* (Insubordination, Failure to Perform Duties, and Lack of Professionalism)

Deni gave the CAP dated March 16 to respondent on or about that date. The CAP incorporated specific directives to respondent, who was ordered to comply. On or about April 27, Billy and Buss provided additional directives to respondent, telling her to check e-mails; to provide the progress reports; to rewrite substitute plans; to make up meetings with parents; to obtain technology assistance; and to provide the DRA protocols.

Respondent failed to comply with any of these directives, as evidenced by her failure to check e-mails in a timely manner (one e-mail was read three weeks after it had been sent, others days or weeks later); her failure to provide the progress reports; her refusal to change her substitute plans even after being told that the substitutes could not understand them; her failure to meet with parents to make up the meetings she had missed during her absences; her refusal to obtain technology assistance; and her continuing failure to produce the DRA protocols when requested by the teachers, supervisors and administrators.

I **FIND** that respondent failed to comply with school policy in reading her e-mails and refused to do so even after being ordered to do so by her supervisors. Respondent failed to respond to the requests of teachers for the DRAs, protocols, and progress reports and failed to take advantage of technology assistance when it was offered to her.

Specification 14. *Return to School in June 2009; Furnishing of Grades and Progress Reports; Issues Relating to Entry of B.H.'s Grades* (Insubordination, Failure to Perform Duties, and Lack of Professionalism)

After being absent from class, respondent returned to her classroom in June 2009 and told the substitute—who had been held over to make a smooth transition because of respondent's absence—to go away. Respondent then erased the SMART Board with the substitute's materials and said she was taking over the class.

Deni received a telephone call from McLaughlin. Some grades were missing for M.R., a student on respondent's roster. Respondent said she had entered them and refused to re-enter them. Deni went to the classroom and told the respondent to come with her, and that the substitute would be teaching.

Deni told respondent that they needed the grades for her students. Respondent had her computer with her and seemed to log on and log off. She also shielded her computer and refused to put the computer on a desk. Deni told respondent to use the desk computer, but respondent refused. Deni called her back to the table and noticed that something was on the screen. Respondent refused to work on the grades. Deni said, "Let us get the data," because they needed the information. Meara had arrived and backed up Deni.

The union representative (Young) and McLaughlin went to respondent's room with her to get the data. Respondent came back with some folders and data, but it appeared to not be enough information to enter the grades. At that point Meara relieved respondent of her teacher duties and told respondent to go home and get the data together. At that time they thought the only grade missing on the computer was M.R.'s. Respondent said she had records "in various locations." The data and information respondent provided were not sufficient to determine a grade for M.R. or to ascertain how the other students had received their grades. Deni checked with the technical department to see if there was any support for the grades in the system but there was none.

Respondent was placed on administrative leave and told she could return when she had the information for the assessments and the grades. Deni, Meara and McLaughlin expected that respondent would return the next day with the data. Respondent never provided the data, despite a follow-up call from McLaughlin. And

while all the grades were ultimately determined to have been entered by respondent, the progress reports had never been completed.

During the hearing, respondent said she had all the data, protocols, and backups at her home and that she had been making copies of all the information ever since the meeting in November. The administrators reviewed this evidence and still found it incomplete and inadequate.

I **FIND** that respondent's conduct was disrespectful to a fellow teacher, and that she failed to provide the grades, the backup data and the progress reports of students in her class.

LEGAL ANALYSIS AND CONCLUSIONS

Respondent Jill Kubicki is a tenured teacher in the Lawrence Township School District. She has worked in the Lawrence Township public school system for eighteen years. Respondent is accused by petitioner, the Lawrence Township Board of Education, of violating her professional responsibilities as a tenured teacher by engaging in insubordination, failure to perform her required duties, fabrication of records, prevarication, lack of professionalism and other just cause.

The legislative design of the statutory tenure provisions is "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. Borough of Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949). Tenure protects competent and qualified teachers during good behavior and guards them against "dismissal for 'unfounded, flimsy or political reasons.'" Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982) (citation omitted).

Teachers may not be dismissed or have their compensation reduced "except for inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10(a). Pursuant to the Tenured Employees Hearing Act, N.J.S.A. 18A:35-1, a tenured teacher may not be removed from her position unless a school board successfully

establishes one or more of these causes by a preponderance of the credible evidence. In re Polk, 90 N.J. 550 (1982).

Because teacher are role models and are entrusted with the care and education of minors, the public is entitled to expect that teachers will fulfill their roles with a high degree of responsibility. In Saunders v. New Jersey Department of Education, 91 N.J.A.R.2d (EDU) 12, 14, the administrative law judge wrote:

> The educator imparts on her students not only academic knowledge, but also the development of social and moral values that are expected from parents, law enforcement officials, and the general public. Thus, teachers must be held to a higher standard of conduct than others who do not in their profession have direct contact with molding habits and nurturing young minds. Suffice it to say, children mimic what they see and they learn by example. Clearly, teachers play a direct role in influencing the opinions of their pupils and, indeed, teachers are role models. Teachers often impart the goals set by their students and the direction they take in achieving those goals.

Another expression of the role of the teacher is:

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience and learn about the teacher.
>
> [In re Tenure Hearing of Tordo, 1974 S.L.D. 97, 98–99; see also Parsippany-Troy Hills Bd. of Educ. v. Molinaro, 96 N.J.A.R.2d (EDU) 268, 276.]

The Board bears the burden of establishing the truth of the charges by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). This tribunal has the duty "to 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. Delaware, Lackawanna & W. R.R. Co., 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). In other words, 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, 275 (1958); see Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

Conduct unbecoming a public employee has been described as an "elastic" phrase that includes "any conduct which adversely affects the morale or efficiency" of the public entity or "which has a tendency to destroy public respect for [public] employees and confidence in the operation of [public] services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. City of Atlantic City, 152 N.J. 532 (1998). Behavior rising to the level of unbecoming conduct need not be predicated upon a violation of any particular rule or regulation and may be based simply upon a violation of the implicit standard of good behavior. City of Asbury Park v. Dep't. of Civil Serv., 17 N.J. 419, 429 (1955); In re Tuch, 159 N.J. Super. 219, 224 (App. Div. 1978).

In the context of a tenured teacher, the contours for dismissal set forth in N.J.S.A. 18A:6-10 have been found to provide a sufficient standard which, while "general in terms," when "measured by common understanding . . . fairly and adequately conveys its meaning to all concerned." Laba v. Newark Bd. of Educ., 23 N.J. 364, 384 (1956). Succinctly stated, "the touchstone is fitness to discharge the duties and functions of one's office or position." In re Grossman, 127 N.J. Super. 13, 29 (App. Div.), certif. denied, 65 N.J. 292 (1974). In an educational setting, unbecoming conduct has been held to be demonstrated by a series of incidents indicating a pattern of behavior, or by a single incident if sufficiently flagrant. See Redcay v. State Bd. of Educ., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd o.b., 131 N.J.L. 326 (E. & A. 1944). In Redcay, a school principal was found guilty of the charges of inefficiency, incapacity,

insubordination, lack of cooperation, unfitness and conduct generally unbecoming a principal. 128 N.J.L. 281, 282 (Sup. Ct. 1942).[3] The court held:

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way.
>
> [Redcay, supra, 130 N.J.L. at 371.]

Insubordination is 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, EDU 7421-97, Initial Decision (May 5, 1999), modified, Comm'r, (August 4, 1999), adopted, State Bd. (Dec. 1, 1999) <http://lawlibrary.rutgers.edu/oal/search.shtml>.

The type of conduct that the Commissioner of Education has determined constitutes "insubordination" and "conduct unbecoming" varies significantly, from verbal/physical altercations and threats of both students and colleagues to failing to comply with school policies. The following are a few recent examples of cases involving conduct that is similar to the conduct in the present case. In these cases, the administrative law judges (ALJs) found the conduct of the tenured teachers to constitute insubordination and conduct unbecoming.

In In re Tenure Hearing of Hill, EDU 5979-06, Initial Decision (April 2, 2007), adopted, Comm'r (May 15, 2007), adopted, State Bd. (Oct. 17, 2007), <http://lawlibrary.rutgers.edu/oal/search.shtml>, the ALJ found a teacher guilty of both insubordination and unbecoming conduct for refusing to accept letters from supervisors, failing to timely submit roll and grade books, using inappropriate language toward a student, and using disrespectful language and vulgar gestures towards colleagues on multiple occasions.

[3] This citation concerns the original case, in which the court remanded back to the board. The board's decision in the remanded matter was subsequently appealed and that opinion is the one published at 130 N.J.L. 369 (Sup. Ct. 1943), aff'd o.b., 131 N.J.L. 326 (E. & A. 1944).

In In re Tenure Hearing of Ash, EDU 2799-03, Initial Decision (May 30, 2008), adopted, Comm'r (July 10, 2008) <http://lawlibrary.rutgers.edu/oal/search.shtml>, the ALJ found a teacher guilty of insubordination and unbecoming conduct for, among other things, failing to adhere to the district's attendance and leave policies, failing to comply with verbal warnings from supervisors, and failing to turn in required lesson plans.

In In re Tenure Hearing of Molokwu, EDU 9650-04, Initial Decision (Oct. 26, 2005), adopted, Comm'r (Dec. 12, 2005), aff'd, State Bd. (May 3, 2006) <http://lawlibrary.rutgers.edu/oal/search.shtml>, the Commissioner found that a teacher was guilty of conduct unbecoming for, among other things, failing to report to a period assignment, obtaining medical leave under false pretenses, pushing a female student, lying to his supervisor about attending a mandatory training program, making threatening comments to the building principal, and telling a ninth-grade female student that she was "acting like a street girl." The Commissioner found that, together, these instances of conduct "constitute[d] an ongoing pattern of conduct unbecoming a teacher and/or other just cause for dismissal."

In In re Tenure Hearing of Bradley, 1990 S.L.D. 790, adopted, Comm'r, 1990 S.L.D. 818, adopted, State Bd., 1991 S.L.D. 2521, a teacher was found to have demonstrated conduct unbecoming and insubordination for "defying Board administrative directives," failing to comply with call-in/sign-in policies, and refusing to speak with a supervisor who approached her about a previous incident that had occurred.

In her defense, respondent contends that the tenure charges filed against her allege inefficiency and that, pursuant to N.J.S.A. 18A:6-11, she was entitled to formal written notice of the alleged inefficiency and ninety days to correct and overcome it, relying principally on Board of Education of Bordentown Regional School District v. Finn, EDU 4205-99, Initial Decision (Feb. 10, 2000), aff'd in part, dismissed in part, remanded in part, Comm'r (March 10, 2000) <http://lawlibrary.rutgers.edu/oal/search.shtml>. Furthermore, without this notice and

the opportunity to correct the inefficiency, some, if not all, of the charges should be dismissed.

Petitioner concedes that while some of the charges brought against respondent may also constitute inefficiency, such as failure to correct the substitute plans, the questionable use of teaching materials, and the unsatisfactory classroom observation, it has not brought charges on those grounds, and therefore was not required to provide a ninety-day period to correct those inefficiencies. It further contends that it has no obligation to bring charges based on inefficiency, when respondent's conduct, taken as a whole, demonstrates an ongoing pattern of unbecoming conduct and other just cause and charges can be brought on that basis, relying on Hill, supra, EDU 5979-06, Initial Decision (April 2, 2007), adopted, Comm'r (May 15, 2007), adopted, State Bd. (Oct. 17, 2007) <http://lawlibrary.rutgers.edu/oal/search.shtml>.

In Finn, a teacher was subject to tenure charges that were dismissed on the basis that they actually constituted inefficiency, and that the teacher had never been provided with written notice and the opportunity to correct her performance. In Hill, the State Board found that, as long as sufficient evidence of unbecoming conduct or other just cause is proved, charges of inefficiency need not be brought or proven.

While it is clear from a review of the evidence that some of the tenure charges in this matter might also constitute inefficiency, I **CONCLUDE** that it was not necessary for the Board to file charges of inefficiency and to provide the ninety-day "last chance" to improve performance as set forth in the statute.

I also note that the demeanor and temperament demonstrated by the respondent during her testimony and in her numerous written memos and letters to other teachers, colleagues, supervisors, and elected officials were indicative of an unwillingness to change behavior. For example, when told that the substitutes, the teachers with whom she worked, and her supervisors thought that the substitute plans were inadequate and incomprehensible, respondent stated that there was nothing wrong with them and that they were the way she had always done them. Without any recognition that a change is

required and/or that performance must be corrected, providing an opportunity for correction would be futile.

After giving careful consideration to the competent credible evidence, I **CONCLUDE** that the Board has met its burden of proof relative to each of the charges it has filed against respondent. Despite being sequestered, the testimony of the witnesses for the Board was consistent as to their observations of the respondent and her actions and behavior during the course of the 2008–2009 school year. They each described respondent as hostile, aggressive, demanding and unresponsive to reasonable requests for grades, progress reports, test scores, and student information. The schools' demonstrated preference for collegial teaching and professional decorum was not observed in the respondent by the witnesses.

Respondent's testimony, on the other hand, was all over the lot. She would not answer questions put to her, but answered questions she would have preferred to have received. She was directed on numerous occasions by me and by counsel to answer, and yet she demurred and went on off topic and rambled. Her e-mails and written communications were obscure and incoherent. Her refusal to follow direct instruction was apparent. Most startlingly, when asked about the grades and progress reports that were the subject of the June 16 meeting and her lack of production of these documents, which led to her being placed on administrative leave, she stated that she had all the documentation at her home and had been copying it since November. She said that she had told her attorney about these documents but he did not want them. This was the very subject of many of the charges against her! Why respondent would wait until the middle of the hearing to produce these documents was never satisfactorily explained by her.

Most importantly, the impact of her behavior on the children must be considered. Some of the incidents described by respondent's fellow teachers occurred in the presence of the children. One class became afraid their teacher might be fired. Other children needed to be removed from respondent's classroom at the request of their parents. Additionally, it cannot be said with any certainty that the grades the children in respondent's class received for school year 2008–2009 were accurate. Nor can it be

said that their DRA reading scores reflected their competence. This is unconscionable, particularly for students with IEP's whose goals and objectives must be met for them to progress with their peers.

I also note that this matter is not a case of personality conflict. That might be the case if one or two teachers simply could not get along with respondent. But here, each of the regular classroom teachers, the case managers, the social workers and the administrators reported having difficulty with respondent. Rather than act in a collegial manner with her colleagues, respondent forced them to work harder simply to best serve the needs of the children. Respondent's behavior was inappropriate and inconsistent with the decorum and responsibility expected of a professional educator.

The Board seeks respondent's dismissal. 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. In re King, EDU 4241-00, Comm'r (February 25, 2002) (citation omitted) <http://lawlibrary.rutgers.edu/oal/search.shtml>.

Here, some of the charges, standing alone, would not, in my view, warrant respondent's dismissal from her position of employment. These are the sorts of incidents that would typically warrant administrative counseling or minor discipline. But some of the charges, such as failure to complete the DRA's, failure to provide accurate assessments, failure to provide progress reports, and the repeated failure to follow the directives and orders of her supervisors, show a continuing pattern of behavior by the respondent, who has not amended her behavior to that which is expected of her as a professional educator. Despite receiving orders and directives, being counseled and transferred, respondent showed no understanding that her behavior was not compatible with the mission of the public schools. She responded to the charges against her with uniform denials of personal responsibility and "the transference of blame to others." King, supra, EDU 4241-00, Comm'r (February 25, 2002) <http://lawlibrary.rutgers.edu/oal/search.shtml>.

Under similar circumstances, the Commissioner has aptly stated that a teacher's "apparent refusal to accept responsibility for his behavior does not portend a positive learning environment for the students entrusted to his care, or a harmonious working relationship with those administrators who supervise him." In re Tenure Hearing of Zofchak, EDU 146-02, Comm'r (Oct. 15, 2002) (citing King, supra, EDU 4241-00) <http://lawlibrary.rutgers.edu/oal/search.shtml>. Based on this record, it cannot be said that respondent's behavior is an aberration, nor can it be said that it is likely that her behavior will change. Ibid. Accordingly, I **CONCLUDE** that respondent's conduct warrants her dismissal from her position as a tenured teacher.

Specification 1. *September 2007 Incident at LIS* (Insubordination, Prevarication, and Lack of Professionalism)

As to Specification 1, I **CONCLUDE** that respondent was insubordinate to Deni and Dauber, that she was not being truthful in denying knowledge of the transfer, and that she demonstrated a lack of professionalism by her refusal to report as directed and in her communications with her supervisors.

Specification 2. *DRA Assessments* (Insubordination, Failure to Perform Duties, Fabrication of Assessment Results, Prevarication, and Lack of Professionalism)

As to Specification 2, I **CONCLUDE** that respondent was insubordinate to her supervisors when asked about the DRA scores; that she failed to perform her duties in properly administering and grading the DRA for at least five students; that the scores for at least five students were fabricated or manufactured; that she was not being truthful when she denied being aware that the protocols/rubrics needed to be turned in; and that she demonstrated a lack of professionalism in her communications with her supervisors.

Specification 3. *Meeting with Parents—November 2008* (Insubordination, Failure to Perform Duties, and Lack of Professionalism)

As to Specification 3, I **CONCLUDE** that respondent was insubordinate by failing to follow the PIP; that she failed to perform her duties by not having the progress reports done in a timely manner; and that she demonstrated a lack of professionalism in her communications with parents.

Specification 4. *Meeting with Administrators—November 2008* (Insubordination and Lack of Professionalism)

As to Specification 4, I **CONCLUDE** that respondent was insubordinate to the administrators present by her attitude and tone, and that she demonstrated a lack of professionalism in her communications with them.

Specification 5. *Failure to Prepare Substitute Lesson Plans* (Insubordination, Failure to Perform Duties, and Lack of Professionalism)

As to Specification 5, I **CONCLUDE** that respondent was insubordinate to the administrators by not following their directives to complete appropriate and comprehensible substitute lesson plans; that she continued to provide inadequate substitute lesson plans; and that she demonstrated a lack of professionalism by her refusal to recognize that her plans were inadequate and by her refusal to correct them.

Specification 6. *Refusal to Accept IEP* (Unbecoming Conduct, Insubordination, Failure to Perform Duties, and Lack of Professionalism)

As to Specification 6, I **CONCLUDE** that respondent engaged in unbecoming conduct by refusing to discuss a student who had been entrusted to her care; that she was insubordinate to Kabo by ignoring reasonable requests to discuss the needs of the student; that she failed to perform her duties by not reviewing the IEP or discussing it with the case manager; and that she demonstrated a lack of professionalism in her response to Kabo.

Specification 7. *Continued Failure to Perform and Submit DRA's* (Insubordination, Failure to Perform Duties, Fabrication, and Lack of Professionalism)

As to Specification 7, I **CONCLUDE** that respondent was insubordinate to Billy by ignoring his directive to complete the DRA's in a timely manner, including the protocols; that respondent failed to perform her duties by not completing the DRA's as directed; that the results without the protocols suggest that those results were fabricated; and that she demonstrated a lack of professionalism by her failure timely complete the DRA's as directed.

Specification 8. *Failure to Timely Submit IEP Progress Reports* (Insubordination, Failure to Perform Duties, and Lack of Professionalism)

As to Specification 8, I **CONCLUDE** that respondent was insubordinate by failing to comply with the directive to complete the progress reports in a timely manner; that she failed to perform her duties by not completing the progress reports; and that she demonstrated a lack of professionalism to the students, their parents, and the school.

Specification 9. *Preparation for and Meeting with Parents—February 2009* (Insubordination, Failure to Perform Duties, and Lack of Professionalism)

As to Specification 9, I **CONCLUDE** that respondent's comments were inappropriate and insubordinate; that they represented a failure to perform her duties; and that respondent demonstrated a lack of professionalism.

Specification 10. *Communications Issues with Administration and Other Staff* (Insubordination, Failure to Perform Duties, and Lack of Professionalism)

As to Specification 10, I **CONCLUDE** that respondent's comments to her supervisors were insubordinate; that she failed to perform the duties owed to her students and colleagues; and that she demonstrated a lack of professionalism by her failure to communicate in the manner expected from a professional.

Specification 11. *Inappropriate Interruption of Another Teacher's Class* (Insubordination, Failure to Perform Duties, and Lack of Professionalism)

As to Specification 11, I **CONCLUDE** that respondent's comments were inappropriate and insubordinate, and demonstrated a lack of professionalism and a failure to perform her duties.

Specification 12. *Issues Relating to Entry of B.H.'s Grades* (Insubordination, Failure to Perform Duties, Lack of Professionalism, and Prevarication/Fabrication)

As to Specification 12, I **CONCLUDE** that respondent's actions in failing to comply with school policy in the entering of grades and the refusal to do so even after being ordered to do so by her supervisor were insubordinate, and demonstrated a lack of professionalism and a failure to perform duties. Respondent prevaricated in providing memos to the DOE and Board while representing that they had been sent to the alleged recipients, when, in fact, they had not.

Specification 13. *Failure to Follow Corrective Action Plan dated March 16, 2009, and Administrative Directive of April 27, 2009* (Insubordination, Failure to Perform Duties, and Lack of Professionalism)

As to Specification 13, I **CONCLUDE** that respondent's failure to comply with school policy and follow reasonable administrative directives—including the failure to check e-mails, failure to complete progress reports, failure to revise her substitute plans, failure to meet with parents, failure to take advantage of technology assistance, and failure to produce the DRA protocols—was insubordinate and demonstrated a lack of professionalism and a failure to perform her duties.

Specification 14. *Return to School in June 2009; Furnishing of Grades and Progress Reports; Issues Relating to Entry of B.H.'s Grades* (Insubordination, Failure to Perform Duties, and Lack of Professionalism)

As to Specification 14, I **CONCLUDE** that respondent's conduct was insubordinate, represented a failure to perform her duties, and demonstrated a lack of professionalism. Her conduct with the substitute teacher lacked the professionalism expected of a teacher, and her failure to provide the grades, the backup data and the

progress reports evinced a failure to perform her duties and insubordination to her supervisors and administrators.

ORDER

It is **ORDERED** that respondent Jill Kubicki be **DISMISSED** and **REMOVED** from her tenured employment with the Lawrence Township Board 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.

January 7, 2011
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

Date Received at Agency: 1/7/11

Date Mailed to Parties: 1/7/11

WITNESSES

For petitioner:

Jonathan Dauber
Andrew Zuckerman
Kristine Deni
Pamela Hernandez
Elizabeth Seipp
Erin Kabo
Elise Hobson
Donna Lawrance
Katrina Vegas
Eileen Auer
Maureen Hayes
Jay Billy
Judith McLaughlin
William Buss
Philip Meara
Michael Dean

For respondent:

Jill Kubicki

EXHIBITS

For petitioner:

P-1 Zuckerman/Gilson letter to LMS Staff—August 2007

P-2 Job Description—Teacher

P-3 E-mail dated September 26, 2008, Deni to Kubicki, and draft PIP attached

P-4 PIP feedback memo, dated October 3, 2008, Kubicki to Deni and Billy, with attachments

P-5a Final PIP with October 10, 2008, Kubicki disagreement attached

P-5b Memo, dated November 6, 2008, Deni to Kubicki, confirming final PIP

P-6a Faculty Meeting Agenda/Minutes September 22, 2008

P-6b PowerPoint Presentation by Pam Hernandez: "A Guide for General Education Classroom Teachers"

P-7a Power Point Presentation by Kris Deni: "Special Education Monitoring LTPS"

P-7b Sign-in sheet for October 6, 2008, meeting

P-8 Webview of resources available

P-9a Agenda for September 3, 2008, faculty meeting at LES

P-9b Sign-in Sheet for September 3, 2008, meeting

P-9c Assessment Calendar

P-10 E-mail dated November 12, 2008, Buss to Kubicki

P-11 E-mail dated November 13, 2008, Buss to Kubicki, re District Assessment Schedule

P-12 Memo, Kubicki to Buss, dated November 19, 2008, re Ben Franklin Fall DRA scores with attachment

P-13 Memo, Kubicki to McLaughlin, dated November 19, 2008, re LES Fall DRA scores

P-14 DRA Protocol, dated October 30, 2008, for K. by Maureen Hayes

P-15a DRA Protocol for Vinnie, Level 2 (undated)

P-15b DRA Protocol for Vinnie, Level 3 (undated)

P-15c DRA Protocol for Vinnie, Level 6 (undated)

P-16a DRA Protocol for K.C., Level 24 (undated)

P-16b DRA Protocol for K.C., Level 28 (undated)

P-17a DRA Protocol for D.P., Level 2 (undated)

P-17b DRA Protocol for D.P., Level 6 (undated)

P-17c DRA Protocol for D.P., Level 8 (undated)

P-18a DRA Protocol for Karrem, Level 20 (undated)

P-18b DRA Protocol for Karrem, Level 24 (November 14, 2008)

P-19a DRA Protocol for B.H., Level 20 (undated)

P-19b DRA Protocol for B.H., Level 24 (undated)

P-20 DRA Protocol for Paulina, Level 24 (undated)

P-21 12/04/08 acknowledgement; Memorandum, dated November 26, 2008, to Kubicki from Buss, Billy and Deni and Attachment re Dates of Correspondence re DRA Testing

P-22 Letter dated November 20, 2008, from Buss to Kubicki, with revised District assessment schedule attached

P-23 Observation report, dated March 3, 2010, by Judith McLaughlin

P-24 Corrective Action Plan, dated March 16, 2009, Deni to Kubicki, with Kubicki notes attached

P-25 E-mail dated March 18, 2009, Deni to Kubicki

P-26 Annual Evaluation dated April 14, 2009

P-27a E-mail dated April 2, 2009, Tomsho to LES Staff

P-27b E-mails dated April 3, 2009, McLaughlin to Kubicki and Kubicki response 7:58 a.m.

P-27c E-mail dated April 3, 2009, McLaughlin to Kubicki 8:09 am

P-27d E-mail dated April 3, 2009, Deni to Kubicki 8:50 a.m.

P-27e Memo dated April 3, 2009, McLaughlin to Kubicki

P-28 Memo dated April 15, 2009, McLaughlin to Kubicki

P-29 DOE letter dated August 17, 2009, from Robert Cicchino to Laura Waters with Report of Examination

P-30 Packet of documents received via Priority Mail May 19, 2009

P-31 Letter dated August 20, 2008, Deni to Kubicki

P-32 Excerpt from Board Minutes, July 11, 2007

P-33 Excerpt from Board Minutes, June 11, 2008

P-34 Letter dated May 5, 2009, Thomas Eldridge to Kubicki, re increment withholding

P-35 Typewritten memo, dated June 16, 2009, by Kristine R. Deni

P-36 Letter dated June 16, 2009, Philip J. Meara, Superintendent, to Kubicki

P-37a E-mail dated August 28, 2008, Buss to Kubicki

P-37b E-mail dated September 1, 2008, Hernandez to J. Kubicki and K. Vegas with BFS Resource Center Schedule attached

P-37c E-mail dated September 3, 2008, Hernandez to Kubicki, Vegas et als with schedule attached

P-37d E-mail dated September 4, 2008, Kubicki to Deni and Billy, Kubicki Roster and Schedule attached

P-37e Handwritten Note, Hernandez, dated September 5, 2008

P-38 E-mail exchange, dated September 8, 2008, between Kubicki and Hernandez

P-39 Series of e-mails, dated from November 19, 2008, to November 25, 2008, Hernandez/Kubicki/Seipp re DRA scores and protocols

P-40 E-mails dated February 6, 2009, Hernandez to Kubicki and Kubicki response

P-41 E-mail memo dated April 6, 2009, Billy to Kubicki

P-42 Handwritten note, dated April 22, 2009, Georgia Stramandi to Hernandez

P-43a E-mail dated January 27, 2009, Kabo to Billy

P-43b E-mail (no date shown but approx. January 27, 2009), Kabo to Kubicki

P-44 E-mail dated April 16, 2009, Kabo to Kubicki

P-45 E-mail dated April 28. 2009, Kabo to Kubicki

P-46 Series of e-mails, dated from November 26, 2008, to December 17, 2008, between Hobson and Kubicki concerning student B.H.

P-47a E-mail dated January 12, 2009, re G & O of student B.H.

P-47b Follow up e-mail, dated January 15, 2009, re same

P-48 E-mail dated February 6, 2009, Hobson to Billy, re report card problems

P-49 E-mail dated February 18, 2009, Hobson to Billy, re input into IEP of K.D.

P-50 E-mail dated March 20, 2009, Lawrence to McLaughlin

P-51a E-mail dated September 27, 2008, Lawrence to Kubicki, re DRA scores

P-51b E-mail dated October 28, 2008, Lawrence to Kubicki, re DRA scores

P-52a E-mail dated January 20, 2009, Vegas to Billy (re sub plans)

P-52b E-mail dated February 27. 2009, Vegas to Billy (re sub plans)

P-53 Sign-in Sheet for September 4, 2008, for K–3 presentation at LES library

P-54 Memo, dated September 7, 2008, Hayes to elementary teachers, re DRA2 with recording sheet attached

P-55 E-mail dated October 21, 2008, Hayes to Kubicki et als re DRA

P-56 Memo, dated October 30, 2008, Hayes to Billy, re incident of 10/29/08

P-57a E-mail dated October 17, 2008, Billy to Kubicki, re DRA training

P-57b E-mail dated October 29, 2008, Billy to Kubicki, re DRA training

P-57c E-mail dated November 12, 2008, Billy to Kubicki, re DRA training

P-58 Memo, dated November 3, 2008, Billy to Kubicki, re Professionalism in Workplace

P-59 DRA Scores submitted by Kubicki, January 29, 2009

P-60 Memo, dated February 9, 2009, Billy to Kubicki, re DRA Testing and Protocols

P-61 DRA scores submitted by Kubicki, March 29, 2009

P-62 DRA protocols for Matthew Rotman, March 10, 2009, and March 9, 2009

P-63 Memo, dated February 9, 2009, Billy to Kubicki, re progress reports and grades

P-64 E-mail dated April 14, 2009, Billy to Kubicki, re progress reports

P-65 Memo, dated April 15, 2009, Billy to Kubicki, re progress reporting

P-66 Progress Reporting Summary for 2008–2009 school year

P-67 Memo, dated July 2, 2009, Billy to Kubicki, re progress reporting/IEP requirements

P-68 E-mail dated April 6, 2009, Billy to Kubicki, re DRA scores

P-69 E-mail dated September 15, 2008, re Lesson Planning

P-70 Memo, dated January 21, 2009, Billy to Kubicki, re Substitute Lesson Plans

P-71 E-mail dated February 25, 2009, McLaughlin to Kubicki, re Sub Plans and M.R. IEP

P-72 Memo, dated March 30, 2009, Billy to Kubicki, re Substitute Plans and Professionalism

P-73 Memo, dated April 17, 2009, Buss to Kubicki, re Sub Plans

P-74 Samples of e-mail response times

P-75 Memo, dated April 23, 2009, Billy to Kubicki, re Checking Mail and E-mail

P-76 Memo, dated January 27, 2009, Billy, Deni and McLaughlin to Kubicki

P-77 Memo, dated February 19, 2009, Billy to Kubicki, re February 18, 2009, IEP meeting

P-78 Memo, dated April 27, 2009, Billy, McLaughlin, Buss and Deni to Kubicki re "Things you need to do immediately"

P-79 Memo, dated April 18, 2009, Billy to Kubicki re "Follow up on list from April 27, 2009"

P-80 Memo, dated June 2, 2009, Billy to Kubicki, re Parent Conference

P-81 Memo, dated June 29, 2009, Billy to Kubicki, re Failure to complete action plan

P-82 Employee (Kubicki) Attendance 2008–2009

P-83 Handwritten letter, dated June 1, 2009, Ruth Cook to J. McLaughlin

P-84 E-mail dated April 15, 2009, McLaughlin to Deni, re J.K. grade entry direction

P-85 School calendar, 2008–2009

P-86 Letter, dated August 21, 2009, Meara to Kubicki

P-87 Letter, dated September 11, 2009, Meara to Kubicki

P-88 Memo, dated January 18, 2007, Dauber to Kubicki, cc: Personnel

P-89 Web Help Desk Log

P-90a Progress log for student D.P., marking periods ending November 2008 and January 2009

P-90b Progress log for student D.P., marking periods ending April 2009 and June 2009

P-90c Progress log for student B.R.H., marking periods ending November 2008 and January 2009

P-90d Progress log for student B.R.H., marking periods ending April 2009 and June 2009

P-91 Report card for student B.H. through third quarter 2008–2009

P-92 Memo dated April 18, 2008, from Deni to teachers (including Kubicki)

P-93 Memo dated November 6, 2008, from Deni to Kubicki

For respondent:

R-1a September 17, 2007, letter from Andrew Zuckerman to Jill Kubicki

R-1b In-school suspension sheet

R-1c Behavioral Intervention Plan Form

R-2a NYU transcript dated October 1, 1991

R-2b NYU transcript

R-2c Boston College transcript

R-2d Teaching Certificate Teacher of the Handicapped issued May 1992 for Jill Kubicki

R-3 Selected pages from agreement between Lawrence Township Board of Education and Lawrence Township Education Association July 1, 2004–June 30, 2007

R-4 Minutes from July 11, 2007, Board meeting provided to Jill Kubicki at September 4, 2007 LIS conference

R-5a ISS room occupancy on days there are five or more people in the space

R-5b Drawing of Room 116 at Lawrence Middle School

R-5c Pictures of Room 116—ISS Room

R-6a Memo from Jill Kubicki to Al Gilson regarding her position at LMS dated September 12, 2007

R-6b Memo from Jill Kubicki to Rebecca Gold and Chris Deni regarding her position at LMS dated September 23, 2007

R-6c Memo from Jill Kubicki to Gold and Deni regarding her position at LMS dated October 7, 2007

R-7a E-mail from Kubicki to Zuckerman regarding faculty meeting dated May 14, 2008

R-7b E-mail from Kubicki to Zuckerman regarding follow-up dated June 2, 2008

R-8a Letter from Kubicki to Deni dated August 17, 2008

R-8b Letter from Deni to Kubicki dated August 20, 2008

R-8c Memo from Kubicki to William Buss regarding transfer to Ben Franklin dated August 26, 2008

R-8d Memo from Kubicki to Judy McLaughlin regarding transfer to Lawrence Elementary School dated August 26, 2008

R-8e Memo from Kubicki to McLaughlin and Buss regarding clarification meeting dated September 3, 2008

R-9a Course catalog for 2008–2009

R-9b Agenda for first-grade PD meeting dated September 5, 2008

R-10a E-mail from S. Prentice to Kubicki regarding PD Day dated September 26, 2008

R-10b E-mail from Kubicki to Denita Ishibashi re: subject NWEA Training dated September 29, 2008

R-10c E-mail from Kubicki to Ishibashi regarding NWEA Training dated October 1, 2008

R-10d E-mail from Kubicki to Ishibashi regarding NWEA Training dated December 16, 2008

R-10e E-mail from Ishibashi to Kubicki regarding NWEA Training dated December 16, 2008

R-10f E-mail from Kubicki to Ishibashi regarding NWEA Training dated December 16, 2008

R-10g E-mail from Ishibashi to Kubicki regarding NWEA Training dated December 16, 2008

R-10h E-mail from Kubicki to Ishibashi regarding NWEA dated December 16, 2008

R-10i E-mail from Kubicki to Ishibashi regarding NWEA Training dated December 17, 2008

R-10j Web Help Desk ticket history

R-10k E-mail from Kubicki to Ishibashi regarding NWEA Training dated December 16, 2008

R-10l E-mail from Kubicki to Ishibashi regarding NWEA Training dated December 16, 2008

R-10m E-mail from Kubicki to Deni, Billy and Ishibashi regarding NWEA follow-up as of 12/22/08

R-10n E-mail from Kubicki to Billy, Deni and Ishibashi regarding NWEA training and now click access follow up

R-10o NWEA Reports—Class Rosters for Kubicki at LMS

R-10p E-mail from Kubicki to Ishibashi regarding NWEA Training dated December 16, 2008

R-10q E-mail from Kubicki to Ishibashi regarding NWEA dated December 16, 2008

R-10r E-mail from Jonathan Snyder to Kubicki regarding web ticket 7066 dated December 16, 2008

R-10s E-mail from LTPS Help Desk to Kubicki regarding ticket 7054 dated December 15, 2008

R-10t Web Help Desk pages

R-10u E-mail from LTPS Help Desk to Kubicki dated December 16, 2008

R-10v E-mail from Kubicki to Ishibashi regarding NWEA Training dated December 16, 2008

R-10w E-mail from Kubicki to Ishibashi regarding ticket 7066 dated December 16, 2008

R-10x E-mail from Kubicki to Ishibashi regarding NWEA Training dated December 16, 2008

R-10y E-mail from Kubicki to Ishibashi regarding NWEA Training dated December 16, 2008

R- 10z E-mail from Kubicki to Ishibashi regarding NWEA Training dated December 16, 2008

R-11a E-mail from Kubicki to Billy regarding clarification follow up dated September 5, 2008

R-11b E-mail from Kubicki to Billy regarding update to 9/3/08 clarification dated September 12, 2008

R-11c E-mails between Kubicki and McLaughlin and Jane Tomsho dated September 12, 2008

R-11d E-mail from Kubicki to Billy regarding follow-up of 9/3/08 clarification meeting dated September 22, 2008

R-12 Lawrence Township 2008–2009 District Assessment Schedule

R-13a E-mail from Kubicki to Zuckerman regarding PIP draft for 07–08 along with PIP

R-13b E-mail from McLaughlin to Kubicki regarding schedule

R-13c E-mail from Kubicki to Koch regarding PIP plan for 08–09 dated June 6, 2008, along with PIP

R-14a E-mail from Kubicki to Deni regarding Kubicki PIP dated September 29, 2008, along with PIP Draft

R-14b E-mail from Kubicki to Deni and Billy regarding PIP feedback dated October 3, 2008, along with accompanying PIP draft

R-14c E-mail from Deni to Kubicki regarding PIP dated September 26, 2008

R-15a E-mail from Kubicki and Billy to Maureen Hayes regarding DRA dated October 27, 2008

R-15b E-mail from Hayes to Kubicki regarding DRA dated October 27, 2008

R-15c E-mail from Kubicki to Billy and McLaughlin regarding clarification dated October 30, 2008

R-15d E-mail from Kubicki to Hayes regarding DRA dated October 29, 2008

R-15e E-mail from Billy to Kubicki dated October 29, 2008, regarding DRA

R-15f E-mail from Billy to Kubicki regarding DRA dated October 17, 2008

R-16a Absentee slips for Jill Kubicki regarding October 23, and October 24, 2008

R-16b Pictures

R-17a Memo from Kubicki to Seipp regarding DRA

R-17b Memo from Kubicki to Buss dated November 19, 2008, regarding DRA2 Fall Scores

R-17c Memo from Kubicki to McLaughlin dated November 19, 2008, regarding DRA2 Fall Scores

R-17d Letter from Buss to Kubicki dated November 20, 2008

R-17e E-mail from Kubicki to Billy regarding DRA testing dated November 12, 2008

R-17f E-mail from Kubicki to McLaughlin regarding meeting dated November 4, 2008

R-17g Professional Development Schedule dated September 2008

R-17h E-mail from Buss to Kubicki regarding DRA dated November 12, 2008

R-17i E-mail from Buss to Kubicki regarding assessment schedule dated November 13, 2008

R-18a Handwritten note from Buss to Kubicki dated November 26, 2008

R-18b Handwritten notes from Kubicki regarding November 26, 2008, meeting

R-19a E-mail from Kubicki to Koch regarding file cabinet key dated February 25, 2008

R-19b E-mail from Kubicki to Buss regarding key dated December 16, 2008

R-19c Handwritten note from Buss to Kubicki dated December 15, 2008

R-19d E-mail from Kubicki to Buss regarding keys dated December 5, 2008

R-19e E-mail from Buss to Kubicki regarding keys dated December 8, 2008

R-19f Photo ID request forms

R-19g Picture of file cabinet at LES dated March 10, 2009

R-19h E-mail from Tomsho to Kubicki regarding LMS keys dated September 9, 2008

R-20a E-mail from Kubicki to Seipp dated November 20, 2008, regarding report cards

R-20b E-mail from Cynthia Brecko to Kubicki regarding report cards dated November 20, 2008

R-20c E-mail from Brecko to Kubicki regarding report cards dated November 20, 2008

R-20d E-mail from Kubicki to Seipp regarding report cards dated November 24, 2008

R-20e Memo from Technology Department regarding power down dated November 20, and November 21, 2008

R-20f E-mails from LTPS Help Desk to Kubicki from November 2008

R-20g E-mail from Kubicki to Chris Guerrera regarding PowerTeacher at LES dated September 2008

R-20h E-mails between Kubicki and Pam Hernandez regarding medical info dated September 2009

R-20i E-mails between Kubicki and Guerrera regarding PowerTeacher at LES from September 2008

R-20j E-mail from Tomsho regarding end of marking period dated November 11, 2008

R-21a E-mail from Kubicki to Laura Krugerazer regarding IEP request dated December 1, 2008

R-21b E-mails between Kubicki, Billy and Hernandez regarding student T.I. from September 2008

R-22 Substitute lesson plans for Kubicki's LES and BF classes for December 15, 2005, through December 19, 2008

R-23 Substitute lesson plans for Kubicki's LES and BF classes for January 5, 2009, through January 9, 2009

R-24 Substitute lesson plans for Kubicki's LES and BF classes from January 2009 to February 2009

R-25 Substitute lesson plans for Kubicki's classes for January 2009 through February 2009 that was left in Ms. Kubicki's room upon her return from illness

R-26 Substitute lesson plans for Ms. Kubicki for LES and BFS classes for February 2, 2009, through February 6, 2009

R-27 Substitute lesson plans for Ms. Kubicki's LES and BFS classes for February 2009 through March 2009

R-28 Weekly lesson plans for Ms. Kubicki's class for LES and BFS for January 2009 along with handwritten note

R-29a Memo from Billy to Kubicki dated February 9, 2009, regarding DRA testing protocols

R-29b Memo from Kubicki to Billy dated February 17, 2009, regarding DRA testing

R-30a Memo from Billy to Kubicki dated February 9, 2009, regarding failure to complete progress reporting

R-30b Memo from Kubicki to Billy dated February 18, 2009, regarding failure to complete progress reporting

R-31a Memo from Billy to Kubicki dated March 30, 2009, regarding substitute plans and Professional decorum

R-31b Memo from Kubicki to Billy dated April 13, 2009, regarding substitute plans and professional decorum

R-32 Memo from Billy to Kubicki dated April 15, 2009, regarding progress reporting and Kubicki's response to memo dated April 23, 2009

R-33 Memo from Kubicki to McLaughlin and Ms. DeFiccio dated April 15, 2009, regarding transfer of grades

R-34 Memos from Kubicki to various administrators dated April 15, 2009, regarding transfer of grades

R-35 Memo from McLaughlin to Kubicki regarding B.H. report card dated April 15, 2009, and response from Kubicki dated May 6, 2009

R-36 Memo from Buss to Kubicki dated April 17, 2009, regarding substitute plans and Kubicki's responses on May 13, 2009

R-37 Handwritten notes from Buss to Kubicki

R-38 Memo from Billy to Kubicki dated April 23, 2009, regarding checking mail and e-mail and Kubicki's response on April 24, 2009

R-39 Memo from Billy, McLaughlin, Buss and Deni to Kubicki dated April 27, 2009, regarding things that needed to be done immediately and Kubicki's responses

R-40a Copy of IEP with handwritten note

R-40b E-mail from Kubicki to S. Isaacs regarding new student mid-year placement dated December 15, 2008

R-40c Web Help Desk ticket history

R-40d E-mail from Kubicki to E. Hobson regarding new students dated January 5, 2009

R-40e E-mail from Hobson to Kubicki regarding meetings this week dated January 4, 2009

R-40f E-mail from Kubicki to Hobson dated December 17, 2008

R-40g E-mail from Kubicki to Hobson dated December 16, 2008

R-40h E-mail from Kubicki to Isaacs regarding new student mid-year placement dated December 15, 2008

R-40i E-mail from Hobson to Kubicki dated December 17, 2008

R-40j Handwritten notes

R-40k Memo

R-40l E-mail from Kubicki to Isaacs regarding new student mid-year replacement dated December 15, 2008

R-40m E-mail from Hobson to Kubicki regarding parent not showing dated December 10, 2008

R-40n E-mail from Hobson to Kubicki regarding B.H. PLAAFP dated December 4, 2008

R-40o E-mail from Kubicki to Hobson regarding access to IEP dated December 3, 2008

R-40p E-mail from Hobson to Kubicki regarding student not starting yet dated December 3, 2008

R-40q E-mail from Kubicki to Hobson regarding new student dated December 3, 2008

R-40r B.H.'s IEP goals and objectives in his IEP

R-40s E-mail from Kubicki to Hobson regarding new student dated December 1, 2008

R-41 E-mail from Kubicki to Eileen Auer regarding internet subscriptions dated September 11, 2008

R-42a Letter from Buss to Kubicki dated March 5, 2009, regarding room assignments for resource instruction at BFS

R-42b E-mail from Billy to Kubicki regarding classroom change dated January 6, 2009

R-42c E-mail from Buss to Deni and others including Kubicki regarding replacement instruction room uses dated September 10, 2008

R-43 Pre-observation form 2008–2009 packet for Kubicki

R-44 Cover letter and classroom visitation and evaluation form from McLaughlin to Kubicki dated March 3, 2009

R-45 Kubicki's response dated March 4, 2009, to classroom evaluation form provided by McLaughlin

R-46a Memo from Kubicki's response to Seipp dated January 29, 2009, regarding DRA2 winter scores

R-46b Memo from Kubicki to Lawrence dated January 29, 2009, regarding DRA2 winter scores

R-46c Memo from Kubicki to Shields regarding DRA2 winter scores

R-46d Memo from Kubicki to DeFiccio dated January 29, 2009, regarding DRA2 winter scores

R-46e Memo from Kubicki to Lawrence dated January 29, 2009, regarding DRA2 scores

R-46f Memo from Kubicki to DeFiccio dated January 29, 2009, regarding DRA2 winter Scores

R-46g Memo from Kubicki to Shields regarding DRA2 winter scores dated January 29, 2009

R-46h Memo from Kubicki to Seipp dated January 29, 2009, regarding DRA2 winter scores

R-46i DRA testing info

R-47a Memos from Kubicki to teachers dated March 23, 2009, regarding DRA2 spring scores

R-47b Memo from Billy to Kubicki dated April 6, 2009, regarding DRA test scores

R-48a Letter from Gold to Kubicki dated April 23, 2009, regarding increment withholding

R-48b May 5, 2009, letter from Board Secretary/Business Administrator to Kubicki regarding withholding of increment and Ms. Kubicki's responses

R-49 Documents regarding Kubicki's schedule for 2008–2009 school year

R-50a E-mail from Kubicki to Krugerazer and Hernandez dated December 1, 2008, regarding IEP requests timeline

R-50b E-mail from Hobson to Kubicki regarding G and O's dated January 12, 2009

R-50c E-mail from Kubicki to Hobson regarding progress reports dated February 6, 2009

R-50d E-mails from Kubicki to Administrators regarding schedule as of February 2009

R-50e E-mail from Billy to Kubicki regarding progress notes dated December 13, 2008

R-51 Sample of report card received in elementary binders

R-52 Note indicating receipt of English workbook dated March 18, 2009

R-53a Letter from Phillip Meara, Superintendent, to Kubicki dated June 16, 2009, regarding administrative leave/suspension

R-53b Note of voicemail from Kubicki to Superintendent regarding administrative leave dated June 18, 2009

R-53c Note of voicemail from Kubicki to Superintendent regarding administrative leave dated June 16, 2009

R-54 Letter from Meara to Kubicki dated August 21, 2009, regarding administrative leave

R-55a Letter from Kubicki to Commissioner Lucille Davy dated December 3, 2008

R-55b Letter from Kubicki to Dr. Samuel Stewart, Acting Executive County Superintendent for Mercer County, dated November 19, 2008

R-55c Letter from Davy to Kubicki dated February 10, 2009

R-56a Letter from Division on Civil Rights to Kubicki dated April 29, 2009, regarding filed complaint

R-56b Letter from US Equal Employment Opportunity Commission to Kubicki dated April 29, 2009, regarding filed complaint

R-56c Letter from Darryl Booker, Mediator from Division on Civil Rights, to Kubicki dated April 5, 2009

R-57a Letter from Joyce Scott to Jonathan Dauber, LIS Principal dated May 24, 2007

R-57b Letter from Lucille Davy, Commissioner of Education, to Joyce Scott dated January 26, 2009

R-58 Policy and Regulations of the Lawrence Township Board of Education

R-59a Letter from Susan Nardi, NJEA UniServ Field Representative, to Zuckerman dated March 27, 2008, regarding Kubicki's 07–08 PIP

R-59b Letter from Zuckerman to Nardi dated March 31, 2008

R-60 Letter from Nardi to Gold dated March 28, 2008, regarding voluntary transfer

R-61 Pictures of Kubicki's classrooms in LIS, LMS, LES and BF

R-62 Kubicki's annual evaluation by Deni dated April 14, 2009, and Kubicki's response dated April 27, 2009

R-63 Corrective Action Plan from Deni to Kubicki dated March 16, 2009, along with handwritten notes

R-64a Kubicki's annual evaluation dated March 8, 2007

R-64b Classroom evaluation visitation form dated February 13, 2007

R-64c Annual evaluation dated June 6, 2006

R-64d Annual evaluation dated April 20, 2005

R-64e Classroom evaluation and visitation form dated December 9, 2004

R-64f Annual evaluation dated April 20, 2004

R-64g Classroom evaluation and visitation form dated December 3, 2005

R-64h Annual evaluation dated March 25, 2003

R-64i Classroom evaluation and visitation form dated November 5, 2002

R-64j Annual evaluation dated March 8, 2002

R-64k Classroom evaluation and visitation form dated October 30, 2001

R-64l Evaluation dated May 31, 2001

R-64m Classroom observation form dated February 23, 2001

R-64n Classroom observation form dated February 23, 2000

R-64o Annual evaluation dated June 1999

R-64p Classroom observation form dated January 27, 1999

R-64q Professional Improvement Plan from September 1997

R-64r Annual evaluation dated June 1998

R-64s Classroom observation Form dated April 30, 1998

R-64t Professional Improvement Plan dated October 1996

R-64u Annual evaluation dated June 1997

R-64v Classroom observation form dated January 15, 1997

R-64w Annual evaluation dated March 1996

R-64x Classroom observation form dated February 21, 1996

R-64y Classroom observation form dated February 5, 1995

R-64z Classroom observation form dated October 24, 1995

R-64aa Annual evaluation dated March 8, 1995

R-64bb Classroom observation form dated January 31, 1995

R-64cc Classroom observation form dated November 7, 1994

R-64dd Annual evaluation dated April 1994

R-64ee Classroom observation form dated March 21, 1994

R-64ff Classroom observation form dated January 6, 1994

R-64gg Classroom observation form dated October 19, 1993

R-64hh Classroom visitation form dated January 12, 1993

R-65 Letter from Meara to Kubicki dated September 11, 2009, regarding administrative leave/suspension

R-66a Record of professional development hours and staff development certificates for 2008–2009 school year

R-66b Documents regarding professional growth plan for 2009–2010 school year

R-67 Kubicki's spring conference schedules at LES and BF

R-68a Letter from Iris G. Udasin, M.D., to Kubicki dated July 1, 2008, regarding medical condition

R-68b Doctor's notes for absences, October 23, 2008, and October 24, 2008

R-68c Doctor's notes regarding absences from October 30, 2008, through November 5, 2008

R-68d Letter from the EOHSI to To Whom It May Concern dated January 20, 2009, regarding Kubicki's absences for January 20 and 21, 2009

R-68e Copy of absent slips for January 2009

R-68f Letter from Iris G. Udasin, M.D., to Lawrence Township Public Schools dated January 21, 2009, regarding absences from January 21, 2009, until January 26, 2009

R-68g Memo from Kubicki to Personnel dated February 26, 2009, regarding absences from February 25, 2009, to February 27, 2009

R-68h Memo from Kubicki to Gold dated March 30, 2009, regarding absences from March 20, 2009, until March 30, 2009

R-68i Memo from Kubicki to Gold regarding absences from April 17, 2009, until April 23, 2009

R-68j Memo from Kubicki to Personnel dated May 18, 2009, regarding absences from May 5, 2009, through May 28, 2009

R-68k Doctor's note regarding Jill Kubicki absences dated June 2, 2009, until June 15, 2009

R-69 Temperature log of LES Room 218 from October 2008

R-70 Reserved

R-71 Reserved

R-72a Report from EOHSI regarding Kubicki dated May 24, 2004

R-72b Picture of old art room

R-72c Handwritten Note from Kubicki to Gold dated August 2004

R-72d Letter and cover fax from EOHSI, Angelo Gupta, M.D., and Iris Udasin, M.D., to Denita Ishibashi, Principal, LIS, dated August 9, 2004

R-73 Documents regarding employee injury and illness incident report dated January 29, 2009

R-74 Reserved

R-75 Kubicki's handwritten notes from April 2009

R-76 Annual Evaluation of Kubicki at LMS dated June 12, 2008

R-77 Copy of last page of district's tenure charges

R-78 Copies of Student Test Documents from Kubicki (Binder #1)

R-79 Copies of Student Test Documents from Kubicki (Binder #2)

R-80 Copies of Student Test Documents from Kubicki (Binder #3)

R-81 Letter from Claire Kohn, Superintendent, to Kubicki dated November 16, 1995

R-82 Certificate of Appreciation for 2004–2005 school year for Kubicki

193-11

H&S CONSTRUCTION & MECHANICAL, INC.:

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF WOODLAND PARK, PASSAIC COUNTY, STONE CREEK, INC., AND TEKTON DEVELOPMENT CORP.,

RESPONDENTS,

AND

TEKTON DEVELOPMENT CORP.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF WOODLAND PARK, PASSAIC COUNTY, AND STONE CREEK, INC.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In these consolidated cases, Petitioners H&S Construction & Mechanical (H&S) and Tekton Development Corporation (Tekton) sought to prohibit the Board from entering into a contract with Stone Creek, Inc., the lowest bidder on two proposed projects in the District. Both petitioners contended that Stone Creek's bid was defective as it included a food service equipment subcontractor, Singer Food Service Company (Singer), which had an expired Certification of Prequalification from the School Development Authority (SDA). H&S argued that both Stone Creek and Tekton had submitted non-responsive bids since both companies listed Singer as a subcontractor; therefore H&S sought award of the contract as the lowest responsible bidder. Tekton contended that it can substitute for Singer as it is properly classified to do the food service work, and also sought the award as the lowest-responsible bidder. The parties filed cross motions for summary decision.

The ALJ found, *inter alia,* that: Stone Creek's submission of Singer's expired prequalification document constituted a material defect that could not be waived; although Tekton is classified to do the work it planned to subcontract to Singer, Tekton may not now substitute itself; case law holds that contractors cannot substitute subcontractors after the bid has been awarded, and the bid instructions required bidders to identify their subcontractors and certify that they would use them. Accordingly, the ALJ concluded that H&S is the lowest responsible bidder under *N.J.S.A.* 18A:18A-4(a) and should be awarded the contract as a matter of law.

Upon full review and consideration of the record, the Commissioner 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.

May 23, 2011

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OAL DKT. NO. EDU 01526-11 AND 01667-11 (CONSOLIDATED)
AGENCY DKT. NO. 36-2/11 AND 41-2/11

H&S CONSTRUCTION & MECHANICAL, INC.	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF WOODLAND PARK, PASSAIC COUNTY, STONE CREEK, INC., AND TEKTON DEVELOPMENT CORP.,	:	COMMISSIONER OF EDUCATION
RESPONDENTS,	:	DECISION
AND	:	
TEKTON DEVELOPMENT CORP.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF WOODLAND PARK, PASSAIC COUNTY, AND STONE CREEK, INC.,	:	
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 Stone Creek, Inc. (Stone Creek) and Tekton Development Corp. (Tekton).

In its exceptions, Stone Creek contends that the Administrative Law Judge (ALJ) did not apply the appropriate standard of review when he determined that the Board should have rejected Stone Creek's bid proposal and awarded the contract to H&S Construction & Mechanical, Inc. (H&S Construction). Stone Creek takes exception to the ALJ's application of a

de novo standard of review, arguing that the ALJ failed to utilize the appropriate abuse of discretion standard of review. Moreover, Stone Creek maintains that the ALJ should have analyzed whether the Board acted arbitrarily and capriciously when it determined that Stone Creek's bid contained a waivable defect.

Stone Creek also takes exception to the ALJ's determination that subcontractors must be prequalified on the date of the bid. Stone Creek contends that *N.J.S.A.* 18A:18A-18 only requires subcontractors to be prequalified prior to entering into the subcontract. Additionally, Stone Creek asserts that there is no legal basis for the assumption that the requirement in the bid specifications that bidders be prequalified on the date of the bid likewise requires subcontractors to be prequalified on the date of the bid. Therefore, Stone Creek argues that since the subcontractors do not have to be prequalified on the date of the bid, Stone Creek's bid was in fact responsive and the material defect analysis was not necessary.

In the alternative, Stone Creek maintains that even if the material defect analysis was required, the fact that its food services subcontractor, Singer Food Service Company (Singer), was not prequalified by the School Development Authority (SDA) on the bid date is a non-material defect that was waivable by the Board. With respect to the first prong of the analysis enumerated in *Township of River Vale v. R.J. Longo Constr. Co.*, 127 *N.J. Super.* 207, 215-16 (Law Div. 1974), Stone Creek argues that the Board had obtained assurances that Singer's work would be performed and guaranteed well in advance of the award of the prime contract. Further, Stone Creek argues that the Initial Decision contains no reference to the assurance, performance or guarantee language contained in *River Vale*. Stone Creek also argues that the ALJ misapplied the second prong of *River Vale* and relied on presumptions and inapplicable case law to conclude that Stone creek's submission of Singer's expired SDA

prequalification adversely affected competitive bidding. In support of its argument, Stone Creek emphasizes that 11 out of 15 bidders used Singer as their food service subcontractor. Therefore, Stone Creek argues that it is the lowest responsive bidder, and that it should be awarded the contract.

Tekton, who also listed Singer as its food services subcontractor in its bid proposal, takes exception to the ALJ's determination that Tekton cannot substitute itself for Singer. Tekton maintains that it is properly classified to do the food services work, and that there are no restrictions in the applicable regulations that prevent Tekton from identifying an unclassified subcontractor to perform work which is subsumed within Tekton's classification rating. Therefore, Tekton argues that it is the lowest responsible bidder and that it should be awarded the contract.

Upon a comprehensive review of the record, the Commissioner concurs with the ALJ that H&S Construction is entitled to summary decision and shall be awarded the construction contract. Specifically, the Commissioner is in accord with the ALJ's determination that the bid specifications required bidders to submit an SDA prequalification for their food services subcontractor. Additionally, the Commissioner agrees that the submittal of an expired SDA prequalification is a deviation of the bid specifications. Finally, the Commissioner finds that Stone Creek's failure to include a food services subcontractor that was SDA prequalified at the time of the bid was a material deviation that cannot be waived; as a result the Board was required to reject Stone Creek's bid. *See, Meadowbrook Carting Co. v. Borough of Island Heights*, 138 *N.J.* 307, 313-315 (1994); *River Vale, supra*, 127 *N.J. Super.* at 215-16.

In its exceptions, Stone Creek argues that the ALJ did not apply the appropriate standard of review in this case. It is important to recognize that the Board did not have any

discretion to waive the material defect in Stone Creek's bid proposal. When a defect in a bid is material, "the public entity to which it has been submitted is without discretion in dealing with it ... [and] the bid must be rejected." *Serenity Contracting Group, Inc. v. The Borough of Fort Lee and C. Raimondo & Sons Construction*, 306 *N.J. Super.* 151, 156 (App. Div. 1997). In this case, Stone Creek's failure to provide a valid SDA prequalification for Singer was a material defect that cannot be waived, and as a result the Board was required to reject the bid. On the other hand if Stone Creek's bid contained a defect that was not material, the Board would have had discretion to determine whether it should waive the defect, and under those circumstances a court's review of that decision would be subject to an abuse of discretion standard of review. *Id.* at 156-157; *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) (citations omitted).

The Commissioner also finds Stone Creek's remaining exceptions to be unpersuasive, largely reflecting arguments previously raised before the ALJ that were taken into consideration and addressed in the Initial Decision. The Commissioner is similarly not persuaded by the exceptions filed by Tekton. Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter. H&S Construction shall be awarded the contract.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/23/11

Date of Mailing: 5/24/11

* 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

H&S CONSTRUCTION & MECHANICAL, INC.,
Petitioner,
v.
WOODLAND PARK BOARD OF EDUCATION, STONE CREEK, INC., AND TEKTON DEVELOPMENT CORP.,
Respondents.

OAL DKT. NO. EDU 01526-11
AGENCY DKT. NO. 36-2/11

TEKTON DEVELOPMENT CORP.,
Petitioner,
v.
WOODLAND PARK BOARD OF EDUCATION, AND STONE CREEK, INC.,
Respondents.

OAL DKT. NO. EDU 01667-11
AGENCY DKT. NO. 41-2/11

Jeffrey S. Wilson, Esq., for petitioner H&S Construction & Mechanical, Inc.

Jeffrey R. Merlino, Esq., for respondent Woodland Park Board of Education (Lindabury, McCormick, Estabrook, Cooper, attorneys)

Steven Cohen, Esq., for respondent Stone Creek, Inc. (Tesser & Cohen, attorneys)

James J. Tarnofsky, Esq., for petitioner-respondent Tekton Development Corp. (Hedinger & Lawless, attorneys)

Record Closed: April 7, 2011 Decided: April 7, 2011

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

H&S did not include Singer Food Service Company in its bid as its food-service equipment subcontractor because one of Singer's prequalification documents had expired. But when Stone Creek submitted the expired document, Woodland Park waived the requirement. Was this expired document a material defect that could not be waived? Yes. Under the test of materiality, a defect is material if waiver would undermine the standards of competition.

Tekton also included Singer in its bid as its food-service equipment subcontractor. Tekton, however, is also classified to do that work. Can Tekton substitute itself for Singer? No. Caselaw holds that contractors cannot substitute subcontractors after the bid has been awarded. Moreover, the bid instructions required bidders to identify their subcontractors and certify that they would use them.

PROCEDURAL HISTORY

Before January 26, 2011, a bid was advertised for the renovation and construction of a new cafeteria at Memorial Middle School and for the renovation and addition of a new kindergarten at Charles Olbon Elementary School in Woodland Park, New Jersey.

In the Instructions to Bidders, the project was referred to as "Renovations and New Cafeteria for the Memorial Middle School and Renovations and New Kindergarten Addition for the Charles Oblon Elementary School."

On January 26, 2011, the bids were opened. Stone Creek submitted the lowest bid ($2,385,800); Tekton submitted the second-lowest bid ($2,442,500); and H&S submitted the third-lowest bid ($2,453,900). As a result, the contract was awarded to Stone Creek on February 7, 2011.

On February 11, 2011, H&S filed a motion for emergency relief with the Department of Education to stop Woodland Park from entering into the contract with Stone Creek. According to H&S, both Stone Creek and Tekton had submitted non-responsive bids because both Stone Creek and Tekton had listed Singer as their food-service equipment contractor when Singer's Certification of Prequalification from the School Development Authority (SDA) had already expired. Ultimately, H&S seeks the award of the contract for the project as the lowest-responsible bidder.

On February 11, 2011, the Department of Education 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.

On February 14, 2011, the OAL received the transmittal.

On that date, Tekton also filed a motion for emergency relief to stop Woodland Park from entering into the contract with Stone Creek because Singer's Certification of Prequalification the SDA had expired. Tekton, however, argues that it can substitute for Singer. As a result, Tekton also seeks the award as the lowest-responsible bidder.

On February 16, 2011, the Department of Education transmitted this second case to the OAL and I consolidated it with the first.

On February 28, 2011, the parties appeared at the OAL for oral argument.

On March 8, 2011, I issued my order granting H&S's and Tekton's applications for emergency relief and enjoining Woodland Park from entering into the contract with Stone Creek for this project until a final decision could be ordered on the whole contested case.

On March 23, 2011, the Commissioner of Education adopted my order.

The parties then moved for summary decision. H&S moved for summary decision that it was the lowest-responsible bidder under N.J.S.A. 18A:18A-4(a) and that Woodland Park award it the contract for the project. Similarly, Tekton moved for summary decision that it was the lowest-responsible bidder but that Woodland Park award it the contract for the project.

Meanwhile, Stone Creek cross-moved for summary decision that it was the lowest-responsible bidder and that Woodland Park award it the contract for the project. Although Woodland Park joined in Stone Creek's cross-motion for summary decision, Woodland Park advised that it would rescind its prior award to Stone Creek, that it would reject the bids by Stone Creek and Tekton as unresponsive, and that it would award the contract to H&S. But Woodland Park also advised that that it would not enter into the contract with H&S until this decision was issued.

Finally, the parties waived any oral argument and relied upon the papers they had submitted in support of and in opposition to the applications for emergency relief.

FINDINGS OF FACT

Based upon the certifications submitted in support of an in opposition to the applications for emergency relief, I **FIND** the following as fact:

The Instructions to Bidders

On pages five and six of the bid instructions, bidders and their subcontractors in the five-major branches of work were required to be prequalified by the SDA and

classified by the Division of Property Management and Construction (DPMC) under N.J.S.A. 18A:7G-33. The bid instructions identified the five-major branches of work as "general construction, plumbing and gas fitting work, heating and ventilating systems and equipment, electrical work, and structural steel and ornamental iron work." In addition, bidders and their subcontracts in the five-major branches of work were required to submit "an Affidavit of No Material Adverse Change together with a Certification of Prequalification from the SDA, a Notice of Classification and a Total Amount of Uncompleted Contracts (DPMC Form 701) from the Division of Property Management and Construction." More significantly, the bid instructions required bidders to submit this documentation for the specialty trades as well:

> Classification of Bidders
>
> A. For all School Facilities Projects, irrespective of project cost, all bidders and those subcontractors in the five (5) major branches of work (general construction, plumbing and gas fitting work, heating and ventilating systems and equipment, electrical work, and structural steel and ornamental iron work), must be prequalified by the SDA and classified by the DPMC pursuant to under N.J.S.A. 18A:7G-33 et seq. as to trade or work classification and aggregate rating limit, on which they must submit bids. The bidder shall submit as to the bidder and each of the subcontractors for the five (5) major branches of work and for all specialty trades for which classification is required, an Affidavit of No Material Adverse Change together with a Certification of Prequalification from the SDA, a Notice of Classification and a Total Amount of Uncompleted Contracts (DPMC Form 701) from the Division of Property Management and Construction.
>
> [(Ex. B to Certif. of Brendan T. Murray, pp. 5-6 (February 11, 2011).)]

On pages eleven and twelve of the bid instructions, bidders were reminded that they had to comply with these instructions and submit these documents. To be clear, the bid instructions enumerated the forms the bidders had to complete and the documents they had to submit. Once again, bidders were instructed to submit the Affidavit of No Material Adverse Change together with the Certification of

Prequalification from the SDA, the Notice of Classification from the DPMC, and the Total Amount of Uncompleted Contracts from the DPMC:

> Preparation of Bids
>
> B. All bidders much use and complete the following bid forms in full:
>
> 7. Affidavit of No Material Adverse Change together with following attachments as to the bidder and the subcontractors in the five (5) major branches of work and all specialty trades for which classification is required:
> a. NOTICE OF CLASSIFICATION from DPMC, as issued by the State of New Jersey, Department of Treasury, Division of Property Management and Construction (DPMC).
> b. Total Amount of Uncompleted Contracts, DPMC Form 701.
> c. The New Jersey Schools Development Authority, Certificate of Prequalification, required for school facilities projects issued by the State of New Jersey Schools Development Authority (SDA).
>
> [(Ex. B to Certif. of Brendan T. Murray, pp. 11-12 (February 11, 2011).)]

The Form of Bid Proposal

On pages four and five of the bid proposal form, bidders were again reminded that they and their subcontractors had to be classified by the DPMC. In addition, bidders had to identify their subcontractors and certify that they would use them. Moreover, bidders were again reminded that they had to submit the same prequalification documents for their subcontractors as they had to submit for themselves. In particular, bidders had to submit their Public Works Contractor Registration Act Certificates as well as the Business Registration Certificates:

> SUBCONTRACTORS
>
> Pursuant to N.J.S.A. 18A:18A-26, in order to be eligible to submit a bid for the Project, the Bidder and its Subcontractors shall be classified by the New Jersey

> Department of Treasury, Division of Property Management and Construction in the following disciplines.
>
> Identify the Subcontractors for the major trades and specialty trades listed below. By indicating the Subcontractors, the Bidder certifies that if it is awarded the bid, the named Subcontractors will be awarded the subcontracts, provided the Subcontractors are approved by the Architect. **All pre-qualification documentation required for the Bidder shall also be submitted for the Major Trade and Specialty Trade Subcontractors.**
>
> All Subcontractors **(irrespective of trade)** must be registered by the State of New Jersey under the Public Works Contractor Act, N.J.S.A. 34:11-56.48 et seq., to work on school construction projects. The bid shall include the Public Works Contractor Registration Act Certificate and a Business Registration Certificate under P.L. 2004 c. 57.
>
> [(Ex. 1 to Certif. of Jeffrey R. Merlino (February 16, 2011).)]

On page five of the bid proposal form, bidders who were classified by the DPMC in trade C008, General Construction, had the space to identify their subcontractors. More specifically, bidders who were classified by the DPMC in trade C008 also had to be deemed classified by the DPMC in trade C030, Plumbing; trade C039, HVAC; trade C047, Electrical; and trade C043, Control Systems. If they were not deemed classified by the DPMC in any of those trades, then they had to engage properly classified subcontractors:

> C008 General Construction (The Bidder must be classified in this trade, as well as the trades listed below, or engage properly classified subcontractors):
>
> **With**
>
> C030 Plumbing (Major Trade Subcontractor)
> C039 HVAC (Major Trade Subcontractor)
> C047 Electrical (Major Trade Subcontractor)
> C043 Control Systems (Specialty Trade Subcontractor)
>
> (1) MAJOR TRADE SUBCONTRACTORS
>
> C030 Plumbing Subcontractor:
> Firm Name of Subcontractor: _____
> Bidder Signature: _____ Date: _____

C039 HVAC Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

C047 Electrical Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

(2) SPECIALTY TRADE SUBCONTRACTOR

C043 Control Systems Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

[(Ex. 1 to Certif. of Jeffrey R. Merlino (February 16, 2011).)]

Similarly, on pages five and six of the bid proposal form, bidders who were classified by the DPMC in trade C009, General Construction/Alterations & Additions, had the space to identify their subcontractors. For those bidders, they also had to be deemed classified by the DPMC in trade C030, Plumbing; trade C039, HVAC; trade C047, Electrical; and trade C043, Control Systems. But they also had to be deemed classified by the DPMC in trade C104, Food Service Equipment. If they were not deemed classified by the DPMC in any of those trades, then they too had to engage properly classified subcontractors:

C009 General Construction/Alterations and Additions (The Bidder must be classified in this trade, as well as the trades listed below, or engage properly classified subcontractors):

With

C030 Plumbing (Major Trade Subcontractor)
C039 HVAC (Major Trade Subcontractor)
C047 Electrical (Major Trade Subcontractor)
C043 Control Systems (Specialty Trade Subcontractor)

(1) MAJOR TRADE SUBCONTRACTORS

C030 Plumbing Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

C039 HVAC Subcontractor:

Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

C047 Electrical Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

(2) SPECIALTY TRADE SUBCONTRACTOR

C043 Control Systems Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

(3) SPECIALTY TRADE SUBCONTRACTOR

C104 Food Service Equipment Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

[(Ex. 1 to Certif. of Jeffrey R. Merlino (February 16, 2011).)]

Addendum #3

Before January 26, 2011, Woodland Park revised its bid proposal form. In Addendum #3, bidders classified by the DPMC in trade C008, General Construction, also had to be deemed classified by the DPMC in trade C029, Structural Steel, and trade C104, Food Service Equipment; otherwise, they had to engage properly classified subcontractors:

C008 General Construction (The Bidder must be classified in this trade, as well as the trades listed below, or engage properly classified subcontractors):

With

C029 Structural Steel (Major Trade Contractor)
C030 Plumbing (Major Trade Subcontractor)
C039 HVAC (Major Trade Subcontractor)
C047 Electrical (Major Trade Subcontractor)
C043 Control Systems (Specialty Trade Subcontractor)
C104 Food Service Equipment (Specialty Trade Subcontractor)

(1) MAJOR TRADE SUBCONTRACTORS

C029 Structural Steel Subcontractor and Ornamental Iron:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

C030 Plumbing Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

C039 HVAC Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

C047 Electrical Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

(2) SPECIALTY TRADE SUBCONTRACTOR

C043 Control Systems Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

(3) SPECIALTY TRADE SUBCONTRACTOR

C104 Food Service Equipment Subcontractor:
Firm Name of Subcontractor: _____
Bidder Signature: _____ Date: _____

[(Ex. D to Certif. of Daniel Hernandez (February 9, 2011).)]

Given this addendum, bidders classified by the DPMC in trade C008, General Construction, or bidders classified by the DPMC in trade C009, General Construction/Alterations & Additions, both had to be deemed classified by the DPMC in trade C104, Food Service Equipment, or engage properly classified subcontractors.

The Certificate of Prequalification from the SDA

Both Tekton and H&S are classified by the DPMC in Trade C008 General Construction while Stone Creek is classified by the DPMC in Trade C009 General Construction/Alterations & Additions. Only contractors classified by the DPMC in Trade C008 General Construction, however, are also deemed by the DPMC to be classified in Trade C104 Food Service Equipment. Therefore, only Stone Creek had to engage a properly classified food-service equipment subcontractor—and it chose Singer.

But so did Tekton. Even though Tekton did not have to engage a properly classified food-service equipment subcontractor, it too chose Singer. As a result, both Stone Creek and Tekton listed Singer as their food-service equipment subcontractor and submitted a Certificate of Prequalification from the SDA on behalf of Singer in their bids.

Singer's certificate, however, had already expired. According to the SDA, Singer's Certificate of Prequalification had expired on December 7, 2010, and was not renewed until February 2, 2011. Although it was renewed retroactive to December 7, 2010, the certificate was still expired when Stone Creek and Tekton submitted their bids. In other words, Singer was not prequalified by the SDA when Woodland Park opened their bids on January 26, 2011.

Moreover, H&S had considered engaging Singer as its food-service equipment subcontractor but had decided against it because Singer's Certification of Prequalification from the SDA had expired.

Incidentally, the parties stipulated that this project is not an SDA project.

CONCLUSIONS OF LAW

I.

Standard for Summary Decision

Where a party seeks an order of an administrative law judge, the party shall apply by motion. N.J.A.C. 1:1-12.1(a). In such proceedings, no technical forms of motion are required—the party shall simply state the grounds upon which the motion is made and the relief or order being sought. N.J.A.C. 1:1-12.1(a)(1).

In motions for summary decision, a party may move upon any or all of the substantive issues and a judge may render a decision if there is no genuine issue of

material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5.

In this case, all of the parties moved for summary decision upon the substantive issue of who was the lowest-responsible bidder. In doing so, all of the parties relied upon the papers they had submitted in support of and in opposition to the applications for emergency relief. Since there is no genuine issue of material fact, I **CONCLUDE** that H&S is entitled to prevail as a matter of law for the following reasons.

II.

Public Schools Contract Law

Under the Public Schools Contract Law, every contract for the performance of any 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).

The Test of Materiality

These requirements notwithstanding, minor discrepancies and technical omissions can be waived. Id. at 314. The test is one of materiality. Originally set forth by Judge Pressler in River Vale v. R.J. Longo Construction Company, 127 N.J. Super. 207, 216 (Law Div. 1974), it 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.

III.

SDA versus Non-SDA Projects

Both Woodland Park and Stone Creek argue that Stone Creek is the lowest-responsible bidder who complied with the substantive and procedural requirements set forth in the specifications because the bid did not require bidders to submit a Certification of Prequalification from the SDA on behalf of their subcontractors. In support of their argument, Woodland Park and Stone Creek rely on page four of the bid proposal. According to Woodland Park and Stone Creek, the bid proposal only required bidders to submit: (1) a Notice of Classification; (2) a Total Amount of Uncompleted Contracts; (3) a Public Works Contractor Registration Act Certificate; and (4) a Business Registration Certificate. Since Stone Creek submitted these forms and offered the lowest price, Woodland Park and Stone Creek conclude that Stone Creek was the lowest-responsible bidder.

Woodland Park and Stone Creek, however, overlook the obligatory language in the bid instructions. More specifically, on pages four to five of the bid instructions, and then again on pages eleven to twelve, Woodland Park required bidders to submit a Certification of Prequalification from the SDA on behalf of their subcontractors. By its own terms and conditions, Woodland Park required bidders to submit this certification in

addition to the Notice of Classification, the Total Amount of Uncompleted Contracts, the Public Works Contractor Registration Act Certificate, and the Business Registration Certificate. Although Woodland Park argues that this requirement is only for SDA projects, the bid documents do not make this distinction. Therefore, I **CONCLUDE** that this distinction does not apply and that bidders were required to submit a Certification of Prequalification from the SDA on behalf of their subcontractors.

Mandatory versus Non-Mandatory Requirements

In the alternative, Stone Creek argues that it is the lowest-responsible bidder who complied with the substantive and procedural requirements set forth in the specifications because the requirement that it submit a Certification of Prequalification from the SDA on behalf of their subcontractors is a minor discrepancy or technical omission that can be waived. In support of its argument, Stone Creek relies upon N.J.S.A. 18A:18A-18. According to Stone Creek, the requirement of prequalification or classification only applies to contractors or subcontractors in the five-major branches of work set forth in the statute.

In further support of its argument, Stone Creek relies upon N.J.A.C. 19:38A-2.1(d). According to Stone Creek, this requirement of prequalification only applies to contractors when they submit their bids and only applies to subcontractors when they enter into their contracts. In other words, it does not apply to subcontractors at the time of bid.

The Appellate Division, however, rejected a similar argument in P & A Construction v. Woodbridge, 365 N.J. Super. 164 (App. Div. 2004). In that case, the governing body waived a financial statement because it was not one of the five-statutorily mandated items under the Local Public Contracts Law, N.J.S.A. 40A:11-1 et seq. Although the financial statement was not one of the five-statutorily mandated items, the Appellate Division reasoned that the protections of that law would be substantially weakened if the local contacting agency could waive any other item. Id. at 176. Finding no legislative direction, the Appellate Division held that waiver of any other

bid defect must be considered under the test of materiality set forth in River Vale. P & A Construction, supra, 365 N.J. Super. at 177.

In this case, Singer is not a contractor or subcontractor in one of the five-statutorily mandated branches of work set forth in N.J.S.A. 18A:18A-18. And the Certificate of Prequalification from the SDA is not one of the statutorily mandated items set forth in the Public Schools Contract Law either. But given the Appellate Division's reasoning and holding in P & A Construction, I **CONCLUDE** that waiver of the Certification of Prequalification from the SDA must be considered under the same test of materiality set forth in River Vale.

Parenthetically, H&S and Tekton argue that the Appellate Division's decision in Begraft v. Franklin Board of Education, 133 N.J. Super. 415 (App. Div. 1975), is dispositive. In that case, the board of education disqualified a bidder which submitted its statutorily mandated qualifications after the date the bids were received but before the date the contract was awarded. Id. at 417. In affirming that decision, the Appellate Division explained that the board of education was without authority to accept the bid because the bid defect could not be waived. As a result, the Appellate Division held that qualification after the date for submission of the bid does not satisfy the requirements of the statute or the bid. Ibid.

Although this case concerns the submission of qualifications after the date the bids were received but before the date the contract was awarded, it still does not concern the submission of statutorily mandated qualifications. Again, such statutorily mandated qualifications cannot be waived. Therefore, I **CONCLUDE** that Begraft does not apply and waiver of the Certification of Prequalification from the SDA must still be considered under the test of materiality set forth in River Vale.

The First Prong of the Test: Assurance of Performance

In considering this test of materiality, Stone Creek argues that its submission of an expired Certification of Prequalification from the SDA on behalf of Singer was a minor discrepancy or technical omission that can be waived because it did not deprive

Woodland Park of its assurance that the contract would be entered into, performed, and guaranteed according to its specifications. In support of its argument, Stone Creek relies on N.J.S.A. 18A:18A-31. According to Stone Creek, the statute requires boards of education to give bidders the opportunity to cure any minor discrepancy or technical omission.

Stone Creek, however, overstates its reach. Under the statute, boards of education must give bidders the opportunity to present additional information to substantiate their qualifications or classifications. But boards of education must only do so after bidders have first established those qualifications or classifications:

> Where there have been developments subsequent to the qualification and classification of a bidder which in the opinion of the board of education would affect the responsibility of the bidder, information to that effect shall forthwith be transmitted to the department for its review and reconsideration of the classification. Before taking final action on any such bid, the board of education concerned shall notify the bidder and give him an opportunity to present to the department any additional information which might tend to substantiate the existing classification.
>
> [N.J.S.A. 18A:18A-31.]

In this case, Stone Creek did not first establish Singer's qualifications. Thus, there was no obligation for Woodland Park to notify Stone Creek and provide it with an opportunity to explain why Singer was still qualified. Had Singer's Certification of Prequalification from the SDA expired after Stone Creek submitted its bid, then Woodland Park would have been obligated to provide Stone Creek with the opportunity to submit the renewal before taking final action on the award. Therefore, I **CONCLUDE** that N.J.S.A. 18A:18A-31 does not apply.

The Second Prong of the Test: Standards of Competition

Stone Creek also argues that its submission of an expired Certification of Prequalification from the SDA on behalf of Singer was a minor discrepancy or technical omission that can be waived because it did not adversely affect competitive bidding by

giving an advantage to one bidder over the other or by undermining the common standards of competition. In support of its argument, Stone Creek relies upon Tec Electric v. Franklin Lakes Board of Education, 284 N.J. Super. 480 (Law Div. 1995). According to Stone Creek, the case held that prequalification documents are immaterial defects that can be waived.

That case, however, is different. In that case, the prequalification document at issue was the Affidavit of No Material Adverse Change and it only had the potential to affect the classification by the DPMC. More significantly, it did not have the potential to affect the competitive-bidding process:

> With regard to the second criterion of the River Vale materiality test, the failure to submit a Prequalification Affidavit offered Tec no opportunity adversely to affect competitive bidding. The information contained in the Prequalification Affidavit concerns the bidder's current DBC classification rating, which in turn denotes a contractor's financial capacity, as well as availability of equipment and personnel, to do the job. It does not and could not influence the amount of plaintiff's or any other contractor's bid.
>
> [Tec Electric, supra, 284 N.J. Super. at 487.]

In this case, the submission of the expired Certification of Prequalification from the SDA did affect the competitive-bidding process because it did affect a bid. As H&S represented, it had considered engaging Singer as its food-service equipment subcontractor but chose not to because Singer's Certification of Prequalification from the SDA had expired. Whether or not other bidders listed Singer as their food-service equipment subcontractor does not change the fact that it affected H&S's bid.

It also lessened the pool of subcontractors. In a persuasive decision, the Appellate Division noted that to waive such conditions for some affords them an unfair-bidding advantage over others because it opens the pool of subcontractors for some while lessening the pool for others:

> As to the second prong of the River Vale analysis, we are in complete agreement with the trial court's findings:

> [B]oth [d]efendants were afforded an unfair bidding advantage insofar as they were not required to submit the subcontractor documentation in their initial bid submissions. Whether or not the burden of doing so is considered to be laborious, the requirement of obtaining Certificates and supporting documents from all subcontractors must surely lessen the pool of subcontractor candidates from which a bidding contractor can choose in preparing the final bid submission. I therefore find it indisputable that a general contractor who is not required to obtain these documents prior to bid submission is placed in a position over its competitors.
>
> [Vanas Construction Co. v. Jersey City, A-1649-10, 2010 N.J. Super. Unpub. LEXIS 3087 (App. Div. Dec. 23, 2010).]

Finally, the waiver of the Certification of Prequalification from the SDA created the perception of favoritism—a perception that our laws seek to avoid. See Bil Jim Construction Co. v. Manchester Twp. Bd. of Educ., 236 N.J. Super. 603 (Law Div. 1989) (where the court vacated the award and rejected all bids because the specifications failed to designate which classification was required for the contract and left the board with unbridled discretion after the bids were opened to determine which classification was required).

Although the specifications in this case designated the classifications, they also designated the qualifications. Indeed, both were required for the contract. To leave the board with the discretion after the bids were opened to waive those qualifications, then, could create the perception of favoritism. Therefore, I **CONCLUDE** that Tec Electric does not apply.

And given my discussion of the test of materiality and its application to this case, I **CONCLUDE** that the submission of the expired Certification of Prequalification from the SDA by a bidder on behalf of Singer is a material defect that cannot be waived.

Therefore, I also **CONCLUDE** that Stone Creek is not the lowest-responsible bidder under N.J.S.A. 18A:18A-4(a) and should not be awarded the contract for this project.

IV.

Meanwhile, Tekton argues that it is the lowest-responsible bidder because it is deemed classified in Trade C104 Food Service Equipment and can substitute for Singer. Both H&S and Stone Creek, however, argue that it cannot. In support of their argument, H&S and Stone Creek rely upon O'Shea v. New Jersey Schools Construction Corporation, 388 N.J. Super. 312 (App. Div. 2006).

In that case, the Appellate Division held that a general contractor may not substitute a major-trade subcontractor after a bid has been awarded because it is contrary to public-bidding laws and their underlying policies. Id. at 314.

In doing so, the Appellate Division reiterated that public-bidding statutes exist for the benefit of the taxpayers, that the underlying purpose of those statutes is to secure the benefits of public competition, and that the public-bidding statutes are to be strictly construed to achieve those ends. Id. at 319.

More specifically, the Appellate Division noted that the need to furnish the names of subcontractors along with the bid of a general contractor is also found in the public-bidding statutes of State government, State agencies, State colleges, county colleges, and the New Jersey Building Authority. Id. at 323. In particular, the court referenced boards of education and N.J.S.A. 18A:18A-18. O'Shea, supra, 388 N.J. Super. at 323. According to the Appellate Division, inconsistent treatment by the various State agencies would lead to uncertainty in the contracting community, open the door to mischief, and undermine competition in the processes. Ibid.

Although this case does not concern the substitution of a major-trade contractor, the same reasoning applies. Moreover, the bid instructions required bidders to identify their subcontractors and certify that they will use them—without making a distinction between major-trade subcontractors and specialty-trade subcontractors. Therefore, I **CONCLUDE** that Tekton cannot substitute for Singer.

As such, I also **CONCLUDE** that Tekton is not the lowest-responsible bidder under N.J.S.A. 18A:18A-4(a) and should not be awarded the contract for this project.

Incidentally, Tekton also relies on the unpublished Appellate Division decision, Contract for Science Wing Addition and Alterations v. Dobco, A-5395-07, 2010 N.J. Super. Unpub. LEXIS 443 (App. Div. March 4, 2010), in support of its argument. In that case, the Appellate Division distinguished O'Shea and held that the contractor could substitute one of its subcontractors because the subcontractor became unavailable after the award of the contract. In short, the court reasoned that the bidding statutes do not suggest a legislative intent to prevent a contractor from doing so:

> Contractors can make changes to the subcontractors listed in their bids for performance reasons, especially when protecting the public interest. In O'Shea v. N.J. Schools Constr. Corp., 388 N.J. Super. 312, 315 n. 1 (App. Div. 2006), where we overturned a policy allowing substitution after the award of bids, we stated that our "opinion [did] not affect a general contractor's remedies if a subcontractor breaches after a contract between the general contractor and the subcontractor has been signed." In [Stano v. Soldo Constr. Co., 187 N.J. Super. 524, 534 n.3 (1983)], we refused to hold that invalidation of a contract would follow in all instances "where a proposed subcontractor named in the bidding papers becomes unavailable for some reason after the award[.]" Finally, in Serenity Contracting Group v. Borough of Fort Lee, 306 N.J. Super. 151, 157 (App. Div. 1997), certif. denied, 153 N.J. 214 (1998), we declared that there were no bidding statutes that "suggest[] a legislative design to supplant all exercises of principled business judgment by the contracting public entity that conform with the express provisions of the Law and its underlying policies."
>
> [Science Wing, supra, A-5395-07 at 31-32.]

This case, however, is different. Indeed, the distinction is the difference. In this case, there were no performance reasons or contractual breaches which would have necessitated substitution. More pointedly, Singer could not become unavailable after the award of the contract because it was already unavailable at the time of the bid. Therefore, I **CONCLUDE** that Science Wing is unpersuasive and does not apply.

V.

Finally, H&S argues that it is the lowest-responsible bidder because it is classified in Trade C104 Food Service Equipment, named itself as the food-service equipment contractor, and does not need to substitute for Singer.

Since none of the parties challenge that H&S is classified in Trade C104 Food Service Equipment, named itself as the food-service equipment contractor, and does not need to substitute for Singer—and since none of the parties challenge any of the other substantive or procedural requirements set forth in the specifications or the bids—I **CONCLUDE** that H&S is lowest-responsible bidder under N.J.S.A. 18A:18A-4(a) and should be awarded the contract for this project as a matter of law, unless Woodland Park rejects the bid for any of the reasons set forth in N.J.S.A. 18A:18A-22.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that H&S's motion for summary decision be **GRANTED** and that all of the other motions for summary decision be **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, 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.

4/7/11
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 4-7-11

Date Mailed to Parties: 4-7-11

dr

195-11

JILLIAN ALLEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

On December 29, 2010, the petitioner – a non-tenured social studies teacher – filed an appeal charging that the respondent Board improperly terminated her employment contract for the 2010-2011 school year. She contends, *inter alia*, that because the Board never voted to terminate the contract, it is still operative – notwithstanding the fact that respondent's director of human resources informed her by letter on August 14, 2010 that she had received the contract in error. Petitioner further argues that the Board's action followed her July 2010 request for maternity leave and Family Medical Leave effective shortly after the school year would have begun – a request that was denied by the director of human resources. The Board filed a motion to dismiss the matter, asserting 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 material facts in dispute, and the matter is ripe for summary judgment; petitioner was employed by respondent Board for one year and four months; petitioner's contract was renewed on or about June 24, 2010; on August 14, 2010, petitioner received a letter from the director of human resources informing her that she had received a contract for the 2010-2011 school year in error and that she should have been non-renewed as a result of the Board's budgetary reduction in force; petitioner filed her appeal on December 29, 2010, well in excess of ninety-days after the receipt of the August 14, 2010 letter notifying her that she had received the contract for the 2010-2011 year in error. Accordingly, the ALJ concluded that the petition should be dismissed for failure to comply with the requirements of *N.J.A.C.* 6A:3-1.3(i), and granted the Board's motion to dismiss the appeal.

Upon full consideration, the Commissioner concurred with the ALJ for the reasons detailed in the Initial Decision, 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 304-11
AGENCY DKT. NO. 724-12/10

JILLIAN ALLEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, Initial Decision of the Office of Administrative Law, and petitioner's exceptions have been reviewed. For the reasons articulated by the Administrative Law Judge, the Commissioner is constrained to dismiss the petition.

Petitioner relies heavily on the fact that on or about June 29, 2010, the respondent Board offered – and petitioner accepted – a contract to teach from September 1, 2010 to June 30, 2011. She argues that since the respondent Board never voted to terminate the contract, it is still operative, notwithstanding that respondent's Director of Human Resources, Karen Murray, did not allow petitioner to commence work on the starting date of the 2010-2011 school year. Petitioner further contends that as long as the contract has not been terminated by Board action, the Department of Education's regulation limiting the time to file administrative appeals – *N.J.A.C.* 6A:3-1.3(i) – is not triggered.

The relief that petitioner demands is specific performance of a contract – a remedy that is generally sought in Superior Court. Petitioner, however, opted to prosecute an

administrative action. Consequently, she is subject to the applicable administrative rules, including the requirement in *N.J.A.C.* 6A:3-1.3(i) that a claimant file an appeal within ninety days of "notice of a final order, ruling or other action by the district board of education, individual party, or agency." (Emphasis added.)

The alleged improper action in this case was the barring of petitioner from a position for which she had previously been given a contract. If the alleged violation is viewed as an *ultra vires* action by Board employee Murray, petitioner was obliged to file her appeal within ninety days of August 14, 2010, the date upon which petitioner acknowledges receiving a letter from Murray purporting to rescind petitioner's employment contract. In the alternative, the alleged violation could be viewed as a breach of contract by the respondent board, which Board neither corrected Murray's action nor paid petitioner the remuneration memorialized in the June 29, 2010 contract. The deadline for filing an appeal under this theory would have been November 30, 2010, ninety days after the 2010-1011 school year commenced – without petitioner.

The instant appeal was filed on or about December 29, 2010, substantially past the filing deadlines under either of the above scenarios. Accordingly, the petition was untimely and is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5|23|11
Date of Mailing: 5|25|11

[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 00304-11
AGENCY DKT. NO. 724-12/10

JILLIAN ALLEN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Jessica S. Swenson, Esq., for petitioner (Fox and Fox, attorneys)

Karen A. Murray, Esq., for respondent

Record Closed: March 2, 2011 Decided: April 6, 2011

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On December 29, 2010, Jillian Allen filed with the Commissioner an application for emergent relief and appeal of the Elizabeth Board of Education's (Board) failure to honor Allen's contract for the 2010-11 school year.

Allen, a non-tenured social studies teacher, contends that, although the Board renewed her contract for the 2010-11 school year on June 24, 2010, she was informed

by the Board's Executive Director for Human Resources Karen Murray on August 14, 2010, that she had received the contract in error and that, "[s]ince you had not earned tenure, you should not have been renewed for the 2010-2011 year, as a result of the Board's budgetary reduction in force." Allen argues that the action by Murray was improper because there was no Board action deeming Allen's contract as non-renewed. Allen further contends that Murray's letter followed her July 2010 request for maternity leave and Family Medical Leave effective September 5, 2010, several days after the commencement of the school year, a request which Murray denied.

On January 4, 2011, the Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted an emergent relief application and petition of appeal 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, for determination as a contested case. The Board filed a Motion to Dismiss on January 13, 2011, contending that the petition should be dismissed as time-barred pursuant to N.J.A.C. 6A:3-1.3(i) and for failure to comply with the required format for a petition in accordance with N.J.A.C. 6A:3-1.4.

I denied the application for emergent relief on January 18, 2011, but declined to rule on the Motion to Dismiss at that time. I further ordered that the parties submit supplemental briefs supporting or opposing the Board's Motion to Dismiss.[1] The Acting Commissioner of Education, on February 18, 2011, adopted my recommended Order denying Allen's application for emergent relief. I received briefs from the parties on March 2, 2011.

FACTUAL DISCUSSION

For the purpose of this Motion the following **FACTS** from Allen's Certification and attachments are deemed as true. The Board employed Allen for one year and four months. On or about June 24, 2010, Allen's contract for 2010-11 was renewed as evidenced by an Employment Contract signed by Board President Carlos M. Trujillo,

[1] The Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 et seq., does provide specifically for the filing of a Motion to Dismiss. The Board's Motion will be treated as a Motion for Summary Decision in accordance with N.J.A.C. 1:1-12.5.

Business Administrator/Board Secretary Harold E. Kennedy, Jr. and Allen. In July 2010, Allen filed a request for maternity leave effective September 5, 2010, and requested Family Medical Leave documents. On or about August 6, 2010, Allen met with Executive Director of Human Resources Karen Murray, who informed her that she would not approve the leave of absence. The following week Allen received a telephone call from Murray indicating that her contract had been provided in error and that she should not have received a contract in June.

On August 14, 2010, Allen received the following letter from Murray:

> Please be advised that you received a contract for the 2010-2011 year in error. Since you had not earned tenure, you should have been non-renewed for the 2010-2011 year, as a result of the Board's budgetary reduction in force.

The letter indicates that it was copied to Kennedy, Assistant Superintendent for Teaching and Learning Olga Hugelmeyer and Supervisor of Payroll Isolina Oyola. Allen's counsel, Jessica Swenson, wrote to Kirk Nelson of the Elizabeth Public Schools Law Department on October 19, 2010, in response to Murray's letter arguing that only action by the Board could properly deem Allen's contract non-renewed. She advised that, if Allen's contract is non-renewed, " . . . we will challenge the non-renewal with the Commission [sic] of Education . . . ." On November 5, 2010, Swenson again wrote to Nelson indicating that she had failed to receive any communication from him in response to her October 19 letter. She further advised that, if no response were received by November 12, 2010, " . . . we will be forced to proceed to litigation."

Neither party has submitted proof that the Board took formal action deeming Allen's contract as non-renewed.

On December 29, 2009, the Acting Commissioner received an appeal from Allen dated December 22, 2010.

ANALYSIS AND CONCLUSIONS OF LAW

Summary decision is the administrative counterpart to summary judgment in the judicial arena. N.J.A.C. 1:1-12.5 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." This language is substantially similar to the guidelines for summary judgment under R. 4:46-2(c) which provides in part 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.

In order to defeat a summary decision motion, the adverse party must respond by affidavits setting forth "specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing." Use of the summary procedure is aimed at "the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial." Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

The New Jersey Supreme Court has encouraged trial-level courts "not to refrain from granting summary judgment when the proper circumstances present themselves." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541 (1995). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified 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." Id. at 540 (citations omitted).

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts which require a plenary hearing regarding the issue of whether the appeal was timely filed, and the Board is entitled to summary decision as a matter of law.

The Commissioner has specifically addressed the time in which a petitioner must initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws. N.J.A.C. 6A:3-1.3(i) requires that:

> 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.

Such a rule represents a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws and falls within the scope of authority granted to the Commissioner. Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 582 (1993). 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. Ibid. Its purposes are 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 and to penalize dilatoriness and serve as a measure of repose by giving security and stability to human affairs. Id. at 587.

The ninety-day requirement is to be strictly construed and is mandatory. Wise v. Bd. of Educ. of the City of Trenton, EDU 160-00, Comm'r (September 11, 2000), aff'd, State Bd. of Educ. (January 3, 2001), <http://lawlibrary.rutgers.edu/oal/search.html>. A petitioner must file a petition within ninety days from a notice of adverse action and not within ninety days of her exhaustion of other avenues and mechanisms she might have employed in seeking renewal of employment. Ibid. Informal attempts to resolve a dispute do not serve to toll the statute of limitations. See Kaprow, supra, 131 N.J. at 588. Also, the ninety-day period for filing a petition of appeal commences when a petitioner learns of facts that would enable her to file a timely claim. Id. at 587. "Adequate 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." Ibid. (citation omitted).

The time by which Allen filed her petition on December 29, 2010, was well in excess of ninety-days from her receipt on August 14, 2010, of the letter from the

Board's Executive Director of Human Resources, Karen Murray, notifying her that she had received the contract for the 2010-2011 year in error. Allen cannot defend her failure to file a petition within this ninety-day period based on her contention that the statute of limitations would not begin to run until the Board officially non-renewed her. If that were so, and if the Board never acted formally, the statute of limitations would still yet to have run. Regardless of whether or not the Board had acted properly, Allen knew by August 14 that her request for a leave of absence was being denied and that she had no teaching position at the commencement of the 2010-11 school year from which to take a leave. Aside from whether Murray had the actual authority to notify Allen as she did without a formal Board action, Allen was so notified by someone (Murray) acting in her official capacity as an agent to the Board. Notice sufficient to trigger the statute of limitations can exist prior to formal Board action. H.H. and E.H. o/b/o Bd. of Educ. of Twp. of Wall, EDU 07602-09, Initial Decision (January 6, 2010), adopted, Comm'r (February 23, 2010), <http://lawlibrary.rutgers.edu/oal/search.html>. As instructed by Kaprow, the ninety days begins to run when notified of an adverse action regardless of whether the action is proper and when the petitioner learns of facts that would enable her to file a timely claim. Both elements existed upon the receipt of the Murray letter.

It is perfectly clear by Allen's conduct, through her counsel, after August 14, 2010, that she knew of an adverse action against her and had learned of sufficient facts that would enable her to file a timely claim. By letters of her counsel of October 19 and November 5, 2010, she acknowledged the adverse action against her by protesting what she considered to be an improper decision to non-renew her contract. Moreover, these attempts to resolve the dispute informally do not toll the statute of limitations.

Accordingly, I **CONCLUDE** that Allen's petition of appeal should be dismissed for failure to comply with the requirements of N.J.A.C. 6A:3-11.3(i).

ORDER

It is hereby **ORDERED** that the Board's motion for summary decision be **GRANTED** and the petition of appeal **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.

April 6, 2011
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: 4/6/11

Date Mailed to Parties: April 7, 2011

Laura Dudics
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

196-1(

STEVEN E. TOMLIN , JR., AND DIANE HOGAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAPE MAY REGIONAL SCHOOL DISTRICT, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged the respondent Board's determination that he had not satisfied requirements for graduation, and therefore could not march in the processional or otherwise participate in high school graduation ceremonies in June 2009. The Board had based its determination on the fact that Steven had received a failing final grade in eleventh grade English. Subsequently, Steven completed and passed all of his courses at the Cape May County Technical School District's Adult High School and otherwise satisfied the requirements for graduation and receipt of a diploma set forth in *N.J.A.C.* 6A:8-5.1 and *N.J.A.C.* 6A:8-5.2(a) and (b)1.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary judgment; the petitioner Steven Tomlin has now completed and passed all of his courses at the Cape May County Technical School District's Adult High School, and has received a high school diploma; petitioner had the option of returning to Lower Cape May County High School and completing requirements to earn a diploma from that school, but decided to remain at the Adult High School to complete his coursework and has now graduated. Accordingly, the ALJ concluded that the matter is now moot, and dismissed the petition.

Upon full consideration, the Commissioner concurred with the ALJ for the reasons comprehensively detailed in the Initial Decision, and dismissed the petition 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.

May 23, 2011

196-11

OAL DKT. NO. EDU 4952-09
AGENCY DKT. NO. 118-6/09

STEVEN E. TOMLIN , JR., AND DIANE HOGAN,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAPE MAY REGIONAL SCHOOL DISTRICT, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

Upon review of the record, the Initial Decision and exceptions submitted by D.H.,[1] the Commissioner concurs that the claims set forth in the petition are moot. Accordingly the petition is dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5|23|11
Date of Mailing: 5|25|11

[1] Diane Hogan is Steven Tomlin's mother. While it is undisputed that Steven has now reached the age of 18, his mother was allowed to assist him in the prosecution of the petition.

[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 4952-09
AGENCY DKT. NO. 118-6/09

STEVEN E. TOMLIN, JR.,
AND DIANE HOGAN,[1]
Petitioners,
v.
BOARD OF EDUCATION OF
THE LOWER CAPE MAY
REGIONAL SCHOOL DISTRICT,
CAPE MAY COUNTY,
Respondent.

Steven E. Tomlin, Jr. and **Diane Hogan**, petitioners, pro se

Peter M. Tourison, Esq., for respondent

Record Closed: January 14, 2011 Decided: April 8, 2011

BEFORE **ISRAEL D. DUBIN**, ALJ:

On June 12, 2009, Steven E. Tomlin, Jr., and his mother, Diane Hogan, filed a Petition of Appeal and Request for Emergent Relief contesting the Lower Cape May

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[1] Given the passage of time, it would not be unreasonable to assume that Steven is now eighteen or nineteen years old, an age at which he has attained "the basic civil and contractual rights and obligations heretofore applicable only to persons 21 years of age or older, including the right to contract, sue, be sued and defend civil actions . . .." N.J.S.A. 9:17B-1a. However, there is no mention, much less proof, of his age in the record. Therefore, Diane Hogan, who has assisted her son throughout these proceedings, has been permitted to continue participating in that capacity.

Regional School District Board of Education's determination that he had not satisfied the requirements for graduation and therefore could not march in the processional or otherwise participate in the high school's graduation ceremonies. The Board based its determination on the fact that Steven had received a failing final grade in eleventh grade English, which he had been re-taking his senior year.[2] This failing grade not only left him approximately five credits shy of the 140 credits needed for graduation, but also resulted in his failure to complete four years of high school English, as required by the State Department of Education's core curriculum standards.

Steven and his mother contested the Board's determination on the grounds that it had been based on false information, unsupported facts, and certain misleading statements made by his eleventh grade English teacher, Sean Murphy. Among other things, they claimed that Mr. Murphy had given Steven zeroes on certain tests he claimed Steven hadn't taken because he'd been absent, when Steven actually had been in school, attended class, taken the tests, and passed. They also claimed they'd been denied the opportunity to review his homework assignments and test papers because, they'd been told, his class folder was "missing." Finally, Steven claimed that Mr. Murphy had broken his promise that he'd give Steven a passing grade if he completed his assignments, did not receive any more zeroes and passed the final exam.

Nevertheless, the Board took the position that unlike a 67 or 68, his final grade of 57 had been far too low to give Steven the benefit of the doubt and allow him to pass with a final grade of 70. In fact, it claimed that even if the missing folder turned up and revealed that he'd received 100s on the tests and homework assignments for which he'd received zeroes, he still would have received a failing final grade. The Board also asserted that Steven and his mother had accessed "Power School," the school-run website that listed homework, quiz, quarterly and final grades, on numerous occasions, including two in May and seven in June, and therefore had been well aware that he was in danger of failing the course.

[2] Steven received a passing grade of 70 (D-) in twelfth grade English, which he had been allowed to take even though he had not passed eleventh grade English.

Following oral argument on June 15, 2009, I granted Steven's petition for emergent relief and directed the Board to allow Steven to participate in graduation exercises including the processional, even if he was only to receive an empty envelope.[3] Still, there remained the question of whether Steven had passed eleventh grade English, earned a sufficient number of credits, and successfully completed the requisite four years of high school English to graduate and receive his high school diploma. Therefore, a plenary hearing was scheduled for August 12, 2009, in order to determine, among other things, the circumstances surrounding the loss of the missing folder; the dates on which the eleventh grade English quizzes and tests had been given and the attendance records for those dates; and the dates Steven and his mother had accessed "Power School," along with the information that had been displayed on those dates. Given the amount of time it was likely going to take for the case to be heard and decided, as well as the difficulties he and his mother would have proceeding as *pro se* litigants, I encouraged Steven to take eleventh grade English in summer school.

On August 7, 2009, the Board requested an adjournment of the hearing because Steven had reportedly enrolled at Atlantic County Community College and the English course for which he'd registered was going to satisfy both his high school and first year of college English requirements. At that time, the Board also indicated that it would consider reimbursing him for the approximately $350 cost of the course if he passed. Consequently, a status conference was scheduled for January 15, 2010, a date by which Steven would have received his final grade in that course.

Following an additional adjournment, the telephone conference was held on January 20, 2010, at which time Steven's newly-retained attorney requested additional time to conduct discovery and explore an amicable resolution of the matter. Status conferences were subsequently conducted on March 3, 2010; April 1, 2010; and then July 13, 2010, when counsel advised me that the case had become moot because Steven had passed a summer school English course and graduated, albeit not from Lower Cape May Regional. Counsel also advised me that I would be provided with a settlement agreement or letter of withdrawal by August 13, 2010.

[3] By order dated June 22, 2009, the Commissioner of Education adopted the recommended order granting Steven's petition.

When August 13, 2010, came and went without an agreement or withdrawal, a status conference was scheduled for September 15, 2010. At that time, counsel for the Board stated that Steven apparently had not attended Atlantic County Community College or the school district's summer program. Instead, he had applied for admission to the Cape May County Technical School District's high school program and the Board had been waiting for a transcript of his grades before deciding whether to give him a diploma. A final status conference was held on November 4, 2010, at which time counsel for the Board advised that he would be filing a motion for summary decision. The motion was filed on December 13, 2010, and Diane Hogan, who was no longer represented by counsel,[4] filed her response on January 24, 2011.

The material facts are undisputed and may be summarized as follows. Steven Tomlin was enrolled as a senior at the Lower Cape May Regional High School throughout the 2008-2009 school year. During that year he took not only twelfth grade English, but also eleventh grade English for which he had not received credit the previous year.[5] As the end of the school year approached, he was notified that he would not be passing eleventh grade English because his grade of 57 was well below the 70 he required to receive credit for the course. He was also notified that his failure to receive credit for the course meant that he would not be graduating that June.

As mentioned earlier, Steven and his mother filed a petition for emergent relief, and following oral argument on June 15, 2009, an order was issued directing the Board to allow him to participate in the high school's graduation exercises. The matter was also set down for a hearing on the issue of whether Steven had actually earned a passing grade in eleventh grade English. At the conclusion of the proceedings, the Board advised Steven that he would be entitled to a diploma if he took and passed eleventh grade English in summer school. Since the hearing was some two months away, and it appeared as though he and his mother were going to proceed without

[4] Again, because there is no evidence of Steven's present age, Diane Hogan has been permitted to assist Steven with the prosecution of this case. Had such evidence been presented and established that Steven was eighteen years old or older, the caption of the case would have been changed and Ms. Hogan would not have been permitted to assist or submit responding papers on behalf of her son.

[5] The record does not disclose whether Steven failed the course or could not complete it because of attendance issues.

counsel, making their task that much more difficult, I encouraged Steven to take eleventh grade English in summer school.

By letter dated August 5, 2009, Joseph A. Catelluci, principal of the Lower Cape May Regional High School, notified Diane Hogan that the English 1203, British Literature I, course that Steven was reportedly going to be taking at Atlantic County Community College that fall would fulfill his eleventh grade English requirement for a high school diploma. He also advised her that he would issue Steven's diploma upon his receipt of a transcript demonstrating that Steven had successfully completed the course. Castelucci Letter, Exhibit P-A.[6]

Steven enrolled at the college but was unable to take English 1203 because it reportedly "interfered with his work and he would have lost his job. [He] also lost his grant money from the college and was removed from this course due to not having his High School Diploma." See Diane Hogan's responsive papers. However, in September 2009, Steven did submit an application to attend the Cape May County Technical School District's Adult High School. Elston Memo, Exhibit P-D. During a meeting with Laura Elston, the District's supervisor of adult and post-secondary education, Steven signed a copy of his "Working Transcript," which indicated the Lower Cape May Regional High School courses for which he would be receiving credit. He also received a class schedule for the two courses he had to take in order to receive a diploma through the Adult High School. Ibid.

At that time, Steven questioned why he needed to take two courses—not just English 11. Ms. Elston advised him that it was the school district's policy, and taking both courses was the only way for him to receive an Adult High School diploma. She also told him that he was still free to complete his required courses—English 11 and physical education—at the Lower Cape May Regional High School. However, after discussing his options, Steven told her "he would rather just stay in Adult High School to complete the coursework." Ibid.

[6] All exhibits were pre-marked, so I am using the parties' letter designations.

On April 11, 2010, Steven signed a graduation information record indicating how he wanted his name to appear on the Adult High School diploma and in the graduation program. He also completed the cap and gown reservation form. Ibid.

The verification dates for having taken and passed English 11 and Family Living were June 3 and June 14, 2010, respectively. Thereafter, Steven was contacted several times concerning the high school's graduation meeting and processional rehearsal date. However, he did not show up for rehearsal and later advised Ms. Elston that he "probably would not be able to make graduation as he would be away." Ibid. Steven did not attend graduation.

Sometime in September 2010, Diane Hogan went to the Adult High School and picked up Steven's diploma and copies of the Verification of Course Completion forms. In early November 2010, Jack Pfizenmayer, Superintendent of the Lower Cape May Regional School District, called Robert W. Matthies, his counterpart at the Cape May County Technical School District, to find out if Steven had, in fact, taken and passed his courses at the Adult High School. Pfizenmayer Affidavit, Exhibit R-1. In a letter dated November 2, 2010, Exhibit R-1A Mr. Matthies enclosed a copy of Laura Elston's memo of same date, Exhibit R-1B. Mr. Matthies subsequently sent Mr. Pfizenmayer a copy of Steven's diploma from the Cape May County Technical High School. Exhibit R-1C.

The facts material to the motion for summary decision, culled not only from the Pfizenmayer Affidavit, but also Diane Hogan's response and supporting exhibits, are not in dispute. Therefore, in accordance with 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 appropriate for summary decision.

Ordinarily, an issue is moot when a decision that is being sought in a particular matter will, when rendered, have no practical effect on the existing controversy. In re Conroy, 109 N.J. Super. 453, 458 (App. Div. 1983). In such cases, the issues that have become moot or academic prior to judicial scrutiny" are generally considered to be . . . improper subject[s] for judicial review." Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch.

Div. 1976). Therefore, when there has been a change in circumstances that raises doubt concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot, regardless of the stage to which the litigation has progressed. Ibid.

In the present matter, Steven Tomlin has completed and passed all of his courses at the Cape May County Technical School District's Adult High School and otherwise satisfied the requirements for graduation and receipt of a diploma set forth in N.J.A.C. 6A:8-5.1 and N.J.A.C. 6A:8-5.2(a) and (b)1. Moreover, as set forth in the Elston memorandum appended to the Pfizenmeyer Affidavit and Diane Hogan's responsive papers, Ms. Elston advised Steven that he had the option of returning to Lower Cape May County High School, taking eleventh grade English and a physical education course, and receiving his diploma from that school. However, Steven "said he would rather just stay in Adult High School to complete the coursework." Elston Memo, supra. In fact, he submitted and signed a graduation information record on April 15, 2010, indicating how he wanted his name to appear on his diploma and in the graduation program, and completed a cap and gown reservation form.

Notably, Steven has not submitted an affidavit or any responding papers in his own behalf. Still, based on the record before me, I find that he consciously chose to complete his required high school courses and receive his diploma from Cape May County Technical High School. Ms. Hogan's assertion that her "son wants his diploma to read the high school that he attended with his friends, the school that he participated at in sports," is not supported in, and is clearly contradicted by, the evidence. In any event, the seminal fact in this matter is that Steven has graduated and received a high school diploma.

Based upon the foregoing, I conclude that any decision I might render will have no practical effect on the existing controversy and the matter should be dismissed as moot. 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 (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, 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.

April 8, 2011

DATE

ISRAEL D. DUBIN, ALJ

Date Received at Agency: 4-8-11

Date Mailed to Parties: APR 12 2011

IDD/lam

EXHIBITS

For petitioners:

P-A Kobik Letter to Elston, dated January 28, 2010

P-B Castellucci Letter to Hogan, dated August 5, 2009

P-C Melletz Letter to Cape May County Technical School district, dated March 9, 2010

P-D Elston Memo, dated November 2, 2010

P-E Tourison Letter to Melletz, dated September 9, 2010

P-F Melletz Letter to Hogan, dated November 8, 2010

P-G Tourison Letter to Melletz, dated October 30, 2010

P-H Tomlin HSPA Scores, dated March 2008

For respondent:

R-1 Pfizenmayer Affidavit, dated December 10, 2010

A) Matthies Letter to Pfizenmayer, dated November 2, 2010

B) Elston Memo, dated November 2, 2010

C) Tomlin Diploma, dated June 2, 2010

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#198-11

OAL DKT. NO. EDU 11162-10
AGENCY DKT. NO. 549-9/10

WENDY COMINSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
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.

Upon such review, the Commissioner approves the provisions of the Agreement and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the settlement.

IT IS SO ORDERED.

DEPUTY COMMISSIONER OF EDUCATION[1]

Date of Decision: 5/26/11

Date of Mailing: 5/27/11

[1] This matter has been delegated to the Deputy Commissioner pursuant to *N.J.S.A.* 18A:4-33.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11162-2010
AGENCY DKT. NO. 549-9/10

WENDY COMINSKY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Timothy R. Smith, Esq. for petitioner (Caruso, Pope, Smith Edell, Picini, attorneys)

Karen A. Murray, Esq. for respondent Elizabeth Board of Education

Record Closed: April 7, 2011 Decided: April 11, 2011

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

This matter was transmitted to the Office of Administrative Law on October 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 on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 18, 2010, and has authorized its president to execute the agreement on its behalf.

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.

April 11, 2011
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: April 11, 2011

Date Mailed to Parties: APR 13 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

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

WENDY COMINSKY, Petitioner, v. BOARD OF EDUCATIONOF THE CITY OF ELIZABETH, UNION COUNTY, Respondent.	STATE OF NEW JERSEY COMMISSIONER OF EDUCATION Agency Docket No.: 549-9/10

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 POPE SMITH EDELL PICINI, 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 Wendy Cominsky ("Cominsky"). 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 January 12, 2007, Cominsky was employed as a Librarian by the Board; and

WHEREAS, on that date, a Citizen Complaint was issued for certain acts alleged to have occurred while Cominsky was in the employ of the Board. A copy of the Elizabeth Complaint No. 2007-001349-2004 is attached hereto, (Exhibit 1); and

WHEREAS, on October 29, 2008, the Elizabeth Municipal Court dismissed the above-referenced Complaint against Cominsky. A copy of the disposition reflecting said dismissal is attached hereto, (Exhibit 2).

WHEREAS, pursuant to N.J.S.A. 18A:16-6.1, Cominsky's defense counsel sought reimbursement from the Board's for attorney's fees and costs associated with her legal defense relative to the Elizabeth Complaint No. 2007-001349-2004; 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 Nine Thousand Nine Hundred Thirty Dollars and Ninety Eight Cents ($9,930.98). The aforementioned amount represents full and complete indemnification of the attorney's fees and costs incurred by Cominsky in relation to Elizabeth Complaint No. 2007-001349-2004. A check for this amount shall be drawn to CARUSO POPE SMITH EDELL PICINI, 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, Cominsky 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, 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 Cominsky 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. 2007-001349-2004.

3. For and in consideration of the Indemnification set forth in Paragraph One (1) above, Cominsky shall withdraw her petition of Appeal, Agency Dkt. No. 549-9/10, OAL Dkt. No. EDU 11162-2010N.

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. Cominsky 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.

WENDY COMINSKY

Wendy Cominsky

Dated: 12/17/10

ELIZABETH BOARD OF EDUCATION

Harold E. Kennedy, Jr.
Board Secretary/School Business Administrator

Dated:

CARUSO POPE SMITH EDELL PICINI

Timothy R. Smith, Esq.
Attorney for Wendy Cominsky

Dated: 12/23/10

Karen A. Murray, Esq.
Labor Counsel for
the Elizabeth Board of Education

Dated:

EXHIBIT 1

CASE NO. 07 156

The State of New Jersey

10 2007 001 49 2001
PAGE 1 OF 1

vs.

WENDY COMINSKY

Defendant Name

436 FIRST AVENUE

Address

ELIZABETH NJ 07202

City, State

SS No.

00-00-0000 00-00-0000

Date of birth Date of arrest

Dr. Lic.#

SBI No.

COMPLAINT - SUMMONS

of

(IDENTIFY DEPARTMENT OR AGENCY REPRESENTED)

Upon oath says that, to the best of (his) (her) knowledge, information and belief, the named defendant, on or about the

2 day of 01 20 07 in ELIZABETH CITY MUNICIPAL CODE NO. 2004 County of UNN N.J.

IN THE JURISDICTION OF THIS COURT DID CAUSE BODILY INJURY TO JAJADA H AND WAS 14 BY CHOKING HER WHILE BEING IN SCHOOL

VIOLATION OF NJS 2C:12-1A

CHARGE CAUSE OF (UP NO) FOUND FOR THE ISSUANCE OF THIS COMPLAIN

Domestic Violence - Confidential

Charge Number			Charge Number			Charge Number		
2C:12-1A		ACSX	N.J.S.		ACSX	N.J.S.		ACSX
Charge Number	As Amended	ACSX	Charge Number	As Amended	ACSX	Charge Number	As Amended	ACSX
			N.J.S.			N.J.S.		

Subscribed and sworn to before me this 23 day of JAN 20 07

Signed

(NAME AND TITLE OF PERSON ADMINISTERING OATH) (COMPLAINANT)

YOU ARE HEREBY SUMMONED TO APPEAR BEFORE THIS COURT TO ANSWER THIS COMPLAINT. IF YOU FAIL TO APPEAR ON THE DATE AND AT THE TIME STATED, A WARRANT WILL BE ISSUED FOR YOUR ARREST.

DATE SUMMONS ISSUED 01/23/2007 DATE TO APPEAR 02/06/2007 TIME 06:00 PM

SIGNATURE OF PERSON ISSUING SUMMONS TITLE

IF YOU INTEND TO PLEAD NOT GUILTY, YOU MUST NOTIFY THE COURT AT LEAST SEVEN DAYS IN ADVANCE OF YOUR SCHEDULED COURT APPEARANCE DATE.)

EXHIBIT 2

MUNICIPAL COURT

OF THE CITY OF ELIZABETH

COMPLAINT / SUMMONS NO. S 2007 001349

DOCKET NO.

NAME OF DEFENDANT Wendy Cominsky

ADDRESS 436 First Ave. Elizabeth, NJ 07202

OFFENSE 2C:12-1A

DATE OF OFFENSE 1-12-07

DATE OF PROCESS

DATE PROCESS SERVED 1-23-07

[illegible] Bryant

ADDRESS 231 Fulton St Elizabeth, NJ 07206

HOW DEFENDANT PLEADS AND DATE Not Guilty 2/6/07

BAIL

NAME AND ADDRESS OF BONDSMAN

ATTORNEY'S APPEARANCE Timothy R Smith + Assoc LLC

REMARKS AND MISCELLANEOUS ENTRIES

TRIAL AND HEARING DATE 10/29/08

HOW DISPOSED AND SENTENCE Dismissed lack of Prosecution

I, Margaret Gonzalez, Administrator, Municipal Court of the City of Elizabeth, NJ certify the above to be a true copy entered in records of the Municipal Court of the City of Elizabeth, NJ

Margaret Gonzalez

MARGARET GONZALEZ, C.M.C.A.

1/30/09

DATE

DISPO CERTIFICATION.doc

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10c

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Wendy Cominsky have discussed a resolution of an Office of Administrative Law matter (OAL Docket No. EDU 11162-2010N; Agency Reference No. 549-9/10); 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 with the Board Secretary, provided that it is fully signed by all parties.

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 18, 2010

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

199-11

PAM WILSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured special education teacher, challenged a performance evaluation which gave her a rating of "marginal" under the category of "Professional Characteristics." Petitioner sought a finding that the respondent Board's action was arbitrary, capricious or unreasonable, and modification of the evaluation to reflect a rating of "effective" rather than "marginal." The Board contended that it is within its authority and responsibility to evaluate teachers and indicate areas of teaching performance that may need improvement, and petitioner's excessive absences during the 2008-2009 school year needed to be addressed in order to appropriately serve the needs of special education students.

The ALJ found, *inter alia,* that: a teacher's performance evaluation by a principal or supervisor must be distinguished from a disciplinary proceeding based on conduct or attendance problems; petitioner's contention that an attendance policy that allows for discipline of a teacher – without regard to the basis for the absences – is not permissible is ill-founded, as it was not contended in this case that discipline is warranted; intermittent absences which cumulatively exceed sick-leave and personal-day allotments are not of benefit to special education students, and cannot be disregarded in teacher evaluations; and receiving a rating of "marginal" as opposed to "effective" when a teacher exceeds the number of sick and personal days allotted is a subjective judgment that cannot be characterized as arbitrary, capricious, or unreasonable. Accordingly, the ALJ determined that attendance is a factor to be considered in a performance evaluation and dismissed the petition.

Upon careful and independent review, the Deputy Commissioner – to whom this matter has been delegated to the pursuant to *N.J.S.A.* 18A:4-33 – 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.

May 27, 2011

OAL DKT. NO. EDU 11569-09
AGENCY DKT. NO. 181-8/09

PAM WILSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	DECISION
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's reply thereto.[1]

The petitioner's exceptions substantially reiterate the substance of her post-hearing submission at the OAL, recasting the arguments therein to support the contention that the Administrative Law Judge (ALJ) erroneously found that the Board's decision to give the petitioner a marginal rating was not arbitrary, capricious and unreasonable. The petitioner contends that the Board's application of its attendance policy was arbitrary and capricious because the Board failed to take into account the reasons for the petitioner's absences and the impact of the absences on the continuity of education.

In reply, the Board urges the adoption of the Initial Decision asserting that the petitioner's exceptions do not raise any new arguments but instead merely restated the arguments made by the petitioner below that were fully considered by the ALJ. The Board again stresses in

[1] The record contains no transcript from the hearing conducted at the OAL on September 24, 2010.

reply that the issuance of a marginal rating on the petitioner's evaluation was not arbitrary, capricious or unreasonable.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ that the Board's decision to give the petitioner a marginal rating in the professional characteristics section of her evaluation was not arbitrary, capricious or unreasonable. Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

DEPUTY COMMISSIONER OF EDUCATION[3]

Date of Decision: 5/27/11

Date of Mailing: 5/27/11

[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.

[3] This matter has been delegated to the Deputy Commissioner pursuant to *N.J.S.A.* 18A:4-33.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11569-09
AGENCY DKT. NO. 181-8/09

PAM WILSON,

Petitioner,

v.

BOARD OF EDUCATION, OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,

Respondent.

Colin M. Lynch, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

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

Record Closed: October 21, 2010 Decided: April 11, 2011

BEFORE **JEFFREY A. GERSON**, ALJ:

BACKGROUND

Pam Wilson, a tenured special education teacher, challenges a performance evaluation which under the category of "Professional Characteristics" gave her a rating of "marginal."

The Mount Olive Board of Education (Board) contends that it is within their authority and responsibility to evaluate teaching staff members and depict areas of teachers' performance that may need improvement.

PROCEDURAL HISTORY

On or about July 23, 2009, Pam Wilson filed a petition of appeal with the Commissioner of Education contending that the district administration wrongly assigned her a rating of "marginal" in the "Professional Characteristics" section of her 2008/2009 Annual Evaluation Report. Relief sought by Wilson was a finding that the Board's action was "arbitrary, capricious or unreasonable" and asked that the evaluation be modified to reflect a rating of "effective" rather than "marginal." The Board filed an answer on September 22, 2009, and the matter was forwarded to the Office of Administrative Law. An initial scheduling date of May 5, 2010, was adjourned by the assigned Administrative Law Judge and the matter was subsequently reassigned to me and was heard on September 24, 2010.

FINDINGS OF FACT

The **FACTS** in this matter are not in dispute.

During the 2008/2009 school year, Wilson was absent for 18.5 days. She used up her annual allotment of 10 sick days in addition to 4 personal days and was not paid for the additional 4.5 days of her absences.

The Board does not contest the fact that the reason for Wilson's absences were either for personal days utilized by her to care for her son after her mother, who was the child's care provider, became ill, or days when either she or her son were ill. Thus, it was not the legitimacy of these dates of absences that were questioned, but rather the number of absences alone.

Mount Olive Middle School Principal Tracy Severns testified that it was her responsibility to prepare Wilson's evaluations, which are based, for the most part, on observations by supervisors and/or principals and conferences resulting from those observations. Principal Severns testified that the question of Wilson's attendance problems first arose in January 2009 at which time she discussed with Wilson her need to improve her attendance. In May 2009, an evaluation report prepared by Principal Severns gave Wilson a rating of "effective" in three of four categories which included planning, instruction, and classroom management. In the fourth category however, that being professional characteristics, Principal Severns noted the following:

> Ms. Wilson's attendance is a significant area of concern. During the 2008/2009 school year, she was absent a total of 18 days. In order to fulfill her contractual obligations and to provide students with the level of instructional continuity that they require, Ms. Wilson must immediately address her absences."

Principal Severns did not recommend any form of discipline for Wilson. Tenure charges were not filed, no suggestion of withholding an increment was made, nor was there a letter of reprimand issued. No disciplinary action whatsoever was taken against Wilson with regard to her attendance record.

Although Principal Severns was aware of the medical and health issues confronting Wilson and her family, she still indicated that regardless of the reasons for the absences, Wilson's attendance still needed to be addressed—for she considered it an important component of the needs of a special education child.

DISCUSSION

A Performance Evaluation by a principal/supervisor of a teacher must be differentiated from a disciplinary proceeding based on either conduct or attendance problems.

The attendance policy of the Board is introduced by way of preamble in two paragraphs which state as follows:

> The regular and prompt attendance of teaching staff members is an essential element in the efficient operation of the school district and the effective conduct of the education program. Because absenteeism exacts a high cost in the depletion of district resources and in the disruption of the educational program, the Board of Education is vitally interested in the attendance of each employee and considers conscientious attendance an important criterion of satisfactory job performance.
>
> The privilege of district employment imposes on each teaching staff member the responsibility to be on the job on time every scheduled working day. This responsibility requires that the employee maintain good health standards, take intelligent precautions against accidents, both on and off the job, and manage his or her personal affairs to avoid conflict with district responsibilities.

Paragraph 3 of the policy addresses failures by teachers such as misuse of sick leave or excessive number of absences without good cause. It is not contended in this matter that discipline was warranted, for if that had been the case the issue of good cause would have become relevant. But it was not discipline that was the target of Principal Severns's performance evaluation of Wilson. Wilson contends that an attendance policy which allows for discipline of a teacher without regard to the basis of absences is prohibited. See Kuehn v. Bd. of Educ. of the Town of Teaneck, 1981 S.L.D. 1290, rev'd, Comm'r 1981 S.L.D. 1299, rev'd, State Bd. of Educ. (Feb. 1, 1983). Also cited by Wilson is Montville Township Education Association v. Board of Education, 1984 S.L.D. 550, reversed, State Board of Education, 1984 S.L.D. 559, reversed, Sup. Ct. App. Div., 1985 S.L.D. 1972, certification denied, 103 N.J. 500 (1986), decision on remand, State Board of Education, 1986 S.L.D. 3113. In Montville, the policy ignored " . . . legitimate extended illness or home confinement at home . . . ." In this matter, it is not extended illness or confinement that is in question, but rather intermittent absences of short-term nature. In fact, in the Commissioner of Education's decision, it was said:

> This Order, however, is not to be construed in any manner to prohibit the Board from ever determining an unsatisfactory rating when medically excused absences are provided. Notwithstanding Kuehn, supra, high absenteeism has been

> deemed sufficient grounds for disciplinary action even with the existence of legitimate medical excuse. Trautwein v. Bound Brook Bd. of Educ., 1978 S.L.D. 445, aff'd with modification, State Bd. of Educ., 1979 S.L.D. 876, rev'd, Sup. Ct. App. Div., 1980 S.L.D. 1539, certif. denied, 84 N.J. 469 (1980); Kulick v. Bd. of Educ. of the Town of Montclair, 1983 S.L.D. 1059; Angelucci v. Bd. of Educ. of the Town of West Orange, 1980 S.L.D. 1066, aff'd, State Bd. of Educ. 1980 S.L.D. 1077.

Intermittent absences which cumulatively exceed sick-leave and personal-day allotments cannot be said to be a benefit to regular education students and certainly not for special education students. Short-term emergency absences, even based on medical excuses, provide additional burden to the school to seek substitutes and/or provide coverage for classes that the absent teacher cannot attend. But, these factors are more pertinent in a disciplinary matter than they are in an evaluatory manner. Attendance cannot simply be disregarded in a teacher evaluation. It is a function of professional characteristics: to receive a rating of "marginal" as opposed to "effective" when a teacher exceeds the sick days and personal days that are allotted is a subjective judgment that cannot be characterized as arbitrary, capricious or unreasonable.

CONCLUSION

Principal Severns's professional evaluation of Pam Wilson resulting in a "marginal" rating in the professional characteristics was not arbitrary, capricious or unreasonable. I **CONCLUDE** that attendance is a factor to be considered in a performance evaluation.

ORDER

I therefore **ORDER** Pam Wilson's petition to reform her rating of "marginal" to "effective" is **DENIED** and 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 (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, 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.

April 11, 2011

DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency:

4/11/11

Date Mailed to Parties: APR 12 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/sej

APPENDIX

WITNESSES

For Petitioner:

Pam Wilson

For Respondent:

Tracey Severns, Principal

EXHIBITS

For Petitioner:

A-1	2008-2009 Summative Evaluation	
A-2	2008-2009 Attendance History	
A-3		(ID only)
A-4		(ID only)
A-5		(ID only)
A-6		(ID only)
A-8		(ID only)
A-9	District Attendance Policy	
A-11	Districts Answers to Interrogatories	

For Respondent:

R-1 Mount Olive Board of Education Summative Evaluation for Pam Wilson, 2008-2009 school year, dated May, 2009

R-2 Mount Olive Board of Education, Employee "Calendar 03" Attendance Calendar for Pam Wilson, 2008-2009 School Year

R-3 Mount Olive Board of Education Collective Negotiations Agreement between the Mount Olive Board of Education and the Education Association of Mount Olive, July 1, 2008–June 30, 2011.

R-4 Mount Olive Board of Education Policy #3222 Evaluation of Tenure Teaching Staff Members (Evid.)

R-5 Mount Olive Board of Education Policy #3212, Attendance (Evid.)

R-6 Mount Olive Township School District Professional Evaluation Matrix

201-11

201-11

OAL DKT. NO. EDU 4776-10
AGENCY DKT. NO. 108-5/10

HEATHER MEEHAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER 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 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5|31|11

Date of Mailing: 6|02|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4776-10

AGENCY DKT. NO. 108-5/10

HEATHER MEEHAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO, GLOUCESTER COUNTY,

Respondent.

Keith Waldman, Esq., for petitioner (Selikoff and Cohen, attorneys)

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

Record Closed: March 31, 2011 Decided: April 12, 2011

BEFORE **LISA JAMES-BEAVERS,** ALJ:

STATEMENT OF THE CASE and PROCEDURAL HISTORY

Petitioner Heather Meehan alleged that, as a tenured teacher with seniority rights, she was entitled to a position with the respondent Glassboro School District (Glassboro) after a reduction in force. The Board denied that petitioner had obtained tenure and was entitled to a position. During a prehearing conference, a hearing was scheduled for December 9 and 13, 2010. However, because other Glassboro

employees whose positions in Glassboro may be affected by the case had the right to intervene and had not yet been notified, those dates were adjourned. The hearing was rescheduled for April 1 and 11, 2011. Prior to the hearing, counsel advised me that they had settled the case. I received the settlement agreement and Board resolution on March 30, 2011.

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.

April 12, 2011
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: APR 14 2011

Date Mailed to Parties: APR 14 2011

cmo

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is being entered into between Petitioner, Heather M.. Adams f/k/a Heather M.. Meehan ("Ms. Adams"), and Respondent, Glassboro Board of Education ("Board"), with regard to *Heather M.. Meehan v. Glassboro Board of Education*, OAL Dkt. No. EDU-4776-2010S, Agency Ref. No. 108-5/10, having agreed to amicably resolve their differences, it is hereby stipulated and agreed that this matter shall be settled upon the following terms:

1. The Board voluntarily recognizes Ms. Adams as a tenured elementary school teacher, with 3.01 years seniority as to instruction within her instructional certificate and her elementary school teacher and reading specialist endorsements.

2. The Board will place Ms. Adams on the recall list for next available permanent position within the scope of her certificate and endorsements. Ms. Adams recognizes that in the event of future reductions in force, as of the date of this Agreement her seniority is set at 3.01 years and there may be more senior teaching staff with greater seniority.

3. The consideration described in Paragraphs 1 and 2 above shall constitute the entire monetary settlement of the matters encompassed by this Agreement.

4. In exchange for the promises and undertakings of the Respondent Glassboro Board of Education, as set forth in Paragraphs 1 and 2 above, Petitioner:

A. Waives the right to bump any of the four putative intervenors, Lisa Rencher, Sheree Butari, Diane Villone and Jennifer Howells.

B. Waives the right to back pay.

C. Agrees to withdraw her petition of appeal with prejudice and without costs as to either party and authorizes attorney to file a Stipulation of Dismissal with

2011 APR -4 A 11:00

Prejudice with respect to her claims and causes of action with the Commissioner of Education in this action.

D. Agrees to execute a General Release and Waiver ("General Release") to the Respondent in the form annexed. Petitioner expressly acknowledges that this Agreement and the General Release and Waiver are intended to extinguish and waive all claims which she may have against any person or entity identified as a releasee in the General Release and Waiver resulting from anything which has happened up to the date of the execution of the General Release and Waiver and which were or could have been asserted, including those claims unknown to her and claims for attorneys fees and costs. Petitioner hereby acknowledges that the execution of this Agreement and the General Release and Waiver which accompanies it shall absolutely bar any such claim, action or suit against any releasee identified in the General Release and Waiver. This release specifically excludes any workers compensation or pension claims. Ms. Adams is unaware of any factual basis for such claims.

5. All documents and information obtained during discovery in this case shall be deemed "confidential." The parties agree that no such documents or information shall be provided or disclosed to or shared with any third party for any purpose whatsoever. This provision shall not apply to third parties and to documents previously filed with the Office of Administrative Law or the Commissioner of Education, but this shall not permit Petitioner to provide copies of such documents to third parties. Petitioner further agrees that she will not use or permit to be used in any other action or matter any information about the Respondents in this action which she obtained as a result of, during the course of or in connection with her

involvement in this action. Petitioner shall not voluntarily assist third parties in pursuit of litigation against Respondent.

6. The parties agree that any breach of any obligation under this Agreement will constitute a breach of this Agreement. In the event of a breach of this Agreement by one of the parties hereto, the breaching party shall pay a penalty to the non-breaching party to be established in the discretion of the Superior Court of New Jersey, Gloucester County, for said breach of any term of this Agreement. In the event that either party is required to commence an action in law or equity to enforce its rights under this Agreement and prevails, the party against whom the action is brought shall be required to pay the prevailing party reasonable attorneys fees and costs in addition to any damages which may be recoverable.

7. It is understood that neither the execution of this Agreement nor any other action taken by the Respondent in connection with this settlement constitutes an admission by the Respondent or, any other person or entity identified in the General Release and Waiver as a releasee, of any violation of any law, duty or obligation, or that any decision or action with respect to the employment of Petitioner was unwarranted, unjustified, retaliatory, discriminatory or otherwise unlawful. The Respondent specifically disclaims any liability to Petitioner or any other person. The parties have entered into this Agreement solely to compromise disputed claims. No findings of any kind have been made or issued by the Commissioner on the merits of the claims in this action and neither party purports to be the prevailing party in this action.

8. The parties to the within petition of appeal agree not to make disparaging statements concerning each other or to defame each other in any manner to any person or entity. The parties also agree not to authorize any person or entity to make any disparaging statements about each other to any person or entity.

9. All parties to this Agreement and their counsel participated in the negotiation and drafting of this Agreement as equals. No particular party shall be deemed the drafter or provider of this Agreement, and the parties agree that the Agreement shall not be construed against any particular party.

10. This Agreement and the General Release and Waiver referred to herein set forth the entire agreement between Petitioner and the Respondents. This Agreement supersedes all prior agreements or understandings, if any, between the parties regarding the subject matter of this Agreement.

11. Petitioner acknowledges that she has consulted with her attorney regarding this Agreement and the General Release and Waiver that accompanies it prior to executing it; that the terms of this Agreement and the General Release and Waiver have been explained to her by her attorney; and that she has represented to her attorney that she has read this Agreement and the General Release and Waiver and fully understands them and agrees to be bound by them. Petitioner has also acknowledged that she has been given a reasonable period of time within which to consider this settlement and the terms of this Agreement and General Release and Waiver prior to executing them.

12. Any notice or other communication under this Agreement shall be in writing and shall be considered given when mailed by regular mail or delivered personally, to the parties at the following addresses:

To Petitioner:

Keith Waldman, Esq.
Sclikoff & Cohen
700 East Gate Drive
Mount Laurel, New Jersey 08054

To Respondents:

Frank P. Cavallo, Esquire
Parker McCay PA
P.O. Box 974, 3 Greentree Center
7001 Lincoln Drive West
Marlton, New Jersey 08053

or at such other address as a party may specify by notice to the other.

13. Nothing contained herein or in the Release shall be intended to bar either party from initiating such action as may be necessary to enforce the terms of this Agreement.

14. Conditioned upon the entry of an initial decision by the Administrative Law Judge and the Commissioner's approval of this Agreement without modification, the parties will submit a stipulation of dismissal with prejudice and without costs.

15. The Board's representative certifies that he or she has been duly authorized to sign this agreement by a motion adopted by the Board at a duly-noticed open public meeting. A true copy of the Board's minutes (or of a resolution) adopting the settlement memorialized by this Agreement are (is) attached as Exhibit A.

16. The parties agree that this Agreement may be signed in counterparts and facsimile signatures may be acceptable in lieu of originals.

The foregoing terms and provisions are hereby agreed to and accepted:

Heather M. Adams f/k/a Meehan

Dated: 3/29/11

Heather M.. Adams f/k/a Meehan

BOARD OF EDUCATION OF BOROUGH OF GLASSBORO

By:_____

Dated:

Print Name and Title:_____

13. Nothing contained herein or in the Release shall be intended to bar either party from initiating such action as may be necessary to enforce the terms of this Agreement.

14. Conditioned upon the entry of an initial decision by the Administrative Law Judge and the Commissioner's approval of this Agreement without modification, the parties will submit a stipulation of dismissal with prejudice and without costs.

15. The Board's representative certifies that he or she has been duly authorized to sign this agreement by a motion adopted by the Board at a duly-noticed open public meeting. A true copy of the Board's minutes (or of a resolution) adopting the settlement memorialized by this Agreement are (is) attached as Exhibit A.

16. The parties agree that this Agreement may be signed in counterparts and facsimile signatures may be acceptable in lieu of originals.

The foregoing terms and provisions are hereby agreed to and accepted:

Dated: _____

Heather M.. Adams f/k/a Mechan

BOARD OF EDUCATION OF BOROUGH OF GLASSBORO

Dated: 3/30/11

By: _____

Print Name and Title: Peter J. Calvo, Board President

WHEREAS, a Settlement Agreement was entered into and is attached as Exhibit "A"

NOW, THEREFORE, be it RESOLVED by the Borough of Glassboro Board of Education on this 30th Day of March, 2011, as follows:

1. The Settlement of Agreement between the Borough of Glassboro Board of Education and Heather Meehan is hereby approved.

Adopted by the Glassboro Board of Education
on March 30, 2011

Walter S. Pudelko, III,
Board Secretary

RESOLUTION OF THE BOROUGH OF GLASSBORO BOARD OF EDUCATION APPROVING THE SETTLEMENT AGREEMENT BETWEEN THE BOROUGH OF GLASSBORO BOARD OF EDUCATION AND HEATHER MEEHAN

WHEREAS, a Petition of Appeal was filed by the Petitioner, Heather Meehan (hereinafter "Petitioner"), with the State of New Jersey School Commissioner of Education in which she alleged entitlement to a position in the Glassboro School District (hereinafter "Glassboro) based upon her Tenure and Seniority rights; and

WHEREAS, the Borough of Glassboro Board of Education (hereinafter "Board of Education") filed an Answer responding to Petitioner's claims; and

WHEREAS, the matter was transmitted to the Office of Administrative Law for Hearing and is presently scheduled to commence on April 1, 2011; and

WHEREAS the Petitioner and Board of Education, through their respective Counsel engaged in settlement discussions since the Petition of Appeal was filed; and

WHEREAS, both the Petitioner and Board of Education acknowledge that the merits of the controversy are in dispute and have not been adjudicated, and that neither admits any liability to any other, but all have reasons to desire amicable resolution of the matter, including to avoid further cost of litigation; and

2011 APR -4 A 11:00

202-11

FRANCO COZZOLINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner's position as a tenured teacher of health and physical education was eliminated in a reduction in force (RIF) in May 2010, and petitioner was consequently not employed for the 2010-2011 school year. Petitioner holds an instructional certificate with an endorsement for Teacher of Health and Physical Education, was continuously employed by the respondent Board from September 2004 through the end of the 2009-2010 school year, and his entire tenured service was at the elementary school level. Petitioner contended that less senior teachers were retained by the Board in violation of his tenure and seniority rights. The Board argued that the staff members retained by the district were in separate seniority categories and therefore petitioner suffered no violation of his tenure and seniority rights.

The ALJ found, *inter alia*, that: a tenured teacher who was subjected to a RIF has seniority rights over a non-tenured applicant only for positions that fall under the same certificate to which the teacher has earned tenure; seniority accrues in the subject areas in which a person actually works, and in the category – elementary or secondary – in which the person is employed; at issue in this case is whether petitioner could claim tenure and seniority rights over a retained teacher who taught in a departmentalized grade 6 school; there is no provision in the seniority regulations for departmentalized grade 6, and therefore previous case law must provide guidance in this area; based on previous cases, a departmentalized grade 6 school falls into the secondary category; petitioner in the instant matter had six years of seniority in elementary health and physical education; petitioner was the least senior health and physical education teacher in the elementary category, and was not entitled to a position outside the scope of his tenure and seniority rights. Accordingly, the ALJ determined that petitioner's tenure rights were not violated, and denied petitioner's appeal.

Upon a thorough and independent review of the record, 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 9311-10
AGENCY DKT. NO. 172-7/10

FRANCO COZZOLINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
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.

The petitioner's exceptions substantially reiterate the substance of his post-hearing submission at the OAL, recasting the arguments therein to support the contention that the Administrative Law Judge (ALJ) erroneously found that the Board did not violate the petitioner's seniority rights. In his exceptions, the petitioner maintains that his seniority in the elementary category entitled him to a physical education teaching position at the Edison school once his position at the elementary school was eliminated as a result of a reduction in force. The petitioner argues that the Edison school, which is a stand-alone Grade 6 school with departmentalized instruction, should be within the elementary category for seniority purposes because the regulations make no reference to Grade 6 in the secondary category. The petitioner also contends that the cases that expand the definition of secondary to cover a departmentalized Grade 6 involved combined Grade 6 and 7 settings or 6, 7 and 8 organizations.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the Administrative Law Judge that the teaching positions at the Edison school were within the secondary category for seniority purposes. The Commissioner is also in accord with the ALJ's determination that the petitioner was not entitled to the physical education teaching position at the Edison school because it was outside the scope of his tenure and seniority rights. Accordingly, for the reasons expressed therein, the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5|31|11

Date of Mailing: 6|02|11

* 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 09311-10
AGENCY DKT. NO. 172-7/10

FRANCO COZZOLINO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

Gregory T. Syrek, Esq., for petitioner (Bucceri and Pincus, attorneys)

Stephen J. Christiano, Esq., for respondent

Record Closed: February 28, 2011 Decided: April 15, 2011

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Franco Cozzolino was formerly employed by respondent West Orange Board of Education as a teacher of health and physical education from September

2004 through June 2010. Petitioner holds an instructional certificate with an endorsement for Teacher of Health and Physical Education and was tenured in this position. On or about May 4, 2010, respondent abolished a teaching position in its health and physical education program. As a result of this reduction in force (RIF), petitioner was terminated and not reappointed for the 2010-2011 school year.

The petitioner's entire service was at the elementary-school level and thus has six years' seniority as a health and physical education teacher at the time of the RIF. There are eight other health and physical education teachers having less or equal seniority to that of the petitioner: two of those teachers worked at West Orange High School; three worked at Roosevelt Middle School (grades 7 and 8); two worked at Liberty Middle School (grades 7 and 8); and one worked at Edison Middle School (grade 6). There was one elementary teacher on the list, Ryan Patscher, who was hired after the petitioner, but has more seniority than petitioner by reason of his years of military service.

FACTS

The parties stipulated to the following facts:

1. Petitioner, Franco Cozzolino (petitioner), was initially employed on a full-time basis by the respondent, West Orange Board of Education (respondent) effective September 1, 2004.

2. Petitioner was reemployed by the respondent on a full-time basis for the 2005-2006 school year.

3. Petitioner was reemployed by the respondent on a full-time basis for the 2006-2007 school year.

4. Petitioner was reemployed by the respondent on a full-time basis for the 2007-2008 school year.

5. Petitioner was reemployed by the respondent on a full-time basis for the 2008-2009 school year.

6. Petitioner was reemployed by the respondent on a full-time basis for the 2009-2010 school year.

7. Throughout his employment with the respondent, petitioner was assigned to teach health and physical education to students at the district's Redwood School. This school is comprised of students in grades kindergarten to five.

8. Petitioner holds a standard instructional certificate with an endorsement as Teacher of Health and Physical Education. It was issued in June 2002.

9. By letter dated May 4, 2010, petitioner was notified that his position of employment had been eliminated and he would not be reappointed for the 2010-2011 school year.

10. Respondent operates the following schools listed on the above-mentioned seniority list:

West Orange High School (grades 9-12)
Liberty (grades 7 and 8) – Departmentalized
Roosevelt (grades 7 and 8) – Departmentalized
Edison (grade 6) – Departmentalized
Gregory (grades K-5)
Pleasantdale (grades K-5)
Washington (grades K-5)

LEGAL DISCUSSION

I. Tenure and Certification Requirements

The New Jersey State Board of Education (State Board) has established a certificate system requiring that "any person employed as a teaching staff member by a district board of education shall hold a valid and appropriate certificate." N.J.A.C. 6A:9-

5.1(a); N.J.S.A. 18A:26-2. The Board has provided for three distinct types of certificates—Instructional, Educational Services, and Administrative. N.J.A.C. 6A:9-2.1; N.J.A.C. 6A:9-5.2. An educator may hold more than one of these certificate types. A "teaching staff member" is not limited to educators (i.e. teachers) but includes any

> 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 and a school athletic trainer.
>
> [N.J.S.A. 18A:1-1.]

Therefore a teaching staff member is anyone employed by a board of education whose job description requires them to hold an instructional, service, or administrative certificate.

Educational personnel are tenured in New Jersey under the Tenure Act, N.J.S.A. 18A:28-1 to -18. The tenure statute prevents school boards from abusing their superior bargaining power over teachers in contract negotiations and protects teachers from dismissal for unfounded, flimsy or political reasons. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 71 (1982) (citations omitted); Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 71 (1962), cert. denied, 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed. 2d 502 (1963). The Tenure Act should be applied liberally to further its purpose of shielding teaching staff who qualify for its protection. Id. at 74. An employee of a board of education is entitled to tenure if (1) she/he works in a position for which a teaching certificate is required (i.e., she/he is a teaching staff member)[1]; (2) she/he holds the appropriate certificate; and (3) she/he has served the requisite period of time. Ibid.; N.J.S.A. 18A:28-5.

[1] Certain positions that are not generally considered "teaching staff members" and do not require certificates, including secretaries, assistant secretaries, and business managers, can acquire tenure simply by being employed for more than three years. N.J.S.A. 18A:17-2.

"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." Nelson v. Bd. of Educ., 148 N.J. 358, 366 (1997) (citing Ellicott v. Bd. of Educ., 251 N.J. Super. 342, 348 (App. Div. 1991)). The Court in Nelson re-affirmed the contention that, except for those positions specifically enumerated in corresponding statute and regulations,[2] "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." Nelson, supra, 148 N.J. at 366 (citing Dennery v. Passaic County Reg'l High Sch. Dist., 131 N.J. 626, 634 (1993)). Although transfer of tenure is authorized between endorsements, tenure is not transferable between certificates. See Dennery, supra, 131 N.J. at 635-36 (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").

One way in which a tenured teacher can be terminated is through a reduction in force (RIF). N.J.S.A. 18A:28-9. Under this section, boards of education have the authority to eliminate a position, even when held by a tenured staff member, "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." Ibid. Teachers can be protected from being "riffed" on the basis of seniority, where the employee with the least amount of service in the district would be the first subjected to the RIF. N.J.S.A. 18A:28-11; N.J.A.C. 6A:32-5.1. 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 accord with sound educational policies." Litchman v. Bd. of Educ. Village of Ridgewood, 93 N.J. 362, n. 4 (1983). When a staff member is "riffed," they are placed on a preferred eligibility list which entitles them to future open positions within the district under which they have accrued seniority. N.J.A.C. 6A:32-5.1; N.J.S.A.

[2] Endorsements under the administrative certificate such as supervisor and principal, as well as the school nurse endorsement under the educational-services certificate, do not allow for transferability of tenure between positions.

18A:28-12. However, seniority only accrues for the job title (typically the endorsement) served by the employee. Ibid. Specifically, the courts have held that "a teacher seeking reinstatement within the endorsements on his or her certificate is entitled to preference in a RIF as against a non-tenured applicant within a same certification." Ellicott, supra, 251 N.J. Super. at 349 (citing Capodilupo v. Bd. of Educ. West Orange, 218 N.J. Super. 510, 515 (App. Div. 1987) (emphasis in original)). Again, the priority rights of tenured teachers over non-tenure teachers to be reinstated apply only "in a position within the certificate of a dismissed tenure teacher." Ibid. (citing Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239, 242 (App. Div. 1987) (emphasis in original). Accordingly, the only priority or seniority rights that a tenured teacher that was subjected to a RIF has over a non-tenured applicant are for positions that fall under the same certificate to which the teacher has earned her tenure.

II. Was the Reduction In Force Properly Implemented with Respect to the Seniority Rights of the Staff Members Involved?

According to N.J.S.A. 18A:28-10, all dismissals based upon a reduction in force must be made on the basis of seniority. Seniority is the determining factor only for tenured personnel and has meaning only when a reduction in force is necessary. Brueck v. Fairview Bd. of Educ., 97 N.J.A.R.2d (EDU) 283, 285 (citing Howley v. Ewing Twp. of Educ., 1982 S.L.D. 1328, aff'd, 1983 S.L.D. 1954).

A tenured individual has the burden of demonstrating his or her seniority rights were violated. Parker v. Bd. of Educ., Matawan-Aberdeen Reg. School Dist., 1990 S.L.D. 1778; Brueck, supra, 97 N.J.A.R.2d at 285.

Seniority is calculated as listed in N.J.A.C. 6A:32-5.1. Seniority accrues in the subject areas in which a person actually works and is further delineated into elementary and secondary categories. N.J.A.C. 6A:32-5.1(1). Sternberg v. Bd. of Educ., Borough of Highland Park, 1986 S.L.D. 2774, 2779; Geiling-Hurley v. Bd. of Educ., Twp. of Edison, 1986 S.L.D. 964 (State Board of Education), aff'd, A-1959-86TS (App. Div.

October 5, 1987). Petitioner served his entire teaching career in respondent's district at an elementary school (Redwood School).

> Any person employed at the elementary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the educational category and only for the period of actual service under such educational services certificate or special subject field endorsement.
>
> [N.J.A.C. 6A:32-5.1(l)18(ii).]

The elementary seniority category consists of service in grades kindergarten through 6, and grades 7 and 8, if those grades are not departmentalized in the school district in question. N.J.A.C. 6A:32-5.1(1)(18) (definition of "elementary"). The secondary category consists of grades 9 through 12, plus grades 7 and 8 if those grades are departmentalized in the school district from which the analysis arises or in junior high schools or middle schools. N.J.A.C. 6A:32-5.1(1)(17) (definition of "secondary").

In Cozzolino's employment, he was assigned to a school with grades kindergarten to grade five. Thus, petitioner had six (6) years of seniority in the elementary category, limited to health and physical education. Azzato began his employment in the year after Cozzolino began. For the year 2010-2011, Azzato was assigned to teach health/physical education in the Edison School. The Edison School is a grade-6-only school and thus the classes are departmentalized.

Seniority regulations for the State of New Jersey make no reference to the categorization of the departmentalized grade 6 for seniority purposes. Departmentalized grades 7 and 8 are in the secondary category. Sternberg, supra, 1986 S.L.D. at 2779 Geiling-Hurley, supra, 1986 S.L.D. 964.

The question for purposes of this cases boils down to whether a departmentalized grade 6 Class is in the elementary or secondary category. Since a

departmentalized grade 6 is not provided for in the seniority regulations, other decisions must be looked to for guidance in this area.

In Unterberger v. Metuchen Board of Education, 93 N.J.A.R.2d (EDU) 59, it states:

> Because the elementary category precludes departmentalization and given that the secondary category includes two elementary grades that are departmentalized, i.e., grades 7 and 8 and based upon the fact that the Board admits that grade 6 classes at Edgar School are departmentalized, the Commissioner finds and determines that the instruction provided therein falls under the secondary category for seniority purposes.

Unterberger was followed by McGlynn v. Sea Girt Board of Education, 93 N.J.A.R.2d (Vol. 4A) 438, 445 (Comm'r July 2, 1992), where the Commissioner held that a social studies teacher "in a departmentalized organization, with assignments in grades six, seven and eight" accrued seniority in the secondary, rather than elementary category. In support of this outcome, the Commissioner emphasized that "petitioner never served in a self-contained classroom." McGlynn, supra, 93 N.J.A.R.2d at 445. Similarly, the Commissioner held that a science teacher, who had "served exclusively in a departmentalized setting for grades six, seven and eight also acquired tenure in the secondary category." "Although the three grades are lumped together, the case suggests that a departmentalized sixth grade falls into the secondary category." Ressler v. Saddle Brook Twp. Bd. of Educ., 96 N.J.A.R.2d (EDU) 581.

From the stipulated facts, Azzato had accrued a longer period of seniority in the secondary setting in teaching health and physical education than that of Cozzolino, even though Cozzolino was teaching longer in the district. See Small v. Schadt, 1987 S.L.D. 2706 (State Bd. Aug. 5, 1987) (where a physical education teacher has greater seniority in the secondary category than another physical education teacher with more years of service in the elementary category).

CONCLUSION

Since Edison was and is a departmentalized secondary school, Azzato's seniority was credited to the secondary category and Cozzolino was the least-senior physical education/health teacher in the elementary category. As such, Cozzolino was properly reduced in force and Azzato was properly retained due to the fact that his seniority accrued in a separate category from that of Cozzolino. Petitioner is not entitled to the position as it is outside the scope of his tenure and seniority rights. Accordingly, a finding in favor of the respondent is entered.

ORDER

It is hereby **ORDERED** that petitioner's tenure rights have not been violated. Therefore, petitioner's request for reinstatement 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, 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.

4/15/11
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: 4/15/11

Date Mailed to Parties: APR 18 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

jb

APPENDIX

EXHIBITS

Joint:

J-1 Resolution of the respondent on June 28, 2004

J-2 Letter from Jerry P. Tarnoff, superintendent of schools, to Franco Cozzolino dated June 29, 2004

J-3 Letter from Jerry P. Tarnoff, superintendent of schools, to Franco Cozzolino dated April 26, 2005

J-4 Letter from Jerry P. Tarnoff, superintendent of schools, to Franco Cozzolino dated April 25, 2006

J-5 Letter from Jerry P. Tarnoff, superintendent of schools, to Franco Cozzolino dated May 10, 2007

J-6 Standard Certificate as Teacher of Health and Physical Education issued June 2002

J-7 Letter from Anthony P. Cavanna, superintendent of schools, to Franco Cozzolino dated May 4, 2010

J-8 Staff Personal Record Card

J-9 Excerpts from seniority list for physical education

203-11

BOARD OF EDUCATION OF THE CITY OF MARGATE, ATLANTIC COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Board of Education of the City of Margate filed an appeal with the Commissioner which sought an order determining that it did not have any obligation to pay the Atlantic City Board of Education $175,000, representing a tuition payment reached during a settlement for a unilateral placement related to a special education student from Margate. Atlantic City and Margate participate in a sending/receiving agreement for the purpose of educating Margate's high school students in grades 9 through 12; further, Margate contracts with Atlantic City to provide educational services for its high school special education students, and the contract states that any under-billed special education tuition costs will be charged to the sending district. On December 15, 2009, Atlantic City reached a settlement with F.M., the parent of K.C., wherein Atlantic City agreed to pay $175,000 towards K.C.'s tuition for various out-of-district special education placements. Margate was not a party to the former litigation or settlement but, on December 18, 2009, received request from Atlantic City to remit the $175,000 tuition payment as soon as possible. Margate denied responsibility for the tuition. Thereafter, the parties sought assistance from the Executive County Superintendent (ECS) to resolve this controversy, but were advised on February 3, 2010 that the ECS did not have jurisdiction and that the matter needed to be decided by the Commissioner. Margate filed its appeal with the Commissioner on October 7, 2010. Atlantic City filed a motion to dismiss the petition pursuant to the 90-day limitation period set forth at *N.J.A.C.* 64:3-1.1(a)(i).

The ALJ found, *inter alia*, that: Margate should have been aware in December 2009 that one of its residents was in need of, and approved for, $175,000 of extraordinary special education services; Margate's argument that the date from which the 90 days must be calculated is July 19, 2010 – the date when Atlantic City actually billed Margate for extraordinary special education services – is unpersuasive; and Margate is the legal, natural and logical district to bear the cost associated with the needs of its residents, and was obligated by contract to remit extraordinary special education costs to Atlantic City. Accordingly, the ALJ dismissed the petition as untimely.

Upon full consideration, the Commissioner concurred with the ALJ and adopted the Initial Decision as the final decision in this matter; the petition was dismissed as untimely.

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.

June 2, 2011

OAL DKT. NO. EDU 11368-10
AGENCY DKT. NO. 590-10/10

BOARD OF EDUCATION OF THE CITY OF MARGATE, ATLANTIC COUNTY, PETITIONER, V. BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Margate Board of Education (Margate) and the Atlantic City Board of Education's (Atlantic City) reply thereto.

Margate takes exception to the Administrative Law Judge's (ALJ) determination that the 90-day statute of limitation period began to run in December 2009 when Margate received notice of the Settlement Agreement that Atlantic City entered into involving special education services for one of Margate's residents. In its exceptions, Margate contends that the ALJ erred by applying a standard for adequate notice used in school employment cases, without factually distinguishing the circumstances in this matter. Margate claims that the cases relied upon by the ALJ did not involve an "extraordinary service" for a special education student and the direct billing for that service. Based on the circumstances in this case, Margate argues that its petition was timely filed on October 9, 2010 because the 90-day time period did not begin to run until Margate received Atlantic City's July 19, 2010 bill for payment. Finally, Margate

maintains that the ALJ made a number of findings regarding the nature of the parties send/receive relationship that are not relevant to the narrow limitations issue.

In reply, Atlantic City urges the adoption of the Initial Decision dismissing Margate's petition as untimely. Atlantic City contends that the ALJ properly determined that the cause of action accrued in December 2009 when Margate had sufficient notice of the Settlement Agreement, and that Atlantic City determined Margate was responsible for making the settlement payments because the settlement involved special education services for one of Margate's residents. Atlantic City argues that – since Margate failed to make the payments required under the Settlement Agreement – it was forced to make the payments, and then seek reimbursement from Margate – the circumstances of which did not change Atlantic City's position that Margate was responsible for the payments. Finally, Atlantic City maintains that the ALJ properly applied the case law regarding the standard for receipt of adequate notice under *N.J.A.C.* 6A:3-1.3(i), emphasizing that the same 90-day limitations period is applied to all cases involving actions of school boards of education.

Upon such review, the Commissioner concurs with the ALJ's determination that Margate's October 9, 2010 petition was not timely filed in accordance with *N.J.A.C.* 6A:3-1.3(i). Pursuant to *N.J.A.C.* 6A:3-1.3(i), a petition must be filed "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." It is undisputed that in December 2009, Margate received notice of the executed Settlement Agreement, which is the subject of the case, along with notice of Atlantic City's position that Margate was responsible for making the settlement payments pursuant to the parties send/receive relationship. The Commissioner is not persuaded by the exceptions filed by Margate in which it

argues that despite having notice of the Settlement Agreement in December 2009, it was the actual July 19, 2010 bill that it received from Atlantic City for reimbursement of the settlement payments that triggered the 90-day limitations period.

In addition to receiving notice of the Settlement Agreement in December 2009, the dispute for responsibility of the payments due under the Settlement Agreement was brought to the attention of the Executive County Superintendent in February 2010, at which time Margate denied any responsibility for the settlement payments. The Executive County Superintendent informed the parties in February 2010 that he did not have jurisdiction to resolve the dispute and that if they could not reach an agreement on the issue, a petition should be filed with the Bureau of Controversies and Disputes. Even assuming, arguendo, that the 90-day limitation period did not begin to run until after the Executive County Superintendent informed the parties that the Commissioner had jurisdiction over the matter, Margate's October 2010 petition is still untimely. Accordingly, the petition of appeal is dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6|02|11

Date of Mailing: 6|02|11

[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

INITIAL DECISION
(Motion for dismissal as untimely)

OAL DKT. NO. EDU 11368-10
AGENCY DKT. NO. 590-10/10

BOARD OF EDUCATION OF THE CITY OF MARGATE, ATLANTIC COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,
Respondent.

Robert A. Muccilli, Esq., for petitioner (Capehart & Scatchard, attorneys)

Mark G. Toscano, Esq., for respondent (Comegno Law Group, attorneys)

Record Closed: April 6, 2011 Decided: April 18, 2011

BEFORE **W. TODD MILLER**, ALJ:

STATEMENT OF THE CASE

On October 7, 2010, the Margate City Board of Education (Margate) filed a petition with the Commissioner of Education seeking an order that it has no obligation to pay Atlantic City Board of Education (Atlantic City) $175,000. The $175,000 represents tuition payment reached during a settlement for a unilateral placement related to a

special education student from Margate. On December 15, 2009, Atlantic City reached settlement with F.M., the parent of K.C., wherein Atlantic City agreed to pay $175,000 towards K.C.'s tuition. Margate was not a party to the former litigation or settlement.

On October 28, 2010, Atlantic City filed a counterclaim seeking referral of this dispute to the Executive County Superintendent (ECS). Atlantic City then filed a motion arguing that Margate had not exhausted its administrative remedies. Atlantic City's motion was denied. I determined the dispute was not required to be submitted to the ECS. The Superintendent himself stated that he did not have the authority to decide the matter. (Atlantic City's submission dated February 25, 2011, Exhibit 8). Therefore the substance of the counterclaim was disposed of in my Order dated February 8, 2011. On February 11, 2011, Margate moved to dismiss Atlantic City's counterclaim based upon my prior ruling. (See Margate's Notice of Motion dated February 11, 2011, Exhibit A).

In this motion, Atlantic City moves to dismiss Margate's petition due to the 90-day limitation set forth at N.J.A.C. 64:3-1.3(a)(i). For the reasons discussed below, Atlantic City's motion to dismiss Margate's petition is **GRANTED**. Likewise, Atlantic City's counterclaim is **DISMISSED** as moot for the reasons expressed in my February 8, 2011, Order.

SUMMARY OF RELEVANT FACTS

Atlantic City and Margate have a send-receive agreement for purposes of educating Margate's high-school age students (grades 9-12). (C-1). F.M. is a Margate resident and her child, K.C., is eligible to attend Atlantic City High School. K.C. is classified and eligible for special education services.

K.C.'s Background

K.C.'s background with Atlantic City gives context to the dispute at hand. K.C. graduated the Margate school system's eighth grade program during the school year 2003-2004. Rather than attend Atlantic City in 2004-2005, K.C. was unilaterally placed

in an unapproved private school in Massachusetts. The placement was made without notice and approval of Atlantic City.

For the 2005-2006 school year, K.C. was again placed in a private out-of-district school in Pennsylvania without notice to or consent of Atlantic City. In March of that same school year, K.C. enrolled in Atlantic City. He was later disenrolled in April 2006. He was then placed in a psychiatric hospital until July 2006. Thereafter, he was placed in another psychiatric hospital in Philadelphia, Pennsylvania.

For the 2006-2007 school year, K.C. was unilaterally placed at an unapproved private out-of-state school in Colorado. He was discharged from the school in Colorado in October 2006 after exhibiting paranoia and psychiatric symptoms. He was then placed in a psychiatric hospital in Colorado. In November 2006 he was placed at the Summit Hospital in Summit, New Jersey with homicidal and suicidal ideations.

In January 2007, K.C. was brought back to the Atlantic City school system. Placement was attempted in Atlantic City, but Atlantic City did not receive cooperation from K.C. or his mother. In February 2007, K.C. was again placed in a hospital in Summit, New Jersey. This unilateral placement was changed to the school in Belle Mead, New Jersey without notice to or consent from Atlantic City.

The 2007-2008 school year continued with the same pattern. Atlantic City attempted contact with K.C., to no avail. During the school year, K.C. was placed in psychiatric hospitals in New York.

K.C. enrolled in Atlantic City in September 2008 for the 2008-2009 school year. IEP meetings were scheduled and various evaluations were planned. During the planning period, K.C. was at the Carrier Clinic in Belle Mead, New Jersey. In October 2008, K.C. was discharged from the Carrier Clinic and placed in an unapproved, unaccredited, private, out-of-state school in Vermont. In January 2009, K.C. was placed in or admitted to the Vermont State Hospital. Atlantic City attempted to conduct evaluations while K.C. was in the hospital, to no avail. The hospital refused the evaluators access to its patient.

F.M. filed a due process petition exclusively against Atlantic City seeking, inter alia, tuition reimbursement for the out-of-district placements mentioned above. Margate was not a party to the action, did not intervene and was not interpleaded. N.J.A.C. 1:1-16.1. On December 15, 2009, the case between F.M. and Atlantic City was settled for $175,000. Atlantic City believed that it minimized its exposure to by resolving the case for this amount. F.M.'s claim, if successful, could have required funding her child's education until the age of twenty-one. Since K.C. was diagnosed with severe psychological problems, the better course of action was to fund a fixed amount for past, present, and future high school educational needs to be handled by outside institutions of the family's choosing.

Relevant Timeline

On December 16, 2009, Atlantic City forwarded by e-mail the settlement agreement and the Atlantic City Board's Resolution No. 09 12A 68 to Margate. (Atlantic City's submission dated February 25, 2011, Exhibit 2). The e-mail did not specifically mention Margate's obligation to pay the settlement amount. But Margate was aware of its June 25, 2010, special education contract with Atlantic City. Margate contracted with Atlantic City to provided educational services for its high school special education students. The contract states that any under-billed special education tuition costs will be charged to the sending district. (C-1; ¶ 4d.).

On December 17, 2009, Atlantic City forwarded an e-mail from its attorney to Margate explaining "please make the necessary arrangements to forward the approved Settlement on to Margate and request payment be made as soon as possible". (Atlantic City's submission dated February 25, 2011, Exhibit 3).

On December 18, 2009, counsel for F.M. also sent Margate a letter demanding payment of the settlement. (Atlantic City's submission dated February 25, 2011, Exhibit 4).

On January 21, 2010, Margate responded by stating that "the claims in that litigation related to special education responsibilities of Atlantic City toward K.C. and that Margate was not obligated to make the settlement payments called for by the settlement agreement entered into between Atlantic City and K.C." (Atlantic City's submission dated February 25, 2011, Exhibit 5).

On January 29, 2010, the dispute was filed with Thomas J. Dowd, Executive County Superintendent by counsel for Atlantic City. The dispute was presented as a request to settle a tuition controversy. (Atlantic City's submission dated February 25, 2011, Exhibit 6).

On February 1, 2010, Margate responded to the ECS and denied any responsibility for the tuition related to K.C. (Atlantic City's submission dated February 25, 2011, Exhibit 7).

On February 3, 2010, the ECS responded that after discussions with the DOE "it appears that an interpretation of the existing law would be required in order to resolve the issue at hand. That being so, I do not have authority to make such a determination." The ECS further suggested that the matter be referred to Department of Education's Office Controversies and Disputes. (Atlantic City's submission dated February 25, 2011, Exhibit 8).

Atlantic City paid the $175,000 settlement amount in two installments of $105,000 and $70,000.

On July 19, 2010, the Atlantic City School Business Administrator submitted the $175,000 bill to Margate pursuant to N.J.A.C. 6A:23A17.1(e)(5)viii under the category of extraordinary services provided to special education students for which the board of education may bill directly.

On October 7, 2010, Margate filed its petition of appeal with the Commissioner of Education.

Send-Receive Agreement

The parties' rights and responsibilities are contractual. The send-receive agreement provides in part:

> NOW, THEREFORE, in consideration of the covenants herein contained, the parties agree as follows:
>
> 1. The **SENDING DISTRICT** agrees to **purchase educational services** form the RECEIVING DISTRICT. The RECEIVING DISTRICT agrees to provide educational services to the SENDING DISTRICT in accordance with the applicable New Jersey statutes and the rules and regulations of the State Board of Education. The specific educational services to be purchased and provided are described in 1a below.
>
> * * *
>
> 4d. In the event that it is later determined that the tentative tuition charge was less than the "actual cost per pupil" as certified by the commissioner multiplied by the actual average daily enrollment received, the RECEIVING DISTRICT will charge the SENDING DISTRICT no later than the end of the third school year following the contract year of the amount owed as follows:
>
> **CHECK ONE ONLY**
>
> **{X}** **All of the amount owed.** { } None of the amount owed. { } Part of the amount owed as indicated in this space.
>
> The **SENDING DISTRICT will pay any amount owed to the RECEIVING DISTRICT** in accordance with the following payment schedule: **DUE ON THE 1ST OF EACH MONTH BEGINNING SEPTEMBER 2010 ENDING JUNE OF 2011 AT THE ENTIRE AMOUNT INDICATED ABOVE.**
>
> 4c. In the event it becomes necessary for the SENDING DISTRICT to request that the county superintendent waive the payment schedule in 4b. Due to hardship, the SENDING DISTRICT will immediately notify the RECEIVING DISTRICT of such request.

> 5. The RECEIVING DISTRICT agrees to provide the SENDING DISTRICT with a monthly tuition bill and a monthly report showing pupil enrollment and attendance.
>
> 6. In the event any dispute arises out of this AGREEMENT the parties will seek to resolve the dispute as expeditiously as possible. **Except as may be set forth herein, the interests of the pupil(s) shall be the foremost concern in resolving such disputes**.
>
> [C-1; Emphasis added in bold and underlined]

The Special Education contract also states that the interest of the student shall be the foremost concern. Thus, Atlantic City paid the full amount of the settlement rather than seek an immediate payment from Margate. Failure of Atlantic City to pay the settlement would result in a breach of the settlement agreement and more costly ligation. Therefore, Atlantic City paid the settlement in full under the assumption that Margate would ultimately be the responsible party.

The settlement amount of $175,000 was eventually submitted to Margate for tuition reimbursement under the send-receive agreement. Margate filed the present action asserting that Atlantic City violated K.C.'s right to a free and appropriate public education (FAPE) and therefore Margate has no obligation to pay the tuition settlement. The claims advanced by Margate suggest negligence or breach of contract as a cause of action. (See, for example, ¶¶ 12-24 of Margate's compliant). This is supported by Margate's submission to ECS on February 1, 2010, wherein it states, "[w]hat Atlantic City is attempting to do is require Margate to pay $175,000 to resolve claims that Atlantic City breached its obligation to K.C." (Atlantic City's submission dated February 25, 2011, Exhibit 7)

CONCLUSIONS

To assert a claim under the school law, a petition must be filed "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). The 90-day time period for

filing a petition is to be strictly construed and claims that are not timely filed are precluded from review. Raymond v. Bd. of Educ. of River Edge, 94 N.J.A.R. 2d. (EDU) 203. The Commissioner of Education has held that a petitioner's failure to comply with N.J.A.C. 6:24-1.2 will result in a dismissal of the appeal. Baley v. Board of Ed. of Mansfield, OAL DKT. EDU 4997-79 (Feb. 6, 1980) rejected by Commissioner of Ed. (June 19, 1980), aff'd State Bd. of Ed. (Feb. 4, 1981); Kallimanis v. Board of Ed. of Carlstadt, OAL Dkt. EDU 868-80 (August 8, 1980), adopted Commissioner of Ed. (September 26, 1980), aff'd State Bd. of Ed. (March 4, 1981); Stolte v. Board of Ed. of Willingboro, OAL Dkt. EDU 2261-79 (Jan. 30, 1980), rejected by Commissioner of Ed. (March 17, 1980), aff'd State Bd. of Ed. (July 2, 1980). Moreover, this time limit has been strictly construed to mean that the 90-day period runs from the time the initial cause of action accrued. See, Watchung Hillls Regional Ed. Association v. Board of Ed. of Watchung Hills, 1980 S.L.D. 356. The proper time for filing a petition with the Commissioner is immediately after notification of board action, and not the completion of some other process such as arbitration. See State Board of Ed. of Bernards Township v. Bernards Township Education Association, 79 N.J. 311 (1979); Riely v. Board of Education of Hunterdon Central High School, 173 N.J. Super. 109 (App. Div. 1980); Wright and Sobanko v. Board of Ed. Of Belleville, OAL DKE. EDU 5299-80 (Dec. 5, 1980), aff'd by Commissioner of Ed. (Jan. 23, 1981). Prompt filing of actions before the Commissioner serves to preserve the immediacy of the record and to stabilize existing relationships, thereby avoiding disruption of the educational process. Le Mee v. Bd. of Educ. of Village of Ridgewood, 1990 S.L.D. 663, 668.

For example, when a teaching staff member is notified that they are being non-renewed on or before April 30, and they are subsequently terminated at the end of the school year, it is the first notification date that triggers the 90-day limitation. The cause of action accrues on the date of notice, not the date of action. Nissman v. Bd. of Ed. of Twp. of Long Branch Island, 272 N.J. Super. 373, 381 (App. Div. 1994). Therefore, if a board notifies a non-tenured teacher on April 27, 2000, that their contract will not be renewed, and subsequently sends a termination letter at the end of the school year on August 31, 2000, the 90-days will run from April 27, 2000. Id.; Kaprow v. Board of Educ. of Berkeley Tp., 131 N.J. 572 (1993); Lygate v. Bd. of Ed. of Carteret, OAL Dkt. No. EDU 2660-07, 2008 N.J. AGEN LEXIS 254. So long as the aggrieved party has clear

and unambiguous notice of the intended final action, the claim can be time barred. Kaprow at 579. The intended final action is to be treated like an anticipatory breach and suit can be filed immediately. Nissman at 382.

The timeline in the matter at bar is undisputed. Therefore, summary disposition is appropriate. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954); N.J.A.C. 1:1-12.5. The trigger date for counting the 90-days is the date Margate was on notice that it was going to be responsible for the payment of the $175,000 connected with special education costs associated with one of its residents. This date was culminated on December 18, 2009, when Atlantic City forwarded the settlement agreement by e-mail along with Atlantic City Board Resolution No. 09 12A 68. (Atlantic City's submission dated February 25, 2011, Exhibits 1-4). The settlement contained sufficient information to alert Margate that one of its residents was in need of, and approved for, $175,000 of extraordinary special education services. N.J.A.C. 6A:23A17.1(e)(5)viii. The e-mail was followed by demand for payment from F.M.'s attorney to Margate and an e-mail from Atlantic City's counsel placing Margate on notice it was expected to pay this amount. The December dates could be tolled due to the request for assistance by the ECS. But on February 3, 2010, the ECS advised that he did not have authority to decide questions of interpretation of law and referred the parties to the Commissioner. (Atlantic City's submission dated February 25, 2011, Exhibit 8). Even if measured from the point in time after which the ECS took action, Margate still waited 155 days to file its petition with the Commissioner. Indeed on February 3, 2010, the ECS urged the parties to file an action with the Commissioner. But no action was taken until October 7, 2010.

Margate argues that the trigger date for calculating the 90-day statute of limitations occurred on July 19, 2010. This is the date that Atlantic City actually billed Margate for the special education settlement. Margate suggests that when the case was settled in December 2010, Atlantic City sought to compel Margate to pay the bill as part of a litigation settlement. Margate aggressively defended against such action and submitted a detailed brief to the ECS. As indicated above, the ECS refused to take action for lack of authority. Interestingly, Margate now claims that Atlantic City substantively recast its claim as "tuition bill" rather that a "litigation settlement". On July

19, 2010, Atlantic City submitted the bill directly to Margate pursuant to N.J.A.C. 6A:23A-17.1(e)(5)viii (as extraordinary special education services). It is substantively different than seeking reimbursement for a litigation settlement back in December 2009. Hence, Margate argues the clock was reset on July 19, 2010. Therefore, Margate's filing of its petition on October 7, 2010, was well within the 90-day statute of limitations.

Margate's argument, while creative, does not fall within the body of law on this issue. The time for Margate to take action commenced when Atlantic City notified Margate that it would be seeking payment or reimbursement for tuition. That occurred on December 18, 2009. During this timeframe, Atlantic City forwarded a Resolution approving the settlement with F.M. for $175,000, indicated that $175,000 was for a Margate special needs resident who falls within the send-receive agreement, and that Atlantic City expected Margate to make payment arrangements. The case law is clear that the limitation period begins when the aggrieved party learns of the existence of facts that would enable him or her to file a timely claim. Kaprow, supra, at 588-89.

It would be naive of Margate to conclude that Atlantic City was not going to bill it for extraordinary special education expenses for one of its residents. Margate contracted away its obligation to provide special education services for its high school aged students. Atlantic City was Margate's authorized agent. Atlantic City cannot charge its taxpayers for extraordinary special education services rendered to a resident from a sending district. Moreover, the send-receive agreement states that any "under billed" services can be billed for up to three years by the receiving district to the sending district. While the litigation settlement does not clearly fall within the tentative tuition analysis, the agreement does state the "under billed" amounts (actual cost per pupil) not included in the initial tuition calculation can be billed to a sending district. Finally, Margate is the legal, natural and logical district to bear the cost associated with the needs of its residents, absent any breach of contract or act of negligence by Atlantic City.

If Margate wants to alter the send-receive arrangement as it relates to extraordinary costs associated with special needs students, then it must do so in future

agreements. It cannot shift the cost to Atlantic City in this instance. There is no common law, regulation or contract term that permits this action at the moment.

Finally Margate's petition is an action cloaked as a negligence or breach of contract claim against Atlantic City. Margate suggests that Atlantic City failed to provide a FAPE to K.C. It is, therefore, Atlantic City's failure to meet K.C.'s FAPE requirements that justifies Atlantic City bearing the cost of the settlement. Atlantic City must pay for its mistakes (i.e. negligence), according to Margate. When Margate's cause of action is viewed through this lens, it is clear that the trigger date has to be when the tort or breach occurred not when the bill was submitted. And this date was December 18, 2009.

In sum, Margate's obligation to pay tuition for its own residents is well established. Margate assigned its obligation to provide special education services for its 9-12 grade students to Atlantic City. Atlantic City is required by contract and regulation to submit tuition bills to Margate for special education related expenses for Margate residents. If Atlantic City was negligent in carrying out its contractual or regulatory obligations to Margate, a cause of action accrued on or about December 18, 2009. This was the time frame that Margate was adequately informed about Atlantic City's settlement with F.M. and that Margate would be exposed to liability for the settlement. Even if the time was tolled until after the ECS addressed the issue on February 3, 2010, Margate still missed the 90-day limitation by 155 days. Atlantic City's submission of the tuition invoice on July 19, 2010, did not alter the date the action accrued. Finally there was no basis relax the limitation period. The claim does not involve a significant public policy question, a constitutional claim or other reason to enlarge the filing period. Domenick Malinconico v. State-Operated School District of the City of Newark, Essex County, No. A-4015-09T3 (App. Div. December 10, 2010) (slip op. at 4). My ruling herein satisfies the intent[1] and purpose of N.J.A.C. 6A:3-1.3(i).

[1] 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. Because education disputes frequently involve conflicting claims to one teaching position, the remedy is to award the prevailing party the position with back pay. 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. Certainly, for

For the reasons stated above, I **CONCLUDE** that Margate's petition was filed untimely pursuant to N.J.A.C. 6A:3-1.3(i).

ORDER

It is **ORDERED** that Atlantic City's motion to dismiss the action filed by Margate is **GRANTED**. Margate's petition of appeal is **DISMISSED** as untimely. Atlantic City's counterclaim is **DISMISSED** as moot for the reasons expressed in my February 8, 2011, Order.

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.

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the Commissioner to find that the efficient administration of a school system requires the stability offered by the ninety-day limitation period is reasonable. Kaprow, supra, at 582.

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.

April 18, 2011
DATE

W. Todd Miller
W. TODD MILLER, ALJ

Date Received at Agency: 4-18-11

Date Mailed to Parties: 4-18-11

/sd

APPENDIX

MOVING DOCUMENTS

Margate's Petition Filed October 7, 2010

Atlantic City's Answer and Counterclaim filed October 28, 2010

Margate's Motion to Dismiss Counterclaim dated February 11, 2011

Atlantic City's Motion to Dismiss, February 25, 2011

Margate's Brief in Opposition to Motion, March 9, 2011

Atlantic City's Reply, March 18, 2011

REQUESTED BY THIS ALJ

C-1 June 25, 2010, Special Education Tuition Contract Agreement

204-11SEC

AGENCY DKT. NO. 687-11/10

IN THE MATTER OF CHRISTINA OZTAN,	:	
GREATER BRUNSWICK CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
MIDDLESEX COUNTY.	:	DECISION
	:	

On November 23, 2010, the School Ethics Commission (Commission) recommended that respondent be reprimanded for failure to attend a training session in finance during the third year of her term as a charter school trustee – purportedl y in violation of *N.J.S.A.* 18A:12-33. The Commissioner of Education concurred with the Commission and issued a decision imposing the recommended penalty. *In the Matter of Christina Oztan, Greater Brunswick Charter School, Middlesex County*, Commissioner Decision No. 23-11SEC (January10, 2011).

In March 2011, pursuant to an inquiry concerning the applicability of the 2007 revisions to *N.J.S.A.* 18A:12-33 to respondent Oztan, the Commission revisited its recommendation that respondent be reprimanded. The Commission determined that Oztan had completed her first term as a trustee prior to the 2007 revision of *N.J.S.A.* 18A:12-33, which revision required for the first time that board members and charter trustees take training courses in the second and third years of their term. Finding nothing in the language or history of *N.J.S.A.* 18A:12-33 which indicated that the 2007 revision was meant to be retroactive, the Commission concluded that respondent Oztan was not subject to the expanded training requirements of same, and vacated its prior decision.

Accordingly, given that the finding of violation upon which it was based has now been vacated by the Commission, the Commissioner's decision of January 10, 2011 is concomitantly VACATED and shall be deemed of no force and effect.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/02/11

Date of Mailing: 6/02/11

* 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)

	:	**BEFORE THE SCHOOL**
	:	**ETHICS COMMISSION**
IN THE MATTER OF	:	
CHRISTINA OZTAN	:	
Greater Brunswick Charter School	:	**DECISION TO VACATE**
Middlesex County	:	**PRIOR DECISION FOR FAILURE**
	:	**TO ATTEND TRAINING**
	:	
	:	**DOCKET NO. T32-10/3**
	:	**AGENCY DKT. NO. 687-11/10**

PROCEDURAL HISTORY

This matter arises from a decision issued by the School Ethics Commission on November 23, 2010, in the above-captioned matter, finding that Christina Oztan violated the School Ethics Act ("Act") by failing to attend school board member training in accordance with N.J.S.A. 18A:12-33. The Commission's enforcement was based on information the New Jersey School Boards Association ("NJSBA") provided in its required report of those board members and trustees who have not fulfilled the training mandate of the Act, issued to the Commission pursuant to N.J.A.C. 6A:28-4.2(c). The 2010 report from the NJSBA indicated that Christina Oztan failed to complete the school district governance training program entitled "Finance," which is required in a trustee's third year of service on the Board.

In July, 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Charter School Administrator and provided Ms. Oztan with a copy of the same, notifying both that the NJSBA identified the trustee as having failed to complete the Finance training program within the required training period. On September 22, 2010, the Commission issued an Order to Show Cause pursuant to N.J.A.C. 6A:28-1.6 to Ms. Oztan asserting that she failed to complete the mandated training. Ms. Oztan responded that she was a trustee in her third term and that she had not realized that she was required to take the training until she received a formal notice. She intended to take the training before the issuance of the Order to Show Cause but had been unable to attend training because of severe flood conditions. Ms. Oztan completed the training on October 19, 2010.

By decision dated November 23, 2010, the Commission determined that Christina Oztan failed to comply with the training mandate and therefore was in violation of N.J.S.A. 18A:12-33, but that respondent's completion of the training program after receipt of the Order to Show Cause served to mitigate the penalty in this matter. The Commission recommended the penalty of reprimand to the Commissioner of Education. The Commissioner of Education concurred with the Commission's recommended sanction by decision dated January 10, 2011. I/M/O Christina Oztan, Board of Trustees of the Greater Brunswick Charter School, Middlesex County, T32-10/2(November 23, 2010), Commissioner of Education Decision No. 23-11SEC, decided January 10, 2011.

In February 2011, a charter school trustee inquired about the applicability of the training requirements to a trustee who had completed the first term of service prior to the enactment of the expanded training requirements in March 2007. The Commission determined that, at its meeting on March 22, 2011, it would review the application and enforcement of the training requirement to board members or trustees whose first term of service was completed prior to March 2007. In furtherance of its review, the Commission sent a request to Ms. Oztan for specific documentation of her tenure as a trustee

at the Greater Brunswick Charter School. Ms. Oztan provided documentation to the Commission that she served the Charter School continuously from 2003 through 2011 and that she completed her first term as trustee in 2006.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq., was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators. N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training offered by the NJSBA. Specifically, all board members and charter school trustees must complete a training program during the first year of their first term. (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d)). In 2007, the training requirement was amended by the School District Accountability Act, P.L. 2007, c.53, to include the requirement that each board member "shall complete a training program on school district governance in each of the subsequent two years of the board member's first term." N.J.S.A. 18A:12-33a. As noted above, the 2010 report from the NJSBA indicated that Ms. Oztan failed to complete the school district governance training program entitled Finance within the required time period.

Although there is no dispute that the respondent did not complete the required Finance training program prior to the issuance of the Commission's show cause order, documentation forwarded by Ms. Oztan reveals that she served on the board of trustees of the Greater Brunswick Charter School since 2001, and had completed her first term of service in 2006, prior to the effective date of the amendment on March 15, 2007. Finding nothing in the plain language of the statute that would permit the retroactive application of the third-year training requirement, the Commission determines that Ms. Oztan was not subject to the expanded training requirements that became effective on March 15, 2007.

DECISION

At its meeting on March 22, 2011, the Commission voted to vacate its prior decision and find that Ms. Oztan did not violate N.J.S.A. 18A:12-33. A copy of this decision shall be forwarded to the Commissioner of Education for action as he deems necessary.

Robert W. Bender
Chairperson

Mailing Date: April 27, 2011

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on April 26, 2011.

Joanne Boyle, Executive Director

205-11

WILLIAM BERGHOF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ATLANTIC COUNTY VOCATIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In May 2010, petitioner received written notification that his position as a teacher of diesel mechanics would be eliminated as of June 30, 2010 as part of a Reduction in Force (RIF). On October 22, 2010, petitioner filed this appeal contending that the respondent Board deprived him of his position teaching diesel mechanics, notwithstanding that he possessed superior seniority and should therefore have been entitled to teach the second year of this course. Petitioner sought reinstatement to his former position, which would compel the Board to reinstate the diesel technology program – a program that has experienced declining enrollment. The Board filed a motion for summary judgment.

The ALJ found that: there are no material facts in dispute, and the matter is ripe for summary judgment; petitioner was provided written notice of the Board's decision to eliminate his position on May 5, 2010, but did not file his petition until October 22, 2010; therefore, petitioner failed to comply with the 90 day requirement of *N.J.A.C.* 6A:3-1.3(i); further, petitioner does not have seniority rights to teach the second year of the diesel class or the general auto mechanics class. Accordingly, the ALJ concluded that the petition should be dismissed for failure to comply with the requirements of *N.J.A.C.* 6A:3-1.3(i), and granted the Board's motion to dismiss the appeal.

Upon full consideration, the Commissioner concurred with the ALJ that the petition was not timely filed and must be dismissed on that basis. Accordingly, petitioner's seniority claim was not reached.

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.

June 2, 2011

205-11

OAL DKT. NO. EDU 13409-10
AGENCY DKT. NO. 609-10/10

WILLIAM BERGHOF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ATLANTIC COUNTY VOCATIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

Upon review of the Initial Decision of the Office of Administrative Law and the record of this matter,[1] the Commissioner concurs with the Administrative Law Judge that the instant appeal was untimely filed and must be dismissed. Accordingly, it is not necessary to address the merits of petitioner's seniority claim.

The petition is hereby dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/02/11

Date of Mailing: 6/02/11

[1] No exceptions were filed.

[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 Motion for Summary Decision)
DKT. NO. EDU 13409-10
AGENCY DKT. NO. 609-10/10

WILLIAM BERGHOF,
Petitioner,
v.
BOARD OF EDUCATION OF THE ATLANTIC COUNTY VOCATIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,
Respondent.

Ned P. Rogovoy, Esq., for petitioner

John C. Hegarty, Esq., for respondent (Jasinski, P.C., attorneys)

Record Closed: April 18, 2011 Decided: April 19, 2011

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE

On October 22, 2010, petitioner filed an appeal with the Commissioner of Education contending the Atlantic County Vocational School District (hereinafter referred to as ACIT) deprived him of his position teaching diesel mechanics, notwithstanding that he possesses superior seniority and is, therefore, entitled to teach the second year of this course. Respondent sought dismissal of the petition due to it

being filed untimely and also moved for summary decision of the merits of the seniority claim. For the reasons discussed below respondent's motion of summary decision on both the timeliness of the petition and the merits of the claim of seniority is **GRANTED**.

PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was filed at the Office of Administrative Law on December 2, 2010, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13.

On November 19, 2010, respondent filed a Motion to Dismiss in Lieu of a Response. On February 1, 2011, a telephone prehearing conference was held. The parties discussed the pending motion. An additional thirty day period of discovery was requested by petitioner prior to any ruling upon the Motion to Dismiss. This request was granted. On March 14, 2011, a supplemental submission was received from respondent. No further submissions were received from petitioner. The motion record closed on April 18, 2010.

FACTUAL SUMMARY

On May 3, 2010, a Reduction in Force (RIF) was approved by the ACIT Board of Education (See Certification of Dr. Philip J. Guenther, Ed.D, hereinafter referred to as "Guenther Cert."). Because of lack of enrollment, diesel technology would no longer be offered as a stand alone program. (Guenther Cert., ¶ 3).

The diesel technology position was previously reduced from full to part time in the 2009-2010 school year and consisted of six students (Petition, ¶ 4). For the 2010-2011 school year, the ACIT Board, in an effort to maintain fiscal responsibility, decided to eliminate the independent designated diesel technology program and combine it into the more encompassing auto technology course.

On or about May 5, 2010, petitioner Berghof received written notification that his position was being eliminated as of June 30, 2010 (Guenther Cert., Exhibit "B"). The Atlantic County Vocational Teachers Education Association (ACVTEA) did not formally oppose the reduction in force plan, and Mr. Berghof did not appear before the ACIT Board of Education, as was his right under N.J.S.A. 18A:27-4.1 (Guenther Cert., ¶¶ 6-7).

Curtis Silver holds an endorsement to teach both auto technology (endorsement dated 1993) and diesel technology (endorsement dated 2002) (Guenther Cert., ¶ 10). The six students formerly in the diesel technology class were transferred into Curtis Silver's auto technology class for the 2010-2011 school year (Guenther Cert. ¶ 9). The six aforementioned students will receive a joint auto/diesel technology certificate upon successful completion of the program (Guenther Cert, ¶ 11). The auto technology program, which is the only surviving program, has maintained enrollment to justify a full time teacher.

On or about May 12, 2010, Berghof filed a grievance challenging whether Curtis Silver, another teaching staff member, could teach diesel mechanics within the auto mechanics curriculum (Guenther Cert., Exhibit "C"). The grievance was denied. (Guenther Cert., Exhibit "C").

Petitioner seeks reinstatement, which would compel the Board to reinstate the diesel technology program, a program that has experienced declining enrollment (six students).

LEGAL ANALYSIS

Timeliness of the Petition

The Board has the power to initiate a reduction in force (RIF). N.J.S.A. 18A:28-9 states:

> 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.

If petitioner intended to challenge the RIF decision, he had ninety days to initiate the challenge. To assert a claim under the school law, a petition must be filed "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). The ninety day time period for filing a petition is to be strictly construed and claims that are not timely filed are precluded from review. Raymond v. Bd. of Educ. of River Edge, 94 N.J.A.R. 2d. (EDU) 203. The Commissioner of Education has held that a petitioner's failure to comply with N.J.A.C. 6:24-1.2 will result in a dismissal of the appeal. Baley v. Board of Ed. of Mansfield, OAL DKT. EDU 4997-79 (Feb. 6, 1980) rejected by Commissioner of Ed. (June 19, 1980), aff'd State Bd. of Ed. (Feb. 4, 1981); Kallimanis v. Board of Ed. of Carlstadt, OAL Dkt. EDU 868-80 (August 8, 1980), adopted Commissioner of Ed. (September 26, 1980), aff'd State Bd. of Ed. (March 4, 1981); Stolte v. Board of Ed. of Willingboro, OAL Dkt. EDU 2261-79 (Jan. 30, 1980), rejected by Commissioner of Ed. (March 17, 1980), aff'd State Bd. of Ed. (July 2, 1980). Moreover, this time limit has been strictly construed to mean that the 90-day period runs from the time the initial cause of action accrued. See, Watchung Hillls Regional Ed. Association v. Board of Ed. of Watchung Hills, 1980 S.L.D. 356. The proper time for filing a petition with the Commissioner is immediately after notification of board action, and not the completion of some other process such as arbitration. See State Board of Ed. of Bernards Township v. Bernards Township Education Association, 79 N.J. 311 (1979); Riely v. Board of Education of Hunterdon Central High School, 173 N.J. Super. 109 (App. Div. 1980); Wright and Sobanko v. Board of Ed. Of Belleville, OAL DKT. EDU 5299-80 (Dec. 5, 1980), aff'd by Commissioner of Ed. (Jan. 23, 1981). Prompt filing of actions before the Commissioner serves to preserve the immediacy of the record and to stabilize

existing relationships, thereby avoiding disruption of the educational process. Le Mee v. Bd. of Educ. of Village of Ridgewood, 1990 S.L.D. 663, 668.

For example, when a teaching staff member is notified that they are being non-renewed on or before April 30, and they are subsequently terminated at the end of the school year, it is the first notification date that triggers the ninety day limitation. The cause of action accrues on the date of notice, not the date of action. Nissman v. Bd. of Ed. of Twp. of Long Branch Island, 272 N.J. Super. 373, 381 (App. Div. 1994). Therefore, if a board notifies a non-tenured teacher on April 27, 2000, that their contract will not be renewed, and subsequently sends a termination letter at the end of the school year on August 31, 2000, the ninety days will run from April 27, 2000. Id.; Kaprow v. Board of Educ. of Berkeley Tp., 131 N.J. 572 (1993); Lygate v. Bd. of Ed. of Carteret, OAL Dkt. No. EDU 2660-07, 2008 N.J. AGEN LEXIS 254. So long as the aggrieved party has clear and unambiguous notice of the intended final action, the claim can be time barred. Kaprow at 579. The intended final action is to be treated like an anticipatory breach and suit can be filed immediately. Nissman at 382.

On May 3, 2010, the Board approved a resolution wherein it RIF'd petitioner. On May 5, 2010, notice of the Board's decision was provided to petitioner. On October 22, 2010, petitioner filed his appeal of the Board's May 3, 2010 determination. Petitioner waited 170 days. These facts are undisputed. Therefore, summary disposition is appropriate. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954); N.J.A.C. 1:1-12.5.

The claim does not involve a significant public policy question, a constitutional claim or other reason to enlarge the filing period. Domenick Malinconico v. State-Operated School District of the City of Newark, Essex County, No. A-4015-09T3 (App. Div. December 10, 2010) (slip op. at 4). My ruling herein satisfies the intent[1] and purpose of N.J.A.C. 6A:3-1.3(i).

[1] 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. Because education disputes frequently involve conflicting claims to one teaching position, the remedy is to award the prevailing party the position with back pay. The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot

I **CONCLUDE** that petitioner's appeal was filed untimely in accordance with N.J.A.C. 6A:3-1.3(i).

Petitioner's Seniority Claim

Assuming it is determined that petitioner's appeal was filed timely the analysis below resolves the seniority claim.

	Petitioner/Berghof	Curtis Silver
Tenure acquired[2]	Yes	Yes
Diesel Mechanic Endorsement	Acquired August, 2000	Acquired May, 2002
Auto Mechanic Endorsement	After 1993[3]	1993

Here, petitioner concedes that Silver has more seniority or total years of service in the district. (Petition, ¶¶ 3, 7). Silver was employed at ACIT since 1991. Petitioner started teaching diesel mechanics with the ACIT in 2000. The only question in this case is whether petitioner holds an endorsement to teach general auto mechanics (a/k/a Auto technology) and whether it predates Silver's endorsement. Specifically, petitioner states in his pleadings:

> 7. While Curtis Silver holds an automotive certificate **which gives him seniority over the petitioner**, the petitioner clearly has seniority in the teaching of diesel mechanics over Curtis Sliver since the petitioner's diesel mechanics certificate was issued in the year 2000, whereas the diesel mechanics certificate of Curtis Silver was issued in the year 2002.

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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. Certainly, for the Commissioner to find that the efficient administration of a school system requires the stability offered by the ninety-day limitation period is reasonable. Kaprow, supra. at 582.

[2] For purposes of this Motion, it is assumed that both individuals (Berghof and Silver) have attained tenure as no issues as to tenure was raised by either party.

[3] Exact date unknown, but petitioner admits Silver acquired his auto mechanic endorsement prior to his (Berghof's) auto mechanic endorsement. See paragraph 7 of petition filed herein.

[Emphasis added.]

Here, ACIT instituted a curriculum change based upon low enrollment in the diesel mechanics course. The curriculum change cannot be confused with the requirement to possess applicable endorsements. The students in the diesel mechanics class were subsumed into the general auto mechanics curriculum. As long as Silver possesses an endorsement that is appropriate for teaching general auto mechanics and that endorsement predates petitioner's general auto mechanics endorsement (if any), then Silver has seniority.

Petitioner argues that Silver cannot include instruction on diesel mechanics within his general auto mechanics curriculum, particularly for the six students who were in his diesel class. I **DISAGREE**. This is a curriculum determination, not an issue to be determined by endorsements, tenure or seniority. Management can alter its staffing level to meet its curriculum demands through the RIF mechanism. N.J.S.A. 18A:28-9; See also, Parsippany-Troy Hill Ed. Ass'n. v. Parsippany-Troy Hills Bd. of Ed., 188 N.J. Super. 161, 166 (App. Div. 1983) (holding that boards have broad autonomy to determine curriculum and are free to implement or eliminate programs or parts of programs).

Silver is not teaching diesel mechanics. Rather Silver is teaching general auto mechanics (auto technology) within which are a few hours of instruction on diesel engines. Silver has not usurped the diesel class requiring a diesel endorsement. The six students previously enrolled in the diesel class will receive a combined diesel/auto technology designation upon graduation, reflecting their prior instruction in diesel. In effect, petitioner wants to be reinstated to teach just the diesel portion of Silver's general auto mechanic class. This, of course, would undermine the purpose and intent of the RIF statute.

I **CONCLUDE** that Silver's auto mechanic (or technology) endorsement from 1993 predates any similar endorsement held by petitioner. The diesel mechanic class has been abolished. Thus it is petitioner that must hold an endorsement for the general

auto mechanics class and not Silver who must hold a diesel endorsement. Consequently, Silver has seniority to teach general auto mechanics, even if the class includes some of petitioner's former students.

ORDER

Based upon the forgoing, respondent's motion for summary decision is **GRANTED**. It is **ORDERED** that petition is **DISMISSED** as untimely. It is further **ORDERED** that in the event it is determined that petitioner's appeal was filed timely, petitioner does not have seniority rights to teach the second year of the diesel class or the general auto mechanics class.

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.

April 19, 2011 — W. Todd Miller

DATE — **W. TODD MILLER**, ALJ

Date Received at Agency: 4-19-11

Date Mailed to Parties: 4-19-11

/sd

DOCUMENTS CONSIDERED

Respondent's Motion to Dismiss in Lieu of Response, November 19, 2010

Petitioner's Opposition to Respondent's Motion to Dismiss, December 21, 2010

Respondent's Reply to Petitioner's Opposition to Respondent's Motion to Dismiss, January 4, 2011

Respondent's Letter Brief, March 14, 2011

#206-11SEC

AGENCY DKT. NO. 674-11/10

IN THE MATTER OF ANN ROSARIO,	:	
JERSEY CITY COMMUNITY	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, CAMDEN COUNTY.	:	DECISION
	:	

On January 10, 2010, the Commissioner of Education (Commissioner) rendered a decision concurring with the November 23, 2010 recommendation of the School Ethics Commission (Commission) that the respondent charter school trustee – who had failed to attend school board member training in accordance with *N.J.S.A.* 18A:12-33 – be suspended as a trustee until completing such program and, if the program was not completed by January 8, 2011, respondent be removed from office. Subsequently, as respondent did not complete the training by January 8, 2011, the Commission adopted a Resolution of Removal at its meeting on January 25, 2011.

Subsequently, by letter dated April 27, 2011, the Executive Director of the School Ethics Commission advised respondent – and the Commissioner – that the Commission had voted on March 22, 2011 to vacate its prior decision finding respondent in violation of the School Ethics Act. In its April 26, 2011 decision so vacating, the Commission noted:

> *N.J.S.A.* 18A:12-33 requires each board member and charter school trustee to complete training offered by the [New Jersey School Boards Association]. Specifically, all board members and charter school trustees must complete a training program during the first year of their first term....In 2007, the training requirement was amended by the School District Accountability Act, *P.L.* 2007, *c.* 53, to include the requirement that each board member "shall complete a training program on school district governance in each of the subsequent two years of the board member's first term."...
>
> Although there is no dispute that the respondent did not complete the [New Board Member Orientation] training program prior to the issuance of the Commission's

show cause order, Ms. Rosario has now forwarded information confirming that she served on the board of trustees of the Jersey City Community Charter School since 1997, which was the time period when the Commission had issued [a] public advisory opinion [which apparently exempted charter school trustees from the requirement in the Act that they attend new board member training within the first year of their first term on the board] and prior to the adoption of regulations specifically holding charter school trustees to the first year training requirement [adopted in 2000]. Consequently, the Commission determined that Ms. Rosario should not be subject to the training requirements. (Commission's April 26, 2011 Decision at 2)

Accordingly, given that the finding of violation upon which it was based has now been vacated by the Commission, the Commissioner's decision of January 10, 2011 is concomitantly VACATED and shall be deemed of no force and effect.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/01/11

Date of Mailing: 6/02/11

	:	**BEFORE THE SCHOOL**
	:	**ETHICS COMMISSION**
IN THE MATTER OF	:	
ANN ROSARIO	:	**DECISION TO VACATE**
Jersey City Community Charter School	:	**PRIOR DECISION FOR**
Hudson County	:	**FAILURE TO ATTEND TRAINING**
	:	
	:	**DOCKET NO. T09-10NB**
	:	**AGENCY DKT. NO. 674-11/10**

PROCEDURAL HISTORY

This matter arises from a decision issued by the School Ethics Commission on November 23, 2010, in the above-captioned matter, finding that Ann Rosario violated the School Ethics Act ("Act") by failing to attend school board member training in accordance with N.J.S.A. 18A:12-33. The Commission's enforcement was based on information the New Jersey School Boards Association ("NJSBA") provided in its required report of those board members and trustees who have not fulfilled the training mandate of the Act, issued to the Commission pursuant to N.J.A.C. 6A:28-4.2(c). The 2010 report from the NJSBA indicated that Ms. Rosario failed to complete the school district governance training program entitled New Board Member Orientation ("NBMO") which is required in a trustee's first year of service on the Board.

In July, 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Charter School Administrator and provided Ms. Rosario with a copy of the same, notifying both that the NJSBA identified the trustee as having failed to complete the NBMO training program within the required training period. On September 22, 2010, the Commission issued an Order to Show Cause pursuant to N.J.A.C. 6A:28-1.6 to Ms. Rosario asserting that she failed to complete the mandated training. Ms. Rosario failed to respond to the Order to Show Cause. By decision dated November 23, 2010, the Commission found that Ms. Rosario failed to comply with the training mandate and therefore was in violation of N.J.S.A. 18A:12-33. The Commission's decision recommended that Ms. Rosario be suspended as a trustee until demonstrating completion of the required program. If Ms. Rosario did not complete the training program by January 8, 2011, the Commission recommended removal.

Ms. Rosario did not complete the training. The Commissioner of Education concurred with the Commission's recommended sanction by decision dated January 10, 2011. I/M/O Ann Rosario, Jersey City Community Charter School, Hudson County, T09-10NB (November 23, 2010), Commissioner of Education Decision No. 22-11SEC, decided January 10, 2011. Pursuant to N.J.A.C. 6A:28-10.12(d), the Commission adopted a Resolution of Removal at its meeting on January 25, 2011.

During 2010 enforcement proceedings of the School Ethics Act training requirements, a charter school trustee whose service dated back to the inception of the charter school successfully asserted reliance upon a public advisory opinion issued by the School Ethics Commission in 1998 as a defense to his failure to attend new board member training. [1] At its meeting on March 22, 2011, the Commission

[1] Advisory Opinion A14-98 issued on July 31, 1998 appears to include language exempting charter school trustees from the requirement in the Act that they attend new board member training within the first year of their first term on the board. However, because the Commission notes that regulations adopted by the State Board of Education in 2000 include the requirement that charter school trustees must complete new board member training during the first

determined that it would review the application and enforcement of the new board member training requirement to trustees who may have relied upon this advisory opinion. In furtherance of its review, the Commission sent a request to Ms. Rosario for specific documentation of her tenure as trustee at the Jersey City Community Charter School. Ms. Rosario replied that she has served as a trustee since the opening of the Jersey City Community Charter School in 1997 but is no longer available to continue to serve as trustee.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq., was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators. N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training offered by the NJSBA. Specifically, all board members and charter school trustees must complete a training program during the first year of their first term. (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d)). In 2007, the training requirement was amended by the School District Accountability Act, P.L. 2007, c.53, to include the requirement that each board member "shall complete a training program on school district governance in each of the subsequent two years of the board member's first term." N.J.S.A. 18A:12-33a. As noted above, the 2010 report from the NJSBA indicated that Ms. Rosario failed to complete the NBMO training program within the required time period.

Although there is no dispute that the respondent did not complete the NBMO training program prior to the issuance of the Commission's show cause order, Ms. Rosario has now forwarded information confirming that she served on the board of trustees of the Jersey City Community Charter School since 1997, which was the time period when the Commission had issued the public advisory opinion referenced herein, and prior to the adoption of regulations specifically holding charter school trustees to the first year training requirement. Consequently, the Commission determined that Ms. Rosario should not be subject to the training requirements.

DECISION

At its meeting on March 22, 2011, the Commission voted to vacate its prior decision and find that Ms. Rosario did not violate N.J.S.A. 18A:12-33. A copy of this decision shall be forwarded to the Commissioner of Education for action as he deems necessary.

Robert W. Bender

Robert W. Bender
Chairperson

Mailing Date: April 27, 2011

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on April 26, 2011.

Joanne Boyle, Executive Director

year of his/her first term on the board, N.J.A.C. 6A:11-3.1(d), a charter school trustee may be held to the new board member training requirement after that date.

207-11

AGENCY DKT. NO. 679-11/10

IN THE MATTER OF GREG COLLINS,	:	
MARION P. THOMAS CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, ESSEX COUNTY.	:	DECISION
	:	

On January 10, 2011, the Commissioner of Education (Commissioner) rendered a decision concurring with the November 23, 2010 recommendation of the School Ethics Commission (Commission) that the respondent charter school trustee be censured for failure to timely attend school board member training in accordance with *N.J.S.A.* 18A:12-33.

Subsequently, by letter dated April 27, 2011, the Executive Director of the School Ethics Commission advised the Commissioner that the Commission had voted on March 22, 2011 to vacate its prior decision finding respondent in violation of the School Ethics Act. Based on additional information submitted to the Commission by the respondent, the Commission re-examined the record and determined that the respondent had served on the board of trustees of the Marion P. Thomas Charter School since 1998; therefore, the Commission found that Mr. Collins was not subject to the expanded training requirements that became effective on March 15, 2007.

Accordingly, given that the finding of violation upon which it was based has now been vacated by the Commission, the Commissioner's decision of January 10, 2011 is concomitantly VACATED and shall be deemed of no force and effect.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/02/11

Date of Mailing: 6/02/11

* 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)

	:	**BEFORE THE SCHOOL**
	:	**ETHICS COMMISSION**
IN THE MATTER OF	:	
GREG COLLINS	:	**DECISION TO VACATE**
Marion P. Thomas Charter School	:	**PRIOR DECISION FOR**
Essex County	:	**FAILURE TO ATTEND TRAINING**
	:	
	:	**DOCKET NO. T19-10/2**
	:	**AGENCY DKT. NO. 679-11/10**

PROCEDURAL HISTORY

This matter arises from a decision issued by the School Ethics Commission on November 23, 2010, in the above-captioned matter, finding that Greg Collins violated the School Ethics Act ("Act") by failing to attend school board member training in accordance with N.J.S.A. 18A:12-33. The Commission's enforcement was based on information the New Jersey School Boards Association ("NJSBA") provided in its required report of those board members and trustees who have not fulfilled the training mandate of the Act, issued to the Commission pursuant to N.J.A.C. 6A:28-4.2(c). The 2010 report from the NJSBA indicated that Greg Collins failed to complete the school district governance training program entitled "NJQSAC," which is required in a trustee's second year of service on the Board.

In July, 2010, the School Ethics Commission issued a Notice of Enforcement to the appellant's Charter School Administrator and provided Mr. Collins with a copy of the same, notifying both that the NJSBA identified the trustee as having failed to complete the NJQSAC training program within the required training period. On September 22, 2010, the Commission issued an Order to Show Cause pursuant to N.J.A.C. 6A:28-1.6 to Mr. Collins asserting that he failed to complete the mandated training. Mr. Collins responded that he had been unable to take the training because of illness, travel and technical problems. Mr. Collins further stated that he did not believe that the expanded training requirements applied to him because he had been a trustee since 1998.

By decision dated November 23, 2010, the Commission found that Mr. Collins failed to comply with the training mandate and, therefore, was in violation of N.J.S.A. 18A:12-33. The Commission's decision recommended that Mr. Collins be suspended as a trustee until demonstrating completion of the required program. If Mr. Collins did not complete the training program by December 15, 2010, the Commission recommended removal. If Mr. Collins completed the training program by December 15, 2010, the Commission recommended a penalty of censure.

Mr. Collins completed the training prior to December 15, 2010. The Commissioner of Education concurred with the Commission's recommended sanction by decision dated January 10, 2011. I/M/O Greg Collins, Board of Trustees of the Marion P. Thomas Charter School, Essex County, T19-10/2 (November 23, 2010), Commissioner of Education Decision No. 11-11SEC, decided January 10, 2011. Pursuant to N.J.A.C. 6A:28-10.12(d), the Commission adopted a Resolution of Censure at its meeting on January 25, 2011.

On February 24, 2011, counsel for Mr. Collins filed a Motion for Stay of the Commissioner's decision ordering a censure, pending appeal of the Commissioner's decision with the Superior Court of New Jersey, Appellate Division. Upon receipt and review of Greg Collins' certification and arguments filed before the Appellate Division, the Commission determined to reconsider its prior decision at its March 22, 2011 meeting and so notified the appellant and the Commissioner of Education. On

February 28, 2011, pursuant to the authority delegated by N.J.S.A. 18A:4-33, the Assistant Commissioner of Education granted the appellant's request for stay of the Commissioner's decision ordering a censure.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq., was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators. N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training offered by the NJSBA. Specifically, all board members and charter school trustees must complete a training program during the first year of their first term. (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d)). In 2007, the training requirement was amended by the School District Accountability Act, P.L. 2007, c.53, to include the requirement that each board member "shall complete a training program on school district governance in each of the subsequent two years of the board member's first term." N.J.S.A. 18A:12-33a. As noted above, the 2010 report from the NJSBA indicated that Mr. Collins failed to complete the school district governance training program entitled NJQSAC within the required time period.

Upon appellant's filing of the Motion for Stay, at its meeting of March 22, 2011, the Commission re-examined the record and reconsidered its prior decision, based on Mr. Collins' submissions before the Appellate Division. Although there is no dispute that the respondent did not complete the required NJQSAC training program prior to the issuance of the Commission's show cause order, the record and appellant's certification reveal that he had served on the board of trustees of the Marion P. Thomas Charter School since 1998, and had, therefore, completed his first term of service prior to the effective date of the amendment on March 15, 2007. Finding nothing in the plain language of the statute that would permit the retroactive application of the second-year training requirement, the Commission determines that Mr. Collins was not subject to the expanded training requirements that became effective on March 15, 2007.

DECISION

At its meeting on March 22, 2011, the Commission voted to vacate its prior decision and find that Mr. Collins did not violate N.J.S.A. 18A:12-33. A copy of this decision shall be forwarded to the Commissioner of Education for action as he deems necessary.

Robert W. Bender
Chairperson

Mailing Date: April 27, 2011

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on April 26, 2011.

Joanne Boyle, Executive Director

#208-11R

OAL DKT. NO. EDU 3520-11
(EDU 183-11 ON REMAND)
AGENCY DKT. NO. 5-1/11

M.F., on behalf of minor child, L.S.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY AND SUPERINTENDENT MICHAEL NITTI,	:	DECISION
RESPONDENTS.	:	

The record of this matter, the parties' revised settlement agreement, 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 March 28, 2011, the Commissioner remanded this matter to the OAL based upon a determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge did not include the requisite Board of Education approval.

Upon review of the revised agreement and the record on remand, the Commissioner finds that the deficiency identified in the prior agreement has been corrected. 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/02/11
Date of Mailing: 6/02/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.EDU 3520-11

(REMAND OAL DKT. NO. EDU 183-11)

AGENCY DKT. NO. 5-1/11

M.F. O/B/O L.S.F.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY, AND SUPERINTENDENT MICHAEL NITTI

Respondent.

M.F., petitioner, pro se

Jeffrey F. Belz, Esq., for respondent Ewing Township Board of Education

Record Closed: April 12, 2011 Decided: April 27, 2011

BEFORE **DENNIS P. BLAKE**, ALJ:

This matter was remanded to the Office of Administrative Law on March 28, 2011, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have previously agreed to a settlement. However, the Commissioner of Education remanded the matter so that the Board's Resolution approving the

Settlement Initial Decision could be incorporated or, in the alternative, the agreement could be signed by the Board's attorney.

The Board has supplied the settlement agreement which has been executed by the Board's attorney. That executed settlement agreement is attached and fully incorporated herein.

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.

April 27, 2011
DATE

DENNIS P. BLAKE, ALJ

Date Received at Agency: APR 27 2011

Date Mailed to Parties: APR 27 2011

/mev

EXHIBITS

Jointly Submitted

Settlement Agreement

RECEIVED

2011 APR -8 A 11:03

OFFICE OF ADMINISTRATIVE LAW

M.F. o/b/o L.S.F.

v.

Ewing Bd. of Ed. and Michael Nitti, Superintendent

OAL DKT: EDU 183-2011

Settlement Agreement

This matter having come before the Commissioner of Education by M.F. o/b/o L.S.F. on an emergent petition, and the parties having resolved the entire matter in dispute, the parties agree to the following:

1) L.S.F. shall be allowed to participate in

209-11

ARLENE FIORE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a bus driver employed by respondent Board, sought restoration of sick time for injuries sustained in 2002 in the course of employment, pursuant to *N.J.S.A.* 18A:30-2.1. The matter was placed on the inactive list pending settlement of the Worker's Compensation case. On February 13, 2009, counsel for petitioner advised that the workers' compensation matter had been resolved, but requested that the matter remain on inactive status.

Subsequently, after repeated and unanswered attempts by the ALJ and counsel for respondent to obtain a status update from petitioner's counsel, a peremptory hearing date was scheduled for April 26, 2011; counsel for petitioner was directed to confirm no later than April 15, 2011 that she would appear for the April 26 hearing, or the matter would be dismissed. No confirmation was received from petitioner's counsel.

Accordingly, the ALJ found that the matter should be dismissed with prejudice.

The Commissioner concurred with 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.

June 3, 2011

OAL DKT. NO. EDU 7552-03
AGENCY DKT. NO. 160-5/03

ARLENE FIORE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF MORRIS SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
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, the Commissioner concurs with the Administrative Law Judge that this matter is appropriately dismissed.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons fully detailed therein and the instant petition of appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6|03|11
Date of Mailing: 6|03|11

* 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 7552-03

AGENCY DKT. NO. 160-5/03

ARLENE FIORE,

Petitioner,

v.

BOARD OF EDUCATION OF MORRIS SCHOOL DISTRICT, MORRIS COUNTY,

Respondent.

Nancy Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Hillary A. Fraenkel, Esq., for respondent (Marshall, Dennehey, Warner, Coleman & Goggin, attorneys)

Record Closed: April 15, 2011 Decided: April 21, 2011

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

Petitioner alleges that respondent's action in charging her sick days for work-related injury/illness violated N.J.S.A. 18A:30-2.1. The matter was transmitted to the Office of Administrative Law (OAL) on August 12, 2003, and assigned OAL Docket No. EDU 07552-03.

It was determined that the claim asserted was dependent upon the outcome of a companion workers' compensation petition, and the matter was therefore placed on inactive status until March 16, 2004, by then ALAJ Thomas E. Clancy. The matter was continued on inactive status pursuant to ALJ Clancy's January 23, 2004, Letter Order, and remained on inactive status pursuant to ALJ Clancy's September 22, 2006, Letter. The matter was reassigned to the undersigned following ALJ Clancy's retirement on October 1, 2006.

On February 13, 2009, counsel for petitioner advised that the workers' compensation matter had been resolved, but requested that the matter remain on inactive status. On April 15, 2009, a conference call was held, at the conclusion of which the parties agreed to exchange information and then schedule another conference call.

On October 25, November 24, and December 1, 2010, telephone messages were left for petitioner's counsel inquiring as to the status of this matter. No return calls were received. Respondent's counsel represented that she too has been trying to reach petitioner's counsel, for a period of six months, to no avail. Accordingly, a peremptory hearing date was scheduled for April 26, 2011, and counsel were advised that if the hearing did not go forward on that date the matter would be dismissed. Thereafter, respondent's counsel advised that, as a school district, respondent would incur costs and expenses to prepare for a full hearing, possibly unnecessarily. As such, respondent's counsel requested that petitioner's counsel confirm no later than April 15, 2011, at 3:00 p.m. that she intended to and would appear for the full hearing on April 26, 2011, and that if that confirmation was not received, the matter be dismissed. In view of the history of this matter and in the interests of fairness and economy, this request was granted.

Accordingly, as there has been no communication whatsoever from petitioner for more than two years, I **FIND** that this matter should 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.

April 21, 2011
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 4-21-11

Date Mailed to Parties: APR 25 2011

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

210-11

OAL DKT. NO. EDU 1981-10
AGENCY DKT. NO. 26-2/10

M.R., on behalf of minor child, M.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The proposed settlement of the above-captioned matter, which was executed by counsel for the petitioner and the respondent and submitted by the above referenced parties on or about April 12, 2011, is approved. Accordingly, the petition is hereby dismissed, subject to compliance with the applicable terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6|03|11

Date of Mailing: 6|03|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01981-10

AGENCY DKT. NO. 26-2/10

M.R., ON BEHALF OF MINOR CHILD, M.R.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD,

Respondent.

Allan Marian, Esq., for petitioner

David B. Rubin, Esq., for respondent

Record Closed: April 12, 2011 Decided: April 15, 2011

BEFORE **RICHARD McGILL**, ALJ:

M.R. filed a petition with the Commissioner of Education on behalf of her son, M.R., in regard to his suspension from Spotswood High School and his compelled attendance of an alternative school. The matter was transmitted to the Office of Administrative Law on March 9, 2010, for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a Stipulation of Dismissal, which is in substance a settlement agreement. 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 this 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 terms of the settlement, 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.

Apr. 15, 2011
DATE

RICHARD McGILL, ALJ

Date Received at Agency:

Date Mailed to Parties: APR 19 2011

jb

4/19/11
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2011 APR 12 A 3:28

DAVID B. RUBIN, P.C.
Attorney at Law
44 Bridge Street
P. O. Box 4579
Metuchen, New Jersey 08840
(732) 767-0440
Attorney for Respondent

M.R., ON BEHALF OF MINOR CHILD, M.R.,	
Petitioners,	COMMISSIONER OF EDUCATION
v.	OFFICE OF ADMINISTRATIVE LAW
BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,	Docket No. EDU 1981-10
Respondent.	STIPULATION OF DISMISSAL

The undersigned having amicably resolved their differences, the petition of appeal herein is dismissed, with prejudice, on the following representations, terms and conditions:

1. All references to the October 27, 2009 incident, the disciplinary proceedings that ensued before the Board, and the written findings of the Board based on those proceedings, will be removed from M.R.'s student records files promptly upon the dismissal of these proceedings with prejudice.

2. The material referenced in the preceding paragraph will be maintained in a confidential file in the possession or control of the Superintendent, and shall not be disclosed or used in the

future except in the event of a future incident involving M.R. where disclosure or use of same is relevant to the issues at hand.

3. By accepting these terms, M.R. and his parents and/or guardians release the Board, its members, employees, agents and representatives from any and all claims of any nature, known or unknown, arising from the events upon which the petition of appeal in based.

4. The terms hereof shall not affect the Board's standing directive concerning denial of access to school property or functions.

5. This settlement is entered into by the parties solely to avoid the expense and inconvenience of continued litigation, and shall not be construed as a concession by any party of the correctness of any other party's legal or factual position in this matter.

6. The undersigned counsel represent that they have fully consulted with their clients regarding the terms of this settlement agreement, and have due authority to enter into it on their behalf.

DAVID B. RUBIN, P.C.
Attorney for Respondent

BY: _____
DAVID B. RUBIN

Dated: 3/24/11

ALLAN MARAIN, ESQ.
Attorney for Petitioner

BY: _____
ALLAN MARAIN

Dated: 3-28-11

AGENCY DKT. NO. 683-11/10

IN THE MATTER OF MICHAEL LYTLE,	:	
NORTH STAR ACADEMY CHARTER	:	COMMISSIONER OF EDUCATION
SCHOOL, ESSEX COUNTY.	:	DECISION
	:	

On January 10, 2011, the Commissioner of Education (Commissioner) rendered a decision concurring with the November 23, 2010 recommendation of the School Ethics Commission (Commission) that the respondent charter school trustee be reprimanded for failure to attend school board member training – in accordance with *N.J.S.A.* 18A:12-33 – until after the Commission issued an Order to Show Cause.

Subsequently, by letter dated April 27, 2011, the Executive Director of the School Ethics Commission advised respondent – and the Commissioner – that the Commission had voted on March 22, 2011 to vacate its prior decision finding respondent in violation of the School Ethics Act. In its April 26, 2011 decision so vacating, the Commission noted:

> *N.J.S.A.* 18A:12-33 requires each board member and charter school trustee to complete training offered by the [New Jersey School Boards Association]. Specifically, all board members and charter school trustees must complete a training program during the first year of their first term....In 2007, the training requirement was amended by the School District Accountability Act, *P.L.* 2007, *c.* 53, to include the requirement that each board member "shall complete a training program on school district governance in each of the subsequent two years of the board member's first term."...
>
> Although there is no dispute that the respondent did not complete the required NJQSAC training program prior to the issuance of the Commission's show cause order, documentation forwarded by the Charter's Lead Person reveals that Mr. Lytle served on the board of trustees of the North Star Academy Charter School since 2001, and had completed his first term of service in 2002, prior to the effective date of the amendment, March 15, 2007. Finding nothing in the plain language of the statute that would permit the retroactive application of the second-year training requirement, the Commission determines that Mr. Lytle was

not subject to the expanded training requirements that became effective on March 15, 2007. (Commission's April 26, 2011 Decision at 2)

Accordingly, given that the finding of violation upon which it was based has now been vacated by the Commission, the Commissioner's decision of January 10, 2011 is concomitantly VACATED and shall be deemed of no force and effect.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/03/11

Date of Mailing: 6/03/11

	:	**BEFORE THE SCHOOL**
	:	**ETHICS COMMISSION**
IN THE MATTER OF	:	
MICHAEL LYTLE	:	
North Star Academy Charter School	:	**DECISION TO VACATE**
Essex County	:	**PRIOR DECISION FOR FAILURE**
	:	**TO ATTEND TRAINING**
	:	
	:	**DOCKET NO. T23-10/2**
	:	**AGENCY DKT. NO. 683-11/10**

PROCEDURAL HISTORY

This matter arises from a decision issued by the School Ethics Commission on November 23,2010, in the above-captioned matter, finding that Michael Lytle violated the School Ethics Act ("Act") by failing to attend school board member training in accordance with N.J.S.A. 18A:12-33. The Commission's enforcement was based on information the New Jersey School Boards Association ("NJSBA") provided in its required report of those board members and trustees who have not fulfilled the training mandate of the Act, issued to the Commission pursuant to N.J.A.C. 6A:28-4.2(c). The 2010 report from the NJSBA indicated that Michael Lytle failed to complete the school district governance training program entitled "NJQSAC," which is required in a trustee's second year of service on the Board.

In July, 2010, the School Ethics Commission issued a Notice of Enforcement to the respondent's Charter School Administrator and provided Mr. Lytle with a copy of the same, notifying both that the NJSBA identified the trustee as having failed to complete the NJQSAC training program within the required training period. On September 22, 2010, the Commission issued an Order to Show Cause pursuant to N.J.A.C. 6A:28-1.6 to Mr. Lytle asserting that he failed to complete the mandated training. Mr. Lytle responded that he had received the show cause notice and was scheduled to attend training on October 19, 2010. Mr. Lytle completed the training on October 19, 2010.

By decision dated November 23, 2010, the Commission determined that Michael Lytle failed to comply with the training mandate and therefore was in violation of N.J.S.A. 18A:12-33, but that respondent's completion of the training program after receipt of the Order to Show Cause served to mitigate the penalty in this matter. The Commission recommended the penalty of reprimand to the Commissioner of Education. The Commissioner of Education concurred with the Commission's recommended sanction by decision dated January 10, 2011. I/M/O Michael Lytle, Board of Trustees of the North Star Academy Charter School, Essex County, T23-10/2 (November 23, 2010), Commissioner of Education Decision No. 13-11SEC, decided January 10, 2011.

In February 2011, a charter school trustee inquired about the applicability of the training requirements to a trustee who had completed the first term of service prior to the enactment of the expanded training requirements in March 2007. The Commission determined that, at its meeting on March 22, 2011, it would review the application and enforcement of the training requirement to board members or trustees whose first term of service was completed prior to March 2007. In furtherance of its review, the Commission sent a request to Mr. Lytle for specific documentation of his tenure as a trustee at the North Star Academy Charter School. Mr. Michael Ambriz, Lead Person of the North Star Academy Charter School provided documentation to the Commission that Mr. Lytle has served the Academy continuously from 2001 through 2011 and that he completed his first term as trustee in 2002.

ANALYSIS

The School Ethics Act, N.J.S.A. 18A:12-21 et seq., was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators. N.J.S.A. 18A:12-33 requires each board member and charter school trustee to complete training offered by the NJSBA. Specifically, all board members and charter school trustees must complete a training program during the first year of their first term. (N.J.A.C. 6A:28-4.1(a) and (N.J.A.C. 6A:11-3.1(d)). In 2007, the training requirement was amended by the School District Accountability Act, P.L. 2007, c.53, to include the requirement that each board member "shall complete a training program on school district governance in each of the subsequent two years of the board member's first term." N.J.S.A. 18A:12-33a. As noted above, the 2010 report from the NJSBA indicated that Mr. Lytle failed to complete the school district governance training program entitled NJQSAC within the required time period.

Although there is no dispute that the respondent did not complete the required NJQSAC training program prior to the issuance of the Commission's show cause order, documentation forwarded by the Charter's Lead Person reveals that Mr. Lytle served on the board of trustees of the North Star Academy Charter School since 2001, and had completed his first term of service in 2002, prior to the effective date of the amendment, March 15, 2007. Finding nothing in the plain language of the statute that would permit the retroactive application of the second-year training requirement, the Commission determines that Mr. Lytle was not subject to the expanded training requirements that became effective on March 15, 2007.

DECISION

At its meeting on March 22, 2011, the Commission voted to vacate its prior decision and find that Mr. Lytle did not violate N.J.S.A. 18A:12-33. A copy of this decision shall be forwarded to the Commissioner of Education for action as he deems necessary.

Robert W. Bender
Chairperson

Mailing Date: April 27, 2011

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on April 26, 2011.

Joanne Boyle, Executive Director

216-11

OAL DKT. NO. EDU 808-11
AGENCY DKT. NO. 8-1/11

IN THE MATTER OF THE TENURE HEARING OF GLORIA GRANTHAM, SCHOOL DISTRICT OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY.	COMMISSIONER OF EDUCATION DECISION

The proposed Stipulation of Settlement (Stipulation) of the above-captioned matter was executed by the State Monitor and counsel for both parties and submitted to the Office of Administrative Law on or about April 13, 2011. The Commissioner concludes that the Stipulation is consonant with the standards of *In re Cardonick,* 1990 *S.L.D.* 842 (1990) and accordingly approves it.

The petition is hereby dismissed, subject to compliance with the applicable settlement terms.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6|13|11

Date of Mailing: 6|14|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 808-11
AGENCY DKT. NO. 8-1/11

IN THE MATTER OF THE TENURE HEARING OF DR. GLORIA GRANTHAM, SCHOOL DISTRICT OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY.

Raymond L. Hamlin, Esq., for petitioner, Pleasantville Board of Education (Hunt, Hamlin & Ridley, attorneys)

Andrew Babiak, Esq., for respondent, Gloria Grantham

Record Closed: April 13, 2011 Decided: April 26, 2011

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

This matter was transmitted to the Office of Administrative Law on January 27, 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 April 5, 2011.

2. The settlement is in compliance with the standards set forth in In Re Cardonick, 1990 S.L.D. 842 (1990). In reaching this conclusion, I afford substantial weight to the opinions espoused by James Riehman, State Monitor for the Pleasantville Board of Education. Mr. Riehman concluded that respondent's return to the position of Superintendent would have a negative effect upon the District, and that it was in the best interest of the school district that the present administration remain in place.

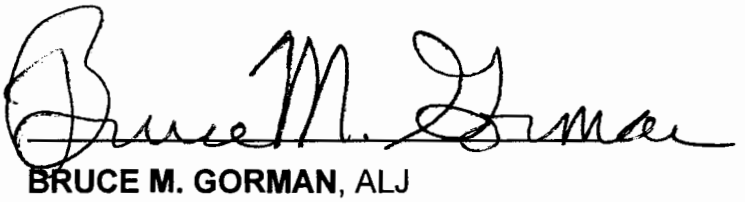
3. The settlement fully disposes of all issues in controversy and is consistent with the law.

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.

April 26, 2011
DATE



BRUCE M. GORMAN, ALJ

Date Received at Agency: APR 29 2011

Date Mailed to Parties: APR 29 2011

/sd

The Law Firm of

HUNT, HAMLIN & RIDLEY

COUNSELORS AT LAW
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Vielka Velazquez

*Also admitted in PA
†Also Admitted in NY

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2011 APR 13 P 2:50

April 13, 2011

The Honorable Bruce M. Gorman, A.L.J.
Office of Administrative Law
1601 Atlantic Avenue
Atlantic City, New Jersey 08401

Re: **Gloria Grantham v. Pleasantville Board of Education, et al.**
Agency Ref. No.: 8-1/11
OAL Dkt. No.: EDU 00808-2011S

Dear Judge Gorman:

Enclosed please find an original and two copies of the executed Settlement Agreement in the above captioned matter. In addition, I have enclosed a copy of the handwritten agreement which was executed on April 5, 2011, the Respondent's letter of resignation, a copy of the Tenure Charges which were filed on or about January 7, 2011 and a copy of the Certified Resolution by the Board of Education approving the Settlement.

If you have any questions or concerns please contact my office.

Respectfully submitted,

HUNT, HAMLIN & RIDLEY

RAYMOND L. HAMLIN

Enclosure

cc: Andrew Babiak, Esq.

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

April 13, 2011

I Certify, that this is an approved resolution from the Pleasantville Board of Education Minutes, dated April 12, 2011.

RESOLUTION ACCEPTING THE RESIGNATION OF DR. GLORIA GRANTHAM, SUPERINTENDENT OF SCHOOLS, EFFECTIVE APRIL 12, 2011, SUBJECT TO THE APPROVAL OF THE SETTLEMENT BY THE COMMISSIONER OF EDUCATION PURSUANT TO THE CASE ENTITLED "IN THE MATTER OF THE TENURE HEARING OF DR. GLORIA GRANTHAM, SCHOOL DISTRICT OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY"

WHEREAS, the Board of Education accepts the resignation of Dr. Gloria Grantham as Superintendent of Schools, effective April 12, 2011, which same is subject to the approval of the Settlement Agreement in the matter currently pending before the Commissioner of Education under Agency Ref. No.: 8-1/11, and OAL Docket Number: EDU 00808-2011S.

NOW THEREFORE BE IT RESOLVED, that the Pleasantville Board of Education accepts the resignation of Dr. Grantham as Superintendent of Schools effective April 12, 2011, upon final approval by the Commissioner of Education.

MOVED: Mr. Marvin Royal SECOND: Ms. Ethel Seymore Yea: X Nay:

ROLL CALL:

Ms. Jackson	Absent	Ms. Griffin	Yes
Mrs. Bey-Blocker	Absent	Mr. Royal	Yes
Ms. Famularo	Absent	Mrs. Seymore	Yes
Mr. McClellan	Yes	Mrs. Graves	Yes
Mr. Moore	Yes		

SIX YES; MOTION PASSED.

Thank you,

Dennis Mulvihill
Business Administrator/Board Secretary

ELVA THOMAS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 7, 2014

DJM/gg
13th day of April 2011

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

April 13, 2011

I Certify, that this is an approved resolution from the Pleasantville Board of Education Minutes, dated April 12, 2011.

RESOLUTION APROVING THE SETTLEMENT OF THE CASE ENTITLED "IN THE MATTER OF THE TENURE HEARING OF DR. GLORIA GRANTHAM, SCHOOL DISTRICT OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY"

WHEREAS, the Board of Education and Dr. Grantham have decided to resolve the matter currently pending before the Commissioner of Education under Agency Ref. No.: 8-1/11, and OAL Docket Number: EDU 00808-2011S.

NOW THEREFORE BE IT RESOLVED, that the Pleasantville Board of Education approves the aforementioned settlement which will be on file with Board Secretary's Office upon final approval by the Commissioner of Education.

MOVED: Mr. Paul Moore, Jr. SECOND: Ms. Melanie Griffin Yea: X Nay:

ROLL CALL:

Ms. Jackson	Absent	Ms. Griffin	Yes
Mrs. Bey-Blocker	Absent	Mr. Royal	No
Ms. Famularo	Absent	Mrs. Seymore	Yes
Mr. McClellan	Yes	Mrs. Graves	Yes
Mr. Moore	Yes		

FIVE YES; MOTION PASSED.

Thank you,

Dennis Mulvihill
Business Administrator/Board Secretary

DJM/gg

Elva Thomas
8th day of April 2011

ELVA THOMAS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 7, 2014

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Attorneys for Petitioner,
School District of Pleasantville

IN THE MATTER OF THE TENURE HEARING OF DR. GLORIA GRANTHAM, SCHOOL DISTRICT OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY AGENCY REF. NO.: 8-1/11 OAL DKT. NO.: EDU 00808-2011S

STIPULATION OF SETTLEMENT

WHEREAS, the Board of Education of the City of Pleasantville ("Board of Education or "District") certified and filed tenure charges with the Commissioner of Education against the Superintendant of Schools, Gloria Grantham, Ph.D ("Dr. Grantham") on or about January 6, 2011, a copy of which charges and Certification of Determination are attached hereto;

WHEREAS, the Commissioner of Education transmitted the tenure charges to the Office of Administrative Law and the case was assigned to the Honorable Bruce Gorman, A.L.J.; and

WHEREAS, Dr. Grantham filed a Motion to Dismiss the tenure charges in Lieu of an Answer; and

WHEREAS, the parties, through their respective counsel, participated in settlement discussion and negotiations on April 5, 2011; and

WHEREAS, hearings are scheduled to begin in June 2011 and extensive discovery will be required; and

WHEREAS, the Board has had a full opportunity to investigate this matter, and based upon that investigation, 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, that the settlement avoids the uncertainty of litigation and a lengthy and expensive hearing process and possible appeals, and that Dr. Grantham 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 Stipulation of 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 Dr. Grantham 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 provides stability in terms of certainty in leadership of the District; and

WHEREAS, Dr. Grantham has filed a civil action against the Board of Education in the Superior Court of Atlantic County in connection with her employment with the Board under docket number: ATL-L-2297-11; and

WHEREAS, the parties have determined it to be in their respective best interests to resolve the case and come to an agreement with respect to the issues presented in this matter; and

WHEREAS, the Board of Education has determined that it is in the best interest of the Pleasantville School District, and the public at large to retain the present leadership to provide stability and certainty of leadership and order within the District now and in the future and to avoid a disruption of the administration which would clearly have an adverse impact upon the children of the District; and

WHEREAS, the Board of Education believes that the prosecution of the tenure charges will divert substantial sums of money, time and key staff resources from the true mission of the Pleasantville School District, the parties have agreed to resolve this matter under and subject to the terms outlined in this Stipulation of Settlement:

AGREEMENT

The parties to this Agreement, intending to be legally bound, agree as follows:

1. Upon the execution and approval of this Stipulation of Settlement, the Board of Education hereby withdraws the tenure charges with prejudice, and Dr. Grantham agrees to the dismissal of same.
2. By executing this Stipulation of Settlement, Dr. Grantham hereby resigns from her position with the Board of Education to be effective April 12, 2011. It is understood and agreed that Dr. Grantham's resignation is conditioned upon the Board of Education's fulfillment of the terms hereof and upon the Commissioner of Education's approval hereof. In the event the Commissioner of Education rejects this Agreement the Board shall reinstate Dr. Grantham to the District's payroll retroactive to April 12, 2011, and shall reinstate her salary effective May 7, 2011. Dr. Grantham shall submit, in writing, her letter of resignation to the Board of Education, subject to the terms hereof, on or before April 12, 2011. The rejection if any by the Commissioner of Education shall result in the continuation of the status quo as it relates to the pending tenure charge case.
3. The Board of Education shall pay Dr. Grantham the sum of Three Hundred and Thirty-Five Thousand Dollars ($335,000.00) as follows:

(a) The Board shall pay Dr. Grantham her salary retroactively from January 7, 2011 through April 12, 2011 upon the Commissioner of Education's approval of this Agreement;

(b) The Board shall pay Dr. Grantham the difference between the gross retroactive salary payment in (a) and $167,500.00 upon the Commissioner of Education's approval of this Agreement but no later than ten (10) days thereof; and

(c) The Board shall pay Dr. Grantham $167,500.00 on or before January 15, 2012. With respect to the payments in (a) and (b) above, the Board, through its business office, shall provide Dr. Grantham an accounting of the payouts. The Board shall make all necessary payroll deductions and/or withholdings from the foregoing amounts for federal and state taxes and for pension contributions.

4. In accordance with Executive Order 11, in response to requests for information about Dr. Grantham's employment, the Board of Education shall indicate the dates of her employment and the fact that she resigned in good standing from the Pleasantville School District. Nothing herein shall prevent Dr. Grantham from obtaining letters of reference from former and/or current members of the Board of Education. The Board of Education agrees that it shall not make any disparaging statements in public about Dr. Grantham's character or performance as Superintendent and Dr. Grantham shall not make any disparaging comments about the Board of Education.

5. The Board of Education and Dr. Grantham agree to release each other from any and all claims which they have now, or may have in the future against each other relating to Dr. Grantham's employment with the Board. Excepted from this release is the case Dr. Grantham has against the Board of Education in connection with her annual

evaluation pursuant to Agency Ref. No. 268-8/10 and OAL Docket No. EDU-09835-2010 S. Nothing in this paragraph shall waive any rights Dr. Grantham may have to COBRA benefits in accordance with Federal Law, and/or any rights she has under the Teachers Pension and Annuity Fund Act.

6. The parties understand that this Stipulation of Settlement is contingent upon the approval of the Honorable Bruce Gorman, A.L.J and the Commissioner of Education. It is understood and agreed that in the event such approval is not granted then this Agreement shall be null and void except to the extent that Dr. Grantham shall be reinstated to the District's payroll in accordance with paragraph 2 hereof, and that the parties shall retain all rights they had prior to their execution of this agreement.
7. The parties warrant that they have entered into this Stipulation of Settlement voluntarily, without any duress or undue influence and that by entering into this agreement, each party waives their right to a hearing and disposition on the merits of the tenure charges.
8. The State Monitor assigned to the District also has approved the terms of this Stipulation of Settlement.
9. Dr. Grantham shall cause the pending case in the Superior Court, Atlantic County to be dismissed under Docket number ATL-L-2297-11 with prejudice.
10. The Board agrees that it shall not bring any additional tenure charges against Dr. Grantham.
11. Dr. Grantham understands and agrees that the Commissioner of Education may refer this matter to the State Board of Examiners for possible action against her certificate.

IN WITNESS WHEREOF, the parties acknowledge their agreement to these terms by their signatures below:

For the Petitioner Pleasantville Board of Education:

James Riehman
State Monitor for PBOE

DATE: April 11, 2011

Doris Graves,
President of PBOE

DATE: 4/12/2011

Terry Ridley
Counsel for the PBOE

DATE: 4/12/2011

For Respondent, Dr. Gloria Grantham, Ph.D.

Gloria Grantham

DATE: April 11, 2011

Andrew Babiak, Esq.
Counsel for Gloria Grantham

DATE: April 11, 2011

#218-11

IN THE MATTER OF THE TENURE	:	
HEARING OF SYLVIA ALEMAN	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF UNION CITY,	:	DECISION
HUDSON COUNTY.	:	

SYNOPSIS

Petitioning Board filed tenure charges of excessive absenteeism and other just cause against respondent, a tenured custodian, 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 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 position in the district as of the date of this 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.

June 14, 2011

AGENCY DKT NO. 106-5/11

IN THE MATTER OF THE TENURE	:	
HEARING OF SYLVIA ALEMAN	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF UNION CITY,	:	DECISION
HUDSON COUNTY.	:	

For the District, Elsie DiNardo, Esq., Office of Susanne Lavelle, Esq.

No appearance by or on behalf of Sylvia Aleman

This matter was opened before the Commissioner of Education on May 6, 2011 through the certification of tenure charges of excessive absenteeism and other just cause by the School District of Union City against Sylvia Aleman, a tenured custodian in the District.

By notice dated May 6, 2011, the Commissioner directed respondent, via both certified and regular mail – the certified copy having been signed for on May 11, 2011 – 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, each count of the charges against respondent is deemed to be admitted.

The Commissioner has reviewed the tenure charges certified against respondent by the District, *i.e.*, excessive absenteeism and other just cause (insubordination, disobedience, job abandonment and unsatisfactory job performance), and the statement of evidence in support of those charges.

Deeming such charges to be admitted, and 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 excessive absenteeism and other just cause, warranting dismissal from her tenured position.

Accordingly, summary decision is hereby granted to the District, and respondent Sylvia Aleman is dismissed from her tenured custodian position in the District's employ as of the date of this decision.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/14/11

Date of Mailing: 6/15/11

[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).

#219-11E

OAL DKT. NO. EDU 4467-11
AGENCY DKT. NO. 87-4/11

BOARD OF EDUCATION OF THE OCEAN COUNTY VOCATIONAL SCHOOL, OCEAN COUNTY,

PETITIONER,

V.

J.O.,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON MOTION

The record of this matter – including the audio recording of the April 28, 2011 hearing[1] – and the Initial Decision of the Office of Administrative Law (OAL) recommending denial of the instant motion for emergent relief have been reviewed.[2] For the reasons thoroughly articulated by the Administrative Law Judge, the Commissioner denies the motion and remands this case to the OAL for a hearing on the merits.

The controversy appears to have been precipitated by concerns expressed by administrative personnel about respondent's conduct, including his behavior towards his colleagues and supervisors. In response to the expressed concerns, the petitioning Board looked into the matter and determined that respondent should be suspended pending the results of a psychiatric evaluation. Although respondent did meet with a psychiatrist provided by petitioner

[1] Those portions of the record consisting of respondent's medical and/or psychiatric records, or documents describing same, shall be sealed.

[2] The exceptions and replies thereto submitted by the parties have not been considered, as there is no provision in the applicable regulations for exceptions to decisions on emergent relief motions.

– Dr. Kenneth J. Rubin – he was allegedly defensive and reluctant to divulge information, preventing Dr. Rubin from fully evaluating his mental status.

Pursuant to Dr. Rubin's request, and in an effort to obtain more information upon which to assess respondent's mental status, petitioner demanded that respondent sign a release (Respondent's Exhibit R-1) allowing Dr. Rubin to review his medical history. No limitations of any kind were noted on the release form, and the letter transmitting the release demanded that respondent furnish "the names and addresses of all of the medical and mental health physicians that you have been treated by or with since [sic] January 1, 2009 to the present." (Petitioner's Exhibit P-O) Further, the release form stated that "I understand that any disclosure of information may be subject to re-disclosure by the recipient and may no longer be protected by federal or state law."

Petitioner asserts that the release is essential to a determination as to whether respondent is fit to teach in its district, and that emergent relief is necessary to spare petitioner the expense of paying respondent's salary while the administrative litigation proceeds. Respondent contends that: the breadth and terms of the release in question jeopardize his privacy rights; the law does not support petitioner's sweeping request for his medical and psychiatric history; and same is not necessary to a psychiatric evaluation. Consequently, respondent concludes that the balance of equities favor the respondent, the law is settled against petitioner, petitioner is not likely to prevail, and the standards for emergent relief are not met.

The ALJ carefully applied the standards – set forth in *N.J.A.C.* 6A:3- 1.6 – for granting emergent relief, and the Commissioner agrees with his conclusions. First, without further fact finding it is not clear that the requested release is necessary to accomplish petitioner's objective. Thus, a finding of irreparable harm is not indicated. Second, the law does

not clearly support the type and breadth of disclosure that petitioner demands. Third, petitioner has not shown a likelihood of success, and fourth, the record as it stands does not definitively support the Board's contention that a balancing of the equities favors it.

Accordingly, the Initial Decision denying petitioner's motion for emergent relief is adopted.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: ~~6/14/11~~

Date of Mailing: 6/15/11

[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

ORDER ON APPLICATION FOR EMERGENT RELIEF
(PORTION SEALED)
OAL DKT. NO. EDU 4467-11
AGENCY DKT. NO. 87-4/11

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOL IN THE COUNTY OF OCEAN,

Petitioner,

v.

J.O.,

Respondent.

Robert C. Shea, Esq., for petitioner (Shea & Associates, attorneys)

Keith Waldman, Esq., for respondent (Selikoff & Cohen, attorneys)

Record Closed: April 28, 2011 Decided: May 2, 2011

BEFORE **ROBERT BINGHAM II**, ALJ:

STATEMENT OF THE CASE

Petitioner, Board of Education of the Vocational School in the County of Ocean (the Board), applies for emergent relief, seeking an order compelling the respondent,

J.O., to provide authorization to obtain his past medical history in order for the Board's physician to complete a psychiatric examination, pursuant to N.J.S.A. 18A:16-2. The Board contends that the right of a school district to require that one of its employees undergo psychiatric examination commands that J.O. furnish a general authorization for release of medical records for that purpose. J.O. contends that the Board may not require an employee to release his or her entire medical history in order to facilitate such a psychiatric examination.

PROCEDURAL HISTORY

On April 15, 2011, the Board filed a petition to compel J.O. to provide medical records. The Commissioner of Education transmitted the case, as an emergent matter, to the Office of Administrative Law (OAL), where it was filed on April 25, 2011. On April 28, 2011, an emergent hearing was held and concluded.[1]

FACTUAL DISCUSSION

The material facts are undisputed. Accordingly, I **FIND AS FACT** the following.

J.O. is a tenured culinary instructor employed by the Ocean County Vocational School. During the months of October through December 2010, school personnel developed concerns regarding his purported behavior. On or about December 8, 2010, he was suspended with pay. By letter dated December 17, 2010 (Exhibit P-3),[2] the Board, through counsel, notified him of continued suspension with pay until further notice, and requested that he undergo a psychiatric evaluation by a Board-designated physician. Although J.O. initially requested a hearing regarding the psychiatric

[1] This Order is being filed at the earliest possible time in light of the undersigned ALJ's assigned responsibilities on April 29, 2011.

[2] For the purpose of convenience, petitioner's exhibits A through R are designated as P-1 through P-18, respectively; AA through DD are designated as P-19 through P-22, respectively. Respondents exhibits A through C are designated as R-1 through R-3, respectively.

evaluation (Exhibit P-4), he subsequently waived his right to the hearing and agreed to undergo the examination (Exhibits P-11, P-12).

In that regard, on March 4, 2011, the Board requested that J.O. provide a release for medical records to facilitate the required psychiatric examination. The release form (Exhibit R-1) was general; it contained no restriction regarding either the type or the time frame of medical records sought. On March 11, 2011, through counsel, J.O. refused to provide the authorization for his medical records (Exhibit P-16). Nonetheless, on March 16, 2011, he underwent the psychiatric examination which was given by Dr. Kenneth J. Rubin.

On or about March 28, 2011, the Board received Dr. Rubin's report dated March 16, 2011 (Exhibit P-17a). Although he interviewed J.O. and reviewed school records, Dr. Rubin was unable to render a final diagnosis or opinion due to J.O.'s nondisclosure of his medical history. In pertinent part, the report stated:

> As he presents today in this examination, there is no overt concern about being a risk to himself or others, but as above, without getting adequate or sufficient history or not entering necessary and appropriate questions, I am not able to give a proper diagnosis and recommendations.
>
> Because of his defensiveness, not willing to divulge information, I believe one of the ways it may be able to elicit some of that would be if he would have neuropsychological testing, specifically including protective tests by a forensic psychiatrist, including malingering scales, and other tests of their nature to get an understanding of the kind of personality or other psychopathology that might be present.
>
> . . . .
>
> I would gladly review the psychological testings as that will help give an opinion. Also . . . it would be very helpful to have his medical records, and mental health records from anybody he has treated with, a psychologist or a psychiatrist, because the patient does have a psychiatric history, did have a medical problem last year, and the details of that would be helpful to know. Also the possibility that even

> some of the medication he was taking during this period of time or now could contribute to his behavior but without knowing what the medications are, one cannot give that opinion. Therefore, without all pertinent and relevant facts and information a final opinion about any psychiatric disorder or his capability or ability to teach, be around students or other teachers cannot be made.
>
> [Exhibit P-17a, at 8.]

On April 15, 2011, the Board filed a petition to compel J.O. to provide medical records. At some point, J.O. provided to Dr. Rubin, for his review, the report of another psychiatrist that had evaluated J.O.[3] By note dated April 27, 2011 (Exhibit P-17b), Dr. Rubin indicated that after reviewing that report, he maintained his opinion and recommendation as indicated in his report dated March 16, 2011, namely, that he would "like to review all previous medical [and] mental health records." Ibid.

LEGAL ANALYSIS AND CONCLUSION

A school board may require an employee to undergo a psychiatric examination when, in its judgment, an employee "shows evidence of deviation from normal, physical or mental health." N.J.S.A. 18A:16-2(a). If required by the Board, such an examination may include laboratory tests or fluoroscopic or x-ray procedures for the purpose of obtaining additional diagnostic data. Ibid. The statute provides for the development of guidelines by the Department of Education, in consultation with the Department of Health, for school boards electing to require testing. The statute has been upheld as constitutional with respect to issues of an employee's rights of association, expression and privacy. Kochman v. Keansburg Board of Education, 124 N.J. Super. 203 (Ch. Div. 1973). See also, Gish v. Board of Education, 145 N.J. Super. 96 (App. Div. 1976) (teacher's free speech and due process rights were not implicated by the board's ability to require a teacher to undergo psychiatric testing).

[3] Neither party submitted that report as evidence in this matter.

Pursuant to N.J.A.C. 6A:32-6.3, which sets forth requirements for physical examinations, a required examination for any candidate for employment or newly employed staff may include a health history. The regulation makes no such provision for inclusion of a health history with regard to an experienced employee.

> Any examinations or assurances required or permitted by N.J.S.A. 18A:16-2(a) or this subchapter shall be limited to those assessments or information necessary to determine the individual's physical and mental fitness to perform with reasonable accommodation in the position which he or she seeks or currently holds, and to detect any health risks to students and other employees.
>
> [N.J.A.C. 6A:32-6.3(d) (emphasis added).]

With regard to specific instances when an employee is required to undergo a psychiatric examination, the "employee may, without reprisal, refuse to waive his or her right to protect the confidentiality of medical information, in accordance with P.L. 104-191, Health Insurance Portability and Accountability Act of 1996 (HIPAA)." N.J.A.C. 6A:32-6.3(e)(3). The Commissioner of Education recognized that right of refusal when, in the fashioning of a penalty against a tenured teacher, it was noted, "Nothing herein is intended to foreclose the Board from subsequently directing that respondent be examined pursuant to N.J.S.A.18A:16-2 if, in its judgment, respondent shows evidence of deviation from normal health, provided, however, that such directive must be effectuated in accordance with N.J.A.C. 6A:32-6.3(e) or such other rule as may be applicable at that time." In the Matter of the Tenure Hearing of Adelphia Poston, School District of the City of Orange, EDU 3876-05, Final Decision, (October 19, 2006), <http://lawlibrary.rutgers.edu/search.shtml> (emphasis in original).

HIPAA requires that medical disclosures be limited to the minimum necessary information to accomplish the intended purpose. 45 CFR §164.502 (b). Additionally, the Americans with Disabilities Act (ADA), which prohibits discrimination on the basis of disability, limits the field of inquiry into a current employee's disability and medical history. 42 U.S.C. § 12112 (d)(4).

N.J.A.C. 1:1-12.6(a) provides for the granting of emergency relief 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. In such circumstances, emergency relief pending a final decision may be ordered upon the application of a party. Subparagraph (f) of this section provides that temporary relief may be granted if there is a finding that immediate and irreparable harm will probably result, if there is the likelihood that the moving party will prevail, and if the relief is as limited in scope and as temporary as possible.

The foregoing regulation embodies the principles of law announced by the court in Crowe v. DeGioia, 90 N.J. 126, 132 (1982). These legal principles may be summarized as follows:

1. Emergency relief should not issue except when necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be redressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Pecuniary damages may be inadequate because of the nature of the injury or of the right affected.

2. Emergency relief should be withheld when the legal right underlying the claim of the requesting party is unsettled.

3. Emergency relief should not issue where all material facts are controverted. Thus, to prevail on an application for emergency relief, the party requesting the relief must make a preliminary showing of a reasonable probability of ultimate success on the merits. That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. The point of emergency relief is to maintain the parties in

substantially the same condition when the final decision is issued, as they were when the litigation began.

4. The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief. The relief granted should be no broader than necessary to preserve the status quo pending a full hearing on the merits.

The application of the above standard to the facts to this case yields the conclusion that petitioner has not met, as it must, all of the above criteria for emergent relief.

Irreparable Harm

The Board argues that it will suffer irreparable harm if relief is not granted because it would have to continue to pay J.O.'s salary during his suspension without any means by which to recoup those funds.[4] J.O. correctly argues that 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. Further, the Board apparently has other options, including: specifically and narrowly tailoring the authorization for release of medical records; immediately requiring the neuropsychological testing referenced by Dr. Rubin; or, should the Board deem appropriate, certifying tenure charges, under N.J.S.A. 18A:6-14, and suspending J.O. without pay. I therefore **CONCLUDE** that petitioner has not shown immediate harm that would constitute irreparable injury justifying issuance of injunctive relief.

[4] The Board would include the salary of the substitute replacement for J.O. for purposes of this analysis; however, there is no evidence in the record to establish that fact.

Right to Underlying Claim Must be Settled

As to the requirement that the right underlying the claim of a requesting party must be settled, it is clear that the Board may require that an employee undergo a psychiatric examination when, in the Board's judgment, he or she displays evidence of deviant physical or mental health. It is also clear that such an examination may include laboratory tests or fluoroscopic or x-ray procedures for the purpose of obtaining additional diagnostic data.

It is unclear, however, whether the scope of any required psychiatric examination must include an involuntary authorization for a general release of unlimited medical records in light of N.J.A.C. 6A:32-6.3, HIPAA and ADA. Accordingly, I **CONCLUDE** that petitioner has not shown that the Board has an absolute right to require that a current employee undergoing a psychiatric examination execute or waive an authorization for general release of his medical records.

Reasonable Probability of Prevailing on the Merits

The Board argues that there is a reasonable likelihood of success on the merits because of its indisputable right to have J.O. undergo a psychiatric examination pursuant to N.J.S.A. 18A:16-2(a). J.O. asserts that, in light of N.J.A.C. 6A:32-6.3, HIPAA and ADA, the probability of success is in his favor. As indicated above, there exists the unsettled question of whether the Board may require an employee to release his or her medical history, without limitation, pursuant to a psychiatric examination under N.J.S.A. 18A:16-2. Accordingly, I **CONCLUDE** that petitioner has not shown that the Board has 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. The Board argues that it would suffer the greater hardship because it would have to continue paying J.O.'s salary while being left without any options. It could not complete the psychiatric examination, thereby safeguarding its duty to protect the public, and it absolutely would not return J.O. to his position otherwise. J.O. asserts that any release of his medical history to the Board and Dr. Rubin is "irreversible," and that his privacy rights "will irretrievably be compromised."

The flaw in the Board's argument is that Dr. Rubin indicated "one of the ways it may be able to elicit some of that [information] would be if he would have neuropsychological testing, specifically including protective tests by a forensic psychiatrist." Dr. Rubin further expressed his willingness to review such testing to help in rendering his opinion. Thus, there apparently does exist an option whereby Dr. Rubin could complete his evaluation with additional testing that would not require unfettered release of limitless private medical information. The flaw in J.O.'s argument is that the pertinent regulation does provide for the security, separate maintenance and limited access to an employee's medical file. N.J.A.C. 6A:32-6.3(f).

On balance, and especially in light of the additional option for completion of Dr. Rubin's evaluation, I agree that the greater harm would be to respondent, notwithstanding the protections afforded by the regulation. Accordingly, I **CONCLUDE** that petitioner has not shown that the Board would suffer a greater hardship if relief were denied pending a plenary hearing.

DECISION AND ORDER

Based upon the foregoing, I **FIND** that for purposes of deciding this application for emergency relief, petitioner has failed to establish: (1) the existence of irreparable harm, (2) that its claim is based upon a settled right, (3) that there is a likelihood of prevailing on the merits, and (4) that, on balance, it would suffer a greater relative hardship pending a full hearing on the merits.

Accordingly, I **CONCLUDE** that petitioner's request for emergency relief seeking an order compelling the respondent, J.O., to provide authorization to obtain his past medical history, in order for the Board's physician to complete a psychiatric examination, pursuant to N.J.S.A. 18A:16-2, should be and hereby is **DENIED.**

It is so **ORDERED.**

It is further **ORDERED** that, except for the purpose of any review of this Order, any and all medical or psychiatric reports or records in this matter be and hereby are **SEALED.**

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.

May 2, 2011
DATE

ROBERT BINGHAM II, ALJ

Date Received at Agency: May 2, 2011

Date Mailed to Parties: May 2, 2011

cmo

APPENDIX
EXHIBITS

For Petitioner:

P-1 Superintendent's letter to J.O. dated December 10, 2010

P-2 Board Resolution dated December 16, 2010

P-3 Board counsel's letter to J.O. dated December 17, 2010

P-4 Letter dated December 20, 2010, from Joan Szalza to Robert Shea, Esq.

P-5 Letter dated January 24, 2011, with enclosure, from Robert Shea, Esq. to J.O.

P-6 Letter dated January 24, 2011, and attached exhibits A through E, outlining statement of reasons, from Superintendent William Hoey, Jr.

P-7 Affidavit of Lillian Zavattieri dated April 7, 2011, with attached chronology

P-8 Memoranda from Lillian Zavattieri, Principal (Exhibits "A-1" through "A-4")

P-9 Affidavit of Nancy Weber-Loeffert dated April 7, 201, with attachments

P-10a Affidavit of John Biscardi, with attachment, dated April 7, 2011

P-10b Affidavit of Lynn Sauer, with attachments, dated April 7, 2011

P-11 Fax Memorandum dated April 7, 2011, from Joan Szalza to Robert Shea, Esq.

P-12 Memoranda dated February 15, 2011, from J.O. to Joan Szalza

P-13 Letter dated February 16, 2011, from Robert Shea, Esq. to Joan Szalza

P-14 Board Resolution dated March 3, 2011

P-15 Letter dated March 4, 2011, from Robert Shea, Esq. to J.O.

P-16 E-mails dated March 11, 2011, between Robert Shea, Esq. and Keith Waldman, Esq.

P-17a Report of Dr. Kenneth J. Rubin dated March 16, 2011

P-17b Note of Dr. Kenneth J. Rubin dated April 27, 2011

P-18a Board Resolution dated March 17, 2011

P-18b Order to Show Cause filed April 15, 2011

P-18c Letter dated March 4, 2011, from Robert Shea, Esq. to Department of Education, with attached the Verification of Petition dated April 19, 2011

P-19 Affidavit of Lillian Zavattieri dated April 7, 2011, with attached chronology, and memoranda (Exhibits "A-1" through "A-4") (same as P-7 and P-8)

P-20 Affidavit of Nancy Weber-Loeffert dated April 7, 201, with attachments (same as P-9)

P-21 Affidavit of John Biscardi, with attachment, dated April 7, 2011(same as P-10)

P-22 Affidavit of Lynn Sauer, with attachments, dated April 7, 2011

For Respondent:

R-1 Board's Authorization for Health Information Disclosure

R-2 Penn Medicine Authorization for Health Information Disclosure

R-3 U.S. Department of Health in Human Services Fact Sheet dated May 9, 2001

220-11

BELGICA POLANCO-GOMEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

On January 28, 2011, the petitioner – a tenured secretary formerly employed by the Board – filed an appeal charging, *inter alia*, that the respondent Board's abolishment – by resolution dated October 4, 2010 – of petitioner's position for reasons of economy and efficiency violated the law, and that petitioner was entitled to a full-time secretarial/clerical position held by non-tenured and/or less senior tenured employees. The Board filed a motion for summary decision, and sought dismissal of the petition for failure to comply with the 90-day requirement of *N.J.A.C.* 6A:3-1.3(i).

The ALJ found that: there are no material facts in dispute, and the matter is ripe for summary judgment; the 90-day period for filing an appeal begins once notice of the final order or ruling is given, which in this case occurred on October 4, 2010; petitioner's argument that the 90-day rule should be relaxed is unconvincing, and she has presented no evidence to show that extraordinary relief is warranted in this case. Accordingly, the ALJ granted summary decision to the respondent Board, and dismissed the petition.

Upon full consideration of the record and Initial Decision of the OAL – and finding the petitioner's exceptions without merit – the Commissioner concurred with the ALJ for the reasons detailed in the Initial Decision, 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.

June 15, 2011

OAL DKT. NO. EDU 2116-11
AGENCY DKT. NO. 23-1/11

BELGICA POLANCO-GOMEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN 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 and the Board's reply thereto – filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

Petitioner's exceptions do not dispute the fact that she failed to file the instant petition within the 90-days mandated by *N.J.A.C.* 6A:3-1.3(i). Rather, she again argues, as she did below, that the exigent circumstances existing in this matter – which included the need to find a new position in order to provide medical insurance coverage for her ill child and the lack of any immediate assistance to locate an attorney who could pursue this matter on her behalf – fully justify the Commissioner's relaxation of the 90-day rule in this case. She, therefore, seeks such relaxation and a remand of this matter for a decision on the merits of her claim. (Petitioner's Exceptions at 1-8)

In reply, the Board points out that petitioner was in no imminent danger of losing health benefits as she was fully aware that she was entitled to remain on the Board's health care plan through COBRA for at least eighteen months following her termination. Moreover, the Board attaches to its reply exceptions – as it had done to its reply brief in support of its Motion to Dismiss below – a copy of the November 23, 2010 Meeting Minutes of the East Rutherford Board of Education (petitioner's current employer). These minutes show that on that date the East Rutherford Board voted to hire petitioner as a

full-time employee at a salary considerably higher than what she earned in Englewood Cliffs. Consequently, notwithstanding petitioner's urging that her search for employment prevented her from seeking an attorney and filing a timely appeal in this matter, as of November 23, 2010, with thirty-five days remaining to appeal her termination, petitioner had already secured new employment with health benefits. (Board's Reply Exceptions at 1-2)

Upon his considered review – and finding petitioner's exceptions without merit – the Commissioner concurs with the Administrative Law Judge (ALJ) that the instant petition is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). The Commissioner, likewise, fully agrees – for the reasons discussed by the ALJ on pages 6-7 of her decision – that petitioner has failed to set forth a bona fide legal or factual basis for waiving the timely filing requirement.

Accordingly, the recommended decision of the OAL is adopted for the reasons stated therein. Summary decision is granted to the Board and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6|15|11

Date of Mailing: 6|15|11

* 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 02116-11
AGENCY DKT. NO. 23-1/11

BELGICA POLANCO-GOMEZ,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Ari G. Burd, Esq., for respondent (Giordano, Halleran & Ciesla, attorneys)

Record Closed: April 11, 2011 Decided: May 4, 2011

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On July 23, 2010, Belgica Polanco-Gomez (petitioner) was sent an e-mail advising her that the Superintendent of the Board of Education of the Borough of Englewood Cliffs (respondent) was in the process of reviewing the role and responsibilities of her position. (Respondent's Exhibit A.) On August 5, 2010, the Superintendent e-mailed the petitioner advising her that he would be making

recommendations regarding her position. (Respondent's Exhibit B.) On October 4, 2010, the Board adopted a Resolution abolishing petitioner's position for reasons of economy and efficiency. (Respondent's Exhibit C.) The Superintendent informed the petitioner on October 4, 2010, that her position had been abolished. On October 12, 2010, the Superintendent sent a letter to the petitioner, which enclosed a copy of the Board's October 4, 2010, Resolution and confirmed their conversation of October 4, 2010, wherein the petitioner had been informed that her position was abolished. (Respondent's Exhibit D.)

On January 28, 2011, the petitioner sent a Petition of Appeal to the Commissioner of Education[1] seeking a determination that respondent's summary termination of petitioner's employment violated the law; that petitioner, when her position was abolished, was entitled to a full-time secretarial/clerical position held by non-tenured and/or less senior tenured employees of the respondent; that petitioner should be returned to her position of employment together with all lost salary and other emoluments of employment; and that respondent should pay pre- and post-judgment interest. On February 23, 2011, the respondent filed its answer to the petition, in which it asked for the dismissal of the petition in its entirety, attorney's fees, costs and expenses. The matter was forwarded to the Office of Administrative Law (OAL), where it was filed on February 28, 2011. The case was assigned to the undersigned on March 3, 2011, and a telephone pre-hearing conference was held on March 14, 2011. A hearing was scheduled for June 2, 2011. However, the respondent notified the judge at the pre-hearing conference that it would be filing a motion for summary decision. The motion was filed with the OAL on March 18, 2011. The petitioner's brief was due on April 4, 2011. On April 6, 2011, the petitioner asked for an extension to file her brief until April 18, 2011. She was granted an extension to April 11, 2011. Ms. Polanco-Gomez's brief was filed on April 11, 2011.

[1] The petition was stamped received by the Department of Education on February 2, 2011.

ISSUES

1. Whether Ms. Polanco-Gomez's petition for relief is time-barred under the 90-day rule?

2. Whether the matter can be decided on summary decision?

ARGUMENTS OF THE PARTIES

The petitioner has argued as follows:

> The situation in this case is quite different from the situation faced by the Petitioners in Kaprow and Nissman. Here, the Petitioner did not unduly delay filing her Petition. Petitioner filed within a few weeks after the ninety day time period expired, not many months after as was the case in Kaprow and Nissman. Further, unlike the Petitioner in Nissman, who was represented by counsel prior to her termination, Petitioner in this matter was not represented by counsel until several months later, and counsel shortly thereafter filed a Petition on her behalf.

In addition, the petitioner asserted that as a "confidential" employee, who was not in a bargaining unit, she did not have a union to turn to for aid in finding counsel. Faced with the need to find a job quickly to obtain medical coverage for her sick child, she concentrated her efforts on a job search and did not think about seeking legal advice until after she had procured new employment.

The respondent argued that N.J.A.C. 6A:3-1.3(i) requires the petitioner to file a petition no later than the 90th day from the date of receipt of the notice of a final ruling by the district board of education. The petitioner received notice of the ruling on October 4, 2010, and received a copy of the ruling on October 12, 2010. Ms. Polanco-

Gomez did not file her petition until January 28, 2011, which was 116 days after learning of the Board's final decision.[2]

LEGAL ANALYSIS

1. 90-Day Rule

The initial issue to be determined is whether Ms. Polanco-Gomez's Petition of Appeal is time-barred pursuant to N.J.A.C. 6A:3-1.3(i). The regulation states:

> 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.

The New Jersey Supreme Court reaffirmed the validity of the 90-day limitation period in the case of Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572 (1993). The Supreme Court concluded that the rule "falls within the scope of statutory authority granted to the Commissioner and the State Board" and "represents a fair and reasonably-necessary requirement for the proper and efficient resolution of disputes under the school laws." Kaprow, supra, 131 N.J. at 582. In explaining the underlying purpose of the rule, the Court said:

> 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. Because education disputes frequently involve conflicting claims to one teaching position, the remedy is to award the prevailing party the position with back pay. 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

[2] Based on representations that the respondent said the petitioner made at a status conference, the District argued that the date of notice of termination, not the date of actual termination, was the date to be used in counting the 90-day period. The petitioner appears to have abandoned this position, since she did not argue the point in her brief. However, as pointed out by the respondent, this position has been struck down in a number of court cases, including Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572 (1993), and H.H. and E.H. ex rel P.H. v. Board of Education of Wall, No. A-3638-09T3 (App. Div. February 15, 2011) <http://lawlibrary.rutgers.edu/search.html>.

> operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements.
>
> [Ibid.]

The 90-day period for filing an appeal with the Commissioner is triggered at the point in time that the affected individual has received "adequate notice" of the "final order, ruling or other action" which is the subject of the requested contested case hearing. Although the regulation does not specify what constitutes adequate notice, the decisional law provides guidance. The Supreme Court has instructed 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, supra, 131 N.J. at 587. It must also be sufficient to further the purpose of the 90-day limitation 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." Ibid. (citation omitted). In recognition of these dual considerations, the Supreme Court held that "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 . . . cause of action" and, "[a]t 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.'" Ibid. (citation omitted). In Kaprow, the Court concluded that a letter from the secretary of the local board, which informed the petitioner that the board had created and filled two positions in which the petitioner claimed a tenure right, while "unofficial and informal, was sufficient to trigger the ninety-day limitations period." Id. at 588.

The 90-day period begins once notice of the final order, ruling or other action is given, and not when the injury is felt by the petitioner. See Nissman v. Bd. of Educ. of Long Beach Island, 272 N.J. Super. 373, 379–81 (App. Div.), certif. denied, 137 N.J. 315 (1994). In Nissman, the Appellate Division held that a principal, who was informed

in April 1990 that the board had adopted a resolution not to offer her a contract and not to grant her tenure, was required to file a challenge within 90 days of that notice, even though it was not until the last day of her contract on August 31, 1990, that the petitioner claimed she acquired tenure rights.

N.J.A.C. 6A:3-1.16 confers on the Commissioner the authority to relax the procedural rules in his discretion "where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." The decisional law makes clear, however, that the 90-day rule is to be strictly applied. Gordon v. Passaic Twp. Bd. of Educ., 1985 S.L.D. 1929, 1931, aff'd, No. A-3294-84T7 (App. Div. May 27, 1986) (unreported), certif. denied, 105 N.J. 534 (1986); Am. Fed'n of Teachers, Local 3417 v. Bd. of Educ. of Berkeley Heights, EDU 5355-97, Initial Decision (October 13, 1998), adopted, Comm'r (November 30, 1998) <http://lawlibrary.rutgers.edu/oal/search.html>; Bd. of Educ. of Elmwood Park v. Farrell, 95 N.J.A.R.2d (EDU) 375, 377. Although the Commissioner has the authority to relax the 90-day rule, such authority is rarely invoked. DeMaio v. New Providence Bd. of Educ., 96 N.J.A.R.2d (EDU) 449, 453. 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. Kaprow, supra, 131 N.J. at 590–91; Gordon, supra, 1985 S.L.D. at 1931–32; DeMaio, supra, 96 N.J.A.R.2d (EDU) at 453; American Fed'n of Teachers, supra, EDU 5355-97, Initial Decision (October 13, 1998), adopted, Comm'r (November 30, 1998) <http://lawlibrary.rutgers.edu/oal/search.html>. As articulated in Bogart v. Board of Education of East Orange, OAL Dkt. No. EDU 6245-82 (January 26, 1983), adopted, Comm'r (March 14, 1983), 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."

The petitioner's argument that the 90-day rule should be relaxed does not meet the standard for relaxation enunciated in Kaprow and the line of cases that followed. Those cases talk about conditions that go beyond the individual circumstances of the parties. It is only in those instances that strict adherence to the rule is relaxed. While the Commissioner has the discretion to relax the rule, N.J.A.C. 6A:3-1.16, this

extraordinary relief has been reserved for only those situations where a substantial constitutional issue is presented or where a matter of significant public interest is involved, beyond that of concern only to the parties. Portee v. Bd. of Educ. of Newark, 94 N.J.A.R.2d (EDU) 381, 384; Wise v. Bd. of Educ. of Trenton, EDU 160-00, Final Decision (September 11, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>. The petitioner has not presented evidence to that effect. While it is understandable that Ms. Polanco-Gomez would concentrate her efforts to look for new employment, this did not preclude her from pursuing her claim against the District. In addition, the petitioner knew in August 2010 that her position was in jeopardy, but she took no action to find out what her legal rights might be until sometime in January 2011.

2. Summary Decision

The rules governing practice in the Office of Administrative Law provide that a motion for summary decision may be granted if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. This provision mirrors 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 that 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 that can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary decision:

> 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 factfinder to resolve the alleged disputed issue in favor of the non-moving party.

In this case there are no disputed facts. The matter rests entirely on the interpretation of the law. Therefore, the case can be decided by summary decision.

CONCLUSIONS

Based on the arguments presented by the parties, I **CONCLUDE** that there are no issues of material fact that prevent this matter from being decided by summary decision.

Further, I **CONCLUDE** that the respondent's motion for summary decision should be granted because the petitioner failed to file her petition within the 90-day period required by the statute, and there are not sufficient grounds to waive the 90-day rule.

ORDER

It is hereby **ORDERED** that the 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.

May 4, 2011
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: May 4, 2011

Date Mailed to Parties: May 4, 2011
db

221-11

OAL DKT. NO. EDU 11995-09
AGENCY DKT. NO. 254-9/09

ROBERT BERGER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PROSPECT PARK, PASSAIC 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' settlement and adopts the Initial Decision as the final decision in this matter. 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: 6|15|11

Date of Mailing: 6|15|11

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11995-09
AGENCY DKT. NO. 254-9/09

ROBERT BERGER,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF PROSPECT PARK, PASSAIC COUNTY
Respondent.

Nancy I. Oxfeld, Esq. for petitioner (Oxfeld Cohen, attorneys)

Jeffrey R. Merlino, Esq. for respondent Prospect Park Board of Education (Lindabury McCormick Estabrook & Cooper, attorneys)

Record Closed: May 4, 2011 Decided: May 4, 2011

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

This matter was transmitted to the Office of Administrative Law on November 2, 2009 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 Prospect Park Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated March 29, 2011.

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.

May 4, 2011
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 5/6/11

Mailed to Parties: May 6, 2011

DIRECTOR AND
~~CHIEF ADMINISTRATIVE LAW JUDGE~~

/rr

In the Matter of
Robert Berger,
Petitioner,
v
Board of Education
of the Borough of
Prospect County,
Respondent.

OAL Docket
No. EDU-1995-09
Agency Dkt. No.
254-9/09

SETTLEMENT
AGREEMENT

The parties to this matter having amicably resolved the dispute, it is hereby agreed as follows:

1. In light of the untimely passing of Dr. Barricalle, and in light of the fact that the IPDP at issue was not enforced, the Petitioner hereby withdraws his petition;
2. The Respondent Board of Education of the Borough of Prospect Park acknowledges the withdrawal is without prejudice to the Petitioners right to raise a challenge to the development or implementation of any future IPDPs; or the subject IPDP;
3. This agreement is subject to approval by resolution of the Respondent Board of Education.

Jeffrey R. Mealue, Esq.
Lindabury, McCormick, Estabrook & Cooper, P.C.
Attorneys for the Respondent Board of Education for Prospect Park

Dated: March 9, 2011

Robert Berger
Dated: 3/9/11

Oxfeld Cohen PC
Attorneys for Petitioner
By:
Barry I. Oxfeld, Esq.
Dated: 3/9/11

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF PROSPECT PARK, PASSAIC COUNTY, NEW JERSEY AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of Prospect Park, County of Passaic and State of New Jersey, convened in public session on March 29, 2011 at 7:30 p.m. in the gymnasium of the Prospect Park School.

The following members of the Prospect Park Board of Education were present:
Roll Call: Paul J. Birch, Albert Demarest, Thomas Magura, Alejandro Makino, Stephen Miller, Jose Pantoja and William Willemsen

The following motion was offered by Mr. Miller. Seconded by Mr. Willemsen and adopted by the Board of Education. (By the following roll call vote)

AYES: Paul J. Birch, Albert Demarest, Thomas Magura, Alejandro Makino, Stephen Miller, Jose Pantoja and William Willemsen

NAYS: None

1. **Approval of Settlement Agreement**
   Be it resolve: Upon the recommendation of the Interim Superintendent, the Board hereby approves the settlement agreement in the matter of Robert Berger vs. Board of Education of the Borough of Prospect Park wherein the Board of Education acknowledges the dismissal of the petition without prejudice.

I, Michael Jordan, Secretary of the Board of Education Prospect Park in the County of Passaic and State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Prospect Park Board of Education duly called and held on March 29, 2011 has been compared by me with the original minutes as officially recorded in my office in the minutes book of said Prospect Park Board of Education is true, complete copy thereof and of the whole of said original minutes so far as the same related to the subject matter referred to in said extract. In witness I have here unto set my hand and affixed the corporate seal of the Prospect Park Board of Education this 3rd day of May 2011.

Michael Jordan
BUSINESS ADMIN/BOARD SECRETARY

In the Matter of
Robert Berger,
Petitioner,
v
Board of Education
of the Borough of
Prospect County,
Respondent.

OAL Docket
No. EDO-1995-09
Agency Dkt. No.
254-9/09

SETTLEMENT
AGREEMENT

The parties to this matter having amicably resolved the dispute, it is hereby agreed as follows:

1. In light of the unfortunate passing of Dr. Barriolle, and in light of the fact that the IPDP at issue was not enforced, the Petitioner hereby withdraws his petition;
2. The Respondent Board of Education of the Borough of Prospect Park acknowledges the withdrawal is without prejudice to the Petitioners right to raise a challenge to the development or implementation of any future IPDPs; or the subject IPDP;
3. This agreement is subject to approval by resolution of the Respondent Board of Education.

Jeffrey R. Mealue, Esq.
Lindabury, McCormick, Estabrook & Cooper, P.C.
Attorneys for the Respondent Board of Education for Prospect Park

Robert Berger
Dated: 3/9/10

Oxfeld Cohen PC
Attorneys for Petitioner
By:
[illegible] Oxfeld, Esq.

222-11

A.M. and M.S. on behalf of minor children, A.S. and L.S.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners appealed the respondent Board's determination that their homeless status had expired and that their children, A.S. and L.S., no longer meet the homelessness criteria to attend Dover schools free of charge. Petitioners maintained that – although they have resided in the same motel in Mine Hill Township since 2006 – they are still homeless, and that until they find a permanent residence, it is in the best interest of the children to continue their enrollment in the Dover school district, which has an obligation to educate the children as their district of origin prior to becoming homeless. Respondent Board contends that since petitioners have resided in Mine Hill for more than five years and have no immediate plans to return to Dover, they no longer meet the statutory criteria for homelessness under *N.J.S.A.* 18A:7B-12(c). Accordingly, the Board argues that as a resident of Mine Hill, A.S. – a seventh grader – is permitted to attend Dover schools under the district's send/receive relationship with Mine Hill, but L.S. – a sixth grader – must attend school in Mine Hill, and that petitioners must reimburse Dover for the cost of L.S.'s tuition for the number of days the child has attended school in the district during the 2010-2011 school year.

The ALJ identified the issue in this case to be whether petitioners have maintained a homeless status since 2006, thus entitling the children to continue enrollment in the Dover school district as the district of origin pursuant to *N.J.S.A.* 18A:7B-12(c). The ALJ found that: the petitioners bear the burden of proof to establish domicile in Dover; the evidence presented by petitioners was unpersuasive, demonstrated no effort by petitioners to reestablish domicile in Dover, and offered no mitigating factors to justify entitlement to continued enrollment in Dover schools. Accordingly, the ALJ concluded that petitioners have not demonstrated a continued state of homelessness to meet the criteria for their children to attend Dover schools at the public expense, and that the school district is entitled to tuition for the sixth grade education of L.S. in the amount of $10,773 for the 2010-2011 school year.

Upon full and careful consideration, the Commissioner rejected the Initial Decision and determined that petitioners' children shall remain enrolled in respondent's school district and that petitioners are not liable for tuition and transportation costs. In so deciding, the Commissioner found, *inter alia*, that: children who live in hotels/motels are classified as homeless pursuant to *N.J.A.C.* 6A:17-2.3(a)(1)(i); a goal of the regulations pertaining to homeless children is that continuity be maintained in their educational program; pursuant to *N.J.S.A.* 18A:38-1(d), homeless persons who reside within a school district for one year or longer shall be deemed to be domiciled within that district, and financial responsibility for the education of their children transfers to the new school district; the Mine Hill School District is liable for L.S.'s sixth grade tuition, and would also be responsible for the send/receive tuition for A.S. should respondent Board seek payment for same.

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.

June 15, 2011

OAL DKT. NO EDU 9780-10
AGENCY DKT. NO. 546-9/10

A.M. and M.S. on behalf of minor children, A.S. and L.S.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY,	:	
RESPONDENT.	:	

This controversy requires the assignment of fiscal responsibility for the education of petitioners' children, A.S. and L.S. The Commissioner has reviewed the record[1] and the Initial Decision of the Office of Administrative Law (OAL);[2] for the reasons which follow, the Initial Decision is rejected.

Petitioners and their children lived in Dover from 2004 to 2006, at which time they became homeless and moved to the Bounty Motel in the Township of Mine Hill, where they still reside. The parties do not appear to dispute the fact that when petitioners became homeless, Dover became the children's "School District of Origin." *N.J.A.C.* 6A:17-2.2. Under the regulations pertaining to homeless children – *N.J.A.C.* 6A:17-1.1 *et. seq.* (the Regulations) – the School District of Origin decides where the children will attend school, pays tuition for the children if they attend school in another district and provides transportation. *N.J.A.C.* 6A:17-2.4.

[1] No transcripts of the March 4, 2011 hearing were provided to the Commissioner. Consequently, the record is sparse, particularly regarding the details of petitioners' living arrangements.

[2] No exceptions to the Initial Decision were filed by either party.

The record indicates that after they became homeless and moved to the Bounty Motel, A.S. and L.S. continued to attend school in Dover – without objection from respondent – for four years. This is consonant with *N.J.A.C.* 6A:17-2.6(a)(1) and (2), which direct that – to the extent practicable – the children should be enrolled in the school district of origin and/or the last district of attendance, barring objections from the parents or guardians. A stated goal of the Regulations is that continuity be maintained in the educational programs of homeless children. *See, e.g., N.J.A.C.* 6A:17-2.6(b)(2).

In August 2010, however, respondent wrote to petitioners stating that the children were no longer eligible to attend school in Dover. Respondent reasoned that in light of petitioners' five years of residence in Mine Hill, their homeless status had expired and, with it, respondent's responsibility to educate petitioners' children. It now demands tuition reimbursement for L.S.'s attendance in its district during the 2010-2011 school year, reasoning that it had put petitioners on notice of their change in status. Petitioners argue that their residence in a motel constitutes homelessness, requiring respondent's district – as the school district of origin – to continue to provide their children with a free public education. Petitioners also maintain that it is in the best interests of their children to remain in respondent's school system.

Petitioners are correct in contending that their children are homeless. Children who live in hotels/motels are indeed classified as homeless pursuant to *N.J.A.C.* 6A:17-2.3(a)(1)(i). However, for purposes of assigning fiscal responsibility for the education of A.S. and L.S., the relevant inquiry is not whether petitioners are homeless, but rather whether they have resided in Mine Hill long enough for *N.J.S.A.* 18A:38-1(d) to attach. More specifically, school law imposes a limit upon how long a former district of domicile is financially responsible

for the education of homeless children. That limit may be found in *N.J.S.A.* 18A:38-1(d), which states:

> Any person whose parent or guardian, **even though not domiciled within the district, is residing temporarily therein,** but any person who has had or shall have his all-year-round dwelling place within the district **for one year or longer, shall be deemed to be domiciled** within the district for purposes of this section.
> (Emphasis added.)

Thus, after one year of the family's residency in the Bounty Motel, it became the Mine Hill Township Board of Education's financial responsibility to educate petitioners' children. *See, also, Board of Education of the Township of Egg Harbor, Atlantic County v. Board of Education of the Mainland Regional High School District, Atlantic County and New Jersey Department of Education, Department of Finance,* Commissioner Decision No. 555-10 (December 30, 2010).

However, the reassignment of financial responsibility for the children's education from respondent to the Mine Hill school district did not inexorably require that the children change schools. As mentioned above, continuity of educational program is an objective of the Regulations. Stated differently, respondent erred in concluding that its release from financial responsibility for the children equated to the removal of the children from its schools.

The record reveals that the Mine Hill and Dover school districts have a send-receive relationship. Mine Hill students in grades seven through twelve attend school in the Dover school district at Mine Hill's expense. A.S., who has been in seventh grade during the 2010-2011 school year, is attending school in Dover. Respondent does not now appear to demand tuition for A.S., but if it did make such a demand, it would be Mine Hill – deemed the district of domicile under *N.J.S.A.* 18A:38-1(d) – that would be obligated to pay same.

L.S. has been in sixth grade during the 2010-2011 school year. Although students residing in Mine Hill normally attend sixth grade in Mine Hill, L.S. has been attending school in

Dover for more than six years. Once again, the Regulations disfavor disruptions in the continuity of a child's educational program. In the present case, to require L.S., who attended school in Dover from Kindergarten through fifth grade, to switch to Mine Hill for sixth grade – only to return to Dover in seventh grade, pursuant to the above-referenced send-receive relationship – would offend an underlying principle of the Regulations.

In light of the foregoing, the Mine Hill School District – not petitioners – is liable for L.S.'s sixth grade tuition in the amount of the daily rate, $59.85, times the number of days of attendance. The record as presented to the Commissioner, however, lacks any proofs to support the latter number.[3] Should respondent seek send-receive tuition for A.S., the responsible party would also be the Mine Hill School District.

While the Mine Hill School District apparently received correspondence relating to the instant litigation, it was not joined as a party. Accordingly, no order against Mine Hill will be issued in the context of this case. However, the relief requested by petitioners is hereby granted. A.S. and L.S. shall remain enrolled in respondent's school district and petitioners will not be liable for tuition and transportation costs.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/14/11

Date of Mailing: 6/15/11

[3] The Commissioner notes that the present school year is almost at an end, and L.S. will likely be progressing to seventh grade. Thus, if petitioners' living situation remains the same in the coming school year, both children will attend school in Dover pursuant to the above referenced send-receive relationship.

[4] 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
OAL DKT. NO. EDU 09780-10
AGENCY DKT. NO. 546-9/10

A.M. AND M.S., ON BEHALF OF MINOR CHILDREN, A.S. AND L.S.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWN OF DOVER, MORRIS COUNTY,
Respondent.

A.M. and **M.S.**, parents of **A.S.** and **L.S.**, pro se

Derlys Maria Gutierrez, Esq., for respondent

Record Closed: April 18, 2011 Decided: May 9, 2011

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Dover School District (District) determined the homeless status of petitioners A.M. and M.S. expired. Therefore, for purposes of school enrollment petitioners' children L.S. and A.S. were no longer eligible to attend the Dover Schools. Based on the address where the the family has lived since October 2006, the District further

determined the children are domiciled in the Roxbury School District. Petitioners appealed the District's determination that their homeless status has expired. They maintain that their children are entitled to continue enrollment in Dover School District, the district of origin.

On September 15, 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. On March 4, 2011, a hearing was held. On April 18, 2011, the undersigned held a telephone conference regarding the parties posthearing briefs and to clarify the sending-receiving relationship referenced at the hearing. The record closed on April 18, 2011.

STIPULATION OF FACTS

Based on the stipulated facts (J-1) and relevant evidence I **FIND** as **FACT:**

1. A.M. and M.S. are the parents of L.S. and A.S.

2. L.S. attends sixth grade at East Dover Elementary School, Dover School District.

3. A.S. attends seventh grade at Dover Middle School, Dover School District.

4. Since kindergarten, the children have been enrolled in Dover Public Schools.

5. From 2004 to 2006, the family resided in Dover, NJ.

6. In 2006, the family was homeless and moved into the Boundary Motel located in Mine Hill.

7. From 2006 to the present, the family has resided at the Boundary Motel, room 101, which is located in Mine Hill.[1].

8. By letter dated August 23, 2010, the District informed the parents that they no longer met the criteria for homeless and that the children could not continue to attend the Dover Public Schools.

9. On or about 9/8/10, the parents filed a petitioner of appeal on residency.

10. By letter dated 9/10/10, Morris County Executive Superintendent of Schools determined that the proper district of residence is Mine Hill and Dover based on the fact that the parents and children are currently living in the Boundary Motel, Room 101, in Mine Hill.

ISSUE

The issue is whether petitioners have maintained a homeless status from 2006 to present and thus the children are entitled to continue enrollment in Dover School District, the district of origin.

Petitioners have the burden of proof to establish domicile in Dover.

LEGAL DISCUSSION AND CONCLUSIONS

Petitioners maintain that their displacement from Dover Township and homeless situation continues to the present. Petitioners further claim that they did not willingly move the children to another school district. Rather, they are residing in Mine Hill due to their homelessness. Until they locate a permanent residence it is in the children's best interests to continue enrollment in the Dover School District.

[1] The parties stipulated that address for Boundary Motel is Roxbury Township, however, the actual address of the hotel is – Rt. 46, Mill Hill, NJ.

The District acknowledged petitioners homelessness in October 2006, and the family's relocation from Dover to Mine Hill. Due to the homeless status the children were permitted to continue enrollment in the Dover School District. The District argues however, since petitioners have resided in Mine Hill for more than five years with no immediate plans to return to Dover. Consequently, on August 13, 2010, the Dover School District determined that petitioners could no longer meet the statutory criteria for 'homelessness' under N.J.S.A. 18A:7B-12(c) which provides that the 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. The statute further provides that "homeless" shall mean an individual who temporarily lacks a fixed, regular and adequate residence. Ibid.

The District presented John Gannaio, Director of Special Services. The county superintendent determined that the family resides in Mine Hill. Therefore, the older child, A.S. is permitted to attend Dover Middle School under the Districts sending-receiving relationship. The younger child, L.S. a sixth grade student of Mine Hill should attend school in that district. Gannaio further testified that annual tuition at Dover for grades six to eight for 2010-2011 is $10,773.00 at a daily rate of $59.85.

I have considered the positions of the parties. The evidence presented by petitioners us unpersuasive. A.M. testified that the family has resided at the Boundary Motel since 2006 due to their homelessness. However, petitioners presented no evidence of his attempt or likelihood to obtain housing in Dover within the reasonable future. Moreover, petitioners presented no mitigating evidence to justify entitlement to continue enrollment in Dover public schools.

The State of New Jersey provides, "Public schools shall be free to . . . [a]ny [child] who is domiciled within the school district." N.J.S.A. 18A:38-1(a). The domicile of a child follows that of his parents. The New Jersey Supreme Court noted that "[s]ince the concept of domicile[e] involves the concurrence of physical presence in a particular [place], and an intention to make that [place] one's home, determination of a disputed issue on the subject requires an evaluation of all the facts and circumstances of the case." Lyon v. Glaser, 60 N.J. 259, 264-65 (1972). N.J.A.C. 6A:22-3.1(a)(1) explains

that "[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." The courts have consistently held that "[d]omicil[e] is very much a matter of the mind—of intention." Lyon, supra, 60 N.J. at 264. A person may have multiple residences, but he may have only one domicile at any given time. State v. Benny, 20 N.J. 238 (1955). "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." N.J.A.C. 6A:22-3.1(a).

Based on the whole of the record, I **CONCLUDE** that petitioners have not demonstrated a continued state of homelessness to meet the criteria for their children to attend the Dover School District at public expense.

Therefore, I **CONCLUDE** that the Dover School District is entitled to tuition for school year 2010-2011 for $10,773.00.

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.

May 9, 2011
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: 5-9-11

Date Mailed to Parties: May 11, 2011
dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

223-11

#223-11E

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

NICHOLAS BROPHY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,	:	APPLICTION 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 June 14, 2011 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Acting Deputy Commissioner – to whom this mater has been delegated pursuant to *N.J.S.A.* 18A:4-33 – concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

In so concurring, however, the Deputy Commissioner is compelled to clarify that petitioner *has* met the threshold standard of irreparable harm, notwithstanding that participation in graduation exercises is a privilege rather than a right – since the opportunity to participate in such an event cannot be regained once lost, and dismissal of an emergent application on this criteria alone would effectively insulate a school district's actions in matters of this type from any meaningful review.[1]

[1] The Deputy Commissioner is fully aware of the well-established principle that a prohibition from attending events of this type does not, in and of itself, rise to the necessary level of irreparable harm so as to warrant extraordinary remedy. However, harm is "irreparable" when there can be no adequate after-the-fact remedy in law or in equity, and monetary damages cannot adequately redress the intangibles of a lost experience after the event is over. In past cases denying similar applications for emergent relief, the irreparable nature of the harm and the degree or severity of the harm have frequently been addressed as a totality, as they are by the ALJ herein; they are, however, two separate factors, and it is on the basis of the *severity* of the harm – which pertains to the weighing of interests – and not its irreparable nature that applications of this kind typically fail. *Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County*, decided by the State Board April 17, 1966; *L.J., on behalf of minor child, S.J. and David Wickham v.*

This said, however, the fact remains that petitioners seeking emergent relief must additionally demonstrate that the legal right underlying their claim is well settled, that they have a likelihood of success on the merits of their underlying appeal, and that the balance of interest and equities under the circumstances rests in their favor. In each of these respects, the Deputy Commissioner agrees with the ALJ – for the reasons clearly presented in his decision – that petitioner has not met the requisite burden, necessitating that his application must be denied.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted. This matter shall proceed at the OAL for whatever may be required to bring it to conclusion.

IT IS SO ORDERED.[2]

ACTING DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 6/15/11

Date of Mailing: 6/15/11 Fax

Board of Education of the Township of Manchester, Ocean County, decided by the Commissioner May 2, 2003. See also *D.M.S., on behalf of minor child, E.B. and Gregory Heck v. Board of Education of the Pinelands Regional School District, Ocean County, et al.*, decided by the Commissioner May 9, 2008.

[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

ORDER ON EMERGENT RELIEF
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:

STATEMENT OF THE CASE

N.B. (petitioner) filed an application for emergent relief seeking to graduate and to participate in graduation ceremonies scheduled for Thursday, June 16, 2007. 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 is therefore not eligible to graduate and participate in graduation ceremonies.

PROCEDURAL HISTORY

On June 11, 2011, petitioner filed an 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 record closed.

STATEMENT OF FACTS

Some of the facts are undisputed. The petitioner is eighteen years of age and is 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 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 (P-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. 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). The District asserts that the petitioner never filed a petition in this matter and are barred by the ninety-day limitations set forth in N.J.A.C. 6a:3-1.3(i).

The District further asserts that the petitioner is not eligible to graduate because he did not receive any credits for the 2009-2010 school year due to his attendance. Petitioner asserts that he passed al but one course, and therefore would have had enough credits to graduate.

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.

The Commissioner has consistently found that denial of attendance at graduation exercises does not constitute irreparable harm. The case law is remarkably consistent that attendance at graduation ceremonies is a privilege, not a right. That privilege may be withheld in the interest of maintaining an orderly and efficient school system. Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County, State Board of Education decision, dated April 17,

1996, citing Camden City Board of Education v. NJSLAA, Docket #A-2802-91T2 (App. Div. 1992); Burnside et al. v. NJSIAA, 1984 S.L.D. 1695 (App. Div. 1984), cert. denied 101 N.J. 236 (1985). The determination of whether or not they may attend is within the sole discretion of the board of education. The denial of a privilege, as opposed to denial of a right, creates no irreparable harm. Denial of attendance at graduation exercises is, therefore, not irreparable harm.

The issue of whether the denial of petitioner graduating is a more difficult issue. Significant harm can result as to the failure to graduate, but it is not irreparable. The petitioner can make up the necessary credits and still obtain a high school degree.

Therefore, I **FIND** that the petitioner has not proven he will suffer irreparable harm.

Local boards of education have been expressly charged with protecting the health, safety, and welfare of its students, and ensuring the orderly conduct of the academic process. The actions of boards of education have a presumption of validity, and petitioners must show that respondent acted arbitrarily and not within the scope of its authority in order to prevail. Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. 327, 332 (App. Div. 1965); Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960).

This case involves the enforcement by the school district and a school of clear educational policies. The action of a 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. Kopera v. West Orange Bd. of Ed., supra, 60 N.J. Super. at 294.

Petitioner argues that the excused absences should not be counted which would result in him satisfying the attendance goal. I do not agree. The policy does not limit unexcused absences, but sets an attendance rate.

Although no case could be found on point, there are a number of cases involving absenteeism with a teacher. In those cases, a distinction was drawn between a long-term illness and intermediate absences, such as exist in this case, for medical or family reasons. A number of cases have held that high absenteeism has been deemed sufficient grounds for disciplinary action even with the existence of legitimate medical excuse. Trautwein v. Bound Brook Bd. of Educ., 1978 S.L.D. 445, aff'd with modification, State Bd. of Educ., 1979 S.L.D. 876, rev'd, Sup. Ct. App. Div., 1980 S.L.D. 1539, certif. denied, 84 N.J. 469 (1980); Kulick v. Bd. of Educ. of the Town of Montclair, 1983 S.L.D. 1059; Angelucci v. Bd. of Educ. of the Town of West Orange, 1980 S.L.D. 1066, aff'd, State Bd. of Educ. 1980 S.L.D. 1077. Wilson v. Board Of Education, Of The Township Of Mount Olive, Morris County , 2011 N.J. AGEN LEXIS 200 (N.J. AGEN 2011).

I **FIND** there is substantial evidence to conclude that N.B. violated the attendance policy. As a result, I **FIND** that the Board's actions in applying its policy to prohibit N.B. from graduating and attending and participating in graduation ceremonies due to his conduct, no matter how regrettable and unfortunate this may be for him, cannot be disturbed. Consequently, I further **FIND** it unlikely that the petitioner would have prevailed on the merits.

As stated above, the actions of boards of education have a presumption of validity. A specific policy and punishment was established by the Board with respect to absences and are enumerated in the School Handbook. Based on these factors, I **FIND** that the petitioner did not meet his burden of proof that there is a legal right underlying the claim.

Clearly, the petitioner has a substantial interest in graduating and attending and marching in the processional at graduation. He has worked extremely hard to pass all his classes and be in a position to graduate. The Board also has a substantial interest in ensuring that its disciplinary policies are applied as to excessive lateness and absences. If it did not enforce its disciplinary policies, or if it did treat N.B. differently than other students in the school, the Board would be sending the wrong kind of

message and possibly establishing a dangerous precedent. Although petitioner has worked so hard and diligently, I **FIND** that the Board would suffer greater harm than petitioner, if the requested relief was not granted.

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. Regardless of whether 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.

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 all four 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 N.B. for emergent relief is **DENIED** without prejudice.

This order on application for emergency relief may be adopted, modified or rejected by the **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 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.

June 14, 2011
DATE

DONALD J. STEIN, ALJ

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

#224-11E

OAL DKT. NO. EDU 06822-11
AGENCY DKT. NO. 153-6/11

DAVID CASTELLANI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE MAINLAND REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
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 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.

In so concurring, the Commissioner emphasizes that petitioner *has* met the threshold standard of irreparable harm.[1] Although the participation in graduation exercises is a privilege rather than a right, the opportunity to participate in such an event cannot be regained once it is lost, and the dismissal of an emergent application on this criterion alone would effectively insulate a school district's actions in matters of this type from any meaningful review.[2]

[1] The Commissioner notes that irreparable harm is a separate and distinct requirement from likelihood of success on the merits.

[2] The Commissioner is fully aware of the well-established principle that a prohibition from attending events of this type does not, in and of itself, rise to the necessary level of irreparable harm so as to warrant extraordinary remedy. However, harm is "irreparable" when there can be no adequate after-the-fact remedy in law or in equity, and monetary damages cannot adequately redress the intangibles of a lost experience after the event is over. In past cases denying similar applications for emergent relief, the irreparable nature of the harm and the degree or severity of the harm have frequently been addressed as a totality, as they are by the ALJ herein; they are, however, two separate factors, and it is on the basis of the *severity* of the harm – which pertains to the weighing of interests – and

This said, however, the fact remains that petitioners seeking emergent relief must additionally demonstrate that the legal right underlying their claim is well settled, that they have a likelihood of success on the merits of their underlying appeal, and that the balance of interest and equities under the circumstances rests in their favor. *N.J.A.C.* 6A:3-1.6(b). In each of these respects, the Commissioner agrees with the ALJ for the reasons stated in his decision that the petitioner has failed to demonstrate his entitlement to emergent relief.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. Since the parties have stipulated that no further issues remain for determination, the Clerk is hereby requested to return the file administratively pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6-20-11

Date of ~~Mailing~~: 6-20-11

Faxing

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not its irreparable nature that applications of this kind typically fail. *Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County*, decided by the State Board April 17, 1966; *L.J., on behalf of minor child, S.J. and David Wickham v. Board of Education of the Township of Manchester, Ocean County*, decided by the Commissioner May 2, 2003. See also *D.M.S., on behalf of minor child, E.B. and Gregory Heck v. Board of Education of the Pinelands Regional School District, Ocean County, et al.*, decided by the Commissioner May 9, 2008.

[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

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 6822-11
AGENCY DKT. NO. 153-6/11

D.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE MAINLAND REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,

Respondent.

D.C., no appearance, but was represented by his father, D.R.C.

Louis J. Greco, Esq., for respondent

BEFORE **RONALD W. REBA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this case, petitioner D.C., an eighteen-year-old high school senior, seeks emergent relief to allow him to attend and participate in the high school graduation ceremony of Mainland Regional High School scheduled for June 20, 2011, at 6 p.m. The matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case on June 15, 2011, on petitioner's application for emergency relief. The

matter was scheduled for oral argument at 9:00 a.m. on June 17, 2011. On that date, testimony and oral argument was presented. At the conclusion of the hearing, the parties advised me that no other issue remained once the emergent relief matter is resolved.

FACTUAL DISCUSSION

For purposes of deciding the application for emergent relief, the following facts are determined to be undisputed.

According to the testimony of Mark Marrone, vice principal of Mainland Regional High School, and Dr. Thomas Baruffi, superintendent of Mainland Regional School District, and upon a review of the certification of Dr. Robert Blake, principal of Mainland Regional High School, who submitted a certification marked as R-1, D.C., on June 10, 2011, while on school property and prior to the start of the school day, was with a group of students throwing water balloons at other students and at motor vehicles. A parent who was driving his child to school became upset and complained to the vice principal, who was on the scene at the time. D.C., along with the other students involved in the water-balloon-throwing incident, were gathered and brought into the school auditorium, where they were spoken to by the vice principal and the principal. When the group was informed that the discipline for the act would be an out-of-school suspension for four school days, plus exclusion from the graduation ceremony, D.C. became verbally abusive toward the administrators, and in the presence of the other students and the administrators asserted that the administrators "were stupid and nothing but a bunch of idiots." This comment by D.C. resulted in his receiving an additional two days of out-of-school suspension, for a total of six days, as well as the discipline of not being able to walk with his class during the graduation ceremony set for Monday, June 20, 2011. The students' parents, including petitioner's parents, were informed of this fact, and the petitioner, along with his father, D.R.C., appeared to discuss the matter with Mr. Marrone, as well as another vice principal, a Ms. O'Neal. While at this meeting, petitioner again became argumentative with the school authorities, which prompted Mr. Marrone to request that petitioner leave the room because of his actions. Thereafter, D.R.C. continued the meeting with Mr. Marrone and Ms. O'Neal.

On Monday, June 13, 2011, petitioner and his father met with Dr. Baruffi and one of the vice principals regarding D.R.C.'s request that D.C. be allowed to walk at graduation. The superintendent declined this request, but allowed D.C. and his family to appeal his decision to the Mainland Regional School District Board of Education, which was meeting that evening. D.C. and his parents appeared at the school board meeting and presented an appeal of the superintendent's decision to the board. The board, by unanimous vote (9-0), rejected petitioner's request to be allowed to graduate with his class. Dr. Baruffi testified that his recommendation was influenced by the decision of the principal, Dr. Blake, not to allow the petitioner to walk with his class at graduation due to the inflammatory and disrespectful tone of his language to the school administrators and the students who were present at the time in the auditorium, plus a review of his prior disciplinary actions.

D.C.'s disciplinary history was submitted as an attachment to Dr. Blake's petition. In addition, respondent's counsel introduced as R-2 a page from the student handbook, which Mr. Marrone testified was distributed to every student. In this handbook it is specifically stated that graduation is a privilege, not a right, and that serious and/or numerous disciplinary actions will prevent a student from being allowed to participate in the graduation ceremony. Dr. Baruffi testified that the petitioner's attitude, as described to him by Dr. Blake, along with his history of disciplinary actions resulted in Dr. Baruffi recommending to the school board that the petitioner not be allowed to graduate with his class.

D.R.C. introduced a one-page letter dated June 16, 2011, from Dr. Joseph R. Mosley, Ph.D., who is treating the petitioner for anger-management problems. (P-2.) This letter implies that the removal of the petitioner from his graduating class will result in an emotional setback for the petitioner in his treatment process. The letter was shown to Mr. Marrone and to Dr. Baruffi, who, although sympathetic, maintained that their actions were justified because of the petitioner's extremely disrespectful conduct. Both witnesses testified that they would not have made a different decision had they

reviewed this letter prior to any action being taken by the principal or the Board of Education.

Petitioner did not make an appearance to explain his actions or testify on his own behalf, and his appeal was limited to the arguments of his father, as well as the letter from Dr. Mosley. The petitioner bases his application on several factors. He argues that the actions of the superintendent and the Mainland Regional High School Board of Education are arbitrary, capricious and unreasonable, in that the students who were with the petitioner will all be allowed to graduate with their class on June 20. He is the only student in that group being prevented from walking with his class at graduation. He also argues that other students, whom he could not name, also had prior histories of discipline, but that Dr. Blake basically gave them a "pass." D.R.C. argued that D.C. is being singled out because of his erratic remarks. Although his remarks were not polite, they were not so egregious as to be a violation under the student handbook policy. In response to D.C.'s argument, Dr. Baruffi testified that the school authorities were quite upset by the actions of D.C., which were in the presence of other students and which could only lead to a further erosion of authority if sanctions were not imposed. Respondent's counsel argued that if this episode is allowed to pass without any penalty, it would lead to a growing disrespect of the authority of the school administration, which cannot be tolerated. The other individuals were allowed to graduate at the discretion of the principal, who allowed the petitioner's appeal to go directly to the superintendent and to the School Board. He also asserted that it was the unanimous decision of the School Board to uphold the decision of the principal and superintendent in this matter, because of the petitioner's language, disrespect and prior discipline history.

LEGAL DISCUSSION AND CONCLUSIONS

Petitioner's application claims that respondent's actions in this matter are arbitrary, capricious and unreasonable, that petitioner is entitled to the presumption that he is innocent until he is proven guilty, and that the punishment is too harsh in relation to the offense. N.J.A.C. 1:1-12.6(a) provides for the granting of emergency relief 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. In such circumstances, emergency relief pending a final decision may be ordered upon the application of a party. N.J.A.C. 1:1-12.6(f) of this section provides that temporary relief may be granted if there is a finding that immediate and irreparable harm will probably result, if there is the likelihood that the moving party will prevail, and if the relief is as limited in scope and as temporary as possible.

The foregoing regulation embodies the principles of law announced by the court in Crowe v. DeGioia, 90 N.J. 126, 132 (1982). These legal principles may be summarized as follows:

1. Emergency relief should not issue except when necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be redressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Pecuniary damages may be inadequate because of the nature of the injury or of the right affected.

2. Emergency relief should be withheld when the legal right underlying the claim of the requesting party is unsettled.

3. Emergency relief should not issue where all material facts are controverted. Thus, to prevail on an application for emergency relief, the party requesting the relief must make a preliminary showing of a reasonable probability of ultimate success on the merits. That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. The point of emergency relief is to maintain the parties in substantially the same condition when the final decision is issued, as they were when the litigation began.

4. The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief. The relief granted should be

no broader than necessary to preserve the status quo pending a full hearing on the merits.

As to the first requirement, there are a significant number of cases holding that a prohibition from attending a graduation ceremony or other similar events does not, in and of itself, rise to the necessary level of irreparable harm so as to warrant the extraordinary remedy being requested. Nevertheless, the Commissioner has recently pointed out that there is no adequate after-the-fact remedy that can adequately redress the intangibles of a lost experience after the event is over.

The real issue in a case such as this is whether the petitioner is entitled to participate in the graduation ceremony. It is only where the petitioner can show such entitlement and is being prevented from participation that he is being irreparably harmed. Therefore, the key issue is whether he can show a likelihood of success on the merits. In the absence of a showing of a likelihood of success on the merits, I **CONCLUDE** that petitioner has failed to establish irreparable harm in this case.

As to the requirement that the right underlying the claim of a requesting party must be settled, it is clear that each school district is obligated to provide a thorough and efficient system of education to all children residing in its school district. N.J. Const. (1947), art. VIII, ¶ 1; N.J.S.A. 18A:33-1. To carry out this policy, local boards of education have been granted discretionary authority at N.J.S.A. 18A:11-1(c) and (d) to adopt rules for the management of the public schools of the district, and to perform all acts and do all things necessary for the lawful and proper conduct of the public schools of the district.

In the present matter, the testimony of the witnesses for the respondent indicates that if the acts in question had been committed a month before graduation, D.C. would have served the suspension period as a penalty and most likely would have been allowed to graduate after a period of calmness. In this case, because the actions of the petitioner occurred on the last day of school, and graduation was imminent, the

decision to implement this particular penalty was necessary. No other action could have been taken that would have had the desired effect.

Local boards of education are responsible for protecting the health, safety and welfare of their students and ensuring the orderly conduct of the academic process. Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975). To accomplish this, such boards are empowered to establish rules of conduct and impose discipline to enforce such rules. It is established law that the actions of a board of education which lie within the area of discretionary powers, especially as it relates to matters of student discipline, cannot be upset unless there is a showing that the discipline imposed was arbitrary, capricious, without a rational basis, or induced by improper motives. J.M. vs. Hunterdon Cent. Reg'l High Sch. Dist., 96 N.J.A.R.2d (EDU) 415, 419 (citing Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288 (App. Div. 1960)).

Based on the evidence submitted, I cannot conclude that the actions of the school district in imposing discipline upon D.C. were arbitrary, without a rational basis, or induced by improper motives. All that is contained in the record before me in support of D.C. is the argument that it would be upsetting for him and his family if he is not allowed to attend graduation, along with the letter from Dr. Mosley indicating his treatment of D.C. There is simply not enough objective evidence in the record before me upon which I can base a conclusion that petitioner would be successful in prevailing on the merits of the underlying claim that he is not guilty of the disciplinary infractions in question.

There is no question that graduation is a privilege, and that under the clearly enunciated policies of the school district, failure to comply with the disciplinary requirements of the school district will result in a student's exclusion from the graduation ceremony.

Finally, I **CONCLUDE** that D.C. has failed to show that when the equities and interests of the parties are balanced, D.C. will suffer greater harm than the respondent will suffer if the requested relief is not granted. While D.C. and his family have a

personal stake in seeing D.C. participate in the graduation ceremony, the school district also has an important interest in seeing that its disciplinary policies are enforced. If those policies are disregarded without clear justification, it will send a message to the students of the school district that they may disregard those policies and avoid the consequences. Such a message will clearly damage the efforts of the school district to ensure the orderly conduct of the academic process.

I have reviewed the case law introduced by D.R.C., along with other cases submitted to me, and I find that they are not helpful, in that these opinions involve out-of-school activities during out-of-school periods of time, which are unconditionally protected by federal law, and are not on point with the immediate facts of this case.

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. Bd. of Educ. of Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Bd. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of N. Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962)). The "arbitrary, capricious and unreasonable" standard of review imposes a heavy burden on challengers of board actions. This standard has been defined by the New Jersey courts as having no rational basis. Piccoli v. Bd. of Educ. of Ramapo Indian Hills Reg'l Sch. Dist., EDU 1839-98 (January 22, 1999) (citing Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974)), adopted, Comm'r (March 10, 1999) <http://lawlibrary.rutgers.edu/oal/search.shtml>.

In the absence of a clear showing of abuse of discretion, the Commissioner of Education will not substitute his or her own judgment for that of the board of education. Massaro v. Bd. of Educ. of Bergenfield, 1965 S.L.D. 84, 85. In Kopera, supra, 60 N.J. Super. at 294, the Appellate Division noted "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."

Based upon the foregoing, I **CONCLUDE** there is a rational basis for the respondent's action and that the right underlying petitioner's claim is settled against the petitioner's position. Therefore, I **CONCLUDE** that petitioner has failed to establish the right to relief in the absence of a full evidentiary hearing showing that the action of respondent is arbitrary, capricious and unreasonable.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioner's request for emergency relief is hereby **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **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 the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days, this recommended decision shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

JUNE 20, 2011
DATE

RONALD W. REBA, ALJ

/mev

WITNESSES

For Petitioner:

None

For Respondent:

Mark Marrone

Thomas Baruffi

EXHIBITS

For Petitioner:

P-1 Suspension Notice

P-2 Letter from Dr. Mosley

For Respondent:

R-1 Certification of Dr. Robert Blake

R-2 First page from the student handbook

OAL DKT. NO. EDU 0358-11
AGENCY DKT. NO. 704-12/10

I.C., on behalf of minor child, A.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF JAMESBURG, MIDDLESEX COUNTY AND GAIL S. VERONA,	:	DECISION
RESPONDENTS.	:	

Petitioner challenged a one-day suspension imposed upon his minor child by the Jamesburg Board of Education (Board). After the matter was transmitted to the Office of Administrative Law (OAL), the parties proposed a settlement which the Administrative Law Judge sent to the Commissioner of Education with a recommendation for approval. Upon review of the terms of the proposed Settlement Agreement (Agreement) the Commissioner rejects same because the Board does not have the authority to agree to one of the provisions contained in the Agreement.

Paragraph 1 of the Agreement states:

> The letter dated October 22, 2010 to the parents indicating the one day suspension of October 25, 2010 shall remain in the student file in Jamesburg until June 30, 2011 but will not be transmitted by Jamesburg as part of his separate discipline file to Monroe Township High School or any high school that the student attends.

Under *N.J.A.C.* 6A:32-7.8(b), a board of education is permitted to destroy student records which are no longer educationally relevant while the student is still enrolled in a district. However, upon graduation or permanent departure from the school district, under *N.J.A.C.* 6A:32-7.8(c)(2), student

records may only be disposed of in accordance with the Destruction of Public Records Law, *N.J.S.A.* 47:3-15 *et seq.* [1]

Students who successfully complete eighth grade in the Jamesburg school district are sent to the Monroe Township school district for their secondary education because Jamesburg does not have a high school. On June 30, 2011, A.C. will no longer be enrolled in the Jamesburg school district as a result of his graduation from eighth grade. Therefore, since A.C. will no longer be enrolled in the Jamesburg school district, the Board is not authorized to remove the October 22, 2010 letter from A.C.'s disciplinary file on June 30, 2011.[2] Further, pursuant to *N.J.A.C.* 6A:16-7.10, the Board is required to provide A.C.'s disciplinary records to the Monroe Township school district or to any other high school that he may attend.

Accordingly, this matter is remanded to the OAL for revision of the settlement or for further proceedings.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/24/11
Date of Mailing: 6/24/11

[1] Pursuant to *N.J.S.A.* 47:3-19, the Bureau of Records Management places all public records on Records Retention Schedules that list the minimum time periods they must be retained by State and local governmental and educational agencies.

[2] Student disciplinary files must be maintained by the school district between 1 and 100 years after graduation depending on the nature of the disciplinary action. www.njarchives.org/links/retention.html

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

277-11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 0358-11
AGENCY DKT. NO. 704-12/10

L.C. ON BEHALF OF A.C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF JAMESBURG, MIDDLESEX COUNTY AND GAIL S. VERONA
Respondent.

Isreal Caraballo, Jr., pro se

Nathanya G. Simon, Esq. for respondent (Schwartz, Simon, Edelstein and Celso attorneys)

Record Closed: May 16, 2011 Decided: May 16, 2011

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

This matter was transmitted to the Office of Administrative Law on June 25, 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 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 Jamesburg Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated May 10, 2011.

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.

May 16, 2011
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: May 16, 2011

Mailed to Parties: MAY 18 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

JAMESBURG BOARD OF EDUCATION
13 AUGUSTA STREET
JAMESBURG, NEW JERSEY 08831

On Tuesday May 10, 2011 at a regular Board of Education meeting the following motion was made by Mrs. Newton and seconded by Mr. Brucato that the Jamesburg Board of Education approved the settlement agreement relating to the Office of Administrative Law Docket No. 358-11 as signed by the parties on May 5, 2011.

ROLL CALL VOTE: VOTING (9) AYES (9) NAYS (0)

Mr. Brucato
Mr. Cicario
Mr. Czarneski
Mrs. Faraone
Mr. Hansen
Mr. Larsen
Mr. Maresca
Mrs. Newton
Mr. Somers

I, Thomas E. Reynolds, Board Secretary of the Jamesburg Board of Education, in the county of Middlesex, State of New Jersey, HEREBY CERTIFY that the above extract from the minutes of a meeting of the Board of Education duly called and held on May 10, 2011 has been recorded in my office in the Minute Book of the governing body and is true, complete and correct copy thereof and of the subject matters referred to in the extract.

IN WITNESS THEREOF, I have hereunto set my hand and affixed the corporate seal of the Jamesburg Board of Education this 11th day of May 2011.

Thomas E. Reynolds, Board Secretary

I.C. d/b/o A.C.

v.

Jamesburg Bd. of Ed.
Dr. Gail S Verona
OAL DKT. NO. EDU 358-11
Agency Ref. No. 704-12/10

SETTLEMENT AND RELEASE

WHEREAS, a dispute arose between these parties with regard to a disciplinary action on October 22, 2010 and

WHEREAS, the parties seek to resolve the matter without a finding on the merits;

NOW THEREFORE, it is agreed as follows:

1) The letter dated October 22, 2010 to the parent indicating the one day suspension of October 25, 2010 shall remain in the student file in Jamesburg until June 30, 2011 but will not be transmitted by Jamesburg as part of his separate discipline file to Monroe Township High School or any high school that the student attends;

2) This settlement is full, complete and final as to all claims and all parties and shall be dismissed with prejudice.

3) It is agreed that the agreement and all its terms shall be confidential.

4) All parties acknowledge the terms are understood and that agree the terms have been entered into freely and willingly.

IN WITNESS WHEREOF, the parties have signed this Agreement or caused their representatives to sign this Agreement on the dates set forth below.

Date: 05-05-2011 Israel Carabalio

Israel Carabalio, Jr. Individually and o/b/o. A.C.

Date: 5/5/11 Jamesburg Board of Education

Date: 5/5/11 Dr. Gail S Verona, Superintendent

Date: 5/5/11 Prudence Stuto

Date: 5/5/11 Nathanya G Symon

228-11

GAIL BILSE,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	COMMISSIONER OF EDUCATION
	:	DECISION
RESPONDENT,	:	
AND		
MAXINE INGRAM,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning teachers in these two consolidated cases challenged their transfer from respondent Board's high school to its middle school effective September 1, 2009, alleging violation of *N.J.S.A.* 18A:25-1 and failure to comply with the Open Public Meetings Act, *N.J.S.A.* 10:4-12(b)(8), by not providing notice of the Board meeting so that the affected employees could exercise their right to request in writing a public discussion of the matter. Petitioners contend that if the Board failed to provide this "Rice" notice, the Board violated the law in transferring them, and therefore acted outside its general authority to transfer by roll call vote.

The ALJ found, *inter alia,* that: the matter was ripe for summary judgment as there are no issues of material fact in dispute; petitioner Bilse suffered no alteration in pay as a result of her transfer and was transferred back to the high school for the 2010-2011 school year; petitioner Ingram's transfer was approved as part of a public roll call vote of the Board on June 11, 2009, in compliance with *N.J.S.A.* 18A:25-1; the meeting during which the Board voted on the transfer was advertised and conducted in compliance with *N.J.S.A.* 10:4-12(b)(8); and the courts have held that a transfer without loss of salary and without impacting tenure rights is not an adverse action warranting a "Rice" notice. Accordingly, the ALJ dismissed the appeal of petitioner Bilse as moot since the relief sought has occurred, and dismissed the appeal of petitioner Ingram with prejudice.

Upon careful and independent review, the Acting 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.

June 24, 2011

228-11

OAL DKT. NOS. EDU 6462-09 and EDU 6611-09 (CONSOLIDATED)
AGENCY DKT. NOS. 193-8/09 and 201-8/09

GAIL BILSE,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND		
MAXINE INGRAM,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	
RESPONDENT.	:	

The petitioning teachers challenged their transfer from respondent's high school to its middle school. As petitioner Bilse has been transferred back to the high school and has suffered no monetary loss, her appeal is dismissed as moot.

The Commissioner has reviewed the record and Initial Decision for petitioner Ingram's appeal and finds it to be without merit. First, at its regular public meeting on

June 11, 2009, respondent implemented the required roll-call vote approving the transfer. Second, as the Administrative Law Judge (ALJ) found, a transfer of teaching assignment from one school to another within a district – without loss of salary or impact on tenure rights – is not an adverse action warranting a Rice notice. *See, e.g., Carpenito v. Bd. of Educ.of Borough of Rumson, Monmouth County,* 322 *N.J. Super.* 522, 529-530 (App. Div. 1999); *Guy Ciarcia v. Board of Education of the City of Trenton, Mercer County,* Commissioner Decision 155-91 (September 3, 1991), at 2.[1]

Accordingly, petitioner Ingram's appeal is also dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/24/11

Date of Mailing: 6/24/11

[1] The record supports the ALJ's determination that, with respect to its June 11, 2009 meeting, respondent generally complied with the applicable requirements of the Open Public Meeting Act (OPMA). Further, in the absence of school law violations to which an OPMA claim might be pendent, the Commissioner has no jurisdiction to adjudicate such a claim – which is reviewable by the Superior Court of New Jersey. *N.J.S.A.* 10:4-15.

[2] 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

OAL DKT. NOS. EDU 06462-09 and EDU 06611-09

AGENCY DKT. NOS. 193-8/09 and 201-8/09

CONSOLIDATED

GAIL BILSE,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,

Respondent,

and

MAXINE INGRAM,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,

Respondent.

Stephen E. Klausner, Esq., for petitioners

Rita F. Barone, Esq., for respondent (Purcell, Mulcahy, O'Neill & Hawkins, attorneys)

Record Closed: April 26, 2011 Decided: May 10, 2011

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 19, 2009, Gail Bilse, a teacher employed by the Franklin Township Board of Education (the Board) filed an appeal with the Commissioner of Education of the Board's decision to transfer her from the high school to the middle school effective September 1, 2009. The Commissioner transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on August 31, 2009. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On August 17, 2009, Maxine Ingram, a teacher also employed by the Board, filed an appeal with the Commission of the Board's decision to transfer her from the high school to the middle school effective September 1, 2009. The Commissioner transmitted the contested case to the OAL, where it was filed on September 14, 2009. Both petitioners alleged violation of N.J.S.A. 18A:25-1.

Since that time, the dispute has focused on whether the Board failed to comply with N.J.S.A. 18A:4-12(b)(8) by not providing notice of the Board meeting so that the affected employees could exercise their right to request in writing a public discussion of the matter. Petitioners contend that if the Board failed to provide that notice, the Board violated the law in transferring them, and therefore acted outside its general authority to transfer by roll call vote.

An order consolidating the two matters was entered by Administrative law Judge Israel D. Dubin on April 21, 2010. The parties agreed to proceed by summary decision, and a briefing schedule was ordered. By letter dated September 1, 2010, the schedule was extended, and on October 7, 2010, an additional brief was received. In response to a letter from ALJ Dubin a Board resolution was provided in supplement on February 8, 2011. On March 8, 2011, counsel were notified that the consolidated matter had been transferred to the undersigned pending ALJ Dubin's retirement, and counsel were asked

to submit answers to a list of questions. Although a response from respondent's counsel was received on March 22, 2011, repeated calls and letters to petitioner's counsel produced no response at all. Petitioner's counsel was advised by letter that continued silence would be deemed as a waiver of the opportunity to respond, and when that silence continued, the record closed on April 26, 2011.

FACTUAL DISCUSSION

Through briefs, exhibits, and certifications, the parties have established the following as undisputed fact.

Gail Bilse

Since Bilse suffered no alteration in pay as a result of the transfer from the high school to the middle school, the only relief sought by Bilse was a return to the high school. Respondent's brief of March 22, 2011, a personnel report approved at the Board's May 6, 2010, meeting, which transferred Bilse back to the high school for the 2010-2011 school year.

Maxine Ingram

At the time of the 2009 transfer, Ingram had been employed by the Board for more than thirty-three years and held an instructional certificate with a comprehensive science endorsement. On May 18, 2009, Dr. John Roberts, the Board's Director of Science, informed Ingram that she had been transferred effective September 1, 2009, from the high school to the middle school. Dr. Roberts never stated to Ingram that the Board would be meeting on June 11, 2009, to approve the transfers, and originally, the petition alleged that this action was taken in the absence of a roll call majority vote. The first time the petitioners were supplied with notice of the Board's action was the answers to the petitions some months later. But, in fact, the transfer was approved as part of a roll call vote of the Board on June 11, 2009. (See Certification of Rita F. Barone dated March 22, 2011, and attached Exhibit B.)

With regard to notice of the Board meeting, the Board on April 28, 2009, voted on an Annual Notice of Public Meetings which covered the period from May 7, 2009, through April 27, 2010. (Exhibit A to Certification of John Calvano.) Agendas for meetings are published by the Board on its website on either the Friday or Saturday morning before the meeting, but the agendas do not list names of teaching staff members or school employees. The June 11, 2009, agenda listed a consideration of "P-4, Personnel Report No. 32, dated June 11, 2009 for Professional Staff." Personnel reports on which the Board will be voting are disseminated to the public prior to the start of the meeting. At the June 11, 2009, Board meeting, the Board did not discuss the transfer of either Bilse or Ingram and any aspect of their employment, either in public or in private. Typically, the Board does not discuss transfers in public session. The Board did conduct a public roll call vote approving the list of transfers in public session. The Petitioner's brief contends that Ingram did not receive notice of the Board's vote until the Board filed its official answers to the petition on August 27, 2009. The Board contends it did so by correspondence dated August 14, 2009. (See respondent's brief of October 5, 2010.) With regard to whether prior notice was given, the approximately two-week difference is not material.

LEGAL ANALYSIS AND CONCLUSION

For purposes of determining whether a matter is appropriate for summary decision, an adjudicator should deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a "genuine issue as to any material fact challenged," Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995). On a motion for summary judgment the court must grant all the favorable inferences to the non-movant, Id. at 536. The inquiry is "'whether the evidence presents a sufficient disagreement to require submission to [a fact finder] or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Insurance Corp., Inc. v. Nowell Amoroso, P.A., 189 N.J. 436 (2007), Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995).

Here, there are no material disputes of fact; the disagreements are entirely a matter of law, and thus the matter is appropriate for summary decision.

The Petitioner's core argument is that she was entitled to a Rice notice[1] before the Board took its action, and that the lack of such notice rendered the action illegal, and therefore outside the Board's general plenary authority to transfer personnel. Carpenito v. Bd. Of Ed. of the Borough of Rumson, 322 N.J.Super. 522 (1999). The materials provided by the Board indicate that the meeting was generally within the parameters of the Open Public Meetings Act, N.J.S.A. 18A:4-12(b)(8), and petitioner has raised no claim of violation of the general tenets of the Act.

In Rice, the Appellate Division noted that the Open Public Meetings Act allows a public body to exclude the public "only from that portion of the meeting at which the public body discusses: . . . (8) Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of . . . any specific . . . employee . . . unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting." N.J.S.A. 10:4-12b. The Appellate Court held that the right to request a public discussion of a personnel matter presupposes notice to an employee who may be adversely affected and that the right to privacy is personal and cannot be waived except by the employee himself. One critical aspect of the statement is the right to be heard before adverse action. In general, courts have held that a transfer without loss of salary and without impacting tenure rights is not an adverse action. "A tenured teacher may be involuntarily transferred to another position within his or her certification where no loss of salary or other reduction in employment is suffered and the teacher is not singled out for the transfer on a prohibited basis." Carpentito, quoting Greenaway v. Board of Educ. City of Camden, 129 N.J.L. 46, aff'd 129 N.J.L. 461 (1943) and Williams v. Plainfield Bd. Of Educ., 176 N.J.Super. 154, 162-64 (App. Div. 1980), certif. denied, 87 N.J. 306, (1981) "A transfer is not a demotion or a dismissal under these circumstances." Ibid.

The Commissioner of Education in Guy Ciarcia v. Board of Education of the City of Trenton, Oal Docket No. EDU 7639-90 (July 15, 2001) cited Ridgefield Park

[1] The notice required pursuant to Rice v. Union Cty. Reg. High School Bd. Of Ed., 155 N.J.Super. 64 (App. Div. 1977).

Education Association v. Ridgefield Park Board of Education, 78 N.J. 144, 156 (1978) for the proposition that, "The selection of the school in which a teacher works or the grade and subjects which he teaches undoubtedly have an appreciable effect on his welfare. However, even assuming that this effect could be considered direct and intimate, we find that this aspect of the transfer decision is insignificant in comparison to its relationship to the Board's managerial duty to deploy personnel in the manner which it considers most likely to promote the overall goal of providing all students with a thorough and efficient education."

However, the statute also addresses "any matter involving . . . terms and conditions of employment." The physical location to which one must report every day would fall within the rubric of a condition of employment, and therefore is potentially implicated here. However, as indicated by the certifications, this Board does not have a practice of discussing the transfers of particular individuals in private session, and as a matter of fact, did not discuss transfers at all – either privately or publicly – before the public vote.

Therefore, I **CONCLUDE** that the requirement of a Rice notice was not triggered both because there was no adverse action within the meaning of the statutes and case law and because the Board had no intent to debate the merits of individual transfers and did not in fact discuss any at all at this meeting, privately or publicly.

ORDER

The appeal of Gail Bilse is **DISMISSED** as **MOOT** since the relief sought – transfer back to the high school – has occurred. The appeal of Maxine Ingram is **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.

May 10, 2011
DATE

Laura Sanders
LAURA SANDERS, ACTING CHIEF ALJ

Date Received at Agency: May 10, 2011

Date Mailed to Parties: May 10, 2011

mjm

WITNESSES

FOR THE PETITIONERS:

None

FOR THE RESPONDENT:

None

EXHIBITS

FOR THE PETITIONERS:

Brief of Stephen E. Klausner, Esq., dated September 15, 2010.

FOR THE RESPONDENT:

Brief of Rita F. Barone, Esq., dated October 5, 2010.

Brief of Rita F. Barone, Esq. received March 22, 2011, plus Certification of Rita F. Barone, Esq., and Certification of John Calvano plus Exhibits A, B, and C.

Brief of Rita F. Barone, Esq., received April 19, 2010, plus Exhibits A, B, C and D.

229-11R

OAL DKT. NO. EDU 4302-11
(EDU 3247-10 ON REMAND)
AGENCY DKT. NO. 35-3/10

BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
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. 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: 6/24/11

Date of Mailing: 6/24/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 04302-11

AGENCY DKT. NO. 35-3/10

ON REMAND

OAL DKT. NO. EDU 03247-10

BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY,

Petitioner,

v.

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

Respondent.

Nicholas Celso, III, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Zitomer, LLC, attorneys)

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

Record Closed: May 4, 2011 Decided: May 4, 2011

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on April 14, 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.

The attached Settlement Agreement and Resolution were submitted 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.

5/4/11
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 5-6-11

Date Mailed to Parties: May 6, 2011
dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Schwartz Simon
Edelstein & Celso LLC
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, NJ 07962
(973) 301-0001; FAX (973) 993-3152
Attorneys for the Petitioner,
Board of Education of the
Township of Hanover

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2011 APR 28 P 12: 22

BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY, Petitioner, vs. BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION AGENCY DOCKET NO.:35-3/10 OAL DOCKET NO.:EDUOT 03247-2010N ADMINISTRATIVE ACTION **STIPULATION OF SETTLEMENT**

The above named parties, wishing to compromise their claims and amicably resolve the underling dispute, hereby stipulate that the within matter shall be deemed to be fully resolved, subject to the following terms and conditions.

1. In consideration of petitioner's withdrawal of the Petition of Appeal, respondent shall remit as full and final payment of all sums due and owing in conjunction with the subject dispute payment in the amount of $6,842.65 (Six Thousand, Eight Hundred Eighty-Four Dollars and Sixty-Five Cents).
2. Upon receipt and clearance of respondent's check, petitioner shall forthwith file a letter with the Court withdrawing the Petition of Appeal.
3. The within settlement does not constitute an admission of wrongdoing by either party.

4. Upon fulfillment of the within terms and conditions, the parties mutually release one another, their employees, agents and successors, form all other claims arising out of the subject dispute.

5. This Settlement is further subject to final approval by each party by way of a public adopted resolution at a duly convened meeting, certified copies of which shall be appended hereto as Attachments "A" and "B" respectively.

For Petitioner
Hanover Twp. Bd. of Ed.

NICHOLAS CELSO, III, ESQ.
Attorney for Petitioner

For Respondent
City of Orange Twp. Bd. of Ed.

MELVIN RANDALL, ESQ.
Attorney for Respondent

EXTRACT OF THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY, NJ, AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Hanover Township Board of Education met at 7:35 p.m. on March 22, 2011 in the Memorial Junior School Library, 61 Highland Avenue, Whippany, New Jersey.

The following members of the Board were present:

Mr. Michael Alwell, President
Mr. Anthony J. Scarpino
Mrs. Brandie Linfante
Mr. Stephen Furda
Mr. Nicholas Duva
Mr. Brian Cahill, Vice President
Mrs. Catherine Slattery
Mr. Salvatore A. Azzarello
Mr. Thomas "Ace" Gallagher

There were no members of the Board absent:

At said meeting the following resolution was adopted:

B. CURRICULUM & INSTRUCTION

Upon recommendation of the Superintendent, move to:

8. Accept the settlement agreement with the Orange Board of Education for payment of tuition for two Orange students from October 13, 2009 through April 1, 2010 in the amount of $6,842.65.

Roll Call: 9 yes, 0 no

I certify that the above extract of the minutes of March 22, 2011 of the Hanover Township Board of Education to be a true and accurate copy of the official minutes of the meeting.

Date: 4/5/11

Vanessa M. Wolsky

Vanessa M. Wolsky
School Business Administrator/Board Secretary

ORANGE BOARD OF EDUCATION PUBLIC SCHOOL DISTRICT

Administrative Office
451 Lincoln Avenue, Orange, New Jersey 07050

NOVEMBER 9, 2010 **G10-054**

RESOLUTION TO ACCEPT THE TUITION SETTLEMENT AGREEMENT BETWEEN ORANGE BOARD OF EDUCATION AND HANOVER TOWNSHIP SCHOOL DISTRICT

WHEREAS, Hanover Township Board of Education filed a Petition of Appeal with the Commissioner of Education against the Orange Board of Education asserting a tuition reimbursement claim that the School District is responsible for the educational services of two (2) former Orange Township Board of Education students; and

WHEREAS, Hanover Township Board of Education demands from the Orange Board of Education the sum of Thirteen Thousand Six Hundred Eighty-Five Dollars and 30/100 cents ($13,685.30) representing tuition payments from October 13, 2009 through April 1, 2010; and

WHEREAS, the Orange Township Board of Education contested the sum claimed by the Hanover Township Board of Education a settlement of $6,842.65 was reached as indicated in the settlement agreement; and

WHEREAS, the parties have decided to amicably resolve the controversy herein. and hereby stipulates that the within matter shall be deemed to be fully resolved, by subject to the following terms and conditions, as listed on the attached stipulation of settlement Agency Docket # :35-3/10 and OAL Docket # EDUOT 03247-2010N

NOW, THEREFORE, BE IT RESOLVED, that the Orange Board of Education hereby approves the attached Stipulation of Settlement between parties.

Said Resolution was adopted and approved on this 9th day of November, 2010.

ROLL CALL CHECKLIST		
	YEA	NAY
Stephanie Brown	✓	
Reginald T. Jackson	✓	
Maxine G. Johnson	✓	
Eunice Y. Mitchell S	✓	
David Wright	✓	
Arthur J. Griffa School Board Vice-President M	✓	
Patricia Arthur School Board President	✓	

Attested to by: _____
School Business Administrator/
Board Secretary

SEND ALL INVOICES TO →

PURCHASE ORDER

ORANGE BOARD OF EDUCATION
451 LINCOLN AVENUE
ORANGE, N.J. 07050
TEL (973) 677-4190 • FAX (973) 673-0535

THIS NUMBER MUST APPEAR ON ALL INVOICES, PACKAGES & CORRESPONDENCE

101547

copy 1

Req# R12044

Ship to
ORANGE BOARD OF EDUCATION
451 LINCOLN AVENUE
ORANGE, N. J. 07050 ATTN:BUSINESS OFF.

To
HANOVER TOWNSHIP BOARD OF EDUCATION (HANT)
61 HIGHLAND AVENUE
WHIPPANY NJ 07981-1399

Account Code	Amount
11-000-100-561-L-00-	$6,842.65

Date: 11/16/10 Dept: MR.JAMES

Qty	Unit	Description	Unit Price	Amount
1		TUITION SCHOOL YEAR 2009 AGENCY DOCKET NO:35-3/10 OAL DOCKET NO:EDUOT 03247-2010N IN CONSIDERATION OF PETITIONER'S WITHDRAWAL OF THE PETITION OF APPEAL, RESPONDENT SHALL REMIT AS FULL AND FINAL PAYMENT OF ALL SUMS DUE AND OWING IN CONJUNCTION WITH THE SUBJECT DISPUTE PAYMENT IN THE AMOUNT OF $6,842.65. HANOVER TOWNSHIP BOARD OF EDUCATION FILED A PETITION OF APPEAL WITH THE COMMISSIONER OF EDUCATION AGAINST THE ORANGE BOARD OF EDUCATION ASSERTING A TUITION REIMBURSEMENT CLAIM THAT THE SCHOOL DISTRICT IS RESPONSIBLE FOR THE EDUCATIONAL SERVICES OF TWO (2) FORMER ORANGE TOWNSHIP BOARD OF EDUCATION STUDENTS. INPUT BY J.C.	6842.650	$6,842.65

Please Sign ~~see~~ Voucher & ret.

Thank You,
Janice Clark
A/P

Total for Lines $6,842.65

THIS VOUCHER MUST BE SIGNED AND RETURNED FOR PAYMENT

VENDOR'S DECLARATION

I hereby declare that the goods or services itemized on the above bill have been delivered or rendered, that no bonus or reward has been given or received by any person with the knowledge of the declarant in connection with the claim, and that the above bill is true and correct.

SIGNATURE (x) Vanessa M. Walsh

OFFICIAL POSITION Business Administrator DATE 4/5/11

PRICE CERTIFIED AND CHECKED BY

NOT VALID UNLESS SIGNED BY THE BOARD SECRETARY/BUSINESS ADMINISTRATOR

VOUCHER COPY - SIGN AT X AND RETURN FOR PAYMENT

230-11

#230-11

BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA, SUSSEX COUNTY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BYRAM, SUSSEX COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
BOARD OF EDUCATION OF THE KITTATINNY REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BYRAM, SUSSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Boards appeal a decision by the Executive County Superintendent (ECS) for Sussex County that Sparta and Kittatinny were obligated to purchase heating fuel oil from Petroleum Traders Corporation (PTC) during the 2008-2009 school year under an alleged joint purchasing agreement between the respondent Board and five other boards of education. Petitioners contend, *inter alia*, that respondent Board failed to register and obtain approval of a joint purchasing program from the Director of the Division of Local Government Services (DLGS) as required by *N.J.A.C.* 5:34-7.5(a), rendering Byrum's agreement with PTC unenforceable against petitioners; further, the ECS did not have the authority to enforce the agreement between Byrum and PTC on petitioners since no joint purchasing agreement exists between petitioners and respondent.

The ALJ found, *inter alia*, that: the matter was ripe for summary judgment as there are no issues of material fact in dispute; boards of education that pursue joint purchasing on behalf of other school districts may do so only with the approval of the DLGS and in compliance with the Public School Contracts Law (PSCL) *N.J.S.A.* 18A:18A-1 *et seq.* and the Cooperative Purchasing rules set forth in *N.J.A.C.*5:34-7.1 *et seq.;* in the instant matter, the requirements for a joint purchasing system and a joint purchasing agreement under the PSCL and CP regulations were not met; since no joint purchasing agreement existed between the parties, the ECS did not possess the jurisdiction to resolve the parties' dispute and impose purchasing obligations on petitioners; and respondent's legal and equitable claims must be decided in Superior Court as they do not implicate interpretation of the school laws. Accordingly, the ALJ granted summary decision in favor of petitioners and reversed the decision of the ECS.

Upon careful and independent review, the Acting 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.

June 24, 2011

OAL DKT. NO. EDU 12573-09 AND 12574-09 (CONSOLIDATED)
AGENCY DKT. NO. 255-9/09 AND 251-9/09

BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA, SUSSEX COUNTY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BYRAM, SUSSEX COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
BOARD OF EDUCATION OF THE KITTATINNY REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BYRAM, SUSSEX 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 Byram Township Board of Education (Byram) and the replies thereto submitted by the Sparta Township Board of Education (Sparta) and the Kittatinny Regional School District (Kittatinny).

Byram takes exception to the Administrative Law Judge's (ALJ) determination that the Executive County Superintendent did not have jurisdiction to decide the dispute between the parties. Byram maintains that the ALJ's interpretation of *N.J.S.A.* 18A:18A-14 was too strict. In its exceptions, Byram argues that there is nothing in the statutory authority indicating that an Executive County Superintendent must first find that a joint purchasing agreement was properly formed in accordance with the statutory and regulatory requirements before determining disputes related to joint purchasing agreements or alleged agreements. Therefore, Byram contends that the Executive County Superintendent properly exercised her jurisdiction over this matter, and that her substantive findings should be upheld.

In reply, both Sparta and Kittatinny urged the Commissioner to adopt the Initial Decision, reiterating the fact that Byram failed to legally create a joint purchasing agreement under the applicable statutory and regulatory provisions, and that the Executive County Superintendent's highly circumscribed jurisdiction is limited to controversies involving valid joint purchasing agreements. Finally, Sparta and Kittatinny both maintain that to the extent Bryam is seeking relief related to this matter, the issues are properly brought before the New Jersey Superior Court.

Upon a comprehensive review of the record, the Commissioner concurs with the ALJ's determination that a valid joint purchasing agreement was not established and, therefore, the Executive County Superintendent did not have jurisdiction to resolve the parties' dispute or the authority to impose purchasing obligations on Sparta and Kittatinny. Additionally, the Commissioner agrees that any dispute between the parties concerning whether Sparta and Kittatinny breached an agreement or the potential application of equitable doctrines should be

pursued in New Jersey Superior Court. Accordingly, for the reasons thoroughly expressed therein, the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 24, 2011

Date of Mailing: June 24, 2011

* 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
(CONSOLIDATED)

BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA, SUSSEX COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BYRAM, SUSSEX COUNTY,
Respondent.

OAL DKT. NO. EDU 12573-09
AGENCY DKT. NO. 255-9/09

BOARD OF EDUCATION OF KITTATINNY REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BYRAM, SUSSEX COUNTY,
Respondent.

OAL DKT. NO. EDU 12574-09
AGENCY DKT. NO. 251-9/09

Rodney T. Hara, Esq., for petitioner Board of Education of the Township of Sparta (Fogarty & Hara, attorneys)

Gary A. Kraemer, Esq., for petitioner Board of Education of Kittatinny Regional School District (Daggett, Kraemer, Kovach & Gjelsvik, attorneys)

John J. Abromitis, Esq., for respondent Board of Education of the Township of Byram (Courter, Kobert & Cohen, attorneys)

Record closed: May 6, 2011 Decided: May 13, 2011

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

STATEMENT OF THE CASE

This consolidated matter arises out of an alleged joint purchasing arrangement between respondent Board of Education of the Township of Byram (Byram) and five other boards of education, including petitioners Board of Education of the Township of Sparta (Sparta) and Board of Education of Kittatinny Regional School District (Kittatinny), to purchase heating fuel oil from Petroleum Traders Corporation (PTC) during the 2008–2009 school year. More particularly, Sparta and Kittatinny appeal a decision by the Executive County Superintendent (ECS) for Sussex County that Sparta and Kittatinny are obligated to purchase 185,599 and 38,654 gallons of fuel oil, respectively, from PTC.

PROCEDURAL HISTORY

On September 24, 2009, Sparta filed a Verified Petition with the Commissioner of Education requesting that an order be issued declaring that the ECS lacked jurisdiction to decide the subject dispute; declaring that the ECS's decision was arbitrary, capricious and unreasonable; reversing the ECS's determination that Sparta is obligated to purchase 185,599 gallons of fuel oil at the price of $3.4484 per gallon pursuant to an agreement between Byram and PTC (the Byram-PTC Agreement); and declaring that Sparta is not obligated to purchase fuel oil from PTC. In this regard, Sparta alleges that Byram failed to register and obtain approval of a joint purchasing program from the Director of the Division of Local Government Services (DLGS) as required by N.J.A.C.

5:34-7.5(a) and that, since a joint purchasing program was not registered, approved and legally created, the Byram-PTC Agreement is unenforceable against Sparta and the ECS did not have the authority to enforce an agreement between Byram and PTC and apply its terms to Sparta. (Count I.) Sparta further alleges that Byram failed to comply with N.J.A.C. 5:34-7.4, by failing to enter into a joint purchasing agreement with Sparta for the purchase of fuel oil that sets forth the clear and specific assignments of responsibilities, duties and rights of Sparta and Byram; Sparta did not approve the agreement between Byram and PTC; Sparta did not agree to be bound by its provisions as part of a joint purchasing agreement; and since no joint purchasing agreement exists between Byram and Sparta, the ECS did not have the authority to enforce an agreement between Byram and PTC and apply its terms to Sparta. (Count II.) Sparta asserts that, pursuant to N.J.A.C. 5:34-7.20, Byram was required to determine prior to the solicitation of bids for a joint purchasing program, whether the estimates submitted by duly registered members of the joint purchasing program were considered firm and binding or whether a member may withdraw its estimates after Byram had awarded a contract to a vendor; the Byram-PTC Agreement provided that the estimates set forth in the specifications were not guaranteed quantities for purchase and that Sparta need only purchase fuel oil from PTC on an "as-needed basis"; the only quantity requirement in the Byram-PTC Agreement was the requirement of a minimum delivery of 3,000 gallons of fuel oil to each school building; and the Byram-PTC Agreement did not commit Sparta to purchase a specific quantity of fuel oil from PTC, it did not provide clear specific assignments of responsibilities, duties and rights of Byram and Sparta, and it did not create a legal obligation on the part of Sparta to purchase a specific quantity of fuel oil from PTC or Byram. (Count III.) Sparta further avers that the ECS's decision is in direct conflict with N.J.A.C. 5:34-7.9(h), which prohibits Sparta from purchasing fuel oil at a price that exceeds prices available elsewhere in the market since it forces Sparta to purchase fuel oil at a price of $3.4484 per gallon when fuel oil was available to Sparta from other sources at a lower price (Count IV), and that the Byram-PTC Agreement is an "open-end" contract, which is unenforceable against Sparta. (Count V.) Finally, Sparta alleges that the ECS did not set forth in her decision any legal or factual basis for her conclusion that Sparta is obligated to purchase 185,599 gallons of fuel oil from PTC; no basis in law or fact for the ECS's decision

exists; and the ECS's determination is arbitrary, capricious and unreasonable. (Count VI.)

On September 23, 2009, Kittatinny filed a Petition of Appeal, and later filed an Amended Petition, which asserted claims similar to those advanced by Sparta. Kittatinny alleges that the ECS's decision is arbitrary, capricious and unreasonable for various reasons (Count 1); that the ECS lacked jurisdiction or authority to render her determination because there was no joint purchasing or cooperative pricing agreement in effect pertaining to the purchase of fuel oil (Count 2); that if Kittatinny was contractually obligated to purchase heating fuel oil from PTC, Kittatinny satisfied that obligation by purchasing 3,013 gallons of fuel oil from PTC (Count 3); and that, in the absence of approval from the Director of the DLGS of a joint purchasing system, the ECS lacked jurisdiction and was otherwise incorrect, arbitrary, capricious, and unreasonable in rendering her determination that Kittatinny was required to purchase 38,654 gallons of fuel oil from PTC.

Byram filed Answers with affirmative defenses to the Petitions, and the Department of Education transmitted the matters to the Office of Administrative Law, where they were filed under EDU 12573-09 (as to Sparta) and EDU 12574-09 (as to Kittatinny) for determination as contested cases. On January 28, 2010, I issued an Order consolidating the matters and scheduling the hearing for September 13, 17, and 20, 2010. Prior to the hearing, Byram filed a motion requesting that the consolidated matter be placed on the inactive list due to a pending action instituted by PTC against Byram in the New Jersey Superior Court in which Byram filed a third-party complaint against Sparta and Kittatinny seeking indemnification and/or contribution to the extent that Byram was held liable to PTC. Sparta and Kittatinny opposed the motion, which I denied by Order dated June 10, 2010. Subsequently, the hearing was adjourned to provide petitioners the opportunity to file motions for summary decision. Sparta and Kittatinny filed motions for summary decision, and Byram filed documentation in opposition to the motions. I entertained oral argument on the motions, after which the parties filed supplemental submissions in support of their respective positions. The record closed upon receipt of the last submission.

FACTUAL DISCUSSION

In support of their motions, Kittatinny and Sparta submitted certifications of counsel (Kraemer Cert. and Hara Cert., respectively). Sparta also submitted certifications of Warren S. Ceurvels, Sparta's Assistant Superintendent for Business/Board Secretary (Ceurvels Cert.), and Keith Gourlay, Sparta's Supervisor of Buildings and Grounds (Gourlay Cert.). In opposition, Byram submitted certifications of Byram's former Business Administrator, William Bauer (Bauer Cert.), and Byram's current Business Administrator, Theresa Linskey (Linskey Cert.), along with an Affidavit of the Business Administrator for Sussex Tech Vocational School, Robert Clark (Clark Affid.).[1] A summary of this documentation follows.

In or around May 2008, William Bauer (Bauer), the then Business Administrator for Byram, attended a county roundtable meeting sponsored by the New Jersey Association of School Business Officials (ASBO). Warren Ceurvels (Ceurvels), the Assistant Superintendent for Business/Board Secretary for Sparta, and other school business officials throughout Sussex County also attended the meeting. (Ceurvels Cert. at ¶2; see Bauer Cert. at ¶2.) At the meeting, Bauer discussed with the school business administrators his past experience in advertising for bids for the joint purchase of fuel oil with another school district, and indicated that the school officials should notify him if they had any interest in purchasing fuel oil through joint purchasing with Byram. (See Ceurvels Cert. at ¶3; Hara Cert. at Exhibit A, transcript of Bauer's deposition (Bauer Transcript) at 19–27, 56–57.) Bauer informed the school officials that he would secure a fixed price for fuel oil through the bidding process. (Bauer Transcript at 24; Ceurvels Cert. at ¶3.) Bauer described in his certification that at the May 2008 meeting he invited the other school districts to join him in "a fuel oil consortium"; that "[t]he idea was that if we pooled our resources, and agreed to purchase a volume of fuel jointly, we could achieve favorable pricing"; and that at the meeting he indicated that whoever was

[1] After oral argument, Byram also submitted copies of transcripts of the depositions taken in connection with the Superior Court action of William Bauer, Warren Ceurvels, and Kittatinny's Business Administrator (Margaret Conroy) and Superintendent (Craig Hutcheson). In addition, in response to my request for clarification regarding certain documentation submitted, counsel for Sparta submitted additional documents under letter dated April 18, 2011, and counsel for Byram clarified in a letter dated May 4, 2011, that he did not submit a certification of counsel as referenced in Byram's brief.

interested should provide him with information regarding their district's fuel oil requirements. (Bauer Cert. at ¶2, ¶3.)

At the time of the ASBO meeting, Sparta was a member of the Morris County Cooperative Pricing Council (MCCPC). The MCCPC is a cooperative pricing system duly registered with and approved by the Director of the DLGS. It was established in 1974, and is administered by the Township of Randolph, which serves as the MCCPC's lead agency, for the purpose of effectuating cost savings for school districts and other municipal entities through joint purchasing of a wide range of goods, including fuel oil. Sparta had renewed its membership with the MCCPC on or about August 24, 2006, and the MCCPC was renewed for an additional five-year period with the DLGS beginning October 1, 2006, and ending September 30, 2011. As a member of the MCCPC, Sparta purchased fuel oil from the Finch Fuel Oil Company (Finch Fuel) at a price equal to the prevailing market price at the time of fuel oil delivery. As a member of the MCCPC and under the MCCPC Agreement with Finch Fuel, Sparta was not required to purchase a specific quantity or all of its fuel oil needs from Finch Fuel, but had the option to purchase as little or as much fuel oil as it wanted from Finch Fuel. (See Ceurvels Cert. at ¶4–¶7; Gourlay Cert. at ¶2–¶4 and Exhibits A, B and C.)

Subsequent to the ASBO meeting, representatives of Sparta and Kittatinny forwarded e-mails to Bauer regarding the bidding for fuel oil. On May 15, 2008, Margaret Conroy (Conroy), the Business Administrator for Kittatinny, informed Bauer by e-mail that Kittatinny "would love to join your fuel oil bid," and that she would forward information regarding the size and location of its tanks. (Linskey Cert. at Exhibit B.) In a later e-mail that day, Conroy advised Bauer that Kittatinny had one 15,000-gallon tank and used approximately 60,000 gallons in the 2007–2008 school year. (Id. at Exhibit C.) On May 16, 2008, Sparta's Assistant School Business Administrator informed Bauer by e-mail that Sparta's Supervisor of Buildings and Grounds, Keith Gourlay (Gourlay), was interested in the possibility of bidding with Byram for the purchase of fuel oil for the 2008–2009 school year. (Gourlay Cert. at ¶6 and Exhibit D.)

By e-mail dated June 3, 2008, Bauer informed Conroy, Ceurvels and other school officials that "[a]s of now we have 6 members of our heating oil consortium," and

requested that information be furnished regarding "estimated district gallonage for the year," along with the addresses of the schools involved for delivery and the contact person for ordering and delivery purposes. (Ceurvels Cert. at ¶9 and Exhibit A; Bauer Cert. at ¶5 and Exhibit A.) He further indicated in the e-mail his intent to put the bid out on July 7, 2008.

Conroy advised Bauer by e-mail dated June 4, 2008, that Kittatinny had one 15,000-gallon tank and used approximately 60,000 gallons in 2007–2008, along with information regarding the location of its school and its contact person. (Linskey Cert. at Exhibit F.) By e-mail dated July 2, 2008, Gourlay provided information to Bauer regarding the gallon capacity of each of Sparta's tanks, the location of the schools and the approximate gallons that each school used for the 2007–2008 school year, which totaled approximately 120,000 gallons. (Gourlay Cert. at ¶9 and Exhibit E.)

After receiving information regarding estimated fuel oil usage, Bauer sent the school officials an e-mail dated July 7, 2008, stating that he would advertise for bids that week and attaching the proposed bid document that would be advertised. The bid opening was scheduled for August 6, 2008. Bauer also stated in the e-mail: "Make sure you do the resolutions you need for this event to take place." (See Bauer Cert. at ¶6 and Exhibit B; Gourlay Cert. at ¶11; Ceurvels Cert. at ¶14.)

Bauer sent Gourlay the bid package that would be advertised, which Byram prepared. (See Gourlay Cert. at ¶11; Bauer Transcript at 30, 37.) The "Invitation to Bid and Specifications" stated in pertinent part:

> Sealed proposals for fuel oil will be received by the Byram Township Board of Education . . . at 10:00 a.m. prevailing time, on Wednesday, August 6, 2008. The Board of Education reserves the right to reject any and all bids.
>
> The unit price per gallon based on 525,000 gallons of #2 fuel oil will be used for comparison of bids. Note the number of gallons is for price comparison and is not a guarantee of quantity to be supplied . . . .
>
> . . . .

> Bid price shall be a fixed sum per gallon from July 1, 2008 through June 30, 2009 with minimum deliveries of 3,000 gallons for each school . . . .
>
> [See attachment to letter of Rodney Hara, Esq., dated April 18, 2011 (emphasis added)]

The bid specifications also listed the location of the "eleven (11) Board of Education/Consortium buildings" to which deliveries shall be made, including the number and size of fuel oil storage tanks at each location, and indicated, in pertinent part, that Sparta had eight tanks with a total gallon tank capacity of 71,000 gallons and Kittatinny had one 15,000-gallon tank.

By e-mail dated August 6, 2008, Bauer informed the school officials that he had opened the bid packets; provided the identity and amount of the "[b]est acceptable bid"; and requested that they have their boards approve the bid at their next meeting. (Bauer Cert. at ¶8; Linskey Cert. at Exhibit H.) Bauer subsequently e-mailed the school officials on August 12, 2008, advising that a bidder was making a protest to the bid package, the matter would be rebid and the new bid would be opened on August 26, 2008.[2] (Bauer Cert. at ¶9 and Exhibit D; see Gourlay Cert. at ¶15 and Exhibit G.) According to the certifications of Ceurvels and Gourlay, Bauer did not provide them with a copy of any of the bids Byram received or the second bid package advertised by Byram. (Gourlay Cert. at ¶15, ¶16; Ceurvels Cert. at ¶17.)

After advertising and receiving bids for a second time, Byram adopted a resolution at its meeting on August 27, 2008, rejecting the bids "on the basis that they each contained conditional language as to the price, contrary to the bid specification's request for a firm price," and authorizing "the Business Administrator, on behalf of the Board, to negotiate and execute the Fuel Oil Contract for the best possible price in accordance with the provisions of N.J.S.A. 18A:18A-5, which shall be presented to the Board of Ratification at its next Board meeting." (Hara Cert. at Exhibit G.) By e-mail dated August 28, 2008, Bauer informed the school officials that the second bid had

[2] Other documentation indicates that the bid opening occurred on August 27, 2008. (See Hara Cert. at Exhibit G; Bauer Cert. at Exhibit E.)

been opened on August 27, and that the bids were rejected due to material changes by the bidders. He further stated that, on legal recommendation, the Byram Board had given him the right to negotiate directly with the bidders without going out to bid; he would negotiate the "best pricing possible"; the "current fixed pricing" was approximately $3.57 per gallon; and any official who needed to speak with him should contact him on Tuesday. (Bauer Cert. at ¶10 and Exhibit E; see Ceurvels Cert. at ¶18.) According to the certifications of Ceurvels and Gourlay, they were not provided with a copy of any of the bids Byram received. (Gourlay Cert. at ¶17; Ceurvels Cert. at ¶18.)

By e-mail dated September 3, 2008, Bauer informed the school officials that he had obtained a price of $3.4484 per gallon and was waiting for a second bidder to provide a quote. (Bauer Cert. at ¶11 and Exhibit F.) He further indicated in the e-mail that, "[i]f we use more than the contract gallonage of 450,000 gals. we will then pay .0744 over the market price"; he was not sure whether the next company would provide a better price; and he would decide by noon. In an e-mail sent later that day, Bauer stated, "the Consortium has awarded a fuel bid to [PTC] as follows: 450,000 gallons at a fixed rate of $3.4484, and gallons needed over the 450,000 will be priced at +$.0744 over the OPIS/Newark/Daily/Avg." (Bauer Cert. at ¶12 and Exhibit G.) Bauer further indicated that he would provide details as to whom to call for deliveries. According to Bauer's certification, he thereafter repeated his request that the other boards pass resolutions memorializing their agreement to be part of the consortium and to purchase from PTC and, after receiving resolutions passed by each of the boards, through assistance of counsel, an agreement was prepared with PTC which he executed on behalf of the consortium. (Bauer Cert. at ¶13–¶14.)

The minutes of the Kittatinny Board's meeting on September 18, 2008, reflect that the Board passed a motion "to approve membership with a consortium of Sussex County schools . . . with Byram being the LEA for the purpose of bidding #2 fuel oil for the 2008–09 school year." It also passed a motion to "accept the award of the bid of #2 fuel oil by the consortium LEA, Byram . . . , to [PTC] at a fixed cost of $3.4484 for the first 450,000 gallons purchased with an increase fee of $.0744 over the OPIS/Newark/Daily Average for gallons over 450,000 for the 2008–09 school year." (Linskey Cert. at Exhibits M and N.)

The minutes of the Byram Board's meeting on September 24, 2008, reflect that Byram adopted a resolution to "ratify the award of a contract for the supply of Fuel Oil #2 to [PTC] for the agreed upon price of $3.4484 per gallon for the first 450,000 gallons and an agreed upon price of +.0774 over the OPIS/Newark/Daily/AVG for any gallons over 450,000 that the school district may need." (See attachment to letter of Rodney Hara, Esq., dated April 18, 2011.) On September 24, 2008, representatives of Byram executed the Byram-PTC Agreement. (Ceurvels Cert. at Exhibit D.)

At its meeting on September 24, 2008, Sparta adopted a resolution approving "participation in a joint fuel oil purchasing program with Byram . . . as the host district." (Ceurvels Cert. at ¶20 and Exhibit B; Gourlay Cert. at ¶19.) The resolution further provides that "[t]he fuel oil bid was awarded at $3.45 per gallon plus $0.07 for each gallon over the districts' fuel allotment." The minutes of that meeting state in pertinent part: "In an effort to keep fuel costs to a minimum, Sparta has joined with Byram Twp. BOE to purchase fuel. SBOE [Sparta Board of Education] still retains the option of purchasing fuel through Morris county co-op . . . ." (Ceurvels Cert. at Exhibit C at 4.)

After Sparta adopted the resolution, Byram sent an executed copy of the Byram-PTC Agreement and accompanying bid specifications to Ceurvels under letter dated September 29, 2008, which Ceurvels received on or around October 8, 2008. According to the certifications of Ceurvels and Gourlay, prior to receiving this correspondence they had never seen the Byram-PTC Agreement and were not aware of its terms. (Ceurvels Cert. at ¶22 and Exhibit D; Gourlay Cert. at ¶20.)

The Byram-PTC Agreement is signed by representatives of Byram and PTC. (See Ceurvels Cert. at Exhibit D.) Pursuant to the Byram-PTC Agreement, "[t]he Services will include the delivery of Fuel Oil #2 to the Consortium buildings," and the first delivery shall be made no later than October 15, 2008, and "[a]ll deliveries thereafter shall be made upon notice from the Board [Byram] to the Contractor [PTC] on an as needed basis." (Article 2.1.) The Byram-PTC Agreement states that "[t]he price to be paid by the Board [Byram] to the Contractor [PTC] for the Services performed . . . , known as the Contract Sum," and for which "[t]he Board [Byram] shall be liable," shall

be as follows: "450,000 gallons of Fuel Oil #2 at $3.4484 per gallon for a total Contract Sum of $1,551,780. Additionally, any gallons ordered and delivered over 450,000 gallons will be priced at +.0744 over the OPIS/Newark/Daily/AVG." (Articles 4.1 and 4.2.) The Byram-PTC Agreement does not specifically address the amount of fuel oil that would be purchased by Sparta or Kittatinny.

It is undisputed that Byram did not prepare or enter into a written agreement with Sparta or Kittatinny that sets forth the parties' rights and obligations for the purchase of fuel oil for the 2008–2009 school year, including any written agreement to purchase a specific quantity and/or all of their fuel oil needs for the 2008–2009 school year from the successful bidder. It is further undisputed that, although Bauer referred to a "heating oil consortium" in his June 3, 2008, e-mail and the formation of a "fuel oil consortium" in his certification, Byram did not formally create a joint purchasing program or cooperative pricing system; it did not register a joint purchasing program or cooperative pricing system for the purchase of fuel oil from PTC with the Director of DLGS; it did not obtain approval from the Director of DLGS of any such program or system; and the DLGS Director did not approve Sparta's and Kittatinny's membership in the fuel oil "consortium" or the Byram-PTC Agreement. (See Bauer Transcript at 39–41, 45–49, 56; Gourlay Cert. at ¶22; Ceurvels Cert. at ¶35; Hara Cert. at Exhibits B and C, response to request for admission Nos. 3–7, 11.)

Gourlay and Ceurvels describe in their certifications that the price of fuel oil available through the MCCPC had steadily and dramatically increased during the 2007–2008 school year. Specifically, the price of fuel oil available through the MCCPC rose from $2.74 per gallon on November 13, 2007, to $3.89 per gallon on June 26, 2008, for Sparta's High School and Mohawk Avenue School, to $4.02 per gallon on June 27, 2008, for the Middle School, and to $3.95 per gallon on June 25, 2008, for Sparta's Helen Morgan Elementary School. (Gourlay Cert. at ¶5; Ceurvels Cert. at ¶8.)

According to Gourlay and Ceurvels, Sparta pursued the joint purchasing of fuel oil with Byram, and they agreed to participate in the alleged consortium with Byram, in order to secure for Sparta a fixed ceiling price for fuel oil in the event the price of fuel oil available through the MCCPC continued to rise through the 2008–2009 school year and

in the event that Sparta could not purchase fuel oil at a lower price elsewhere. Gourlay and Ceurvels certify that at no time did Bauer or any other representative from Byram notify them that the 120,000-gallon estimate that Sparta provided was a firm and binding purchasing commitment that Sparta must undertake in order to participate in the alleged consortium and whether the estimate could be withdrawn after Byram awarded a contract for fuel oil. Additionally, according to the certifications, neither Bauer nor any other Byram representative solicited a commitment from them on behalf of Sparta to purchase a specific quantity or all of Sparta's fuel oil needs for the 2008–2009 school year through the alleged consortium or from PTC; they did not communicate to any Byram representative that Sparta would purchase a specific quantity of fuel oil or all of Sparta's fuel oil needs through the alleged consortium; and Sparta never entered into a written joint purchasing agreement with Byram that sets forth the parties' rights and obligations for the purchase of fuel oil from PTC and/or a joint purchasing agreement with Byram, or a contract with PTC, for the purchase a specific quantity or all of its fuel oil needs for the 2008–2009 school year. The certifications further state that neither Bauer nor any other Byram representative determined and notified Gourlay or Ceurvels of the quantity of fuel oil that Byram should contract to purchase on behalf of Sparta for the 2008–2009 school year; they were not notified that Byram sought to undertake a commitment to purchase a fixed amount of fuel oil for the 2008–2009 school year; and Sparta would not have agreed to participate in the alleged consortium with Byram if doing so required Sparta to purchase a specific quantity or all of its fuel oil needs through the consortium. Rather, Sparta's singular purpose in participating in the alleged consortium with Byram was to secure a ceiling price for the purchase of fuel oil and save the taxpayers of Sparta money in the event the market price for fuel oil available through the MCCPC continued to rise during the 2008–2009 school year, and Sparta agreed to participate in the consortium to enable it to purchase fuel oil from PTC if fuel oil could not be purchased at a lower price elsewhere. In this regard, the certifications of Ceurvels and Gourlay describe that at or around the time the Byram-PTC Agreement was executed, the price of fuel oil available through the MCCPC began to fall. After Sparta adopted the September 24, 2008, resolution, the price of fuel oil available to Sparta through the MCCPC steadily declined from $3.15 per gallon on September 26, 2008, to $1.48 per gallon on February 27, 2009, or approximately $2.00 less per gallon than the $3.4484 price for purchasing fuel oil from PTC. As a result of the dramatic

decrease in the price of fuel oil during the 2008–2009 school year, Sparta decided to purchase fuel oil through the MCCPC and saved the taxpayers of Sparta significant sums of money by doing so. (See Ceurvels Cert. at ¶8, ¶11–¶13, ¶16 ¶25, ¶27–¶28, ¶35; Gourlay Cert. at ¶6–¶8 ¶10; ¶14, ¶21–¶26.)

In opposition to the motion, Byram cites to various excerpts from Ceurvels' deposition testimony. During the deposition, Ceurvels testified that when he received the Byram-PTC Agreement, he understood that Sparta would be bound "[o]nly to the price" in the agreement. He explained that "annexed as part of the contract were the bid specifications" that "stated that the gallonage is only an estimate of fuel oil and not to bind any of the participants to that amount," which "reaffirmed . . . that this was the maximum ceiling amount that we were going to pay if we purchased through this consortium." Ceurvels noted that Sparta did not sign the Byram-PTC Agreement, the Sparta Board did not approve the agreement, and the Board only approved the $3.44-per-gallon price to purchase fuel oil from PTC. Ceurvels described his understanding that "if we were going to buy fuel from [PTC] it would be at [the] price" of $3.44 per gallon and PTC would be bound by this price. He further expressed the view that if Sparta had chosen to purchase fuel oil from PTC, Sparta would have the right to insist on the $3.44-per-gallon price and PTC would be bound to sell Sparta fuel at this price even though Sparta did not sign the Byram-PTC Agreement and no joint purchasing agreement had been signed. In response to questioning regarding why Ceurvels had this belief if no valid consortium was formed and Sparta was not a signatory to the contract, Ceurvels stated, "[b]ecause Mr. Bauer was able to obtain through his negotiations of [PTC] a purchase price of $3.45 rounded off," "[a]cting on behalf of all the districts," including Sparta. He further testified that Sparta "never enforced the [Byram-PTC] agreement." (See Transcript of Ceurvels' deposition at 42–46, 93–96.)

With regard to Kittatinny, Conroy described that since she commenced employment with Kittatinny in 2005 and up to the present, Kittatinny purchased its fuel oil through the New Jersey State contract from vendors approved by the State. According to Conroy, no joint purchasing, cooperative pricing or "consortium" arrangement that she has ever participated in on behalf of a public entity has ever required a minimum quantity of goods/services that must be purchased, and neither

Bauer nor anyone else advised Conroy that by joining the "consortium" Kittatinny was required to purchase a minimum number of gallons of fuel oil. Conroy described that her objective in deciding to participate in the "consortium" was to secure a fixed ceiling price for fuel oil in the event that the prices under the State contract rose to a high level during the ensuing school year, and that the contract between Byram and PTC was not furnished to Kittatinny until after Kittatinny had adopted a resolution to join the "consortium." Conroy further testified that at all relevant times, Kittatinny believed that it could purchase its fuel oil requirements from any supplier offering the lowest price, and was not required to purchase from PTC. (See Kraemer Cert., Exhibit A, transcript of Conroy deposition at 15–17, 25–26, 31–32, 37–39, 65, 67, 72, 78–79, 83, 85, 96.)

Byram also submitted the deposition transcript of Kittatinny's Superintendent, Craig Hutcheson. Hutcheson described that he was told by Conroy that as part of the consortium, Kittatinny was not obligated to purchase fuel oil from one supplier. Hutcheson noted that this was also not mentioned in the proposed contract, which he reviewed before it was signed, and that he brought the matter to the Board in September 2008. Hutcheson testified that Kittatinny was "looking at purchasing this oil at a maximum price in case we got caught in a bind where oil prices went up," and stated his understanding that the 450,000 gallons in section 4.1 of the Byram-PTC Agreement referred to the gallons of fuel oil that would be available for the schools. In response to whether it was Hutcheson's "understanding that although Kittatinny was not a party to this agreement, in other words, wasn't listed as a party to the agreement, . . . Kittatinny was nonetheless bound by the terms of the agreement as part of the consortium," he stated, "I would say we were bound to the terms guaranteeing a ceiling price for oil, that was our understanding, for that particular school year. It was a maximum price we would be exposed to." (See Transcript of Hutcheson's deposition at 9–17.)

Byram further submitted a certification of its current Business Administrator, Theresa Linskey. According to that certification, on or about February 11, 2009, Linskey received a telephone call from Conroy, who identified herself as the Business Administrator for Kittatinny, and indicated that Kittatinny was one of a "group" to purchase fuel oil at $3.34 per gallon. Linskey further relayed alleged advice by Conroy

during that telephone conversation that the prices had dropped significantly; she did not want to spend taxpayer money on a higher price for fuel oil; Kittatinny went elsewhere to purchase fuel oil; and it was "unethical" for Kittatinny to back out of the consortium, but Kittatinny was doing so for cost-saving purposes. (Id. at ¶2–¶4 and Exhibit A.)

By letter dated June 17, 2009, Ceurvels received an invoice from PTC in the amount of $250,013.42, as of June 17, 2009, for its "portion of the unused heating oil gallons" from the Byram-PTC Agreement. (Ceurvels Cert. ¶29 and Exhibit E.)

On June 19, 2009, the ECS e-mailed Ceurvels, along with Sparta's Superintendent of Schools and other superintendents and business officials of the school districts involved, requesting their attendance at a meeting at the ECS's office on June 24, 2009, regarding their "respective obligations under the agreement between Byram Township as the LEA and [PTC] for your districts to obtain fuel oil for the 2008–2009 school year." (Ceurvels Cert. at ¶30 and Exhibit F.) In the e-mail, the ECS stated that "[a]s per [N.J.S.A.] 18A:18A-11, Boards of Education may enter into joint purchasing agreements for their respective districts"; "per [N.J.S.A.] 18A:18-12 (sic) such agreements shall be entered into by resolution adopted by each participating board of education"; "[t]he county office has copies of the Board resolutions passed by both Sparta and Kittatinny, yet to date no fuel has been purchased and no monies have been paid by either district toward the agreed upon fuel purchase"; and "[a]s of June 17, 2009 Sparta is delinquent by $250,013.42 and Kittatinny is delinquent by $52,068.84." The ECS further advised that "[i]n the case of any controversy or dispute with these joint agreements, as per [N.J.S.A.] 18A:18A-14, the same shall be referred to the county superintendent and his/her determination shall be binding, subject to appeal to the Commissioner and the State Board."

Ceurvels attended the June 24, 2009, meeting conducted by the ECS. According to his certification, during the meeting Ceurvels set forth the position that Byram did not create a valid joint purchasing program, that Sparta did not enter into a joint purchasing agreement with Byram, and that Sparta was not legally obligated to purchase a specific quantity of fuel oil from PTC. The ECS distributed a chart at the meeting that purported to set forth the purchasing obligations of each of the six districts

under the Byram-PTC Agreement and listed, in pertinent part, a balance of 38,654 gallons for Kittatinny and 185,599 gallons for Sparta. (Ceurvels Cert. at ¶31–¶32 and Exhibit G.) The chart stated that the "# [of] Gallons [is] based on number of tanks and capacity of those tanks for each district."[3]

Subsequent to the June 24, 2009, meeting, the ECS issued a letter dated July 1, 2009, which states: "After reviewing all of the issues involved in this situation, I have made the determination that the six districts are responsible to purchase the percentage allocation allotted to their district, and not . . . only 3,000 gallons," and that the districts "need to purchase from [PTC] the . . . number of gallons remaining as per the agreement" pursuant to the chart distributed at the meeting. (Ceurvels Cert. at Exhibit H.) The ECS determined that Sparta is obligated to purchase 185,599 gallons, representing a cost of $640,019.59, and Kittatinny is obligated to purchase 38,654 gallons, representing a cost of 133,294.45.

Counsel for Sparta requested that the ECS reconsider her decision by letter dated July 31, 2009. (Hara Cert. at Exhibit D.) In connection therewith, counsel asserted, among other claims, that Byram did not create a legally constituted joint purchasing program; Byram did not register and obtain approval of a joint purchasing program from the DLGS Director as required by the regulations; Sparta did not enter into a formal joint purchasing agreement with Byram; Sparta did not inform Byram that it would purchase a specific quantity or all of its fuel oil from PTC; no factual basis existed for concluding that Sparta had agreed to purchase 185,599 gallons of fuel oil from PTC, which exceeded the estimate that Sparta had furnished to Byram; and since there was not a legally constituted joint purchasing program, the ECS did not have jurisdiction to resolve the dispute pursuant to N.J.S.A. 18A:18A-14. In response to these legal arguments, the ECS issued a letter dated August 11, 2009, stating: "As far as my office

[3]The parties do not dispute that the ECS appears to have relied on the following criteria and calculations in arriving at these balances: The ECS added up the total number of gallons for each fuel oil tank listed in the bid specifications and reached a total of 162,000 gallons. The ECS then took the amount of fuel oil storage capacity listed for each district's tanks in the bid specifications, and divided the same by 162,000 gallons to arrive at a percentage figure of total storage capacity. The ECS multiplied that percentage by the 450,000 gallons of fuel oil stated in the Byram-PTC Agreement to reach a total gallons of fuel oil that each district was obligated to purchase from PTC. The ECS then subtracted from this total the amount of fuel oil the district actually purchased from PTC during the 2008–2009 school year to arrive at the balance figures.

is concerned, the spirit of the agreement appears not to have been upheld by Sparta. Had the price of fuel oil not dropped, I am fairly certain that questions about the legality of the initial agreement would not be surfacing." (Hara Cert. at Exhibit E.)

Bauer states in his certification his understanding that, with the exception of Sparta and Kittatinny, the other four members of the consortium satisfied their purchase obligations with PTC. Bauer further states that "it was clear to everyone that the agreement to join the consortium meant that the consortium members were required to purchase their allotted amount of fuel from [PTC]"; "[i]t was made clear to the other members all along that they had an obligation, not an 'option' to purchase from [PTC]"; and "[a]t no time during the process did the representatives of Kittatinny or Byram[4] ever express any 'lack of understanding,' nor did they ask any substantive questions with regard to their obligations." (Bauer Cert. at ¶15–¶18.)

Byram also submitted an Affidavit of the Business Administrator for Sussex Tech Vocational School, Robert Clark. Clark indicated that he attended an ASBO meeting in or about April 2008, during which Bauer gave a presentation concerning a proposed fuel oil consortium that he was attempting to form, and Clark attended another meeting in or about May 2008, where Bauer continued the presentation concerning the proposed fuel oil consortium. According to Clark, Bauer conveyed that the boards that were interested in joining the consortium would have to provide their fuel oil requirements so that Bauer could determine how much fuel oil would be necessary to be purchased in accordance with the bid and the contract process, and Bauer indicated, "if you are in, you are in," or words to that effect. Clark further described that Bauer indicated that the boards which were joining the consortium would be required to purchase the fuel that was to be contracted for in accordance with the consortium; at no time did Bauer ever say that the purchase of fuel oil would be "optional" or that boards would not be required to purchase fuel oil; and Bauer specifically stated that those participating members would "have to" purchase the fuel oil from the selected supplier. (Clark Affid. at ¶2–¶5.)

[4] It appears that Bauer inadvertently referred to Byram rather than Sparta.

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). Summary decision should be denied "only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill, supra, 142 N.J. at 529 (citation omitted). The New Jersey Supreme Court has cautioned that, "if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of

an insubstantial nature, a mere scintilla, '[f]anciful, frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact." Judson, supra, 17 N.J. at 75 (citations omitted). A "non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill, supra, 142 N.J. at 529. Disputed issues of fact that are immaterial or of an insubstantial nature will not suffice. Ibid.

The principle argument advanced by Sparta and Kittatinny during oral argument is that the ECS lacked the jurisdiction or authority to determine the controversy between the parties because no legally created joint purchasing system and joint purchasing agreement pursuant to the Public School Contracts Law and the corresponding regulations existed. Accordingly, it is urged that the ECS's decision determining that Sparta and Kittatinny are obligated to purchase 185,599 and 38,654 gallons of fuel oil, respectively, from PTC should be reversed and the contractual dispute vis-à-vis the parties' obligations under the Byram-PTC Agreement must be resolved in the Superior Court.

The Public School Contracts Law (PSCL), N.J.S.A. 18A:18A-1 et seq., provides the statutory framework with regard to the expenditure of public funds on behalf of a board of education. Oceanside Charter Sch. v. New Jersey State Dep't of Educ., Office of Compliance Investigation, 418 N.J. Super. 1, 10 (App. Div. 2011). Article 3 of the PSCL governs "joint purchasing agreements." N.J.S.A. 18A:18A-11 to -14.4. Pursuant to N.J.S.A. 18A:18A-11, "boards of education of two or more districts may provide jointly by agreement for the provision and performance of goods and services for their respective districts." The school laws dictate the terms that must be included in joint purchasing agreements. Specifically, N.J.S.A. 18A:18A-12, entitled "contents of agreement," instructs that "[s]uch agreements shall be entered into by resolution adopted by each participating board of education . . . and shall set forth" the following information: (1) "the categories of goods or services to be provided or performed," (2) "the manner of advertising for bids and of awarding of contracts," (3) "the method of payment by each participating board of education," and (4) "other matters deemed

necessary to carry out the purposes of the agreement." N.J.S.A. 18A:18A-12(a) (emphasis added). Subsection (b) of N.J.S.A. 18A:18A-12 further directs that "[e]ach participant's share of expenditures for purchases under any such agreement shall be appropriated and paid in the manner set forth in the agreement and in the same manner as for other expenses of the participant." N.J.S.A. 18A:18A-13 makes clear that "[s]uch purchases and all contracts pertaining thereto shall be subject to all provisions of law and the applicable rules and regulations of the State board." The next section of the statutory scheme provides that, "[i]n the event that any controversy or dispute shall arise among the parties . . . to any such contract, the same shall be referred to the county superintendent of the county in which the districts are situated for determination and his determination thereon shall be binding, subject to appeal to the commissioner and the State board pursuant to law." N.J.S.A. 18A:18A-14 (emphasis added).

The New Jersey Legislature has delegated to the Director of DLGS within the Department of Community Affairs the authority, after consultation with the Commissioner of Education (the Commissioner), to adopt rules implementing the provisions of the PSCL. N.J.S.A. 18A:18A-49.2. The DLGS has promulgated detailed and comprehensive regulations prescribing the procedures that boards of education must follow when pursuing joint purchasing. N.J.A.C. 5:34-7.1 et seq. N.J.A.C. 6A:23A-21.5 directs that "[a] district board of education . . . may by resolution establish joint purchasing systems," provided that "[s]uch joint purchasing system is effective only upon approval of the Director of the [DLGS]" (emphasis added). Similarly, the DLGS regulations instruct that "[b]oards of education . . . that pursue joint purchasing as described in N.J.S.A. 18A:18A-11 shall be subject to the rules set forth" in that subchapter, known as the Cooperative Purchasing Rules (the CP regulations). N.J.A.C. 5:34-7.1(a) and (f) (emphasis added); see also N.J.A.C. 5:34-7.32(a). Accordingly, boards of education that pursue joint purchasing on behalf of other school districts may only do so with the approval of the DLGS Director and in compliance with the PSCL and the CP regulations.

In pertinent part, the CP regulations define a "cooperative purchasing system" as "a cooperative pricing system [or] joint purchasing system . . . which has been approved

and registered pursuant to this subchapter." N.J.A.C. 5:34-7.2. A "joint purchasing system" is defined as follows:

> "Joint purchasing system" means a cooperative purchasing system in which the lead agency serves as the purchasing agent for the membership of the system with all of the duties and responsibilities attendant thereto. The lead agency advertises for bids and awards a single contract to a vendor providing for the payment to the contractor for its own needs and for the needs of the participating registered members of the system. The only contractual relationship is between the lead agency and the vendor.
>
> [Ibid.]

In turn, a "lead agency" is defined as "the contracting unit which is responsible for the management of the cooperative purchasing system," and a "contracting unit" is defined as including a board of education. Ibid. Although the regulations do not define the phrase "cooperative pricing system," the difference between this type of system and a joint purchasing system has been explained as follows:

> In a joint purchasing system, two or more local government agencies contractually agree that one of them will serve as the lead agency or purchasing agent for the group, at least with respect to certain specified categories of purchases. The lead agency, in its capacity of purchasing agent, does the buying for the group. It prepares the formal bid specifications; advertises for and receives bids, and executes a contract with the lowest responsible bidder for the full amount of the commodities or services needed by all participants.
>
> A cooperative pricing system differs from a joint purchasing system in that separate contracts or purchase orders are executed between each participating government agency and the vendor. The local governmental unit serving as the lead agency essentially is providing the members of the cooperative pricing system the availability of prices for specified items based upon its having carried out the advertising and bid procedures required by the Local Public Contracts Law.
>
> [27 N.J.R. 3259(a), 3260 (September 5, 1995).]

In accordance with the CP regulations, "[t]wo or more contracting units may join together to form a cooperative pricing system or a joint purchasing system for the provision and performance of goods and services." N.J.A.C. 5:34-7.3(a). If this course is taken, the contracting unit designated as the lead agency is required to authorize the creation of the system by resolution, and identify in its authorizing resolution whether the system is either a joint purchasing system or a cooperative pricing system. N.J.A.C. 5:34-7.3(b).

In addition, the cooperative pricing or joint purchasing system must be registered with and approved by the DLGS Director. N.J.A.C. 5:34-7.5(a). The lead agency of the proposed system is charged with the obligation to apply to the DLGS Director on behalf of the system's participating contracting units for approval of that system. N.J.A.C. 5:34-7.5(b). The application must include the action requested; the name of the cooperative purchasing system; the name of the contact, address and telephone number of the lead agency; the name of the participating contracting units affected by the request; and "certification of compliance with N.J.S.A. 40A:11-1 et seq. and 18A:18A-1 et seq., as appropriate." N.J.A.C. 5:34-7.5(c); N.J.A.C. 5:34-7.2. Following the submission of the application, the DLGS Director must review the application utilizing the following criteria:

> 1. Provision for maintaining adequate records and orderly procedures to facilitate audit and efficient administration;
>
> 2. Adequacy of public disclosure of such actions as are taken by the participants;
>
> 3. Adequacy of procedures to facilitate compliance with all provisions of the Local Public Contracts Law, Public School Contracts Law and corresponding rules; and
>
> 4. Clarity of provisions to assure that the responsibilities of the respective parties are understood.
>
> [N.J.A.C. 5:34-7.5(e) (emphasis added).]

If the application is approved, the "[a]pproval shall be for a period not to exceed five years, and shall be limited to the terms, participants and scope of services presented for approval." N.J.A.C. 5:34-7.5(f). After the system is approved by the DLGS Director, any subsequent changes shall be submitted to the Director on the form designated in the regulations. Ibid. Additionally, pursuant to N.J.A.C. 5:34-7.9(a), upon approval of a system registration and annually thereafter the lead agency must publish in an official newspaper a notice similar in content to the notice set forth in that regulation.

Beyond the above registration and approval requirements, a lead agency has an obligation to enter into joint purchasing agreements with each of the system's members. As previously noted, N.J.S.A. 18A:18A-12 addresses the "contents of agreement" and delineates basic information that must be included. N.J.S.A. 18A:18A-14.3 further directs that "[a] contract . . . entered into pursuant to this act shall set forth the charge for all services provided, or in the case of a joint undertaking the proportion of the cost each party thereto shall assume and specify all the details of the management of the joint undertaking, and any other matters that may be deemed necessary." Similarly, the CP regulations provide that "[a] contracting unit may apply for membership in an approved cooperative purchasing system by passage of a resolution and executing a formal agreement with the lead agency." N.J.A.C. 5:34-7.6(a). The regulations mandate that all cooperative pricing or joint purchasing systems "shall be based on a formal agreement entered into between the lead agency and each contracting unit," and "[e]ach agreement shall be authorized by resolution." N.J.A.C. 5:34-7.4(a) (emphasis added). The formal agreement must, "[a]t a minimum," include the following information:

1. Reference to the authorizing statute;

2. Identification of the type of purchasing system;

3. Description of the items of the goods and services to be purchased;

4. The manner of advertising for bids and of awarding contracts;

5. Clear and specific assignment of responsibilities, duties and rights of all contracting units;

6. Provision for any sharing of administrative costs and/or payment for goods and services purchased, together with any necessary standards of performance;

7. Length of the agreement, not to exceed 5 years . . . ;

8. The name of the lead agency for the system; and . . .

9. A requirement that the system identifier shall appear on all documentation related to purchases made through the system, including bidding documents, purchase orders, vouchers, contracts and records.

[N.J.A.C. 5:34-7.4(b) (emphasis added).]

The CP regulations further impose affirmative obligations on the lead agency with respect to the advertising and preparation of bid specifications for joint purchasing. In the case of a joint purchasing system, "[b]efore seeking bids, the lead agency shall obtain from the registered members . . . the exact quantity of goods to be provided or services to be performed that the lead agency shall purchase for the registered members." N.J.A.C. 5:34-7.9(c) (emphasis added). In situations involving a cooperative pricing system, "[b]efore seeking bids, the lead agency shall obtain from the registered members . . . the estimated quantities that each registered member proposes to contract for during the life of the master contract." Ibid. (emphasis added). In addition, for a joint purchasing system, the lead agency "shall disclose in the specifications, the quantities and details of delivery required." N.J.A.C. 5:34-7.9(d). For a cooperative pricing system, the lead agency "shall include in the specifications lead agency requirements, stated in definite quantities; and registered member requirements, stated as individual estimated needs," and "shall list the registered members who have submitted estimates, their delivery address, their estimated maximum quantities and other relevant information to permit the bidder to understand what is potentially involved." N.J.A.C. 5:34-7.9(e). Pursuant to N.J.A.C. 5:34-7.10(a), for either type of system, the request for bids must contain language requiring uniform bid price(s) for both the lead agency and registered members, and include a provision

with respect to the registered members substantially in the form set forth in that regulation.

The CP regulations also address terms and conditions with regard to the "master contract" in a cooperative pricing system between the lead agency and the vendor. The master contract "shall" provide for "[t]he quantities ordered for the lead agency's own needs" and "[t]he estimated aggregate quantities to be ordered by the registered members who submitted estimates, subject to the specifications and prices set forth in the master contract." N.J.A.C. 5:34-7.11(b). The lead agency shall supply the registered members of the cooperative pricing system who have submitted estimates, the name of the successful bidder, prices awarded and the contract identification number, and each registered member who submitted estimates may then order directly from the vendor. N.J.A.C. 5:34-7.11(c). Registered members of a cooperative pricing system "who submit estimates shall not issue orders and contractors shall not make deliveries that deviate from the specifications or price as set forth in the master contract." N.J.A.C. 5:34-7.11(d).

With regard to either type of system, "[n]o contract shall be made by any registered member for a price which exceeds any other price available to the registered member." N.J.A.C. 5:34-7.9(h). The regulations governing a cooperative pricing or joint purchasing system further mandate that the lead agency "shall determine prior to the solicitation of bids whether the estimates submitted by a duly registered member of the system shall be considered firm and binding or a member may withdraw its estimate even after a supplier has been selected." N.J.A.C. 5:34-7.20.

In short, the requirements governing a joint purchasing arrangement between school boards reveal a statutory and regulatory framework designed to ensure that all boards of educations are put on notice of their rights, responsibilities and duties in pursuing joint purchasing. They require that the lead agency create by resolution a cooperative purchasing system and identify in its resolution whether the system is a joint purchasing system or a cooperative pricing system. They require that after such a system is created and identified, the lead agency must apply to the DLGS Director on behalf of the system's participating contracting units for approval of that system. They

require that the lead agency and each of the system's members enter into a joint purchasing agreement that satisfies the statutory and regulatory requirements, including, "[c]lear and specific assignment of responsibilities, duties and rights of all contracting units." They require the lead agency to solicit from the member districts before seeking bids either "the exact quantity of goods to be provided or services to be performed that the lead agency shall purchase for the registered members" (if a joint purchasing system) or "the estimated quantities that each registered member proposes to contract for during the life of the master contract" (if a cooperative pricing system). And, in either case, the regulations require that the lead agency determine prior to the solicitation of bids whether the estimates submitted by a duly registered member of the system are considered firm and binding or whether a member may withdraw its estimate even after a supplier has been selected.

Against this backdrop, the within matter involves Sparta's and Kittatinny's appeals from the ECS's determination that they are obligated to purchase 185,599 and 38,654 gallons of fuel oil, respectively, from PTC. Petitioners urge, among other claims, that the ECS lacked the jurisdiction or authority to resolve the subject dispute because no valid joint purchasing system or joint purchasing agreement existed stemming from Byram's failure to adhere to the requirements of the PSCL and CP regulations.

Pursuant to N.J.S.A. 18A:6-9, the Commissioner possesses the jurisdiction to decide "controversies and disputes arising under the school laws." Plainly, the Commissioner has the authority to determine whether a valid joint purchasing system was legally created and whether a joint purchasing agreement between Byram and Sparta or Byram and Kittatinny was in place in accordance with the PSCL and the corresponding regulations. Further, inasmuch as N.J.S.A. 18A:18A-14 explicitly provides for an appeal to the Commissioner from a determination made by the county superintendent, the Commissioner unquestionably has the authority to determine whether the ECS properly invoked or exercised the statutory authority to determine a controversy or dispute between local boards of education arising out of a joint purchasing agreement.

I **CONCLUDE** that there is no genuine issue of material fact in dispute regarding Byram's failure to comply with the requirements set forth in the PSCL and the CP regulations governing joint purchasing by a board of education.

The undisputed evidence establishes that Byram, as a lead agency seeking to pursue joint purchasing on behalf of other school districts, failed to create and register a cooperative purchasing system for approval by the DLGS Director. Succinctly stated, I agree with petitioners' stance that the "heating oil consortium" referred to in Byram's e-mail correspondence was neither a joint purchasing system nor a cooperative pricing system as envisioned by the governing statutes and regulations. Byram's failure to register the "consortium" for approval by the DLGS Director was not an inconsequential omission. Rather, N.J.A.C. 6A:23A-21.5 unambiguously directs that a "joint purchasing system is effective only upon approval of the Director of the [DLGS]." Emphasis added; see also N.J.A.C. 5:34-7.1. Indeed, had Byram registered a cooperative purchasing system, the DLGS Director would have reviewed the application to ascertain whether the purchasing system had clear provisions in place "to assure that the responsibilities of the respective parties are understood," whether the system had adequate procedures "to facilitate compliance" with the PSCL and the corresponding rules, and whether "public disclosure" of the participants' actions was adequate. N.J.A.C. 5:34-7.5(e). In other words, had Byram registered the "consortium" as a joint purchasing system or a cooperative pricing system, critical information concerning the parties' intent in joining the "consortium" would have been revealed, such as Sparta's and Kittatinny's asserted intent to secure a ceiling price for fuel oil in the event that the cost of their alternative sources of oil continued to rise and Byram's asserted intent to secure a commitment from them to purchase a specific quantity or all of their fuel oil needs for the 2008–2009 school year. In turn, this would have forced the parties to come to a clear understanding of what purchasing commitments they were or were not willing to undertake. Apart from this, Byram's failure to register a cooperative purchasing system with the DLGS Director deprived the Director of the opportunity to review the proposed system, including its impact on member districts, and to determine whether Byram complied with the PSCL and applicable regulations.

It is further undisputed that Byram did not prepare and enter into a written joint purchasing agreement with either Sparta or Kittatinny in accordance with the statutory and regulatory requirements. Byram did not prepare and enter into a "formal agreement" with Sparta or Kittatinny setting forth the "[c]lear and specific assignment of responsibilities, duties and rights" of the school boards with respect to the "consortium," or the manner in which administrative costs and/or payment for goods and services purchased would be shared. N.J.A.C. 5:34-7.4(b). Similarly lacking is any written formal agreement that expressly addressed "the method of payment by each participating board of education," "the proportion of the cost each party [to a joint undertaking] . . . shall assume" or "the details of the management of the joint undertaking." N.J.S.A. 18A:18A-12(a); N.J.S.A. 18A:18A-14.3. The record is further bereft of any written formal agreement between Byram and Sparta or Byram and Kittatinny that expressly addressed the specific nature of the purchasing commitment being undertaken, including any obligation to purchase a specific quantity or all of their fuel oil needs for the 2008–2009 school year through the "consortium." The resolutions adopted by Sparta and Kittatinny do not address these matters. Indeed, at least as to Sparta, it apparently adopted its resolution before it received the Byram-PTC Agreement and, according to the minutes of the meeting, apparently proceeded to take the action it did believing that it retained the option to purchase fuel oil through the MCCPC.

Further absent from the record is written correspondence demonstrating that prior to seeking bids Byram obtained information from Sparta and Kittatinny pertaining to the "exact quantity" of fuel oil that Byram should purchase on their behalf (as required for a joint purchasing system) or the "estimated quantities" that they proposed "to contract for during the life of the master contract" (as required for a cooperative pricing system), and that Byram determined "whether the estimates submitted by a duly registered member of the system shall be considered firm and binding or a member may withdraw its estimate even after a supplier has been selected." N.J.A.C. 5:34-7.9; N.J.A.C. 5:34-7.20. If a cooperative pricing system was intended, the specifications also should have included "the lead agency requirements; stated in definite quantities, and registered member requirements, stated as individual estimated needs," and the master contract with the vendor must provide for [t]he quantities ordered for the lead

agency's own needs" and "[t]he estimated aggregate quantities to be ordered by the registered members who submitted estimates." N.J.A.C. 5:34-7.9(e); N.J.A.C. 5:34-7.11(b). In the within matter, the Byram-PTC Agreement does not set forth the quantity of fuel oil that Sparta or Kittatinny would order for the 2008–2009 school year, and the bid specifications do not set forth minimum quantities that Sparta and Kittatinny may purchase but, instead, list the size and number of their fuel oil tanks.

Byram's opposition to the petitioners' motions does not raise a genuine issue of fact concerning Byram's non-compliance with the PSCL and CP regulations. Indeed, Byram candidly acknowledged in its submissions that "these formalities [under the PSCL and CP regulations] were not followed" and that "all of the legal requirements were not satisfied" under the PSCL and CP regulations. I do not embrace Byram's position that its obligations under the PSCL and CP regulations are "technical" requirements or "formalities" that may be overlooked. Rather, the statutes and regulations unambiguously instruct that the requirements are mandatory and applicable to all boards of education that pursue joint purchasing of goods or services on behalf of other boards of education. See N.J.S.A. 18A:18A-13; N.J.A.C. 6A:23A-21.5; N.J.A.C. 5:34-7.1; N.J.A.C. 5:34-7.32.

The issue of whether a joint purchasing agreement within the intendment of the statutes and regulations was in existence among the parties to this action is pertinent in view of the narrowly drawn jurisdiction and adjudicatory power conferred upon the county superintendent pursuant to N.J.S.A. 18A:18A-14. The statute grants to the county superintendent limited jurisdiction and adjudicatory authority over certain disputes among boards of education. Specifically, N.J.S.A. 18A:18A-14 confers jurisdiction upon the ECS to determine a "controversy or dispute . . . among the parties . . . to any such contract." Emphasis added.

In contrast to the Commissioner's general jurisdiction to determine controversies and disputes arising under the school laws, the Legislature has assigned to the county superintendent the narrow function of making an initial decision in a dispute among parties to a joint purchasing agreement. Plainly, the reference to "such contract" in N.J.S.A. 18A:18A-14 must be read in context with the other provisions in Article 3,

which address the mandatory contents of, and procedures governing, "joint purchasing agreements." In other words, "such contract" means a joint purchasing agreement that was created under the PSCL and complies with the basic requirements as to content (see N.J.S.A. 18A:18A-12), and with all applicable rules and regulations of the State board (N.J.S.A. 18A:18A-13). Stated differently, the Legislature has granted to the county superintendent limited jurisdiction and the authority to resolve a dispute between or among parties to a joint purchasing agreement that meets the requirements of the statutes and regulations, including the requirements governing the DLGS's approval of the purchasing system and the clear delineation in the agreement of the parties' responsibilities, duties, rights and share of expenditures. The plain language of the statute does not evidence a legislative design to grant to the county superintendent broad and general powers to resolve disputes among boards of education stemming from issues arising outside of a joint purchasing agreement that complies with the applicable statutes and regulations.

I agree with petitioners' position that the jurisdiction conferred upon the county superintendent to entertain the dispute and the authority to require performance can only be invoked where there is a valid joint purchasing agreement to be interpreted. Had Byram complied with the statutory and regulatory provisions, the county superintendent would have been clothed with the authority to act under the narrowly drawn jurisdiction granted by the Legislature in N.J.S.A. 18A:18A-14. The county superintendent would have had an approved joint purchasing system and a formal joint purchasing agreement before her to review, including an agreement containing explicit provisions that addressed the boards' responsibilities, duties and rights, method of payment and the manner of apportioning to each board its share of the expenditures for goods and services furnished by the contractor.

I **CONCLUDE** that the requirements for a joint purchasing system and a joint purchasing agreement under the PSCL and CP regulations were not met. Accordingly, I **CONCLUDE** that since no joint purchasing agreement within the intendment of the PSCL and CP regulations existed between the parties, the ECS did not possess the jurisdiction or authority to resolve the parties' dispute and to impose purchasing obligations on Sparta and Kittatinny.

The crux of Byram's position is that Sparta and Kittatinny should be bound based on contract law, and should also be held liable under equitable principles of estoppel, waiver and/or ratification. Byram argues that issues of fact exist as to whether Sparta and Kittatinny breached their agreement with Byram, whether the petitioner school districts should be equitably estopped from denying that they have an obligation to purchase fuel oil from PTC, whether they waived the requirements under the PSCL and CP regulations by virtue of their conduct, and/or whether their resolutions amount to a ratification of their agreement to be part of the consortium and/or the Byram-PTC Agreement. In short, Byram asserts that the documentary evidence and deposition testimony demonstrate that Sparta and Kittatinny knew of their legal obligations, and they acknowledged joining the consortium along with their belief that they would have the right to enforce the Byram-PTC Agreement against PTC.

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. Our courts have held that "[w]here the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel." Bd. of Educ. of E. Brunswick v. Twp. Council of E. Brunswick, 48 N.J. 94, 102 (1966). It is recognized that "the sweep of the Department's interest and the Commissioner's jurisdiction does not extend to all matters involving boards of education." Archway Programs, Inc. v. Pemberton Twp Bd. of Educ., 352 N.J. Super. 420, 424–25 (App. Div. 2002). In determining the scope of the Commissioner's jurisdiction under N.J.S.A. 18A:6-9, the Appellate Division has held that "contract claims against boards [of education] do not arise under the school laws but rather from statutory or common law," and such claims are appropriately adjudicated by the Superior Court. Id. at 425; see Picogna v. Bd. of Educ. of Cherry Hill, 249 N.J. Super. 332, 335 (App. Div. 1991) (holding that the "contract claim of a nontenured school employee does not arise under the school laws simply because its outcome may later enable him to attain tenure under the school laws," and "[w]hether petitioner's employment was wrongfully terminated under the contract and under the CEP Act is for the court, not the Commissioner, to decide"); S. Orange-Maplewood Educ. Ass'n v. Bd. of Educ. of the Sch. Dist. of S. Orange and Maplewood, 146 N.J. Super. 457, 463 (App. Div. 1977) (holding that the

Commissioner did not have jurisdiction over a dispute involving the interpretation of a sabbatical leave provision set forth in a collective negotiations agreement between the board of education and the education association). Indeed, in its motion requesting that this proceeding be placed on the inactive list due to the pending Superior Court action, Byram urged that contract claims against boards of education do not arise under the school laws, but rather statutory or common law, and only the Superior Court had jurisdiction to render legal rulings with regard to the parties' obligations under the terms of the contract and jurisdiction to determine what obligation is owed to PTC under the terms of the Byram-PTC Agreement.

I **CONCLUDE** that the issues raised by Byram are insufficient to defeat petitioners' motions for summary decision. I **CONCLUDE** that the legal and equitable claims raised by Byram do not invoke the Commissioner's jurisdiction, as such claims do not implicate or require an interpretation of the school laws, requiring the expertise of the Commissioner. Any dispute between the parties concerning whether Sparta or Kittatinny breached an agreement with Byram and/or the Byram-PTC Agreement, or whether equitable doctrines should be applied as a result of their conduct and/or admissions, are questions of law that should be decided in the Superior Court.

Accordingly, I **CONCLUDE** that summary decision should be granted in favor of Sparta and Kittatinny and that the ECS's decision should be reversed on the basis that the ECS lacked the jurisdiction or authority to resolve the dispute between the parties. In so ruling, I do not express any opinion as to the existence or meaning of any agreement between the parties, the proper interpretation or enforceability of the Byram-PTC Agreement against petitioners, and/or the impact (if any) of the parties' conduct in this matter, issues that should be decided in the Superior Court, as in the case of any other contractual dispute.

ORDER

Based upon the foregoing, it is **ORDERED** that petitioners' motions for summary decision be and hereby are **GRANTED**, and that the ECS's decision dated July 1, 2009, be and hereby is **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.

May 13, 2011
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: May 13, 2011

Date Mailed to Parties: May 13, 2011

jb

231-11

#231-11

OAL DKT. NO. EDU 1837-11
AGENCY DKT. NO. 37-2/11

IN THE MATTER OF THE TENURE HEARING OF ARLENE DOBY, BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY.	COMMISSIONER OF EDUCATION DECISION

The record of this matter, the proposed "Stipulation of Settlement and Release" (Settlement) 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 ALJ that the proposed Settlement is consistent with the standards governing the settlement of tenure matters – as established in *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 Commissioner approves the Settlement and adopts the Initial Decision as the final decision in this case, subject to compliance with the settlement terms.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/24/11
Date of Mailing: 6/24/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1837-11

AGENCY DKT. NO. 37-2/11

IN THE MATTER OF THE TENURE HEARING OF ARLENE DOBY, BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY.

Nicholas Celso, III, Esq., for petitioner (Schwartz, Simon, Edelstein and Celso, attorneys)

Keith Waldman, Esq., for respondent (Selikoff and Cohen, attorneys)

Record Closed: April 21, 2011 Decided: May 13, 2011

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

This matter was transmitted to the Office of Administrative Law on February 22, 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 Stipulation of Settlement 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.

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.

4. The tenure charges involve issues of absenteeism.

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.

May 13, 2011
DATE

DONALD J. STEIN, ALJ

Date Received at Agency: MAY 19 2011

Date Mailed to Parties: MAY 19 2011

cmo

SCHWARTZ SIMON
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P.O. Box 2355
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(973) 301-0000 (973) 998-0070
Attorneys for Bridgewater-Raritan
Regional School District
Board of Education

IN THE MATTER OF THE TENURE HEARING OF ARLENE DOBY, BOARD OF EDUCATION OF BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY DOCKET NO. 37-2/11 OAL DOCKET NO. EDU 01857-2011 S ADMINISTRATIVE ACTION STIPULATION OF SETTLEMENT AND RELEASE

WHEREAS, the Board of Education of the Bridgewater-Raritan Regional School District ("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 encusted with maintaining and conducting the public schools of the said School District; and

WHEREAS, Arlene Doby is a tenured secretary employed by the Board; and

WHEREAS, on or about January 14, 2011, Dr. J. Michael Schilder, Superintendent of Schools, filed sworn tenure charges (Ex. A, annexed hereto) against Respondent, together with a sworn statement of evidence in support of the charges, with Peter Stamz, School Business Administrator/Board Secretary; and

WHEREAS, on or about January 28, 2011, Arlene Doby filed a Statement of Position with the Board pursuant to N.J.A.C. 6A:3-5.1(b)(3) (Ex. B, annexed hereto); and

WHEREAS, on February 8, 2011, 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 simultaneously to continue Respondent's suspension without pay, pursuant to N.J.S.A. 18A:6-14; and

WHEREAS, on or about February 11, 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.*; (Ex. C, annexed hereto); and

WHEREAS, on or about February 16, 2011, Arlene Doby filed an Answer to the tenure charges pursuant to N.J.A.C. 6A:3-5.3(a) (Ex. D, annexed hereto); and

WHEREAS, on or about February 22, 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, Hon. Donald J. Stein; and

WHEREAS, in or around December of 2010, Ms. Doby submitted an application to the Public Employees Retirement System (PERS) for disability retirement; and

WHEREAS, on or about March 18, 2011 Ms. Doby was notified by PERS that her application for disability retirement has been approved, effective March 1, 2011; and

WHEREAS, in view of the foregoing approval by PERS Ms. Doby is willing to resign for purposes of retirement and the Board is willing to withdraw the tenure charges, subject to approval by the Office of Administrative Law and Commissioner of Education without modification, and in accordance with the provisions of N.J.A.C. 6A:3-5.6; and

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, the parties agree to a tentative settlement of the matter in accordance with the requirements of *N.J.A.C.* 6A:3-5.6 and the following terms and conditions:

1 Tenure Charges to be Moot/No Further Board Action

The Board agrees that upon approval of the within Settlement Agreement and Release ("this Agreement" or "this Settlement") by the Office of Administrative Law and the Commissioner without modification that the subject tenure charges shall be moot and shall be deemed to be withdrawn by the Board, and that 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 the subject litigation (including all claims and defenses) and/or any other cause of action that they might have related to same and that their obligations under this agreement shall be null and

2 Resignation

Respondent has tendered her irrevocable resignation (copy annexed hereto as Ex. E) from all employment with the Board of Education, subject to fulfillment of the terms and conditions set forth in this Settlement and, said resignation to be effective as of the close of business on the date of approval of the within Settlement by the Commissioner without modification.

3. Payment

In full and final satisfaction of all claims by respondent, as more fully detailed below, the Board shall pay respondent as follows:

Salary, less all normal payroll deductions for 8.3 unused vacation days.

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, with the exception of any benefits to which she may be lawfully entitled under the Workers' Compensation Act or COBRA.

5. Release

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, 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 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 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, [illegible] claims.

This release specifically excludes claims, if any: (a) arising under any pension, earnings or tax sheltered annuity plan in which Arlene Doby is a participant; (b) arising under the New Jersey Workers' Compensation Act or (c) arising from the breach of this Stipulation of Settlement and Release. Arlene Doby is unaware of any factual basis for such claims.

6. No Admissions

Nothing contained in this Agreement shall be deemed to constitute an admission of wrongdoing or liability by either party.

7. Non-Disparagement

Both parties agree not 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.

8. Surrender of Board Property

Respondent shall forthwith surrender all school keys and property in her possession to the below named legal counsel who, in turn shall forward same to the Board's counsel.

9. Public Interest

This Settlement will serve the public interest in that the a lengthy and expensive tenure dismissal litigation will be avoided with the result of a voluntary agreement removing respondent from her tenured position. If the tenure case were to have litigated to conclusion, this is the most favorable outcome that the Board could have achieved if the litigation were to continue and the Board were to succeed.

10. Board Approval

The Board President has been duly authorized by Board Resolution (Ex. F) to execute this Agreement on behalf of the Board of Education.

11. 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 Mr. Bobby Zahn, Esq., at Whippany Road, Suite 210, P.O. Box 2355, Morristown, New Jersey 07962. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Plaintiff will be entitled to none of the consideration described herein.

12. 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.

13. Materiality and Severability

The Parties agree that each paragraph of this agreement is material. In the event that any portion of this Agreement is determined to be illegal, the Parties agree, in advance, to reform the Agreement in good faith to provide each Party with the full benefit of the settlement memorialized by this Agreement to the extent permitted by law. In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law and should such reformation prove impossible, then the remaining portions of the Agreement shall remain in full force and effect.

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:

Arlene Doby
ARLENE DOBY

Date: April 6, 2011

WITNESS:

Edward J. Mora

Date: 4-6-2011

BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT:

_____, BOARD PRESIDENT Date: 4/15/11

ATTEST:

_____ Date: 4/15/11

PETER STARRS
Board Secretary/Business Administrator

Sworn Tenure Charges

Exhibit A

Statement of Position

Exhibit B

Certificate of Determination for Tenure Charges

Exhibit C

Answer

Exhibit D

Resignation Letter

Exhibit E

Board Resolution

Exhibit F

SCHWARTZ SIMON
EDELSTEIN & CELSO LLC
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, NJ 07962
Tel. (973) 301-0001; Fax (973) 993-3152
Attorneys for the Bridgewater-Raritan
Regional Board of Education

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CONTROVERSIES & DISPUTES

IN THE MATTER OF THE TENURE CHARGES AGAINST ARLENE DOBY,	BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION
BY THE BRIDGEWATER-RARITAN REGIONAL BOARD OF EDUCATION, SOMERSET COUNTY, NEW JERSEY	**SWORN TENURE CHARGES AGAINST ARLENE DOBY**

STATE OF NEW JERSEY}
SS:
COUNTY OF SOMERSET}

I, J. Michael Schilder, Ed.D., of full age and capacity, having been duly sworn by the undersigned authority, depose and say as follows:

I am employed by the Bridgewater-Raritan Regional Board of Education (the "Board") as Superintendent of Schools. The Board maintains administrative offices at 836 Newmans Lane, Bridgewater, New Jersey 08807. Arlene Doby has been a secretary in the Bridgewater-Raritan Regional School District (the "District") since August 11, 1997. I am fully familiar with the facts and circumstances regarding the Sworn Tenure Charges against Ms. Doby. I hereby charge Ms. Doby with *chronic absenteeism, neglect, insubordination and/or other just cause* warranting dismissal and reduction in salary, pursuant to N.J.S.A. 18A:17-2 and N.J.S.A. 18A:6-10, as follows:

CHARGE I

Ms. Doby was hired by the Board in or about August of 1997 as a Payroll/Bookkeeping Secretary in the office of the Business Administrator/Board Secretary and subsequently attained tenure in her position. Ms. Doby has been chronically absent from her position since she began her employment with the District. Assuming that Ms. Doby continues her employment with the Board until at least February 23, 2011, since the commencement of her employment, Ms. Doby will have missed 623 days of employment. Her absenteeism continues to have a detrimental impact upon the Board's operations. Over the previous 13 or so years that Ms. Doby has been employed by the Board she has been absent an average of approximately 41.5 days per year. Ms. Doby's deficiencies in this regard are set forth fully below in each of the following Counts. This conduct constitutes *chronic absenteeism and/or other just cause* warranting dismissal, pursuant to N.J.S.A. 18A:17-2 and N.J.S.A. 18A:6-10.

Count 1:

During the 1997-98 school year, Ms. Doby was absent on nine and a half (9.5) separate occasions, including but not limited to two and a half (2.5) sick days and two (2) personal days.

Count 2:

During the 1998-99 school year, Ms. Doby was absent on 19 separate occasions, including but not limited to nine (9) sick days and one and a half (1.5) personal days.

Count 3:

During the 1999-00 school year, despite admonitions concerning her need to improve attendance, Ms. Doby was absent on 43.5 separate occasions, including but not limited to 24 sick days, two (2) personal days and four and a half (4.5) days of approved leave.

Count 4:

During the 2000-01 school year, Ms. Doby was absent on 45.5 separate occasions, including but not limited to 19.5 sick days, seven (7) sick days without pay, two (2) personal days, and three (3) days of approved leave.

Count 5:

During the 2001-02 school year, Ms. Doby was absent on 28 separate occasions, including but not limited to seven and a half (7.5) sick days, two (2) personal days and four (4) days of approved leave.

Count 6:

During the 2002-03 school year, Ms. Doby took was absent on 39.5 separate occasions, including but not limited to 19 sick days, one (1) personal day and three and a half (3.5) days of approved leave.

Count 7:

During the 2003-04 school year, Ms. Doby was absent on 110.5 separate occasions, including but not limited to 17 sick days, three (3) personal days and 70 days of approved leave.

Count 8:

During the 2004-05 school year, Ms. Doby was absent on 33.5 separate occasions, including but not limited to 13.5 sick days, two (2) personal days and one (1) day of approved leave.

Count 9:

During the 2005-06 school year, Ms. Doby was absent on 43.5 separate occasions, including but not limited to 14.5 sick days, two (2) personal days and one and a half (1.5) days of approved leave.

Count 10:

During the 2006-07 school year, Ms. Doby was absent on 55.5 separate occasions, including but not limited to 14 sick days, seven (7) sick days without pay, two (2) personal days, and six and a half (6.5) days of approved leave.

Count 11:

During the 2007-08 school year, Ms. Doby was absent on 33.5 separate occasions, including but not limited to 14 sick days, two (2) personal days and a half (0.5) day of approved leave.

Count 12:

During the 2008-09 school year, Ms. Doby was absent on 35.5 separate occasions, including but not limited to 12.5 sick days, two (2) personal days and one (1) day of approved leave.

Count 13:

During the 2009-10 school year, Ms. Doby was absent on 42 separate occasions, including but not limited to 15.5 sick days, two (2) personal days and one (1) day of approved leave.

Count 14:

During the 2010-11 school year, assuming that Ms. Doby continues her employment with the Board until at least February 23, 2011, Ms. Doby will have been absent on 93 separate occasions as of February 23, 2011, including but not limited to 14 sick days, 54 family leave days and two (2) personal days.

CHARGE II

Ms. Doby has demonstrated poor judgment, failed to follow directions, policies and procedures; and has engaged in otherwise improper conduct, as specifically set forth below in each of the following counts. This misconduct constitutes *neglect, insubordination and/or other just cause* warranting dismissal pursuant to N.J.S.A. 18A:17-2 and N.J.S.A. 18A:6-10.

Count 1:

In her capacity as a secretary in the Board's payroll department during the 2003-2004 school year, Ms. Doby input payroll-related data for herself, resulting in overpayments. She continued to so on at least one other occasion in 2009, despite having been explicitly directed in writing not to do so.

Count 2:

Ms. Doby has failed to properly follow policy and procedures upon requesting vacation time on at least two (2) occasions including, but not necessarily limited to her failure to receive prior approval before taking vacation days in 2007 and 2010.

Count 3:

Ms. Doby has demonstrated significant lapses in judgment and unacceptable conduct including, but not necessarily limited to: 1) an incident in 2005 during which she informed a candidate for the position of executive secretary that she must not have received the job; and 2) an incident in 2010 when she was observed not picking up the phone when it repeatedly rang despite her responsibility to do so.

J. Michael Schilder, Ed.D.
Superintendent of Schools

Sworn and subscribed to
Before me on the 14th
Day of January 2011:

Attorney at Law
State of New Jersey
Jonathan M. Busch

SELIKOFF
&COHEN, PA

A Labor and Employment Law Firm for more than 25 years

Keith Waldman
Steven R. Cohen
Carol H. Alling
Michael C. Damm

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VIA UPS OVERNIGHT (MONDAY) DELIVERY

January 28, 2011

Mr. Peter Starrs, Business Administrator/Board Secretary
Members of the Bridgewater-Raritan Regional Board of Education
836 Newmans Lane
P.O. Box 6030
Bridgewater, NJ 08807-0030

Re: *In the Matter of Tenure Charges Against Arlene Doby, Bridgewater-Raritan Regional School District*
Statement of Position
Our File No. 5840

Dear Mr. Starrs:

This firm represents Arlene Doby in connection with the above-referenced matter. In accordance with *N.J.S.A.* 18A:6-11, please consider the following as Ms. Doby's statement of position to the tenure charges filed against her. The tenure charges dated January 14, 2011, were received by Ms. Doby on January 17, 2011.

As to Charge I, to the extent that chronic absenteeism can be proven, the charge is deficient inasmuch as the charge fails to consider the reasons for the absences as is required by *Montville* and other Education Law. Also the charge fails to account for whether any of the absences were and are eligible for leave under the Family and Medical Leave Act of 1993, as amended, or the New Jersey Family Leave Act or qualify as leaves of definite duration which are a recognized form of disability accommodation under the New Jersey Law Against Discrimination and the Americans with Disabilities Act. Ms. Doby contends that the Board had and has a duty to extend leaves and to reasonably accommodate her known disability and the absenteeism charge could have been avoided if the Board had provided her the leaves and reasonable accommodations.

In the alternative, even if the Commissioner were to ultimately find that the Board's administrators could not accommodate Ms. Doby, to the extent that the alleged absenteeism was caused by a known disability, instead of bringing a charge of "excessive absenteeism," the administrators should have more appropriately brought a charge of incapacity and/or made an application for involuntary disability pension. Instead, the administrators chose to brand the disability-based absences as "chronic absenteeism" and have impeded her pending application for an ordinary disability pension. Ms. Doby reserves the right to bring such action as may be appropriate under the New Jersey Law Against Discrimination, contending that the mis-reporting of the disability-based absences as a disciplinary matter for chronic unexcused absenteeism violates her rights under the anti-discrimination laws and is unjustifiably interfering with her ability to apply for a disability-based pension. Ms. Doby urges the Board to require its administrators to amend the charges to state a sole charge of incapacity, to direct its administrators to clarify to the Division of Pensions that it has brought the charges based upon

allegations of chronic disability-based absenteeism which it contends cannot be accommodated and direct its administrators to cross-file for an involuntary disability pension based upon incapacity.

As to Charge II, Ms. Doby denies the allegations of this charge and leaves the Board to its proofs, noting that the charge appears to be a "make weight" effort to re-catagorize the attendance-based charges and payment for days absent as a form of neglect, insubordination and/or other just cause. Ms. Doby denies the allegations and also notes that the alleged conduct, even if proven, does not arise to a level that would justify her removal as an employee.

Should the charges be certified, on Ms. Doby's behalf, we assert the following preliminary objections:

(a) the charges, as received, are not supported by a statement of evidence as required by *N.J.S.A.* 18A:6-11. The certification that accompanies the charges is, in many respects, not made upon personal knowledge contrary to *Patrolman's Benevolent Ass'n. v. Montclair*, 70 *N.J.* 130, 134 n. 1 (1976) and *Wang v. Allstate Ins. Co.*, 125 *N.J.* 2, 16 (1991) (affidavits must be made upon personal knowledge). To the extent that the charges are based upon unsworn hearsay statements by third parties, they do not satisfy the requirements of the residuum rule. *Weston v. State*, 60 *N.J.* 36, 51 (1972). As a result, the charges and supporting materials fail to provide Ms. Doby with adequate notice of the charges against her and, therefore, deprive her of a meaningful opportunity to meet and rebut the charges with a formal statement of position. This is improper as a matter of constitutional and administrative due process. *See, e.g., Town of West New York v. Bock*, 38 *N.J.* 500 (1962); *Nicoletta v. North Jersey Dist. Water Supply Comm'n*, 77 *N.J.* 145 (1978); *Dolan v. City of East Orange*, 287 *N.J. Super.* 136 (App. Div. 1996).

(b) the filing of the charges constitutes an arbitrary, capricious and unreasonable action and a failure to accommodate.

Without waiving these objections, Ms. Doby denies the allegations set forth in the charges. It is Ms. Doby's position that the charges made against her are either untrue or are distorted and cast to present her in a false light. Additionally, there is a lack of substantial, credible evidence supporting the charges, and the proposed penalty is excessive. In view of the foregoing, probable cause does not exist to support the charges, nor is there sufficient basis to warrant the dismissal of Ms. Doby from her tenured position or a reduction of her salary. *See N.J.S.A.* 18A:6-11.

Again, we urge the Board, in the strongest terms possible, to amend the charges to state a single charge of incapacity, to update its response to the Division of Pensions accordingly and to cross-file for an involuntary disability pension. If the Board does so, Ms. Doby may be able to

file a non-contesting answer to the charge and all parties could be spared tens of thousands of dollars in unnecessary litigation costs.

Very truly yours,
SELIKOFF & COHEN, P.A.

BY: _____
KEITH WALDMAN
kwaldman@selikoffcohen.com

KW:
c: Nicholas Celso III, Esq. (via email only, courtesy copy--no appearance noted)
Henry John Klein, NJEA UniServ Rep. (via email only)
Ms. Arlene Doby

CERTIFICATION

I have reviewed the above Statement of Position and the facts set forth in it are true to the best of my knowledge, information and belief.

DATED: January 28, 2011

_____
Arlene Doby

CERTIFICATION AS TO FAXED SIGNATURE

I am submitting a facsimile of the above certification of Arlene Doby. Pursuant to *R.* 1:4-4(c), I certify that Ms. Doby was not available to sign the certification in my office. As a result, I am filing it with a facsimile of the original signature. I certify that the Ms. Doby acknowledged the genuineness of the signature and that the document or a copy with an original signature affixed will be filed if requested by the Court or a party. 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: January 28, 2011

_____
KEITH WALDMAN

SELIKOFF
&COHEN, PA
A Labor and Employment Law Firm for more than 30 years

Keith Waldman[*]
Steven R. Cohen[o*]
Michael C. Damm[*]
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Carol H. Alling
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February 4, 2011

Mr. Peter Starrs, Business Administrator/Board Secretary
Members of the Bridgewater-Raritan Regional Board of Education
836 Newmans Lane
P.O. Box 6030
Bridgewater, NJ 08807-0030

Re: *In the Matter of Tenure Charges Against Arlene Doby, Bridgewater-Raritan Regional School District*
Statement of Position Original Certification Page
Our File No. 5840

Dear Mr. Starrs:

As you know, this firm represents Arlene Doby in connection with the above-referenced matter.

Enclosed please find the original signed certification page for your records.

Thank you.

Very truly yours,
SELIKOFF & COHEN, P.A.

BY:_____
KEITH WALDMAN
Kwaldman@selikoffcohen.com

KW:jlm
Enclosure
c: Nicholas Celso III, Esquire,
(via email only, courtesy copy--no appearance noted)(with enc.)
Henry John Klein, NJEA UniServ Rep. (via email only)(with enc.)
Ms. Arlene Doby (via first class mail)(with enc.)

SELIKOFF
&COHEN, PA *A Labor and Employment Law Firm for more than 25 years*

file a non-contesting answer to the charge and all parties could be spared tens of thousands of dollars in unnecessary litigation costs.

Very truly yours,
SELIKOFF & COHEN, P.A.

BY: _____
KEITH WALDMAN
kwaldman@selikoffcohen.com

KW:
c: Nicholas Celso III, Esq. (via email only, courtesy copy--no appearance noted)
Henry John Klein, NJEA UniServ Rep. (via email only)
Ms. Arlene Doby

CERTIFICATION

I have reviewed the above Statement of Position and the facts set forth in it are true to the best of my knowledge, information and belief.

DATED: January 28, 2011

Arlene Doby
Arlene Doby

CERTIFICATION AS TO FAXED SIGNATURE

I am submitting a facsimile of the above certification of Arlene Doby. Pursuant to *R.* 1:4-4(c), I certify that Ms. Doby was not available to sign the certification in my office. As a result, I am filing it with a facsimile of the original signature. I certify that the Ms. Doby acknowledged the genuineness of the signature and that the document or a copy with an original signature affixed will be filed if requested by the Court or a party. 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: January 28, 2011

_____
KEITH WALDMAN

SCHWARTZ SIMON EDELSTEIN
& CELSO LLC
44 Whippany Road, Suite 210,
P.O. Box 2355
Morristown, New Jersey 07962
(973) 301-0001; FAX (973) 993-3152
Attorneys for the Bridgewater-Raritan
Regional Board of Education

RECEIVED BY C&D
2011 FEB 11 P 1:58
CONTROVERSIES & DISPUTES

IN THE MATTER OF THE TENURE CHARGES AGAINST ARLENE DOBY,	BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION
BY THE BRIDGEWATER-RARITAN REGIONAL BOARD OF EDUCATION, SOMERSET COUNTY, NEW JERSEY	CERTIFICATE OF DETERMINATION FOR FILING OF TENURE CHARGES AGAINST ARLENE DOBY PURSUANT TO N.J.S.A. 18A:6-11 AND N.J.A.C. 6A:3-5.1

I, Peter F. Starrs, being of full age, do hereby certify:

1. I am the Board Secretary/Business Administrator for the Bridgewater-Raritan Regional Board of Education (hereinafter "Board of Education") and am fully familiar with the instant matter.

2. On January 14, 2011, Sworn Tenure Charges Against Arlene Doby, a tenured secretary employed by the Board of Education, together with a Sworn Statement of Evidence and Exhibits, were filed with the undersigned, by Dr. J. Michael Schilder, Superintendent of Schools of the Board of Education.

3. On January 14, 2011, the Sworn Tenure Charges and accompanying Sworn Statement of Evidence and exhibits were transmitted to Arlene Doby, advising her, inter alia, of his right to submit a written Statement of Position and a written Statement of Evidence, under oath, within 15 days of receipt thereof.

4. After consideration of the Sworn Tenure Charges and Statement of Evidence against Arlene Doby, together with the response thereto filed by her attorney on behalf of Mr. Dudley, the Board of Education determined at a duly convened meeting held on February 8, 2011 at 7 p.m. at 836 Newmans Lane, Bridgewater, New Jersey 08807, during the closed executive session portion of the meeting, that there was probable cause to credit the evidence in support of the charges and that the Sworn Tenure Charges are sufficient, if credited, to warrant dismissal and/or reduction of salary of Arlene Doby.

5. Accordingly, the Board further determined to proceed to certify the Sworn Tenure Charges to the Commissioner of Education for a hearing pursuant to law.

6. The determination to certify the said Sworn Tenure Charges to the Commissioner of Education was authorized by a majority vote of the full membership of the nine (9) member Board which vote was:

8 ayes 0 nays 1 abstentions and 0 absent.

7. Additionally, at the same meeting, the Board resolved to suspend Arlene Doby without pay, in accordance with the provisions of N.J.S.A. 18A: 6-14. This action was authorized by a majority vote of the full membership of the nine (9) member Board which vote was:

8 ayes 0 nays 1 abstentions and 0 absent.

I hereby certify that the foregoing statements made by me are true to the best of my knowledge and belief and that if same are willfully false, I am subject to punishment under law.

Peter F. Starrs
Board Secretary/Business Adm.

Dated: February 8, 2011

SELIKOFF
& COHEN, PA
A Labor and Employment Law Firm for more than 30 years

Keith Waldman[*]
Steven R. Cohen[◇*]
Michael C. Damm[*]
Stacey A. Cutler[*]
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Carol H. Alling
Of Counsel

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[◇]*members DC bar*
[*]*members PA bar*

VIA UPS SECOND DAY DELIVERY

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selikoff.cohen@verizon.net

February 15, 2011

Christopher D. Cerf, Acting Commissioner
Bureau of Controversies and Disputes
New Jersey Department of Education
100 River View Plaza
Route 29
Trenton, New Jersey 08625-0500

Re: *In the Matter of Tenure Charges Against Arlene Doby, Bridgewater-Raritan Regional School District*
Enclosure of Answer to Tenure Charges
Our File No. 5840

Dear Acting Commissioner Cerf:

This firm represents Arlene Doby in connection with the above-referenced matter.

Pursuant to the Sworn Tenure Charges Against Arlene Doby, filed by the Bridgewater-Raritan Board of Education, dated January 14, 2011, and received in this office on February 11, 2011, enclosed please find an original and four copies of Respondent's Answer to Tenure Charges in the above-referenced matter.

I ask that you kindly file the original and three (3) copies and return one time-stamped copy in the enclosed envelope.

Thank you for your attention in this regard.

Very truly yours,
SELIKOFF & COHEN, P.A.

BY: _____
KEITH WALDMAN
Kwaldman@selikoffcohen.com

KW:jlm
Enclosures
c: Nicholas Celso III, Esquire, (via email)(with enc.)
Henry John Klein, NJEA UniServ Rep. (via email)(with enc.)
Ms. Arlene Doby (via first class mail)(with enc.)

SELIKOFF & COHEN, P.A.
700 East Gate Drive, Suite 502
Mt. Laurel, NJ 08054-3823
(856) 778-6055
Counsel for Respondent,
Arlene Doby

IN THE MATTER OF THE TENURE HEARING OF ARLENE DOBY, BRIDGEWATER-RARITAN REGIONAL BOARD OF EDUCATION, SOMERSET COUNTY

BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY

DOCKET NO. 267-9/08

ANSWER TO TENURE CHARGES

Respondent, Arlene Doby ("Ms. Doby" or "Respondent"), residing at 4 W. Somerset Street, Raritan, New Jersey 08869, by way of answer to the Statement of Charges certified to the Commissioner of Education, says:

CHARGE NO. 1

As to the allegations set forth in the first unnumbered paragraph and subsequent Counts 1 - 14, Respondent admits that she had absences, but denies she is chronically absent without cause. As the Bridgewater-Raritan Regional Board of Education ("Board" or "Petitioner") is aware, Ms. Doby is capable of performing her assignments even though she suffers from a disability. Some, if not all, of her absences qualify under the Family Medical Leave Act of 1993, as amended, and/or the New Jersey Family Leave Act and/or the New Jersey Law Against Discrimination and/or the Americans with Disabilities Act. On many occasions, Ms. Doby gave the Board actual notice that her absences were due to her disability. On other occasions, Ms. Doby gave the Board constructive, if not actual, notice that her absences were due to her disability.

In the alternative, if it is proven that Ms. Doby's disability makes it impossible for her to perform her assignments, the charges should more properly be framed as charges of incapacity and the Board should cross-file for an involuntary disability pension. In fact, if it is

determined that Ms. Doby is incapable of performing her assignments, the Commissioner should render a decision of incapacity as opposed to conduct unbecoming and notify the Division of Pensions of this determination.

CHARGE NO. 2

As to the allegations set forth in the first unnumbered paragraph of this charge, and subsequent Counts 1 - 3, denied as stated. Charge No. 2 is a thinly veiled attempt to add weight to Charge No. 1 by claiming Ms. Doby is insubordinate and has acted negligently. By the Board's own admission, Ms. Doby has been employed by the Board for thirteen years and has less than a handful of minor infractions. None of the infractions rise to the level of insubordination or neglect and none warrant the penalty of termination of employment.

SEPARATE DEFENSES

FIRST SEPARATE DEFENSE

Petitioner has failed to comply with the procedural requirements of the Tenure Employees' Hearing Law, *N.J.S.A.* 18A:6-10, *et. seq.*

SECOND SEPARATE DEFENSE

A rational nexus between the allegations made by Petitioner, even if true, and Respondent's fitness to work, does not exist.

THIRD SEPARATE DEFENSE

Petitioner's allegations, if true, would demonstrate that Respondent has a disability which required reasonable accommodation within the meaning of New Jersey's Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.* and the Rehabilitation Act of 1973, 29 *U.S.C.* §701 *et seq.*, as opposed to requiring punishment under the Tenure Employees' Hearing Law.

FOURTH SEPARATE DEFENSE

The charge of insubordination is unmerited as, on its face, the charge fails to refer to any deliberate and wilful refusal to comply with and disobedience of a legitimate order or directive.

WHEREFORE, Respondent requests that the Commissioner of Education issue an order dismissing the instant charges.

SELIKOFF & COHEN, P.A.
Counsel for Respondent,
Arlene Doby

BY:_____
KEITH WALDMAN

Dated: 02-15-11

I certify that the within Answer was filed in accordance with the requirements of *N.J.A.C.* 6A:3-5.3(a)

SELIKOFF & COHEN, P.A.
Counsel for Respondent,
Arlene Doby

BY:_____
KEITH WALDMAN

March 22, 2011

Arlene Doby
4 W. Somerset St
Raritan, N.J. 08869

RECEIVED
MAR 23 2011
BUSINESS OFFICE

Mr. Peter Starrs
Business Administrator
Bridgewater BOE
836 Newmans Lane
Bridgewater N.J. 08807

Dear Mr. Starrs

I have been approved by the Public Employees Retirement System for an ordinary disability retirement effective March 01, 2011. Please accept this letter as a formal letter of resignation to retire March 01, 2011.

It is my understanding that this resignation to retire moots the tenure charges and that the Board will make a motion to the office of Administrative Law and the Commissioner of Education to withdrawl the tenure charges.

Very truly yours,
Arlene Doby

BOARD OF EDUCATION
OF THE TOWNSHIP OF BRIDGEWATER
AND BOROUGH OF RARITAN
SOMERSET COUNTY, NEW JERSEY
As recorded in the official minute book

The Board of Education of the Township of Bridgewater and Borough of Raritan in the County of Somerset, New Jersey, convened in public session on **Tuesday, April 12, 2011** at the John F. Kennedy Primary School, Raritan, New Jersey

Jeffrey Brookner – President
Evan Lerner – Vice President

The following members of the Board of Education were present: Mrs. Hurley, Mr. Smith, Mrs. Gladstone, Mr. Breslin, Dr. Mathur, Mr. Lerner, Mr. Brookner

The following resolution was offered by Evan Lerner, seconded by Al Smith and adopted by roll call vote:

APPROVAL OF SETTLEMENT/RELEASE RESOLUTION
(ATTACHMENT #W6)

ROLL CALL: **AYES: 7**
NOES: 0

STATE OF NEW JERSEY)
COUNTY OF SOMERSET) ss

I, **Peter F. Starrs**, Secretary of the Board of Education, of the Township of Bridgewater, in the County of Somerset, hereby certify that the foregoing extract from the minutes of **April 12, 2011** has been compared by me with the original minutes as officially recorded in my office in the minute book of said Bridgewater-Raritan 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 extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this **14th day of April, 2011.**

SEAL

BOARD SECRETARY

RESOLUTION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION

BE IT RESOLVED, upon the recommendation of the Superintendent, the Board hereby approves the Stipulation of Settlement/Release in the matter of the Tenure Charges Against Arlene Doby, docketed as Agency No. 37-2/11; EDU 01837-2011 S, currently pending in the Office of Administrative Law, in accordance with the terms and conditions set forth therein, including but not limited to acceptance of her resignation for the purpose of retirement, subject to approval by the Commissioner of Education. The Board Attorney, Superintendent and Business Administrator are authorized to take all steps necessary to implement this resolution upon approval by the Commissioner.

232-11

K.M., on behalf of minor children, D.M., D.M. AND D.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her children in April 2010. The respondent filed an answer and requested that the petition be dismissed. Petitioner received appropriate notice of a hearing on August 26, 2010, but failed to appear and provided no explanation for her nonappearance. Having received no explanation from the petitioner for her non-appearance, 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.

June 24, 2011

OAL DKT. NO. EDU 4422-10
AGENCY DKT. NO. 70-4/10

K.M., on behalf of minor children, D.M., D.M. AND D.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
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 May 9, 2011, 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: 6|24|11

Date of Mailing: 6|24|11

[1] It is noted that, by letter dated April 18, 2011 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).

ADELE STAPLETON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured special education teacher, employed by respondent since 1975 – appealed the district's withholding of her salary increment for the 2010-2011 school year. Petitioner contended that the Board's withholding of her increment was arbitrary, capricious and unreasonable. The Board contends that it acted appropriately pursuant to *N.J.S.A.* 18A:29-14, which authorizes local boards to withhold salary increments for inefficiency or other good cause.

The ALJ found, *inter alia*, that: an individual contesting a salary increment withholding has the burden of proof to demonstrate that the Board's decision was arbitrary, capricious and unreasonable; for the 2009-2010 school year, petitioner was re-assigned as an inclusion teacher in kindergarten; petitioner was observed and evaluated by her principal and the special education supervisor, both of whom had extensive training and experience in special education; petitioner received "unsatisfactory" ratings in the categories of Students and Learning, Instruction, and Classroom Environment, and a "needs improvement" rating in Planning and Preparation; both administrators were in agreement that petitioner failed to perform up to their level of expectation; and petitioner failed to meet her burden to prove that respondent's action in withholding her increment was arbitrary, capricious, unlawful, or induced by improper motive. Accordingly, the ALJ dismissed petitioner's appeal with prejudice.

Upon independent review and consideration, the Commissioner adopted the Initial Decision as the final decision in this matter for the reasons expressed therein. 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.

June 24. 2011

OAL DKT. NO. EDU 10898-10
AGENCY DKT. NO. 558-9/10

ADELE STAPLETON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
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 a comprehensive review of the record in this matter, the Commissioner concurs with the Administrative Law Judge that the Board's decision to withhold the petitioner's increment for the 2010-2011 school year was not arbitrary, capricious or unreasonable. Accordingly the Initial Decision is adopted as the final decision in this matter.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6|24|11
Date of Mailing: 6|24|11

* 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 10898-10
AGENCY DKT. NO. 558-9/10

ADELE STAPLETON,
Petitioner,
v.
JERSEY CITY PUBLIC SCHOOL DISTRICT, HUDSON COUNTY,
Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch, Porwich & Feintuch, attorneys)

Paula Mercado Hak, General Counsel, for respondent

Record Closed: March 31, 2011 Decided: May 13, 2011

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Adele Stapleton appeals the denial of a salary increment for the 2010-2011 school year. On September 20, 2010, petitioner appealed to the Department of Education, asserting that respondent's decision to withhold her salary increment was arbitrary, capricious and unreasonable. On September 28, 2010, respondent Jersey City School District (the District or Jersey City) filed its answer asserting that it had

acted appropriately pursuant to N.J.S.A. 18A:29-14. The matter was then transmitted to the Office of Administrative Law (OAL), where on October 6, 2010, it was filed as a contested case pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. A hearing was held on March 4, 2011. The record closed following receipt of the parties' post-hearing briefs on March 31, 2011.

The issue in dispute is whether respondent's withholding of petitioner's increment was arbitrary, capricious or unreasonable.

TESTIMONY

Jorge Fernandez

Jorge Fernandez (Fernandez) is the principal of Public School 20 in the Jersey City Public School System. He has worked for Jersey City Public Schools for thirty-two years and worked as the principal for P.S. 20 for twelve years. Fernandez worked as an elementary teacher, a high school teacher, a supervisor, an assistant principal and a principal. Fernandez received extensive training and professional development in special education. Part of his duties as principal in P.S. 20 was the evaluation of the teachers in that school. Fernandez testified that petitioner began teaching at P.S. 20 around 1999 and he was the principal at that time. Fernandez began the evaluations of petitioner around five to six years ago.

During the evaluation of petitioner, Fernandez would go over the blank evaluation forms and then provide petitioner with the evaluation within the next twenty days. Fernandez inquired as to whether petitioner understood the evaluation (which she did); then inquired as to whether she had any questions (which she did not).

Fernandez's evaluation took place on April 12, 2010, because petitioner was not available in the beginning of the year and Fernandez wanted to provide the petitioner with a chance to settle in to her then-current position. In addition, Fernandez wanted to make sure that petitioner had ample support in order to promote success.

Fernandez reviewed petitioner's plans and found that the plans lacked details and revealed a lack of true effort by petitioner. Her plans were not clear and contained no notes. It was Fernandez's experience that the better the plans, the better the teacher—and thus the better the education provided to the students.

When Fernandez attended the petitioner's classroom, he found that the atmosphere was not conducive to learning and the adults in the classroom did not act as a team. The children's needs were not being properly addressed. Fernandez found that petitioner did not create records on the students' progress or performance. Such records are essential, especially in the case of special education students. He found that petitioner was barely covering the basics. Petitioner took a very passive role relating to the children. It appeared to Fernandez that petitioner was "barely going through the motions." Fernandez believed that a good teacher must have the ability to constantly monitor the children and adjust instruction in order to enhance learning.

Fernandez felt that petitioner's efforts to engage students were unsatisfactory. Because petitioner did not communicate clearly, the students seemed lost. Petitioner had no effective instructional strategies. Because petitioner has two assistants, Fernandez's expectations of petitioner were high. Petitioner needed to make the learning material more accessible. Few, if any, of the students were relating to what was going on in the classroom.

Fernandez found that petitioner did little to further a culture for learning. She did not follow established classroom procedures. Fernandez found that petitioner was often negative in her comments with the students. He never heard petitioner make a positive statement. Fernandez knows that children at those ages crave love and support and none of that was presented in petitioner's classroom. He found that the pace of instruction was slow and haphazard.

Fernandez did walk-throughs once a week and did not find any improvement since the time of his review. Fernandez invited petitioner to discuss how to improve instruction. Petitioner did not take advantage of that and did not ask any questions.

Petitioner did not provide any additional data to be entered into the record—as was her right—within ten days after the evaluation.

Petitioner's Professional Improvement Plan (PIP), which was based on Fernandez's meetings with petitioner, addressed moving forward in the next school year and how petitioner would improve her practices in areas of concern. Fernandez stated that an individual is to reflect on his or her evaluation and then come back with the PIP, which he rejects if it is not complete, and signs once he is satisfied with the plan.

The recommendation he made to the board to withhold her increment (P-14) is the standard Rice Letter that goes out to individuals being discussed at a board meeting. He told petitioner in advance that he would be making the recommendation to the board that her salary increment for the school year 2009-2010 be withheld.

On cross-examination, Fernandez admitted that he only completed one evaluation since it took place late in the year. Fernandez testified that petitioner provided no closure in the areas of teaching and there was no transition between the different teaching topics. Fernandez found that petitioner would talk over the children and at times would scream at the children. Fernandez found that in general, petitioner was ignoring her plans; her plans were deficient and lacked activity; and that petitioner did not keep accurate records on student progress and performance. It was petitioner's responsibility to keep those records and document student growth. Although in the cross-examination Fernandez admitted that the failures could not be blamed on the petitioner alone, it was clear to him that petitioner's methods were in dire need of improvement and were in-total unsatisfactory.

Linda Crombie-Daniels

Linda Crombie-Daniels (Daniels) has a background in special education and a Master's degree in early childhood. She was an employee in the Jersey City Public School system since 1981. In the school year 2009-2010, Daniels was the supervisor for special education. As a supervisor, her duties included providing support and guidance to the teachers, evaluate teachers and support the education of the children.

Daniels provided petitioner with support, including advising her of webinars, events, and providing materials on a regular basis. She observed petitioner on December 2, 2009. Daniels had provided petitioner with several suggestions to improve her teaching. She felt that petitioner's performance fell below expectations.

After Daniels's observation, she met with petitioner and discussed the issues which needed to be addressed. Daniels did several walk-throughs thereafter and found a "bit of improvement." In cross-examination Daniels admitted that petitioner was engaged with the students; however, she had concerns about petitioner's teaching as a result of her observation. Any improvement was not to the degree Daniels had hoped. Although Daniels had no input regarding whether petitioner should be retained as a teacher or given an increment, she did state that she recommended that petitioner should be placed in a different setting.

Adele Stapleton

Petitioner began teaching in the Jersey City Public School system in 1975. Petitioner is certified as a special education teacher and worked as same since she began working in Jersey City. In 1988 she began teaching in elementary school. She began working in P.S. 20 since February 1999. She was assigned as an inclusion teacher with special education children and general education children.

On the date that she was observed by Fernandez, petitioner was teaching a new math program and was working on shapes. This topic took up the entire assigned period in the morning. The one special needs child in her classroom exhibited emotional problems and petitioner would count down with him to assist him to stop crying. By the end of the year, petitioner reported that this child was "fine."

Petitioner recalled one official visit by Fernandez and one unofficial visit by Daniels. It was her belief that the evaluation would be the same as the year before. Petitioner did admit that she had no experience in kindergarten, but despite that, she felt as though she was doing a satisfactory job teaching. She stated that no one showed her what to do and she was provided with minimal support.

It was petitioner's belief that the three adults in the classroom acted as a cooperative unit and provided effective teaching. She testified that she followed the IEP for the handicapped student. All students made sufficient progress and graduated to first grade. Petitioner stated that there were no behavioral problems in her class and the children were responsive. She had no discussions with Fernandez and was not counseled by him on deficient areas.

On cross-examination, petitioner did admit that she received feedback from Fernandez after he reviewed her plan book, although she did not believe it was counseling. Petitioner testified that she told Fernandez that she was doing a fine job. She did state that she was unaware that she could provide a rebuttal to her evaluation and that Fernandez did not invite her to do so. She claims that she received no support from Daniels.

She could not fully recall her lessons presented to her class on the date of her evaluation. She believed, overall, that her teaching performance was satisfactory then and throughout the school year.

FACTUAL DISCUSSION

Based upon the testimonial and documentary evidence presented and having had the opportunity to observe the demeanor of the witnesses and to assess their credibility, I **FIND** the following **FACTS**:

Petitioner has been employed by respondent since 1975, as a teacher of the handicapped in high school and grammar school. For the year 2009-2010, she was hired as an inclusion teacher in the kindergarten. During that school year, she was observed and evaluated by Jorge Fernandez (principal) and Linda Crombie-Daniels (special education supervisor). Both Fernandez and Daniels had extensive training and experience in special education.

Daniels observed petitioner on December 2, 2009. Overall, Daniels believed that petitioner's teaching performance was below standards and expectations. Daniels did several walk-throughs which further confirmed her opinion. Daniels provided support to petitioner in an effort to improve her teaching performance. Milagros Perrine, an inclusion specialist, provided petitioner with extensive support with cooperative structure and implementing a form of differentiated-instructional techniques.

Fernandez did a formal observation of petitioner on April 12, 2010. It was done later in the school year in order to provide petitioner with a time period to settle in to her position and to give her an opportunity to succeed. After the observation, Fernandez completed a Formative Observation Form which was signed by petitioner and Fernandez. Fernandez rated petitioner as "unsatisfactory" in the following categories: 2) Students and Learning; 3) Instruction; and 4) Classroom Environment. Fernandez rated petitioner as "needs improvement" in 1) Planning and Preparation. Daniels understood the ratings provided by Fernandez.

Although petitioner stated that she felt her teaching performance was satisfactory and she disagreed with the evaluations of Fernandez and Daniels, she never submitted a rebuttal or response to the evaluation as was her right.

Support was supplied to petitioner by other teachers and support staff in an effort to improve petitioner's performance. Despite this support, Fernandez did not see any improvement in petitioner's performance by the end of the school year.

On August 24, 2010, the Jersey City Public School District Superintendent resolved, at the recommendation of Fernandez, to withhold petitioner's 2009-2010 salary increment.

LEGAL DISCUSSION AND CONCLUSION

Salary increments are controlled by N.J.S.A. 18A:29-14, which provides:

> 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. The commissioner may designate an assistant commissioner of education to act for him in his place and with his powers on such appeals. It shall not be mandatory upon the board of education to pay any such denied increment in any future year as an adjustment increment.

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 (1984). The statute was intended to vest local school boards "with the ability to withhold increments" from those who had "not performed well during the previous year." Probst v. Haddonfield Bd. of Educ., 127 N.J. 518, 526 (1992). A local board's exercise of its discretionary powers "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). The issues to be determined are: (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 upon those facts, bearing in mind their expertise. Id. at 296-97.

In a matter such as this, the petitioner has the burden of showing that the denial of the salary increment was arbitrary or capricious. Id. at 288. The decision to withhold an increment does not require a showing of shortcomings sufficient to justify dismissal under the Tenure Act. Kopera v. W. Orange Bd. of Educ., 1960-61 S.L.D. at 62. The

only question for the Commissioner is whether the district "had a reasonable basis for its factual conclusion." Kopera, supra, 60 N.J. Super. at 295. Indeed, it has been observed that a school district has no duty to prove by a preponderance of credible evidence that the allegations against petitioner are true. To do so would convert an increment-withholding action into a tenure case and accordingly shift the burden of proof to the board. Such is not the purpose of an appeal to the Commissioner under the provisions of N.J.S.A. 18A:29-24. Reilly v. Parsippany-Troy Hills Twp. Bd. of Educ., 1989 S.L.D. 1830, 1843 (citing Colavita v. Hillsborough Twp. Bd. of Educ., 1983 S.L.D. 1205).

Moreover, the decision to withhold an increment has been held to be "a matter of essential managerial prerogative which has been delegated by the legislature to the board." Ibid. (citing Bernards Twp. Bd. of Educ. v. Bernards Twp. Educ. Ass'n, 79 N.J. 311, 321 (1979)). An individual contesting a salary increment withholding has the burden of proof of demonstrating that the decision was unreasonable, arbitrary, without rational basis or induced by improper motives. Kopera, supra, 60 N.J. Super. at 297.

Courts have used varying language when trying to elaborate on the "arbitrary, capricious or unreasonable" standard. Despite the variations, the common element among all of the decisions is that board of education actions are given a strong presumption of validity. See Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966) (school board decisions "entitled to a presumption of correctness"). A board of education has broad discretionary authority and its actions are entitled to a presumption of lawfulness and good faith. Quinlan v. N. Bergen Bd. of Educ., 73 N.J. Super. 40, 46 (App. Div. 1962). Not only are board actions entitled to a "presumption of correctness," they have a presumption that those actions "will be upheld by the Commissioner of Education, absent a showing of bad faith, illegal motive or a lack of rational basis." Raimondi v. Westwood Reg'l Bd. of Educ., EDU 5904-04, Initial Decision (Sept. 26, 2005), adopted, Comm'r (Dec. 23, 2005), aff'd, State Bd. (June 7, 2006), <http://lawlibrary.rutgers.edu/oal/search.shtml>.

In a proceeding such as this, the burden of proof by a preponderance of the competent and credible evidence is on the petitioner. In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962).

Both Daniels and Fernandez had numerous conversations with petitioner during the 2009-2010 school year about her performance wherein they conveyed to her that she was not fulfilling the expectations of a teacher in her position. Petitioner was aware that Fernandez felt her performance was deficient. While petitioner asserts she performed satisfactorily, she nevertheless failed to present credible evidence that the action in withholding her increment was arbitrary, capricious or unreasonable. The respondent presented credible evidence that the action withholding the 2009-2010 salary increment was based on tangible and valid deficiencies as observed by two witnesses and relayed to the petitioner. Accordingly, such action was not arbitrary, capricious or unreasonable.

Special Education Supervisor Daniels testified credibly that petitioner's performance needed improvement and that petitioner's teaching performance fell below standards and expectations. Daniels was in basic agreement with the scores provided by Fernandez in the domain set up in the teaching evaluation form.

The proclivity to assume that increments are automatic, and triggered in a vacuum without regard for the teaching and learning of children, is misplaced. Both administrators were in agreement that petitioner failed to perform up to the level expected.

Based upon all of the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioner has not met her burden of establishing that respondent's action was arbitrary, capricious, unlawful, or induced by improper motive. To the contrary, respondent had a reasonable basis for its action.

Based upon all of the foregoing, I **CONCLUDE** that respondent appropriately withheld petitioner's salary increment for school year 2010-2011.

ORDER

It is hereby **ORDERED** that the petition filed by petitioner is **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, 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.

5/13/11
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: 5/13/11

Date Mailed to Parties: 5/13/11

jb

APPENDIX

WITNESSES

For Petitioner:

Adele Stapleton

For Respondent:

Linda Crombie-Daniels, special education supervisor

Jorge Fernandez, principal

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Contract Agreement between the Jersey City Public School District and the Jersey City Education Association for September 1, 2006, to August 31, 2009, and extension year September 1, 2005, to August 31, 2006 (with attached Memorandum of Agreement, dated May 10, 2010, covering the period September 1, 2010, to August 31, 2013, and extension year September 1, 2009, to August 31, 2010)

R-2 Excerpt from binder of inclusion specialist, Milagros Perrine, for school year 2009-2010: "Teacher Support Log"

R-3 Excerpt from binder of inclusion specialist, Milagros Perrine, for school year 2009-2010: "Behavior Modification"

R-4 Record of support activities for Adele Stapleton for 2009-2010 by Linda Crombie-Daniels, special education supervisor, dated December 2, 2009 and signed December 10, 2009

R-5 J.C.P.S. Formative Observation Form for Adele Stapleton for April 12, 2010, by Principal Jorge Fernandez, signed April 28, 2010 (with attached notes)

R-6 J.C.P.S. Summative Evaluation and Professional Improvement Plan for Adele Stapleton, dated June 17, 2010

R-7 Form for Tenured Teacher Candidates for Teacher Academy for June 2010

R-8 Memo from Principal Jorge Fernandez to Dr. Hermione McNeil, executive assistant, human resources, dated June 2010, subject: Withholding of Increment

R-9 Letter from Flavio Rubano, associate superintendent, human resources, to Adele Stapleton, dated August 24, 2010, re: Withholding of Increment for SY 2010-2011

234-11

T.L.J. on behalf of minor child A.J.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her child, A.J.L., was not eligible for a free public education in the Pine Hill school district during the 2009-2010 school year. Petitioner asserted that she has resided in Pine Hill since 2005, and that A.J.L. is domiciled with her under a joint custody agreement issued in 2009, which granted her primary physical custody of her children. The respondent Board contended that petitioner is domiciled in Pennsylvania, and sought dismissal of the appeal and reimbursement for counsel fees and other costs "appropriate under the circumstances." Petitioner testified and presented evidence at an OAL hearing on May 2, 2011, but counsel for respondent Board failed to appear despite having received adequate notice of the proceeding. Respondent Board additionally failed to submit any explanation for its failure to appear.

The ALJ found that: based upon the credible, undisputed and corroborated evidence presented by T.L.J. at the OAL hearing, petitioner does reside in Pine Hill; under a court order issued in December 2009, petitioner has primary physical custody of her children; petitioner has clearly established that A.J.L. is domiciled in the district and is therefore entitled to a free public education in Pine Hill schools; pursuant to *N.J.A.C.* 1:1-14.4(d), the petitioner is entitled to a decision on the merits based on the proofs presented at hearing since the Board failed to submit an explanation for its failure to appear. Accordingly, the ALJ granted the petitioner's residency appeal, and denied the Board's claims for financial reimbursement.

Upon a full and independent review, the Commissioner 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.

June 24, 2011

234-11

OAL DKT. NO. EDU 893-10
AGENCY DKT. NO. 31-2/10

T.L.J. on behalf of minor child A.J.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner challenged respondent's determination that her son was not eligible for a free public education in its district. A review of the Initial Decision and the record of this matter reveals that petitioner appeared at the May 2, 2011 hearing in the Office of Administrative Law (OAL), and presented evidence which the Administrative Law Judge (ALJ) found sufficient to support her assertion that she is domiciled in petitioner's district and that she has primary residential custody of her son. The ALJ further found that petitioner and her witness were credible.

Despite adequate notice, neither respondent nor its representative appeared at the OAL hearing. Nor did respondent provide – within a day of the hearing – any explanation for its absence. Thus, there was no evidence before the ALJ to rebut the proofs offered by petitioner. Pursuant to *N.J.A.C.* 1:1-14.4(d), the ALJ issued an Initial Decision on the merits granting the

relief requested in the petition. Upon independent review, the Commissioner adopts the Initial Decision as the final decision in this case.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/24/11

Date of Mailing: 6/24/11

[1] 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
OAL DKT. NO. EDU 00893-10
AGENCY DKT. NO. 31-2/10

T.L.J., ON BEHALF OF MINOR CHILD, A.J.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
BOROUGH OF PINE HILL,
CAMDEN COUNTY,
Respondent.

T.L.J., petitioner, pro se

No appearance by or on behalf of respondent

Record Closed: May 3, 2011 Decided: May 16, 2011

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

STATEMENT OF THE CASE

T.L.J, mother of A.J.L. (petitioner), challenges the determination made by the Pine Hill Board of Education (District) that she did not reside in the Pine Hill School District. The District has filed a counterclaim seeking payment of tuition for the number of days A.J.L. attended school in the district.

PROCEDURAL HISTORY

On February 2, 2010, the District notified the petitioner that her child was being disenrolled based on non-residency. On the same day, petitioner appealed the decision. On April 6, 2010, the case was transmitted to the Office of Administrative Law (OAL). On July 15, 2010, during a conference call, the attorney for the District advised that he would be filing a summary decision motion. No motion was filed.

On March 17, 2011, another conference call was scheduled. The attorney for the District was not available by phone, and a message was left. No attempt to contact this office was ever made to reschedule the conference or explain his unavailability. The hearing was scheduled for May 2, 2011. The attorney for the District nor any representatives appeared. The record closed on that date.

STATEMENT OF FACTS

Since the District failed to appear, the following facts, subject to credibility are essentially undisputed. The petitioner is the mother of A.J.L., who is eighteen years of age and attends Overbrook High School in the Pine Hill School District. There does not appear to be any dispute that the petitioner resides at 54 Millstream Road, in Pine Hill. This was established by the testimony of petitioner, her boyfriend, Daryl J. Collins, and her direct deposit statement, her New Jersey Driver's License, her South Jersey Gas Bill (P-2), Custody documents from Philadelphia Common Pleas Court (P-3), the Rental Agreement (P-4), the address on her sample ballot (P-5) and her satellite radio bill (P-5). Additionally, correspondence from the District was sent to the Pine Hill address (P-6, P-7). Therefore, based upon the undisputed and corroborated evidence, I **FIND** that the petitioner resides within the Pine Hill District.

Petitioner testified that the issue raised by the District was that her son was not leaving and returning to her address. This is confirmed by the February 2, 2011 sent by the District (P-7).

She further explained that her son had lived with her for six years but in 2008 decided to live with his father in Philadelphia and attend Lincoln High School. While attending Lincoln, he was assaulted, badly beaten and hospitalized. After the incident, she and her former husband decided to have the son live with her where it would be safer. He came back to live with her in 2009 and started school in September 2009 at Overbrook.

The Custody Agreement, dated December 9, 2009, states that the petitioner shall have "primary physical custody of the children." The agreement further states that the father shall have partial physical custody every weekend starting at 6:00 p.m. until Monday morning when the father is to drop the children off at school (P-3). Both the petitioner and Daryl Collins testified that she has had custody of the children.

Petitioner also testified that she has another son who attends the John Glenn Elementary School. No questions have been raised as to his residence.

The testimony as to the custody arrangement was testified to by the petitioner and Daryl Collins and corroborated by the Custody Agreement. Therefore, I **FIND** that the petitioner does have physical custody of the children except for weekends.

CONCLUSIONS OF LAW

When a party fails to appear for a hearing or conference despite having received adequate notice of the proceedings, the appearing party may ask the administrative law judge for permission to proceed through the presentation of ex parte proofs. If, after holding the matter for one day, the judge does not receive from the absent party an explanation for the failure to appear, and the circumstances require a decision on the merits, the judge may then issue an initial decision on the merits based on the ex parte proofs presented. N.J.A.C. 1:1-14.4(c). New Jersey Real Estate Commission v. Grennor, 92 N.J.A.R. 2d (REC) 29. Since the District failed to submit an explanation for their failure to appear, I **CONCLUDE** that the petitioner is entitled to an initial decision on the merits based on the proofs presented at hearing.

The issue in this matter is whether A.J.L. was entitled to a free education under N.J.S.A. 18A:38-1, which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See V.R. o/b/o A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (Educ. 1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds, sub nom Rabinowitz v. New Jersey State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education).

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. v. Manville Bd., 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. Matter of 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).

The acts, statements and conduct of the individual, as viewed in light of all circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)2.

Petitioners have clearly established that A.J.L. is domiciled in the school district. He lives with the petitioner except for weekends pursuant to the Custody Agreement. Therefore, I **CONCLUDE** that A.J.L. is entitled to a free public education in the District.

Since he is entitled to a free public education within the District, and the District has not appeared to submit any evidence as to tuition reimbursement, the District's claim for reimbursement is **DENIED**.

DECISION AND ORDER

It is, therefore, **ORDERED** that A.J.L. is entitled to a free public education within the District. It is further **ORDERED** that the District counterclaim for tuition reimbursement 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.

May 16, 2011
DATE

DONALD J. STEIN, ALJ

Date Received at Agency: May 17, 2011
MAY - 8 2011

Date Mailed to Parties:

cmo

APPENDIX
WITNESSES

For Petitioner:

T.J.L.
Daryl Cousins

For Respondent:

None

EXHIBITS

For Petitioner:

P-1 Letter from Overbrook High to T.L.J. dated December 17, 2009
P-2 Direct deposit, New Jersey Driver's License and South Jersey Gas Bill
P-3 Custody documents from Philadelphia Common Pleas Court
P-4 Rental Agreement
P-5 Sample ballot
P-6 Satellite Radio Bill
P-7 Letter from Overbrook High to T.L.J. dated February 2, 2010

For Respondent:

None

235-11

IN THE MATTER OF THE TENURE :

HEARING OF JOHN SOCRATES, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE TOWNSHIP : DECISION

OF JACKSON, OCEAN COUNTY. :

SYNOPSIS

The Board certified tenure charges of conduct unbecoming against John Socrates – a tenured teacher – for alleged criminal acts on April 17, 2010. Specifically, respondent was charged with a violation of *N.J.S.A.* 2C:14-4(a), *N.J.S.A.* 2C:35-10(a)(4) and 39:4-49.1, and *N.J.S.A.* 2C:36-2. Respondent filed an answer admitting that he had been criminally charged, but denying that he engaged in any criminal activity or conduct unbecoming a teacher. Respondent was granted a stay of the tenure charges pending disposition of the criminal case against him. Subsequently, respondent pled guilty to a violation of *N.J.S.A.* 2C:14-4(a), and the other charges were dismissed. By letter dated February 17, 2011, the Manager of the Department's Criminal History Unit advised the Board that respondent had received a conviction for a disqualifying offense enumerated in *N.J.S.A.* 18A:6-7.1, and that he is therefore permanently disqualified from employment in New Jersey public schools. The Board filed a motion for summary decision.

The ALJ found that: there is no genuine issue as to any material fact in dispute, and the matter is ripe for summary judgment; *N.J.S.A.* 18A:6-7.1 provides in pertinent part that an individual shall be permanently disqualified from employment as a teacher of children if the individual's criminal history record check reveals a record of conviction for an offense set forth in Chapter 14 of Title 2C of the New Jersey Statutes; there is no statutory authority for respondent's position that disqualification is not mandatory and mitigating factors may be presented; accordingly, there is no basis for a hearing or oral argument on the tenure charges. The ALJ concluded that summary decision is appropriately granted to the petitioning Board, and that respondent must be removed as a tenured teaching staff member.

Upon independent review of the record, 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.

June 24, 2011

OAL DKT. NO. EDU 12652-10
AGENCY DKT NO. 621-10/10

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN SOCRATES,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF JACKSON, OCEAN COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions – 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.

On exception, respondent presents for reconsideration his letter memorandum in opposition to the District's Motion for Summary Judgment submitted to the Administrative Law Judge (ALJ) below. Such letter memorandum requested the ALJ to schedule a hearing or, at the very least, oral argument to determine whether there is a basis for the District's requested Order removing respondent as a tenured teaching staff member without granting him the right to present evidence on his behalf. Respondent cites to Commissioner of Education cases from 1985, 1988, 1989 and 1990 for the proposition that – even when there have been guilty pleas to criminal charges – in making a determination as to penalty in any tenure charge proceedings involving allegations of unbecoming conduct, the factors dictated by *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967), *i.e.*, 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 the likelihood of such behavior reoccurring, must be taken into consideration. (Respondent's letter memorandum in opposition to the District's Motion for Summary Decision, at 1-5)

Upon full consideration, the Commissioner is in complete accord with the ALJ that a summary decision order removing respondent from his tenured teaching position with the School District of the Township of Jackson is appropriately granted to the Board. In so determining, the Commissioner categorically rejects respondent's exception arguments, as this result does not emanate as a consequence of the tenure charges filed against him but, rather, is obligatory as a matter of law. Specifically, due to the overriding need to protect New Jersey's school children from potential harm, effective June 30, 1998, the Legislature significantly amended the statutory provisions governing criminal history record checks of school employees (*N.J.S.A* 18A:6-7.1), making the statute stricter and removing its prior provision for demonstration of rehabilitation. This statute, in pertinent part, is clear on its face:

> ...An individual, except as provided in subsection g. of this section,[1] shall be permanently disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction for any crime of the first or second degree; or a. *[a]n offense as set forth in chapter 14 of Title 2C of the New Jersey Statutes,* or as set forth in N.J.S. 2C:24-4 and 2C:24-7, or as set forth in R.S. 9:6-1 et seq., or as set forth in N.J.S. 2C:29-2; or...(emphasis supplied)

Here, it is uncontested that on February 16, 2011 respondent pled guilty in Wall Township Municipal Court to a violation of *N.J.S.A.* 2C:14-4(a). (See District's Motion for Summary Decision, Exhibit E & F) As evidenced above, this offense is specifically identified by *N.J.S.A.* 18A:6-7.1 as one for which a conviction renders the individual ineligible for employment in New Jersey's public schools. By letter dated February 17, 2011,

[1] As recognized by the ALJ, subsection g. is not applicable in the instant matter.

Carl H. Carabelli, Manager of the Department of Education's Criminal History Unit, notified the District that, as a consequence of his conviction, respondent had been notified that "he is permanently disqualified for employment with any public school or educational facility under the supervision of the Department of Education or contractor providing service to said school or institution." (See District's Motion for Summary Decision, Exhibit G). As such, the District had the obligation – as a matter of law – to terminate respondent's employment once he was disqualified from school employment and he neither requested nor obtained a stay of such disqualification pending appeal pursuant to *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended decision of the OAL – as expounded on above – is adopted as the final decision in this matter. Respondent John P. Socrates is removed as a tenured teaching staff member in the School District of the Township of Jackson.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6|24|11

Date of Mailing: 6|24|11

[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 12652-10
AGENCY DKT. NO. 621-10/10

IN THE MATTER OF THE TENURE HEARING OF JOHN SOCRATES, SCHOOL DISTRICT OF THE TOWNSHIP JACKSON, OCEAN COUNTY.

Ben A. Montenegro, Esq., for petitioner, School District of the Township of Jackson (Montenegro, Thompson, Montenegro & Genz, attorneys)

Stephen B. Hunter, Esq., for respondent, John Socrates (Detzky & Hunter, LLC, attorneys)

Record Closed: May 9, 2011 Decided: May 16, 2011

BEFORE **JOHN SCHUSTER III**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On April 5, 2011, the Jackson Township Board of Education (petitioner) submitted a notice of motion for summary decision affirming the removal of John P. Socrates (respondent) as a tenured teaching staff member of the Jackson Township School District. Responsive papers were received on May 9, 2011 requesting a hearing

or oral argument relating the aforesaid motion. For the reasons set forth below, I am granting summary decision in favor of petitioners and denying respondent's request to schedule a hearing or permit oral argument on the notice of motion.

FACTUAL DISCUSSION

On September 20, 2010, petitioner certified tenure charges against the respondent charging unbecoming conduct as a result of committing criminal acts on April 17, 2010 at the Wall Township Garden State Parkway Rest Stop/Service Area. Specifically respondent was charged with a violation of N.J.S.A. 2C:14-4(a), N.J.S.A. 2C:35-10(a)(4) and 39:4-49.1, as well as N.J.S.A. 2C:36-2. On November 9, 2010, respondent filed an answer with the New Jersey Department of Education admitting that he had been criminally charged but denying that he engaged in any criminal activity or conduct unbecoming to his position as a teacher. Subsequently the respondent requested and was granted a stay of the tenure charges proceedings pending disposition of the criminal matters set forth above. On February 16, 2011, respondent plead guilty and was found guilty of the [N.J.S.A. 2C:14-4(a)] offense. The remaining charges were dismissed. Petitioner was represented by counsel during the criminal proceedings. By letter dated February 17, 2011, the New Jersey Department of Education advised petitioner that respondent had received a conviction for a disqualifying crime or offense enumerated in N.J.S.A. 18A:6-7.1 and as such he was permanently disqualified from employment by petitioner. Petitioner then brought this notice of motion stating that as a matter of law and as a result of respondent's guilty plea; summary decision is mandated requiring the removal of petitioner as a tenured teaching staff member of the Jackson Township School District.

Respondent's submitted responsive papers setting forth the position that under these circumstances there is discretion and multiple factors have to be considered prior to removing a tenured teacher for unbecoming conduct. Therefore a hearing should be held so that respondent has an opportunity to present mitigating factors or in the alternative, oral argument should be allowed to have those mitigating factors placed on the record.

LEGAL ANALYSIS

N.J.A.C. 1:1-12.5 provides that a motion for summary decision shall be granted when the pleading submitted showed 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. An adverse party may defeat a motion for summary decision by submitting affidavits setting forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing. In essence this is the same standard as set forth in matters requesting summary judgment in the Superior Court and enumerated in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954) and Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 528-40 (1995).

N.J.S.A. 18A:6-7.1 provides in pertinent part that an individual shall be permanently disqualified from employment as a teacher of children if the individuals criminal history record check reveals a record of conviction for an offense set forth in Chapter 14 of Title 2C of the New Jersey Statutes. There is an exception pursuant to Subsection G of that statute; however, that does not apply to the respondent in this matter.

Despite respondent's assertion that disqualification is not mandatory and mitigating factors may be presented there is no statutory authority for that position. As a result I **FIND** there is no basis for a hearing or oral argument on petitioner's notice of motion.

In addition N.J.S.A. 18A:6-7.3 provides that when disqualifying criminal charges as set forth in N.J.S.A. 18A:6-7.1 result in a conviction "the employee shall not be eligible for continued employment."

CONCLUSION

I therefore **CONCLUDE** that petitioner has met its burden in establishing that there is no material fact in dispute which would otherwise prevent respondent from

being removed as a tenure teaching staff member of the Jackson Township School District.

ORDER

For the reasons set forth herein, I **ORDER** summary decision be granted in favor of the Jackson Township School District and John P. Socrates be removed as a tenured teaching staff member of that 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.

May 16, 2011
DATE

JOHN SCHUSTER III, ALJ

Date Received at Agency: 5/16/11

Date Mailed to Parties: 5/16/11

/cad

236-11E

OAL DKT. NO. EDU 05838-11
AGENCY DKT. NO. 129-5/11

I.C.W., on behalf of minor child, J.W.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
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.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/24/11

Date of Mailing: 6/24/11

* 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

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CONTROVERSIES & DISPUTES

ORDER ON MOTION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 05838-11
AGENCY DKT. NO. 129-5/11

I.C.W. ON BEHALF OF MINOR CHILD, J.W.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,
Respondent.

Paul N. Barger, Esq., for petitioners (Kalac, Barger & Bacigalupo, attorneys)

M.L. Fabian, Esq., for respondent (Porzio, Bromberg & Newman, P.C., attorneys)

BEFORE **LELAND S. McGEE**, ALJ:

STATEMENT OF THE CASE

I.C.W., Petitioner, filed a petition for Emergency Relief contesting the Borough of Mountain Lakes Board of Education's decision to deny her son, J.W., induction into the National Honor Society.

PROCEDURAL HISTORY

On May 23, 2011, Petitioner filed an application for emergent relief with the New Jersey Department of Education, Office of Controversies and Disputes. On the same day, this matter was transmitted to the Office of Administrative Law (OAL) for a hearing on the requested emergent relief. On May 31, 2011, the application for emergent relief was heard at the OAL, 33 Washington Street, Newark, New Jersey, and the record closed.

STATEMENT OF FACTS

The pertinent facts of this case are not in dispute and I **FIND** the following to be the **FACTS** of this case.

J.W. is a resident of Kennelon, New Jersey, and an eleventh grade out-of-district high school student in the Mountain Lakes School District. He has attended school in this district pursuant to an Individualized Education Program (IEP) since he was four years old. J.W. wears a cochlear implant to assist with his hearing impairment.

On or about May 6, 2009, the end of J.W.' nineth grade year, two students reported an incident involving R.W. to Stephen W. Ryan, the Assistant Principal at Mountain Lakes High School. The investigation of this incident resulted in a short-term out-of-school suspension.

In the spring of 2011, J.W. satisfied the initial academic proficiency threshold for receiving an invitation to apply for membership in the National Honor Society. J.W.'s application was considered by a five-member Local Faculty Council (LFC) which was comprised of five teachers selected by the school prinicipal.

On or about April 11, 2011, the LFC met to consider applicants for induction into the NHS and determined not to select J.W. The council concluded that his "disciplina ry record did not meet chapter selection standards."

Petitioner filed a timely motion for emergent relief, contesting the decision of the LFC, and the failure of Respondent to take any action to reverse that decision. Petitioner contends that the decision of the LFC was not supported by any facts and was arbitrary, carpricious and/or unreasonable. Further, Petitioner contends that the failure of Respondent to vote on the action of the LFC was arbitrary, caprious and/or unreasonable.

On or about May 27, 2011, Respondent held an induction ceremony for students selected for membership in the National Honor Society. A less formal induction ceremony will be held in October 2011, for eligible students not inducted during the spring ceremony.

DISCUSSION AND CONCLUSIONS OF LAW

The standards which must be met by the moving party in an application for emergent relief are embodied in Crowe v. DeGoia, 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 first consideration is whether J.W. will suffer irreparable harm if the requested relief is not granted. While there are multiple reasons why Petitioner will not suffer irreparable harm in this matter, I need only cite that there is no emergent need to for the relief sought. The spring ceremony has already occurred and another ceremony will be held in October. This ceremony, albeit less formal, will occur prior to the deadline for submission of college applications. As such, to the extent that Petitioner is concerned about including membership in NHS on his college admissions applications, he will be able to do so if he prevails on the merits of the case. No other evidence of "immediate harm" as contemplated in the Crowes test has been offered.

I **CONCLUDE** that Petitioner has not satisfied the first prong of the Crowes test. Irreparable harm will not result if J.W. is not immediately inducted in to the National Honor Society. Having failed this first test, I need not discuss the remaining elements of Crowes because it requires that all of its elements be satisfied.

For the foregoing reasons, I **CONCLUDE** that the emergent relief requested by Petitioner must be denied. Accordingly, it is **ORDERED** that Petitioner's motion 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.

June 1, 2011
DATE

LELAND S. McGEE, ALJ

LSM/lr

Reyes, Elisa

From: Reyes, Elisa
Sent: Wednesday, June 01, 2011 3:34 PM
To: 'Ducan Kathleen (Kathleen.duncan@doe.state.nj.us)'; 'Heredia Cris (cris.heredia@doe.state.nj.us)'
Cc: 'pbarger@kbbllc.com'; 'mlfabian@pbnlaw.com'
Subject: REVISED--Judge McGee's Order on Motion for Emergent Relief EDU 5838-11
Attachments: EDU 05838-11(John Weinand v Mountain Lakes BOE) - Natl Honor Society - emergent.doc

Lisa Reyes
Secretary to:
Honorable Leland S. McGee
Honorable Caridad F. Rigo
Honorable Sandra Ann Robinson

tel. 973-648-6052
fax. 973-648-2358
e-mail: *elisa.reyes@oal.state.nj.us*

237-11

J.S., on behalf of minor child, E.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NORTHERN BURLINGTON COUNTY REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In October 2010, the petitioner filed a *pro se* residency appeal on behalf of minor child E.D. On November 17, 2010, E.D. was withdrawn from respondent Board's district and transferred to Rancocas Valley Regional High School by her father, J.D. The respondent Board filed a motion to dismiss the petitioner's appeal.

Petitioner received appropriate notice of a hearing in this matter on May 11, 2011, but failed to appear and provided no explanation for his nonappearance. Having received no explanation from the petitioner for his non-appearance, 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.

June 24, 2011

OAL DKT. NO. EDU 12514-10
AGENCY DKT. NO. 605-10/10

J.S., on behalf of minor child, E.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NORTHERN BURLINGTON COUNTY REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
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 May 13, 2011, 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: 6|24|11

Date of Mailing: 6|24|11

[1] It is noted that, by letter dated May 11, 2011 to the Administrative Law Judge, the Board withdrew its cross petition 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).

238-11

AGENCY DKT. NO. 136-5/11

IN THE MATTER OF THE TENURE HEARING OF BEN S. SHOER, NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES.	COMMISSIONER OF EDUCATION DECISION

In this tenure matter, petitioner originally charged respondent with 1) conduct unbecoming, 2) incompetency/inefficiency/failure to perform duties, and 3) other just cause. The notice of discipline specified a seven day suspension which, under *N.J.A.C.* 4A:2-2.2 (a), constitutes major discipline and falls within the purview of *N.J.S.A.* 18A:60-1 to 60-2 and 6-10, the law that imposes procedural and substantive preconditions to the dismissal or reduction of compensation of tenured teachers.

Subsequent to the filing of the petition, the parties fashioned a settlement agreement wherein it was proposed that two of the three original charges would be dropped, leaving the charge of unbecoming conduct. It was further proposed that the discipline be reduced to five days' unpaid suspension and two days "on the record" (for the purposes of respondent's history of progressive discipline). Such a reduction transforms the discipline to minor discipline, *see N.J.A.C.* 4A:2-2.2(a), which is not deemed to be a reduction in compensation sufficient to implicate *N.J.S.A.* 18A:60 and 18A:6-10. *See, N.J.A.C.* 6A:3-5.1(a)(1).

In light of the foregoing, a tenure proceeding before the Commissioner of Education is not necessary. *See, e.g. Robert Bittner v. Burlington Township,* 2003 N.J. AGEN LEXIS 269 (May 12, 2003), *aff'd* Merit System Board, 2003 N.J. AGEN LEXIS 1463

(June 30, 2003) (a minor discipline matter is appropriate for local, not agency proceedings). However, insofar as the parties have placed a settlement before the Commissioner, and in light of the foregoing facts set forth in the record, the Commissioner has determined that the proposed settlement constitutes an acceptable disposition of this case.

Accordingly, the Commissioner approves the settlement and dismisses the petition.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/24/11

Date of Mailing: 6/24/11

STATE OF NEW JERSEY
DEPARTMENT OF CHILDREN AND FAMILIES
DISCIPLINARY ACTION APPEAL SETTLEMENT AGREEMENT

DCFD -2011-0463

1. Institution/Agency	2. Name/Title Representative
Department of Children and Families / OCLR	Yvette Waugh-Everson, Personnel Assistant II

3. Name/Title Employee:
Ben Shoer, Teacher 2

4. Name/Title Representative of Employee:
Joesph Nardini, CWA 1039 Staff representative

5. Disciplinary Action Appealed: a. X Removal b. **Suspension of 7 days with out pay** c. Official Reprimand
d. ☐ Demotion e. ☐ Fine of _____

6. a. **Offense(s)** NJAC 4A:2-2.3(a)6 – Conduct unbecoming a public employee. NJAC2:2.3(a) 11- Other Sufficient Cause
c. Offense Date(s) 3/22/11
d. Date of Disciplinary Action appealed: **5/24/11**

7. The institution/agency agrees to amend the appealed disciplinary action to: **7 day suspension, 5 days with out pay, 2 days to be on the record. Dates of suspension with out pay will be July 5, 6, 7, 8 and July 11, 2011, dates on the record will be July 12 and 13 , 2011.**

b. ☐ Official Reprimand c. ☐ Demotion d. ☐ Fine of _____ e. ☐ Counseling f. ☐ Oral Warning g. Written Warning

8. a. X Not-Applicable b. ☐ Applicable. The institution/agency agrees to reimburse the employee_____ of back pay.

9. **The employee agrees to withdraw his/her appeal and agrees not to initiate and/or pursue other appeals.**

10. a. **Not-Applicable** b. Applicable. Employee agrees to a General Resignation effective _____ and will not seek future employment with the Department of Children and Families or its contracted agencies.

11. The employee waives all claims against the State of New Jersey including, but not limited to, counsel fees, other monetary relief or any award of back pay except as may be noted in 8b above.

12. The parties to this Settlement Agreement agree that its terms do not establish any precedents and will not be referred to in any forum or manner except for the assessment of the employee's disciplinary record in any subsequent disciplinary proceedings.

13. Appellant waives all appeals, claims, demands, damages, causes of action or suits (hereinafter referred to collectively as "Appeals/Claims") which he/she may have against the State, its employees, agents, or assigns arising out of or related to the subject matter of this disciplinary action, regardless or whether such Appeals/Claims are known or unknown, have been or could have been brought, and regardless of what forum, court or other venue could be used for such Appeals/Claims from the beginning of time to the date of this agreement. Further, Appellant waivers all claims/appeals resulting from anything which has happened up to now in his/her employment the State including but not limited to Claims/Appeals arising under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the New Jersey Law Against Discrimination, the Americans with Disabilities Act, the Equal Pay Act, the Conscientious Employee Protection Act, the Family and Medical Leave Act, the New Jersey Family Leave Act, the Civil Service Act, 42 USC, 1983, New Jersey age and hour laws, retaliation claims under Workers Compensation laws, the U.S. Constitution the New Jersey Constitution tort law or contract law.

This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims.

14. This settlement shall be non-precedential in any other future matter. **(EMPLOYEE PLEASE SIGN STATEMENT BELOW).**

I, Ben Shoer, being the moving party in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all my questions regarding this settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

Ben Shoer — 6/1/11

Employee: Date

J Marlini, CWA 1039 — 6-2-11

Representative of Employee: Date

Daisy Barreto — 6.2.11

Institution/Agency Representative: Date

Daisy Barreto, Manager Office of Cooperative Labor Relations

OFFICE OF COOPERATIVE LABOR RELATIONS –

Director

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239-11

AMPARO BISHOP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

On September 1, 2010, the petitioner – a secretary in the Piscataway School District – filed an appeal alleging that the respondent Board improperly charged petitioner's sick leave bank for absences attributable to a work-related injury. Petitioner contends that she was injured in a work-related accident on January 10, 2002. Her worker's compensation claim in that matter was settled by an Order dated May 4, 2007.

The ALJ found that: there are no material facts in dispute, and the matter is ripe for summary judgment; the 90-day period for filing an appeal begins once notice of the final order or ruling is given, which in this case occurred on May 4, 2007 – the date of the Order approving settlement of petitioner's worker's compensation claim; the instant petition was filed well after the 90-day period set forth in *N.J.A.C.* 6A:3-1.3(i); and there is no cause for relaxation of the 90-day rule. Accordingly, the ALJ granted summary decision to the respondent Board, and dismissed the petition.

Upon full consideration of the record and Initial Decision of the OAL, the Commissioner concurred with the ALJ for the reasons detailed in the Initial Decision, 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.

June 24, 2011

OAL DKT. NO. EDU 13897-10
AGENCY DKT. NO. 703-12/10

AMPARO BISHOP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
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 consideration, the Commissioner concurs with the Administrative Law Judge that the instant petition is appropriately dismissed because it was filed well outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). The Commissioner, likewise concurs that petitioner has failed to set forth a bona fide legal or factual basis warranting relaxation of the timely filing requirement.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons stated therein. Summary decision is granted to the Board and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6|24|11

Date of Mailing: 6|24|11

* 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 13897-10
AGENCY DKT. NO. 703-12/10

AMPARO BISHOP,

Petitioner,

v.

PISCATAWAY BOARD OF EDUCATION,

Respondent.

William P. Mikita, Jr., Esq., for petitioner (Gill & Chamas, attorneys)

David B. Rubin, Esq., for respondent

Record Closed: May 9, 2011 Decided: May 24, 2011

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On September 1, 2010, Amparo Bishop (Bishop) filed with the Commissioner of Education an application for appeal of the Piscataway Board of Education (Board) charging petitioner's sick leave bank for absences due to a work-related injury.

Bishop, a secretary in the Piscataway School District, contends that she was injured in a work-related accident that occurred on January 10, 2002. Bishop argues that she was out of work for a total of 196 days. Respondent paid petitioner's salary for three days. Bishop further contends that respondent continued to pay her for an additional 111 days at 100 percent of her salary when she should have been paid at seventy percent. Bishop stated when respondent realized its error; respondent stopped paying her under Workers' Compensation and charged her sick account for the remaining eight-two days. Accordingly, Bishop contends that she is entitled to have 48.7 days of sick leave restored to her.

On December 15, 2010, the Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted a petition of appeal 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, for determination as a contested case. The Board filed a Motion for Summary Decision on April 8, 2011, contending that the petition should be dismissed as time-barred pursuant to N.J.A.C. 6A:3-1.3(i). The record closed upon receipt of the last submission.

FACTUAL DISCUSSION

For the purpose of this motion the following **FACTS** from Bishop's Certification and attachments as well as the respondent's attachments are deemed as true.

The Board employed Bishop as a secretary, who sustained an injury, which was determined to be compensable under the Workers' Compensation Act, due to an accident which occurred on January 10, 2002. An Order approving a settlement of her compensation claim was entered by the Judge of Compensation William Lake on May 4, 2007.

On August 20, 2007, a letter was forwarded to Inservco Insurance Services, the claims administrator for the Piscataway Board of Education, in which a request was made to provide the exact sick days taken and to reimburse petitioner in accordance to

the Workers' Compensation statute. On October 9, 2007, the Board responded wherein it was stated that all sick days have been restored with reference to this accident.

On March 26, 2010, Bishop's counsel forwarded to the Commissioner of Education for filing an earlier petition of appeal. That petition was dismissed by the Bureau of Controversies and Disputes on March 30, 2010, because it had not been properly verified by Bishop. On May 26, 2010, an amended petition was filed, which was stayed pending submission of another certification. On June 14, 2010, respondent answered the petition. On July 23, 2010, the petition was deemed withdrawn by the Department of Education. On December 6, 2010, the petition was re-filed and on December 8, 2010, the Commissioner of Education received an appeal from Bishop dated September 1, 2010.

ANALYSIS AND CONCLUSIONS OF LAW

Summary decision is the administrative counterpart to summary judgment in the judicial arena. N.J.A.C. 1:1-12.5 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." This language is substantially similar to the guidelines for summary judgment under R. 4:46-2(c) which provides in part 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.

In order to defeat a summary decision motion, the adverse party must respond by affidavits setting forth "specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing." Use of the summary procedure is aimed at "the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial." Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

The New Jersey Supreme Court has encouraged trial-level courts "not to refrain from granting summary judgment when the proper circumstances present themselves." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 541 (1995). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified 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." Id. at 540 (citations omitted).

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts which require a plenary hearing regarding the issue of whether the appeal was timely filed, and the Board is entitled to summary decision as a matter of law.

The Commissioner has specifically addressed the time in which a petitioner must initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws. N.J.A.C. 6A:3-1.3(i)(1) requires that:

> Any petitioner claiming benefits under N.J.S.A. 18A:30-2.1 shall file a petition within 90 days of the date of the determination by the Division of Workers' Compensation that either finds the employee to have sustained a compensable injury or settles the compensation claim without a determination of work-related causation, unless the claim constitutes an exception to the requirement that the Commissioner refrain from exercising jurisdiction until the Division has made a determination on the underlying injury, in which case the petition shall be filed within 90 days of receipt of notice of the district board of education's action, or of the action of the district board of education's agent, which has the effect of denying such benefits.

Such a rule represents a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws and falls within the scope of authority granted to the Commissioner. Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 582 (1993). 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. Ibid. Its purposes are 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 and to penalize dilatoriness and serve as a measure of repose by giving security and stability to human affairs. Id. at 587.

The ninety-day requirement is to be strictly construed and is mandatory. Wise v. Bd. of Educ. of the City of Trenton, EDU 160-00, Comm'r (September 11, 2000), aff'd, State Bd. of Educ. (January 3, 2001), <http://lawlibrary.rutgers.edu/oal/search.html>. A petitioner must file a petition within ninety days from a notice of adverse action and not within ninety days of her exhaustion of other avenues and mechanisms she might have employed in seeking renewal of employment. Ibid. Informal attempts to resolve a dispute do not serve to toll the statute of limitations. See Kaprow, supra, 131 N.J. at 588. Also, the ninety-day period for filing a petition of appeal commences when a petitioner learns of facts that would enable her to file a timely claim. Id. at 587. "Adequate 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." Ibid. (citation omitted).

The time by which Bishop filed her petition on December 6, 2010, was well in excess of ninety-days from her receipt, of the Order from the Honorable William Lake, JWC, approving a settlement of her compensation claim on May 4, 2007. Bishop cannot defend her failure to file a petition within this ninety-day period based on her contention that the statute of limitations would not begin because Judge Lake's Order approving settlement on May 4, 2007, did not include any issues regarding lost sick days. If that were so, and if the Board never acted formally, the statute of limitations would still yet to have run.

N.J.A.C. 6A:3-1.3 requires a petitioner asserting a claim under N.J.S.A. 18A:30-2.1 to

> include a copy of the ruling or settlement agreement issued by the Division of Workers' Compensation with respect to the injury underlying the claim or provide reasons why the matter constitutes an exception to the requirement that the Commissioner refrain from exercising jurisdiction until the Division makes a determination of work-related injury.

Here Bishop attached to her petition the May 4, 2007, Order approving the settlement of her Workers' Compensation claim, which initiated the ninety-day statute of limitations. In that Order it was determined by Judge Lake that the employee sustained a compensable injury. Bishop did not file the petition until three-and-one-half years later.

In addition, there exists no cause for relaxation of the ninety-day rule, averring that the New Jersey Courts have stated that the ninety-day rule will only be relaxed where there is some compelling constitutional concern or other fundamental public interest beyond the parties which would warrant waiver of the rule. New Jersey Courts consistently held this rule is mandatory and that the ninety-day time period begins to run on the date that notice is received of the action taken. See Nissman v. Bd. of Educ. of Twp. of Long Beach Island, 272 N.J. Super. 373 (App. Div. 1994), certif. denied, 187 N.J. 315 (1994); Wynne v. Tillery, Camden County Superintendent of Sch., 96 N.J.A.R.2d (EDU) 995; Conklin v. Old Bridge Twp. Bd. of Educ., 96 N.J.A.R.2d (EDU) 502; Portee v. Newark Bd. of Educ., 94 N.J.A.R.2d (EDU) 381. At the very latest, the petitioner became aware of the school district's action regarding her sick days when on October 9, 2007, petitioner's attorney received a letter from Director of Human Resources Peter Pitucco for the Piscataway Township Schools stating: "Please be advised that we have restored all the sick days that we are legally obligated to restore in regard to this accident (Amparo Bishop, Date of Accident 1/10/02)." Even using this later date, the petitioner's filling is still well beyond the ninety-day time limit and thus is untimely.

Accordingly, I **CONCLUDE** that Bishop's petition of appeal should be dismissed for failure to comply with the requirements of N.J.A.C. 6A:3-1.3(i).

ORDER

It is hereby **ORDERED** that the Board's motion for summary decision be **GRANTED** and 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.

5/24/11
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: 5/24/11

Date Mailed to Parties: 5/24/11

jb

OAL DKT. NO. 7255-11
AGENCY DKT. NO. 162-6/11

OSHEA SAMUEL,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings conducted at the Office of Administrative Law (OAL) on June 27, 2011, and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Acting Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33 – concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

In so concurring, the Deputy Commissioner emphasizes that petitioner *has* met the threshold standard of irreparable harm – notwithstanding that participation in graduation exercises is a privilege rather than a right – since the opportunity to participate in such an event cannot be regained once lost, and dismissal of an emergent application on this criteria alone would effectively insulate a school district's actions in matters of this type from any meaningful review.[1]

[1] The Deputy Commissioner is fully aware of the well-established principle that a prohibition from attending events of this type does not, in and of itself, rise to the necessary level of irreparable harm so as to warrant extraordinary remedy. However, harm is "irreparable" when there can be no adequate after-the-fact remedy in law or in equity, and monetary damages cannot adequately redress the intangibles of a lost experience after the event is over. In past cases denying similar applications for emergent relief, the irreparable nature of the harm and the degree or severity of the harm have frequently been addressed as a totality; they are, however, two separate factors, and it is on the basis of the *severity* of the harm – which pertains to the weighing of interests – and not its irreparable nature that applications of this kind typically fail. *Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County*, decided by the State Board April 17, 1966; *L.J., on behalf of minor child, S.J. and David Wickham v. Board of Education of the Township of Manchester, Ocean County*, decided by the Commissioner May 2, 2003. See also *D.M.S., on behalf of minor child, E.B. and Gregory Heck v. Board of Education of the Pinelands Regional School District, Ocean County, et al.*, decided by the Commissioner May 9, 2008.

This said, however, the fact remains that petitioners seeking emergent relief must additionally demonstrate that the legal right underlying their claim is well settled, that they have a likelihood of success on the merits of their underlying appeal, and that the balance of interest and equities under the circumstances rests in their favor. In each of these respects, the Deputy Commissioner finds that petitioner has not met the requisite burden, necessitating that her application must be denied.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted. This matter shall proceed at the OAL for whatever may be required to bring it to conclusion.

IT IS SO ORDERED.[2]

ACTING DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 6|27|11

Date of Mailing: 6|28|11

[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

DECISION ON
EMERGENT RELIEF
OAL DKT.NO. EDU 7255-11
AGENCY DKT. NO. 162-6/11

O.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE
CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

A.S., for petitioner, appeared pro se on behalf of **O.S.**

R. Scott Eveland, Esq., for respondent (assistant general counsel, Jersey City Public Schools)

Record Closed: June 27, 2011 Decided: June 27, 2011

BEFORE **TAHESHA L. WAY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By a request for emergency relief filed with the Commissioner of Education, the petitioner, O.S., seeks an order requiring respondent, Board of Education of the City of Jersey City (District) to grant her a diploma and therefore allow her to participate in the high school graduation ceremonies scheduled tonight, June 27, 2011.

The matter was transmitted to the Office of Administrative Law (OAL) where it was filed on June 23, 2011, and oral argument was conducted on June 27, 2011.

FACTUAL DISCUSSION

O.S is an eighteen year old student who is currently in the twelfth grade at Henry Snyder High School. Specifically, she was advised that she would not be eligible for graduation on the basis that her final average in her required English 4 course was 65.

O.S., however, contended that her overall grade in English 4 was above 70, and that her teacher miscalculated her grade. She also contended that in or around May 2011, she received her progress report which reflected a failing grade but that she contacted her teacher, Ms. Sosa, in an attempt to address this issue but to no avail. O.S. explained that her grade unfairly reflects alleged missing assignments and absences. Moreover, she emphasized that her absences were the result of her father's illness, and that she did turn in the work that she missed. Lastly, O.S. contended that she attempted to verify her grades via the school's online system, En-Grade, but could not access the system.

The District, however, defended its policy that a student must pass all core courses to participate in their graduation ceremonies, especially a required class like English 4. The District also contended that the 65 is an accurate representation of her English 4 final grade and that O.S had notice and the opportunity to address this issue upon the receipt of her progress report in May 2011, and by way of access to the En-Grade system. Additionally, the District claimed that O.S. was late twelve times from September 2010, through January 2011. O.S.' grades also reflect important missing and incomplete assignments, like her assignment regarding an independent novel. Furthermore, the District explained that several of her low grades were even dropped, as in the case of her Elizabeth project.

LEGAL DISCUSSION

The standard for emergent relief in this matter is found at N.J.A.C. 1:6A-14.2(a):

1. The petitioner will suffer irreparable harm if the requested 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.

It is imperative to note that these standards are written in the conjunctive. Thus, O.S. must satisfy all four (4) requirements in order to be entitled to receive the relief requested.

With respect to the first prong, O.S. will suffer irreparable harm if the requested relief is not granted. While it is understood that O.S. will receive her diploma upon the successful completion of her English summer class, a high school graduation only occurs once. However, the legal right underlying petitioner's claim is well settled. That is, the applicable case law establishes beyond question that attendance at a graduation ceremony is a privilege and not a right. See I.K. v. West Windsor-Plainsboro School District, 97 N.J.A.R.2d (EDU) 639; M.P. v. Hackettstown Board of Education, 95 N.J.A.R.2d (EDS) 210. Therefore, because O.S. has no legal right to attend the ceremony, O.S. cannot satisfy that prong of the test. Moreover, a determination of a likelihood of prevailing on the merits of the underlying claim is questionable and cannot be established without conducting a full hearing. There is a genuine factual dispute as to the determination of O.S.' overall English 4 grade. Finally, the District will suffer greater harm than O.S. if there is a total disregard of the policies. While O.S. will suffer harm, her interests must be balanced by the interests and responsibilities the District has for all its' students. Accordingly, I **CONCLUDE** that O.S. has not sustained her

burden of establishing the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b).

ORDER

I **ORDER** that petitioner's application for emergent relief requesting an award of a diploma and participation in her graduation at Henry Snyder High School on June 27, 2011, be **DENIED.**

This order on application for emergency relief may be adopted, modified or rejected by the **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 (45) 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 (45) 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.

June 27, 2011
DATE

TAHESHA L. WAY, ALJ

/rr

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street
Newark, New Jersey 07102

FAX TRANSMITTAL

DATE: 6/27/11
TIME: _____

TELECOPIED TO:	FAX NO:
Kathy Duncan	609 292-4333

FROM: ALJ Clay

Office of Administrative Law: Newark, Trenton, Atlantic City
OFFICE (CIRCLE ONE)

973 648-6069
TELEPHONE NUMBER

FAX TELEPHONE NUMBER: (Circle One)

(Newark)	973-648-6124 or 973-648-6058
(Trenton)	609-588-3730 or 609-588-6536
(Atlantic City)	609-441-3824

THERE ARE 4 PAGES TO FOLLOW. IF YOU DO NOT RECEIVE ALL OF THE PAGES, PLEASE CALL THE SENDER AT THE TELPEHONE NUMBER LISTED ABOVE. THANK YOU.

243-11

OAL DKT. NO. EDU 6277-11
AGENCY DKT. NO. 132-5/11

KAREN BORRELLI,	:	
PETITIONER,	:	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, 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.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6|30|11

Date of Mailing: 7|06|11

* 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 6277-11
AGENCY DKT. NO. 132-5/11

KAREN BORRELLI,
Petitioner,
v.
BOARD OF EDUCATION OF THE
CITY OF CAMDEN, CAMDEN COUNTY,
Respondent.

Saul J. Steinberg, Esq., for petitioner (Zucker, Steinberg, Sonstein & Wixted, attorneys)

Louis R. Lessig, Esq., for respondent (Brown & Connery, attorneys)

BEFORE **EDWARD J. DELANOY, JR.,** ALJ:

This matter having been opened on the filing of a petition for emergent relief, submitted by petitioner, Karen Borrelli, Saul J. Steinberg, Esq. appearing, and respondent, Board of Education of the Township of the City of Camden, Camden County, Louis R. Lessig, Esq. appearing, and the undersigned having considered the moving papers, Verified Petition 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 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.

Petitioner is a tenured physical education teacher in the employ of the Camden City School Board of Education ("Board"). On March 28, 2011, the Board suspended petitioner with pay from her position for "Conduct Unbecoming." This was based upon an investigation by the Division of Youth and Family Services (DYFS) into allegations of alleged sexual misconduct with a student. The Board also alleges that it commenced its own independent investigation into those allegations. During the same time, the Board submits that it began an investigation into a fundraiser orchestrated by petitioner to raise funds with the purpose of taking students on a field trip. While petitioner argues that the principal of the school authorized the fundraiser, substantive issues remain as to the involvement and participation of the principal versus the petitioner in the fundraising activity. In any event, without direct authorization from the Board, petitioner purchased coupon books and directed her students to sell them to raise funds for the field trip. Prior to her suspension, petitioner, through her students, raised $820 from thirty-seven individuals for the field trip. Petitioner was thereafter requested to terminate the fundraiser and turn over to the Board all funds collected.

On March 29, 2011, petitioner's attorney forwarded a letter to the Board's attorney requesting clarification of the nature of the allegations, and questioning the justification for the suspension and the possibility of petitioner losing her position as teacher curriculum writer for the middle school health and physical education program. On April 1, 2011, petitioner turned over to respondent all of the proceeds of the fundraising activity. On April 6, 2011, the Board's attorney wrote to petitioner's attorney and advised that the Board had mandated a full accounting from petitioner of where the dollars came from in the fundraising activity, and demanded that petitioner produce this accounting so that the money might be returned to the individuals. On April 13, 2011, petitioner's attorney wrote the Board's attorney and advised that the DYFS investigation had been concluded, that petitioner had been absolved, requesting clarification as to

what other areas were being investigated by respondent, and again advising of the possibility of petitioner losing the benefit of stipends for curriculum writing.

On or about April 20, 2011, a notice was sent to the parties that the allegations of sexual misconduct were unfounded based upon the DYFS standards of review. On April 21, 2011, counsel for the Board forwarded a letter to petitioner's counsel advising that an internal investigation of petitioner's conduct had been commenced by the Board, and requesting a copy of the list of students who would require reimbursement from the fundraiser. After some apparent confusion by the parties as to what was required, on May 12, 2011, petitioner's attorney provided a list of the first and last names of six students who raised money for the fundraiser. On May 13, 2011, the Board's attorney advised petitioner's attorney that the list was inadequate because it only provided the names of the students who sold the coupon books, and not the names of the students who purchased them. On May 18, 2011, a complete list of the names of the students who purchased the coupon books was provided to the Board's attorney.

On May 27, 2011, petitioner's attorney advised the Board's attorney that the distributor who sold the coupon books to petitioner had not been paid and was seeking payment. The Board's attorney responded back the same day requesting information as to the distributor, so that the proper investigation could be undertaken as to whether or not the Board was exposed to liability to the distributor, or whether the petitioner would be financially responsible. This request to petitioner was renewed on June 2, 2011. On June 2, 2011, the within application for emergent relief was filed by petitioner.

Petitioner asserts as a tenured teaching staff member she wants to, and has a right to be immediately returned to work. She avers that she has never been served with any written notification detailing the reasons why she was suspended, that the demands made by the Board were a sham and a pretext for continuing her unjustified suspension, and that while under suspension, she is not able to participate in curriculum writing programs for which she has been approved and for which she would receive stipends. In addition, the suspension precludes her from applying for other curriculum writing opportunities for summer activities for which she would receive compensation,

and that she has been advised that she is not going to receive an increment raise. In sum, petitioner alleges that there never was, nor presently is, any valid reason for the imposition of the suspension.

The Board argues that it has an unequivocal right to conduct an investigation, and that were it not for petitioner's delays in providing requested information, the investigation could have been completed. The Board submits that petitioner has not carried its burden 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, petitioner avers she will suffer irreparable harm if the relief is not granted. In support of her application, she argues that as a result of the suspension, she is suffering irreparable harm, and that there is no way she will ever be compensated for her loss of the curriculum writing opportunities. Petitioner also claims that her reputation has suffered as a result of the improperly issued and continuing suspension, which damage cannot be compensated by money damages.

"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. Ibid.

In making her argument, however, petitioner offers nothing more in her Verified Petition beyond general statements, of any immediate financial duress. She is currently on full pay status. Petitioner argues that she will be denied opportunities to engage in curriculum writing and employment opportunities which cannot be made up by money damages. However, petitioner has not provided any specific evidence or proof of approval of curriculum writing programs, or when those approvals were given. Moreover, the employment opportunities are stipend positions, and if petitioner were able to prove that she was approved for those programs and denied entry therein, she could receive monetary compensation or damages for the loss of the stipends.

As to petitioner's claim that she will suffer irreparable harm to her reputation if she is not reinstated, petitioner again offers no proof or facts as to how her reputation would be harmed if the suspension continues. Petitioner has been suspended since March 28, 2011, and therefore, harm, if any, to her reputation has already been incurred. It is unclear at best as to what effect a continuing suspension would have on her reputation. 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.

While 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 there is a clear legal right underlying her claim and that she has a likelihood of prevailing on the merits of the underlying claim. I **FIND** the legal right underlying petitioner's claim is not settled; and I further **FIND** petitioner does not, at this time, have a likelihood of prevailing on the merits of the underlying claim. Although the petitioner was cleared by DYFS in its investigation, the Board continues its own investigation into those allegations, and is investigating the activities concerning the fundraiser. Petitioner was advised of this in several letters written by the attorney for the Board. Due to a misunderstanding of what the Board required for its investigation into the fundraiser, several weeks passed before petitioner forwarded the necessary information to the Board regarding what students had purchased coupon books. What role, if any, the principal played in this fundraiser, has yet to be determined. The Board is entitled to conclude its investigation. If no misconduct has occurred, petitioner will be reinstated. Further information that may be developed may show that no misconduct has occurred, but that information has not yet been produced, and 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 avers when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the Board if emergent relief is not granted. She argues the greater loss and potential for loss will be suffered by her without a corresponding risk of loss by the Board. However, petitioner has been suspended with pay. She would not be working for the Board over the summer, other than potentially for the stipend. The Board has an interest in, and is entitled to complete its investigation. The Board also has an interest in completing its investigation because it is currently being harmed by paying a teacher not to work. Therefore, I **FIND** that the equities do not favor on balance the grant of emergent relief.

IT IS therefore on this 10th day of June, 2011,

ORDERED that petitioner's application for emergency relief is **DENIED**.

For the reasons set forth above, it is hereby **ORDERED** that petitioner's request for emergency relief for reinstatement from her suspension pending final hearing is hereby **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 matter is scheduled for a telephone prehearing conference on July 11, 2011, at 4:00 p.m. I am requesting that Mr. Steinberg initiate this conference.

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.

June 10, 2011

Edward J Delanoy Jr

DATE

EDWARD J. DELANOY, JR., ALJ

/lam

244-11

244-11L

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 5, 2011

Andrew Babiak, Esq.
920 West State Street
Trenton, NJ 08618-5328

Frank P. Cavallo, Jr., Esq.
Parker McCay P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, NJ 08054-1539

Dear Counsel:

I have reviewed the papers filed in connection with the Petition for Declaratory Ruling in the matter captioned *Diane J. Bacher v. Board of Education of the Township of Mansfield, Burlington County*, Agency Dkt. No. 155-6/11. Therein, the petitioning Superintendent of Schools seeks a declaration that she was reappointed, by operation of law, to the position of Superintendent for the period July 1, 2011 through July 1, 2015 – at her current salary of $146,192 – as a consequence of the Board's failure to give her one year's notice of non-renewal of her contract pursuant to *N.J.S.A.* 18A:17-20.1. Please be advised that even assuming, *arguendo*, that petitioner's 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,

Christopher D. Cerf
Acting Commissioner of Education

CDC/MKD/MH
County Superintendent

245-11

245-11E

OAL DKT. NO.
AGENCY DKT. NO. 166-6/11

LAURA BECKHARD, KIM BORGERSON, ROBERTA GACKOWSKI, LUZ GONZALEZ, MAUREEN O'CONNOR-GRUBB, MARYANN JAROLMEN, DAWN KOSMAN, DOROTHEA INTORRE, BRENDA MALTMAN, JANIS PARKER, ELIZABETH ROTA, JANET SINGER, KAREN SIRENO, AND KAREN SMITH,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION ON
V.	:	APPLICATION FOR EMERGENT RELIEF
NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES, COMMISSION FOR THE BLIND AND VISUALLY IMPAIRED,	:	
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings conducted at the Office of Administrative Law (OAL) on June 29, 2011, 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 clearly presented in his Order – that petitioners have not satisfied their burden of establishing the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the recommended Order of the OAL denying petitioners' application for emergent relief is adopted. This matter shall proceed at the OAL for a hearing on its merits as expeditiously as possible, given the nature of petitioners' claims. Respondent is hereby directed to immediately produce a combined seniority list for the ALJ to utilize in resolving this case.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 5, 2011 Date of Mailing July 6, 2011

[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 APPLICATION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 7470-11
AGENCY DKT. NO. 166-6/11

LAURA BECKHARD, KIM BORGERSON, ROBERTA GACKOWSKI, LUZ GONZALEZ, MAUREEN O'CONNOR-GRUBB, MARYANN JAROLMEN, DAWN KOSMAN, DOROTHEA INTORRE, BRENDA MALTMAN, JANIS PARKER, ELIZABETH ROTA, JANET SINGER, KAREN SIRENO AND KAREN SMITH,

Petitioners,

v.

NEW JERSEY STATE DEPARTMENT OF HUMAN SERVICES, COMMISSION FOR THE BLIND AND VISUALLY IMPAIRED,

Respondent.

Rosemarie Cipparulo, Esq., for petitioner (Weissman and Mintz, attorneys)

M. Stephanie Beaty, Deputy Attorney General, for respondent (Paula T. Dow, Attorney General of New Jersey, attorney)

Record Closed: June 29, 2011 Decided: June 30, 2011

BEFORE **ROBERT BINGHAM II**, ALJ:

STATEMENT OF THE CASE

Petitioners apply for emergent relief, seeking an order restraining their layoff and declaring that the respondent, New Jersey Department of Human Services, Commission for the Blind and Visually Impaired (CBVI), is required to calculate tenure and seniority of its 10- and 12-Month Instructors on a combined basis and effect layoffs in reverse order of seniority. CBVI contends that its layoffs of 10-Month Instructors are proper and petitioners are not entitled to the relief sought.

PROCEDURAL HISTORY

On June 28, 2011, the petitioners filed a petition for declaratory ruling and interim relief. The Commissioner of Education transmitted the case, as an emergent matter, to the Office of Administrative Law (OAL), where it was filed on June 28, 2011. On June 29, 2011, an emergent hearing was held and concluded.

FACTUAL DISCUSSION

The material facts are undisputed. Accordingly, I **FIND as FACT** the following.

CBVI is a division of the New Jersey Department of Human Services which operates a statewide educational program servicing school-aged children through provider service agreements with local school districts. CBVI instructors provide a variety of services to blind and visually impaired children. There are two job titles for CBVI instructors: Instructor Commission for the Blind and Visually Impaired - 10 months (10-Month Instructor), and Instructor Commission for the Blind and Visually Impaired - 12 months (12-Month Instructor). Both positions are unclassified and have the Class Code of 22. The positions have separate job specifications and different salary ranges, although substantially similar or identical duties. While a 12-Month

Instructor works year round, a 10-Month Instructor works from September until June and is eligible for unemployment during the summer.

CBVI made a fiscal decision and determined that elimination of the 10-Month Instructor title would result in savings. The Governor's FY 2012 budget proposed the elimination of twenty-one positions. On May 10, 2011, CBVI notified all 10-Month Instructors that it was consolidating teaching positions and their jobs were being eliminated as of June 30, 2011. The 12-Month Instructors were unaffected.

Petitioners argue that the layoffs must be based upon a calculation of the tenure and seniority of all 10- and 12-Month Instructors combined. Petitioners further argue that they will suffer greater and irreparable harm if the emergent relief sought is not granted. CBVI contends that petitioners are not entitled to emergent relief, and that the layoffs of 10-Month Instructors are proper.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:1-12.6(a) provides for the granting of emergency relief 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. In such circumstances, emergency relief pending a final decision may be ordered upon the application of a party. Subparagraph (f) of this section provides that temporary relief may be granted if there is a finding that immediate and irreparable harm will probably result, if there is the likelihood that the moving party will prevail, and if the relief is as limited in scope and as temporary as possible.

The foregoing regulation embodies the principles of law announced by the court in Crowe v. DeGioia, 90 N.J. 126, 132 (1982). These legal principles may be summarized as follows:

1. Emergency relief should not issue except when necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be redressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Pecuniary damages may be inadequate ~~because of the nature of the injury or of the right affected~~.

2. Emergency relief should be withheld when the legal right underlying the claim of the requesting party is unsettled.

3. Emergency relief should not issue where all material facts are controverted. Thus, to prevail on an application for emergency relief, the party requesting the relief must make a preliminary showing of a reasonable probability of ultimate success on the merits. That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. The point of emergency relief is to maintain the parties in substantially the same condition when the final decision is issued, as they were when the litigation began.

4. The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief. The relief granted should be no broader than necessary to preserve the status quo pending a full hearing on the merits.

The application of the above standard to the facts to this case yields the conclusion that petitioners have not met, as they must, all of the above criteria for emergent relief.

Irreparable Harm

Petitioners argue that they will suffer irreparable harm if relief is not granted because they would become unemployed and lose health and pension benefits. 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. Here, all petitioners are not similarly situated. Petitioners Jarolmen, Rota, Sireno, Smith, O'Connor-Grubb, and Parker have now accepted 12-Month Instructor positions. Kosman has applied for a 12-Month Instructor position and a vacancy for at least one such position will be posted soon. A position as Vocational Rehabilitation Counselor 1 has been accepted by Gonzalez, and another such position has been offered to Gackowski.

On the other hand, petitioners Beckhard, Borgersen, Maltman and Indore have chronic health problems that require medical treatment that is covered through their State Health Benefits Plan. Their layoffs would result in an inability to maintain healthcare, as they cannot afford to pay for their health benefits under COBRA. Even if they were to be reinstated at a later time, the adverse impact resulting from any interim decline in health would not be compensable.

I therefore **CONCLUDE** that petitioners Beckhard, Borgersen, Maltman and Intorre have shown immediate harm that would constitute irreparable injury justifying issuance of injunctive relief.

Right to Underlying Claim Must be Settled

Petitioners assert that they have seniority over instructors who have retained their positions and, consequently, their seniority should be grouped with the seniority of the 12-month instructors to determine the order of individuals dismissed as a result of the reduction in force. The legal basis for this claim is their assertion that, though they are 10-month instructors and the other instructors 12-month instructors, all such instructors teach within the same category and, based on the standards for determining seniority, both types of instructors, therefore, should have been grouped together and

dismissed in reverse order of their seniority. Petitioners assert that the law is settled with regard to how their seniority should be calculated based on the regulations applicable to the lay off that has occurred here.

In their briefs and oral arguments, the parties differed with regard to what regulations were applicable to petitioners' positions. Because petitioners serve as instructors for the CBVI, which is within DHS, respondent argued that regulations that impact teaching staff members serving in school districts, namely those in Title 6A Chapter 32 of the Administrative Code, were inapplicable. However, the specific regulations applied to petitioners' positions found in Title 10 Chapter 11 of the Administrative Code clarify that N.J.A.C. 6A:32-5.1 is applicable to the determination of seniority in this particular situation. N.J.A.C. 10:11-1.9, with regard to reductions in force, specifically reads:

> Nothing contained in N.J.S.A. 18A shall be held to limit the right of the Commissioner of Human Services in the case of any educational program conducted under his or her jurisdiction, supervision or control, to reduce the number of instructional staff in any such educational program or programs when the reduction is due to natural diminution of the number of students participating in the educational program or programs, subject to N.J.A.C. 6:3-5.1.
>
> [N.J.A.C. 10:11-1.9 (emphasis added).]

Although the regulation cites a provision of the Code no longer in effect, the regulation was last updated prior to the recodification of Title 6 to Title 6A, and the regulatory history of N.J.A.C. 6:3-5.1 reveals that it was recodified to N.J.A.C. 6A:32-5.1. 36 N.J.R. 4050(a) (Sept. 7, 2004) at 4052 & 61; 37 N.J.R. 1982(a) (June 6, 2005) at 1985; 37 N.J.R. 3322(a).[1] Thus, N.J.A.C. 6A:32-5.1, entitled "Standards for Determining Seniority," is certainly applicable to the reduction in force that has occurred in this matter, regardless of the title of Chapter 32, because it is incorporated by reference in

[1] The seniority standards at N.J.A.C. 6:3-5.1 were also previously codified at N.J.A.C. 6:3-1.10.

DHS' own regulations.[2] This determination was also made by the Commissioner of Education in Helm v. DHS, EDU 256-97, Final Decision, Comm'r. (July 22, 1998) <http://lawlibrary.rutgers.edu/oal/final/edu256-97.pdf>. Nevertheless, this does not settle the issue.

N.J.A.C. 6A:32-5.1 is a lengthy provision that in relevant part provides that:

> (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. If he or she shall have insufficient seniority for employment in the same category, he or she shall revert to the category in which he or she held employment prior to his or her employment in the same category and shall be placed and remain upon the preferred eligible list of the category from which he or she reverted until a vacancy shall occur in such category to which his or her seniority entitles him or her.

The provision emphasizes that the calculation of seniority when a reduction of force occurs depends upon an individuals' employment in a specific category. N.J.A.C. 6A:32-5.1 specifies such categories for determining seniority. In relevant part, it states:

> (l) The following shall be deemed to be specific categories, not necessarily numbered in order of precedence:
>
> > 19. Additional categories of specific educational service endorsements issued by the State Board of Examiners and listed in the State Board rules dealing with teacher certification pursuant to N.J.A.C. 6A:9, Professional Licensure and Standards.

[2] Even if N.J.A.C. 6A:32-5.1 were inapplicable, N.J.S.A. 18A:60-3, which provides the statutory authority to effectuate the reduction in N.J.A.C. 10:11-1.9, states: "When such . . . instructors . . . under tenure are dismissed by reason of such reduction, those . . . instructors having the least years of service to their credit shall be dismissed in preference to those having longer terms of service." Calculating seniority based on the statute, therefore, would likely be more liberal than how it is performed within school districts. However, because N.J.A.C. 6A:32-5.1 is applicable and specifies that seniority is calculated with a categorical basis, as discussed below, the answer to the question of whether petitioners here have more seniority than 12-month instructors becomes dependent on whether 10-month and 12-month instructors are within the same category.

[N.J.A.C. 6A:32-5.1.]

Therefore, one such category in which an individual accrues seniority would be in "Blind or visually impaired," an endorsement that "authorizes the holder to teach blind or visually impaired students." N.J.A.C. 6A:9-9.2(b)(6)(i).

In the instant matter, aside from their differences over which regulations are applicable to the reduction in force, the parties differ over whether the 10-month positions and the 12-month positions would be considered within the same category for the purpose of calculating seniority. If they fall within the same category, then petitioners' seniority would be grouped with the seniority of those instructors holding 12-month positions to determine which instructors would lose their positions as a result of the reduction in force. It is undisputed that the instructors at issue here hold the same certificates with endorsements as the 12-month instructors and that both the 10-month and 12-month positions require that those certificates be held by these instructors. Consequently, under a plain reading of N.J.A.C. 6A:32-5.1, it is clear that the two positions would be considered within the same category.

Case law further supports this. In Helm, supra, a teacher serving in the position of Teacher I had been laid off after a reduction in force because individuals in the position of Teacher II, DHS argued, had more seniority. Helm asserted that because the descriptions for Teacher I and Teacher II described the required endorsement differently, one more specific than the other, they were separate categories. DHS argued the positions should be treated as in the same category because they essentially required the same endorsement even though the required endorsements were described differently. The Commissioner, however, determined that because the standards for determining seniority promulgated by the Department of Education were applicable to a reduction in force of instructors by DHS, the positions of Teacher I and Teacher II had "distinct certification and experience requirements" and, as such, were to be treated separately, thus holding that Helm should be returned to her position.

The holding in Helm is reflective of the way in which our Supreme Court has applied seniority as well. While the distinguishable facts in Lichtman v. Village of Ridgewood Bd. of Educ., 93 N.J. 362 (1983), as pointed out by respondent, are noted, the Supreme Court in that case nonetheless provided an interpretation of how seniority is determined based on a position's category. Lichtman was a tenured part-time librarian whose job duties were identical to those of a full-time librarian. When her part-time position was eliminated, she applied for a vacant full-time librarian position, but a non-tenured applicant was chosen instead. In reviewing whether her seniority warranted that she be hired for the full-time position, the Court, looking at the predecessor regulation of N.J.A.C. 6A:32-5.1, N.J.A.C. 6:3-1.10(b), stated that its language and import "are to be understood as allowing a pro rata calculation of seniority based upon the total accumulated services in a specific category. In this way, actual service can be duly recognized and relevant experience and seniority of all tenured employees within a single category can be readily ascertained and compared." Id. at 368. To this it noted that "[s]eniority . . . provides the mechanism for ranking tenured teaching staff members so that reductions in force and reemployment can be effected in an equitable fashion and in accord with sound educational policies." Id. at 368 n. 4. Ultimately, the Court determined that because Lichtman's seniority accrued "from her actual service in the particular position for which she [was] certified" which was as "teacher-librarian" and the nature of the duties for a part-time and full-time librarian "were identical," she was entitled to preference over a non-tenured applicant. Id. at 369. Though the Court did not specify whether she would have had "bumping rights," for that was not the issue at hand, the Court's holding indicates that a teacher who holds a position for which she is certified and that has identical duties to another position should have her seniority ranked along with tenured teachers holding such other positions.

The Supreme Court has also emphasized that similarity of duties in different positions reflects that those positions may fall within the same category for purposes of calculating seniority. For example, in Dennery v. Passaic County Reg'l High Sch. Dist. Bd. of Educ., 131 N.J. 626 (1993), the Court drew the distinction between a tenured employee's right to be placed in a newly created position that had substantially identical

duties to the abolished position the employee held and a tenured employee's right to be placed in a newly created position that had overlapping duties but also additional duties to or different responsibilities from the previously-held position. Id. at 639-40. It emphasized that a school board would be required to extend a teacher's tenure rights to a position with substantially identical duties. Id. at 639-40 (citing Viemeister v. Bd. of Educ., 5 N.J. Super. 215, 219 (App. Div. 1949); Vogel v. Bd. of Educ., St. Bd. (June 5, 1985), slip. Op. at 5-6; Luppino v. Bd. of Educ., 1980 S.L.D. 1028, 1035-36). However, it also recognized that no such rights could be extended to a position that was not substantially similar because it required additional duties or responsibilities. Id. at 640 (citing Santasiero v. Parsippany-Troy Hills Bd. of Educ., 1984 S.L.D. 854, 879; Sandri v. Bd. of Educ., 1986 S.L.D. 1501; Rufalo v. Bd. of Educ., 1986 S.L.D. 1699.

Respondent asserts that the 10-month and 12-month positions are treated differently by the Civil Service Commission ("CSC") because they have been given different codes by the CSC. However, petitioners rightly point out that the description of the requirements and duties of these positions are identical, aside from the length of service and salary. That CSC decided to provide the positions with different codes does not appear to have any bearing on the way in which DHS is required to determine seniority according to N.J.A.C. 6A:32-5.1. What has bearing, however, is that both positions require the same certification and endorsement for teaching and are identical in the duties expected to be performed by the individuals that hold them.[3] Consequently, by the plain language of N.J.A.C. 6A:32-5.1 as well as the Supreme Court's application of seniority and tenure rights to individuals who are seeking positions that, because of their similarity in requirements and duties, are in the same category as the position they have been removed from, it is evident at this juncture that the law is settled that CBVI should have grouped the seniority of the instructors of both 10- and 12-month positions to determine the layoff sequence for its reduction in force.

[3] Respondent asserts in its brief that certain 12-month instructors can provide orientation and mobility services while all of the 10-month instructors cannot and that this supports that the positions are not identical. (Resp't's Br. 5). Upon reviewing the descriptions for both positions in P-2, it is evident that they both require instructors to hold a valid orientation and mobility instructor certificate. Hence, respondent's argument collapses on the fact that while some instructors may have these skills, others who do not are currently holding positions for which they are required to hold specific certificates in orientation and mobility instruction.

Accordingly, I **CONCLUDE** that petitioners have demonstrated the right to require that layoffs be based upon a calculation of the tenure and seniority of all 10- and 12-Month Instructors combined.

Reasonable Probability of Prevailing on the Merits

Petitioners have the burden to "make a preliminary showing of a reasonable probability of ultimate success on the merits." Crowe, supra, 90 N.J. at 133 (citing Ideal Laundry Co. v. Gugliemone, 107 N.J.Eq. 108, 115-16 (E. & A. 1930)). With regard to this prong, the Supreme Court in Crowe, supra, stated that this "requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo." Id. at 134 (citations omitted). See also 37 New Jersey Practice, Administrative Law and Practice, § 5.20, at 261 (Steven L. Lefelt, et al.) (2d ed. 2000) (stating the same). "[T]he point of emergency relief is to maintain the parties in substantially the same condition when the final decision is issued, as they were when the litigation began." Ibid. This prong is the most difficult to meet when a moving party is attempting to demonstrate it is entitled to emergent relief. R.N. v. Hazlet Twp. Bd. of Educ., EDU 8026-09, initial decision (June 24, 2009), adopted, Comm'r. (June 24, 2009) <http://lawlibrary.rutgers.edu/oal/search.html>.

In the instant matter under this prong, petitioners must show that 10-month instructors will be placed in positions currently held by less senior 12-month instructors. All fourteen petitioners who held positions as 10-month instructors are asserting that they hold more seniority than persons holding 12-month instructor positions for CBVI. The assertion that more senior instructors have been laid off when less senior instructors continue to hold 12-month positions has been certified as true by each of the petitioners named in the petition. Furthermore, petitioners Intorre, Maltman, and Borgerson certify that they are 12-month instructors at the Cherry Hill office with less seniority, (Intorre Cert. ¶ 7, Maltman Cert. ¶ 7, & Borgerson Cert. ¶ 7), and Beckhard certifies that there are 12-month instructors at the Toms River office with less seniority,

(Beckhard Cert. ¶ 7). Respondent has not outright contested that there are 12-month instructors with less seniority than the 10-month instructors. Nevertheless, the lack of evidence substantiating these certifications leaves more than mere doubt as to the validity of petitioners' claims. Because of the lack of proofs produced, it is not clear here that petitioners have a reasonable probability of ultimate success on the merits because, while it is clear that the law would require more senior 10-month instructors to "bump" less senior 12-month instructors, it is not clear that any 10-month instructors have more seniority over persons holding 12-month positions.

Accordingly, I **CONCLUDE** that petitioners have not shown that they 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. CBVI argues that petitioners have not demonstrated that the private interests of employees outweigh the public's interest in "reducing staff and meeting its constitutional obligation to adjust spending to meet much depleted revenues." Petitioners argue that their loss of income, health insurance and pension contributions, as well as any psychological damage resulting from loss of a career, outweighs any potential harm to CBVI.

Petitioners' positions were abolished due to an overall fiscal policy that resulted in a combination of teaching positions. The operational needs of the agency required a reduction in force. Reversing CBVI's determination to eliminate those positions would adversely impact its ability to operate within budget and thus deliver services to the public. On balance, I agree that the greater harm would be to respondent, notwithstanding the unfortunate and harsh consequences suffered by petitioners.

Accordingly, I **CONCLUDE** that petitioners have not shown that they would suffer a greater hardship if relief sought were denied pending a plenary hearing.

DECISION AND ORDER

Based upon the foregoing, I **FIND** that for purposes of deciding this application for emergent relief, petitioners other than Beckhard, Borgersen, Maltman and Intorre have failed to establish the existence of irreparable harm. I further **FIND** that all petitioners have failed to establish that there is a likelihood of prevailing on the merits, and that, on balance, they would suffer a greater relative hardship pending a full hearing on the merits.

Accordingly, I **CONCLUDE** that petitioners' request for emergent relief seeking an Order restraining their layoffs on June 30, 2011, and declaring that the respondent, New Jersey Department of Human Services, Commission for the Blind and Visually Impaired (CBVI), is required to calculate tenure and seniority of its 10- and 12-Month Instructors on a combined basis and effect layoffs in reverse order of seniority, should be and hereby is **DENIED.**

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 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.

June 30, 2011
DATE

ROBERT BINGHAM II, ALJ

Date Received at Agency:

Date Mailed to Parties:

cmo

APPENDIX
EXHIBITS

For Petitioner:

P-1 Layoff Notices
P-2 Job Specification No, 62663, Instructor, Commission for the Blind & Visually Impaired (12-Mos. and 10-Mos.)
P-3 Two letters to CBVI Instructors, dated October 17, 1988 and October 13, 1988
P-4 Department of Human Services Personnel Information Bulletin No. 87-187
P-5 Department of Human Services Inter-Office Communications, dated July 25, 1988
P-6 Memorandum, dated August 1, 1988
P-7 Attorney General Formal Opinion No. 18-1975 (Page 112 is missing from the Rutgers Law Library archive)
P-8 Certification of Laura Beckhard
P-9 Certification of Kim Borgersen
P-10 Certification of Brenda Maltman
P-11 Certification of Dorothea Intorre

For Respondent:

R-1 New Jersey Civil Service Commission State Title Listing
R-2 Job Announcement for 12-Month Instructor Position, dated March 2, 2011
R-3 2012 Proposed Budget Impact – Questions and Answers
R-4 Article 29, Layoff and Recall for Unclassified and Provisional Employees
R-5 Certification of Vito De Santis

246-11

IN THE MATTER OF THE TENURE HEARING	:	
HEARING OF ANTHONY COLUCCIO, JR.,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF CORRECTIONS, EDNA MAHON	:	
CORRECTIONAL FACILITY FOR WOMEN.	:	

SYNOPSIS

The New Jersey State Department of Corrections filed tenure charges of conduct unbecoming a public employee against respondent, a tenured teacher of cosmetology, and sought to terminate his employment at the Edna Mahon Correctional Facility for Women. The charges arose out of an improper and unauthorized relationship with an inmate in the correctional facility.

The ALJ found, *inter alia*, that: the testimony of the inmate with whom respondent allegedly had an improper relationship was articulate, credible, and supported by letters she had authored to respondent and recordings of contemporaneous telephone conversations between the inmate and her mother; respondent's testimony was articulate and coherent, but his version of events was at odds with the documentary and physical evidence presented by the Department, as well as the recorded telephone conversations with the inmate's mother; based on the credible evidence, respondent instigated and maintained a consensual, but improper, relationship with the adult inmate from October 2008 until April 2009; respondent's prior disciplinary history – and the fact that the improper relationship was with an adult student, was reciprocated, and did not directly compromise the facility's security – mitigates against the penalty of termination. Accordingly, the ALJ concluded that the Department of Corrections has established that respondent is guilty of conduct unbecoming, but determined that the appropriate penalty in this matter is a one-year suspension without pay.

The Commissioner concurred with the ALJ that the respondent is guilty of unbecoming conduct, but found that respondent's improper and unauthorized relationship with an inmate necessitates his termination from tenured employment. Accordingly, the Commissioner adopted the Initial Decision of the OAL as to the ALJ's finding that respondent is guilty of conduct unbecoming, and dismissed respondent from his 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.

July 5, 2011

246-11

OAL DKT. NO. EDU 60-10
AGENCY DKT NO. 158-7/09

IN THE MATTER OF THE TENURE HEARING	:	
HEARING OF ANTHONY COLUCCIO, JR.,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT	:	DECISION
OF CORRECTIONS, EDNA MAHON	:	
CORRECTIONAL FACILITY FOR WOMEN.	:	

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 entire record in this matter – which included transcripts of the hearings conducted at the OAL on June 4, June 11, August 16, and October 27, 2010 – the Commissioner concurs with the Administrative Law Judge (ALJ) that the Department of Corrections (Department) has established that the respondent is guilty of unbecoming conduct. The 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.[1] Specifically, with respect to the credibility of the respondent and the inmate with whom he had the relationship, the ALJ found the following,

> A review of the entire record therefore shows Lindorff's version of the events to be the more credible one. She was direct, candid and articulate in her testimony. Further, that testimony was supported by the letters she wrote to Collucio as the relationship progressed, and importantly, by the taped telephone conversations with her

[1] It is well established that the Commissioner must defer to the credibility findings of the ALJ unless these prove to be 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).

> mother. Those conversations were recorded contemporaneously with many of the events. Collucio's version of events, while delivered in an articulate manner, fails in comparison to the weight of the evidence presented by the Department.

The Commissioner also finds that the ALJ's fact-finding analysis and conclusions as to the truth of the Department's allegations and the characterization of respondent's behavior as unbecoming conduct to be fully supported by the record and consistent with applicable law.

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.* 185; *In re Hearing of Kittell, Little Silver School District*, 1972 *S.L.D.* 535, 541; *In re Fulcomer,* 93 *N.J. Super.* 404 (App. Div. 1967).

The Commissioner recognizes that the charges in this matter are serious in nature and finds that the respondent's improper and unauthorized relationship with an inmate necessitates the termination of his tenured position. The respondent's unbecoming conduct was not the result of an isolated incident, but rather a pattern of conduct that occurred between October 2008 and May 2009, which involved multiple discussions with sexual overtones and inappropriate touching of the inmate initiated by the respondent. Although the relationship was technically consensual in nature, as a teacher in a correctional facility the respondent inherently had a degree of power over the inmate which further exacerbates the gravity of his conduct.

The record also demonstrates that respondent's responses to the charges against him range from complete denial of the alleged behavior to allegations that such behavior was inconsequential in nature and directed at a co-worker, a position that is completely inconsistent with the testimonial evidence. Additionally, the respondent conceded that he authored the sexually explicit contents of the "post-it note" as well as the "Application for a Relationship" questionnaire, although he incredibly maintained at the hearing that neither document was intended for the inmate, but instead for a co-worker with whom he had a friendly relationship. The mere fact that the respondent wrote the contents of those documents while working as a teacher at the correctional facility – and carelessly left them around his desk – demonstrates his severe lack of judgment and an astounding inability to appreciate the egregiousness of his behavior. Finally, the Commissioner considered respondent's extended employment with the Department, and nonetheless determines that the nature of the incidents proven to have occurred demonstrate that he is unfit to remain in his position.

Accordingly, the Initial Decision of the OAL is adopted as to the ALJ's finding that the respondent is guilty of unbecoming conduct. Respondent is hereby dismissed from his tenured position with the Department.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7|05|11

Date of Mailing: 7|06|11

[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 60-10
AGENCY DKT. NO. 158-7/09

IN THE MATTER OF THE TENURE HEARING OF ANTHONY COLUCCIO, JR., NEW JERSEY STATE DEPARTMENT OF CORRECTIONS, EDNA MAHON CORRECTIONAL FACILITY FOR WOMEN.

Daniel Vannella, Deputy Attorney General, for New Jersey State Department of Corrections, Edna Mahan Correctional Facility for Women, petitioner (Paula T. Dow, Attorney General of New Jersey, attorney)

John M. Holliday, Esq., for Anthony Coluccio, Jr., respondent

Record Closed: January 3, 2011 Decided: May 19, 2011

BEFORE **PATRICIA M. KERINS,** ALJ:

STATEMENT OF THE CASE

In this matter the Department of Corrections (Department) seeks the dismissal of Anthony Coluccio (Coluccio), a tenured teacher of cosmetology at the Edna Mahon Correctional Facility for Women (Edna Mahon). He is charged with conduct unbecoming arising out of an improper and unauthorized relationship with an inmate at that facility.

PROCEDURAL HISTORY

On June 24, 2009, the Department filed a Preliminary Notice of Disciplinary Action (PNDA) against Coluccio. On June 29, 2009, a departmental hearing was held and he was suspended without pay. On July 13, 2009, notice of tenure charges was transmitted to the Commissioner of Education. On July 25, 2009, respondent requested that the charges be held in abeyance until the disposition of a criminal investigation related to the charges. Pursuant to Ott v. Bd of Ed. of Hamilton Tp., 160 N.J. Super. 333 (App. Div.), certif. den., 78 N.J. 336 (1978), the Bureau of Controversies and Disputes of the Department of Education (Education) notified the parties on July 28, 2009, that the request was granted. On October 27, 2009, respondent requested a continued stay of the tenure charges due to the continued criminal investigation by the Hunterdon County Prosecutor's Office. On January 13, 2010, after the conclusion of the criminal investigation, Education deemed the charges sufficient and forwarded the matter on January 20, 2010, to the Office of Administrative Law (OAL) for a hearing pursuant to N.J.S.A. 18A:6-16.

On March 5, 2010, a prehearing conference was held and a Prehearing Order regarding discovery and the conduct of the hearing was issued on March 9, 2010. On May 17, 2010, a second prehearing conference was held and an Order extending the time for discovery was issued on May 19, 2011. The first hearing dates scheduled for May 20 and 21, 2010, were adjourned at the parties' request. The hearing was held, and testimony taken on June 4 and 11, 2010, August 16, 2010, and October 27, 2010. On November 24, 2010, the parties submitted a Joint Stipulation into the record and the parties were granted thirty days for the submission of post hearing briefs. At the request of respondent's counsel, the time for submission of briefs was extended to January 3, 2011, and the record closed. The time for the filing of the Initial Decision was extended to May 19, 2011.

FACTUAL DISCUSSION

General Background Facts

Anthony Coluccio began working as a cosmetology teacher at Edna Mahon in 1989, after being employed by the Department since 1986. During late 2008 through mid-2009, his classroom was located in the Education Building at the facility, along with the office of its Director of Education, Cathy Morgan (Morgan). Coluccio's office was located within a classroom set up as a beauty salon to train inmates in cosmetology. While in the same building as Morgan's office, his classroom was down a hall from her office and across from the inmate's legal library.

Morgan's office provided space for the faculty's mail slots, office equipment and computers for her staff. Inmates serving as paraprofessionals made up her support staff and performed secretarial and clerical duties. One such inmate was Heather Lindorff, who was serving a six year sentence. Lindorff usually worked five days a week, and occasionally on weekends. As one of the three inmates serving as paraprofessionals for Morgan in late 2008 through spring 2009, Lindorff also performed clerical tasks for teachers at the facility as directed by Morgan. She was considered a good worker by Morgan and had no history of disciplinary infractions at Edna Mahan.

Relationship between Coluccio and Lindorff

Lindorff first encountered Coluccio in 2006, when she received a haircut at the facility. One of Coluccio's duties was supervising inmates being trained in cosmetology, who provided haircuts and manicures to the inmates. According to Lindorff, she began more than a passing acquaintance with Coluccio in October 2008. By then she was working in Morgan's office, in the same building as Coluccio. On October 23, 2008, a job fair and community awareness day was held at the facility. During the event, she and Coluccio spoke and exchanged jokes during the day. On the next teaching day, Lindorff described Coluccio approaching her in Morgan's office, telling her to "stay out of my dreams." He first mouthed the words and then whispered them to her.

The relationship as described by Lindorff continued to move from friendly talks and jokes to discussions with sexual overtones through November 2008. Lindorff also was included in a program supervised by Coluccio that made appearances at schools. Sometime in November 2008, Lindorff testified that Coluccio began to touch her physically. She recalled that one day before the holiday break while she was standing in the doorway of the inmate legal room, he placed his hands on her breast. Sometime in early December, he "rubbed her butt," something she testified he did between 7 to 9 times between late fall 2008 and Valentine's Day 2009. He also grabbed her hand and placed it on his crotch. The touching occurred in or around Morgan's office or within the education building. According to Lindorff, while the onset of the touching was unexpected, it was not unwelcome. She found Coluccio attractive and the relationship was consensual.

By December 2008, Lindorff began to write letters to Coluccio, either handwritten or on her computer. She also kept copies of the letters. At first she would give letters to him in his classroom but they agreed she would leave them in an envelope in his faculty mail slot. The letters, which ranged from the sexual and emotional parameters of the relationship, to their interests and daily activities, are remarkably detailed. According to Lindorff, Coluccio did not communicate in writing to her, except on two occasions. In early December when Lindorff questioned him about the status of the relationship in a letter (P-8), she said he responded with a handwritten response on a yellow post-it note (P-9). The note stated:

> I say we keep things going just like they are here. Then when you get home I'll come by and hang out. Then I'll go down on you and make you come till you beg me to stop. And I will. But then I will come up and fuck you till your toes curl and you scream till you can't anymore. Get rid of this."

The post-it note was given to Lindorff in the same envelope in which she had given him one of her letters. However, instead of destroying it, she forwarded the note via mail to her mother, Mildred Cullinan, for safekeeping. Lindorff regularly spoke to her mother, either in her personal visits to the facility or by telephone. She discussed her

relationship with Collucio in those conversations and in a phone conversation advised her mother that she would be sending her something for safekeeping. (P-76).

The second writing from Collucio was a completed "Application for a Relationship" questionnaire that Lindorff had given him. According to LIndorff she gave him the form, which was sexually explicit, and he filled it out for her with his preferences. (P-17). Lindorff then mentions the application in letters to him later in December (P-18 and 19).[1]

According to Lindorff, the relationship with Collucio continued in the same manner until around Valentine's Day 2009. At that point, he told her to "lay low" and she assumed he was backing off the relationship. Aside from the occasional "sexual type comment" in April, 2009, Lindorff saw the intensity leave their friendship, although the two remained in contact through their interactions in the Education building. On May 12, 2009, one of Lindorff's fellow paraprofessionals, noticed a document on her computer that mentioned Collucio and reported it. As a result, Morgan contacted the facility's administration and Lindorff's computer was examined. After the discovery of her letters to Collucio, she was transferred to a maximum security unit and the investigation of their interaction commenced.[2]

In her first statements to the Department's investigators, Lindorff denied any improper relationship with Collucio and described her letters as the product of her overheated imagination. In subsequent interviews, she did admit to the relationship. As she explained her change of heart and her admission, she first chose to protect him since she genuinely cared for him and did not want him to suffer the consequences of her relationship. It was only after she learned that he had spoken of her in derogatory terms when denying the extent of their relationship that she chose to admit what had occurred. Although she was transferred to a less restrictive unit after she cooperated

[1] At times, Lindorff referred to herself as "Bosh" and Collucio as either "Dylan" or "Bart", as she had discovered his middle name was Bartholomew.

[2] Around this time, a separate investigation had begun into a corrections officer in her housing unit and his improper relationships with inmates. Lindorff was questioned in that matter and admitted that she was one of the inmates with whom the officer had a relationship. In communications with her mother, she referred to that officer as "Jordan".

with investigators, she received no other benefits from her cooperation and went on to serve out the remainder of her sentence.

As testified to by Kathleen Zdonowski, a principal investigator for the Department, Lindorff's admissions were corroborated by an examination of the letters she had written to Collucio, as well as by a review of Lindorff's almost daily telephone conversations with her mother. Such calls by inmates are routinely taped and a CD compilation of these calls (P-76) revealed that Lindorff discussed her interactions with Collucio on a regular basis with her mother, using the name Dylan for Collucio. In her testimony, Zdonowski detailed the manner in which she corroborated Lindorff's account with her letters and phone calls. Additionally, the Department contacted her mother and obtained the incriminating "post-it note" that Lindorff had not destroyed but had forwarded to her mother for safekeeping. The Department's investigators also retrieved an office calendar (P-78) from Collucio's office with a mark for Lindorff's birthday, as Lindorff claimed Collucio had marked the calendar in red for her birthday while she was in his office.

The Department's final witnesses were Mildred Cullinan and Ellis Allen, a Department investigator. Cullinan testified that she received the letter with the "post-it note" from her daughter in December 2008. She also confirmed her conversations with her daughter regarding Collucio. Allen testified that he traveled to the Cullinan home and took custody of the "post-it note".

In response to the Department's case, Collucio testified on his own behalf and presented Morgan and a fellow teacher in support of his version of events. Collucio denied any relationship, other than a passing acquaintance, with Lindorff. He denied interacting with her at the October 2008 career day at the facility and denied choosing her for the outside tour program. He explained her participation in the program by explaining that it was usually the paraprofessionals who were chosen. In his testimony he denied telling her to "stay out of my dreams" or touching her in any manner. He denied receiving letters from her or ever being alone with her. As he put it, any relationship he had with Lindorff was "all in her head."

He did state that "some of the girls", meaning other inmates, mentioned to him that they noticed Lindorff "stalking" him. He then noticed her around his classroom and the inmate law library more often, and that she would stare at him from the legal room across the hall. After ignoring the situation, he went to Morgan with his concerns. Morgan advised him that she would counsel Lindorff but after a respite, he saw the behavior continue. He said he asked other inmates to remain in his classroom area with him so that Lindorff would not bother him. He did not file a report or take formal action regarding Lindorff's behavior, saying it was up to Morgan to "solve the problem".

Collucio did admit authoring the "post-it note" that Lindorff asserted was given to her. However, he denied writing it for Lindorff or giving it to her. In his version of events, he wrote it to give to Linda Fleming, a fellow teacher and a long time friend with whom he lunched. He described their relationship as friendly, joking and occasionally flirtatious. He wrote the note for Fleming but never gave it to her, feeling embarrassed and changing his mind. He assumed that he left it around his desk and that Lindorff took it to send on to her mother. It was also his testimony that he mentioned to Fleming that he had written her a note but was too embarrassed to give it to her.

Similarly, he admitted filling out the "Application for a Relationship" form. He found it in his mailbox, and thinking it was a joke from a coworker, filled it out and left it on his desk. As with the "post-it note", he assumed that Lindorff must have taken it from his desk. As for his office calendar, he had no idea how a mark for Lindorff's birthday was placed on it.

Both Linda Fleming and Kathy Morgan testified as part of Collucio's response to the tenure charges. Fleming described herself as a close friend of Collucio. While Collucio's classroom was in the Education building at the facility, Fleming's was in the maximum security complex. She would see him in the morning, for lunch every day and at the end of the work day. She said their relationship was flirtatious and they "joked around a lot". According to Fleming, she recalled a conversation with Collucio in December 2008 or January 2009, in which he said he wrote her a letter. When shown

the post-it note (P-9) for the first time in an interview by the Hunterdon County Prosecutor's office, she admitted that she was not certain that it was the letter he had mentioned to her. In her testimony, she described the contents of the note as more explicit than their usual bantering. She also admitted that she received a call from Collucio just prior to her interview with the prosecutor's office regarding their investigation.

After some hesitation, she further testified that Collucio spoke with her about Lindorff's infatuation with him and that he had asked her to come down early to his classroom to make sure he would not be alone with Lindorff. She did recall Lindorff standing in the legal resource room across the hallway from Collucio's classroom, staring into it.

Kathy Morgan described the physical layout of the Education building, her office being on the short end of a "T" shaped hallway, with Collucio's classroom down the hall and around a corner, across from the legal resource room. The inmates's restroom was near his classroom as well. She has known Collucio for at least ten years, and is his direct supervisor. Lindorff was one of her paraprofessionals and Morgan confirmed that her duties placed her in the area near Collucio's classroom. Morgan recalled Collucio complaining to her sometime in the winter of 2008-09 that he felt uncomfortable with Lindorff's presence and that she was stalking him. Morgan then spoke with Lindorff counseling her to stay in her office area. She recalled speaking to her a second time and Lindorff explained that she was using the legal resource room for matters related to the custody of her children. As did Fleming, Morgan denied seeing any inappropriate conduct by Collucio. Although she found Lindorff a good worker, and never found her untruthful, Morgan stated that she felt Lindorff was lying about her relationship with Collucio. When pressed on her reasoning, she averred that it was because she was an inmate.

As part of his response to the charges, Collucio submitted the unsworn statements of several inmates. (R1-7). The transcripts resulted from interviews taken by a private investigator for Collucio and none of the inmates were produced as

witnesses at the hearing. In their statements they agree that Lindorff was infatuated with Collucio, and that Collucio asked them to hang around his classroom so that he would not have to be alone with her.

Credibility Determinations and Findings of Fact

The two protagonists in this matter, Lindorff and Collucio, present opposing versions of what occurred between them from October 2008 through May 2009. Lindorff's version is supported by the letters she authored to Collucio and by the contemporaneous phone conversations with her mother, along with her mother's testimony. Her version is further buttressed by the physical and documentary evidence submitted by respondent. Collucio, in turn, is supported by the testimony of Fleming and Morgan on facts related to what occurred between him and Lindorff, as well as unsworn statements from other inmates.

Lindorff and Collucio were both articulate witnesses who presented their testimony in a direct manner. Lindorff in particular was a credible witness. She did not deny her feelings for Collucio and her evident infatuation with him. It is clear from her writings to him that for a period of time she enjoyed their relationship and hoped to continue contact with him after she left prison. Those writings provide a timeline for, and description of the relationship, including descriptions of the furtive touchings by Collucio that she described in her testimony. Both her testimony and her writings are detailed and coherent, and agree with each other on the progress of the relationship. Her version is further corroborated by the taped phone conversations with her mother, which stand as a contemporaneous record of her assertions.

While she first denied the relationship during questioning by the Department's investigators, she was candid in her explanation that she still cared for Collucio and did not wish him harm. Only after she felt he had betrayed by his speaking of her in a derogatory manner, did she admit the extent of the relationship. Given the feelings she harbored for Collucio, it was not unexpected that her initial attempt to protect him

should give way under the weight of his perceived betrayal. Her explanation of her initial denials therefore rang true in her testimony.

Lindorff's descriptions of the physical area in which the relationship took place and her detail of the movements of herself and Collucio, as well as those around them, were also detailed and coherent. Her descriptions of his furtive gropings in the confined areas they inhabited each work day were plausible in time and place.

The Department's investigators also were credible witnesses. Zdonowksi, in particular, provided testimony on the correlation in time and place of the interconnected testimonial, documentary and taped evidence showing the extent of the relationship between Lindorff and Colluccio. Cullinan too was credible in how she came into possession of the incriminating "post-it note", an account that was corroborated by her taped conversation with her daughter and by Ellis' account of physically taking custody of the note at Cullinan's home.

Although Collucio presented an articulate and coherent version of events in response to the charges, that version was nevertheless at odds with the documentary and physical evidence presented by the Department, as well as by the contemporaneously recorded conversations between Lindorff and her mother. His denials of an improper relationship were accompanied by testimony from Morgan and Fleming that he had complained to both about LIndorff's infatuation with him and his attempts to forestall being alone with her. Each was credible on that score and LIndorff herself admitted that Morgan had spoken to her about remaining in a specific area. Yet such an action by Collucio could also be seen as a proactive measure to sheid himself from the unwanted attention LIndorff's infatuation was bringing to their relationship.

While Collucio's version of how and why he authored the "post-it note" was supported in part by Fleming, it was belied by the note itself, and LIndorff's successful efforts to safeguard at her mother's home. Fleming never saw the note until she was questioned about it during the investigation, and even then was clearly embarrassed by its contents, admitting it went beyond the parameters of her friendship with Collucio.

While she recalled Colluccio mentioning something in the winter about a note he chose not to send her, she appeared uncomfortable in her testimony and admitted that Collucio called her the evening prior to her interview with the prosecutor's office. Collucio and Fleming's testimony regarding the note were simply less credible than that of Lindorff, and the corroborating evidence presented in support of her version of events.

Similarly, Collucio's version of how he came to complete the "Application for a Relationship" form fails in comparison to the evidence presented in opposition. While he admitted filling out the form, he posited it as a random event, something which appeared in his mail slot. He then answered it in a sexually explicit manner, leaving it around his desk. Lindorff however, provided a more coherent explanation, detailing how she gave it to him. Her account is corroborated by her incorporation of his answers in her subsequent letters to him.

Collucio also presented opinions from Morgan and inmates at the facility as to Lindorff's credibility. While Morgan admitted Lindorff was a good worker who had never lied to her, she appeared to base her opinion solely on the fact that she was an inmate. As for the statements of the other inmates, each was unsworn and none of the inmates were produced for testimony at the hearing. Additionally, a review of the statements shows that they were rarely specific as to dates and provided little information other than the fact that Lindorff was infatuated with Collucio.

A review of the entire record therefore shows LIndorff's version of events to be the more credible one. She was direct, candid and articulate in her testimony. Further, that testimony was supported by the letters she wrote to Collucio as the relationship progressed, and importantly, by the taped telephone conversations with her mother. Those conversations were recorded contemporaneously with many of the events. Collucio's version of events, while delivered in an articulate manner, fails in comparison to the weight of the evidence presented by the Department.

Based on the record before me in this matter, I **FIND** that Anthony Collucio instigated and maintained an improper relationship with Heather Lindorff while she was an inmate at the Edna Mahan Correctional Facility and he was employed as a teacher at that facility. The relationship commenced in late October 2008 and continued into April 2009. During that period, Collucio touched her breasts and posterior and placed her hand on his crotch. He also authored two sexually explicit documents, a post-it note and a form questionnaire and gave them to her. While the relationship was consensual, it was nevertheless an improper one, given her status as an inmate.

Prior Disciplinary History

Respondent's prior disciplinary history, as set forth in P-68, consists of a reprimand for smoking in a prohibited area and a three-day suspension for the failure to report loss of equipment.

LEGAL DISCUSSION

Pursuant to N.J.S.A. 18A:60-1.2, "no tenured teacher, or other tenured certified individual serving in a teaching capacity in a State institution within the Department of Corrections, shall be dismissed or subjected to a reduction in salary except for inefficiency, incapacity, conduct unbecoming a teacher, or other just cause . . ." In this matter, the Department has charged respondent with conduct unbecoming, citing N.J.A.C. 4A:2-2.3(a)6, and the Department's Human Resources Bulletin 84-17 (as amended). (P-48). That Bulletin sets forth the Department's policy on disciplinary actions for the listed offenses. Specifically, Coluccio is charged with the following violations:

> Section C-11: Conduct unbecoming an employee.
>
> Offense D4: Improper or unauthorized contact with an inmate (undue familiarity with inmates, parolees, their families, or friends.
>
> Offense C-31: Racial and/or sexual harassment, discrimination and/or retaliation.

The Department bears the burden of proving these charges by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962); Matter of 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). As set forth above, the Department has proven its case that Collucio carried on an improper relationship with an inmate, one that included sexually explicit communications, as well as physical touching. Such conduct fits within the charges set forth against him. His actions constituted conduct unbecoming a public employee and these actions had a level of familiarity that gave rise to improper and unauthorized conduct. Finally, his sexually explicit communications and his furtive gropings of LIndorff rose to the level of sexual harassment. While not unwanted, those attentions were given to an inmate, someone to whom he was superior in position.

The Department requests the sanction of termination for these infractions. It maintains a "zero tolerance policy" for such infractions, and given the sexually explicit nature of the relationship, it argues that termination is appropriate. In determining the sanction in this matter, it is clear that Collucio's conduct was improper and serious in nature. His relationship with, and physical touching of an imate were clear violations of Department regulations and policies. As set forth in its Disciplinary Action Policy (P-48), the penalties for Collucio's infractions range from suspensions of several days to removal. Collucio's infractions are his first offense under each charge. His disciplinary history as set forth in the record shows no serious infractions and he has not been disciplined previously for the type of behavior at issue in this matter.

Although his conduct was serious, his prior disciplinary history is a factor in his favor. Additionally, the improper relationship was with an adult student and was reciprocated. The relationship was finite in time and Collucio took steps to end it. Such factors do not excuse his conduct but are relevant to an analysis of the penalty to be imposed. Finally, Collucio worked in a minimum security area of the facility and while his duties were part of its overall operation, they were not directly related to its security. His relationship with Lindorff, while inappropriate, did not appear to directly compromise

the facility's safety. Given these factors, a suspension of one year is an appropriate penalty in this matter.

ORDER

I **ORDER** that Collucio be suspended without pay for the period of one 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.

5/19/11
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: 5-19-11

Date Mailed to Parties: 5-19-11

/lam

WITNESSES

For Petitioner:

Heather Lindorff
Mildred Cullinan
Ellis Allen
Kathleen Zdonowski

For Respondent:

Linda Fleming
Cathy Morgan
Anthony Coluccio

EXHIBITS

Joint Exhibits:

J-1 Consent Protective Agreement for Release of Confidential Special Investigations Division Reports and Related Evidentiary Materials, and Inmate Face Sheets

J-2 Letter from John Holliday to Judge Kerins, dated November 12, 2010, and Stipulation of Facts

For Petitioner:

P-2 HCPO Supplementary Report, dated June 24, 2009

P-4 HCPO Fleming Interview, dated June 23, 2009

P-8 Undated Letter

P-9 Post-It Note

P-10 Undated Letter

P-12 December 12, 2008, Letter
P-13 December 10-13 Letter
P-17 Application for Relationship
P-18 December 19, 2008, Letter
P-19 December 21, 2008, Letter
P-20 December 23, 2008, Letter
P-21 December 24, 2008, Letter
P-26 December 29, 2008, Letter
P-30 Undated Letter
P-31 May 12, 2009, Letter
P-33 Cover of Buckland's Book of Saxon Witchcraft
P-34 English-Theban Translator
P-42 SID Lindorff Statement, dated May 13, 2009
P-43 SID Lindorff Statement, dated May 27, 2009
P-45 SID Lindorff Statement, dated June 12, 2009
P-46 SID Lindorff Statement, dated June 25, 2009
P-48 Human Resources Bulletin 84-17
P-55 SID Cantrell Statement, dated September 4, 2009
P-56 SID Lindorff Statement, dated October 28, 2009
P-61 SID Investigation Report, dated May 12, 2009 – Anthony Coluccio
P-76 CD of Phone Calls – Heather Lindorff-Mildred Cullinen
P-78 Desk Calendar

For Respondent:

R-1 Statement of Linda Fleming
R-2 Statement of Cathy Morgan
R-3 Statement of Ivelisa Figueroa
R-4 Statement of Jennie Rosada
R-5 Statement of Beatrice Cantrell
R-6 Statement of Tina Aniello
R-7 Statement of Rokesha Carter

OAL DKT. NO. EDU 11373-10
AGENCY DKT. NO. 560-9/10

L.R. and D.D., on behalf of minor child, A.F. PETITIONERS, V. BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

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.

The Commissioner notes that paragraph 1 of the Agreement states that part of the settlement payment is due upon the execution of the Agreement, and the remaining part is due within thirty (30) days from the execution of the Agreement. Those dates have 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7|07|11

Date of Mailing: 7|07|11

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11373-10
AGENCY DKT. NO. 560-9/10

L.R. and D.D. on behalf of minor child, A.F.,
Petitioners,
v.
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,
Respondent.

Laura Roman, Esq., member of the Ohio Bar, admitted pro hac vice, for petitioners (Roman Law Firm, LLC, attorneys), Attorney of Record: **Joseph J. Piazza, Esq.**

Kimberly A. Sukinik, Esq., for respondent (Comegno Law Group, attorneys)

Record Closed: May 9, 2011 Decided: May 24, 2011

BEFORE **SUSAN M. SCAROLA**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 21, 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, and a hearing was scheduled for December 14, 2010.

Prior to the hearing date, at the request of the parties, the hearing was converted to an in-person settlement. On December 10, 2010, a joint request for an adjournment was received in order that discovery could be completed. The request was granted and the matter was rescheduled for January 7, 2011, as a settlement conference. The parties appeared on January 7, 2011, and reached a tentative settlement subject to Board approval.

On May 9, 2011, the attached Settlement Agreement and General Release was received together with the Board Resolution adopting the settlement.

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.

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 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.

May 24, 2011
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: MAY 26 2011

Date Mailed to Parties: MAY 26 2011

mph

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BY: ARTHUR F. RISDEN, ESQUIRE
KIMBERLY A. SUKINIK, ESQUIRE

LEEANNA ROMAN and DEBORAH DENNEHEY o/b/o A.F., Petitioner, v. LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION DOCKET NO: EDU 11373-2010 S AGENCY REF: 560-9/10 **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement ("Agreement") is entered into by and between the Lenape Regional High School District Board of Education (the "Board") and Leeanna Roman ("Petitioner Roman") and Deborah Dennehey ("Petitioner Dennehey") on behalf of A.F. (collectively referred to as "Petitioners"). Petitioner Roman, A.F.'s mother, resides at 3 Hopewell Avenue, Lumberton, New Jersey and Petitioner Dennehey resides at 14 Eaves Mill Road, Medford, New Jersey. The Board and the Petitioners are collectively referred to as the "Parties."

WHEREAS, on or about August 26, 2010, Petitioner Roman requested a residency waiver from the Board for A.F. to attend Shawnee High School for A.F.'s senior year. Petitioner indicated that the Medford home had been rented and consequently, A.F. will be residing at the Lumberton address "at least for the beginning of the school year;"

WHEREAS, Petitioner Roman thereafter indicated that A.F. would reside with Petitioner Dennehey at 14 Eaves Mill Road, Medford, New Jersey;

WHEREAS, on September 8, 2010, the Board received an application seeking A.F.'s enrollment as

an "affidavit student" pursuant to N.J.S.A. 18A:38-1(b) (hereinafter referred to as "Application");

WHEREAS, on September 9, 2010, the Application was denied because the Board concluded that Petitioners failed to comply with the provisions of N.J.S.A. 18A:38-1(b), and therefore A.F. would not be enrolled at Shawnee High School;

WHEREAS, on or about September 24, 2010, Petitioners filed a Residency Appeal which forms the basis of the above-captioned matter. Pursuant to law, A.F. was enrolled and attended Shawnee High School, effective September 24, 2010;

WHEREAS, on October 13, 2010, the Board filed an Answer and Counterclaim in the above seeking reimbursement of tuition and costs;

WHEREAS, A.F. turned 18 years of age on October 30, 2010;

WHEREAS, Petitioners allege that A.F. resides at 14 Eaves Mill Road, Medford, New Jersey with Petitioner Dennehey; and,

WHEREAS, the Parties enter into this Settlement Agreement to outline the Parties' agreement without alleging or admitting deficiencies in their positions on the above-captioned matter.

THE PARTIES HEREBY AGREE THAT:

1. Petitioner Roman agrees, in resolution of the Board's Counterclaim and the Amended Counterclaim sought by the Board, to pay to the Board the amount of $9,000.00, which allegedly represents reimbursement for a portion of the tuition and fees for A.F.'s attendance and enrollment at Shawnee High School during the 2009-2010 and 2010-2011 school years. Upon execution of this Agreement, Petitioner Roman shall pay $5,000.00 of the total $9,000.00 to the Board. Thereafter, within thirty (30) days of execution of this Agreement, Petitioner Roman agrees to pay to the Board an additional amount of $4,000.00, which also represents the final payment to the Board for A.F.'s tuition and fees for the 2009-

2010 and 2010-2011 school years. In agreeing to make payments, as set-forth in this paragraph, Petitioner Román is not acknowledging or agreeing that A.F. was a non-Medford resident at any or all relevant times herein, but rather, desires to come to a fair and equitable resolution of this matter.

2. All payments pursuant to paragraph one (1) above shall be made payable to "Lenape Regional High School District" and sent to following address:

Mr. James Hager, Business Administrator
Lenape Regional High School District
93 Willow Grove Road
Shamong, NJ 08008

3. In the event Petitioner Román fails to make the $4,000.00 payment within thirty (30) days of this Agreement, the Board shall be permitted to reduce the amount owed and outstanding to a judgment against Petitioner.

4. Any party that seeks enforcement of this Agreement, and is deemed a prevailing party in the enforcement action, may seek interest and counsel fees in connection with the enforcement action.

5. For the remainder of the 2010-2011 school year, A.F. shall continue to primarily reside within the Medford Township school district. The Board agrees that it will not seek to remove A.F. from the Board schools pursuant to N.J.S.A. 18A:38-1, et. seq. or otherwise declare A.F. a non-resident should he elect to return to Petitioner Roman's Lumberton home from the close of school each Friday until the beginning of school each Monday for the remainder of the 2010-2011 school year. In the event A.F. resides with Petitioner Roman for any additional days other than those indicated in this paragraph, the Board may seek to remove A.F. pursuant to N.J.S.A. 18A:38-1, and seek recovery for tuition from the date he began residing outside of Medford, New Jersey.

6. Petitioners and Board hereby dismiss, with prejudice, all claims in the above-captioned matter.

7. **Petitioners, 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 Disabiiities 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.F., his Parents, or on the behalf of A.F. in any forum arising out of or connected with A.F.'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 Petitioners and A.F. from asserting any claims against the Board that may arise in the future, after the date of this Agreement.**

8. The Board, upon the execution of this Agreement, fully and completely release, remises, acquits, satisfies, and forever discharges the Petitioners from any and all claims it has or may have, of any kind whether contractual, common law or statutory, including but not limited to all claims for injunctive relief, all manner of actions, causes of action, suits, covenants, contracts, agreements, promises, debts,

sums of money, damages, judgments, claims or any other demands whatsoever, in law or in equity which have been or could have been asserted by the Board or on its behalf in any forum arising out of or connected with A.F.'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 the Board from asserting any claims against Petitioner's that may arise in the future, after the date of this Agreement.

9. 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.

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, which must be obtained prior to Ms. Roman's second and final payment of $4,000.00 and reflected by the Secretary of the Board's signature and execution of this Agreement below. Failure of the Board to approve and sign this Agreement within thirty (30) days of the date of this Agreement shall constitute a rejection of this Agreement requiring the Board to return immediately Ms. Roman's initial payment of $5,000.00.

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 to the extent permitted by law.

LENAPE REGIONAL HIGH SCHOOL
DISTRICT BOARD OF EDUCATION

BY: _____
James H. Hager, School Business Administrator, Secretary, Board of Education, on behalf of the Board

Dated: 2-16-11

PETITIONER LEEANNA ROMAN

BY: _____
LEEANNA ROMAN

Dated: 1/31/2011

PETITIONER DEBORAH DENNEHEY

BY: _____
DEBORAH DENNEHEY

DATED: 1/31/2011

LENAPE REGIONAL HIGH SCHOOL DISTRICT

K. KIKI KONSTANTINOS ADMINISTRATION AND STAFF DEVELOPMENT BUILDING

93 WILLOW GROVE ROAD
SHAMONG, NEW JERSEY 08088

609-268-2000
FAX: 609-268-8971

EMILY CAPELLA, *Superintendent of Schools*

CAROL L. BIRNBOHM,Ed.D., *Assistant Superintendent*
JAMES H. HAGER, *Business Administrator/Board Secretary*

LENAPE HIGH SCHOOL
SHAWNEE HIGH SCHOOL
CHEROKEE HIGH SCHOOL
SENECA HIGH SCHOOL

February 17, 2011

EXECUTIVE PLANNING

1. On motion made by Mr. Heitmann, seconded Mr. Stow to approve the settlement agreement regarding student (A. F.).
On roll call vote members Bende, Bisignano, Borucki, Eckenhoff, Fisicaro, Heitmann, Lee, Looney, Shinske, and Stow voted yes, no one opposed.
Motion carried.

This is a certified true copy of a resolution approved by the Lenape Regional Board of Education at its meeting held on February 16, 2011.

James H. Hager, Board Secretary

249-11

OAL DKT. NO. EDU 12527-10
AGENCY DKT. NO. 652-11/10

BOARD OF EDUCATION OF THE BOROUGH OF SPRING LAKE, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
M.G. and W.G., on behalf of minor child, M.G.,	:	DECISION
RESPONDENTS.	:	

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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7|07|11

Date of Mailing: 7|07|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12527-10

AGENCY DKT. NO. 652-11/10

SPRING LAKE BOARD OF EDUCATION,

Petitioner,

v.

M.G. AND W.G. ON BEHALF OF M.G.,

Respondent.

Athina Lekas Cornell, Esq., for petitioner (Lindabury, McCormick, Estabrook and Cooper, P.C., attorneys)

John P. Brennan, Jr., Esq., for respondents

Record Closed: April 15, 2011 Decided: May 19, 2011

BEFORE **LISA JAMES-BEAVERS,** ALJ:

This matter was transmitted to the Office of Administrative Law on November 16, 2010, as an emergent matter 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 emergent matter was withdrawn and the petition was filed as a non-emergent matter.

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 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.

May 19, 2011
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: MAY 25 2011

Date Mailed to Parties: MAY 25 2011

cmo

SETTLEMENT AGREEMENT

This Agreement made on April 11, 2011 by and between the Spring Lake Board of Education (the "District") located at 411 Tuttle Avenue, Spring Lake, New Jersey 07762 and William and Megan Gepp, parents of M.G., (the "Parents") located at 540 Ludlow Avenue, Spring Lake, N.J. 07762.

WHEREAS, M.G., is a general education 8th grade student enrolled in the District; and

WHEREAS, on June 18, 2010 an incident between M.G. and another student resulted in M.G.'s suspension from school; and

WHEREAS, the District required M.G. to submit to a medical examination to determine whether he was under the influence of any substances prior to returning to school; and

WHEREAS, the District also required M.G. to submit to psychiatric evaluation to determine whether he was a danger to himself or others prior to returning to school; and

WHEREAS, the Parents disputed the right of the District to require such examinations; and

WHEREAS, prior to the commencement of the 2010-2011 school year a dispute arose between the District and the Parents regarding M.G.'s ability to return to school; and

WHEREAS, in September, 2010, the parties agreed to place M.G. on home instruction; and

WHEREAS, to date, M.G. remains on home instruction; and

WHEREAS, on or about November 17, 2010, the District filed a Petition for Emergent Relief with the Bureau of Controversies and Disputes seeking that M.G. undergo a medical examination and drug test prior to returning to school; and

WHEREAS, on or about November 29, 2010, the District filed a Petition of Appeal with the Bureau of Controversies of Dispute; and

WHEREAS, on or about December 22, 2010, the Parents filed an Answer to the District's Petition; and

WHEREAS, the parties have a desire to settle the above matter in an amicable way;

NOW THEREFORE, the parties hereby agree as follows:

1. The parties agree that M.G. shall remain on home instruction (10 hours per week) through June 23, 2011.
2. The parties agree that M.G. shall not be permitted to participate in any District activities, including but not limited to, the 8th grade graduation ceremony.
3. Upon successful completion of coursework provided by the home instruction, the parties agree that M.G. shall receive a District diploma at the conclusion of the 2010-2011 school year.
4. The parties have reached this compromise to avoid the expense and inconvenience of a hearing before the Bureau of Controversies and Disputes. Neither part is admitting any wrongdoing.
5. The parties agree that the terms of this Agreement shall be confidential to the maximum extent permitted by law.
6. In consideration of the settlement of this matter, the Parents shall release the District from any and all claims, rights and liability, including but not limited to any and all claims for additional attorneys fees, compensatory education, money damages, civil liability, or any other equitable or legal relief through the date of the execution of this Settlement Agreement.

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. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.
12. This Agreement is subject to ratification by the Spring Lake Board of Education at its next regularly scheduled meeting after receipt of a signed Agreement from the Parents.

ON BEHALF OF M.G.

William Gepp, Parent — Date: 4/10/11

Megan Gepp, Parent — Date: 4/11/11

ON BEHALF OF THE SPRING LAKE SCHOOL DISTRICT

Trish O. Hansen

Trish O. Hansen, Board President

Date: 4/11/11

CERTIFICATE AS TO EXTRACT OF MINUTES

I, Debra Leigh Allen, Board Secretary to The Board of Education of the Borough of Spring Lake in the County of Monmouth, a school district of the State of New Jersey, HEREBY CERTIFY that the attached is a true and accurate extract of the minutes of the meeting held on April 11. 2011.

IN WITNESS WHEREOF, I have hereunto set my hand as of the 12th day of April, 2011.

Debra Leigh Allen, Board Secretary

C. Resolved: To approve Middlesex Regional Educational Services Commission as the NP192/193 services provider for the 2011-2012 fiscal year. TABLED

D. Building and Grounds
Resolved: To accept the proposal from P. W. Moss and Associates for the design and construction services to upgrade the existing fire alarm systems at a fee of $13,000.

Dates to set up joint meeting with Booster Club one morning.

VIII. **Board Attorney's Report**
On motion by Mrs. Hansen and seconded by Dr. Petrosini
WHEREAS, the Sen. Byron M. Baer Open Public meetings Act, N.J.S.A. 10:4-6 et seq., (the "Act") provides that the Spring Lake Board of Education may hold an "Executive Session" from which the public is excluded to discuss matters that are confidential or are one of the nine (9) subject matters listed Section 12(b) of the Act; and

WHEREAS, it is recommended by the Business Administrator that the Spring Lake Board of Education go into Executive Session on March 28, 2011 at 7:35pm to discuss matters that are permissible for discussion in Executive Session; and

WHEREAS, the length of the Executive Session is estimated to be 30 minutes after which the public meeting of the Board shall reconvene and proceed with business; and

WHEREAS, that the Board hereby declares that its discussion of the following subject(s) will be made public at a time when the public's interest in disclosure is greater than any privacy or governmental interest being protected from disclosure.

NOW, THEREFORE, BE IT RESOLVED by the Spring Lake Board of Education that the Board shall go into Executive Session to discuss the following items: (To be determined and announced as needed)

a. Settlement Agreement – Attorney Client Privilege
b. Student Placement – Attorney Client Privilege
c. Personnel – Non Tenured and Tenured Staff

Vote: Yes: Unanimous consent, all members present.

On motion by Mrs. Hansen and seconded by Dr. Petrosini
RESOLVED: To return to open session and resume the order of business. Time: 8:15 pm
Vote: Yes: Unanimous consent, all members present

On motion by Mrs. Hansen and seconded by Mr. Galvin
Resolved: To approve, upon recommendation of the Superintendent, the Settlement Agreement regarding Student #4364114676.
Roll Call Vote: Yes: Mr. Galvin, Mrs. West, Dr. Petrosini, Mrs. Hansen
Abstained: Mr. Panzini Motion carried.

250-11

KAREN HARRINGTON AND EVE HILLER,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SUSSEX COUNTY VOCATIONAL SCHOOL DISTRICT, SUSSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners – both of whom were tenured secretaries employed by the respondent Board – lost their positions due to a reduction in force (RIF) in 2008. Petitioners appealed the Board's denial of their requests to "bump" into the positions of Accounts Payable Assistant and Payroll/Benefits Assistant in the school business office. The Board contends that the tenure of both petitioners extends only to the position of general secretary, and not to positions in the business office which require training and experience in accounts payable and payroll and benefits.

The ALJ found, *inter alia*, that: petitioners' assertion that they should have been appointed to either of the positions in the business office – Accounts Payable Assistant or Payroll/Benefits Assistant – is without merit, as petitioners' tenure rights extend only to secretarial positions; the positions to which petitioners claim entitlement are not secretarial positions in either title or function, and are not included on the secretarial salary guide; the business office positions in question have a significantly higher starting salary, are non-union positions, and are hierarchically higher positions than those in which petitioners were employed; petitioners are not entitled to "bump" into these positions, as such placement would constitute a promotion with responsibilities and duties that were not attendant in their secretarial positions; and it is well settled that tenured school employees asserting priority over non-tenured employees must be fully qualified for the positions sought. Accordingly, the ALJ concluded that there has been no violation of petitioners' tenure or seniority rights, and dismissed the petition.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ that petitioners are not entitled to the positions of Payroll Benefits Assistant or Accounts Payable Assistant. 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.

July 7, 2011

OAL DKT. NO. EDU 9137-08
AGENCY DKT. NO. 186-7/08

KAREN HARRINGTON AND EVE HILLER,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE SUSSEX COUNTY VOCATIONAL SCHOOL DISTRICT, SUSSEX COUNTY,	:	
RESPONDENT.	:	

The record[1] of this matter, the detailed Initial Decision of the Office of Administrative Law (OAL) and petitioners' exceptions have been reviewed. Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the petition must be dismissed.

In this appeal, two tenured secretaries – Karen Harrington and Eve Hiller – allege that when a district reduction in force (RIF) eliminated their positions, they were entitled to transfer into the positions of Payroll Benefits Assistant to the Business Administrator[2] and Accounts Payable Assistant to the district Business Administrator,[3] respectively, which positions

[1] Transcripts of the hearing were not provided to the Commissioner.

[2] The Payroll Benefits Assistant position was filled on an unspecified date by incumbent Susan Predmore.

[3] The Accounts Payable Assistant position was filled in June 2008 by incumbent Andrew Italiano.

were held by non-tenured employees. Petitioners submitted letters to respondent on April 22, 2008, asserting alleged "bumping rights," but respondent rejected same.

Petitioners do not allege that the RIF was improper. Nor do they contend that they have held any positions in the district other than the position of secretary. Rather, they argue that the positions they seek are secretarial positions and that they are qualified for same.

Included in the record are the job descriptions for the petitioners' secretarial positions, and for the accounting and payroll positions which petitioners seek. The testimony – as summarized by the ALJ and unrefuted by the parties – provides detailed descriptions of the tasks required by the payroll and accounting jobs, and performed by Susan Predmore and Andrew Italiano. These responsibilities far exceed those required in petitioners' secretarial positions. Indeed, it is undisputed that petitioners have no experience performing the majority of the duties which are central to the payroll and accounting positions.

A tenured secretary's seniority rights allow him or her to "bump" into another secretarial position held by a non-tenured employee. *See, e.g. Lavine v. Board of Education of the City of Trenton, Mercer County,* Commissioner's Decision No. 232-84, decided July 23, 1984, *aff'd* State Board of Education, December 5, 1984, *aff'd* App. Div., November 18, 1985. However, the ALJ correctly determined – based upon the facts in the instant record – that the payroll and accounting positions sought by petitioners both require different skill sets than petitioners' secretarial positions and are hierarchically above the secretarial positions. Thus, any "bumping rights" held by petitioners cannot extend to the positions which they seek.

Petitioners' assertion that they are entitled to the positions by virtue of the fact that they satisfy some of the minimal requirements set forth in the job descriptions is without

merit – both in light of the fact that the sought positions are not secretarial and in light of the evidence that petitioners' training and experience do not provide proper foundations for the payroll and accounting positions. Also unmeritorious is petitioners' argument that they should be given the positions and afforded on-the-job instruction. In this regard they allege, for instance, that Predmore enjoyed on-the-job training. However, Predmore's experience had included years of executing payroll responsibilities in private sector and non-profit organizations. She needed to learn specific requirements applicable to public entities, but did not need the extensive schooling that Harrington would have needed for the payroll benefits assistant position. Respondent has no obligation to provide same.[4]

In summary, petitioners are not entitled to the positions of Payroll Benefits Assistant and Accounts Payable Assistant. The petition is accordingly dismissed.

IT IS SO ORDERED.[5]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7|07|11

Date of Mailing: 7|07|11

[4] Petitioners also contend that no significance should have been attached to the fact that the payroll and accounting positions were non-classified. This argument is not helpful, since union alignment was not the determinative factor in the ALJ's conclusion that the payroll and accounting positions were not secretarial in nature.

[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 09137-08
AGENCY DKT. NO. 186-7/08

KAREN HARRINGTON AND EVE HILLER,
Petitioners,
v.
BOARD OF EDUCATION OF THE SUSSEX COUNTY VOCATIONAL SCHOOL DISTRICT, SUSSEX COUNTY,
Respondent.

Randi Doner April, Esq., for petitioners (Oxfeld Cohen, attorneys)

Mark A. Tabakin, Esq., for respondent (Weiner Lesniak, attorneys)

Record Closed: February 24, 2010 Decided: April 11, 2011

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners Karen Harrington and Eve Hiller were tenured secretaries who were employed by respondent Sussex County Technical School Board of Education ("Sussex County") since 1990 and 1992, respectively. In 2008, petitioners lost their jobs due to a reduction in force instituted by Sussex County. The parties do not dispute that

petitioners attained tenure as secretaries with Sussex County or that the relevant reduction in force was proper. Instead, the parties disagree that petitioners are entitled to the positions of accounts payable assistant to the school business administrator and/or payroll/benefits assistant to the school business administrator, which are currently held by non-tenured employees.

The matter was transmitted to the Office of Administrative Law (OAL) on July 23, 2008, 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 hearing was scheduled for February 23, 2009, and adjourned at petitioner's request. Respondent then moved for summary decision, alleging that no genuine issues of material fact exist in this matter. That motion was denied on February 3, 2010. The matter continued on March 12, 2010. Thereafter respondent moved for the sequestration of petitioners during the hearing, or, in the alternative, bifurcation of petitioners' claims for hearing. The motion for sequestration was granted and the motion to bifurcate the claims was denied, by Order dated June 4, 2010. The hearing continued on August 11, October 27 and November 8, 2010. At the conclusion of the hearing the parties requested time to obtain the transcripts, and to submit post-hearing briefs. The time within which to submit briefs was extended at the request of counsel for petitioners, and following receipt of the briefs the record was closed.

FINDINGS OF FACT

Based upon consideration of the 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 facts:

A. Reduction in Force

1. On April 17, 2008, the Sussex County Technical School Board of Education voted to effectuate a reduction in force. As a result of the reduction in force, two secretarial positions were eliminated.

2. The secretaries whose employment would be terminated as a result of the reduction in force were determined based upon seniority as provided in the parties' collective bargaining agreement.

3. A seniority list was created and it was concluded that Hiller and Harrington had the least seniority and, therefore, would be subject to the reduction in force. At the time of the reduction in force, Hiller was working part time for the adult school. At the time of the reduction in force, Harrington was working full time as the secretary to the athletic director.

4. During its April 17, 2008, meeting, the Board also accepted the resignation of Estrella Molinet. In the beginning of February 2008, the Board posted for Ms. Molinet's position, as well as the position of payroll/benefits assistant to the business administrator.

5. After being notified that her employment would be terminated as a result of the reduction in force, Hiller inquired as to whether or not her tenure rights would allow her to "bump" into any existing positions in the District.

6. Hiller was informed by Robert Clark, the Board's business administrator, that while the Board was currently hiring for two positions in the business office, neither of the positions available were secretarial positions. Since Hiller's tenure extended only to the position of general secretary, she was advised that she was not entitled to exercise bumping rights to either position in the business office. However, Clark informed Hiller that the Board was accepting applications for those positions and that she was welcome to apply.

7. On February 27, 2008, Hiller submitted an application for the position of accounts payable assistant to the business administrator. Hiller was not interviewed for the position of accounts payable assistant because Robert Clark determined that based upon her educational and professional experience, she was not qualified for the position.

8. Harrington did not submit an application for either the position of accounts payable assistant to the business administrator or the position of payroll/benefits assistant to the business administrator.

9. On April 22, 2008, both Harrington and Hiller submitted letters to the Board asserting bumping rights to the positions of payroll/benefits assistant and accounts payable assistant. The Board denied both Harrington's and Hiller's requests to "bump" into the positions of accounts payable assistant and payroll/benefits assistant.

Karen Harrington

10. Karen Harrington was hired by the Board in September 1990 to serve as attendance/discipline office secretary.

11. Harrington's educational background included a high school education and some classes at community college.

12. Harrington had no accounts-payable experience prior to being hired by the Board.

13. Other than one year's experience as a personnel secretary for the Howmet Corporation in 1975, Harrington had no payroll/benefits administration experience prior to being hired by the Board. While serving as personnel

secretary, Harrington was required to submit insurance claims and disburse checks received from insurance companies.

14. Harrington testified that the job duties as set forth in the job description for attendance/discipline office secretary accurately reflected the duties required by that position. As attendance/discipline office secretary, Harrington's duties included typing, filing, answering phones and photocopying. Prior to being hired by the Board, Harrington already knew how to file, was aware of proper phone etiquette, and possessed interpersonal skills.

15. Harrington served as attendance/discipline office secretary until 2001, when she was transferred to the position of secretary to the director of the School Based Youth Services Program, another general-secretary position. Harrington testified that the job description for secretary to the director of the School Based Youth Services Program accurately reflected the duties required by that position. The position of secretary to the director of the School Based Youth Services Program also required Harrington to type, file and answer phones.

16. In 2003, Harrington was again transferred to another general-secretary position, secretary to the athletic director and the dean of students. Harrington testified that the job description for secretary to the athletic director and the dean of students accurately reflects the duties required by that position. Harrington held the position of secretary to the athletic director and the dean of students until her position was eliminated as a result of the reduction in force in 2008.

17. During the entire course of her employment with the Board, Harrington's salary was established pursuant to the secretarial salary guide set forth in the collective bargaining agreement entered into between the Board and the Association. Harrington's placement on the secretarial salary guide did not change as a result of any reassignment.

18. Harrington's duties in each of the three positions she held during her employment with the Board remained generally the same, in that she was predominantly required to answer phones, photocopy and file.

19. Harrington's responsibilities in her former secretarial positions were not interchangeable with the responsibilities of the business office positions. Harrington does not currently possess the "rudimentary knowledge" necessary to be an accounts payable person. While employed by the District, Harrington did not perform any of the responsibilities set forth in the job description for payroll/benefits assistant to the business administrator position.

Eve Hiller

20. Eve Hiller was hired by the Board in 1991. Hiller's educational background included a high school education and several courses at Pace University and Sussex County Community College.

21. Prior to being hired by the Board, Hiller worked for United States Trust Company for nine years.

22. Hiller was hired by the Board as a receptionist, a general-secretary position. Her general duties included answering the phone, sorting mail, processing working papers, filing, typing and photocopying.

23. In 1995, Hiller was transferred to the position of principal's secretary. However, the transfer did not result in an increase in pay.

24. In 2000, Hiller was again transferred to a general-secretary position in the nurse's office.

25. In 2001, Hiller became the secretary to the adult school supervisor.

26. Hiller began working for Ilene Avery in 2003.

27. In 2008, Hiller was notified that her employment was being terminated as a result of a reduction in force. After being notified of the vacancy, on February 27, 2008, Hiller applied for the position of accounts payable assistant. Hiller was not offered the position of accounts payable assistant.

28. Hiller submitted a letter to the Board requesting that she be permitted to exercise bumping rights to the position of accounts payable assistant or the position of payroll/benefits assistant. Hiller's request was denied because the Board concluded that her tenure rights did not extend outside the position of "general secretary" and that the positions of payroll/benefits assistant and accounts payable assistant were not general-secretary positions.

29. Throughout her employment with the Board, Hiller remained a member of the union and was paid pursuant to the secretarial salary guide.

Payroll/Benefits Assistant to the Business Administrator

30. Susan Predmore currently serves in the position of payroll/benefits assistant to the business administrator. For record-keeping purposes, the position of payroll/benefits assistant is not considered a secretarial position.

31. Prior to becoming employed in the District, Predmore held various positions in which she performed payroll and accounting duties. Specifically, prior to being hired by the Board, Predmore was employed for two years as senior accounting person by the House of the Good Shepherd. Predmore's responsibilities at the House of the Good Shepherd included handling accounts receivable, billing, payroll for 130 employees, and the personal-needs accounts of all of the residents.

32. Prior to working at the House of the Good Shepherd, Predmore worked at Lancaster Associates, where she was responsible for accounting, and as an office manager in charge of bookkeeping and payroll at Community Corporation.

33. Prior to her employment with the Board, Predmore had worked with a computer-based payroll system.

34. Predmore's general job duties as payroll/benefits assistant include all aspects of processing payroll for approximately 200 employees.

35. Harrington has never run a payroll cycle, utilized Systems 3000 Payroll software, prepared a payroll transfer report, or maintained a payroll check register.

36. Hiller has never performed a payroll transfer, prepared a Posted Wage, Tax and Deduction Analysis report, or prepared a payroll check register report.

37. Predmore is required to update the agency account deposit and is required to prepare W-2 and W-3 forms.

38. Hiller has never been required to determine tax withholdings or prepare a W-2. Harrington has never prepared a W-2 or a W-3.

39. Predmore is required to file both FICA and Medicare taxes for all employees.

40. Hiller has never prepared a FICA distribution report.

41. Harrington is unfamiliar with FICA.

42. Predmore is required to file the state share and the employer's share of FICA on DOEnet. Predmore did not receive any training from the Board regarding DOEnet.

43. Harrington is unfamiliar with DOEnet.

44. Predmore is required to file reports with the Teachers' Pension and Annuity Fund (TPAF) and the Public Employees' Retirement System (PERS). Predmore did not receive any training from the Board regarding TPAF and PERS.

45. Hiller has never enrolled or retired an employee in TPAF or PERS.

46. Predmore is required to assist employees in filing for temporary disability leave or family temporary disability leave.

47. Hiller has no experience with and is unfamiliar with family temporary disability leave.

48. Predmore is required to maintain the Unemployment Trust Fund.

49. Hiller is unfamiliar with the Unemployment Trust Fund.

50. Harrington is unaware of how to prepare deposits for the Unemployment Trust Fund.

51. Predmore is not required to retrieve the business administrator's mail, type letters, take dictation, greet visitors, keep the business administrator's calendar, answer his phone or do his filing.

52. Retrieving mail, typing letters, taking dictation, greeting visitors, keeping the business administrator's calendar, filing, and answering the business

administrator's phone are tasks performed by the administrative assistant to the business administrator, a general-secretary position.

53. Documents prepared by Predmore are neither reviewed by nor signed by any other Board employee.

54. Predmore is not a member of the union, nor does she pay a union representation fee, and she is not paid in accordance with the secretarial salary guide. Predmore's salary was negotiated at the time she was hired.

Accounts Payable Assistant to the Business Administrator

55. For record-keeping purposes, the position of accounts payable assistant is not considered secretarial and is not paid pursuant to the secretarial salary guide.

56. Andrew Italiano was hired by the Board in June 2008 as the accounts payable assistant to the business administrator.

57. Italiano graduated from St. Thomas Aquinas College, where he received a degree in business administration. While at St. Thomas, Italiano completed courses in accounting and finance.

58. Italiano has also completed the New Jersey Association of School Business Officials course. This course includes training in school finance, school accounting, GAAP double-entry bookkeeping and public contracts law.

59. Prior to being hired by the Board, Italiano served as the assistant school business administrator for the Delaware Valley Regional High School from July 2005 through June 2008.

60. Italiano's general duties while at Delaware Valley included processing payroll, maintaining financial spreadsheets, performing financial analysis, processing checks for several checking accounts, and generally assisting the school business administrator with the full financial operation of the district.

61. While at Delaware Valley, Italiano also assisted in the development of the school budget.

62. As accounts payable assistant to the business administrator, Italiano is involved in processing workers' compensation claims.

63. Harrington has never processed a workers' compensation claim.

64. Italiano is also responsible for overseeing the purchase order, requisition and voucher process.

65. Harrington does not know how to prepare a quotation for the purchase of goods or services.

66. Hiller is unaware of the difference between a voucher and a purchase order.

67. Italiano is required to ensure that requisitions are in compliance with the Public Contracts Law.

68. Harrington is unfamiliar with competitive contracting.

69. Hiller is unfamiliar with the Public Contracts Law.

70. As part of his regular job duties, Italiano is required to complete 1099 forms.

71. Hiller is unaware of when a 1099 form must be issued.

72. Italiano is also required to work with Enterprise Accounts.

73. Harrington is unfamiliar with Enterprise Accounts.

74. Italiano is responsible for ensuring that all accounts in the Business Office adhere to Generally Accepted Accounting Principles (GAAP).

75. Hiller is unfamiliar with GAAP.

76. Italiano's position requires him to be familiar with the Department of Education's accountability regulations regarding travel.

77. Harrington is unfamiliar with the Department of Education's accountability regulations regarding travel.

78. Hiller is not familiar with the Department of Education's Accountability Regulations on Travel Reimbursement.

79. Italiano is required to utilize the Uniform Minimum Chart of Accounts on a daily basis.

80. Harrington is unfamiliar with the Uniform Minimum Chart of Accounts.

81. Hiller is not familiar with the Uniform Minimum Chart of Accounts.

82. Italiano is not required to retrieve the business administrator's mail, type letters, take dictation, greet visitors, keep the business administrator's calendar, answer his phone or do his filing.

83. Italiano is not paid pursuant to the secretarial salary guide, is not a member of the union, and does not pay union dues.

TESTIMONY

Karen Harrington

Harrington testified that she was hired in September 1990 as an attendance/discipline office secretary. She worked thirty-five hours a week. Harrington is a high school graduate, and did not attend college except for taking a few classes at a community college. Her duties included typing, filing, photocopying and answering the telephones. She also coordinated transportation for spots with the busing company. In 2001 her job title changed and she became secretary to the student center director and had different duties. She now helped the director with the student center budget entries based upon a grant received from the State. She entered check requests by hand, but requisitions to the Board were done by computer. She also did typing and filing, and answered the phone. She also began scheduling teachers for teen programs and continued to coordinate busing.

In 2003 she was transferred to the athletic office, working for the supervisor of science and math, but dealt primarily with athletics, as one person held all three titles. She had one day of training on the computer for the student center program, and now at the athletic office had to handle payroll, checks, the switchboard and attendance. She also had to prepare New Jersey State Interscholastic Athletic Association (NJSIAA) forms, and attended a one-day seminar to learn the requirements. Initially the paperwork was handwritten, but then the State developed a program, "STI." A supervisor showed her how to use the STI program, and she took care of payroll, including that for referees for games. She did that on Quicken, and was taught how to do this. She also did purchase requisitions for supplies, and that was done on the computer in "Systems 3000." She was only trained on the purchase-requisition functions for Systems 3000. Eventually, in approximately 2003 or 2004, they started using Systems 3000 for everything. Once the requisition was sent the Board office

would send out checks to vendors. Harrington also testified that she kept spreadsheets for all of the officials' payments so that income-tax information could be sent to the Board office. She used Excel for this, and taught herself. Harrington could not remember the names of the tax forms that had to be issued, and indicated that the Board issued the forms. She also prepared the school calendar that went home with students; she had to ask teachers what they wanted on it, and delivered the calendar to the printer. She also scheduled buses for all games, and had to obtain coverage if a teacher was a coach and had to leave early. She also handled the checking account for the athletic department.

By 2002 the school had its own buses and so she had to coordinate with the transportation coordinator and do a weekly spreadsheet to show what buses were needed. She held this job until the reduction in force in 2008.

Harrington testified that in high school she took clerical classes in bookkeeping, accounting and typing, and took a class at community college to learn how to use a computer. She agreed that the job description for the attendance/discipline office secretary (P-1) reflected what she did in that job, but stated that she probably had not seen that job description before testifying. She also agreed that the job description for the secretary to the director of the School Based Youth Services Program reflects what she did in that job (P-2), but also indicated that she had not seen that prior to testifying. Similarly, the job description for the secretary to the athletic director and dean of students (P-3) reflects what she did in that job, but she had not seen that previously. She also stated that she did additional tasks, including reconciliation of the athletic department checking account each month, covering the switchboard if needed, and assigning substitute teachers if the secretary who usually handled that was out. Harrington testified that she has previously seen the job description for payroll/benefits assistant to the school business administrator (P-4), and indicated that this is one of the positions she is entitled to. Harrington testified, however, that of the responsibilities listed, she has not previously performed any of them. She stated that she had some payroll responsibilities that related to items in the job description for payroll/benefits

assistant to the school business administrator (P-4) and also had worked with Quicken. She also testified that she is familiar with Microsoft Office and Excel.

Harrington also has seen the job description for accounts payable assistant to the school business administrator (P-5), and believes that she had some of the qualifications listed and has handled some of the responsibilities.

On cross-examination, Harrington testified that check requests came from others to her, and she then entered the requisition on the computer. She did not do the purchase order; that was prepared by the central office. Regarding the STI program, a student-based program regarding attendance and discipline, Harrington did not know what the initials "STI" stood for, but indicated that when a student was absent, for example, she would enter that into the system. She wrote checks by hand for the athletic officials and did not use Quicken to print checks. She stated that the software was on her computer, but she did not have a printer and did not ask for one. She indicated that she received two days of training on Systems 3000, but that it was a group training session and they were only trained on how to enter purchase requisitions.

When asked to describe a 1099 form, Harrington testified that it is "what someone gets when they make over a certain amount of money." She described a W-2 form as "something you fill out to declare your taxes." Harrington had no idea what a W-9 is, and indicated that individuals fill out their own W-2 forms. She testified that she sent the information to the business office and that office prepared the forms. Checks to athletic officials were handwritten and then inputted into Quicken. Harrington testified that if one of the officials earned over $600, then that person had to be sent a 1099 form.

Harrington agreed that she did not do accounts payable or process purchase orders or do a bill list. When asked about the job description for accounts payable assistant to the school business administrator, she indicated that she saw it and applied for the job in writing, as was the case for payroll/benefits assistant to the school

business administrator, which was posted in April or May 2008. Harrington agreed that she would need training in some areas, and that she had performed some level of six out of twenty-five of the responsibilities listed.

Harrington testified that she had no experience with accounts payable, payroll or benefits, except for when she worked at Howmet Corporation for one year from 1975–1976. She has no other experience in accounts payable, benefits or payroll, but believes that the other positions are interchangeable with her secretarial position. Harrington agreed that the duties and responsibilities listed on the job description for secretary to the supervisor of the athletics department and the head of math and science (R-2) were her responsibilities in that position and are similar to those set forth in the job description for secretary to the athletic director and dean of students (P-3), and that P-3 "morphed" into R-2, and as such P-1, P-2, P-3 and R-2 reflect the total of her experiences with respondent. Harrington indicated that she took classes in high school in bookkeeping, accounting and business math, but also agreed that none of the positions she held required any of those things. When asked, Harrington could not indicate what GAP stands for,[1] and did not know what GAZBY stands for. Harrington described FICA as a federal tax paid, and said she believes that it is 6.5 percent for the employee and the employer. (P-4.) Harrington was not aware of what an NJWR-30 is, or what DOEnet is, or what TPAF is, but was aware that an NJ927W is a report and that FED 941 is a report. She also never prepared any W-2 forms and W-3 forms, but when asked what a flexible-benefits fund is, she said that she believes it is something you get paid out of if you are out sick for a long time, and that it is a percentage of your pay. Harrington did not know what a payroll budget account was, and testified that she never helped develop a budget. Harrington disagreed that all of the duties required for the two positions she had applied for were unlike anything she had done previously in any job, and rather indicated, "no, they are similar but you need training." She stated that she can be trained to do anything. Harrington agreed, however, that none of the items listed in P-4 are in any of her prior job descriptions, and agreed that she cannot do any of the duties listed in P-4 now. She also has no experience with public contract law.

[1] General Accounting Principles.

Harrington testified that she trained some teachers in how to do requisitions, but that she has never processed a requisition change to a purchase order, never processed a purchase order for payment, and never processed vouchers. She did not know who was authorized to make purchases on behalf of the Board of Education and had no idea what bid threshold is or if it ever increases, no idea what competitive contracting is, and no idea when bids are required as opposed to just a quote. She indicated that she would need training for these things.

Harrington agreed that the qualifications under item one in P-5 are qualifications she had from the courses she took prior to 1967, and agreed that she is not qualified to do what is listed in number three now. She has never prepared a quote for the purchase of goods or services and does not know what a business-registration certificate or an enterprise account is. She is not familiar with what travel expenses are permitted, and only knows how to handle requisitions on Systems 3000. Harrington was not aware of what the Uniform Minimum Chart of Accounts is or why it is important, or what asset management is, and has never processed workers' compensation claims.

She testified that she had a full day of training to learn the MIS system, but does not know what MIS stands for. Harrington testified that she was in the secretarial union the entire time she was employed by respondent, and received secretarial pay, and went up a step each year without regard to her position, which were all secretarial. Nothing changed with each secretarial assignment, and Harrington agreed that she performed few or none of the duties listed in P-4 in any job she has held. She has never worked in the business office and never used the Systems 3000 payroll component. She testified that she did handle payroll in a dental office that she worked at in high school in 1965. Harrington had no knowledge of a Social Security contribution sheet or a FICA report, and has never done a Social Security contribution sheet; a payroll budget spreadsheet; a direct-deposit system; a New Jersey Education Association (NJEA) dues report; a New Jersey State tax report; a MEDI report; a wage garnishment; or a credit-union report. She does not know if any of these relate to verification of payroll, and does not know how any are used in the process of handling

payroll or benefits. She was never asked to do any of these forms in the position she held. Harrington has never processed a timesheet for payment and does not know how they are done. She has no knowledge of the pension process at all and no knowledge of family leave, temporary leave or temporary disability leave. Harrington also did not know what constituted taxable wages. She agreed she would need to be trained on everything listed on P-4 that she has no idea about, and agreed that the responsibilities listed on P-4 are not interchangeable with those set forth in P-1.

Harrington's official last day was June 30. She recalled the memorandum of a June 20 meeting (R-3) and agreed that she deleted thousands of files from the computer. She asserted that the school had backed up the files before she deleted them.

Harrington agreed that she had done some level of six of the responsibilities listed on P-5. She also indicated that she learned how to enter tables of names in Excel because she sat through a class at community college with her daughter, but she said she would have to refer back to the manual to do it now because she has not used it in four to five years. She agreed that she never used Excel for computation functions.

On redirect examination Harrington testified that she deleted everything from her computer that was "irrelevant." Everything she deleted was in her "P" drive, which she referred to as her "desk drawer." She indicated that she made a disc of everything that was "pertinent to the job so that whoever came in to do it would not have to go through what was obsolete." She agreed, however, that she knew it was not her computer and that she did not have the authority to delete files.

Eve Marie Hiller

Hiller testified that she is a high school graduate and had a "little bit of college." She attended Pace University for a very short time. In high school she took typing and transcription courses. She has been employed by respondent since 1991 when she became a full-time employee. Prior to that she was filling in per diem for someone who

was out after being hurt. Hiller handled switchboard reception, including answering the phone, doing the mail, filing, photocopying and processing working papers for students. If she was free she would help with random typing. She testified that has always been employed as a secretary in the District, but moved around to different positions. From 1991 to 1995 she handled the switchboard, and then she became the principal's secretary, a position she held until 2000. Hiller had no responsibility for purchase orders or requisitions, but just filed them. From 2000–2001 she worked in the nurse's office and entered the students into the database and kept track of athletics. She had no responsibility for finances or money.

In 2001 Hiller went to work for Bill Leach and handled the student-activities accounts, where money raised from fundraisers would be deposited and the account reconciled. She also worked for Lisa Krause for a while and drafted letters for her. Hiller also testified that she entered purchase orders to Systems 3000, but did not make any disbursements.

In 2003 Hiller began working for Ilene Avery, and in that position she was doing more promotional things for the school and "dabbled in different programs" that she kept track of. She also spent the summer entering purchase orders. Hiller indicated she was not sure what had to go out for public bid, and she did not have to learn any new systems or programs when working for Avery or for Nancy Vargo. She also has never done payroll, but has prepared deposits, although not for payroll. Hiller also agreed that she had done very few of the tasks listed on P-4, and testified "these things are very specific" when asked which items she had done.

Hiller agreed that she had never provided a bill list for the Board and did not know what a bill list was, and she agreed she was not involved in preparing a budget. When asked to explain the difference between a purchase-order requisition and a voucher, Hiller did not remember in which order those documents were prepared and indicated that she just entered them and filed her copy. She was not familiar with public bidding; she just knew that things had to go out to bid, but she was not aware of the threshold and did not draft bid documents. She did not know what a 1099 form was or

when it has to be issued, and was not familiar with the requirements for reimbursement of travel expenses. Hiller was not familiar with the Uniform Minimum Chart of Accounts and had no experience with asset management. Hiller had experienced contacting carriers after disability claims were filed, but she never had to follow up on any of those claims. She testified that she has always been a member of the union and has always been in secretarial positions, and her salary has never changed with any of the position changes. Regarding payroll records, Hiller was never responsible for determining what tax would be withheld and never prepared any of the forms associated with payroll, and she testified that she was not familiar with the Social Security contribution report or the FICA distribution report. She did not prepare any reports and never did any payroll on the job, and the only payroll she has handled has been timesheets tallied for substitutes. She has never enrolled anyone in the retirement system and did not handle personnel matters. Hiller was not aware of the differences between a W-2, a W-3 and a W-4, she did not know what the unemployment trust fund is, and she had no experience in the administration of health benefits. She indicated that she is not sure when the two positions she is seeking became vacant, but remembers seeing the postings. She said that she applied for one of them, but did not remember which one.

Hiller applied for an accounts payable assistant position on February 27, 2008 (R-4), and believes that she tried to "bump in" to that position, although her letter does not so indicate. Mr. Clark told her she would have to apply, and she was told that she was not qualified and was never interviewed. When she was a part-time secretary and this position opened up she did not file any due process to claim that she had bumping rights due to seniority, and did not file until after the reduction in force. Hiller agreed she had no idea what the District budget is and no idea what the District payroll is each cycle.

On redirect examination, Hiller testified that she completed her college degree in 2007 at William Paterson University and now teaches special education classes.

Andrew Italiano

Andrew Italiano has been employed by respondent as an accounts payable assistant to the school business administrator since June 2008. Prior to that he was employed by Delaware Valley Regional High School from July 2005 to June 2008 as an assistant school business administrator. His duties included processing payroll, maintaining financial spreadsheets, performing financial analysis, processing checks for several accounts, and generally assisting the administrator with the financial operations of the district. He also helped develop the school budget and sat with all the department heads to go over the prior year's budget and the goals for the coming year. Italiano has a bachelor's degree in business administration and completed several courses in accounting and finance. He completed the New Jersey Association of School Business Officials course, which included training in school finance, school accounting, GAAP, double-entry bookkeeping and public contracts law. He described those as essential skills for an assistant business administrator or an accounts payable person.

In his current position as an accounts payable assistant he processes workers' compensation claims and reconciles multiple bank accounts, balancing statements against general ledger positions for revenue and expenditures and researching and resolving any differences. He also oversees the purchase-order requisition and voucher process and ensures that requisitions are in compliance with the public contracts law. He also prepares 1099 forms and works with enterprise accounts. Italiano is also responsible for ensuring that all accounts in the business office are in accordance with GAAP standards. He knows the accountability regulations regarding travel, which he indicated he needs to know to do his job on a daily basis. He also knows the Uniform Minimum Chart of Accounts, which is part of his everyday work. Italiano also testified that he has multiple additional responsibilities, including training on general ledger accounting and refresher training for current staff. He is not on a secretarial salary guide, is not a member of the union, and does not pay any dues or fees, and his job does not include typing or greeting people or making copies other than

for himself. He also does not do filing, maintain schedules, answer phones or type letters.

Susan Predmore

Predmore has been employed by respondent since 2008 as the payroll benefits person and assistant to the business administrator. Prior to that she was the senior accounting person at the House of the Good Shepherd. She handled all accounts receivable, billing, payroll for 130 employees, and the personal-needs accounts of all the residents. Prior to that she was employed at Lancaster Associates, where she handled all the accounting, and also worked at the Community Corporation handling all bookkeeping and payroll.

Her job duties in payroll and as assistant to the business administrator include processing payroll for approximately 200 employees. She is not provided the information to input, rather she has to find it. She prepares all the tax reports (federal, New Jersey and Pennsylvania) and has to verify their accuracy. She then handles the wire transfers for the federal tax, state tax, Pennsylvania tax and TPAF (pensions and PERS). She has had no training on how to actually do payroll. She files the tax reports with each agency online and has to verify all the amounts. She also is required to file the state share and the employee share of FICA on DOEnet. She also helps employees complete family-leave paperwork and disability papers and has to research their files for the information required. She also is required to know what taxable wages are; what an NJ WR-30 report is; what an NJ 927W report is; and the difference between a W-2 and a W-3. She is required to generate both of those. She also maintains the unemployment trust fund, handles flexible-spending accounts, and is responsible overall for twenty to thirty payroll accounts, which all have to be reconciled with each other.

Predmore also generates a Social Security report for every payroll (R-6); a board share of FICA distribution each cycle (R-7); a payroll transfer report every payroll (R-8); a Posted Wage, Tax and Deduction Analysis for every payroll cycle (R-10); a definition

details report (R-11); a payroll check register (R-12); a rate-based definition composite details report (R-13); a payroll budget spread (R-14); a payroll direct-deposit spread (R-15); an SUI report (R-16); a Pennsylvania state tax report (R-17); a New Jersey state tax report (R-18); a check-register report (R-19); NJEA reports (R-20); Medicare reports (R-21); a garnishments report (R-22); a FICA report (R-23); a federal tax report (R-24); an Equitable AXA report (R-25); a disability-insurance report (R-26); a dental, prescription and health report (R-27); a credit union report (R-28); a TPAF pension report for the teachers (R-29); a PERS pension report (R-30); a multiple-worksite report (R-31); a 941 quarterly report (R-32); an NJ 927 quarterly report (R-33); and timesheets for hourly employees (twenty or forty each payroll period) (R-34). All the reports she prepares have to be verified with posted wage and tax and all reports then go to Robert Clark, the business administrator. She sits down with Clark after she has completed everything and they review the totals together.

She testified that Mr. Clark does not tell her when to do what, and that she does not get his mail, type his letters, greet his visitors, answer his phone or do his typing. Predmore testified that she is not a member of the union and does not pay dues, and that her position is confidential and her salary negotiated and not related to the secretarial salary guide.

On cross-examination Predmore testified that she received a four-hour review of System 3000 from Estrella Molinet, who showed her where to find things but not how to do the job. The forms she prepares for the State do not require anyone else's signature or approval, and Predmore prepares them and then sends them. No one trained her on DOEnet or on TPAF or PERS.

Robert T. Clark

Mr. Clark has been the business administrator and board secretary for respondent since June 2001. He coordinates grants, and as the business administrator is in charge of all the financial operations of the District, as well as all the transportation, food service, building properties and all insurances. Clark oversees the day-to-day

operations of the business office and administers all of the grants and prepares all of the reports. The Board voted that two secretarial positions be eliminated in a reduction in force, one full time and one part time. The reduction in force was necessary because in the spring of 2007 Sussex Community College and Sussex Vocational Technical Adult Education programs were competing with each other and there was overlap. As a result, Sussex Vocational Technical reduced classes, lowered enrollment, and felt they needed only one secretary for athletics and adult education. The seniority list determined which secretary would be terminated (R-35). Petitioners were the least senior secretaries; Hiller was part time at the adult school and Harrington was the full-time secretary to the athletic director. Once the two schools reduced the scope of the night school the force was reduced, as there was less work. They posted for a payroll person and accounts payable person at the same time to cover the positions vacated by Estrella Molinet, who resigned, and another individual, who died. At the time Estrella was handling both jobs with his help, but both were full-time jobs.

Hiller was part time when those positions were posted, and he told her that they were not secretarial, but she applied for one. Neither she nor the union filed a grievance until other people were hired to fill the positions. When Hiller applied for the accounts payable position (R-4) Clark did not interview her because she was not qualified, and he was not going to interview anyone who was not qualified for the position. She did not have the education and prior experience necessary. Harrington did not apply for either position. Clark received at least 100 résumés for the openings.

Clark testified that if someone had the experience and the training to do both positions they could; however, the positions were distinctly different. Initially, two people committed to the jobs and then changed their minds. The District then hired Predmore, and after Estrella left the District interviewed and hired Italiano. Thereafter the District received letters from petitioners saying they were entitled to the positions (R-37; R-38.) A level-three grievance hearing was held, and Clark indicated that petitioners were not qualified. They were secretaries and could not perform the duties necessary. The payroll benefits assistant to the school business administrator (P-4) was required to perform all the responsibilities listed and needed to be an independent

decision maker, and the position is not secretarial. The payroll benefits salary is negotiable with the individual holding the job, and salary increases are not tied to the secretarial salary guide in accordance with the collective bargaining unit. Clark testified that Hiller was not qualified for the position even if it had been secretarial. He testified that she spent most of July doing purchase orders and was very slow, and that if she took that long in the business office nothing would ever get done. Hiller did not know how to code things, and she called him all the time to ask him how to do it. She constantly had questions for him regarding the difference between the quote threshold and the bid threshold, which was simple, and yet she still did not know it. Clark testified that Harrington was similarly not qualified, and under no circumstances could she handle the work in the business office. For example, when they set up Quicken to pay athletic officials she did not feel comfortable even printing checks, and would hand-write them and then enter them manually into the Quicken program. Following an audit in 2004 (R-39) there was one recommendation from the auditors that there was a need for changes in supporting documentation. Clark testified that if there are two consecutive years of the same audit recommendation then monitoring goes into place, and at the time of the initial recommendation Harrington was the secretary to the athletic director. The following year on June 30, 2005 (R-40) the same comment was made by the auditors, indicating that the same deficiency existed in the athletic account.

Predmore had the qualifications she needed for the payroll benefits position and needed no training in "functionality." Clark testified that every new employee gets a few hours' training on Systems 3000.

The job description for the accounts payable assistant to the business administrator (P-5) lists all the requirements of that position. The accounts payable assistant is also the backup person for payroll, and the bookkeeper was out a great deal of time that summer, and Predmore and Italiano did her work in addition to their own. The accounts payable assistant is not secretarial and the pay is not on a secretarial scale. The position is confidential and not tied to the secretarial salary guide, and salary increases are also not based upon the secretarial salary guide. Clark testified that his secretary does not do anything on P-5 that the accounts payable

assistant does. Clark testified that Italiano did not receive "sit down" training, and that neither Italiano nor Predmore typed, filed or answered his phone. Clark testified that after the 2004 audit recommendations he gave a very specific explanation about what needed to be done, indicating that he stated, "you need this and this to write a check."

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)). However, "[r]eduction in force (RIF), whether of tenured or nontenured [staff], if done for reasons of economy, is entirely within the authority of the [local board of education]." Maywood Bd. of Educ. v. Maywood Educ. Ass'n, 168 N.J. Super. 45, 55 (App. Div. 1979) (citing N.J.S.A. 18A:28-9). There is no statutory or regulatory authority that "provides tenured educational secretaries with a set of clearly delineated seniority rights or procedures governing dismissal when a reduction in force is effected by employing boards." Sheridan v. Bd. of Educ. of Ridgefield Park, 1976 S.L.D. 995, 997. In the event of a reduction in force, "the entitlement of a tenured secretary to a position held by a nontenured secretary will be adjudged by the Commissioner [of Education] to be viable only if the tenured secretary possesses the skills and necessary qualifications to efficiently perform the duties of such secretarial position." Id. at 999. In such cases, "title alone is not dispositive and actual duties should control over labels." Hibo v. Bd. of Educ. of the West Essex Reg'l Sch. Dist., EDU 1226-96, Initial Decision (November 12, 1997) <http://lawlibrary.rutgers.edu/oal/search.html>, adopted, Comm'r (December 29, 1997), adopted, St. Bd. of Educ. (June 3, 1998) <http://www.nj.gov/education/legal/>.

A fact-finder needs to determine the exact duties of a position to which a tenured employee claims entitlement and whether the employee is qualified to perform those duties. In Mount v. Tinton Falls Schools Board of Education, EDU 120-00, Initial Decision (December 29, 2000), modified, Comm'r (February 7, 2001)

<http://lawlibrary.rutgers.edu/oal/search.html>, Mabel Mount, a tenured secretary who worked in the Tinton Falls school board's transportation office, was terminated as part of a reduction in force. According to Mount, Tinton Falls violated her tenure rights by retaining non-tenured employees to perform duties for which she was qualified. Tinton Falls argued that Mount was not qualified for the position of clerical assistant for district services/special programs and projects, or for secretarial positions in the school board's special services office. While the written job descriptions for all of the relevant positions were placed in the record, several witnesses offered testimony at the hearing before the OAL about the actual work performed by Mount and the employees to whose jobs Mount claimed entitlement in order to assess Mount's qualifications. The witnesses who testified at hearing offered insight into the day-to-day operations of the relevant positions that was not necessarily captured by the written job descriptions maintained by the school board for hiring purposes. While ALJ Kathryn Clark found that Mount was qualified for the clerical assistant position and the secretarial positions, the Commissioner disagreed with the ALJ with respect to Mount's qualifications for the clerical assistant position. According to the Commissioner, "[Mount's] tenure in the position of Secretary [does not entitle] her to hold the position of Clerical Assistant for District Services/Special Programs and Projects, . . . since the record before [the Commissioner] supports the conclusion that this position is not, by either title or function, a secretarial one." Mount, supra, EDU 120-00, Comm'r (February 7, 2001) <http://lawlibrary.rutgers.edu/oal/search.html>. Thus, after independently reviewing the written job descriptions and the testimony of several witnesses, the ALJ and the Commissioner disagreed as to Mount's qualifications for the clerical assistant position, and the Commissioner ultimately found that Mount was not entitled to that position.

Here, respondent submits that petitioners are not qualified for the positions to which they claim entitlement. To support its argument, respondent relies heavily on the written job descriptions it maintains for hiring purposes. However, petitioners rely on the same written job descriptions to support their argument that they are qualified for the jobs they seek. Petitioners assert that they are qualified for the positions of accounts payable assistant to the school business administrator and/or payroll/benefits

assistant to the school business administrator due to the similarity between their former positions and their desired positions.

Respondent also argues that petitioners were denied those positions because they may only exercise seniority bumping rights to positions within the same job category as that in which their tenure vested. Therefore, petitioners were only entitled to exercise bumping rights to general-secretary positions, and the positions they seek are not general-secretary positions. While the positions petitioners seek do not include the word "secretary" in the titles, "title alone is not dispositive and actual duties should control over labels." Hibo, supra, EDU 1226-96, Initial Decision (November 12, 1997) <http://lawlibrary.rutgers.edu/oal/search.html>. Respondent argued that the positions of accounts payable assistant to the school business administrator and payroll/benefits assistant to the school business administrator are not secretarial in nature and, for petitioners, would constitute a promotion to a hierarchically higher position, and that an employee is only entitled to assert entitlement to those positions in the District with an equal or lesser rank than the position in which they currently serve. Petitioners asserted that the jobs they seek are secretarial in nature and would not constitute a "hierarchically higher position" by submitting written job descriptions for the relevant positions that indicate that petitioners performed similar duties in their former positions.

Petitioners' assertion that they should have been appointed to the position of either accounts payable assistant to the school business administrator or payroll/benefits assistant to the school business administrator is without merit, as petitioners' tenure rights extend only to secretarial positions. It is clear from the relevant job descriptions and the undisputed testimony that neither the position of accounts payable assistant to the school business administrator nor the position of payroll/benefits assistant to the school business administrator is a general-secretary position. Both petitioners served in several secretarial positions, remained members of the union, and continued to pay union dues, all while being paid in accordance with the secretarial salary guide.

Petitioners also claim that following the reduction in force, the Board wrongly denied them the ability to exercise "bumping rights" to the position of accounts payable assistant to the school business administrator or the position of payroll/benefits assistant to the school business administrator, as these positions were occupied by nontenured employees. However, the Board properly denied this request, as the positions to which petitioners claimed entitlement through their tenure rights were not general secretarial positions.

As in Mount, an analysis of the job duties, as testified to at the hearing, clearly demonstrates the substantial differences between the two positions to which petitioners claim entitlement and a general secretary. Here, the facts provide even greater support for the conclusion that the positions to which petitioners claim entitlement are not secretarial positions in either title or function, and, therefore, are outside the realm of positions to which petitioners can assert bumping rights. Unlike in Mount, the positions of payroll/benefits assistant and accounts payable assistant are not included on the secretarial salary guide. The basis for the higher salaries is directly correlative to the significantly higher level of responsibilities, more complex tasks, and greater knowledge base and skill set required of employees serving in those positions.

A review of the job descriptions for the positions held by Hiller and Harrington as compared to those for the position of accounts payable assistant to the school business administrator and payroll/benefits assistant to the school business administrator clearly reveals the striking differences in both qualifications and responsibilities. The exclusion of the position of accounts payable assistant to the school business administrator or payroll/benefits assistant to the school business administrator from the characterization of general secretarial position is further evidenced by the omission of those employees from the union and the significantly higher starting salary for those positions, which has been established without regard to the secretarial salary guide.

Moreover, petitioners are not entitled to "bump" into the positions, as they are hierarchically higher positions. As such, placement in the positions would constitute a promotion, with responsibilities and duties that were not attendant to the lower position.

Ms. Hiller's and Ms. Harrington's ability to claim tenure rights to the positions is dependent upon the duties performed in their previous positions, as well as the duties required of the payroll benefits assistant and accounts payable assistant. The list of responsibilities as set forth in the relevant job descriptions, as well as those elicited through the testimony, amply distinguish the job duties required of Hiller and Harrington as general secretaries and the intricate and complex work performed by Predmore and Italiano.

It is well settled that tenured school employees asserting priority over nontenured employees must be fully qualified for the positions being sought. See Kearny Bd. of Educ. v. Horan, 11 N.J. Misc. 751 (Sup. Ct. 1933). Here, it was abundantly clear, as evidenced by their testimony, that the petitioners did not possess the necessary skills or knowledge to adequately perform the duties of the positions they sought. The job qualifications for and responsibilities of the positions to which petitioners claim entitlement are far more extensive and complex. Petitioners' own candid testimony reflects that they lack the requisite knowledge to perform the majority of the tasks and responsibilities enumerated in the job descriptions for the positions of accounts payable assistant to the school business administrator and payroll/benefits assistant to the school business administrator.

CONCLUSION AND ORDER

Based on all of the foregoing, I **CONCLUDE** that there has been no violation of petitioners' tenure rights, seniority rights or any statutory or regulatory benefits, and it is therefore **ORDERED** that the 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.

April 11, 2011
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency:

4/11/11
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: APR 12 2011
dr

APPENDIX

Witnesses

For Petitioner:

Karen Harrington

Eve Marie Hiller

For Respondent:

Andrew Italiano

Susan Predmore

Robert T. Clark

Exhibits

For Petitioner:

P-1 Attendance/Discipline Office Secretary, Job Description

P-2 Secretary to Director of School Based Youth Services Program, Job Description

P-3 Secretary to the Athletic Director and Dean of Students, Job Description

P-4 Payroll/Benefits Assistant to School Business Administrator, Job Description

P-5 Accounts Payable Assistant to the School Business Administrator, Job Description

For Respondent:

R-1 Letter from Karen Harrington to Sussex County Vo-Tech attn: Robert Lombardo

R-2 Secretary to Supervisor of Athletics/Department Head of Math and Science, Job Description

R-3 Memorandum from Mark Toback to Karen Harrington dated July 7, 2008

R-4 Letter from Eve Hiller to Robert Clark dated February 27, 2008

R-5 Andrew J. Italiano, résumé

R-6 2009 FICA System Data Entry

R-7 Board share of FICA distribution

R-8 Payroll Transfer Report

R-9 Summary of Social Security Contributions

R-10 Posted Wage, Tax and Deduction Analysis

R-11 Definition Details Report by Definitions

R-12 Payroll Check Register

R-13 Rate Based Definition Composite Details

R-14 Payroll Budget Spread

R-15 Payroll Direct Deposit Spread

R-16 SUI report

R-17 Pennsylvania State Tax

R-18 New Jersey State Tax

R-19 Check Register Report

R-20 NJEA

R-21 MEDI Report

R-22 Garnishments

R-23 FICA Report

R-24 Federal Tax

R-25 Equitable AXA

R-26 Disability Insurance

R-27 Dental, RX and Health

R-28 Credit Union

R-29 TPAF Pension Report

R-30 PERS Pension Report

R-31 Multiple Worksite Report

R-32 Employer's Quarterly Federal Tax Return

R-33 NJ 927 Report

R-34 Time Sheet

R-35 Secretarial Seniority List

R-36 BOE, Vocational School, Work Session/Regular Meeting, April 17, 2008

R-37 Letter from Eve Hiller to Robert Clark dated April 22, 2008

R-38 Letter from Karen Harrington to Robert Clark dated April 22, 2008

R-39 Summary of Recommendations, Year Ended June 30, 2004

R-40 Summary of Recommendations, Fiscal Year Ended June 30, 2005

253-11E
OAL DKT. NO. 6313-11
AGENCY DKT. NO. 142-6/11

BETHLEHEM TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF BETHLEHEM TOWNSHIP, HUNTERDON 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 June 9, 2011 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.[1]

Upon full review and consideration, the Commissioner is in full accord with the ALJ's determination that petitioner's application here is untimely filed pursuant to *N.J.A.C.* 6A:3-1.3(i), necessitating its dismissal. However, even assuming, *arguendo,* that petitioner's application had been timely filed, the Commissioner concurs with the ALJ that the petitioner has 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, it has failed to demonstrate irreparable harm.

Accordingly, the recommended Order of the OAL is adopted and petitioner's requested relief is hereby denied. This matter shall proceed at the OAL for whatever action may be necessary to bring it to conclusion.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7|08|11
Date of Mailing: 7|08|11

[1] It is noted that petitioner filed exceptions to the ALJ's Order denying emergent relief. In that there is no authorization for such a filing, this submission – and the Board's objection thereto – were neither reviewed nor considered herein.

[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

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 6313-11
AGENCY DKT. NO. 142-6/11

BETHLEHEM TOWNSHIP EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF BETHLEHEM TOWNSHIP, HUNTERDON COUNTY,

Respondent.

William P. Hannan, Esq, for petitioner (Oxfeld Cohen, PC, attorneys)

Joseph L. Roselle, Esq. for respondent (Schenk, Price, Smith and King, attorneys)

Record Closed: June 9, 2011 Decided: June 10, 2011

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

The Bethlehem Township Education Association, petitioner, seeks emergent relief ordering respondent Bethlehem Township Board of Education to set a start date

for the 2011-2012 school year after September 1, 2011.

PROCEDURAL HISTORY

Petitioner filed a petition of appeal and brief with the Commissioner of Education Bureau of Controversies and Disputes on June 3, 2011 seeking emergent relief. Petitioner simultaneously filed an Unfair Practice Charge with the Public Employment Relations Commission, which is still pending. On June 6, 2011, the Bureau transmitted the 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. On June 8, 2011, respondent filed a brief and certification in Answer to the petition. The case was scheduled for oral argument on the emergent relief application on June 9, 2011. On that date, I heard oral argument and closed the record.

DISCUSSION

As a threshold matter, respondent argues that the petition is procedurally deficient and has been filed outside of the ninety-day limitations period within which claims may be brought before the Commissioner. N.J.A.C. 6A:3-1.3(i) sets forth that 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, . . . which is the subject of the requested contested case hearing." Petitioner responds that, because it is arguing that starting the school year before September 1, 2011 is in violation of petitioner's collective bargaining agreement with the respondent, the applicable statute of limitations should be the one applicable to a recovery on a contractual claim or liability, which is six years. Lavin v. Board of Education, 90 N.J. 145 (1982).

If the present petition were solely a contractual claim, as petitioner asserts, then the Commissioner of Education would not have subject matter jurisdiction. Petitioner brought the case before the Commissioner alleging violations of the education statutes, N.J.S.A. 18A:1-1 et seq. Therefore, the limitations period that applies is the one set

forth at N.J.A.C. 6A:3-1.3(i).

Petitioner does not dispute that the Board took action at its public meeting on September 21, 2010, to adopt the 2011-2012 school year calendar and establish the first day of school as August 24, 2011. The board agenda indicated that the calendar would be discussed under old business and made reference to Attachment 30, which showed three options for the calendar, one of which was to align the calendar with the North Hunterdon School District. (Exhibit C of Superintendent Lubarsky's Certification). The respondent Board voted to establish its first day of school to align with the first day of school of North Hunterdon School District, to which Bethlehem sends students. The decision was placed in the Board minutes and the minutes were posted on the District's website. Because the Board took the action at a public meeting, petitioner was aware as early as September 21, 2010, that the first day of school for Bethlehem students would be August 24, 2010. Ninety days from that date is December 20, 2010. Petitioner did not file the present petition until June 3, 2010, almost nine months after the petitioner had notice of the Board's action. Therefore, in accordance with N.J.A.C. 6A:3-1.3(i), I **CONCLUDE** that the petition must be dismissed as out of time.

Moreover, for a request for interim relief or stay, N.J.A.C. 6A:3-1.6 requires as follows:

> (b) 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.

After hearing the arguments of the parties and reading their submissions, I find no basis from which to conclude that respondent's decision to start the 2011-2012 school year prior to September 1, 2011, constitutes irreparable harm. The fact that the petitioner did not file its petition for almost nine months after the Board took action severely hurts its argument that its members will sustain irreparable harm if interim relief is not granted. The respondent's decision was made so long ago that it is very likely that the parents who have children at both the Bethlehem and the North Hunterdon School Districts will be the ones harmed if the calendar is changed at this late date. It is speculative that petitioner's members will sustain any harm at all.

In addition to the petition being out of time, I **CONCLUDE** that petitioner has not established irreparable harm. Therefore, since all four standards must be established to obtain emergent relief, petitioner does not satisfy the Crowe v. DeGioia standards and the Petition for Emergent Relief must be denied.

ORDER

It is hereby **ORDERED** that petitioner's application for emergent relief is **DENIED**. Based on the limited issue that the Bureau of Controversies and Disputes transmitted for consideration by the OAL, no other issues remain for this forum once the emergent matter is 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.

June 10, 2011
DATE

LISA JAMES-BEAVERS, ALJ

cmo

#257-11

AGENCY DKT. NO. 135-5/11

NICHOLAS CAPUANO, :

PETITIONER, :

V. :

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION ON MOTION

The pleadings, exhibits and motion papers having been reviewed, it appears that the parties have agreed to pursue the internal appeals process set forth in the constitution of the New Jersey State Interscholastic Athletic Association (NJSIAA). Consequently, the matter is not ripe for adjudication by the Commissioner of Education.

Accordingly, respondent's motion for summary decision is granted and the petition is dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/12/11

Date of Mailing: 7/13/11

[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)

258-11

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
JAMES RIEHMAN, STATE-APPOINTED MONITOR,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Board alleged that respondent improperly overturned the Board's decision to reject a proposed settlement of a lawsuit filed by an employee under the Conscientious Employee Protection Act (CEPA). The Board contended that the state-appointed monitor overstepped his authority under *N.J.S.A.* 18A:7A-54 *et seq.* – the School District Fiscal Accountability Act – which it claims limits the power of the monitor by assigning the Board the sole power to sue or be sued.

The ALJ found that: the sole question to be addressed in this matter is whether the respondent had the authority to override the Board's decision not to enter into a settlement agreement; the respondent's argument – that litigation has fiscal consequences and he is empowered by the School District Fiscal Accountability Act, *N.J.S.A.* 18A:7A-54 *et seq.* (SDFAA), to oversee all fiscal affairs of the district – is without merit, as under this construction of the SDFAA, the state monitor would have the power to overrule any non-procedural action by the board of education; this interpretation of the SDFAA renders indistinguishable the line between monitoring and the full state intervention allowed under *N.J.S.A.* 18A:7A-15 *et seq.*, which grants a State District Superintendent total authority over the operation of the school district; the respondent bases his authority to settle the lawsuit on the language of *N.J.S.A.* 18A:7A-53(b)(1), which affords the state monitor the authority to make "payment of bills and claims" but does not empower him to "settle" claims; and once a matter is in litigation, authority over the case's disposition arises from the power to sue – which is specifically and exclusively granted to the Board of Education under *N.J.S.A.* 18A:11-2(a). Accordingly, the ALJ concluded that the respondent overstepped his bounds when he overturned the Board's decision to reject the proposed settlement, and granted the Board's motion for summary decision.

Upon comprehensive review, the Commissioner concluded that the Monitor did not exceed his statutory authority under *N.J.S.A.* 18A:7A-55 when he overturned the Board's decision to reject the proposed settlement. In so deciding, the Commissioner found, *inter alia*, that: state monitors have the authority – pursuant to *N.J.S.A.* 18A:7A-55(b)(5) – to override a vote of the board of education in order to achieve fiscal stability; and the ALJ's reference to the power afforded to State District Superintendents under *N.J.S.A.* 18A:7A-15 *et seq.* is completely unrelated to the School District Fiscal Accountability Act and the statutory authority of state monitors. Accordingly, the Commissioner rejected the Initial Decision of the OAL and affirmed the decision of the Monitor to overrule the Board's rejection of the settlement agreement at issue 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 13. 2011

OAL DKT. NO. EDU 11454-10
AGENCY DKT NO. 539-9/10

BOARD OF EDUCATION OF THE CITY OF PLEASANTVILLE, ATLANTIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
JAMES RIEHMAN, STATE-APPOINTED MONITOR,	:	
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 James Riehman, State-Appointed Monitor ("Monitor").[1]

The Monitor submitted exceptions to support his contention that the Administrative Law Judge (ALJ) erroneously concluded that he did not have the authority to overturn the Board's decision to reject the settlement proposal in the Abdullah matter, which involved a Conscientious Employee Protection Act (CEPA) claim by a former employee. The Monitor first argues that the ALJ erroneously relied on *N.J.S.A.* 18A:11-2(a), which provides that the authority over a case's disposition in litigation is exclusively granted to the Board. The Monitor points out that *N.J.S.A.* 18A:11-2(a) in no way limits the authority of state monitors. Additionally, the ALJ failed to acknowledge that the Monitor was appointed because of the fiscal shortcomings of the district to provide direct oversight of the Board's business operations and to oversee the expenditure of school funds, which involves making decisions in litigation that could

[1] The Board submitted a letter stating that it had no exceptions and was instead relying on the Initial Decision.

result in significant financial exposure to the Board. In his exceptions, the Monitor also contends that the ALJ improperly analogized the State Intervention Statute and the powers afforded to the State District Superintendent with the State Monitor's Authority under the School District Fiscal Accountability Act, *N.J.S.A.* 18A:7A-54 *et seq.* ("Fiscal Accountability Act"). Finally, the Monitor argues that the ALJ's legal conclusion misinterprets the governing law; frustrates the purpose of the Fiscal Accountability Act; and overlooks legal precedents upholding the authority of state monitors.

Upon a comprehensive review of the record in this matter, the Commissioner finds that the Monitor did not exceed his statutory authority under *N.J.S.A.* 18A:7A-55 when he overturned the Board's decision rejecting the settlement proposal in the Abdullah matter. Pursuant to the Fiscal Accountability Act, the Commissioner is authorized to appoint a state monitor to oversee the fiscal management and expenditures of school district funds when an independent audit reveals the existence of certain financial shortfalls that are delineated in the Act. *N.J.S.A.* 18A:7A-55(a) and (b). Further, in order to achieve fiscal stability, state monitors have the authority to override a vote of the board of education. *N.J.S.A.* 18A:7A-55(b)(5).

In this case, trial counsel for the Board recommended that the Board approve a settlement in the amount of $225,000 to settle a claim filed by a former employee under the Conscientious Employee Protection Act. Under the settlement proposal, the Board would be required to pay $100,000 and its insurance carrier would pay $125,000. Trial counsel for the Board recommended the settlement based upon the issues that could compromise the Board's defense at trial, as well as the potential for a jury verdict of $500,000 or higher plus attorney's fees. Despite the trial counsel's recommendation, the Board voted to reject the settlement proposal and continue with the litigation. Based on his concern for the financial exposure to the

Board if the litigation were to continue, the Monitor overruled the Board's decision and authorized the settlement proposal. The Commissioner finds that the potential exposure for a high damages award in the $500,000 range for a school district that is plagued with financial shortcomings is a valid fiscal rationale for entering into a settlement that would essentially cost the Board $100,000. Therefore, the Commissioner finds that the Monitor's decision was related to the fiscal management of school funds, and thus falls within the statutory authority of a state monitor.

Additionally, the ALJ's reference to the power afforded to State District Superintendants under *N.J.S.A.* 18A:7A-15, *et seq.* is completely unrelated to the Fiscal Accountability Act and the statutory authority of state monitors; further, its mere existence is irrelevant to a determination as to whether a state monitor exceeded his authority in overruling a school board decision. Moreover, despite the ALJ's suggestion to the contrary, the Commissioner's finding that the Monitor did not exceed his authority in this case does not equate to a blanket determination that state monitors have the power to overrule all non-procedural actions by the Board.

Accordingly, the Initial Decision of the OAL is rejected; and the Monitor's decision to overrule the Board and to approve the settlement in the Abdullah case is hereby affirmed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7|13|11
Date of Mailing: 7|13|11

[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
(On Motions for Summary Decision)
OAL DKT. NO. EDU 11454-10
AGENCY DKT. NO. 539-9/10

BOARD OF EDUCATION OF
THE CITY OF PLEASANTVILLE,
ATLANTIC COUNTY,
Petitioner,
v.
JAMES RIEHMAN, FISCAL MONITOR,
Respondent.

Ronald C. Hunt, Esq., for petitioner (Hunt, Hamlin & Ridley, attorneys)

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

Record Closed: April 12, 2011 Decided: May 31, 2011

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

STATEMENT OF THE CASE

Petitioner, Board of Education of the City of Pleasantville (Board) alleges that respondent, State Monitor James Riehman (Monitor or Riehman) improperly overturned the Board's decision to reject a proposed settlement of a lawsuit filed by an employee under the "Whistleblower Act."

PROCEDURAL HISTORY

The appellant requested a fair hearing and the matter was filed at the OAL on October 20, 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 parties filed cross-motions for summary decision. Oral argument was heard on April 12, 2011, and the record closed.

SUMMARY OF THE RELEVANT FACTS

This matter comes before this tribunal on cross-motions for summary decision. The facts are not in dispute. Petitioner, Board of Education of the City of Pleasantville (Board), is a Board of Education organized under Title 18A of the New Jersey revised statutes. Respondent, James Riehman, is the State-appointed Monitor assigned to Pleasantville in accordance with the School District Fiscal Accountability Act, N.J.S.A. 18A:7A-54, et seq. (SDFAA).

On September 24, 2007, Tauheedah Abdullah filed a complaint against the Board in the Superior Court under the Conscientious Employee Protection Act (CEPA). On July 1, 2010, the Board's counsel, Lisa S. Grosskreutz, submitted a memorandum wherein she recommended that the matter be settled for the gross amount of $225,000. The Board of Education would be required to pay $100,000, and the Board's insurance carrier would pay the balance.

On July 27, 2010, the Board rejected the proposed settlement. On August 8, 2010, the Monitor issued a memorandum overturning the Board's action and approving the proposed settlement. The settlement was consummated in Superior Court and the money paid. The only question before me is the authority of the Monitor to overrule the Board's determination.

The Monitor bases his action on the provisions of N.J.S.A. 18A:7A-55(b)(1), which empowers him to:

> b. The State monitor shall:
>
> (1) oversee the fiscal management and expenditures of school district funds, including, but not limited to, budget reallocations and reductions, approvals of purchase orders, budget transfers, and *payment of bills and claims*;
>
> [Emphasis added]

The Monitor asserted that the lawsuit constituted a claim against the Board of Education. The Monitor contended that because the suit could have resulted in the imposition of a monetary judgment against the Board, he had the power to override the Board's decision to reject the proposed settlement.

It must be noted at this juncture that the wisdom of the Monitor's decision is not before me in these motions. The Board determined to ignore the advice of its counsel; the Monitor overrode that decision and accepted the advice of counsel. His decision may well have been prudent, but the question here is whether he had the authority to take that action.

In support of his interpretation, the Monitor cited two cases, Pleasantville Board of Education and Pleasantville Education Association v. State Department of Education, #A-2123-08T3 (App. Div. August 25, 2009) (Slip Op.). That case involved a reduction in force, an issue over which the Monitor clearly has oversight pursuant to N.J.S.A. 18A:7A-55(b)(4). Consequently, the issue in that case was substantially different from the one at bar.

The second case cited by the Monitor is Rankins v. Board of Education of the City of Pleasantville, EDU 6918-09, Initial Decision (August 3, 2010), rejected, Acting Comm'r. (Oct. 26, 2010) <http://lawlibrary.rutgers.edu/oal/search.html>. Rankins concerned the decision of the Monitor to terminate an employee over the objection of the Board of Education. Again, the issue in that case was covered by N.J.S.A. 18A:7A-55(b)(4), not N.J.S.A. 18A:7A-55(b)(1), and therefore has no bearing on the facts of this case. It should also be noted that Rankins is on appeal to the Appellate Division.

In support of its cross-motion, the Board relies upon the language of N.J.S.A. 18A:11-2(a), which states, in pertinent part, that the Board may:

> Sue or be sued by its corporate name and likewise submit to arbitration and determination disputes and controversies in the manner provided by law;

The Board argued that the plain language of N.J.S.A. 18A:11-2(a) ascribes to the Board and only the Board the power to sue or be sued. The Board contends that the absence of the specific power to sue or be sued in the SDFAA limits the power of the Monitor and leaves to the Board and the Board alone the power to sue or be sued, and, hence, the power to resolve litigation.

The Monitor countered by arguing that the litigation had fiscal consequences, and he is empowered by the SDFAA to oversee all fiscal affairs of the district. The problem with the Monitor's argument is that nearly every action taken by a Board of Education has fiscal consequences. Aside from a motion to approve the minutes of the previous meeting, a Resolution to appoint a president and a vice-president, and a motion to adjourn a public meeting, the Monitor's counsel was unable to delineate any action by a Board of Education that did not, in some manner, have a fiscal consequence. The Monitor's counsel conceded that, either directly or indirectly, all substantive actions by a Board of Education have fiscal consequences. Therefore, under the Monitor's construction of SDFAA, he has the power to overrule any non-procedural action by the Board of Education. In short, the Monitor's power over the district is limitless, and the Board of Education is little more than a cipher.

This construction of SDFAA might be reasonable were it not for the existence of N.J.S.A. 18A:7A-15, et seq. That legislation affords the Commissioner the power to engage in full state intervention. The statutory scheme empowers the State to appoint a State District Superintendent. The State's District Superintendent is granted total authority over the operation of the school district. The power of the State Monitor authorized under N.J.S.A. 18A:7A-54 theoretically differs from the level of authority afforded the State District Superintendent, but given that Monitor Riehman ascribes to

himself power over all fiscal matters, and given Riehman's acknowledgment that all actions by a Board of Education have fiscal ramifications, if Riehman's definition of his authority is accepted, then there would appear to be no dividing line between the State District Superintendent and the Monitor. Indeed, if Riehman's position is accurate, then the line between monitoring and full state intervention becomes indistinguishable.

Such was clearly not the intent of the statutory scheme. If the legislature had intended the Monitor to have the same powers as the State District Superintendent, it would have said so. By definition, the Monitor must lack the full powers of a State District Superintendent. The Monitor's authority must have some limit.

It is also significant to note that Riehman holds only a Business Administrator's Certificate. As such, his expertise lies fundamentally in the areas of economics, accounting and finance (N.J.A.C. 6A:9-12.7). He is required to have no concomitant expertise in educational leadership, an area of expertise considered essential for superintendents/chief school administrators charged with operating public schools (N.J.A.C. 6A:9-12.4). Consequently, to ascribe to Riehman the powers normally held by a Superintendent of Schools directly conflicts with the administrative scheme prescribed by the legislation.

In this case, the Monitor bases his authority to settle the lawsuit on the language of N.J.S.A. 18A:7A-53(b)(1). That statute affords the Monitor the authority to make "payment of bills and claims." The language of the statute does not authorize him to "settle" claims. Once a matter is in litigation, authority over the case's disposition arises from the power to sue. That power is specifically and exclusively granted to the Board of Education under N.J.S.A. 18A:11-2(a).

Accordingly, based upon the plain language of the statutory scheme, the Monitor overstepped his bounds when he overturned the Board's decision to reject the proposed settlement. The Board's motion for summary decision must be **GRANTED**, and the Monitor's motion must be **DENIED**. Again, it is important to emphasize that this

does not address the wisdom of the Monitor's decision, but only his authority to make that decision.

ORDER

I **ORDER** that summary decision be **GRANTED** in favor of petitioner, Pleasantville Board of Education.

I **ORDER** that Monitor James Riehman's motion for summary decision be **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.

5-31-11
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency: 5-31-11

Date Mailed to Parties: 5-31-11

sd

DOCUMENTS CONSIDERED

Petitioner's Motion for Summary Decision, with attachments

Respondent's Motion for Summary Decision, with attachments

Respondent's Brief in Response to Petitioner's Motion for Summary Decision

Petitioner's Letter Reply Memorandum in response to Respondent's Motion for Summary Decision

#259-11

V.W., on behalf of minor children, T.W. and T.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PITTSGROVE, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In February 2011, the petitioner filed a *pro se* residency appeal on behalf of his minor children, T.W. and T.W., contending that the family was homeless and that the last district of residency was Pittsgrove Township. On April 5, 2011, the Salem County Executive County Superintendent issued a determination that the family is homeless as of December 2010 and that Pittsgrove Township is the district of residence pursuant to *N.J.S.A.* 18A:38-1(f) and *N.J.S.A.* 18A:7B-12.1(c). Subsequently, the respondent Board requested a withdrawal of its counterclaim for tuition and instructed that the matter should be dismissed as moot. Petitioner did not answer his telephone for a telephone conference scheduled for May 23, 2011. Accordingly, the OAL returned the file to the Commissioner, and the petition was dismissed 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.

July 14, 2011

OAL DKT. NO. EDU 4030-11
AGENCY DKT. NO. 34-2/11

V.W., on behalf of minor children, T.W. and T.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PITTSGROVE, SALEM COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the 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 May 31, 2011, 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: 7/14/11

Date of Mailing: 7/15/11

[1] It is noted that, by letter dated April 19, 2011 to M. Kathleen Duncan, Director, Bureau of Controversies and Disputes, the Board withdrew its counterclaim for tuition in this 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).

260-11

OAL DKT. NO. EDU 1841-10
AGENCY DKT. NO. 27-2/10

A.E. on behalf of minor child, M.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT	:	

The record in this matter, the proposed Settlement Agreement (Settlement), a resolution by respondent authorizing the 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 and adopts the Initial Decision as the final decision in this case, with the following observation.

Section 4 of the Settlement references 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 petition and respondent's counter-claims are hereby dismissed, subject to compliance with the settlement terms.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/14/11

Date of Mailing: 7/15/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01841-10
AGENCY DKT. NO. 27-2/10

A.E. ON BEHALF OF M.E.,
Petitioner,
v.
WAYNE BOARD OF EDUCATION,
PASSAIC COUNTY,
Respondent.

James J. Frega, Esq., for petitioner

John E. Croot, Esq., for respondent

Record Closed: May 25, 2011 Decided: May 31, 2011

BEFORE **LELAND S. MCGEE,** ALJ:

This matter was transmitted to the Office of Administrative Law March 5, 2010 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.

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.

May 31, 2011
DATE

LELAND S. MCGEE, ALJ

Date Received at Agency: 6-3-11

Date Mailed to Parties: JUN - 3 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2011 MAY 25 A 9:02

SCHWARTZ SIMON EDELSTEIN
& CELSO LLC
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, NJ 07962
(973) 301-0001
Attorneys for Respondent
Wayne Township Board of Education

A.E. o/b/o M.E., Petitioner, vs. Board of Education of the Township of Wayne, Passaic County, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION AGENCY REF. NO.: 27-2/10 OAL DOCKET NO.: EDUOS 01841-2010N ADMINISTRATIVE ACTION SETTLEMENT AGREEMENT

WHEREAS, a residency investigation conducted by the Wayne Township Board of Education (hereinafter referred to as "the Board") concluded that pupil M.E. was not legally domiciled in Wayne; and

WHEREAS, a residency hearing concerning pupil M.E was held before the Wayne Board of Education on January 14, 2010; and

WHEREAS, on that date the Board of Education adopted a resolution that M.E. be removed from the Wayne School District ("District"); and

WHEREAS, A.E., the father of M.E., filed a petition of appeal with the Commissioner of Education and the Board filed an Answer and a Counterclaim for tuition; and

WHEREAS, the appeal was transferred to the Office of Administrative Law; and

Apr-05-2011 01:01pm From-JOSEPH C PERCONTI ESQ +9784273172 T-687 P.001/004 F-215
Apr. 5 2011 01:00pm

WHEREAS, the appeal was scheduled for a settlement conference on March 24, 2011 before the Hon. Leland S McGee, OAL; and

WHEREAS, the Board claimed it was owed $32,000.00 in tuition, fees and costs through April 1, 2011; and

WHEREAS, the parties conferred and agreed to a settlement of the matter; and

WHEREAS, the terms of the settlement were placed on the record on March 24, 2011; and

WHEREAS, the parties desire to have the terms of the settlement memorialized in a written agreement.

NOW, THEREFORE, it is hereby agreed by and between the parties as follows:

1. A.E. will dis-enroll M.E. from the District on or before April 1, 2011.

2. A.E. acknowledges that the Board is not responsible for M.E.'s education or any related services

3. M.E. has no right to be re-enrolled in the District without proof of proper domicile.

4 The parties have agreed to settle the Counterclaim for the sum of $17,000.00, payable by A.E. to the Board as follows:

- $7,000.00 by April 30, 2011,
- $2,500.00 by May 30, 2011,
- $2,500 00 by June 30, 2011,
- $2,500.00 by July 30, 2011, and
- $2,500.00 by August 30, 2011.

5. If any payment is not made on time, following a seven (7) day grace period, A.E. consents to the entry of judgment against him in the Superior Court of New Jersey for the full claimed amount of $32,000.00, less any sums already paid. A.E. waives the issuance and service

Apr-05-2011 01:01pm From-JOSEPH C PERCONTI ESQ +9734273172 T-687 P.002/004 F-215

of process in any action brought to enter judgment in this matter and consents to the entry of judgment without further notice.

6. If M.E. remains enrolled in the District after April 1, 2011, A.E. will also be responsible for pro-rated tuition for the balance of the 2010-2011 school year. Payment for any such additional tuition will be due by September 30, 2011. In any event, M.E. will be dis-enrolled from the District by June 30, 2011 at the latest.

5. This Agreement represents the entire agreement between the parties and will not be modified, in whole or in part, except by a subsequent mutual written and signed agreement.

6. 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 choice.

7. Anthony J. Enrico, Jr. ("A.E.") acknowledges that this Agreement constitutes a full and final settlement as to all issues and he agrees, in consideration for the terms hereof, to release the Board and its members, agents, servants and employees from any and all claims which were or could have been raised to date.

8. This settlement is subject to formal approval by the Board at its next regular meeting.

WAYNE TOWNSHIP BOARD OF EDUCATION

Date: 4/7/11 **By:** _____
Robert Ceberio, Board President

Date: 4/4/11 _____
Anthony J. Enrico, Jr., Individually and o/b/o M.E.

Apr-05-2011 01:01pm From-JOSEPH C PERCONTI ESQ 4973427317Z T-687 P.003/004 F-215

STATE OF NEW JERSEY)
SS:
COUNTY OF PASSAIC)

I CERTIFY that on April 4, 2011, Anthony J. Enrico, Jr., Individually and n/b/o M.E., personally came before me and acknowledged under oath, 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 at Law/Notary Public

(1 Document)

Apr-05-2011 01:01pm From-JOSEPH C PERCONTI ESQ +8734273172 T-687 P.004/004 F-215

Public School District
Wayne
50 Nellis Drive Wayne, New Jersey 07470

APR 11 2011

Administrative Offices
www.wayneschools.com
Phone: 973.633.3000

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK.

The Board of Education of the Township of Wayne in the County of Passaic, New Jersey, convened in a PWS Meeting on April 7, 2011 in the Wayne Board of Education Administration Building Conference Room, 50 Nellis Drive, Wayne, New Jersey 07470. This meeting was scheduled to begin at 7:00 p.m. pursuant to the terms of the Sunshine Law.

The following members of the Wayne Board of Education were present: R. Ceberio, D. Pavlak, Jr., F. Mazzei, J. Hutchison, M. Badiner, D. Del Sardo, J. Walsh, J. Jimenez, and A. Mordkoff

PS-61-11 – Approval of Settlement Agreement with of A.E. o/b/o M.E. – **RECOMMENDED ACTION:** "that the Board approve a Settlement Agreement with A.E. o/b/o M.E., as per attached."

MOTION: **D. Pavlak, Jr.**
SECOND: **M. Badiner**
VOTE: **9-0**

STATE OF NEW JERSEY)
COUNTY OF PASSAIC) ss:

I, Juanita A. Petty, School Business Administrator, Wayne Board of Education of the Township of Wayne, in the County of Passaic, State of New Jersey, hereby verify that the foregoing extract from the minutes of the meeting of the Wayne Board of Education, duly called and held on April 7th, 2011 has been compared by me with the original minutes as officially recorded in my office in the minute book of said Wayne 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 the Wayne Board of Education this 8th day of April 2011.

SEAL

Juanita A. Petty, RSBA
School Business Administrator/Board Secretary

JAP:plc

261-11

OAL DKT. NO. EDU 4187-10
AGENCY DKT. NO. 83-4/10

ANTHONY W. BROCCO, II,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this matter, the proposed Stipulation of Settlement and Release (Settlement), a resolution by respondent authorizing the 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 notes the following.

First, Section 6 of the Settlement appears to 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. Second, with regard to Sections 2 and 11, the parties may not confer upon the Commissioner jurisdiction to construe and enforce settlement contracts where such jurisdiction does not otherwise exist.

Accordingly, the Commissioner approves the settlement subject to the above articulated qualifications and provided that the parties have either successfully implemented the settlement terms in Section 6, or have agreed upon mutually satisfactory alternate dates for the

effectuation of same. Assuming the foregoing, the petition and respondent's counter claims are hereby dismissed, subject to compliance with the settlement terms.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7|15|11

Date of Mailing: 7|15|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.EDU 4187-10

AGENCY DKT. NO. 83-4/10

ANTHONY W. BROCCO, II,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,

Respondent.

Matthew B. Wieliczko, Esq., for petitioner (Zeller & Wieliczko, attorneys)

Paul H. Green, Esq., for respondent (Schenck Price Smith & King, LLP, attorneys)

Record Closed: May 13, 2011 Decided: May 27, 2011

BEFORE **DENNIS P. BLAKE**, ALJ:

This matter was transmitted to the Office of Administrative Law on April 28, 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. Prior to the hearing scheduled for April 26, 2011, the parties reached a settlement, which was submitted to the OAL on May 13, 2011.

The parties 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 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.

May 27, 2011
DATE

DENNIS P. BLAKE, ALJ

Date Received at Agency: JUN - 3 2011

Date Mailed to Parties: JUN

/mev

EXHIBITS

Jointly Submitted

Settlement Agreement

Resolution

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

2011 MAY 13 A 11:51

Anthony W. Brocco, II, *Petitioner*, v. Board of Education of the Township of Cherry Hill, *Respondent*.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY / OFFICE OF ADMINISTRATIVE LAW Agency Ref. No. 83-4/10 OAL Docket No. EDU 04187-2010S **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. The respondent Board of Education will appoint petitioner to a paid extracurricular position of Assistant Football Coach at Cherry Hill High School East for the 2011-2012 school year.

2. For the 2012-2013 school year, provided that the Cherry Hill School District continues to have a varsity football program, petitioner will be considered a qualified in-District candidate for a paid extracurricular position of Assistant Football Coach at Cherry Hill High School West should he apply for same and will have priority over any out-of-District candidates for such a position, on the condition that between October 18, 2010 and the time of the District's consideration of his application for the position petitioner has not committed any misconduct which would constitute a disqualifying act or actions for appointment to the position. In the event

the Board declines to appoint petitioner to the position on such ground, Petitioner shall have the right, through the Cherry Hill Education Association, to submit to binding arbitration pursuant to the collective negotiation agreement grievance procedure the question whether the particular conduct at issue constitutes just cause for the Board's refusal to so appoint petitioner. If the Cherry Hill Education Association refuses to pursue binding arbitration on Petitioner's behalf, he shall have the right to seek relief by filing an action with the Commissioner of Education. In the event that it is determined in either venue that the alleged act or actions were not disqualifying for purposes of appointment to the position, petitioner shall receive a payment equal to the assistant football coaching stipend, level 4, for the 2012-2013 school year.

3. In considering any future coaching position applications by petitioner, the School District will not consider any allegations of misconduct or poor judgment occurring prior to October 18, 2010.

4. The Board will not involuntarily transfer petitioner to a position at Cherry Hill High School East for the 2011-12 school year.

5. In the event petitioner subsequently determines that he does not wish to accept the Assistant Football Coach position at High School East for the 2011-12 school year, such decision shall be without prejudice to the terms agreed upon herein with respect to the Assistant Football Coach position at High School West for the 2012-13 school year.

6. Petitioner will consult with the Cherry Hill Education Association in January, 2011 for the purpose of having the Education Association assist in coordinating with the High School East football coaching staff for petitioner's preliminary participation in that school's football program for the period January through May, 2011.

7. Each party hereby releases the other from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial or quasi-judicial proceedings of any kind whatsoever, which have been or could have been brought, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the actions giving rise to the within controversy, except as may be necessary to enforce the terms of this Stipulation.

8. This Stipulation shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose. Each party shall be responsible for his or its own attorney fees.

9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and all terms of this Stipulation are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby agrees to a dismissal, with prejudice, of his Petition of Appeal in this matter.

11. The parties understand and agree that to the fullest extent permitted by law they will not disclose or cause to be disclosed the nature, terms, or substance of this settlement for any reason or purpose whatsoever to any person. Notwithstanding the foregoing, the parties are permitted to disclose the nature, terms, or substance of this settlement or to furnish a copy of this Stipulation: (1) where required to do so by applicable law; (2) as is necessary in the course of preparing and filing of income tax returns; (3) with the prior consent of the other party to this agreement; (4) pursuant to Court Order after reasonable prior notice is provided to the other party to this agreement; (5) as may be necessary in conjunction with potential or actual employment with

another employer. The parties also shall not disparage each other in public or private communications. In the event petitioner directly breaches the confidentiality provisions of this paragraph, the Board shall have the right to decline to appoint him to the positions referenced in this Stipulation. In the event the Board declines to appoint petitioner to the position on such ground, Petitioner shall have the right, through the Cherry Hill Education Association, to submit to binding arbitration pursuant to the collective negotiation agreement grievance procedure the question whether petitioner knowingly breached the confidentiality clause of this Paragraph 11. If the Cherry Hill Education Association refuses to pursue binding arbitration on Petitioner's behalf, he shall have the right to seek relief by filing an action with the Commissioner of Education. In the event that it is determined in either venue that the petitioner did not directly breach the confidentiality provisions of this paragraph, the petitioner shall receive a payment equal to the assistant football coaching stipend at the applicable level for the school year in which he was not appointed.

12. This Agreement shall be incorporated into an Initial Decision by the Honorable Dennis Blake, ALJ, which shall be subject to approval and adoption by the Commissioner of Education.

IN WITNESS WHEREOF, the parties have executed this Stipulation on the dates set forth below.

PETITIONER

Anthony W. Brocco, II

WITNESS:

Joan E Young

DATED: 4-15-11

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL

By: Seth Klukoff, President

ATTEST:

By: James Devereaux
James Devereaux
Asst. Supt. Business – Bd. Secy.

DATED: 5-4-11

Cherry Hill Public Schools

Malberg Administration Building
45 Ranoldo Terrace, P.O. Box 5015
Cherry Hill, NJ 08034
(856) 429-5600
Fax (856) 354-1864

ACTION AGENDA
April 26, 2011

C. HUMAN RESOURCES/NEGOTIATIONS

ITEM 11. APPROVAL OF STIPULATION OF SETTLEMENT

RECOMMENDATION:

Resolved that the Board approve the stipulation of settlement in the administrative proceeding pending in the Office of Administrative Law under Docket #EDU 04187-2010S, and authorizes its President and Secretary to execute same on behalf of the Board.

Motion Mrs. Judge Second Mrs. Cohen Vote Ayes - 9 No - 0

This is to certify that the above is a true and correct copy of the recommendation adopted by the Cherry Hill Township Board of Education at its regular action meeting held on April 26, 2011.

James Devereaux
Asst. Supt., Business/Board Secretary

Cecilia Rosado
Notary Public 5/17/2011
Commission Expires 5/3/16

#262-11

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF SABINA SIERPOWSKI, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

In November 2008, the Elizabeth School District filed a petition requesting that the teaching certificate of respondent be suspended pursuant to *N.J.S.A.* 18A:26-10 for failure to honor the terms of her employment agreement with the district. In December 2008, an Order to Show Cause was served upon respondent – a non-tenured teacher – requiring her to show cause why her teaching certificate should not be suspended for resigning her position as a teacher of mathematics less than 10 days before the start of the 2008-2009 school year, and less than three days before the district's new teacher orientation.

The ALJ found that: the purpose of *N.J.S.A.* 18A:26-10 is to provide notice to the school district that a member of its teaching staff will not complete the terms of his or her teaching agreement, thereby allowing the district time to arrange for a suitable replacement without adversely impacting students; at no time in this matter did the district consent to relieving respondent of her contractual duties; and, accordingly, the respondent unilaterally breached her employment contract with the district. The ALJ concluded that this action constitutes unprofessional conduct warranting a one-year suspension of respondent's teaching certificates.

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. Accordingly, respondent's certificate was suspended for a period of one year from the date of the filing of this decision – a copy of which was forwarded to the State Board of Examiners for the purpose of effectuating this order.

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 14, 2011

OAL DKT. NO. EDU 1031-09
AGENCY DKT. NO. 354-12/08

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF SABINA SIERPOWSKI, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

Review of the record of this matter and Initial Decision of the Office of Administrative Law[1] reveals that respondent failed to honor the contract into which she entered to teach mathematics in petitioner's district during the 2008-2009 school year. It was stipulated that respondent executed the contract on July 26, 2008 and that she was to report for new-teacher orientation on August 28, 2008. On August 25, 2008 respondent advised petitioner that she would not report for duty, and refused to teach for sixty days or until such time as a replacement could be secured. The parties agree that summary disposition is appropriate.

The Commissioner concurs with the determination of the Administrative Law Judge that respondent violated *N.J.S.A.* 18A:26-10, and that the circumstances warrant suspension of her teaching certificate for one year. Accordingly the Commissioner adopts the Initial Decision as the final decision in this case and herewith forwards same to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/14/11
Date of Mailing: 7/15/11

[1] No exceptions were filed by 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)

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 1031-09
AGENCY DKT. NO. 354-12/08

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF SABINA SIERPOWSKI, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.

Marvin Lehman, Esq., for petitioner School District of the City of Elizabeth, Union County

Nancy I. Oxfeld, Esq., for respondent Sabina Sierpowski (Oxfeld Cohen, attorneys)

Record Closed: April 4, 2011 Decided: June 3, 2011

BEFORE **CARIDAD F. RIGO,** ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 6, 2008, the Elizabeth School District filed a petition with the Commissioner of Education of the State of New Jersey requesting that the teaching certificate of respondent, Sabina Sierpowski, be suspended for unprofessional conduct

in accordance with N.J.S.A. 18A:26-10 for failure to honor the terms of her employment agreement with the district.

On December 1, 2008, the Commissioner signed an Order to Show Cause requiring respondent to show cause why an order should not be entered suspending her teaching certificate. On or about December 17, 2008, respondent filed an answer to the Order to Show Cause, contesting the matter. On or about January 14, 2009, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case. On or about February 8, 2011, at a pre-hearing conference the parties agreed to a Stipulation of Facts and agreed that the case would proceed on a summary basis.

ISSUES

Did respondent engage in unprofessional conduct within the meaning of N.J.S.A. 18A:26-10? If so, should respondent's teaching certificate be suspended for one year?

STIPULATED FACTS

1. At the July 17, 2008, meeting of the Elizabeth Board of Education, respondent was appointed as Teacher–Mathematics at Elizabeth High School–Halsey House, effective September 1, 2008. (Exhibit 1.)

2. On or about July 17, 2008, Superintendent Pablo Munoz sent a letter to respondent stating that respondent "was appointed as Teacher–Mathematics, Elizabeth High School–Halsey House, effective September 1, 2008, during the pleasure of the Board." (Exhibit 2.)

3. On or about July 26, 2008, respondent signed and returned the letter with the marking of an "X" next to the sentence that stated: "I accept appointment as designated above." (Exhibit 3.)

4. On or about August 25, 2008, Superintendent Munoz received two different letters from respondent. One letter states: "Unfortunately, I can not work for

Elizabeth High School–Halsey House due to personal reasons." In the other letter, respondent stated: "I am requesting for you to release me from my contract with your school district." (Exhibits 4A and 4B.)

5. The Elizabeth School Board did not approve the request in her letter dated August 25, 2008. (Exhibits 4A and 4B.)

6. Respondent did not report to work on August 28, 2008, for new-teacher orientation.

7. Respondent did not report for the opening of the new school year on September 2, 2008.

8. Respondent holds two teaching certificates: a) elementary teacher with mathematics specialization; and b) teacher of mathematics.

9. On December 5, 2008, petitioner sent an Order to Show Cause and supporting certifications to the Commissioner of Education seeking to have respondent's teaching certificate suspended pursuant to N.J.S.A. 18A:26-10.

LAW AND ANALYSIS

The parties have agreed to the underlying material facts, and there is an agreement that no genuine issue of material fact exists. Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995). And, the parties have agreed to proceed on a summary basis. I therefore find this matter ripe for summary decision.

The applicable statute for this case is N.J.S.A. 18A:26-10, which provides in pertinent part as follows:

> Any teaching staff member employed by a board of education or an approved private school for the disabled, 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.

The purpose of N.J.S.A. 18A:26-10 is to provide notice to the school district that a member of its teaching staff will not complete the terms of the teaching agreement, thereby providing the district with time to arrange for a suitable replacement without adversely impacting students. The ultimate objective is to protect the students. Penns Grove-Carneys Point Bd. of Educ. v. Leinen, 94 N.J.A.R.2d (EDU) 405, 407.

Here, respondent entered into an employment contract for a school term set to begin September 1, 2008. Respondent was appointed to the position on July 17, 2008, and she accepted the position on July 26, 2008. She resigned by letter dated August 25, 2008, less than ten days before the start of school and less than three days before the new-teacher orientation. And, at no time did she receive the consent of the district relieving her of her contractual duties. I **FIND** that respondent unilaterally breached her employment contract with the district, and I **CONCLUDE** that such action constitutes unprofessional conduct.

Petitioner seeks a one-year suspension of respondent's teaching certificate, and cites multiple cases in support of such action. Prior precedent can be summed up as follows: Generally, the Commissioner of Education has imposed the full one-year suspension of a teaching certificate for leaving a district without adequate notice. Only in rare circumstances has the Commissioner seen fit to lessen the suspension period. When a suspension period has been for less than one year it has been for compelling reasons, or there have been significant mitigating factors justifying a lesser suspension. Alpine Bd. of Educ. v. Yuz, EDU 1116-06, Initial Decision (July 17, 2008), adopted, Commissioner of Education (September 23, 2008) <http://lawlibrary.rutgers.edu/oal/search.shtml>.

In this matter, respondent has not provided any compelling reason(s) or mitigating factors as to why her teaching certificate should not be suspended for one year. Respondent simply stated that she could not work for the Elizabeth School

District due to personal reasons, and the record is devoid of any explanation of those personal reasons. Respondent's action constitutes unprofessional conduct, and I **CONCLUDE** that her unprofessional conduct warrants a one-year suspension.

ORDER

It is hereby **ORDERED** that the teaching certificate of respondent, Sabina Sierpowski, is suspended for a period of one 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.

June 3, 2011
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency:

Date Mailed to Parties: JUN - 6 2011
lr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

EXHIBITS

Joint exhibits:

Exhibit 1	Letter of Appointment dated July 17, 2008
Exhibit 2	Letter offering teaching position dated July 17, 2008
Exhibit 3	Letter dated July 26, 2008, from respondent accepting appointment
Exhibit 4A	Letter dated August 25, 2008, from respondent asking to be released
Exhibit 4B	Letter dated August 25, 2008, from respondent asking to be released

263-11E

263-11

OAL DKT. NO. EDU 06301-11
AGENCY DKT. NO. 139-6/11

BOARD OF EDUCATION OF THE TOWN OF BELVIDERE, WARREN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
ROBERT BLUM,	:	APPLICATION FOR EMERGENT RELIEF
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 for the fact-specific analysis required by *Board of Education of the City of Sea Isle City, Cape May County v. Kennedy*, 196 *N.J.* 1 (2008) and other such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/14/11
Date of Mailing: 7/15/11

* 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
EMERGENT RELIEF
OAL DKT. NO. EDU 06301-11
AGENCY DKT. NO. 139-6/11

BOARD OF EDUCATION OF THE
TOWN OF BELVIDERE, WARREN COUNTY,
Petitioner,
v.
ROBERT BLUM,
Respondent.

John E. Croot, Esq., for petitioner (Schwartz, Simon, Edelstein & Celso, attorneys)

George M. Holland, Esq., for respondent (Lentz and Glengaro, attorneys)

BEFORE **EVELYN J. MAROSE**, ALJ:

In this request for Emergent Relief, petitioner, the Board of Education of the Town of Belvidere (BOE) seeks an order immediately suspending respondent, Robert Blum (Blum) from his position on the Board of Education of the Town of Belvidere pursuant to N.J.S.A. 18A:12-2. Respondent asserts that the BOE has not satisfied the requirements necessary to obtain emergent relief.

On June 28, 2010, Blum and his wife filed a Request for Mediation with the New Jersey Department of Education, Office of Special Education, on behalf of their son, B.B. The Request for Mediation was converted into a Petition for Due Process. On December 16, 2010, the day scheduled for a plenary hearing, the parties entered into a Settlement Agreement, which resolved the issues raised in the Petition for Due Process with the exception of legal fees and costs. On April 11, 2011, Blum and his wife filed a complaint in the United States District Court for the District of New Jersey, seeking to recover legal fees and costs from the BOE related to the special education matter. The complaint for attorney's fees is pending.

On April 27, 2011, Blum was elected to the BOE for a three-year term. On May 3, 2011, prior to Blum being sworn into office, the attorney for the BOE notified Blum's counsel that Blum's complaint for legal fees and costs "appeared to present a conflict of interest." The BOE attorney suggested that Blum either forego membership on the BOE or dismiss the complaint. Blum declined to either forego his membership on the BOE or dismiss his complaint, but offered to excuse or recuse himself from any decisions that might affect his complaint for fees and costs, which totals approximately $14,428.

Blum was sworn into office as a member of the BOE at the organization meeting on May 4, 2011. On June 2, 2011, a Verified Complaint to disqualify Blum from serving on the BOE, pursuant to N.J.S.A. 18A:12-2 was filed, along with this Motion for Emergent Relief, to immediately suspend Blum from his position pending a full hearing on the merits of permanent removal.

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.

Emergent relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra, 90 N.J. at 132. The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. "The requisite for injunctive relief requires a 'clear showing of immediate irreparable injury,' or a 'presently existing actual threat; [emergent relief] 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.'" Continental Group v. Amoco Chemicals Corp., 614 F.2d 351, 359 (D.N.J. 1980) (citations omitted).

A person may be disqualified from serving on a board of education pursuant to N.J.S.A. 18A:12-2, which provides:

> No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor, in the case of local and regional school districts, shall he hold office as mayor or as a member of the governing body of a municipality, or in the case of county special services school districts and county educational school districts, shall he hold office as a member of the governing body of a county.

In Board of Education of City of Sea Isle City v. Kennedy, 196 N.J. 1 (2008), the Court considered whether a school board member was properly removed from office because his petitions to the school board on behalf of his child constituted an impermissible interest in a claim against the board. The Court held that not all controversies and disputes that may erupt between a local school district and a parent who is also a sitting board member concerning the special education program for a member's own child should require the member's removal from office. Id. at 4. Further,

not all claims against a board in which a board member has an interest constitute a "substantial conflict requiring removal from office as the sole remedy." Id. at 6.

> The line between acceptable and prohibited activities by a board member may be resolved throught the prism of a fact-specific inquiry. That inquiry should assess whether there are substantial and deeply antagonistic interests that would call into question a board member's . . . ability to perform his or her office.
>
> [Id. at 7.]

When disputes arise between parents of a handicapped child and a school board, the court should consider that the board and the parents have a common interest in resolution of an appropriate education for the child. Because not all claims result in a substantial conflict, "board members who have handicapped children should not have to fear the loss of their elected office as a condition of questioning, or if necessary pursuing through the initiation of proceedings, the appropriateness of the child's education." Id. at 37. "The Commissioner should review the claim and determine whether it portends the likelihood of protracted and intractable litigation between the parties." Id. at 38. Although the Court requires that the Commissioner examine the nature of the dispute and establish a more careful and fact-specific explanation of when a conflict over a child's educational program become so substantial that removal from office is required, it [the Court] finds that when a due process claim includes "a request for a specific, significant monetary relief, a line has been crossed and a substantial conflict can be found to exist." Id. at 38-39 (emphasis added).

In this matter, after hearing the arguments of petitioner and respondent and considering all documents submitted, I **FIND** that the BOE has not met all four prongs necessary for emergent relief. As noted in the above cited law, pursuant to N.J.S.A. 18A:12-2, a board member may be disqualified for office. However, as detailed in Kennedy, if the conflict is between a member who is a parent and the board, the Commissioner should examine the nature of the dispute and establish a more careful and fact-specific explanation of why removal from office is required. Kennedy, supra, 196 N.J. at 38-39.

While the Court found in Kennedy that if there was a request for a specific, significant monetary relief, a line had been crossed and a substantial conflict could be found to exist; only one of the cited cases relied upon by petitioner concerns a demand limited to attorneys' fees. See Bd. of Educ. of the Borough of Palmyra v. Marinnie, EDU 2611-05, Initial Decision (April 26, 2005), <http://lawlibrary.rutgers.edu/oal/search.html> (the board member's nineteen-year-old son asserted that the BOE did not have the curriculum as required by New Jersey law and that this failure caused him to lack the proper prerequisite courses for NCAA eligibility. The son was seeking approximately one million dollars in damages); Bd. of Educ. of the Borough of Berlin v. Lee, EDU 6050-01, Initial Decision (April 29, 2002), <http://lawlibrary.rutgers.edu/oal/search.html> (the board member and her husband filed a notice of claim on behalf of their children seeking reimbursement for medical bills which were accruing and would continue to accrue into the future, plus damages for mental anguish, mental distress, humiliation, pecuniary loss, and $25,000 in compensatory damages. The amount sought for medical had the potential to be substantial. Only six weeks after the incident that gave rise to the claim, $1,300 in medical expenses had already been incurred); Bd. of Educ. of Cedar Grove Twp. v. Tully, EDU 11663-06, Initial Decision (March 21, 2007), <http://lawlibrary.rutgers.edu/oal/search.html> (the board member himself asserted serious and permanent injures and unliquidated personal damages allegedly caused by the BOE's failure to properly maintain the seating area around the high school football field).

Only one case cited by petitioner concerns a request for attorney's fees and costs, Hogan v. Kearny Board of Education, 1982 S.L.D. 329, affirmed, 1982 S.L.D. 354. In that matter, while the Commissioner found that a request for attorney's fees could possibly lead to disqualification, a claim for attorney's fees did not automatically disqualify a person from running or sitting on the board. I **FIND** that the BOE did not meet the second and third prongs for emergent relief since under some circumstances a board member may sit on a BOE while being involved in a dispute regarding his child's educationl program and the BOE has not proven the likelihood that it will prevail in this matter, where the sole issue between the parties is a claim for fees and costs.

The BOE also did not present any credible evidence that it would suffer greater harm than Blum if emergent relief were granted. Blum was elected to the BOE for a three-year term this April. If removed from office immediately, with certainty, he will lose a significant part of his term. In contrast, the BOE represented no credible evidene that the BOE would be harmed if Blum were to remain on the board. While the BOE argued that if Blum were on the board, he might inhibit free exchange of information, it presented no credible evidence of an immediate, actual harm that it would suffer and no rationale as to why any action that Blum participated in would be invalidated in the future. As noted above, the possibility of a future remote injury is insufficient. Further, pending a resolution of his entitlement to serve, Blum has agreed to excuse or recuse himself from any decisions that affect his suit for attorney's fees. I therefore **FIND** that the BOE has also not met the first and fourth prongs for emergent relief since the BOE has not presented any credible evidence that it will suffer any irreparable harm if Blum remains on the board pending a full hearing of the request for his removal, and it has not proven that, 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.

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) and is not entitled to emergent relief.

ORDER

I hereby **ORDER** that the petitioner's request for an Order immediately suspending respondent from serving on the board, pending a full hearing on the merits is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **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 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.

June 14, 2011

DATE

EVELYN J. MAROSE, ALJ

sej

286-11

#286-11

JENNIFER DeKENIPP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In July 2010, petitioner – employed at that time as a tenured teacher in the district – filed an appeal of the respondent Board's rescission of a previously granted discretionary extension of maternity/child care leave for the 2010-2011 school year. On August 6, 2010, respondent sent petitioner a letter requesting that she notify the Board of whether she intended to return to the district in September or resign her position. Emergent relief was denied in this matter on August 10, 2010 and on the same day, petitioner submitted a letter of resignation. Subsequently, in the course of this matter, petitioner claimed that her resignation was under duress or stressful circumstances, and therefore should be rescinded. Respondent Board sought to have petitioner's appeal dismissed because she voluntarily resigned her position.

The ALJ found, *inter alia,* that: petitioner's resignation was not made under duress, but rather was a reasoned decision made in order to spend more time with her child and, therefore, the resignation was binding; petitioner relinquished any rights she had as a teaching staff member upon resignation, thereby rendering the instant proceedings moot; the petitioner did not have a vested right to the extended maternity leave once it was granted, as the board retained the right to reconsider this exercise of discretionary power; and petitioner has not demonstrated that the Board's discretionary exercise of power was arbitrary, capricious or unreasonable. Accordingly, the ALJ dismissed the appeal.

The Commissioner concurred with the ALJ that petitioner lost her standing to prosecute the instant appeal when she resigned from the Board's employ on August 10, 2010, and found petitioner's arguments regarding invalidation of the resignation unpersuasive. Accordingly, the Commissioner concluded that: there is no basis for rescinding petitioner's resignation; petitioner consequently has no standing to prosecute the instant appeal; and it is therefore not necessary to consider the merits of petitioner's arguments challenging the validity of respondent's rescission of its discretionary grant of extended child care leave. The petition was therefore 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.

July 15, 2011

OAL DKT. NO EDU 7786-10
AGENCY DKT. NO. 166-7/10

JENNIFER DeKENIPP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner instituted this appeal challenging respondent's rescission of a child care leave extension that had initially been granted to her. A second and overriding issue was created when petitioner resigned from her employment in respondent's district. After 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 the appeal must be dismissed.

At the outset, the Commissioner concurs with the ALJ that petitioner lost her standing to prosecute the instant action when she resigned from employment with respondent on August 10, 2010. Petitioner's arguments urging invalidation of the resignation are unpersuasive.

Petitioner urges in her exceptions that her resignation should be deemed invalid because she resigned under duress caused by the threat of tenure charges. The ALJ, however, did not find this aspect of petitioner's testimony to be credible. (Initial Decision at 6-7) Consequently, in conducting his independent review of the record, the Commissioner took into account the established principle that he may not reject credibility findings unless they are

arbitrary, capricious, unreasonable or not supported by the record, *see, N.J.S.A.* 52:14B-10C; *N.J.A.C.* 1:1-18.6(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 concludes from his review that there is no basis to disturb the ALJ's finding that petitioner's resignation flowed not from fear of tenure charges, but from a strong preference for remaining at home with her young children for an extra year.

More specifically, the record reveals that petitioner was notified of the rescission of her extended child-care leave on May 11, 2010, three and one-half months before the date on which she was expected to report for duty. Because she wished to spend an additional year with her children, she instituted the present appeal and did not make the alternate arrangements that would have been necessary for her to return to work.

On August 6, 2010, respondent wrote to petitioner, reminding her that: 1) her extended leave had been rescinded; 2) she had been sent a contract for the 2010-11 school year, which was supposed to have been returned by July 15, 2010; 3) respondent needed a response from her in order to prepare for staffing needs; 4) her continued failure to respond could be interpreted as an abandonment of position or as insubordination; and 5) failure to respond within five business days could lead to tenure charges. (Petitioner's Exhibit P-50) It is this letter that petitioner characterizes as the threat which caused her to resign under duress.

The Commissioner declines to accept this characterization. Respondent had determined that it was in the best interest of its district not to grant extended child care leave, had so notified petitioner in mid-May 2010, and had tendered to petitioner a contract to teach during the 2010-2011 school year, which contract was supposed to have been executed and returned by mid-July. Over three months after notifying petitioner of the rescission of extended leave, and

shortly before the commencement of the 2010-11 school year, respondent had not received a signed contract from petitioner and did not know whether she would report for work. As a practical matter, it was reasonable for respondent to send petitioner the August 6, 2010 letter urging her to reveal her intentions and putting her on notice of the consequences that continued inaction might engender.

When – on August 10, 2010 – petitioner's emergent application for an order allowing her leave during the pendency of this litigation was denied, it was incumbent upon her to decide whether to return to work. Since respondent was not willing to approve extended leave, a decision not to return to work meant either resignation or defiance of respondent's action to rescind the leave time. Notwithstanding the harshness of the respondent's action, it must be assumed that petitioner understood that failure to report to work – in lieu of resignation – would likely lead to discipline. Thus, the Commissioner would characterize respondent's August 6, 2010 letter as an iteration of the realities of the situation, rather than a threat.

Petitioner's alternate argument for rescission of her resignation is that it is necessitated by the holding in *Evaul v. Camden Board of Education*, 35 *N.J.* 244 (1961). However, the record supports the ALJ's determination that the circumstances of petitioner's resignation were distinguishable from the resignation that the New Jersey Supreme Court annulled in *Evaul.*

In that case the Court determined that emotionally charged events and unusual timing led to the impulsive tendering and precipitous acceptance of Evaul's resignation:

> [W]e think that the peculiar circumstances of this case require the reinstatement of the appellant on equitable principles. It was an extraordinary concatenation of events which resulted in a loss to appellant of her tenure, seniority and pension rights acquired during twenty-five years of service. First, there were the disturbing incidents of March 13, 1959, which led to the submission of her

> resignation. The unpleasant and emotional meeting with her department head was shortly followed by the unanticipated and tempestuous confrontation in the Principal's office. It is reasonable to suppose that the anxiety and distress engendered by these incidents reached a climax when her subsequent efforts to confer with the Principal and the President of the School Board were frustrated. It is clear to us that the submission of her resignation was an impetuous act prompted by her understandably distraught condition. The emotionally-charged words she used in her note of resignation bear this out. Second, linked to the above chain of events, was the fortuitous circumstance that a special meeting of the school board had, unknown to her, previously been scheduled for a few hours after she wrote her resignation. But for that happenstance, her attempted rescission, on March 15, 1959, would have been effective.

In contrast, the record below supports the ALJ's conclusion that petitioner's resignation was the result of a considered weighing of options and priorities – in consultation with her husband – and in the wake of the denial of her emergent application for child care leave during the pendency of this litigation.

The Commissioner therefore concludes that there is no basis for rescinding petitioner's resignation from employment in petitioner's school district. Petitioner consequently has no standing to prosecute the instant appeal. In light of petitioner's lack of standing, the merits of petitioner's arguments challenging the validity of respondent's rescission of its original grant to petitioner of extended child care leave need not be reached.

The petition is accordingly hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/15/11
Date of Mailing: 7/18/11

[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 07786-10
AGENCY DKT. NO. 166-7/10

JENNIFER DeKENIPP,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,

Respondent.

Marissa A. McAleer, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Daniel R. Roberts, Esq., for respondent (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: March 4, 2011 Decided: June 2, 2011

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Jennifer DeKenipp (petitioner) appeals Wall Township Board of Education's (respondent's) rescission of a previous grant of extended maternity/child care leave.

PROCEDURAL HISTORY

On July 21, 2010, petitioners' petition of appeal was filed with the Office of Controversies and Disputes of the New Jersey Department of Education, along with a request for emergency relief seeking an order compelling respondent to grant the previously granted leave. On July 26, 2010, the emergent matter alone was filed with the Office of Administrative Law for oral argument, which was held on July 30, 2010.

The undersigned denied emergent relief, as did the Commissioner of Education. On August 25, 2010, petitioner moved to amend her petition. Petitioners motion was opposed in part by respondent. An order was entered on September 3, 2010 granting petitioner leave to amend her petition of appeal. An amended Petition of Appeal and Answer were subsequently filed by the parties.

The matter was set down for a hearing on December 16, 2010. The matter was heard on that date and the record was left open for the parties to file closing arguments after transcripts of the proceedings were received. The record closed on March 4, 2011 and an order extending time in which to file an Initial Decision was entered.

STATEMENT OF FACTS

Petitioner commenced employment with respondent on or about September 1, 2004 as a teacher holding a K-12 art endorsement on an instructional certificate. Petitioner began contractually provided maternity leave on or about April 24, 2009 in expectation of the birth of her second child, who was born on June 8, 2009. Pursuant to the collective bargaining agreement between respondent and petitioner's bargaining unit such leave was to conclude at the end of the 2009-2010 school year. Petitioner requested that respondent grant a discretionary extension of her unpaid leave for the duration of the 2010-2011 school year, effective September 1, 2010. Respondent granted this request on March 9, 2010, but subsequently rescinded its approval on May 11, 2010. After respondent declined to reconsider its rescission, petitioner filed a

petition of appeal with the Commissioner of Education claiming petitioner held a right to the leave which vested once respondent granted its approval. Petitioner also filed a request for emergent relief compelling respondent to grant the leave pending the underlying proceeding. Emergent relief was denied.

On August 6, 2010, respondent sent petitioner a letter requesting that she resign her position or notify the Board of her intent to return to the district in September for the 2010-2011 school year. On August 10, 2010, petitioner submitted a letter of resignation.

The preceding information has not been disputed or contradicted by the parties, and is hereby **FOUND as FACT**.

Heather Garret-Muly

Heather Garret-Muly was formerly employed as a special education teacher with the Wall Township Board of Education. She was involved during her employment with the Wall Township Education Association as a building rep. She testified that she had been granted extended maternity leaves a number of times without problem. She described the procedure by which she requested and received extended maternity leave, and kept her principal informed of the process.

Ms. Garret-Muly requested extended maternity leave for the 2010-2011 school year as was denied. She stated she was told prior to her request that petitioner's request had been granted. She was then advised when informally told of her denial that another teacher was being denied and that petitioner's leave was being rescinded. Although the collective bargaining agreement between the parties has change during her career, she does not believe that a teacher was entitled to two full years maternity leave under any earlier iteration of the contract.

Dennis DeKenipp

Dennis DeKenipp the husband of petitioner. He is an eighth grade science teacher employed by the Ocean Port Board of Education. DeKenipp described finding out from a human resources worker that petitoner's previously granted extended leave had been rescinded. He and petitioner attended a meeting with Dr. Habel, the Superintendant of Schools. Dr. Habel had just returned from being out and asked to be brought up to speed. Dr. Habel suggested that petitioner write a letter to the personnel committee requesting a reconsideration (P-4). Habel indicated to the DeKenipps that the Board Attorney had advised the Board to follow the WTEA contract "to the 'T'".

DeKenipp further testified as to the efforts he and petitioner undertook in reliance upon the initial granting of the leave, including the arrangements for daycare, daily schedules and routines, and money deposits. When asked why petitioner had resigned her position, he said she wanted to spend time at home with the baby because, "those years you don't get back." That was the biggest reason, that he and his wife felt it was important that she be at home.

Jennifer DeKenipp

Jennifer DeKenipp is the petitioner in this matter. She testified similarly as her husband as to the phone call from human resources, the meeting with Dr. Habel and the preparations she and her husband had made in reliance upon the board's prior granting of her extended leave.

Petitioner also testified as to her understanding as to how extended maternity leave worked and how she went about requesting it. She also described people she knew who had received extended leave and also one she felt was indicative of an individual attempting to take advantage of the system by having a baby when extended leave was expiring and requesting additional leave, which she believes to be a reason for the change in practice of granting extended leaves.

Petitioner testified that she resigned because she was scared she would be brought up on tenure charges if she did not, based on the language of the letter she received from the district (P-5). She stated a fear of having her pension or her ability to return to teaching being compromised and resigned to avoid facing tenure charges.

Dr. James Habel

Dr. Habel is the Wall Township Superintendant of Schools. He was on medical leave when petitioner requested her additional leave, but he is aware of the circumstances. Petitioners request was granted in accordance with Article 9 of the WTEA allowing the agreement of granting such leave for good reason.

Habel described what he believed to be abuses of the system with regard to extended leave, citing a teacher who was selling real estate during their leave period. He indicated that each request was considered on a case by case basis. After petitioner's leave was granted, some request were made that caused the board to deliberate. The board determined to try to apply a standard of uniformity and educational continuity in considering the requests. After giving consideration the Board determined to look back to previously granted leave requests for the following year and apply those standards to them as well. Petitioners was felt to be outside of those parameters. Petitioner's leave was rescinded and other requests were denied.

Habel cited that the board be able to correct an error previously made as basis for revisiting what he deems a leave granted in error. He further discussed the interrelation between articles 7 and 9 of the WTEA agreement, which govern maternity and extended leaves, respectively. It was felt that extended maternity leaves were being considered under article 7 when they should in fact have been considered under article nine. Once that was realized, three requests were denied and petitioner's leave rescinded. He further testified that this led to a confusion due to an incorrect reading

that extended leaves for child care were required under article 7, whereas in actuality such consideration was to be given under the discretionary language of article 9.

FINDINGS OF FACT

Credibility is the value that a fact finder gives to the testimony of a witness. The word 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). The term has been defined as testimony, which must proceed from the mouth of the credible witness and must be such as our common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); see, also, Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). A fact finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837 (1973). Credibility does not depend on the number of witnesses and the finder of fact is not bound to believe the testimony of any witness. In re Perrone, 5 N.J. 514 (1950).

Having heard the testimony given and reviewed the evidence offered, I found all the witnesses before me to be largely credible in the statements provided, with one exception. Although petitioner largely appeared to be sincere and truthful in the testimony given, I do not find as credible her testimony that she resigned out of fear of being subjected to tenure charges. First, it is noted that P-5, the letter which purportedly induced this fear, merely indicated that a failure to respond "may,' result in charges. Furthermore, despite petitioner's, testimony of the fear that she alleges rendered her resignation as one under duress, petitioner's actions do not paint a picture consistent with that assertion. Petitioner waited four days and resigned her position on August 10 (which, it is noted, is also the date that the Commissioner of Education affirmed the decision on emergent relief.). As respondent notes her testimony seems to indicate that she was determined to stay home with her child and after four days she and her husband made a reasoned decision to resign her position. This is supported

by the testimony of petitioner's husband, who testified at length that the desire to have petitioner remain with the child seemed paramount in their decision for her to resign, whereas he failed to raise fear of reprisal as a reason until prompted to do so. Accordingly, **I FIND** that petitioner's decision to resign was the result of a reasoned, deliberative result of considering the circumstances and determining, in concert with her husband, that they wanted her to continue to remain at home with the children.

CONCLUSIONS OF LAW

In the current matter, respondent seeks to dismiss petitioner's claim on jurisdictional grounds. Respondent asserts that petitioners claims in this matter are merely a grievance cloaked as a petition of appeal," in that the matter is at hear a discussion of application of rights under the collective bargaining agreement. Before the submission of the post hearing brief, both parties have agreed, even as early as the emergent relief proceedings, that the action under review was an exercise of the Board's discretionary powers outside of the contract. The contract discusses the provisions governing maternity leave, and the granting of extended leave was beyond the contract, the sole province of the board's discretionary powers. That petitioner claims that the Board's action is arbitrary, capricious or unreasonable, and offers a history demonstrating the routine granting of such requests as support of the arbitrary nature of the rescission, does not convert or reduce the petition suddenly into a past-practices complaint to be shoehorned back into the contract. **I CONCLUDE** that the Commissioner does and continues to have jurisdiction over this matter.

Respondent also seeks to have petitioner's appeal dismissed because she voluntarily resigned her position on August 10, 2010. Petitioner claims that the resignation was under duress or stressful circumstances and therefore should be rescinded. Peitioner cites Evaul v. Board of Educ., City of Camden, 35 N.J. 244 (1961), as controlling in this matter and supporting the notion that petitioner's resignation should be rescinded.

In Evaul, a discreet set of extreme circumstances occurred which involved a series of heated and contentious interactions and meetings which culminated in Evaul's tendering her resignation on the same day as the events in questions, essentially sleeping on it, cooling down and changing her mind two days later, only to find that the board had already, at an intervening meeting, accepted the resignation.

In the current matter, a much less intense pace was involved. Petitioner was informed of the rescission of her leave in May of 2010. Petitioner filed her petition of appeal in July and the emergent proceedings were conducted, with petitioner seeking to remain on leave until the due process claim was completed and determined. That emergent relief request was denied by the undersigned on August 2, 2010. Respondent sent a letter on August 6 asking that petitioner either indicate in writing whether she would return to work or resign her position. Four days later, petitioner sent a letter indicating her resignation.

It is not inappropriate that the board, given the denial of emergent relief, would want to know and expect an answer as to whether petitioner intended to return to work. This is made more apparent by Dr. Habel's noting in the letter (P-5) that the district required the employment contract to be returned on or before July 15th. Additionally, that the board notified petitioner of the potential consequences that "may," (emphasis added) occur if petitioner did not respond to the request does not appear to be a threat, but a reasonable notification of steps the board may have needed or determined to take if it did not hear from petitioner and needed to make a determination regarding staffing levels. Again, it was appropriate.

Considering the prior discussion and findings of fact regarding petitioner's behavior in the aftermath of receiving the letter requesting her confirmation to return to work or her resignation, the situation at hand does not appear to be analogous to the heated situation in Evaul which were all contained in one day and resulted in an impetuous, if not hasty offering of a resignation which was rescinded two days later.

The record does not reflect that petitioner sought to rescind her resignation once she thought better of it, as was the case in Evaul. In fact the topic of rescission of the resignation did not come up until August 25, 2010, fifteen days later. And even then it was by way of motion to amend the petitioner's complaint to include a count seeking to vacate the resignation only if it is determined that "petitioner's maternity leave was wrongfully rescinded." (Proposed amended petition, P. 5). Given the timeline and order of events, it is hard not to look at this request as an attempt to have it both ways, to ensure that she got the emergent relief she was denied.

Accordingly, I **CONCLUDE**, that petitioner's resignation was not made under duress, but rather was at best a reasoned decision made deliberately to spend more time with her infant child, or possibly an attempt to nonetheless obtain the sought-after benefit of her denied request for emergent relief. I therefore conclude that the resignation was binding and in so offering it petitioner relinquished any rights she had as a teaching staff member and rendered the current proceedings moot.

Even had petitioner not resigned, the record does not yield new or substantive material facts which change the basic analysis from the emergent relief proceedings. Now as then, petitioner argues that once a Board of Education passes a formal resolution establishing a leave of absence, the board may not unilaterally rescind its decision, relying heavily on Oxford v. Pohatcong, 81 S.L.D. 48, OAL Dkt. No. EDU 2711-80 (November 25, 1980), aff'd, Commissioner of Education (January 16, 1981) to support this assertion.

As noted during the emergent proceedings, there are several distinctions between Oxford and the matter currently at issue. In Oxford, the respondent Board unilaterally extended the time of a teacher's return date, delaying the date by several months beyond an agreed to return date into the next year. This had the result of effectively reducing that teacher's salary, which, it was determined, implicated the petitioner's rights under the tenure statute. In the current matter, the opposite is true, as respondent is requesting that petitioner return to work sooner than anticipated,

therefore not serving to reduce petitioner's salary or affect her compensation at all. The tenure statute, N.J.S.A. 18A:28-5, protects, tenured teachers from dismissal and reduction in compensation. Granting, denial or rescission of what is agreed to be a discretionary exercise of the Board's power is not a part of the tenure protections.

In Oxford, the petitioner received notice of the Board's action only one week prior to the start of the school year in question, whereas in the current matter the respondent took action nearly four months prior to the effective date of the additional leave, leaving sufficient time to plan. Finally, Oxford dealt with setting the return date for a maternity leave which was mandated and provided for in the collective bargaining agreement between the parties, and it is in that foundation where it took root as a vested right. As earlier noted, the leave requested by petitioner is not a contractual right, nor is it contemplated anywhere in the agreement between respondent and the bargaining unit. The current matter involves what all parties agree is a discretionary act of the board's authority. Accordingly, I **CONCLUDE** that petitioner did not have a vested right to the extended maternity leave once it was granted. The board retained the right to revisit and reconsider this exercise of discretionary power even after it had passed its resolution. Petitioner's equitable claims fail similarly as the rescission occurred in May of 2010 and while petitioner was certainly entitled to challenge the decision, she was certainly free and given ample time (three months) to explore alternative arrangements for child care. Any right to rely upon the granted leave should have and did cease when the board rescinded its decision in May. To the extent that petitioner may have a claim toward reimbursement of non-refundable monies spent in reliance prior to the rescission, that is not a question for this forum, and is rendered moot by petitioner's decision to resign and maintain the arrangements that had been made.

Finally, I **CONCLUDE** that petitioners have not demonstrated that the discretionary exercise of power involved was arbitrary, capricious or unreasonable. Dr. Habel's testimony, demonstrates that there was a rational basis behind the board's decision, specifically an acknowledgement that previous leave requests had been

granted in mistaken belief that it was contractually required and the board's intent to correct it going forward.

DECISION AND ORDER

It is, therefore, **ORDERED** that petitioner's request for relief is rendered moot and barred by her voluntary resignation of her position. It is further **ORDERED** that, absent her resignation, petitioner's request to have her extended maternity leave reinstated after it was rescinded by the Board is **DENIED**. 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.

June 2, 2011
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

mamf

APPENDIX

WITNESSES

For petitioner:

Heather Garret-Muly
Dennis DeKenipp
Jennifer DeKenipp

For respondent:

Dr. James Habel

EXHIBITS

For Petitioner:

P-1 Article 7 of Collective Bargaining Agreement
P-2 Human Resources Report, 3/9/2010
P-3 Human Resources Report, 5/11/2010
P-4 Letter from Petitioner Requesting Reconsideration of Recission of Leave
P-5 Letter Requesting Confirmation of Return to Work or Resignation
P-6 Letter Releasing Petitioner from 60 Day Notice Requirement
P-7 Letter of Resignation
P-8 Human Resources Report 1/19/2010

P-9 Portions of Minutes of Respondents Meetings Depicting Roll Call of 2/16, 3/9, 3/23, 3/31, 4/13, 5/11, 2010.

P-10 Certification of Dr. Habel

P-11 Letter from Janet Essner

P-12 Human Resources Report 9/21/2010

P-13 Article 9 of Collective Bargaining Agreement

P-14 Respondent's Answers to Petitioner's Interrogatories

P-15 Respondent's Amended Answers to Petitioner's Interrogatories

For Respondent:

R-1 Contract Between Board of Education and Education Association

289-11

#289-11E

OAL DKT. NO. 6924-11
AGENCY DKT. NO. 154-6/11

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUATION
V.	:	DECISION ON
BRUCE N. RODMAN, FORMER MONITOR FOR THE ASBURY PARK BOARD OF EDUCATION,	:	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 July 8, 2011 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs with the ALJ – for the reasons comprehensively presented in his Order – that petitioner has not satisfied the burden of establishing the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted. This matter shall proceed at the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/21/11

Date of Mailing: 7/22/11

* 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 6924-11
AGENCY DKT. NO. 154-6/11

BOARD OF EDUCATION OF THE CITY
OF ASBURY PARK, MONMOUTH COUNTY,
Petitioner,

v.

BRUCE N. RODMAN, FORMER MONITOR
FOR THE ASBURY PARK BOARD OF EDUCATION,
Respondent.

Stephen J. Edelstein, Esq, for petitioner (Schwartz, Simon, Edelstein, Celso, LLC, attorneys)

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

BEFORE **JOHN R. FUTEY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner, the Board of Education of the City of Asbury Park, Monmouth County (hereinafter "petitioner" or the "Board") seeks emergent relief in

which it challenges the March 17, 2011, order of respondent, Bruce M. Rodman, former monitor for the Asbury Park Board of Education (hereinafter "respondent" or the "Monitor"), in which he ordered the closing of a school facility, the Barack Obama School, hereinafter known as the "Obama School".

On June 15, 2011, the Office of Controversies and Disputes within the Department of Education ("Department") received a verified petition from the Board alleging that the Monitor acted beyond the scope of his statutory authority while in the position of State Fiscal Monitor for the Asbury Park School District ("District"). The Department also received a motion for emergent relief with accompanying brief from the Board for an order enjoining respondent's decision of March 17, 2011, wherein respondent ordered the Board to relocate the students attending the Obama School to three other schools in the District. The Board identified this as a decision to close the Obama School. The matter was transmitted without an answer to the Office of Administrative Law (hereinafter "OAL") on June 16, 2011. Respondent filed a brief in opposition to the Board's motion on June 27, 2011, and requested dismissal of the matter on the basis of standing. The matter was originally scheduled to be heard as an emergent relief hearing on June 28, 2011 but was adjourned in advance at the request of petitioner's attorney who was in trial in another court at the time. The matter was rescheduled for July 7, 2011, accordingly. The Board thereafter filed a reply on July 7, 2011. Oral argument, in which both parties participated, was held the next day, July 8, 2011 at 9:00 a.m. at the OAL Quakerbridge Plaza Office. Respondent Rodman also appeared. The hearing record closed for purposes of emergent relief at that time and this order is issued pursuant thereto.

RELEVANT FACTS

Based upon the facts presented by way of the emergent relief pleadings as well as the oral argument, the following constitute the relevant facts adduced in this matter. On November 20, 2010, respondent was appointed by the Acting Commissioner of Education to the position of State Fiscal Monitor to the District, after having served as the Controller of another school district for three years and a School Business Administrator of an educational services commission for nearly twenty-seven years.

(Rodman Cert. ¶¶ 2 & 3; Pet. ¶ 2.) Respondent retired from his position of State Fiscal Monitor on May 24, 2011. (Rodman Cert. ¶ 2.)

On March 16, 2011, the District Superintendent, Dr. Denise Lowe ("Dr. Lowe"), presented two recommendations to the Board. First, she recommended that the Board reconfigure the grading in the District schools so that certain class grades would be housed in different buildings than they had been. (Rodman Cert. ¶ 5; Pet. ¶ 3.) Her recommendation was offered as a solution to the underutilization of District facilities which were operating far below their capacity based on a decline in student enrollment, which had been 3,150 in 2000-2001 but fell to 2,092 in 2009-2010. (Rodman Cert. ¶ 6, Ex. A.) As an alternative to a grade reconfiguration, Dr. Lowe proposed that students in the Obama School be relocated to other District schools for the 2011-2012 school year. (Rodman Cert. ¶ 7; Pet. ¶ 3.)

It appears from the basic evidence provided that Dr. Lowe had presented the alternative plan to the Board prior to the March 16, 2011, meeting. On March 3, 2011, respondent had sent Dr. Lowe an e-mail explaining that the Board members might be less frustrated than they were the night before about the Obama School plan if they were given more information. (Rodman Cert. Ex. D.) He explained that the Board needed more information about the cost savings, financial benefits realized, enrollment trends, enrollment outlook, staff-student ratio, eliminated positions, new positions, and the outlook for getting State financing to replace the Obama School. (Ibid.) About a week later, Dr. Lowe sent a letter entitled, "Potential Closing of Obama Elementary School Explanation of Spreadsheet" to all of the Board members, explaining how the numbers in the spreadsheet "regarding the 'Potential Closing of Obama'" were derived. (Rodman Cert. Ex. C.) The letter also explained that there were "a total of 13 positions to be eliminated if the Barack Obama Elementary School closes." (Ibid.) Overall, the letter appears to be addressing cost savings that would result if the school closed. (Ibid.) The net estimated savings from doing so would be about $531,105, with a total estimated savings of $675,175. (Ibid.) The spreadsheet provided information regarding how much would be saved for each of the positions cut. (Ibid.)

Ultimately, the Board declined to accept Dr. Lowe's recommendations at its March 16, 2011, meeting. (Pet. ¶ 4.) At that meeting, respondent advised that he reserved his right to either overturn or implement corrective action as authorized in N.J.S.A. 18A:7A-55. (Pet. Ex. A; Rodman Cert. ¶ 27, Ex. B.)

On March 17, 2011, respondent wrote a letter to the Board ordering, among other things that, effective July 1, 2011, the Obama School students in grades kindergarten through fourth were to be relocated to the Thurgood Marshall and Bradley Elementary schools, and those in grades five through eight were to be relocated to the Asbury Park Middle School. (Pet. Ex. A; Rodman Cert. Ex. B.) He concluded that due to the Board's failure to implement Dr. Lowe's recommendations, it was in the District's best interests to do this. (Ibid.) He further concluded that this relocation was the most likely configuration to produce a thorough and efficient education and in reaching this conclusion he considered the decline of student population in excess of thirty-five percent in ten years; the age and condition of the Obama School, which was constructed in three stages from 1910 to 1950; and the significant savings of approximately $375,000 in the first year, $759,000 in the second year if the Alternative School moved to the Obama School, and $975,000 in the third year if the Administrative Office moved there. (Ibid.) He stated in the letter that he was taking action at that time because "time is of the essence" and the District was trying to finalize a budget for 2011-2012. (Ibid.) That same day, respondent e-mailed Joseph Passiment, the Acting Executive Monmouth County Superintendent, informing him of this directive and attached to the e-mail a copy of his memorandum to the Board. (Rodman Cert. ¶ 33, Ex. F.)

The Board states that "the actual and intended effect of [respondent's order] was to close the [Obama School] as an educational facility." (Pet. ¶ 7.) Respondent certifies that he did not order that the Obama School be closed and that he specifically noted that the building would remain open for educationally-relevant purposes. (Rodman Cert. ¶¶ 34-35.)

In his certification, respondent states that he examined both of Dr. Lowe's plans, found both to be acceptable, but decided that the relocation was the best choice for the District because it would result in efficient use of facilities and significant cost savings. (Rodman Cert. ¶ 8.) The relocation would allow the District to eliminate or consolidate a number of positions without reducing the number of teachers so as to preserve the same teacher-student ratio. (Id. at ¶ 10.)

Respondent points to various sources as supporting his decision. He addresses that the cost savings projected by Dr. Lowe's letter to the Board dated March 11, 2011, supported a savings of approximately $375,000 in the first year. (Rodman Cert. ¶ 11.) He also noted that the lease agreement between the Salvation Army and the District whereby the District pays $150,000 per year to lease building space for an Alternative School would not be necessary and significant costs would be saved if the Obama School became available for use for the Alternative School. (Id. at ¶¶ 12-14.) At the hearing, it was clarified by him that the Alternative School currently educates about sixty pupils. Respondent also stated that the District leases office space to house its administrative staff, and such leasing would not be necessary if the students at the Obama School were relocated and the administrative staff began to utilize the Obama School building, creating further cost savings. (Id. at ¶ 15.) He also found that the Child Study Team ("CST") offices could be relocated to the Obama School so that the District could sell the building that currently houses them to realize the income from the sale. (Id. at ¶ 16.) At the hearing, respondent averred that the CST office relocation was already underway, and that these offices would be the location where IEP meetings are held. Although petitioner's counsel then argued that such a plan was speculative at best, petitioner failed to produce any evidence to the contrary to support that challenge. When questioned by this tribunal, respondent's attorney acknowledged that the functions of the child study team at that location would be direct educational activities inasmuch as they would be conducting parent/teacher meetings, creating individualized education programs for pupils, and administering to the immediate needs of their special education population. When further questioned by this tribunal about the size of the District, the Monitor indicated that the district is one-and-one-quarter mile square and there are no busing issues for any of the regular education students. This is

a standard walking school community. The only transportation concerns they have (which they have had all along) involve those of special education students who must be bused elsewhere.

Respondent further explained in his submission that, when he analyzed the fiscal status, the District had a zero balance in its capital reserve fund; therefore, it was particularly important to realize cost savings, and that he reviewed the District's Long Range Facility Plan ("LRFP") and facilities data to determine that the proposed relocation of the Obama School students was within the plan's parameters and there was sufficient capacity to house those students in the other schools. (Rodman Cert. ¶¶ 20-21.) At the hearing, respondent presented documentary support for the relocation plan in the audit performed by the Office of State Auditor wherein the State Auditor suggested the possibility of consolidating schools for a more efficient operation of the District. (R-G at 5.)

Respondent further stated that he had discussed the relocation plan with Joseph Passiment, the Acting Executive Monmouth County Superintendent, who agreed that the plan was fiscally sound but suggested that he contact Susan Kutner ("Kutner"), Director of Policy and Planning in the Department's Office of School Facilities to obtain State approval. (Rodman Cert. ¶¶ 22-23.) In an e-mail to respondent on March 14, 2011, Kutner explained that she had examined the proposed reorganization that had been posted on the District's web site and stated that both scenarios (the reconfiguration of grades and "closing Obama") could be supported by the Office of School Facilities. (Rodman Cert. Ex. E.) Attached to her e-mail was a spreadsheet containing information of the capacity, enrollment, and space within the District's schools as well as a capacity analysis showing a capacity surplus, and information regarding facilities efficiency standards compliance and educational adequacy and building conditions, which listed the Obama School as a marginal facility, although Kutner explained it was not educationally inadequate. (Ibid.) Respondent asserts that this amounts to an approval by the Department prior to the relocation plan's implementation. (Rodman Cert. ¶ 26.)

THE PARTIES' ARGUMENTS

In its brief supporting the motion for emergent relief, the Board sets forth arguments addressing each of the four prongs it is required to meet to be awarded emergent relief. First, it asserts that it would suffer irreparable harm because closing the school would cause damage that would not be adequately redressed by monetary damages.[1] Second, the Board states that because State Monitors do not have the statutory power to close a school and because the New Jersey Administrative Code requires procedural steps to be taken before a school is closed, the law is settled that respondent's failure to follow the steps required under the Code equates to an abuse of his power as a State Monitor. Third, the Board argues that the facts demonstrate that respondent failed to obtain the approval required under law prior to his decision and, as such, it is therefore likely to succeed on the merits of the underlying claim. Finally, the Board believes the harm it will suffer in physically relocating the students and conducting the administrative tasks to do so smoothly is greater than the harm respondent will suffer.[2]

In his opposition, respondent addresses each of these arguments. First, respondent asserts that the Board has not demonstrated it will suffer irreparable harm because it fails to allege any harm and because the harm inferred from the Board's argument is speculative. Second, respondent's argument regarding whether the law is settled is three-fold. Primarily, respondent argues that the Board cites law that does not relate to his actions because he did not order the closing of the Obama School, but rather ordered a "repurposing" of the school which would include instructional and administrative purposes, purposes which indicate that the school was not being closed. Alternatively, he states that even if his decision effectuates closing the Obama School, he complied with all requirements to do so. Ultimately, he states that his order was made in accordance with his statutory authority. Third, respondent asserts that the

[1] The Board begins its argument demonstrating that irreparable harm has been determined when harm cannot be redressed by monetary damages; however, it never expresses that the harm caused by respondent's order cannot be redressed. The argument stated here, rather, is inferred from the brief.
[2] The Board balances its harm against the possible lost savings suffered if respondent's plan is enjoined, savings that the Board believes have not been demonstrated by documentation or analysis.

Board has not shown that it will likely succeed on the merits because respondent followed all statutory and administrative requirements, did not order the closing of the Obama School, and his actions as a government official are entitled to deference. Fourth, respondent argues that he will suffer greater harm than the Board if emergent relief is granted because any harm caused to the Board is speculative while the cost-savings to the District will be lost.[3] In a newly raised defense, respondent further asserts that the matter should be dismissed because the Board lacks standing to bring the petition in that it has no stake or adverseness in the outcome of the matter.

In its reply brief (which, once again was submitted to the OAL one day before the rescheduled emergent relief hearing, the timeliness of which submission is, according to respondent, not appropriate since it is not allowed for under the emergent relief rules) the Board reiterates its arguments, emphasizing new points, and also addressed respondent's standing argument. The Board emphasizes the limited authority of a State Monitor (as opposed to the State Superintendent) as evidenced by the language of N.J.S.A. 18A:7A-55(b)(5); the inconsequence of the Obama School's speculated potential use for the Alternative School, and respondent's inability to demonstrate that Rodman adhered with the steps required under the Code to close a school. With regard to standing, the Board asserts that it is charged with the providing a thorough and efficient education which inherently requires it to take steps to effectuate change in the best interests of its students.

LEGAL ANALYSIS

Based upon all of the foregoing, I have considered the arguments raised and the proofs presented and make the following findings:

A. Whether the Board has Demonstrated that it is Entitled to Emergent Relief.

N.J.A.C. 6A:3-1.6 provides the standard for granting emergent relief for controversies subject to the Commissioner of Education's jurisdiction:

[3] Like the Board, respondent does not indicate what harm he will suffer if the request is granted.

> (b) 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.

Failure to meet all of the criteria (conjunctively) for relief mandates the denial of the application. A.F. o/b/o D.M. v. Jersey City Bd. of Educ., EDS 1807-11, (February, 28, 2011) <http://lawlibrary.rutgers.edu/oal/search.html>.

1. Whether the Board Will Suffer Irreparable Harm If the Requested Relief Is Not Granted.

As stated hereinabove, petitioner argues that it will suffer irreparable harm if the injunctive relief is not granted since the District must make provisions for the assignment of personnel and the designation of students to particular schools by sometime in mid August 2011. As a result, if the Obama School is not kept open, it will deny the district the opportunity to make those determinations in a timely fashion. Respondent argues that greater harm will occur if the District is forced to forgo the significant financial savings which it has referenced in its presentation this matter. After having considered all the arguments in that regard, I **FIND** that the respondent's claim is more valid and realistic under the circumstances. Furthermore, its plans are not speculative to the extent argued by petitioner. Much has to be done to effectuate the plan, including reassigning new functions to the school and ending leases which takes time. Also, this is not a geographically large district, it being a mere one-and-one-quarter miles square. Thus, the adverse logistical impact upon the students and faculty by going to another school within this relatively small community is not great. Further, it is curious that the District has known since at least March of this year that the Monitor had exercised his authority to allow for the repurchasing of the Obama School. Under those circumstances, the District should have anticipated the impact of any such

repurchasing and responded by way of emergent relief much sooner than it did. Thus, its argument in that regard is specious at best. Further, the Monitor has represented that the child study team (CST) program is already gearing up to move into the Obama School currently. Although petitioner suggests that this is speculative, I do not concur with that argument. Rather, the Monitor's representation in that regard must be given appropriate deference, absent any other proof to the contrary. Further, even a brief look at the location of one of the proposed three schools indicates that it is apparently only a city block away from the Obama School. Thus, the adverse logistical impact upon the students and staff and the relocation appears to be minimal. As a result, I **FIND** that petitioner failed to satisfy this individual prong of the standard utilized for emergent relief.

2. Whether the Legal Right Underlying the Board's Claim is Settled.

The second prong carries with it its own independent need for extended analysis. In 2006, our Legislature passed the School District Fiscal Accountability Act, L. 2006, c. 15, whereby, among other things, the Commissioner of Education was granted the power to appoint a State Monitor "as necessary, to provide direct oversight of a board of education's business operations and personnel matters." N.J.S.A. 18A:7A-55(a). A State Monitor can be appointed if "the school district receives an adverse or a disclaimer of opinion by its independent auditor in the [required] annual audit," or if "any two or more of the following circumstances apply . . . :" the school district 1) "ends the fiscal year with a deficit balance . . . ;" 2) "receives a qualified opinion by its independent auditor in the annual audit . . .;" 3) "receives an adverse, disclaimer, or qualified opinion by its independent auditor under the single audit section for State or federal awards in the annual audit . . . ;" 4) "receives any audit findings by its independent auditor identified as material weaknesses in internal controls;" 5) "fails to develop and implement a plan acceptable to the commissioner or his designee to address a potential or actual deficit balance in the general fund, special revenue fund, or capital projects fund, with the exception of a capital projects fund deficit caused by the issuance of bond anticipation notes;" 6) "fails to implement a plan from the prior year which causes any findings from the independent auditor to be repeated;" 7) "is required

to return federal funds once it is determined that the school district's expenditures are not in compliance with the grant requirements;" or 8) "submits the annual audit after the submission date required pursuant to [N.J.S.A. 18A:23-1]." Ibid.

Once appointed, the State Monitor is required to report "directly to the Commissioner or his designee on a weekly basis" and "monthly to the board of education and members of the public at the regularly scheduled board of education meeting." N.J.S.A. 18A:7A-55(c). The State Monitor is also required to, in relevant part, 1) "oversee the fiscal management and expenditures of school district funds . . . ;" 2) "oversee the operation and fiscal management of school district facilities, including the development and implementation of recommendations for redistricting and restructuring of schools;" and 3) "ensure development and implementation of an acceptable plan to address the circumstances" regarding why the State Monitor was appointed—a plan which "shall include measurable benchmarks and specific activities to address the deficiencies of the school district." N.J.S.A. 18A:7A-55(b). In addition to these duties, the State Monitor also has the "authority to override a chief school administrator's action and a vote by the board of education on any of the matters set forth in [N.J.S.A. 18A:7A-55(b)], except that all actions of the State monitor shall be subject to the education, labor, and employment laws and regulations . . . ." N.J.S.A. 18A:7A-55(b)(5).

Consequently, a State Monitor can override a board of education's vote not to implement a relocation of students to another school so as to utilize a school for other purposes, such as those in the present case, if it is a vote over a matter set forth in N.J.S.A. 18A:7A-55(b). The State Monitor must, nevertheless, override the action in accordance with applicable education, labor, and employment laws and regulations.

In the instant matter, it is noted that the Board does not argue that respondent was overriding a vote unrelated to the matters listed in N.J.S.A. 18A:7A-55(b). This is appropriate to acknowledge because it provides that the override would be within respondent's authority as State Fiscal Monitor if he complied with the applicable laws. In that respondent overrode the Board's vote on how to operate and fiscally manage

school district facilities, respondent had the authority to override the Board's vote, as indicated by N.J.S.A. 18A:7A-55(b)(2). The issue is whether he lawfully implemented it in accordance with applicable education, labor, and employment laws and regulations.

The Board argues that respondent was required to comply with N.J.A.C. 6A:26-7.5 because his action was essentially the closing of the Obama School. N.J.A.C. 6A:26-7.5 requires that

> (a) To receive approval for the closing of a school, the district board of education shall provide the Division[4] and the county superintendent with the following assurances:
>
> 1. The proposed closing is consistent with the school district's approved LRFP[5] because:
>
> i. The school district has demonstrated that sufficient school building capacity exists to house school district students following such closing for the succeeding five years; or
>
> ii. The school district through a feasibility study has demonstrated that the benefits of undertaking new construction outweigh those of rehabilitating the school proposed for closure.
>
> 2. The use of temporary facilities in the remaining schools does not result or increase from an overall facilities shortage caused by the school closing; and
>
> 3. The re-assignment of students to other schools in the school district does not produce, sustain nor contribute to unlawful segregation, separation or isolation of student populations on the basis of race or national origin.
>
> (b) A request for approval from the Division for the closing of a school shall include the recommendation to the county superintendent.
>
> (c) A letter of approval from the Division, based on the information in (a) above, is required before the closing of a school.
>
> (d) The Division shall notify the school district of its determination in writing with respect to the requested school closing, with a copy to the county superintendent.

N.J.A.C. 6A:26-7.5 is entitled "Closing of a School Facility." Under N.J.A.C. 6A:26-1.2,

[4] "'Division' means the Division of Finance in the Department of Education." N.J.A.C. 6A:26-1.2.

[5] "'Long-range facilities plan' or 'LRFP' means the plan required to be submitted to the Commissioner by a school district pursuant to N.J.S.A. 18A:7G-4 and N.J.A.C. 6A:26-2." N.J.A.C. 6A:26-1.2.

> "School facility" means and includes any structure, building or facility used wholly or in part for educational purposes by a school district or community provider, and facilities that physically support such structures, buildings and facilities, such as district wastewater treatment facilities, power generating facilities, and steam generating facilities, but shall exclude other facilities as defined in this section.

As indicated by the definition of "other facilities," "any structure, building or facility used solely for school administration" would not be considered a school facility, even though spaced used within a school facility for administrative purposes is considered "educational space." N.J.A.C. 6A:26-1.2. Yet, it can be best argued that the functions of the child study team program are more akin to direct educational functions than to strictly administrative actions since the CST deals directly with the educational components of special education students, thus excluding it from the strict designation of "school administration" functions.

The Board argues that respondent failed to follow the requirements of N.J.A.C. 6A:26-7.5 prior to overriding its decision, and, thus, he abused his authority. The Board's argument is not well-supported; however, because the law is not settled that N.J.A.C. 6A:26-7.5 would apply to the action at issue since the key to this matter is that the plan intends to continue using the Obama School for both educational and, ultimately, administrative purposes, not solely for administrative purposes. At the same time, although Dr. Lowe had been identifying her plan regarding the Obama School as a "closing" and the Monitor and Kutner apparently used this to same term of "closing" in their communications, I **FIND** that such terminology was unfortunately misguided at best and did not reflect what was actually happening since it is evident from respondent's order of March 17, 2011, that the Obama School will continue to be used for educational purposes. The action contemplates the Obama School not only housing administrative offices eventually, but more to the point and more immediately the Alternative School, and the CST offices. Since the plan projects that the Obama School continue to be used as a school facility because it would be used for educational purposes by housing the Alternative School, it would be inappropriate to

apply the requirements of N.J.A.C. 6A:26-7.5 to respondent's action.[6] In addition, as it was clarified at the hearing that the CST office relocation was currently underway, it is doubtful whether such use of the Obama School could be considered solely administrative even at the current time since, at an absolute minimum, the CST offices perform functions that might not be exclusively identifiable as administrative. Rather, they perform direct educational functions on behalf of the student population. Thus, the petitioner cannot utilize the unfortunate and perhaps inappropriate use of the word "closing" in order to succeed since the ample proofs are to the contrary. The Obama School will not close as an educational facility. And I so **FIND.** That represents the linchpin of respondent's defense to this emergent relief application.

Overall, the Board is alleging that respondent ultimately overstepped his authority as a State Monitor, but, based on the foregoing, the basis of such a claim cannot be made upon any law settled thus far. The authority of a State Monitor, which was granted by N.J.S.A. 18A:7A-55 only so far back as 2006, is both explicit and implicit at times in the statute, and it would be a stretch to say that the law is settled in favor of petitioner with regard to what a State Monitor can and cannot do, particularly in this instance. Compare Rankins v. Pleasantville Bd. of Educ., EDU 6918-09, final decision, Comm'r. (October 26, 2010) <http://lawlibrary.rutgers.edu/oal/final/edu06918-09.pdf> (rejecting ALJ's finding that State Monitor did not have authority to overturn board's decision not to hire non-tenured custodian because State Monitor overturned it with fiscal motivation)[7] with Pleasantville Bd. of Educ. v. Riehman, EDU 11454-10, initial decision, (May 31, 2011)[8] (examining the few cases where a State Monitor's authority is determined and deciding that a State Monitor oversteps his bounds when overturning a board's decision to reject a settlement claim even if it relates to fiscal matters). It seems readily apparent at this juncture, however, that, to achieve fiscal stability, a State

[6] Respondent cites to Shuster v. Bd. of Educ., 17 N.J. Super. 357 (App. Div. 1952) for support that the new use of the Obama School should be considered school purposes, which, under Shuster, supra, undoubtedly, it would be. However, the matter in Shuster, supra, was quite different from the one at hand. There, the court was asked to construe a deed that required the property be used for "school purposes," and it recognized the very broad meaning of that phrase to find that board meetings and school elections constituted "school purposes." Id. at 361. Here, we are considering whether respondent unlawfully closed a school facility, a term that would not be so broadly interpreted as the phrase "school purposes" was in Shuster, supra, as indicated by the definitions provided in N.J.A.C. 6A:26-1.2.

[7] Rankins, supra, is on appeal to the Appellate Division. Riehman, infra.

[8] Available electronically on Lexis but not on Rutgers as of July 7, 2011.

Monitor could override a board of education's vote so as to implement a plan to relocate students that was declined by a board, so long as the action was compliant with applicable laws. The authority to override a vote and order that the plan be implemented can be read in N.J.S.A. 18A:7A-55(b)(5), particularly in the plan's correlation to N.J.S.A. 18A:7A-55(b)(1) through (3). At the same time, and after having considered the within breath of the arguments raised by way of emergent relief, I further **FIND** that the law is not settled in favor of petitioner with regard to respondent's authority in the instant matter. If anything, it is directly to the contrary since N.J.S.A. 18A: 7A-55c authorizes the Monitor to oversee (1) fiscal management and expenditures, (2) the operation and fiscal management of school district facilities, including the development and implementation of recommendations for redistricting and restructuring of schools, and, (3) ensure the development of implementation of an acceptable plan to address the circumstances why the State Monitor was appointed. All of the proofs submitted by respondent amply demonstrate that the Monitor followed a conscientious, well-reasoned course, including appropriate dialogue with both County and State officials, in accordance with his statutory authority to ensure that the fiscal needs of the district were properly addressed when he identified the need, first expressed by Superintendent Lowe, to reposition the operations of the Obama School. His effort to effectuate economy in this regard having been thus met, this prong also individually fails.

3. Whether the Board Has a Likelihood of Prevailing on the Merits of the Underlying Claim.

Even though, as I find herein, respondent has adequately demonstrated his statutory authority to repurpose the needs of the Obama School, he nonetheless additionally asserts and draws upon several actions he took prior to overriding the Board's decision to support that the claim that N.J.A.C. 6A:26-7.5 is nonetheless consistent with his actions, and that he did so in compliance with its provisions. He certifies that he conversed with the acting executive county superintendent who expressed his approval. He also attaches exhibits to his certification showing that he received an informal approval from the Director of Policy and Planning in the Department's Office of School Facilities and that the District's LRFP as well as the capacities of the school facilities were considered when implementing the plan. This

evidence, if N.J.A.C. 6A:26-7.5 was determined to be applicable, harms the Board's ability to uphold its burden in demonstrating that it has a likelihood of succeeding on the merits of its claim, and, considered alone, would be enough to deny the request for emergent relief. Nevertheless, given that N.J.A.C. 6A:26-7.5 does not apply to the action in light of the foregoing, the Board has additionally failed to demonstrate a likelihood of success on the merits because it has failed to provide a legal basis that would support its claim. And I so **FIND.**

4. Whether when the equities and interests of the parties are balanced, the Board will suffer greater harm than respondent will suffer if the requested relief is not granted.

After having considered the arguments advanced and after having noted the minimal adverse impact to any of the potentially affected students and personnel, I am satisfied and further **FIND** that the district will suffer greater harm than will the Board if an injunction is placed against the Monitor at this time since the Monitor has an overriding affirmative responsibility to maintain the fiscal integrity of the District in the face of severe and apparently long misdirected energies which have placed the district into such crisis up to this point. At best, it appears that the Board's apparent effort to dilute that affirmative responsibility by bringing this emergent relief application is highly misplaced. Rather, it should consider its appropriate role in relationship to the responsibilities vested in the Monitor for which he is charged under State law. The Monitor made strenuous efforts to redeem a level of fiscal responsibility by repurposing the Obama School operations in order to save significant monies for the District and any protracted delay in that regard will further exacerbate his ability to do so. It also makes complete sense to house all of the CST offices in one central location in order to obtain further economy and efficiency. And the inclusion of the Alternative School at the Obama School will save significantly more funds for the district, while also utilizing the remaining three schools with more complete enrollment capacity, there being no legal argument presented to demonstrate that either students or staff will suffer by any form of overcrowding or any lack of appropriate educational services at those schools as a result of that repurposing and reassignment. In doing so, the Monitor eliminated the need to keep wasting money by renting space when viable facilities at the Obama School presently exist to continue educational functions operating there and at a time

when the other remaining schools can be used more effectively and efficiently by having the inclusion of all the students therein. Thus, the Monitor has acted properly in accordance with his stated mandate. And I so **FIND.**

By contrast, in generating this challenge, petitioner has caused greater harm than good due to the unnecessary generation of expenditures of legal fees and costs to both sides, which is especially frustrating and counterproductive in light of the enormous financial climate and burden which face all taxpayers and the State. Parenthetically, if petitioner's district had been more fiscally responsible over time, there would have been no need to have a monitor there in the first place to oversee the reconstruction of its fiscal crisis. This compelled the State to act as it did in appointing the Monitor. And since the Monitor is so vested with that affirmative responsibility to maintain the operational and fiscal integrity of the district facilities, his actions regarding the repurposing of the Obama School operations are to be considered commendable and consistent with that mandate. Thus, greater harm will occur to the district if the Monitor's actions in this regard are not upheld.

B. Whether the Board Has Standing to Bring This Claim.

This does not say however, that the Board lacked standing to bring the claim, despite the argument that the Monitor indicated that the true parties to this matter are only the students and their families as well as the affected staff. Rather, I **FIND** that a Board does have an affirmative responsibility to make proper challenges on behalf of its student population when a monitor exceeds his or her lawful authority, although based upon the determinations made herein, this Board was perhaps somewhat shortsighted and ill-advised in the manner in which it challenged that overriding authority in this matter. At the same time it is nonetheless noted that the Monitor did apparently respond to the Board in making his determination with reference to the repositioning of the population of the Obama School. Thus, he did not do so act in either isolation or in a vacuum. At minimum, this suggests that the Monitor recognized that the Board does have a role that process, which validates that it did have a measure of standing.

As stated hereinabove, N.J.A.C. 1:1-12.6(a) provides for the granting of emergency relief 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. In such circumstances, emergency relief pending a final decision may be ordered upon the application of a party. Subparagraph (f) of this section provides that temporary relief may be granted if there is a finding that immediate and irreparable harm will probably result, if there is the likelihood that the moving party will prevail, and if the relief is as limited in scope and as temporary as possible. The granting of emergent relief is an extraordinary remedy which can only be awarded based upon a showing that irreparable harm will result if it is not granted, and a further showing that there is a likelihood of success on the merits. See N.J.A.C. 1:1-12.6; Stroh Assoc., Inc. v. Bd. of Educ. of the Twp. of Hillsborough, Somerset County, 95 N.J.A.R.2d (EDU) 235.

Once again, the foregoing regulation embodies the principles of law announced by the Supreme Court in Crowe v. DeGioia, 90 N.J. 126, 132 (1982).

Petitioner must meet all four criteria conjunctively to prevail on this application. See Crowe v. DeGioia, 90 N.J. 126 (1982. The moving party bears the burden of proving each of the elements for emergent relief "clearly and convincingly." Waste Mgmt of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

In general, a board of education's actions (or those of the Monitor who has been assigned such authority under State law) are entitled to a presumption of lawfulness and good faith. Where such 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)).

The "arbitrary, capricious and unreasonable" standard of review imposes a heavy burden on challengers of such actions. This standard has been defined by the New Jersey courts 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 no 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.
>
> [Piccoli v. Ed. of Educ. of Ramapo Indian Hills Regional School District, OAL Dkt. EDU 1839-98 (January 22, 1999) (citing Bayshore Sewage Co. v. Dent. of Envir. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974).]

In the absence of a clear showing of abuse of discretion, the Commissioner of Education will not substitute his or her own judgment for that of the board of education or, as I have found herein, the actions of the State-sanctioned Monitor. Massaro v. Bd. of Educ. of the Boro. of Bergenfield, 1965 S.L.D. 84, 85. In Kopera v. Bd. of Educ. of West Orange, 60 N.J. Super. 288, 294 (App. Div. 1960), the Appellate Division stated, "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 without rational basis or induced by improper motives." See also G.M. v. Roselle Park Boro. Bd. of Educ., 95 N.J.A.R. 2d (EDU) 107, 109 (where the Commissioner adopted the decision of the ALJ when in a challenge to board action, the ALJ stated, "it is the management prerogative of boards of education that will not be usurped or assumed by the Commissioner of Education absent a definitive showing of bad faith or arbitrary actions taken in bad faith without a rational basis."). As long as the record reflects a rational basis for the action, as well as an absence of bad faith, an authority's action shall be upheld. In the G.M. case, supra, the ALJ, after a full hearing, found the board's decision to change geographic boundaries for kindergarten pupil placement, with a goal of evenly distributing the pupils at different schools within the district, to be a reasonable exercise of authority. In this matter, it appears even on its face that the Monitor utilized appropriate means in order to validate the need to reposition the inhabitants of the Obama School and that he reached out to county and state officials

to review his proposed plan of action even if those parties, including Director Kutner, were not vested with the ultimate responsibility to determine "closure" requirements, inasmuch as I am satisfied that the proofs amply supported the notion that the Obama School was being repurposed to accommodate other educational needs and was not being closed in accordance with the closure requirements for hereinabove. As a result, it was not being closed, despite the unfortunate use of the "closure" nomenclature to the contrary which presumptively generated in this matter.

Based upon the foregoing and after having considered all the arguments advanced as well as the proofs offered by both sides, I therefore **FIND** that the right underlying petitioner's claim is settled against the petitioner's position. I also **FIND** that petitioner has failed to establish the right to relief and has failed to show that the action of respondent is arbitrary, capricious and unreasonable, this having occurred after having given petitioner all due deference and a full and a complete opportunity to present such arguments at the emergent relief hearing.

The most difficult requirement for the moving party to establish or in order to show entitlement to emergency relief is the third factor. In order to prevail on one's application for emergency relief, the party requesting the relief must make a preliminary showing of a reasonable probability of ultimate success on the merits. If the point of emergency relief is to maintain the parties in substantially the same condition at the final decision as when this matter began, it must be established by the moving party that it will probably win on the merits. It is with respect to this that petitioner has great difficulty. Petitioner must show that respondent's actions in this matter are arbitrary and capricious and unreasonable. Petitioner must show that respondent's actions generally exceeded his presumed authority as monitor. This it has failed to do for the reasons stated hereinabove. Once again, it is noted that the Monitor re-purposed the operations of the Obama School. A logistical and necessary first step in the process was to reassign the present school population into alternate facilities as a prelude to shifting other educational functions into it. This was consistent with the Monitor's need to address the fiscal objectives which he had targeted as part of his ongoing job responsibilities. And those efforts were endorsed by officials on both the County and

State educational levels. Therefore, I also **FIND** that petitioner has failed to show the likelihood of prevailing on the merits. Finally, I **FIND** that greater harm will occur to respondent than to petitioner if the emergent relief is granted for the reasons stated hereinabove.

CONCLUSION AND ORDER

Based upon the foregoing, I **CONCLUDE** that, for purposes of deciding this application for emergency relief, petitioner has failed to establish (1) the existence of irreparable harm, (2) that petitioner's claim is based upon a settled right, (3) that petitioner is likely to prevail on the merits, or that (4) the Board would suffer a relative hardship greater than the respondent. In view of the fact that petitioner has failed to establish any or all of the requirements for emergency relief, I **CONCLUDE** that petitioner's request must be **DENIED**. In the process it is also noted that, although the Board argues that respondent must be blocked from ordering that the relocation plan be implemented because of the closure requirements attendant to N.J.A.C. 6A:26-7.5, it nonetheless cites no other law for support for that regard, and, consequently and in accordance therewith the request for emergent relief must be further **DENIED**. It is also clear that the Board has not been able to demonstrate that the law is settled in its favor to show that respondent did not have the authority to do what he did in his capacity as State Monitor and, as a result, that the Board would therefore be likely to succeed on the merits of its underlying claim.

Further, I **CONCLUDE** that petitioner has also failed to establish its entitlement to emergent relief regarding the other two remaining prongs for the reasons stated hereinabove. At the same time, I also **CONCLUDE** that the Board nonetheless had standing to bring the application in the first place. I have made all these above findings and have formed all of these conclusions by a preponderance of the credible evidence.

Based upon the foregoing, it is hereby **ORDERED** that petitioner's request for emergency relief is **DENIED.**

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISIONER 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 (45) days following the entry of this order. If the **COMMISIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) 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, 2011
DATE

JOHN R. FUTEY, ALJ

mph

EXHIBITS ADMITTED
AT THE EMERGENT RELIEF HEARING

For petitioner:

P-A through P-N

For respondent:

RA through R-G

#293-11R

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM TRACY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION ON REMAND
OF TRENTON, MERCER COUNTY	:	
	:	

SYNOPSIS

The petitioning Board certified tenure charges of conduct unbecoming and other just cause against respondent William Tracy – a tenured principal assigned to the Board's Daylight/Twilight High School – for failure, *inter alia*, to enforce the Board's attendance policy. The Board sought dismissal of respondent from his tenured employment.

The Commissioner decided this matter in April 2009, adopting the Initial Decision of the OAL which found that the District had sustained the charge of unbecoming conduct against respondent for failing to properly administer the attendance policy of the District. In so deciding, the Commissioner concurred with the ALJ that the appropriate penalty in this matter was a six-month suspension without pay, to be served prospectively.

On appeal, the Appellate Division affirmed the Commissioner's finding that respondent was guilty of unbecoming conduct, but remanded the matter solely for reconsideration of the penalty imposed, finding that the Commissioner acted in an arbitrary, capricious and unreasonable manner in directing that the six-month suspension would be in addition to respondent's prior period of suspension.

Upon review of the Appellate Division's reasoning in remanding this matter, the Commissioner found that: the court was not familiar with the statutory prescriptions attendant to the bringing and prosecution of tenure charges against individuals; and the respondent's argument on appeal – that the ALJ intended that the 120-day unpaid suspension, imposed when tenure charges were certified, be credited against the recommended penalty of a six-month unpaid suspension – was without merit. Accordingly, the Commissioner concluded that a six-month suspension, to be served prospectively, is the appropriate penalty 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 21, 2011

OAL DKT. NO. EDU 6213-08
AGENCY DKT NO. 183-6/08
APPELLATE DIVISION DKT. NO. A-4569-08T3

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM TRACY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION ON REMAND
OF TRENTON, MERCER COUNTY	:	
	:	

For the Petitioner: Rocky L. Peterson, Esq.
Hill Wallack, LLP

For the Respondent: Robert M. Schwartz, Esq.

The Commissioner decided this matter on April 8, 2009, adopting the Administrative Law Judge's (ALJ) Initial Decision which found that the District had sustained its charge of unbecoming conduct against respondent, principal of Daylight/Twilight High School, for failing to properly administer the attendance policy of the District. The Commissioner found, as did the ALJ, that central to the establishment of this charge were the dual issues of "authority" and "accountability". Specifically, the Commissioner was in complete accord with the ALJ that:

> In order to receive State aid, school districts are required to comply with the rules and standards for equalizing opportunity, including implementing the Core Curriculum Content Standards and providing public school facilities for at least 180 days per year. *N.J.S.A.* 18A:7F-9. The authority to make, amend, and repeal rules for the supervision of district schools rests with the board. *N.J.S.A.* 18A:11-1. *N.J.A.C.* 6A:16-7.8(a)(2) and (3) require boards of education to implement policies and procedures on attendance, including "[t]he expectations and consequences regarding attendance at school and classes," and "[a] definition of

unexcused absence...that, at a minimum, shall be based on the definition of a school day...and the following considerations: i. Family illness or death; ii. Educational opportunities; iii. Written parental permission; iv. Excused religious observances..." The regulation goes on to list a detailed required process for addressing four o[r] more absences. The regulations require the average daily attendance rate for each school district to average 90 percent or higher as calculated for the three years prior to the school year being monitored. *N.J.A.C.* 6A:32-13.1(a). Each school with a three-year average below 90 percent is required to develop performance objectives for improving student attendance. *N.J.A.C.* 6A:32-13(b).

The statutes and regulations make clear that Tracy, as a school principal, had no authority to act separately with regard to attendance policy. The Board, not the school principal, is vested with the power to make policy, which is fundamental to the academic mission. Districts are barred from granting diplomas to students who do not meet core curriculum requirements and attendance policy. *N.J.A.C.* 6A:8-5.2(b).

The fact that Tracy was apparently operating a school without any written policy that would meet the standards of *N.J.A.C.* 6A:16-7.8(a)(2) and (3) demonstrates a dereliction of the principal's duty as primary school administrator. It is the principal's job to communicate a precise understanding of attendance through a written policy available to everyone. The lack of such a policy contributed to the misunderstanding with the Board and the lax documentation by the staff.

While it is true that *N.J.A.C.* 6A:32-8.3(f) states that daily roll call is taken by a teacher or other authorized person, *N.J.A.C.* 6A:32-7.4(b) requires that "[r]ecords for each individual student shall be maintained in a central file at the school attended by the student. When records are maintained in different locations, a notation in the central file as to where such other records may be found is required." *N.J.A.C.* 6A:32-7.3(a)(2) states that mandated student records include a record of daily attendance. The principal is the school leader, responsible for administration and supervision of the school. *N.J.A.C.* 6A:32-4.1(f)(1).

The absence of the school attendance documentation in the required centralized file speaks for itself. Tracy did not see to it that the school had an adequate central file, and he did nothing to ensure that teachers were moving the documentation into that file. There is also no evidence that he made any effort to ensure that

> waivers were properly granted. Rather, he assumed that the lack of complaint meant that others outside the school understood what was being done inside the school and approved of it.
>
> This was an abrogation of the principal's duty as a school leader and primary supervisor, as was the failure to disseminate enough written information about the attendance policy to ensure that the Board, the parents, the students, and the staff all understood it. Therefore, based on the fact that 33 of 91 graduates in the 2005-2006 school year had more than the fifteen absences allowed by Trenton Board of Education policy, the fact that no centralized attendance record-keeping system existed for the Daylight/Twilight High School as a whole, the fact that the Smith Avenue location had no actual waiver documentation system, and the fact that Tracy made no effort to create or monitor a proper attendance system, I CONCLUDE that the Board has proved the charge. (Initial Decision at 22-24), (Commissioner's Decision at 8-9)

After reviewing the factors which must be considered when fashioning a penalty (*In re Fulcomer*, 93 *N.J. Super.* 404, 421-22 (App. Div. 1967)), the Commissioner concurred with the ALJ that respondent's termination from his position was too harsh a penalty under the circumstances and agreed with the ALJ that a six-month suspension from his position was the appropriate penalty, stressing that such suspension must be served prospectively.

On appeal, the Appellate Division, fully rejecting all of respondent's arguments to the contrary, affirmed the Commissioner's finding of respondent's guilt on the unbecoming conduct charge against him. However, it determined to remand this matter solely for reconsideration of the penalty imposed. In so doing, the Court stated: "Tracy next argues that the Commissioner did not articulate a reason for directing that his six-month suspension should be served prospectively, that is, in addition to his prior period of suspension. He urges that the Commissioner thus acted in an arbitrary, capricious, and unreasonable manner. We agree." (Appellate Division Decision at 19) In making its determination, the court presented the following reasoning:

> Tracy asserts that he had already received a four-month, unpaid suspension prior to the ALJ's decision, which "he had already done at the time in which the charges were initially certified." From the record before us, we have not been able to verify the exact length or timing of the prior suspension, but Tracy was apparently first suspended in December of 2007 for an indeterminate amount of time. The record does not reflect whether that suspension was with or without pay, but the Board acknowledges that Tracy was suspended for four months without pay sometime prior to the ALJ's initial decision.
>
> Presuming that Tracy already served a four-month period of suspension prior to the Commissioner's imposition of the prospective six-month suspension, we cannot on the record before us say that a suspension of ten months would be shocking to our sense of fairness in light of the circumstances, although it seems harsh and we may well ourselves have concluded that a total of six months loss of salary was quite sufficient. Tracy has offered no comparison to discipline imposed on other principals in analogous situations to lead us to the conclusion that the suspension here was a sharp departure from prior practice.
>
> However, we do have difficulty with the Commissioner's imposition of a six-month suspension "prospectively" because it is not clear that she really intended to (sic) Tracy to suffer a ten-month suspension. Nothing in the Commissioner's written opinion expressly acknowledges any awareness that Tracy had already been suspended for at least four months during some unspecified period, although she noted that Tracy sought reinstatement to his principal position with back pay. The ALJ noted that Tracy was suspended in December 2007 but, in her final decision, did not indicate whether her recommended penalty of suspension was prospective or retroactive.
>
> In addition to these ambiguities, if the Commissioner intended that Tracy suffer a suspension in excess of six months, she provided no explanation for why his conduct justified a longer suspension than that imposed by the ALJ.... (Appellate Division Decision at 22, 23, 24)

[1]In reviewing the court's above-stated reasoning surrounding its remand in this matter, it is readily apparent that the court was unfamiliar with the statutory prescriptions attendant to the

[1] It is noted that upon receipt of the Appellate Division's remand in this matter, the parties were provided an opportunity to submit briefs with respect to the issue on remand. Such submissions were fully considered here.

bringing and prosecution of tenure charges against individuals and the parties' submissions obviously did not serve to enlighten the panel in this regard. The suspension of a tenured employee without pay is governed by *N.J.S.A.* 18A:6-14 which specifies:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but if the determination of the charge by the Commissioner of Education is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.

Pursuant to this statute, the Board has the authority to suspend a tenured employee without pay when it certifies tenure charges against that employee, which the Board admittedly did here. Once the charges are certified, this statute allows the suspension to continue without pay for 120 calendar days after certification of the charges. The statute further mandates that resumption of the suspended employee's full salary must begin on the 121st day after the certification of charges and this payment of full salary must continue until the date of determination of the charges by the Commissioner.[2] Such is the case irrespective of the fact that *the individual provides no services whatsoever to the Board during this time*.[3]

Turning to respondent's argument on appeal – that the ALJ obviously intended, in recommending a six-month period of suspension for respondent, that the 120-day suspension imposed at certification of tenure charges be credited against her recommended penalty and therefore the Commissioner increased the recommended penalty without explanation, an argument which the Appellate Division inexplicably seems to have accepted – such a

---

[2] Upon the *sustaining* of tenure charges at the end of the case – unless specifically discussed or directed otherwise in the Commissioner's decision – payment for this suspension period is deemed forfeited.

[3] There is no claim here that respondent suffered any interruption of this statutorily mandated full pay status during the full course of this case.

contention finds absolutely no support in the record. The ALJ's decision offers no substantiation at all – either implicitly or explicitly – that she ever contemplated crediting respondent's statutorily-mandated suspension against her recommended penalty in this matter. To the contrary, the ALJ's recommended Order clearly states: "I further ORDER that respondent *shall be* suspended for six months[,]" (emphasis added) unquestionably phrased in prospective rather than retroactive language. Irrespective of the fact that the Commissioner finds no ambiguity whatsoever as to the ALJ's recommended penalty, there can be no doubt as to the Commissioner's ruling in this matter. Stating that the Commissioner did not view respondent's dereliction of his duties as a principal in connection with the charge established against him is a *de minimis* infraction; recognizing that such dereliction clearly had a detrimental effect on the Board in that respondent impermissibly usurped the Board's authority in the establishment of uniform standards in its schools and seriously compromised its ability to conform to its regulatory obligations with respect to the attendance component of graduation requirements at the Daylight/Twilight High School; and also, seeking to impress upon respondent the seriousness of the abdication of his responsibilities in this regard, the Commissioner imposed a six-month prospective suspension – which remains unaltered here.

Accordingly, the Acting Commissioner concludes that a penalty of a six-month suspension from respondent's position, to be served prospectively, is the appropriate penalty for the proven unbecoming conduct charge against him.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/21/11
Date of Mailing: 7/22/11

* 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)

#294-11L

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRISTOPHER D. CERF
Acting Commissioner

July 22, 2011

David M. Serlin, Esq.
505 South Lenola Road
Blason II, Suite 120
Moorestown, New Jersey 08057

T[redacted] and R[redacted] C[redacted]
[redacted]
Willingboro, New Jersey 08046

Re: *Board of Education of the Township of Burlington, Burlington County v. T.C. and R.C., on behalf of minor child, Y.C. Agency Dkt. No. 126-5/11.*

Dear Parties:

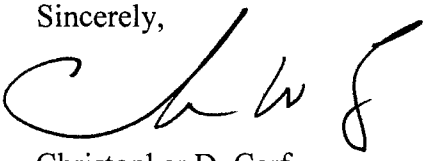
Upon review of the Petition of Appeal filed in connection with the matter entitled *Board of Education of the Township of Burlington, Burlington County v. T.C. and R.C., on behalf of minor child, Y.C.,* Agency Dkt. No. 126-5/11, and based upon the respondents' failure to submit an Answer to the petition, I have determined to grant summary decision in favor of petitioner.

On May 19, 2011, petitioner filed a Petition of Appeal claiming that Y.C. was not entitled to attend school in the District in accordance with *N.J.S.A.* 18A:38-1 *et seq.*, and requesting that it be awarded tuition in the amount of $7,527.80 for the 140 days that Y.C. attended school in the District during the 2010-2011 school year. The petitioner sent a copy of the Petition of Appeal to the respondents on May 18, 2011, via certified and regular mail.

On May 20, 2011, the Bureau of Controversies and Disputes sent the respondents an acknowledgment of filing and notice that an Answer to the petition was due within 20 days. *N.J.A.C.* 6A:3-1.5. Because the respondents failed to respond to the initial notice, on June 15, 2011 a second notice was sent to the respondents, 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 would be deemed admitted and this matter may be decided on a summary decision basis pursuant to *N.J.A.C.* 6A:3-1.5(e). Although the copy sent via certified mail was returned indicating that the notice was unclaimed, the notice sent via regular delivery was not returned as undeliverable.

To date, no Answer has been filed on behalf of the respondents. Accordingly, petitioner's claim that Y.C. was not entitled to attend school in the District during the 2010-2011 school year pursuant to *N.J.S.A.* 18A:38-1 *et seq.* is deemed admitted by the respondents. The respondents are hereby ordered to pay the petitioner tuition for the 140 days that Y.C. attended school in the District during the 2010-2011 school year in the amount of $7,527.80.*

Sincerely,



Christopher D. Cerf
Acting Commissioner

c: County Superintendent
State Law Library ✓

CDC/MKD/JKH

VIA REGULAR MAIL

* 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)

295-11L

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 22, 2011

K[redacted] R[redacted]
[redacted]
Orange, New Jersey 07050

Board Secretary
Board of Education of the City of Orange
451 Lincoln Avenue
Orange, New Jersey 07050-2704

Re: *K.R., on behalf of minor children, J.W., M.R. and Y.R. v. Board of Education of the City of Orange, Essex County. Agency Dkt. No. 112-5/11.*

Dear Parties:

Upon review of the Petition of Appeal filed in connection with the matter entitled *K.R., on behalf of minor children, J.W., M.R. and Y.R. v. Board of Education of the City of Orange, Essex County*, Agency Dkt. No. 112-5/11, 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 May 11, 2011, petitioner filed a Petition of Appeal pursuant to *N.J.A.C.* 6A:3-8.1 *et seq.* claiming that *J.W., M.R. and Y.R.* were entitled to attend school in the District in accordance with *N.J.S.A.* 18A:38-1 *et seq.* A copy of the Petition of Appeal was served upon the Board Secretary via facsimile on May 11, 2011, together with an acknowledgment of filing and 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 to the Board Secretary on June 2, 2011, 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 would be deemed admitted and this matter may be decided on a summary decision basis pursuant to *N.J.A.C.* 6A:3-1.5(e). The Board also failed to respond to the second notice. On June 21, 2011 a Final Notice was sent to the Board Secretary – via certified and regular mail, with a copy to counsel for the Board – again clearly indicating that, absent receipt of an Answer to the Petition of Appeal within 10 days, each count in the petition would be deemed admitted and this matter may be decided on a summary decision basis.

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To date, no Answer has been filed on behalf of the Board. Accordingly, petitioner's claim that *J.W., M.R. and Y.R.* are entitled to attend school in the District pursuant to *N.J.S.A.* 18A:38-1 *et seq.* is deemed admitted by the Board. The Board is hereby ordered to continue to admit *J.W., M.R. and Y.R.* into its public school system, free of charge, so long as there is no change in circumstances that would alter that entitlement.*

Sincerely,

Christopher D. Cerf
Acting Commissioner

c: Melvin C. Randall, Esq.
County Superintendent
State Law Library

CDC/MKD/JKH

VIA REGULAR MAIL

* 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).

296-11

OAL DKT. NO. EDU 09748-08
AGENCY DKT. NO. 204-7/08

NICOLETT S. WOOD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
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 was due within thirty (30) days from the March 17, 2011 Board meeting. 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7|22|11
Date of Mailing: 7|22|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09748-08

AGENCY DKT. NO. 204-07/08

NICOLETT S. WOOD,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

Wayne J. Oppito, Esq., for petitioner

Karen A. Murray, Esq., for respondent

Record Closed: June 9, 2011 Decided: June 13, 2011

BEFORE **MUMTAZ BARI-BROWN,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 21, 2008, 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.

The attached Confidential Settlement Agreement and Board Resolution were submitted on June 9, 2011, 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 13, 2011
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: 6-15-11

Date Mailed to Parties: JUN 15 2011
dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

RECEIVED
BOARD OF EDUCATION
LAW DEPT.
ELIZABETH, NJ

2011 MAR 14 PM 12:34

NJPSA 25+ Years of Service
Established 1981

March 11, 2011

Karen A. Murray, Esq.
Legal Department
Elizabeth Public Schools
500 North Broad Street
Elizabeth, New Jersey 07208

Re: Nicolett Wood / Elizabeth Board of Education

Dear Ms. Murray:

In furtherance of our discussions, you will present the following to the Board of Education at its meeting on March 17, 2011 to resolve the above matter.

1. Ms. Wood's salary would be adjusted retroactively for the 2007-2008 school year to $105,300.00 plus longevity in accordance with the then contract between the Board of Education and the EASC.

2. For 2008-2009 the same salary of $105,300.00 plus longevity, retroactively.

3. For 2009-2010 the same salary of $105,300.00 plus longevity, retroactively.

4. For 2010-2011 the same salary of $105,300.00 plus longevity, retroactively.

5. For 2011-2012 the same salary of $105,300.00 plus longevity.

All of the above retroactive salaries shall be made in accordance with the Division of Pensions Worksheet on retroactive salary increases and shall be paid to Ms. Wood within thirty (30) days of the March 17, 2011 meeting.

6. In addition Ms. Wood shall be paid $15,000.00 less the customary and usual deductions, in a separate check for the vacation time that she lost in going from a supervisor to a school nurse, to be paid within thirty (30) days of the March 17, 2011 meeting. The above is a one time payment and is not pensionable.

7. Ms. Wood shall waive her recall rights to any position of supervisor.

New Jersey Principals and Supervisors Association
12 Centre Drive • Monroe Township, New Jersey 08831-1564
Tel.: [illegible] Fax: [illegible] E-Mail: [illegible] Web: [illegible]

8. Ms. Wood shall withdraw the petition currently before the Commissioner and OAL with prejudice.

Kindly discuss this matter with the board of education and advise as to its acceptability. If acceptable the parties will draft a more formal agreement and notify the Administrative Law Judge of the resolution of this matter.

Very truly yours,

Wayne J. Oppito

Wayne J. Oppito, Esq.

Karen Murray
For the Bd.

WJO/lm
cc: Nicolett Wood

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P
Y

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Nicolett Wood have discussed a resolution of an Office of Administrative Law matter (OAL Docket No. EDUOA 09748-2008N; Agency Reference No. 204-7/08); 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 with the Board Secretary, provided that it is fully signed by all parties.

Elizabeth, New Jersey
March 17, 2011

297-11

#297-11

OAL DKT. NO. EDU 1122-11
AGENCY DKT. NO. 1-1/11

L.L., on behalf of minor child, M.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, 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' settlement and adopts the Initial Decision as the final decision in this matter. 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: 7/22/11

Date of Mailing: 7/22/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01122-11
AGENCY DKT. NO. 1-1/11

L.L. ON BEHALF OF MINOR CHILD, M.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY
Respondent.

Samuel R. Mechanic, Esq. for petitioner (Law office of Samuel R. Mechanic, attorney)

Athina Lekas Cornell, Esq. for respondent Cranford Board of Education (Lindabury McCormick Estabrook & Cooper, attorneys)

Record Closed: June 16, 2011 Decided: June 16, 2011

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

This matter was transmitted to the Office of Administrative Law on January 26, 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 on the attached settlement agreement. The Cranford Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated June 7, 2011.

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 16, 2011
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: June 16, 2011

Mailed to Parties: JUN 20 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

LINDABURY, McCORMICK, ESTABROOK & COOPER
A Professional Corporation
53 Cardinal Drive
P.O. Box 2369
Westfield, New Jersey 07091
(908) 233-6800
Attorneys for Respondent, Cranford Board of Education

JUN 16 A 10:35
OFFICE OF ADMIN LAW

L.L. o/b/o M.L. Petitioners	:	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION DOCKET NO.: EDU-01122-2011N
-vs-	:	AGENCY REF. NO.: 1-11/11
CRANFORD BOARD OF EDUCATION	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

This Agreement made on MAY 23, 2011 by and between the Cranford Board of Education (the "District") located at 132 Thomas Street, Cranford, New Jersey 07016 and Linda Logue, parent of M.L., (the "Parent") located at 58 Lenhome Drive, Cranford, N.J. 07016.

WHEREAS, M.L., is a general education second grade student enrolled in the District; and

WHEREAS, in September 2009 M.L. was domiciled in Roselle and sought to attend the District as a tuition student, enrolled as a tuition student in the District; and

WHEREAS, in September 2009 the Parent agreed to pay annual tuition to the District in the amount of $10,732.00 on a monthly basis ($1,0732.20 per month) for the 2009-2010 school year; and

WHEREAS, the Parent paid the District $1,073.20 per month for the months of October 2009 through January 2010; and

WHEREAS, on or about February 18, 2011, the Parent completed an Affidavit of Residency attesting residency at 58 Lenhome Drive, Cranford, New Jersey; and

WHEREAS, on or about the same date Henry Schwartz completed an Affidavit of Landlord attesting that the Parent and M.L. resided at 58 Lenhome Drive, Cranford, New Jersey; and

WHEREAS, based on the Affidavit the District did not charge the Parent tuition monies from March through June 2010; and

WHEREAS, in or about September 2010, the District received a report indicating that the Parent and M.L. did not reside at 58 Lenhome Drive, Cranford, New Jersey; and

WHEREAS, the District questioned the Parent about the residency report and the Parent acknowledged that they did not reside in Cranford because they were renovating their property; and

WHEREAS, the District provided the Parent with written correspondence advising that M.L. was not entitled to a free public education in the District because he did not reside in Cranford, New Jersey; and

WHEREAS, a dispute arose between the District and the Parent as to whether M.L. was entitled to a free public education; and

WHEREAS, prior to the end of October 2010, the Parent and M.L. moved into the property located at 58 Lenhome Drive, Cranford, New Jersey thereby satisfying the criteria for domicile; and

WHEREAS, on or about December 22, 2010 the Cranford Board of Education provided the Parent with notice that M.L. was not domiciled within the District during the period in question, and therefore, not entitled to a free public education; and

WHEREAS, on or about January 4, 2011, the Parent filed a pro se appeal of the Cranford Board of Education's residency decision; and

WHEREAS, on or about January 21, 2011, the District filed an Answer to the Parent's appeal; and

WHEREAS, the parties have a desire to settle the above matter in an amicable way;

NOW THEREFORE, the parties hereby agree as follows:

1. The Parent shall pay the District two thousand dollars ($2,000.00) in full and final settlement of the tuition monies due and owing the District.
2. The Parent shall pay the District two hundred dollars ($200.00) per month on the first day of each month.
3. If the Parent defaults in payment of the $2,000, the District reserves the right to seek enforcement of the payment provisions outlined in this Settlement Agreement in an appropriate Court of law. If the Parent defaults in payment of the $2,000, the District also reserves the right to reinstitute this matter in order to recover the full amount of past due tuition monies.
4. The parties have reached this compromise to avoid the expense and inconvenience of a hearing before the Bureau of Controversies and Disputes. Neither party is admitting any wrongdoing.
5. The parties agree that the terms of this Agreement shall be confidential to the maximum extent permitted by law.
6. In consideration of the settlement of this matter, the Parent shall release the District from any and all claims, rights and liability, including but not limited to any and all claims for additional attorneys fees, compensatory education, money damages, civil liability, or any other equitable or legal relief through the date of the execution of this Settlement Agreement.

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. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.
12. This Agreement is subject to ratification by the Cranford Board of Education at its next regularly scheduled meeting after receipt of a signed Agreement from the Parent.

ON BEHALF OF M.L.

Linda Logue

Linda Logue, Parent

Date: 5/9/11

ON BEHALF OF THE CRANFORD BOARD OF EDUCATION

Mary Venditti

Mary Venditti, Board President

Date: 6-9-11

CRANFORD BOARD OF EDUCATION
RESOLUTION 5/23/11 - 35
SETTLEMENT AGREEMENT

BE IT RESOLVED that the Board of Education, upon the recommendation of the Superintendent of Schools, approves the Settlement Agreement, OAL Docket No.: EDU01122-2011 N, between the Board of Education and Linda Logue, parent of M.L.

Certified to be a true copy of a resolution adopted by the Cranford Board of Education at a meeting held on May 23, 2011.

Robert J. Carfagno
Business Administrator/
Board Secretary

June 7, 2011
Date

300-11

WESLEY GILMER,	:	
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
IN THE MATTER OF THE TENURE HEARING OF WESLEY GILMER STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	:	

SYNOPSIS

The Board certified 19 charges of inefficiency against respondent – a tenured teacher employed by the district since 1997 – for poor teaching performance, including unsatisfactory pedagogical technique, inadequate classroom management, and failure to meet professional obligations such as, *inter alia*, timely submission of lesson plans, management books, and report cards. Respondent contended that the tenure charges were baseless; that he is an effective, dedicated, and well-regarded teacher; and that the unfair charges resulted from a contentious relationship with the principal whom he worked under in his most recent teaching assignments. The Board sought dismissal of respondent from his tenured employment.

The ALJ found, *inter alia*, that: the Board carried its burden of proving the tenure charges of inefficiency against respondent; the district repeatedly attempted to encourage professional improvement over the course of many years, did not act precipitously or prematurely in the filing of tenure charges against respondent, and provided him the support contemplated by *N.J.S.A.* 18A:6-11; respondent had the commitment and love of children necessary to be an effective educator, but was unwilling to use those positive qualities in a professional manner within the curricular and pedagogical framework of the district; respondent countered the charges against him with denials of personal responsibility; respondent's attitude created no confidence that he would be responsive to continued district efforts to assist him in the future; and respondent has not demonstrated that the district violated his rights when it withheld his salary increment prior to the filing of tenure charges. Accordingly, the ALJ concluded that respondent should be dismissed from his tenured employment and, and further affirmed the withholding of respondent's salary increment.

Upon comprehensive and independent review of the record, the Commissioner adopted the Initial Decision as the final decision in this matter and dismissed respondent from his tenured position. A copy of the decision was transmitted 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.

Mailed 7/29/11

OAL DKT. NOS. EDU 13895-08, EDU 13560-09 (CONSOLIDATED)
AGENCY DKT NOS. 317-10/08, 296-10/09

WESLEY GILMER,	:	
PETITIONER,	:	
V.	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
IN THE MATTER OF THE TENURE HEARING OF WESLEY GILMER STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, 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 and the School District's (District) reply thereto.

The respondent takes exception to the Administrative Law Judge's (ALJ) determination that the District proved the charges of inefficiency against him, and that the District's decision to deny his increment was not arbitrary, capricious or unreasonable. The respondent maintains that the District did not provide positive assistance to help him overcome his alleged inefficiencies during the 90-day and extended improvement period[1] (Improvement Period) as required by *N.J.S.A.* 18A:6-11 and *Rowley v. Board of Education of the Manalapan-Englishtown Regional School District*, 205 *N.J. Super.* 65 (App. Div. 1985). The respondent

[1] The initial 90-day improvement period began on January 30, 2009 and was later extended by the District until June 30, 2009. The respondent went out on medical leave effective May 18, 2009, therefore the Improvement Period lasted for approximately 138 days.

argues that the District and Principal Hartsfield simply conducted evaluations during the Improvement Period without providing the required cohesive assistance and support. Additionally, the respondent contends that the findings contained in the Collaborative Assessment for Planning and Achievement Report for the Quitman School raise serious questions about Principal Hartsfield's credibility on issues related to whether cohesive support and assistance were provided to the respondent.

In his exceptions, the respondent also argues that the District failed to adhere to its own policy for evaluating respondent's performance, which states that ten observations – including four formal and six informal – shall be conducted during the 90-day improvement period. Respondent points out that, in his case, nine informal and three formal observations were conducted by the District. Additionally, the respondent argues that after the extension of the original 90-day improvement period, the District improperly failed to provide him with an updated improvement plan that took into account his improvement and noted any additional deficiencies. The respondent also contends that the District did not give him adequate time to make improvements since it authorized his medical leave during the Improvement Period. Finally, the respondent maintains that – contrary to the ALJ's assessment – dismissal is not required because the respondent has had positive evaluations during his 13 years of service with the District, and that he should be given another opportunity to prove himself without the tension caused by the bad relationship that he had with Principal Hartsfield.

In reply, the District urges the adoption of the Initial Decision asserting that the respondent's exceptions simply reiterate the unsuccessful arguments made by the respondent throughout the proceedings. The District generally maintains that over the course of three consecutive schools years, the respondent exhibited severely deficient teaching performance

which was observed by several different performance evaluators. Additionally, the District emphasizes that the record established that the respondent was afforded substantial positive assistance. In reply, the District also references certain findings made by the ALJ in the Initial Decision that directly contradict the respondent's exceptions.

Upon a comprehensive review of the entire record in this matter, which included the transcripts of the hearing dates conducted at the OAL between April 30, 2010 and February 4, 2011[2], the Commissioner concurs with the ALJ – for the reasons discussed on pages 31-37 of the Initial Decision – that the District has proven the inefficiency charges brought against the respondent. The Commissioner is also in accord with the ALJ's determination that the District's decision to withhold the petitioner's increment for the 2008-2009 school year was not arbitrary, capricious or unreasonable.

Despite the arguments and objections presented by the respondent in his exceptions, the record overwhelmingly demonstrates that the District provided the respondent with the assistance required by *N.J.S.A.* 18A:6-11, and that he was given ample opportunity to overcome his deficiencies. During the Improvement Period, the District took various steps to help the respondent cure his inefficiencies by: providing him with assistance from content coaches and resource teacher coordinators; giving him the opportunity to observe other classrooms; coordinating the observations of respondent's teaching method by a variety of outside administrators that included an opportunity for him to conference before and after the observation; and providing him with the resources available to the teachers during weekly grade level meetings. Moreover, with respect to the assistance provided by the District, the ALJ found the respondent's testimony to be incredible, noting that, "the respondent's protestations that he

[2] According to the Initial Decision there were 23 hearing dates at the OAL. The record does not include a transcript from the hearing on March 9, 2010 or September 21, 2010.

was unassisted during his improvement period are not credible." On the other hand, the ALJ found that the school's administration repeatedly rated the respondent's teaching performance as unsatisfactory, and she found no cause to question the credibility or sincerity of the performance evaluators. 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. Insofar as her opinion on this issue is a credibility determination, the Commissioner may not disturb it unless a review of the record discloses that it is arbitrary, capricious or unreasonable. *N.J.S.A.* 52:14B-10c; *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).

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.* 185; *In re Hearing of Kittell, Little Silver School District*, 1972 *S.L.D.* 535, 541; *In re Fulcomer,* 93 *N.J. Super.* 404 (App. Div. 1967).

It is apparent from the record that the respondent has been unwilling or unable to improve his performance in the classroom despite the extensive efforts of the District. The respondent's defenses to the charges against him range from complete denial to allegations that the charges were drummed up because of Principal Hartsfield's alleged vendetta against him, a stance which is completely inconsistent with the testimonial and documentary evidence.

Remarkably, during the course of the protracted proceedings the common theme advanced by the respondent consisted of a litany of excuses as to why the District was not doing enough to make him a better teacher, despite the fact that the evidence showed that the District provided the respondent with the requisite support and assistance during the Improvement Period, and even well before it was implemented. It is troubling that the respondent has been completely incapable of recognizing that at some point a struggling teacher has to take responsibility for his own actions and shortcomings, and should be able to at least demonstrate that he is capable of grasping fundamental teaching principles. As a result, the Commissioner does not find that the record before him provides any indication that the respondent will improve his unsatisfactory teaching performance. Finally, the Commissioner considered respondent's 13 years of employment with the District, and nonetheless determines that the extensive record illustrates that he is unfit to remain in his position.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Respondent is hereby dismissed from his tenured position with the State-Operated School District of Newark. This matter 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.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/28/11

Date of Mailing: 7/29/11

[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

WESLEY GILMER,

Petitioner,

v.

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

Respondent.

OAL DKT. NO. EDU 13895-08

AGENCY DKT. NO. 317-10/08

IN THE MATTER OF THE TENURE HEARING OF WESLEY GILMER, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.

OAL DKT. NO. EDU 13560-09

AGENCY DKT. 296-10/09

Arsen Zartarian, Esq., for petitioner, the State-Operated School District of the City of Newark

Robert Pickett, Esq., for respondent, Wesley Gilmer

Record Closed: March 28, 2011 Decided: May 6, 2011

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Wesley Gilmer is employed by the State-Operated School District of the City of Newark (the District) as a teacher under tenure, pursuant to N.J.S.A. 18A:28-5. On or

about January 26, 2009, inefficiency tenure charges were filed against Gilmer by Jacquelynn Hartsfield, principal of Quitman Street Community School (Quitman). On July 23, 2009, Gilmer was notified that the alleged inefficiencies had not been corrected during the ninety-day statutory period prescribed by N.J.S.A. 18A:6-11. On September 11, 2009, Gilmer filed a response to the charges. He asserted that the charges of inefficiency were baseless, and that he is an effective, dedicated, and well-regarded teacher.

On October 23, 2009, the Regional Superintendent of Schools and the District Superintendent considered the charges and supporting evidence and determined that probable cause existed to credit the evidence in support of the charges, and that the charges, if so credited, were sufficient to warrant Gilmer's dismissal. Pursuant to N.J.S.A. 18A:7A-39 and N.J.S.A. 18A:6-14, Gilmer was suspended without pay effective October 26, 2009.

The tenure charges and supporting documents were filed with the Commissioner of Education on November 6, 2009, and an answer filed by Gilmer on November 20, 2009. The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on November 30, 2009. Via order dated January 8, 2010, the tenure matter was consolidated with a pending challenge to an increment withholding, which arose from the same facts.[1]

On April 12, 2010, the District filed a motion in limine, seeking to exclude the testimony of Gilmer's proposed expert witness. The motion further sought to exclude a December 2007 New Jersey Department of Education Collaborative Assessment for Planning and Achievement (CAPA) report completed after a visit to Quitman by the CAPA team. Gilmer filed a brief in opposition to the motion on April 30, 2010, and the District replied to the opposition on May 21, 2010. Via order dated June 21, 2010, I granted the District's motion as to the testimony of the expert witness, but denied the motion as to the CAPA report.

[1] Gilmer's increment was withheld pursuant to N.J.S.A. 18A:29-14 on or about July 31, 2008. A petition was filed challenging the action of the School District on October 31, 2008. The School District filed its answer and the matter was transmitted to the OAL as a contested case on December 5, 2008.

The hearing commenced on March 9, 2010, and continued for twenty-two additional days.[2] The record closed on March 28, 2011, with the filing of post-hearing submissions.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Background Facts

The charges against Gilmer arise from his teaching performance as a fifth-grade and first-grade teacher at Quitman. Newark is struggling school district, and Quitman is a struggling school. The CAPA team visited Quitman from December 10-13, 2007. Quitman had been designated as a school "in need of improvement," and under No Child Left Behind (NCLB), 20 U.S.C. § 6301 et seq., the New Jersey Department of Education (DOE) was required to provide intensive and sustained support to Quitman. The CAPA review process supports schools like Quitman by assigning "teams of skillful and experienced individuals to provide . . . practical, applicable, and helpful assistance, increasing the opportunity for all students to meet the state's Core Curriculum Content Standards." (R-24.)

Christine Rennie led the CAPA team and testified that the purpose of CAPA review is to provide an outsider's view of the school and its climate and culture. She stressed that her team's report is not an "evaluative instrument," but rather was intended to offer constructive criticism and suggestions to all levels of the school's professional community, and to teachers and administrators alike. The report highlighted serious deficiencies both in instruction and in supervision. But as evidence in this proceeding, the report is most helpful where it shares actual classroom observations by the CAPA team. These reflect that in 2007 the students at Quitman received uneven instruction, and that sound pedagogical practices were not uniformly in place.

[2] The hearing dates are listed in the appendix.

Rennie testified that as part of the review process close to twenty teachers were interviewed. She found that faculty members were not entirely satisfied with the assistance and leadership received from administration. But I can afford this aspect of the CAPA report little weight. These findings are based on hearsay interviews by unnamed staff members who could not be cross-examined at hearing. At hearing, several Newark administrators described a variety of programs available to assist struggling teachers. Accordingly, to fully appreciate the dissatisfaction of these individual interviewees, it would be necessary to understand their own personal pedagogical strengths and limitations; know more about how their performance was evaluated and remediated by administration; and perhaps most importantly, learn whether these staff members embraced any assistance offered.[3]

The CAPA report does confirm, however, and I **FIND** that Quitman was a troubled educational environment that, at least in 2007, appeared to be shortchanging many of its students in a manner inconsistent with State and federal law. As to why Quitman found itself in this condition, suffice it to say that there appeared to be blame to go all around.

Gilmer's testimony provided insight into his background and motivation to enter the field of teaching. It is uncontroverted and I **FIND** that Gilmer is a native of Newark, a 1976 graduate of the Newark Public Schools, and a veteran of the United States Marine Corps. Gilmer is one of nine siblings, only two of whom attended college. Gilmer grew up impoverished, and he is devoted to bettering his community. Gilmer organized a tenant's association, and worked to patrol his neighborhood in an effort to free it from violence and drugs. He opened a local recreation center that would provide a safe haven for local children. Gilmer testified with passion and credibility that he wished to make Newark a better and safer place.

Gilmer began his career as an educator in 1994 at Sacred Heart School in Newark, teaching fifth grade. He taught "struggling students," and testified proudly

[3] The report questions the availability and effectiveness of the instructional support available, but again, these findings are based on comments by interviewees. For example, relative to mathematics instruction the report states, "teachers . . . continue to request 'hands on' training, modeling, and non-threatening observation and supervision in this area." (P-24 at p. 9.)

regarding the inroads he made to better them as people and students. Gilmer remained at Sacred Heart until November 1997, when he was hired by the Newark Public Schools to replace a fifth-grade teacher at Miller Street School. Two months later Gilmer was reassigned to Morton Street School, where he taught seventh-grade language arts. His Morton Street seventh graders came from poor homes, and lacked the discipline and focus needed to grow academically. Gilmer stated, and it was uncontroverted, that he worked long hours, purchased materials for his students with his own funds, and tutored them during after-school hours and on weekends free of charge. Gilmer shared letters and testimony from former students and parents lauding his efforts on their behalf.[4]

A June 1998 Annual Evaluation Report signed by Carolyn Allen rated Gilmer as satisfactory overall. But the report was not without recommendations for improvement, and noted that "[t]here is a need to restructure the instructional program by providing the students with innovative and interactive learning experiences." Allen indicated as well that attention needed to be paid to "classroom management and developing methods of reaching students who were not achieving mastery." (R-1.)

During the 1999-2000 school year, Gilmer was assigned to sixth grade at Morton, and was observed and evaluated by Principal Carl Gregory. An October 26, 1999, evaluation report likewise rated Gilmer as satisfactory but included recommendations for pedagogical growth. Particularly noteworthy was the recommendation that Gilmer use test results to drive instruction, and align instruction with Core Curriculum Content Standards. A January 31, 2000, observation was similarly complimentary, and indeed, included several "outstanding" ratings. By November 2000, Gregory had rated Gilmer as "outstanding" overall, complimenting the print-rich environment in his classroom. A February 5, 2001, evaluation also rated Gilmer's work as "outstanding." Gilmer testified that during this year he won a "Best Practices Award," which he described as an honor that recognized his efforts to ensure the educational success of his students.

An April 23, 2001, evaluation rated Gilmer as "outstanding" overall. The evaluation noted that Gilmer had been selected to be the America's Choice

[4] These accolades came from former students and parents at each of the schools at which Gilmer taught, including Quitman.

Demonstration classroom for the 2001-2002 school year. Gilmer testified with much pride that America's Choice was a reading and writing program that had been selected for use at Morton. Teachers would be invited to watch Gilmer demonstrate a lesson, so that they could take his practices back to their own classrooms. A May 17, 2001, observation again rated Gilmer's work as "outstanding," although the "areas in need of improvement" section of the evaluation form noted a need for better progress by students per the Progressive Data Analysis (PDA) approach utilized by the District. The summative evaluation for the 2000-2001 school year was glowing overall, but did note areas where student performance was troublingly poor, pointing to a decrease in students reaching benchmarks in certain language-arts skills. The evaluation stated, "It is imperative to implement [sic] for you the above areas in need of improvement." (R-8.) It was during this school year that Gilmer earned tenure.

In June 2002, Gilmer was evaluated by the vice principal at Morton Street School, Hakimah Abdul-Ghani. The evaluation was "satisfactory" overall, and noted excellent classroom management. But a December 2002 evaluation, although also "satisfactory," began to reflect shortcomings in Gilmer's performance, with several areas rated as needing improvement. Abdul-Ghani found that Gilmer's instructional technique did not incorporate the Whole School Reform (WSR) model used by the District. She furthermore found that Gilmer needed to improve his displays of student work and needed to employ better procedures for care and use of materials and equipment. The narrative portion of the evaluation presages some of the concerns that would plague Gilmer's performance evaluations once he transferred to Quitman. Abdul-Ghani wrote that, "[a]s the model America's Choice classroom for the school, there should be more charts displayed of the lessons that have been presented." (R-11.) Abdul-Ghani noted that "[s]ome components of America's Choice are not evident, i.e. the writer's workshop stations . . . the 25 Book Campaign roster and the Principal's Book of the Month . . . ." (R-11.)

The evaluation was critical of the lack of student work displayed in the classroom and hallway. Concerns were expressed that students were not prepared with proper materials, such as a reading-response journal, and that their writing folders were not up to date. Abdul-Ghani also criticized Gilmer for omitting certain mandated instructional

approaches, stating, "CM/CD artifacts are displayed, but no implementation was evident. CM/CD does work for middle school students, even the go-around cup. Ms. Fischman has been instructed to assist you with implementation. CM/CD is not an option!"[5] (R-11.)

An evaluation at the conclusion of the 2002-2003 school year, again signed by Abdul-Ghani, once more rated Gilmer as "satisfactory" overall, but now contained increasingly serious performance concerns. These concerns would surface again once Gilmer transferred to Quitman; and included unsatisfactory attendance and failure to timely submit writing samples, lesson plans, and substitute plans. Gilmer's selection as the America's Choice model classroom notwithstanding, Abdul-Ghani noted that "implementation of America's Choice Program was sporadically done." (R-13.) Her concerns about the quality of instruction appeared to be consistent with evidence of poor student performance, and she stated in the evaluation that "Fall writing samples went from 16 being proficient to only 7 in the Spring." (R-13.)

Gilmer returned to the sixth grade at Morton for the 2003-2004 school year. At the conclusion of that year he was once again evaluated by Gregory. While "communicating with parents" and "reflecting on teaching" were noted to be areas of strength, Gregory wrote that Gilmer did not adhere to school submission timelines for lesson plans and writing tasks. The evaluation stated that Gilmer "[n]eeds to assume more responsibility for and participate in school-wide projects and be more diligent in completing them." (Emphasis in original.) His performance received a rating of only "basic" in such areas as "demonstrating professionalism," "contributing to the school and district," and "maintaining accurate records."[6] (R-14.)

At the conclusion of the 2003-2004 school year, Gilmer was transferred to Quitman. According to Gilmer, the entire Morton fifth-grade class was transferred as well, and he had been asked to be one of the staff members who accompanied the students to their new school. Despite the fact that his evaluations at Morton were no

[5] Gilmer could not entirely explain what CM/CD referred to, stating that to the best of his recollection it was a classroom-management/disciplinary approach no longer utilized by the District.

[6] At this point the District evaluation instrument contained four rankings, "unsatisfactory, basic, proficient and distinguished."

longer uniformly positive, Gilmer urged that his relationship with Gregory and the other evaluators there was excellent, and he took advantage of the opportunity to move to Quitman because it would present a new challenge. Gilmer reiterated throughout his testimony that any difficulties in his relationship with School District administration were nonexistent until he arrived at Quitman.

Yet, Gilmer's version of the events surrounding his transfer did not ring true, and it felt odd that he would be chosen to follow the fifth grade to Quitman when this was a grade he had never taught at Morton. Indeed, on cross-examination it was revealed, and I **FIND** that Gilmer asked to be transferred from Morton. His request had not been for a transfer to an elementary school such as Quitman, but rather to a middle school setting, per a May 5, 2005, letter to Hartsfield. (P-177.) It thus appears that as his evaluations began to contain criticisms, Gilmer sought to change schools, a pattern he would soon repeat at Quitman.

Gilmer's Fifth-Grade Performance at Quitman

In September 2004, Gilmer began to teach fifth grade at Quitman. At the time of his transfer he was a tenured teacher with ten years of experience in the classroom—including close to seven years of experience in the Newark Public Schools. He was not a novice teacher.

Hartsfield was the principal of Quitman throughout Gilmer's tenure there. She had protocols in place that she insisted upon with her staff. These were fully explained to the faculty at the start of each school year, and memorialized in voluminous opening day packets. The packets included sample forms and directions designed to assist teachers in understanding and complying with building protocols. Topics such as communicating with parents, planning instruction, classroom management, instructional objectives, grades, best practices for a literacy classroom, and differentiated instruction were addressed. Literacy and mathematics curriculum guides were provided to teachers. Student scores on standardized tests were shared with the faculty; this data was intended to drive instruction.

Hartsfield required that teachers maintain a classroom-management book. The management book contained reminders about other paperwork related responsibilities, and provided guidance regarding benchmarks for observational surveys. It was a vehicle for teachers to document student attendance, contacts with parents, homework assignments and professional development efforts. Hartsfield testified that the management book was distributed to teachers and the requirement that it be completed and submitted monthly to administration was explained each school year. Additionally, the management book itself states under "Monthly Responsibilities" that "Management Books are due on the first Tuesday of each month." Professional expectations for teachers at Quitman were reinforced through periodic staff announcements. For example, a September 15, 2008, announcement reminded teachers that "[l]esson plans should have been completed for Wednesday, September 10th" and that "[a]ll bulletin boards should reflect current student work." Hartsfield's testimony left the impression that she encouraged her faculty to succeed in meeting extensive, but nonetheless necessary, paperwork obligations.

The testimony further reflected that teachers and administration engage in a regular and rigorous evaluation process. Tenured teachers are observed annually. A pre-observation conference is conducted between teacher and administrator to review the substance of the lesson to be observed. A post-observation conference gives the teacher an opportunity to discuss the lesson, and review administration's suggestions for improvement at length. Teachers are evaluated across four "domains," which assess their planning, pedagogy, classroom environment, and compliance with professional obligations. At year end, a written summative evaluation reviews the teacher's performance for the year, and an evaluative conference is conducted. A professional improvement plan (PIP) is developed collaboratively to set goals for professional growth during the next academic year. Weekly grade-level meetings provide an opportunity for faculty to discuss instruction and share questions and concerns.

Support is available for struggling teachers. Literacy and Mathematics Coaches, and Resource Teacher Coordinators (RTC), are former teachers who provide input and assistance to instructional staff. A building principal, such as Hartsfield, may refer a

struggling teacher to these coaches and coordinators for guidance and help. The District offers a Teacher Assistance Program (TAP) to help teachers with performance shortcomings. The Newark Teachers' Union Collective Bargaining Agreement provides that a teacher who receives an unsatisfactory evaluation may request a demonstration lesson. (R-76.)

Gilmer felt that he had a good start at Quitman. His evaluations during his first year rated his work as "satisfactory," but nonetheless contained serious criticisms. An evaluation dated January 3, 2005, noted a need for an improved approach in questioning students, suggesting to Gilmer that he did not utilize techniques that encouraged critical thinking. Hartsfield likewise suggested that Gilmer provide more effective feedback to students. A June 27, 2005, evaluation addressed the "professional responsibilities" aspect of the evaluative process, denoted on the evaluation instrument as "domain four." Gilmer's attendance was determined to be unsatisfactory, and Hartsfield advised that he had failed to timely submit his management book, class newsletter and samples of student work. Hartsfield directed that Gilmer "maintain a system for keeping and recording student records and submit these documents in a timely fashion." (P-5.)

Gilmer's summative evaluation for his first year at Quitman rated him as "proficient." But the evaluation was uneven, and several aspects of Gilmer's instructional technique were rated "basic." He was rated as "unsatisfactory" relative to his professional responsibilities and Hartsfield wrote that "[h]is system for maintaining accurate records is unsatisfactory." Hartsfield further stated that "Mr. Gilmer's participation in professional development activities was limited. His attendance is not consistent with district policy standards." (P-6.) Gilmer and Hartsfield signed off on a PIP which strived for excellence in recordkeeping, in student proficiency in meeting core curriculum requirements, and in utilizing questioning techniques with students. Gilmer urged that he was happy at Quitman during the 2004-2005 school year, and that he was satisfied with his evaluations. The record certainly did not reflect an openly contentious relationship between Gilmer and Hartsfield, although it is plain that from the start she saw shortcomings in Gilmer's pedagogical technique and in his ability to comply with his professional obligations. In his May 5, 2005, letter to Hartsfield, Gilmer highly

complimented her management style and the school in general, but nonetheless sought a transfer to a middle school.

That transfer was denied, and according to Gilmer, the relationship between the parties deteriorated. Gilmer focused intensely on a parking incident in the fall of 2005, citing this as the pivotal event that changed his relationship with Hartsfield, and led her, in his words, to begin to "paper him." According to Gilmer, and the school custodian, Ashton Berkeley, who testified on his behalf, there was no designated parking spot for the Quitman principal. Berkeley took it upon himself to create one by placing a cone in the street. It was common knowledge in the Quitman community that this area on the public street belonged to Hartsfield, who according to Berkeley, was experiencing difficulty parking in the morning.

Although only several months earlier Gilmer had referred to Hartsfield in his May 5, 2005, letter as a "hands-on, knowledgeable and caring administrator," he testified that he found her actions in reserving a parking space quite inappropriate. Gilmer testified that teachers would drive around the block seeking a place to park, while the principal he described as "hands-on" was chronically absent from the building, and the parking spot, which was directly in front of the school, remained vacant. Accordingly, Gilmer arrived early one morning, well in advance of the rest of the faculty, at 6:50 a.m. He parked in Hartsfield's spot. Gilmer testified that at about 8:00 a.m., prior to the arrival of the students, Hartsfield called him to the office and asked why he had parked there. Gilmer urged that he very politely advised Hartsfield that it was public street. He testified that she became enraged, and insisted that he move his car. He refused to do so, she became even angrier, and advised in a threatening tone, "I am going to get you."

Gilmer offered the testimony of Rose Hines, a former security guard at Quitman, to buttress his contention that Hartsfield was extremely territorial about the parking spot, and that she responded vindictively when staff members did not respect her exclusive right to park there. According to Hines, she too parked there, and was told by Hartsfield she was defiant in doing so. Hines claimed that she was transferred as a result, asserting that there could be no other reason for her transfer, as she had worked at

Quitman for ten years, and there had never been a complaint about her. She specifically and adamantly denied that any complaints had been lodged regarding her lack of courtesy to school visitors.

Hines's testimony, and Gilmer's, were at odds with Hartsfield's version of the events. Hartsfield was surprised that Gilmer had parked in her designated area, and inquired why he chose to do so, in passing, in the hall. She was unequivocal that while she was a bit incredulous, she was not truly angry, and certainly not angry enough to embark upon a vendetta that would result, years later, in the filing of tenure charges. Hartsfield testified that Gilmer advised that he had parked there because he had heard that doing so was a good way to get transferred. Hartsfield stated that she scolded Gilmer for making this comment, and then forgot the incident.

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). In making a credibility determination, it is appropriate to consider contradictory testimony, or testimony impeaching the witness's truth and veracity. After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I did not deem either Gilmer's or Hines's testimony to be credible.

Gilmer's version of the events does not "hang together." He urged that he parked in Hartsfield's spot because he was trying to prove a point on behalf of the faculty, but no other witness from the Quitman community attested to a problem with parking.[7] He had no personal need to park there, as he arrived very early, when parking spots were plentiful. Gilmer stated that Hartsfield demanded he move his car, but she testified, credibly, that she was able to pull in right behind him. Seeking to anger Hartsfield in the hope of provoking a transfer thus becomes the most logical explanation for Gilmer's action, since he had unsuccessfully sought a transfer only months earlier, and appeared to be under the impression that similar conduct by Hines

[7] Gilmer called many Quitman Street parents and faculty members as witnesses.

had resulted in her transfer from Quitman. Hartsfield offered the most believable version of the events. She testified with credibility. Her tone and manner was understated and professional. Hartsfield believably denied threatening Gilmer and believably denied focusing years of administrative effort on a scheme to undermine him solely because he usurped her parking spot.

Moreover, Hartsfield testified that Hines was transferred because she was repeatedly the subject of complaints by visitors to the school, who found her rude and argumentative, and not because she parked in the reserved spot. Another witness for Gilmer, Lynette Hillman-Loyd, confirmed that Hines did quarrel with school visitors, and that at least on one occasion that visitor was Hillman-Loyd's husband. According to Hillman-Loyd, Hines verbally assaulted her husband because she felt he had parked improperly, and quite nastily and aggressively demanded that Hillman-Loyd's husband immediately move his car. Hartsfield was forced to intervene. Undoubtedly, this incident informed Hartsfield's impression that Hines was rude to school visitors. Thus, I **FIND** that no credible evidence was presented that Hartsfield transferred employees or harassed them because they parked in her designated spot in front of the school.

Gilmer unpersuasively asserted that only after the parking spot incident did Hartsfield begin to fill his personnel file with criticisms, and that these criticisms had no basis in fact. Indeed, the record reflects that during the 2005-2006 school year, Hartsfield did more extensively document Gilmer's failure to comply with the paperwork and other demands of his position as a fifth-grade teacher. While Gilmer correctly observed that his file now contained "more paper," substantively the concerns expressed by Hartsfield were not new, however. I **FIND** that the administrative evaluations and reprimands that came during the 2005-2006 school year, and thereafter, were not part of a scheme to retaliate for Gilmer's refusal to move his car, but rather, were efforts by administration to document performance shortcomings that dated back to Gilmer's assignment at Morton.

Hartsfield utilized a notification form entitled "Areas Needing Attention/Improvement," to alert teachers when required paperwork was not timely submitted. During the 2005-2006 school year, Gilmer received about thirteen such

forms, which advised him that the management book, writing samples, scholarship books, lesson plans, and newsletters were not timely submitted to administration. He was advised that bulletin boards were not up to date with student work. Each notice afforded Gilmer an opportunity to redirect his efforts so that he became compliant with the demands of his position, and had remedied any deficiencies prior to receiving his final evaluation for the year. Each notice afforded Gilmer an opportunity to seek to confer with Hartsfield in the event he did not understand the basis for her concern. The record does not reflect that he used these notifications to improve his teaching performance, or even simply to attempt to please Hartsfield by complying with her rules.

Gilmer's testimony regarding the management books is indicative of his reaction to the "Areas Needing Attention/Improvement" notifications from Hartsfield. He urged that her criticism was unfair, because he never received a management book, and thus was unable to submit one monthly. Since Hartsfield testified that every teacher received a book and was advised about its importance during orientation activities, it strains credibility that Gilmer did not receive one as well. Furthermore, he first received notice that he had not submitted the book in November 2005. If Gilmer did not receive a management book as he contended, he apparently never followed up and requested one. Indeed, Gilmer continued to receive monthly notices that the management book had not been submitted until May 2006.

Gilmer's summative evaluation in June 2006 rated his performance as "unsatisfactory" overall. (P-25.) The evaluation expressed concerns about the quality of instruction, and rated Gilmer as "basic" in several areas, including a marginal understanding of the use of PDAs, and a failure to use differentiated instruction in planning for instruction. He received a "basic" in the area of "designing coherent instruction." A domain four evaluation dated June 19, 2006, rated Gilmer as "unsatisfactory" in meeting his professional obligations, and this document summarized the concerns which Gilmer had been continuously alerted about during the academic year. It was reiterated that Gilmer had failed to provide lesson plans, newsletters, management books, and compete PDAs.

Gilmer's summative evaluation for the 2005-2006 school year noted that he failed to create "an environment of respect and rapport," rating him as "unsatisfactory." Hartsfield attested to several parental complaints regarding Gilmer's interactions with their children. One such complaint was memorialized in an incident report dated May 30, 2006. The parent of a female student, M.S., had complained to Gilmer that her daughter felt that he looked at her inappropriately, and since lodging that complaint the child reported that she felt "singled out." M.S. reiterated to Hartsfield that she felt Gilmer "looked at her like he is a pervert." The matter was referred to DYFS, which determined not to investigate. M.S. was transferred to another classroom, and apart from noting a concern in his summative evaluation, no further action was taken during the 2005-2006 school year relative to this issue.

Gilmer's Transfer to First Grade

Effective September 2006, Gilmer was transferred to the first grade at Quitman. The aforementioned complaints by parents, in part, drove Hartsfield's decision to make this transfer. But this was not the exclusive reason for her decision. According to Hartsfield, when a teacher is floundering a change can be reinvigorating. Hartsfield urged that, in her experience, simply finding the right age match could be all that was needed for a teacher to experience success. She chose first grade for Gilmer precisely because he seemed to have difficulties interacting successfully with fifth graders. The record reflected that Gilmer was not the only Quitman teacher who was reassigned across grade levels.

Gilmer contended that he was given little or no support when forced to make the transition to first grade, and he presented the testimony of several colleagues who were likewise transferred by Hartsfield, and who likewise felt unsupported in their new class-level assignments. The testimony of these colleagues was of limited credibility, however, as on cross-examination it was revealed that each had contentious relationships with Hartsfield. Several were themselves the subject of tenure charges, including Lynette Hillman-Loyd, Annette Alston and Teresa Potts. While the CAPA report and the testimony of these witnesses surely gave the impression that Hartsfield

was not a uniformly well-liked principal, neither credibly supported Gilmer's contention that he was unsupported in his transfer to first grade.

Hartsfield described the support offered Gilmer. She met with him the previous June to inform him about the grade-level transfer. She alerted Gilmer to the availability of summer workshops in "every day math" and literacy. The literacy coach was instructed to support Gilmer by providing model lessons, and by assisting in understanding the literacy curriculum content. At weekly grade-level meetings the instructional process was addressed with all first-grade teachers. Materials were provided to Gilmer that outlined core curriculum requirements at the first-grade level.

Hartsfield's testimony was buttressed by the testimony of Literacy Coach Jacqueline DeRosa Tomczyk who indicated that Hartsfield specifically asked her to help Gilmer because he was new to first grade. Tomczyk provided assistance with guided-reading techniques, interactive writing, the morning message and classroom environment and organization. Tomczyk noted that she even made herself available to reply to inquiries from Gilmer via email on nights and weekends. She stated that while at first Gilmer appeared amenable to her assistance, the support faded eventually, because, in her view, he appeared "disinterested." Similarly, the RTC, Cheryl Simeonidis, confirmed that she assisted Gilmer by visiting his classroom and taking him to another school to view a model lesson.[8] After their observation of the model lesson, Simeonidis asked Gilmer to select two observed practices to implement the next day in his own classroom, and to email his selections to her that evening. Simeonidis had intended to support Gilmer in the implementation of these choices, but he never followed through as she had requested.

Importantly, by the time Gilmer had been transferred he had been teaching for close to twelve years. Although the move to first grade required learning a new curriculum, and applying some different pedagogical approaches, Gilmer did not come to the task bereft of any classroom experience to draw upon. As Hartsfield convincingly

[8] Gilmer contended that the model lesson was not useful to him because it took place in a school that is in a better neighborhood, and whose students do not come to class with the same host of problems as his students.

asserted, Gilmer was qualified to teach all elementary grades, and fundamentally, teaching is teaching.

During the 2006-2007 school year, Vice Principal Ginamarie Mignone was Gilmer's primary evaluator. New that year to Quitman, Mignone testified convincingly that she was assigned certain grade levels to supervise by Hartsfield, who offered no substantive comments about the performance of the teachers Mignone was about to observe and evaluate. Thus, Mignone came to the task of evaluating Gilmer with no predisposed notions about his competency. Mignone observed Gilmer in late November 2006. She rated several aspects of his performance as "unsatisfactory." The narrative portion of the evaluation describes a disorganized classroom environment that did not promote effective learning. Relative to management of classroom procedures, Mignone found:

> Classroom routines and procedures are ineffective and result in excessive loss of instructional time. Students waited while Mr. Gilmer taped index card to the board, conversed with teacher's aide about different types of dogs and distributed materials to students in centers. Activities were not clear to students prior to them moving to centers. Materials were not at each center and as a result students sat unattended and with no task before them while waiting for Mr. Gilmer. Instructional time was loss [sic]. Activities were not grade appropriate and did not correspond with the instructional objective . . . .
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> [(P-130.)]

Mignone found that Gilmer failed to differentiate instruction, did not utilize effective questioning and discussion techniques, and as a result did not effectively engage his students in learning. She testified that he never asked his students "why?"; a fundamental questioning technique that encourages critical thinking. His performance was ranked as "basic" in several other areas, such as providing feedback to students and communicating clearly and accurately. Mignone testified that to her observation, when students would not understand a concept, Gilmer would simply repeat his explanation, as opposed to creatively changing his approach in an effort to achieve understanding. Mignone's observation was followed by a conference with Gilmer at

which she elaborated on her concerns, and at which Gilmer had an opportunity to work with Mignone to explore strategies to improve his teaching performance.

During the 2006-2007 school year Gilmer continued to be unable to meet his paperwork obligations in a timely fashion. He received numerous "Areas Needing Attention/Improvement" notifications from Mignone. These notifications alerted Gilmer that he had failed to timely hand in lesson plan books; failed to pick up his students in a timely fashion after lunch; failed to submit required class newsletters; failed to submit a complete classroom management book; failed to submit writing samples; failed to update bulletin boards; failed to display student work in the classroom; and failed to timely submit report cards. Several of these shortcomings were the subject of repeated "needs improvement" notifications. Mignone likewise sent several lengthy memoranda to Gilmer during the 2006-2007 school year in which she elaborated on her concerns. A January 23, 2007, handwritten note to Gilmer alerted him that the bulletin board outside his classroom is not grade appropriate, and in detail explained what Mignone felt was missing and would bring the hallway display up to par. A March 2, 2007, memorandum outlined in detail concerns about Gilmer's inability to properly complete paperwork, and Mignone wrote:

> [y]ou have professional obligations Mr. Gilmer. Your total disregard for procedure demonstrates a pattern of insubordination. These procedures, that you habitually neglect, are in place in order for us to work together as a team to move our students forward. Please take time to reflect and re-evaluate your actions. I trust that after some self reflection you will be more cooperative and more responsible in managing your time as to meet your professional obligations.
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> [(P-145.)]

Mignone formally observed Gilmer again on June 13, 2007. Her overall rating of his performance was "unsatisfactory." She expressed serious concerns about his pedagogy. Mignone noted that Gilmer had not submitted lesson plans in advance as required, and when she asked for them at the time of her visit, what she received was inadequate. The lesson lacked focus, and a specific reading or writing strategy or skill was not emphasized. Mignone testified that the children were not properly grouped for

reading, and differentiated instruction was not evident. Instruction began late, minimal student work was displayed and Gilmer had not placed the objective of the lesson on the board as required. Mignone noted on the evaluation instrument that Gilmer refused to participate in a follow-up conference to discuss her evaluation of his performance.

Mignone's final evaluation for the 2006-2007 school year, dated June 20, 2007, rated Gilmer's overall performance as "unsatisfactory." She found that he did not meet minimal performance expectations in several critical areas, including planning and preparation, managing classroom procedures, engaging students in learning, and demonstrating flexibility and responsiveness in his instructional approach. Relative to Gilmer's professional responsibilities, the evaluation indicated that he made no effort to become involved in school projects, did not keep accurate records or participate in the professional development activities required by his Professional Improvement Plan (PIP). A separate domain four evaluation, dated June 21, 2007, outlined with even greater specificity the shortcomings in this area, and listed school events and in-service training that Gilmer had not attended. (P-163.) Mignone recommended that Gilmer's increment be withheld, but the record reflects that the District did not act immediately to do so.

Gilmer urged that, like Hartsfield, Mignone did not like him and sought to harass him. Gilmer described an incident in which she yelled at him in the cafeteria, "pointed her finger" in his face, and publicly humiliated him. (R-120.) Gilmer offered this incident as evidence that Mignone did not fairly and honestly evaluate him, and that she was "out to get him." But the record lends no support to this contention. Mignone testified with professionalism and credibility that she neither liked nor disliked Gilmer, and cared only about the children and their educational progress. She denied harassing or humiliating Gilmer, and I believed her.

Evaluations completed during the 2007-2008 school year reflected ongoing administration concerns about Gilmer's performance. He was rated as "basic" overall in an observation by Hartsfield dated November 28, 2007. (P-63.) The evaluation described serious shortcomings in knowledge of content and pedagogy and in differentiating instruction for his students. These areas were rated "unsatisfactory." The

evaluation noted that students were not engaged in learning "as evidenced by inappropriate activities and/or materials, poor representation of content, lack of lesson structure, and/or inappropriate student grouping." The lengthy narrative portion of the evaluation offered concrete suggestions for improved instruction in Gilmer's classroom. These concerns and recommendations were discussed with Gilmer at a December 21, 2007, post-observation conference.

Gilmer's continued inability to comply with the paperwork demands of his position was likewise ongoing during the 2007-2008 school year. His personnel file contained in excess of fifteen "Areas Needing Attention/Improvement" memoranda, which alerted him to repeated failures to timely submit lesson plans, substitute plans, management books, PDAs, and math and writing samples. Errors in his report cards and scholarship books were likewise noted. Gilmer urged in his testimony that by this school year, his relationship with Hartsfield had deteriorated rapidly, the implication being that she was picking on him and that there was no factual basis for her criticisms. It is clear that the two were at odds. A February 5, 2008, memorandum chastised Gilmer in strong terms for his conduct at a grade-level meeting. (P-68.) He apparently came to the meeting unprepared, had not completed his PDAs and suggested that the meeting time be used for this purpose. He informed Hartsfield in front of his colleagues that her meetings were not properly conducted.

Gilmer and Hartsfield's relationship became confrontational yet again during a May 28, 2008, P.T.A. meeting. Hartsfield felt Gilmer inappropriately criticized her during a discussion about a sixth-grade social studies assignment. In a stern May 29, 2008, memorandum she advised "[i]t was clear to all present at this meeting and throughout the school year that your goal has been not to assist me in changing the culture in this building but to continually try to undermine my authority." (P-81.) Gilmer urged that his comments at each meeting were justified and that Hartsfield's reaction was vindictive. During this time period, Gilmer became active in his local teachers union, and he urged that his union activism also angered Hartsfield and caused her to unfairly criticize his performance.

His testimony lacked credibility. Our courts have held that "credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses . . . that are not transmitted by the record." State v. Lourito, 157 N.J. 463, 474 (1998). Gilmer spent several days testifying both on direct and cross-examination, and I had ample opportunity to assess his demeanor. On the one hand, he projected as a likeable, earnest and sensitive individual. But questioning on cross-examination easily provoked a sharp temper, and a clear inability to gracefully accept or react to criticism. At one point, Gilmer's reaction to counsel's questioning on cross-examination started to include personal invectives, and I was forced to intervene. I thus **FIND** that Gilmer was rude and combative at the two meetings in question. Hartsfield's memoranda simply address that rudeness, and are not further evidence of a vendetta against him.

Hartsfield was not alone in her criticism of Gilmer's classroom performance. On February 25, 2008, he was observed by Barbara Irvin, a principal at another District school. Irvin rated Gilmer's lesson as "unsatisfactory," and expressed concerns about his instructional technique and the "culture for learning" in his classroom. She was disappointed in his reading instruction, stating, "[d]uring the guided reading portion of the lesson, he did not conduct a guided reading group . . . ." (P-172.) Irvin informed Gilmer that "[g]uided reading has a very specific series of research based strategies that teachers are to have students complete." These strategies were not evident in Gilmer's instruction. Irvin observed as follows:

> Mr. Gilmer's classroom does not reflect the implementation of district initiatives in literacy. Student journals had fewer than six entries from September to the end of February. Writing folders also had very little student work and the progressive writing wall had papers dated October, December and/or January, with not [sic] February dates.
>
> [(P-172.)]

She offered concrete suggestions for improvement, including the suggestion that Gilmer study District protocols for best practices, and observe a model literacy block.

But by the end of the 2007-2008 school year, Gilmer was so angered by administration's criticisms that he was entirely uncooperative with the evaluative process and was unwilling or unable to accept any suggestions for improved-teaching techniques offered by his supervisors. Indeed, Irvin testified that Gilmer declined to meet with her for a post-observation conference. An observation by Hartsfield dated June 16, 2008, addressed Gilmer's ongoing inability to meet his paperwork obligations, and he was rated "unsatisfactory." The evaluation confirmed again that he had failed to submit lesson plans, PDA data, management books, writing and math samples and monthly newsletters. Hartsfield noted that Gilmer refused to meet and discuss the observation report. Hartsfield's June 16, 2008, summative evaluation likewise rated Gilmer as "unsatisfactory," noting concerns about pedagogical technique such as questioning of students, engaging students in discussion, and differentiation of instruction. He insisted on union representation at the conference to discuss the evaluation, but that meeting was apparently never arranged, and Hartsfield noted on the evaluation that although two meetings were scheduled, "union representation did not respond." (P-85.)

Throughout this time it is clear that administration sought to assist Gilmer. A June 2008 PIP set forth in detail where improvement was expected, and offered detailed suggestions. For example, to achieve the professional goal of fostering a classroom environment that reflects high expectations for student learning, Gilmer was urged to "display rubrics, display class rules, display objectives." (P-85a.) He refused to meet to discuss the PIP. Throughout the 2007-2008 school year, numerous grade-level meetings were conducted, which were designed to assist in sharing ideas about instructional technique and classroom performance. Likewise, support personnel such as RTCs and mentors were available to assist Gilmer. A January 26, 2008, email belies Gilmer's protestations to the contrary; he confirms that he has been invited to visit model classrooms, and that grade-level meetings can be useful, describing a presentation at one such meeting on differentiated instruction as "brilliant and intellectually delivered." (P-178.)

Gilmer's salary increment was withheld at the close of the 2007-2008 school year in accordance with N.J.S.A. 18A:29-14. A letter dated July 31, 2008, was forwarded to

Gilmer by Acting State District Superintendent Kevin West, in which he outlined the rationale for this action. West pointed to shortcomings in Gilmer's planning and preparation, including failures to appropriately select instructional goals and objectives, failure to assess student learning, and failure to demonstrate a knowledge of his students and their unique learning styles. The letter further indicated that Gilmer's classroom environment failed to establish a culture for learning, and that his instructional technique was lacking. Finally, the letter reiterated historic concerns about Gilmer's failure to meet his paperwork responsibilities.

Via letter dated August 13, 2008, Gilmer unsuccessfully sought a transfer from Quitman. In September 2008, he began his third year as a first-grade teacher, and his fifth year as a teacher under Hartsfield's leadership. Yet the record reflects that he remained unable to meet even the most fundamental of her professional expectations. An October 15, 2008, "Areas Needing Attention/Improvement" memorandum again advised that the management book had not been timely submitted. In November, two additional memoranda advised that lesson plans were incomplete or late. In December 2008 Gilmer was advised in writing that a math-problem-solving task had not been submitted on time, nor had writing samples. He was advised on December 18, 2008, that he had not submitted a management book for the months of September through November 2008.

The Tenure Charges and the Performance Improvement Period

These tenure charges followed in January 2009. Nineteen individual charges of inefficiency were filed against Gilmer. The charges renewed the instructional, planning and pedagogical concerns that had plagued Gilmer's performance since his days at Morton. The charges additionally asserted that Gilmer failed to contribute to the school community, and failed to communicate effectively with parents and families. He was charged with failing to meet District-paperwork obligations, and with not meeting minimum-District-attendance requirements. At this point, Gilmer was so angry and discouraged that he cooperated not at all with administrative efforts to assist him. A theme in Gilmer's presentation at hearing was that he was provided no assistance or encouragement during his ninety-day improvement period. I **FIND** that, to the contrary,

the District embarked on comprehensive plan to support and assist him, but that inexplicably, Gilmer was wholly unable or unwilling to avail himself of the help being offered.

A ninety-day PIP was presented to Gilmer in late January 2009, but he declined to meet and discuss it with Hartsfield. The PIP offered concrete and comprehensive advice to improve the shortcomings in Gilmer's instructional technique. For example, to assist him in improving his pedagogy, the PIP suggested:

> Incorporate the following Balanced Literacy Practices:
>
> - Modeled/interactive writing/writing workshop
> - Flexible grouping during guided reading
> - Strategy based teaching
> - Daily purposeful read alouds/shared reading/guided reading
> - Daily purposeful message time
>
> Use results of observational surveys, running records, theme assessment, fluency test and math unit test to inform instruction[.]
>
> [(P-97.)]

The improvement period was later extended until June 26, 2009.[9] (P-98.) The ninety-day PIP was placed on a new form used by the District in April 2009, but a review of the new document reflects that it sought to encourage growth in the very same areas pinpointed in the January 2009 PIP. The modified PIP was signed by Gilmer, who completed a section in which he was asked to reflect on his job performance and job expectations. The tone and content of his comments are quite revealing, and are consistent with my observation that he bridles under criticism, and becomes unable to use that criticism to effectuate positive change. When asked to list notable obstacles to performing his job, Gilmer wrote, "Your 'gotcha' mentality is a notable obstacle that has impeded my performance of my job . . . ." When asked if he had any questions about what is expected of him in his job, he stated, "Are you ever going to treat me with the

[9] On or about May 18, 2009, Gilmer became ill and was absent for the remainder of the year. His leave was approved by school administration. Accordingly, he was given approximately four and a half months to correct the inefficiencies noted in the charges, or about a month and half more than the ninety-day minimum required by the statute.

respect other professionals receive here . . . ?" He continued, "Am I ever going to receive a fair and impartial evaluation of my practice, followed up by meaningful coaching?"

During the second half of the 2008-2009 school year, and while aware that he was working under the threat of tenure charges, Gilmer nonetheless continued to fail to submit needed paperwork. On January 30, 2009, he was advised that his lesson plans had been submitted late. On February 10, 2009, he was advised that his student report cards contained numerous errors, and that he had failed "to duplicate 10 report cards for students who neglected to return after cycle 1." (P-102.) On February 17, 2009, he was again informed that his lesson plans were late. In March 2009 Gilmer was informed via an "Areas Needing Attention/Improvement" memorandum that he had failed to submit math-problem-solving tasks and writing samples. Likewise, twice in March, he was advised that he failed to submit lesson plans. Gilmer was informed in April 2009 that he had not timely submitted his management book, math, or writing samples, or a "running record binder." Gilmer continued to receive "Areas Needing Attention/Improvement" memoranda into May 2009; these again documented missing management books and other paperwork obligations.

Gilmer offered a somewhat curious defense to the evidence of his consistent failure to timely submit required paperwork. He suggested that his administrators wholly fabricated this accusation against him. Gilmer repeatedly advised that evidence of their fabrications would be coming later in his presentation at hearing, but such evidence was never presented. Kimberly Malone testified that Gilmer submitted lesson plans that Hartsfield later claimed were not submitted. But Malone works as an office clerk at Quitman, and thus could not testify as to the whether the plans were complete, or filed in accordance with Hartsfield's timelines. Moreover, Malone spoke only to one incident, hence her testimony offered little solace to Gilmer, as his file was replete with countless memoranda reminding him of his paperwork obligations. Likewise, Gilmer's documentary submissions purported to include some of the allegedly missing documents. But he in no way accounted for the many missed deadlines documented in his personnel file annually.

I **FIND** that during the statutory improvement period, Gilmer was offered assistance from RTCs, subject-content coaches and various District administrators. He was enrolled in the TAP workshops designed to assist struggling teachers. He was invited to attend a training on Managing Antisocial Behaviors. He was afforded an opportunity to view a model lesson. He was repeatedly evaluated by a number of administrators, several of whom were from other District schools. Each of these evaluations came with opportunities to conference his performance and discuss improvement. Throughout the remainder of the 2008-2009 school year, Gilmer was likewise present for discussions about student progress and pedagogy that took place at weekly grade-level meetings.

Gilmer's repeated assertions that he received no assistance whatsoever during his improvement period ignore the testimony and the documentary record. The rebuttal testimony of Naga Philkhana, a former District math coach, now an RTC, was a staggering blow to Gilmer's credibility. Gilmer had subpoenaed Philkhana's testimony. When she appeared the next day at the OAL pursuant to Gilmer's subpoena, he elected not to call her as a witness. Gilmer was asked on cross-examination if he had confronted Philkhana regarding her testimony prior to the hearing date. Gilmer firmly denied doing so. Philkhana was then called as a rebuttal witness by the District. In troubling testimony, she stated that the day before she was scheduled to testify, Gilmer appeared at Quitman, although he was still on suspension. He asked Philkhana to be certain to testify that she had provided him with no assistance. She replied to Gilmer that she would not lie. Philkhana was a sincere, soft-spoken, professional and highly credible witness. Accordingly, Gilmer's protestations that he was unassisted during his improvement period are not credible.

The District has developed guidelines for evaluating a teacher during the ninety-day improvement period. (R-74.) The guidelines provide that ten observations must be completed, including six informal and four formal evaluations. It is recommended that a variety of administrators conduct these evaluations. Matthew Brewster is employed by the District as Director of Instructional Staff Development, and he clarified the intent of these regulations. Brewster's testimony made it plain that the number of evaluations was not a mandate, but rather offered as guidance, and to emphasize that observations

should be intensive during the ninety-day period. He stated that the goal of the guidelines is support for the struggling teacher, and that this support "is probably more important than the sheer number" of evaluations.

During Gilmer's improvement period, which was extended beyond ninety days, he was observed formally four times. He was informally observed nine times. In addition to Hartsfield, Gilmer was evaluated by several administrators who were not employed at Quitman, who he could not contend disliked him, but who nonetheless found his instruction sorely lacking. He was rated "unsatisfactory" by Maria Merlo on February 17, 2009. Merlo found student behavior in Gilmer's class to be poor, and that classroom routines and procedures were non-existent, resulting in loss of instructional time. She noted that children were not engaged in learning, observing:

> You opened up the lesson with a lengthy explanation of what the students were going to be doing in their groups, who they were going to partner with, what words they were going to be making and how the words needed to be place in their work folders . . . . While you were going through the procedures, I observed children talking, eating breakfast, distracted, walking around the room and simply not interested in what you were saying.
>
> [(P-173.)]

Karen Gray, another District administrator, observed Gilmer on May 8, 2009, and rated his performance as "unsatisfactory." She noted that Gilmer was ill at ease with the subject matter he taught, relating that "Mr. Gilmer held a sheet of paper and referred to it throughout the lesson." Gray advised that "[h]e should become more familiar with the literacy content so that he does not need to refer to the lesson plan or teacher's edition throughout the lesson." Gray stated that although Gilmer had been trained in a District instructional approach, the Children's Literacy Initiative (CLI), "there were several engaging components of CLI lacking." Gray related that the classroom environment lacked organization, with little student work displayed. She observed that the classroom was not "print rich." (P-175.)

These outside observers echoed Hartsfield's continued concerns during the improvement period. A February 6, 2009, observation found that the lesson was aligned to the instructional objective, but that Gilmer continued to fail to use questioning techniques that encouraged higher-ordered thinking, failed to differentiate instruction, failed to utilize District content initiatives, and failed to provide appropriate feedback to students. Hartsfield made similar observations on February 24, 2009. A March 13, 2009, observation revealed a continued failure to differentiate instruction, no evidence of "pre-assessment" to guide instruction, a lack of alignment with District curriculum and New Jersey Core Curriculum standards in the instruction, and a failure to implement strategies received from content coaches and RTCs. Hartsfield found that the classroom was not orderly or well managed and that student work was not displayed. Hallway displays likewise did not contain current work. Character-education goals were not reinforced by Gilmer during his instruction.

A March 20, 2009, evaluation continued to reflect little improvement by Gilmer. Differentiation continued to be lacking, and varied assessments of student learning were not imbedded in the lesson. Hartsfield found that Gilmer continued not to establish a culture for learning. She noted specifically that student work was not posted, "content-based word walls" were not "interactive and progressive," the library area was not properly organized, and classroom resources were not easily accessible. (P-110.) Hartsfield critiqued Gilmer's use of his classroom space, noting that pathways were cluttered, and the furniture arrangement in the classroom did not support learning activities. She expressed analogous concerns after March 27, 2009, and April 3, 2009, observations. An April 22, 2009, observation including the foregoing concerns, but also noted that students were not engaged in learning, and that Gilmer was not effectively using time on task.

On May 14, 2009, Hartsfield observed a classroom lacking small-group instruction, teacher-modeled activities, or small-group instruction. The objective for the lesson was not posted, as required. Student progress was not being assessed throughout the lesson. The classroom was not orderly, and several protocols were not in place, such as a bathroom log, hall passes, computer and library logs. Concerns

about the utilization of the classroom's physical space were ongoing. Students were not effectively engaged in learning.

Based on the evidence presented, I **FIND** that during his tenure as teacher in the Newark Public Schools, classroom observations revealed the following shortcomings in Gilmer's instructional technique and classroom management, shortcomings which were not remedied during the ninety-day improvement period:

- Failure to demonstrate knowledge and content of pedagogy
- Failure to differentiate instruction
- Failure to properly prepare lesson plans
- Failure to assess learning
- Failure to manage classroom procedures
- Failure to engage students, and create a culture for learning
- Failure to use flexible and responsive teaching techniques to reach students
- Failure to use appropriate questioning techniques
- Failure to maintain and submit records properly, including lesson plans
- Failure to grow and develop professionally
- Failure to create an appropriate learning environment in his classroom
- Failure to properly order the physical space in his classroom
- Failure to comply with District policies, such as the requirement that a management book be maintained
- Failure to reflect on teaching by implementing suggestions for improvement

Several of the tenure charges necessitate further brief discussion. It is alleged that Gilmer did not contribute to school and District. He urged strenuously at hearing that he is active in his teacher's union and the PTA and that he uses both organizations as vehicles to better Quitman Street School. Gilmer offered the example of attempts made by him to better the physical environment at Quitman. But Gilmer misapprehends the concern expressed here by the District. His evaluations note failures by him to

contribute to and participate in such events as math and science fair projects. The evaluations find that he failed to implement District initiatives or to implement strategies received via the support of coaches and RTCs. This charge is furthermore directed at the negativity evidenced by his reaction to the constructive criticism of his professional technique and his demeanor at grade-level meetings and PTA meetings. The negative exchanges with Hartsfield at these meetings reflect a lack of support for the overall mission of Quitman's administration and I **FIND** constitute a failure to contribute to the school and District.

Gilmer testified credibly that he spends personal time assisting his students, and several parent witnesses confirmed that Gilmer tutored their children free of charge during his spare time. He offered numerous written exchanges with parents into evidence, including correspondence about absences, homework and other classroom issues. But the District presented evidence of repeated failures by Gilmer to submit required newsletters, evidence of report cards not being timely filed, and an ongoing failure by Gilmer to document communication with parents in his management book.[10] It was this sort of communication that the District felt was lacking, and I **FIND** that the testimonial and documentary evidence supports the District's concerns in this regard.

Finally, on several occasions, Hartsfield sent notifications to Gilmer that indicated that his attendance poor, and that his occasional absences exceeded District expectations. Gilmer continued to receive such notifications during the improvement period, including one dated February 25, 2009, which advised that as of that date his record reflected twelve occasional absences during that academic year. No evidence was presented which suggested that these absences did not take place, and I **FIND** that the evidence supports the District's charge that Gilmer's attendance, at times, was poor.

[10] Gilmer shared newsletters and the testimony of a colleague who stated that she would compete with him to see who could create the better newsletter. But this testimony only proved that Gilmer sometimes created newsletters, not that he did so with the regularity required by administration.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to N.J.S.A. 18A:6-10, a tenured teaching staff member cannot be "dismissed or reduced in compensation, except 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).

The District bears the burden of proving the charges against Gilmer by a preponderance of the 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). Preponderance is the greater weight of credible evidence in the case; that is, the evidence having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). After giving careful consideration to the competent credible evidence, I **CONCLUDE** that the District has met its burden of proof relative to the charges it has filed against Gilmer.

The District did not act precipitously or prematurely in filing these tenure charges. To the contrary, it exercised considerable restraint by repeatedly, and over the course of many years, identifying areas of Gilmer's performance that were unacceptable or in need of improvement. Administration repeatedly attempted to encourage professional improvement and more efficient performance by Gilmer. The District employed progressive discipline by reprimanding Gilmer and withholding his increment prior to filing tenure charges. The record reflects that Gilmer clearly has the passion, commitment, and love of children that are vital for an excellent educator. But he is unwilling to use those positive qualities within the bureaucratic, curricular and pedagogical framework needed to create a successful public school classroom. Administration has repeatedly rated Gilmer's teaching performance as unsatisfactory. Having found no cause to question the credibility or sincerity of these performance

evaluations, I **CONCLUDE** that the District has proven its charges of inefficiency against Gilmer.

A charge of inefficiency constitutes an allegation that while a teacher has the capacity to perform ably, he nonetheless failed to do so. As the Commissioner and State Board of Education have indicated:

> The charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency . . . would be a useless exercise . . . . Incompetence requires proof that the affected person regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher.
>
> [In re Bradley, 191 S.L.D. 2521, 2522 (citing E. Brunswick Bd. of Educ. v. Sokolow, 182 S.L.D. 1358, 1362).]

Thus, the district is required to inform the employee with specificity where his performance is inefficient, and further inform him that, unless the inefficiencies are corrected within a minimal ninety-day period, it intends to certify those charges of inefficiency with the Commissioner. N.J.S.A. 18A:6-11 provides as follows:

> [I]f the charge is inefficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency.

See also N.J.A.C. 6A:3-5.1(c)(1) and (3). The District must also provide a modification of the individual PIP at the commencement of the ninety-day probation period and assure that the plan addresses the specific charges of inefficiency. N.J.A.C. 6A:3-5.1(c)(4).

It is well established that the district is required to "make reasonable efforts to provide assistance to the teaching staff member to overcome the specific inefficiencies."

Rowley v. Bd. of Educ. of the Manalapan-Englishtown Reg'l Sch. Dist., 205 N.J. Super. 65, 72 (App. Div. 1985). If a school district chooses to file tenure charges of inefficiency against a teacher, "the administration bears the heavy responsibility to render positive assistance to the teacher in an effort to overcome his inefficiencies." Ibid. The rationale underlying this requirement is that the teacher be afforded an opportunity to demonstrate that he is capable of effective teaching. He can only do so if offered specific criticisms and constructive advice. In re Johnson, 1981 S.L.D. 239.

The analysis in Green Brook School District v. Fodor, 1984 S.L.D. 269, 284, affirmed, State Board, 1984 S.L.D. 297, regarding a school district's obligations during the ninety-day period is instructive, holding as follows:

> No particular pattern or scheme of assistance or approach by a school board is required during the 90 day period. Each case must, therefore, be judged on its own merits. A determination must be made concerning whether the 90 day period was reasonably implemented so that the teacher had a fair opportunity to improve.
>
> [Id. at 284.]

Gilmer strenuously argues that the District failed to meet its obligations to him. He asserts that model lessons and other assistance should have come directly from Hartsfield. His arguments are unavailing. I **CONCLUDE** that nowhere does the law require that the school principal herself directly provide the support and assistance needed. Gilmer was assisted by content coaches and the RTC. He was invited to observe other classrooms, and to attend the TAP program. He was observed by a variety of outside administrators; all of these observations included an opportunity to conference the lesson both before and after the observation, and to derive input from different evaluators, all of whom brought a new perspective and outlook to bear. These interventions took place during the improvement period, and in the years that preceded it. Gilmer argues that outside evaluators did not provide proper support because they observed him without being aware that he was under ninety-day review. But elsewhere he suggests that Hartsfield conspired with these outside evaluators in a vindictive effort to undermine him, referring to them in his post-hearing submission as Hartsfield's

"friends."[11] He cannot have it both ways. I **CONCLUDE** that the District provided the support contemplated by N.J.S.A. 18A: 6-11, and the Rowley decision.

In Fodor a long period of corrective action preceded the ninety-day period. Specific suggestions to overcome the teacher's inefficiencies had been made to him before and during the improvement period. Likewise here, efforts to improve Gilmer's performance were not made for the first time after the inefficiency charges were served. The charges came in the aftermath of years of effort to encourage Gilmer to improve. Gilmer misconstrues the sort of assistance required. It is clear that the law does not envision the ninety-day period as a time to simply document a case against the teacher, and to thus undermine any chance that he could use this time to remedy his inefficiencies. But conversely, I **CONCLUDE** that it is unreasonable to blame the District because it could not undo years of unresponsiveness by Gilmer to administrative advice and admonitions. Gilmer argues that he begged repeatedly for help and that it was not forthcoming. His arguments ignore the factual record—and his own obligation after more than ten years of teaching experience—to have progressed further in his pedagogical technique and in his attentiveness to the paperwork demands of his position.

Likewise unpersuasive is Gilmer's argument that the District violated his rights by extending the improvement period beyond ninety days. The improvement period began on January 30, 2009, and was to have expired ninety days later. It was later extended by the District until June 30, 2009. However, Gilmer became ill, and left the District for an approved medical leave effective May 18, 2009. His improvement period thus lasted approximately 138 days. Gilmer's argument that this somehow violated his rights is a bit hard to follow, but apparently he contends that since the District intended to extend the improvement period for an additional ninety days, the charges should be dismissed because the Gilmer was in school for only forty-eight of those additional days.

The statute makes it plain that the ninety-day period is a minimum, stating that the employee must be afforded "at least" ninety days to attempt to remedy his

[11] The record reflects that the relationship between Hartsfield and these other administrators was professional, and nothing more.

inefficiencies. N.J.S.A. 18A: 6-11. It is thus readily apparent that Gilmer was given more time than the statute requires to remedy his inefficiencies. I **CONCLUDE** that there is no basis in fact or law to penalize the District for extending this period beyond what was required, notwithstanding the fact that the extension did not last as long as originally anticipated due to Gilmer's illness. The civil service case law cited by Gilmer pertains to an employee's probationary period, and is inapposite. See, e.g., In re Bernal, CSV 3154-07, Initial Decision (September 12, 2008), adopted, Comm'r (November 7, 2008), <http://lawlibrary.rutgers.edu/oal/search.html>.

Nor did the District violate its own policies during the improvement period, as Gilmer contends. It thoroughly evaluated him in a manner consistent with the spirit and intent of its internal policy on the processing of inefficiency charges, per the testimony of Matthew Brewster. Gilmer urges that once the review period was extended, an entirely new PIP should have been developed. He cites no authority for this proposition, and I know of none. Accordingly, I **CONCLUDE** that the processing of these tenure charges was procedurally sound.

The School District urges that Gilmer's record of inefficient performance warrants his dismissal from his tenured position of employment. I agree. Some of the concerns raised in the charges, if standing alone, might not warrant dismissal. For example, while at times his absences were excessive, poor attendance is not a pervasive feature in his employment profile. Likewise, although Gilmer did not meet District expectations relative to communication with parents, I am convinced that Gilmer cared about his students, and was available to them and their families after school hours, thus balancing out any concerns about formal communication shortcomings. Although he sometimes did not attend workshops or science fairs, this likewise was not presented as a chronic issue.

But the Newark schools have employed Gilmer for more than ten years, have placed him in a variety of schools and grade levels, and he has continuously performed below District expectations. In arguing that he can be "salvaged," Gilmer again deflects blame from himself and urges at length that it is Hartsfield's leadership, as pinpointed in the CAPA report, that is the cause of his professional shortcomings. In a troubling

statement, he states in his post-hearing submission that the CAPA report "focused on where the problem lies – and that is with Principal Hartsfield." (Respt's br. at p. 180.)

Hartsfield's performance is not at issue here, and Gilmer's repeated efforts to make her the focus of this proceeding emphasizes his ongoing unwillingness to look inward and work earnestly to become a quality teacher. Precisely because Newark is a troubled school district, its students must have optimal instruction. A theme in Gilmer's defense is that the leadership at Quitman is inadequate, the school culture and environment is unsupportive, and the student body is poorly prepared and not uniformly available for learning. Gilmer offered the CAPA report as evidence that since Quitman is a struggling school his performance shortcomings should somehow be excused. But I started my factual discussion with the CAPA report precisely because I took away a different message from its critique of Quitman; that is, that Quitman and its students deserve the best and most able teachers available.

Factors to be taken into account in making a penalty determination include the nature and circumstance of the incidents or charges, the teacher's prior record and present attitude and any harm or injurious effect that the conduct at issue will have on the proper administration of the schools. In re MacDowell, 96 N.J.A.R.2d (EDU) 644; In re Fulcomer, 93 N.J. Super. 404-12 (App. Div. 1967). Here, administration has counseled, transferred, and reprimanded Gilmer repeatedly, yet he appears unable to bring his classroom performance to acceptable levels. He has responded to the charges against him with denials of personal responsibility, and his attitude creates no confidence that he would be responsive to District efforts to assist him in the future. Accordingly, I **CONCLUDE** that Gilmer should be dismissed from his tenured position of employment.

Finally, I **CONCLUDE** that Gilmer has not demonstrated that the District acted in violation of his rights when it withheld his salary increment. His increment was withheld pursuant to N.J.S.A. 18A:29-14, which states 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). In challenging the withholding of an increment, the teacher has the burden of demonstrating that the action of the school district was arbitrary, capricious or unreasonable. Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). Based on the record developed here, it is clear and I **CONCLUDE** that the action of the School District was neither arbitrary, capricious nor unreasonable.

ORDER

Based on the foregoing, I **ORDER** that Gilmer be **DISMISSED** from his tenured position of employment with the Newark Public Schools.

I further **ORDER** the action of the School District in withholding Gilmer's salary increment is **AFFIRMED** and the petition of appeal filed by Gilmer challenging his increment withholding 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.

May 6, 2011
DATE

ELLEN S. BASS, ALJ

Date Received at Agency:

Date Mailed to Parties: May 9, 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Petitioner:

Jacquelynn Hartsfield
Ginamarie Mignone
Cayce Cummins
Maria Merlo
Barbara Ervin
Naga Madhuri Philkhana
Jacquelin Chavis

For Respondent:

Ashton Berkeley
Rose Hines
Lynette Hillman-Loyd
Sylvia Martinez
Barbara Tolbert
Robert Gilmore
Gail Young
Najeeah Eason
Joanne Bergamotto
Karen George-Gray
Christine Rennie
Deborah Brown
Annette Allston
Carolyn Greer
Cheryl Simeonidis
Jacqueline de Rosa Tomczyk
Lisa Brown
Matthew Brewster
Lavone "Bonnie" Smith

Kimberly Malone

Teresa Potts

Christina Patterson Bright

Wesley Gilmer

EXHIBITS

For Petitioner:

P-1a Opening Day Packet

P-1b Opening Day Packet

P-2 Classroom Management binder

P-3 Weekly announcements

P-4 Observation dated December 16, 2004

P-5 Observation dated June 27, 2005

P-6 Annual Evaluation dated June 1, 2005

P-7 Areas Needing Attention/Improvement dated November 21, 2005

P-8 Areas Needing Attention/Improvement dated December 1, 2005

P-9 Areas Needing Attention/Improvement dated December 13, 2005

P-10 Areas Needing Attention/Improvement dated December 13, 2005

P-11 Areas Needing Attention/Improvement dated December 16, 2005

P-12 Memorandum dated December 19, 2005

P-13 Observation dated January 3, 2006

P-14 Areas Needing Attention/Improvement dated January 31, 2006

P-15 Areas Needing Attention/Improvement dated March 7, 2006

P-16 Areas Needing Attention/Improvement dated March 7, 2006

P-17 Areas Needing Attention/Improvement dated March 10, 2006

P-18 Memorandum dated March 10, 2006

P-19 Areas Needing Attention/Improvement dated March 22, 2006

P-20 Areas Needing Attention/Improvement dated March 29, 2006

P-21 Areas Needing Attention/Improvement dated April 28, 2006

P-22 Areas Needing Attention/Improvement dated May 16, 2006

P-23 Memorandum dated June 6, 2006

P-24 Observation dated June 13, 2006

P-25 Annual Evaluation dated June 16, 2006
P-26 Memorandum dated May 7, 2007
P-27 Letter dated May 7 ,2007
P-28 Email dated May 14, 2007
P-29 Memorandum dated May 24 ,2007
P-30 Areas Needing Attention/Improvement dated June 11, 2007
P-31 Grade-Level Meeting Agenda
P-32 Grade-Level Meeting Agenda
P-33 Grade-Level Meeting Agenda
P-33a Staff Development Agenda
P-34 Grade-Level Meeting Agenda
P-35 Grade-Level Meeting Agenda
P-36 Grade-Level Meeting Agenda
P-37 Grade-Level Meeting Agenda
P-38 Grade-Level Meeting Agenda
P-39 Grade-Level Meeting Agenda
P-40 Grade-Level Meeting Agenda
P-41 Grade-Level Meeting Agenda
P-42 Grade-Level Meeting Agenda
P-43 Grade-Level Meeting Agenda
P-44 Grade-Level Meeting Agenda
P-45 Grade-Level Meeting Agenda
P-46 Grade-Level Meeting Agenda
P-47 Grade-Level Meeting Agenda
P-48 Grade-Level Meeting Agenda
P-49 Staff Development Sign-in Sheet
P-50 Staff Development Sign-in Sheet
P-51 Grade-Level Meeting Agenda
P-52 Grade-Level Meeting Agenda
P-53 Grade-Level Meeting Agenda
P-54 Grade-Level Meeting Agenda
P-55 Grade-Level Meeting Agenda
P-56 Grade-Level Meeting Agenda

P-57 Grade-Level Meeting Agenda

P-58 Staff Development Day Agenda

P-59 Grade-Level Meeting Agenda

P-60 Areas Needing Attention/Improvement dated November 11, 2007

P-61 Areas Needing Attention/Improvement dated October 15, 2007

P-62 Areas Needing Attention/Improvement dated November 21, 2007

P-63 Observation dated November 28, 2007

P-64 Areas Needing Attention/Improvement dated December 4, 2007

P-65 Memorandum dated December 4, 2007

P-66 Areas Needing Attention/Improvement dated December 18, 2007

P-67 Areas Needing Attention/Improvement dated January 17, 2008

P-68 Memorandum dated February 5, 2008

P-69 Areas Needing Attention/ Improvement dated February 13, 2008

P-70 Areas Needing Attention/ Improvement dated February 15, 2008

P-71 Memorandum dated February 19, 2008

P-72 Areas Needing Attention/Improvement dated February 27, 2008

P-73 Areas Needing Attention/Improvement dated March 12, 2008

P-74 Areas Needing Attention/Improvement dated April 15, 2008

P-75 Areas Needing Attention/Improvement dated April 18, 2008

P-76 Memorandum dated April 24, 2008

P-77 Areas Needing Attention/Improvement dated April 26, 2008

P-78 Areas Needing Attention/Improvement dated April 28, 2008

P-79 Areas Needing Attention/Improvement dated May 8, 2008

P-80 Areas Needing Attention/Improvement dated May 19, 2008

P-81 Memorandum dated May 29, 2008

P-82 Memorandum dated May 29, 2008

P-83 Areas Needing Attention/Improvement dated June 16, 2008

P-84 Observation dated June 16, 2008

P-85 Annual Evaluation dated June 16, 2008

P-85a Professional Improvement Plan

P-86 Grade-Level Meeting Agendas

P-87 Notification of missed coaching session, October 25, 2007

P-88 Trainer leave form

P-89 Grade-Level Meeting Agendas
P-90 Areas Needing Attention/Improvement dated October 15, 2008
P-91 Areas Needing Attention/Improvement dated November 10, 2008
P-92 Areas Needing Attention/Improvement dated November 24, 2008
P-93 Areas Needing Attention/Improvement dated December 18, 2008
P-94 Areas Needing Attention/Improvement dated December 18, 2008
P-95 Letter dated January 5, 2009
P-96 Memorandum dated January 30, 2009
P-97 Professional Improvement Plan
P-98 Modified Professional Improvement Plan with cover sheet
P-99 Areas Needing Attention/Improvement dated January 30, 2009
P-100 Informal Feedback Summary dated February 6, 2009
P-101 Areas Needing Attention/Improvement dated February 10, 2009
P-102 Memorandum dated February 10, 2009
P-103 Areas Needing Attention/Improvement dated February 17, 2009
P-104 Informal Evaluation Form dated February 24, 2009
P-105 Letter dated February 25, 2009
P-106 Informal Observation dated March 4, 2009
P-107 Informal Observation dated March 13, 2009
P-108 Areas Needing Attention/Improvement dated March 16, 2009
P-109 Areas Needing Attention/Improvement dated March 16, 2009
P-110 Informal Evaluation dated March 20, 2009
P-111 Informal Evaluation dated March 27, 2009
P-112 Areas Needing Attention/Improvement dated March 30, 2009
P-113 Formal Evaluation Form dated April 3, 2009
P-114 Areas Needing Attention/Improvement dated April 13, 2009
P-115 Areas Needing Attention/Improvement dated April 13, 2009
P-116 Areas Needing Attention/Improvement dated April 20, 2009
P-117 Formal Evaluation Form dated April 22, 2009
P-118 Areas Needing Attention/Improvement dated May 4, 2009
P-119 Areas Needing Attention/Improvement dated May 8, 2009
P-120 Formal Evaluation form dated May 14, 2009
P-121 Areas Needing Attention/Improvement dated May 15, 2009

R-71 Enhancing Professional Practice, by Charlotte Danielson

R-72 Attendance Improvement Program, Newark Public Schools

R-73a Observation and Performance Evaluation Guidebook

R-74 Observation Evaluation Guidebook, Inefficiency Charges

R-75 Not admitted

R-76 Collective Bargaining Agreement

R-77 Grievance dated April 10, 2008

R-78 Grievance dated October 27, 2008

R-79 Email dated October 31, 2007

R-80 Not admitted

R-81 Email dated May 23, 2008

R-82 Email dated May 24, 2008

R-83 Email dated November 14, 2007

R-84 Letter dated December 18, 2007

R-85 Email dated May 22, 2008

R-86 Evaluation dated May 14, 2009

R-87 Class profile, grade 1

R-88 Undated letter regarding building conditions

R-89 Undated letter

R-90 Letter dated February 26, 2007

R-91 Undated letter

R-92 Memorandum dated May 18, 2007 with hand-written notes

R-93 Letter dated June 13, 2007

R-94 Email dated September 25, 2007

R-95 Letter dated April 6, 2008

R-96 Email dated May 23, 2008

R-97 Email dated May 24, 2008

R-98 Letter dated April 29, 2008

R-99 Letter dated May 30, 2008

R-100 Observation dated November 19, 2006

R-101

R-102 Interrogatories

R-103 Not admitted

R-104 Not admitted

R-105 Not admitted

R-106 Professional Improvement Plan 2008-2009 year

R-107 Not admitted

R-108 Not admitted

R-109 Not admitted

R-110 Not admitted

R-111 Inefficiency Charges

R-112 Response to Request for Admissions

R-113 Letter dated March 8, 2006

R-114 Email dated March 8, 2006

R-115 Class checklist

R-116 Letter dated February 23, 2007

R-117 Undated letter response to March 2007 letter from Hartsfield

R-118 Letter dated June 10, 2007

R-119 Letter dated June 13, 2007

R-120 Email dated June 25, 2007

R-121 Email dated September 24, 2007

R-122 Class profile

R-123 Math scores, 2006-2007

R-124 Signatures of principal regarding Management Book submission

R-125 PDAs completed by Gilmer

R-126 Email dated December 7, 2007

R-127 Email dated December 4, 2007

R-128 Email dated November 14, 2007

R-129 Email dated September 11, 2007

R-130 Email dated October 22, 2007

R-131 Letter dated December 18, 2007

R-132 Letter dated January 8, 2008

R-133 Email dated January 8, 2008

R-134 Letter dated January 18, 2008

R-135 Email dated January 26, 2008

R-136 Email dated February 6 ,2008

R-137 Undated letter

R-138 Letter dated April 6, 2008

R-139 Letter dated April 29, 2008

R-140 Lesson plan review forms

R-141 Letter dated October 24, 2008

R-142 "Snapshot" dated December 8, 2008

R-143 Letter dated February 28, 2009

R-144 Email dated March 4, 2009

R-145 Email dated October 22, 2007

R-146 Petition

R-147 Intervention forms

R-148 RTC Log

R-149 Email dated May 4, 2007

R-150 Not admitted

R-151 Letter dated November 29, 2006

R-152 Best Practice Awards

R-153 Attendance Improvement Plan excerpt

R-154 Letter dated April 16, 2007

R-155 Photographs of classroom

R-156 Receipt dated November 2, 2007

R-157 Receipt dated October 9, 2006

R-158 PTA Certificate of Attendance

R-159 Email dated November 14, 2007

R-160 Email dated May 22, 2008

R-161 Grievance dated March 18, 2008

R-162 Newsletters

R-163 Letter dated August 12, 2008

R-164 Letter dated August 25, 2008

R-165 Memorandum dated September 18, 2008

R-166 Grievance dated October 27, 2008

R-167 Letter dated June 13, 2007

R-168 Not admitted

R-169 Grievance dated March 18, 2008

R-170 Email dated November 29, 2007

R-171 Email dated May 22, 2008

R-172 Newsletter dated May 22, 2008

R-173 Certificate of Health Care Provider, dated June 2, 2009

R-174 RTC visitation log

R-175 Email dated May 23, 2008

R-176 Letter dated June 20, 2007

R-177 Assessments of Gilmer's students

Hearing Dates

March 9 ,2010

April 30, 2010

May 4 and 6, 2010

July 29, 2010

August 2, 3 and 5, 2010

September 21, 22, 24, 27, 28 and 29, 2010

October 28 and 29, 2010

November 8, 19 and 22, 2010

December 23, 2010

January 21 and 25, 2011

February 4, 2011

301-11

#301-11

F.O., on behalf of minor children, D.O. and R.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her children in November 2010. The respondent filed a motion to dismiss in lieu of an answer, asserting that the appeal was not timely filed, that petitioner lacks standing as she does not have primary custody of the children, and additionally does not reside in the district. A hearing at the Office of Administrative Law (OAL) was scheduled for June 7, 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. The Commissioner additionally noted that the record included an unresolved claim for tuition reimbursement from the Board, and remanded the matter to the OAL for supplementation of the record regarding the amount of tuition sought, and an appropriate recommended initial decision regarding payment of same.

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 28, 2011

OAL DKT. NO. EDU 227-11
AGENCY DKT. NO. 651-11/10

F.O., on behalf of minor children, D.O. and R.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WALDWICK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this residency matter and advisement of failure to appear transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with a copy of the notification sent to the petitioner by the OAL on June 20, 2011, providing her thirteen days to submit an explanation for such nonappearance. 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.[1]

Notwithstanding the dismissal of the petition, the Commissioner notes that the Board's Answer in this residency matter contained a counterclaim for tuition which was left unresolved by the Administrative Law Judge. Although the record returned to the Commissioner by the OAL contains an affidavit of the Board's Business Administrator attesting to the amount of tuition claimed by the Board for the period of September 17, 2010 through June 7, 2011 as a consequence of the ineligible attendance of petitioner's children in its schools, it is unclear from

[1] A filing of counsel for the Board subsequent to the return of this file to the Agency objects to what it contends was an untimely facsimile submission sent by petitioner to the Agency on July 11, 2011. It is noted that the Agency has received no communication of any kind from petitioner since the return of this matter.

this submission if they are additionally seeking tuition through the end of the school year. Thus, this matter must be remanded to the OAL for supplementation of the record in this regard and an appropriate recommended initial decision regarding the payment of tuition.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/28/11

Date of Mailing: 7/29/11

[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).

302-11

#302-11

D.R., on behalf of minor child, S.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ANTHONY SCHAIBLE AND BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought a determination that her minor child, S.R. was not appropriately identified as an eighth grade student for placement as a freshman into the respondents' Advanced Placement Academy (Academy) at Monmouth Regional High School. Petitioner asserted that respondents did not use the required multiple measures as outlined in *N.J.A.C.* 6A:8-3.1 when determining S.R.'s eligibility for admittance into the Academy, but rather relied solely on the result of an outdated standardized test score. Petitioner seeks to enroll S.R. in the Academy as a junior for the 2011-2012 school year.

The ALJ found, *inter alia,* that: boards of education are granted discretionary authority under Title 18A of the New Jersey Statutes to adopt policies and rules for the management of public schools; appropriate deference must be given to professionals in a school district when assessing the appropriate placement of a student; in the instant matter, the district created a standard for admission to the Academy – specifically that a student must score a combined total of 500 in language and math on a standardized test given during the spring of the seventh grade year; S.R. failed to meet this criteria, and was therefore not admitted to the Academy; petitioner has not proven that the Board acted in an arbitrary, capricious or unreasonable manner in determining that S.R. was not qualified for placement in the Academy; and the Board did not violate *N.J.A.C.* 6A:8-3.1, as the District does have a gifted and talented program in place which is separate and apart from the optional Academy program. Accordingly, the ALJ denied petitioner's application for relief, and dismissed the petition.

Upon consideration and review, the Commissioner 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.

July 28, 2011

OAL DKT. NO. EDU 7006-10
AGENCY DKT. NO. 121-6/10

D.R., on behalf of minor child, S.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ANTHONY SCHAIBLE AND BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
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 failed to establish either that the Board acted in an arbitrary, capricious or unreasonable manner or in violation of *N.J.A.C.* 6A:8-3.1 when it determined that S.R. was not qualified for placement in its Advanced Placement Academy.

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.*

Andrew J. Spaniel

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/28/11
Date of Mailing: 7/29/11

* 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 7006-10
AGENCY DKT. NO. 121-6/10

D.R., ON BEHALF OF MINOR CHILD, S.R.,
Petitioner,
v.
ANTHONY SCHAIBLE AND BOARD OF EDUCATION OF THE MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,
Respondents.

D.R., petitioner, pro se

Martin M. Barger, Esq., for respondents (Reussille Law Firm, attorneys)

Record Closed: May 12, 2011 Decided: June 22, 2011

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

STATEMENT OF THE CASE

Petitioner seeks a determination that her minor child, S.R., was not appropriately identified as an eighth grade student for placement as a freshman into the respondents' Advanced Placement Academy ("Academy") at Monmouth Regional High School.

Petitioner argues that respondents did not use the required multiple measures as outlined in N.J.A.C. 6A:8-3.1 when determining S.R.'s admittance into the Academy, but instead relied solely on the result of an outdated standardized test score. Petitioner requests that S.R. be enrolled in the Academy as a junior for the 2011-2012 school year.

PROCEDURAL HISTORY

On or about June 15, 2010, petitioner filed a petition of appeal with the Commissioner of the Department of Education. The Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter on June 21, 2010, 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, for determination as a contested case. The case was filed at the OAL on July 1, 2010. The hearing was held on May 12, 2011, and the record closed on that date.

FACTUAL DISCUSSION

Testimony

Witnesses for Respondent

Charles R. Ford

Charles R. Ford is in his second year as superintendent of the Monmouth Regional School District ("District"). When he began his employment, he became part of the Academy planning committee ("Committee"). The Academy was created to counter magnet schools from luring talented students away from the District. The Academy would be a separate program from the gifted and talented (GT) program already in place in the District. While the GT program would offer honors and advanced placement (AP) courses, the Academy would increase the competitiveness and difficulties of the course offerings. During planning in 2009 for the first year of the Academy, the Committee agreed that the criteria needed for invitation to the Academy

was a combined total of 500 in language and math on the New Jersey Assessment of Skills and Knowledge Test ("Test"). The Test is a standardized review of a student's ability given during the spring of the child's seventh grade year. Because the results of the Test are not printed until August, the District cannot use the eighth grade score as it is reported immediately preceding the high school year, and there is insufficient time to determine the Academy rosters for the following school year. S.R. scored lower than the required 500 on her Test. As a result, S.R. was not given an invitation to the Academy.

Subsequent to the first year of the Academy, the Committee modified the criteria necessary for invitation. The modification was based on a finding that students were leaving the Academy because of an inability to compete, and the District determined that more stringent requirements were necessary to determine the best candidates. Additional requirements for an entrance exam, as well as feedback from intermediate school teachers, became part of the invitation process. The Committee also made the determination that if a child left the Academy, his or her spot would remain unfulfilled. This provision was based upon the difficulty a new child would have in catching up with the Academy workload and curriculum.

The Academy would take a small group of children and place them in a predetermined group of classes during their freshman and sophomore years. The Academy would allow students to pursue more individualized studies during their junior and senior years. During their junior and senior years, non-Academy children could attend the same AP classes as Academy children. S.R. is scheduled to take three AP courses and two honors courses during her 2011-2012 junior year.

Jennifer Mitchell

Jennifer Mitchell has been employed by the District for the last fifteen years as a freshman English teacher. She is involved with the Academy and teaches an Academy English course, as well as four non-Academy honors classes.

In 2009, the Committee made a decision to use the seventh grade Test results as the basis for determining its initial September 2009 Academy class. This was necessary to allow for class scheduling in February 2009, and because scheduling difficulties made it impossible for the District to wait for the eighth grade test results released in August 2009.

Mitchell had formerly taught S.R. She found S.R. to be a very good honors student. However, in a letter to Ford, Mitchell was of the opinion that S.R. should remain in honors English, rather than AP Academy English, during S.R.'s sophomore year. (R-1.) Mitchell believed that since the Academy courses were taught in progression, it would not be a good idea to substitute a child into the Academy at a late date. This would create an unnecessary burden for that child. In addition, Mitchell believed that substituting S.R. into the Academy would be unfair to the approximate ten students who ranked higher than S.R.in ability, skill level and grades.

Joseph Nappi

Joseph Nappi is in his seventh year of employment by the District as a history teacher. Nappi had formerly taught S.R., and knew her to be a very good student. He recommended S.R. for the Academy, subject to other well qualified children also being given the chance to attend the Academy. Nappi believed that three to four other children were more qualified for the Academy than S.R.

Gail Fitzmaier

Gail Fitzmaier has been employed by the District as the director of guidance for the last four years, and is the spokesperson for the Academy. The purpose of the Academy was to ensure that the District would not lose talented children to the magnet schools, which magnet schools would then later take credit for highly proficient SAT scores. For the first year of the Academy in 2009, sixty-three children were invited, and forty-one joined. S.R. was not one of the invited children based on her Test score of below 500. Currently, twenty-eight students remain enrolled in the Academy, with thirteen dropping out in grades nine and ten.

As a result of not being a part of the Academy, S.R. will miss a Capstone project, and the opportunity to travel abroad to Costa Rica. S.R. will, however, be entitled to enroll in similar AP courses as Academy children during her junior and senior years.

The District is in full compliance with the New Jersey GT regulations for individualized instruction. The GT program does not require a formal application, and children are identified for the program based upon the eighth grade teacher recommendations. Fitzmaier agreed that S.R. performed extremely well on her New Jersey Assessment of Skills and Knowledge Test given during S.R.'s eighth grade, scoring as advanced proficient in mathematics, and well above 500 overall. (P-1 at 1.)

Witness for Petitioner

D.R.

D.R. is the mother of S.R., currently a sophomore at Monmouth Regional High School. S.R. was hoping to attend the Academy beginning in September 2009. However, D.R. believes that S.R. was not appropriately identified, and that the District incorrectly used the seventh grade Test scores to determine the admission to the Academy, rather than the eighth grade New Jersey Assessment of Skills and Knowledge test scores, which would have been a more accurate reflection of a student's ability. S.R. is a conscientious student, and D.R. believed she would successfully complete the rigors of the Academy workload. D.R.'s confidence was based upon the recommendations of Nicole Kenny, Sharon Finan, and Trish Rodenberg, all teachers of S.R. in the eighth grade. (P-1 at 3 to 5.)

D.R. also believed that while the GT program may have complied with the requirements of N.J.A.C. 6A: 8- 3.1, the Academy program did not, because the only item considered for admission to the Academy was the result of the seventh grade Test. D.R. agreed that S.R. had applied to the Communication High School magnet school, but was rejected. D.R. was disappointed that S.R. would not be entitled to participate in the Capstone project, the opportunity to travel abroad to Costa Rica, and the ability to

graduate with distinction with other students from the Academy. D.R. believed the District acted in an arbitrary, capricious, and unreasonable manner by not considering various aspects of S.R.'s qualifications as required by N.J.A.C. 6A: 8- 3.1, and by using a seventh grade Test result to determine admission to a ninth grade academic program.

FINDINGS OF FACT

After carefully considering the testimonial and documentary evidence presented, and having had the opportunity to listen to testimony and observe the demeanor of the witnesses, I **FIND** the following to be the relevant and credible **FACTS** in this matter: The Academy was created by the District to counter magnet schools from luring talented students away from the District high school. The Academy was to be a separate program from the GT program already in place at the District high school. While the GT program would offer honors and AP courses, the Academy would increase the competitiveness and difficulties of the course offerings. The first year of the Academy was the 2009-2010 school year. During planning in 2009 for the first year of the Academy, the Committee agreed that the criteria needed for invitation to the Academy was a combined total of 500 in language and math on the Test. The Test is a standardized review of a student's ability given during the spring of the child's seventh grade year. Because the results of the Test are not printed until August, the District cannot use the eighth grade score as it is reported immediately preceding the first high school year, and there is insufficient time to determine the Academy rosters for the following school year. S.R. scored lower than the required 500 on her Test, and as a result, was not given an invitation to the Academy. S.R. performed extremely well on her New Jersey Assessment of Skills and Knowledge Test given during her eighth grade year, scoring as advanced proficient in mathematics, and well above 500 overall.

The Academy was to take a small group of children and place them in a predetermined group of classes during their freshman and sophomore years. During the junior and senior years, the Academy would allow their students to pursue more individualized studies. During the junior and senior years, non- Academy children could attend the same AP classes as Academy children. S.R. is scheduled to take three AP courses and two honors courses during her 2011-2012 junior year.

Subsequent to the first year of the Academy, the Committee modified the criteria necessary for invitation. The modification was based on a finding that students were leaving the Academy because of an inability to compete, and the District determined that more stringent requirements were necessary to determine the best candidates. Additional requirements for an entrance exam, as well as feedback from intermediate school teachers, became part of the invitation process. The Committee had also determined that if a child left the Academy, his or her spot would remain unfulfilled. This provision was based upon the difficulty a new child would have in catching up with the Academy workload and curriculum.

S.R. is currently a sophomore, and is a conscientious honors student. As a result of not being a part of the Academy, S.R. will miss a Capstone project, the opportunity to travel abroad to Costa Rica, and the ability to graduate with distinction with other students from the Academy. S.R. will however, be entitled to enroll in similar AP courses as Academy children during her junior and senior years.

LEGAL ANALYSIS

In the absence of a clear showing of abuse of discretion, the Commissioner of Education will not substitute his or her own judgment for that of a board of education. In Kopera v. Bd. of Educ. of West Orange, 60 N.J. Super. 288, 294 (App. Div. 1960), the Appellate Division stated, "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 without rational basis or induced by improper motives." 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 order to fulfill its obligation to provide students with a thorough and efficient education, boards of education have been granted discretionary authority under Title 18A of the New Jersey Statutes to adopt policies and rules for the management of the public schools. Appropriate deference must be given to the

professionals in a school district when assessing the appropriate placement of a student.

Petitioner contends that the District acted in an arbitrary, capricious, and unreasonable manner by not considering various aspects of S.R.'s qualifications as required by N.J.A.C. 6A: 8-3.1, and by using a seventh grade Test result to determine admission to a ninth grade academic program. Taking petitioner's proofs in their best light, there is no showing that the Board's action in denying S.R. access to the Academy was arbitrary and capricious, or was without rational basis or induced by improper motives. It is the position of the Board that S.R.'s performance on the Test was a sufficient and critical part in its decision to place S.R. in the Academy. The Commissioner has consistently held that local boards of education may place students in public school grade levels according to their own rules and regulations. Shenkler v. Ho-Ho-Kus Bd. of Educ., 1974 S.L.D. 772, aff'd 1975 S.L.D. 1157; Boulogne v. Bd. of Educ. of the City of Jamesburg, 1964 S.L.D. 107; Wilcox v Bd. of Educ. of the Borough of Oceanport, 154-55 S.L.D. 75. Such deference to local boards should be no less when determining placement in a particular class within a grade level, or when determining qualification for admission to an advanced learning Academy. The District created a standard for admission to the Academy in 2009. That standard was a 500 score on the Test, and that requirement was not arbitrary, capricious, or unreasonable. N.J.A.C. 6A: 8-3.1 governs the responsibility of a District to identify gifted and talented students and provide them with appropriate instructional adaptations and services. It is undisputed that the District had a gifted and talented program in place, and therefore did not violate N.J.A.C. 6A: 8-3.1. The creation of the Academy was an optional program created by the District, and its standards for admission into such an optional program did not run afoul of N.J.A.C. 6A: 8-3.1.

After careful consideration of all of the arguments, I **CONCLUDE** that petitioner has not proven that the Board acted in an arbitrary, capricious or unreasonable manner in determining that S.R. was not qualified for placement in the Academy, nor did the Board violate N.J.A.C. 6A: 8-3.1. Petitioner's request for relief must be denied, and S.R. will not be enrolled in the Academy for the 2011-2012 school year.

ORDER

It is **ORDERED** that petitioner's application for relief be **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 22, 2011

DATE

EDWARD DELANOY, JR., ALJ

Date Received at Agency: JUN 23 2011

Date Mailed to Parties:

/lam

WITNESSES

For petitioner:

D.S.

For respondent:

Charles R. Ford, Jr.
Jennifer Mitchell
Joseph Nappi
Gail Fitzmaier

EXHIBITS

For petitioner:

P-1 Grade 8 New Jersey ASK scores, report card and teacher recommendations

P-2 Copy of New Jersey gifted and talented regulations

P-3 Copy of Advanced Placement Academy presentation to parents, dated January 20, 2009

P-4 Response from Gayle Fitzmaier to petitioner's question on October 28, 2010

P-5 Copy of Advanced Placement Academy presentation to parents, dated January 20, 2009; congratulations letter to parents, dated December 23, 2009; Asbury Park Press news article; Description of field trip to be taken by Academy students

For respondent:

R-1 Letter from Jennifer Mitchell indicating why S.R. should remain in the present class and not move to the Advanced Placement Academy

R-2 Answers to Interrogatories and documents supporting the Answers

R-3 Answers from Gayle Fitzmaier to requests from petitioner, dated January 21, 2011

R-4 Answers from Gayle Fitzmaier to requests from petitioner, dated January 31, 2011

R-5 Answers from Gayle Fitzmaier to requests from petitioner, dated February 8, 2011

303-11

303-11

BROOKFIELD SCHOOLS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The petitioner, Brookfield Schools (Brookfield), is a private school for the handicapped (PSH) which has been approved by the New Jersey Department of Education (Department) to receive public school special education students on a tuition basis. Brookfield challenged the Department's determination to restrict its 2008-2009 tuition rate to a 10% increase over its tentative per diem rate. Brookfield had certified a tuition rate that represented a 17.39% increase, based on the escalation of its costs per pupil resulting from an unexpected drop in enrollment of 25 percent in the fall of 2008. The Department contended that its action was warranted by Brookfield's failure to comply with *N.J.A.C.* 6A:23A-18.2(a)(2), which requires PSHs to timely notify sending districts when proposed tuition increases will exceed 10%. Brookfield asserted that it complied with the letter and spirit of the regulation. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue, and the case is ripe for summary decision; the clear intent of *N.J.S.A.* 18A:46-21 is that the tuition charged by PSHs be fair and related to the educational services actually provided by the PSH, and regulations were promulgated by the Department to implement this statutory intent; the intent of *N.J.A.C.* 6A:23A-18.2(a)(2) is to ensure that sending districts are promptly advised about proposed tuition adjustments, that such adjustments be linked to properly developed financial data, that these financial reports be approved by the PSHs' governing body, and that such approval is a prerequisite to Department approval of the final tuition rate; and Brookfield acted in concert with these regulatory requirements when it notified sending districts in November 2008 of the proposed tuition adjustments. The ALJ determined that *N.J.A.C.* 6A:23A-18.2(a)(2) does not expressly require formal approval of a PSHs' financial report prior to proposing a rate increase, and concluded that Brookfield substantially complied with the regulatory requirements. Accordingly, the ALJ ordered summary decision in favor of petitioner.

Upon full consideration, the Commissioner concurred with the ALJ that summary decision is appropriately granted to the petitioner. The Initial Decision was adopted as the final decision in this matter, and Brookfield's request for a tuition increase of 17.39% for 2008-2009 was granted.

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 11447-10
AGENCY DKT. NO. 569-9/10

BROOKFIELD SCHOOLS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

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

Respondent's exceptions essentially recast and reiterate its arguments advanced before the Administrative Law Judge (ALJ) below. In that the Commissioner finds that such arguments were fully considered and addressed in the Initial Decision, they will not be revisited here.

Upon full consideration, the Commissioner concurs with the ALJ – for the reasons comprehensively presented in her decision – that summary decision is appropriately granted to petitioner.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. Respondent's determination limiting the tuition increase allowably charged by Brookfield Schools for the 2008-09 school year to 10 percent is reversed.

Brookfield Schools' request for a tuition increase of 17.39 percent for the 2008-09 school year is hereby granted.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/28/11

Date of Mailing: 7/29/11

* 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 11447-10
AGENCY DKT. NO. 569-9/10

BROOKFIELD SCHOOLS,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

Respondent.

David Rubin, Esq., for petitioner

Susan M. Huntley, Deputy Attorney General, for respondent (Paula T. Dow, Attorney General of the State of New Jersey, attorney)

Record Closed: May 31, 2011 Decided: June 15, 2011

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

STATEMENT OF THE CASE

Petitioner, Brookfield Schools (Brookfield), is a private school for the disabled, which has been approved by the State of New Jersey, Department of Education (the Department), to receive public school special education students on a tuition basis.

Brookfield challenges the Department's determination to restrict its 2008–2009 tuition rate to a 10 percent increase over its tentative per diem rate. The Department contends that its action was warranted by Brookfield's failure to comply with N.J.A.C. 6A:23A-18.2(a)(2), which requires private schools for the disabled to timely notify sending districts when proposed tuition increases will exceed 10 percent. Specifically, the Department asserts that Brookfield's notice to its sending districts was based on financial data that had not yet been approved by its Board of Trustees. Brookfield urges that it complied with the letter and spirit of the regulation.

PROCEDURAL HISTORY

Brookfield filed a petition of appeal with the Commissioner of Education (Commissioner) on September 24, 2010. An answer was filed on October 13, 2010, and the contested case was transmitted to the Office of Administrative Law (OAL) on October 14, 2010. I conferred with counsel via telephone, who advised that they believed that this matter could be resolved on cross-motions for summary decision. Via letter order dated January 5, 2011, I set down a discovery and briefing schedule, which was later extended by consent of the parties. Cross-motions and supporting briefs were filed on April 28, 2011. Simultaneous replies were filed on May 31, 2011, at which time the record closed.

FINDINGS OF FACT

The material facts are not in dispute, and I **FIND** as follows:

Brookfield is a private school for the disabled, and is approved by the Department to receive special needs students from local public school districts. In accordance with Department regulations, Brookfield established a tentative per diem tuition rate of $184 at the commencement of the 2008–2009 school year. In September and October 2008 Brookfield experienced an unexpected drop in enrollment, and lost 25 percent of its students. As a result, its costs per pupil escalated dramatically. Financial reports were presented to the Brookfield Board of Trustees at its November 24, 2008, meeting, reflecting that the final per diem tuition rate would increase by more

than 10 percent of the tentative rate charged. Via formal resolution the Board of Trustees approved these financial reports.

Just prior to that meeting, Brookfield business manager Mary Anne McStravick communicated with her counterparts at the sending public school districts. Her November 21, 2008, letter advised as follows:

> In reviewing our records we have discovered that due to an unexpected decrease in enrollment the actual cost per pupil at Brookfield Academy–Transition to College for the 2008–2009 school year may be in excess of ten percent of the tentative tuition rate charged of $184. In accordance with the New Jersey State Department of Education [sic] we are required to notify each sending district as well as the Assistant Commissioner of finance [sic] that such an increase will be charged and the reason for the charge.

This letter was mailed to the local business administrators on November 21, 2008, as confirmed in certified answers to Requests for Admissions signed by McStravick on January 25, 2011.[1]

Audited financial statements were thereafter forwarded by Brookfield to the Department for review. These documents certified a per diem rate of $216, an increase of 17.39 percent above the tentative rate. Via letter dated April 29, 2010, Jim Verner, a section supervisor for the Office of Fiscal Policy and Planning, disallowed a tuition charge increase in excess of 10 percent of the tentative rate because the financial report for the quarter ending September 30, 2008, did not substantiate this significant an increase. Brookfield appealed Verner's decision to Acting Assistant Commissioner Yut'se Thomas via letter dated June 1, 2010.

McStravick urged in her letter of appeal that the September first quarterly report did not demonstrate a need for a greater than 10 percent increase because the drop in enrollment that necessitated this increase did not take place until October. Although the

[1] In e-mails that accompany the submissions of the parties, McStravick appears to assert that the letter was not actually sent until after the November 24, 2008, meeting of her Board of Trustees. But in light of her certified answers provided in discovery, I **FIND** that she has abandoned that contention.

regulation requires quarterly financial reports, McStravick noted that she "goes above that requirement and reports on a monthly basis." Based on the data available to her, it was clear that notification that tuition would need to increase was warranted in November. McStravick wrote, "[o]ur goal is to be responsible stewards of our sending districts' funds. As such, we felt it appropriate and responsible to send the notification as soon as it was apparent that we would be in excess of 10%, rather than waiting for the second quarter reports to indicate that."

Thomas replied via letter dated July 28, 2010. She agreed that Verner's basis for denying the increase was incorrect, as the November notification was not a notification for the first quarter. But she nonetheless again denied the requested tuition increase. Thomas found that Brookfield did not comply with N.J.A.C. 6A:23A-18.2(a)(2), and, more specifically, N.J.A.C. 6A:23A-18.4(a)(11), because it notified the sending districts that it proposed an increase prior to the review and acceptance of the November 2008 financial report by the Board of Trustees. Accordingly, the Department restricted Brookfield to a 10 percent increase, allowing a tuition adjustment from the tentative rate of $186 to $202.40 per diem.

ANALYSIS AND CONCLUSIONS OF LAW

The parties have cross-moved for relief under 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) (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, 213 (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 251–52, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

It is clear from the submissions of the parties that they do not disagree as to the facts, only as to how those facts should affect Brookfield's ability to increase its tuition rate under the regulatory scheme. Accordingly, I **CONCLUDE** that this matter is ripe for summary decision.

Brookfield is approved to receive public school special needs students pursuant to N.J.S.A. 18A:46-15, and, as such, must comply with complex statutory and regulatory provisions which govern the tuition it may charge. N.J.S.A. 18A:46-21 states that Brookfield may determine a tuition rate to be paid by its sending boards of education, "but in no case shall the tuition rate exceed the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the State Board of Education." The statute recognizes that tuition is paid to schools like Brookfield with public funds, and that these funds are utilized to educate public school students with multifaceted needs that cannot be met within their home school districts. Council of Private Sch. for Children with Special Needs, Inc. v. Cooperman, 205 N.J. Super. 544 (App. Div. 1985). Accordingly, the clear intent of the statute is that the tuition charged be fair and reasonably related to the educational services actually provided by the

private school. Regulations promulgated by the Department are designed to implement this statutory intent. N.J.A.C. 6A:23A-18.1 to -18.16.

The private school and a sending district typically establish an initial agreement for the provision of services based upon a tentative tuition rate. N.J.A.C. 6A:23A-18.2(h). In order to establish a final tuition rate that is based on the certified actual cost per pupil, the private school must prepare quarterly financial reports in a format approved by the Department. N.J.A.C. 6A:23A-18.4(a)(11). These reports must be submitted to the private school's governing body for approval, and the acceptance of the report must be documented in the governing body's minutes. Once a final rate is established an adjustment is made. Thus, if the tentative rate does not adequately reflect the actual cost per pupil, the private school may bill its sending public districts for "all or part of the difference owed." N.J.A.C. 6A:23A-18.2(m).

Consistent with the goal of ensuring the proper and orderly expenditure of public funds, the regulations expressly direct private schools for the disabled to give timely notice of anticipated tuition adjustments, as follows:

> 2. If the approved private school for students with disabilities proposes to charge a final tuition rate in excess of 10 percent above the tentative tuition rate charges, the private school shall notify each sending district board of education and the Assistant Commissioner, Division of Finance that such an increase will be charged and the reason for the increase on or before the following dates: December 15th for the first quarter, March 15th for the second quarter, June 15th for the third quarter and September 15th for the fourth quarter, or the next business day when applicable. The determination of a final tuition rate in excess of 10 percent above the tentative tuition rate charged shall be based on the completion of the required quarterly financial report in accordance with N.J.A.C. 6A:23A-18.4(a)11.

> i. If the sending district board of education and the Assistant Commissioner, Division of Finance are not notified on or before the dates noted in (a)2 above, the approved private school for students with disabilities shall charge an increase not to exceed 10 percent of the tentative tuition rate charged.
>
> [N.J.A.C. 6A:23A-18.2(a)(2) (emphasis supplied).]

The Department does not contend that Brookfield failed to give timely notice of its proposed tuition increase to its sending public school districts. There is no contention that its November 2008 financial report was not completed in a format approved by the Commissioner. Nor does the Department assert that the requested tuition increase was not justified by the financial data presented. Rather, the Department denied the requested tuition adjustment only because McStravick's notification letter predated formal approval of her financial report by her Board of Trustees by three days.[2] The Department urges that the local districts were notified of a tuition increase before "completion of the required quarterly financial report," and thus before Brookfield could have properly determined a final tuition rate under the process required by the regulation. N.J.A.C. 6A:23A-18.2(a)(2) (emphasis supplied).

Brookfield bears the burden of demonstrating that the Department's determination was arbitrary, capricious or unreasonable. Titusville Acad., Inc. v. N.J. Dep't of Educ., EDU 00651-06, Initial Decision (May 21, 2007), adopted, Comm'r (July 6, 2007) <http://lawlibrary.rutgers.edu/oal/search.html>; Catholic Family and Cmty. Servs. v. N.J. Dep't of Educ., EDU 01051-01, Initial Decision (January 14, 2003), adopted, Comm'r (March 3, 2003), adopted, State Bd. (July 2, 2003) <http://www.nj.gov/education/legal/>. I **CONCLUDE** that Brookfield has met its burden. Brookfield asserts that it has substantially, if not fully, complied with the requirements of N.J.A.C. 6A:23A-18.2(a)(2) and N.J.A.C. 6A:23A-18.4(a)(11) and that the decision of the Department denying a tuition increase in excess of 10 percent should be reversed. I agree. It is well established that an administrative regulation is subject to the same canons of construction as a statute. In re N.J.A.C. 14A:20-1.1, 216 N.J. Super. 297,

[2] Review of a 2008 calendar reveals that the letter was dated only one business day prior to the board meeting at which the report was approved. November 21, 2008, was a Friday, and November 24, 2008, was the following Monday.

306 (App. Div. 1987). When interpreting a statute or regulation, our courts assume that the framers intended to ascribe to words their ordinary meaning. Jablonowska v. Suther, 195 N.J. 91, 105 (2008). The intent of a statute or regulation should be gleaned from a view of the whole and of every part of the statute, with the real intention prevailing over the literal sense of its terms. Schierstead v. City of Brigantine, 29 N.J. 220 (1959).

It is clear from the language of N.J.A.C. 6A:23A-18.2(a)(2) that the regulation's real intent is that sending districts be promptly advised about proposed tuition adjustments, and that such adjustments be linked to properly developed financial data. It is also clear that financial reports must be approved by the private school's governing body, and that such approval would be a prerequisite to Department approval of the final tuition rate. I concur with Brookfield that it acted in concert with these regulatory requirements. It based its November 21, 2008, notification to its sending districts on hard data developed by its financial professionals. It ensured that the sending local public districts had this critical financial information as promptly as possible, indeed, sooner than contemplated by the regulation.[3] McStravick presented her financial report to Brookfield's Board of Trustees, and secured its approval prior to finalizing Brookfield's final tuition rate for 2008–2009.

I **CONCLUDE** that Brookfield has been penalized for failing to comply with an apparent agency requirement that is not clearly and explicitly expressed in regulatory language. Neither regulation relied upon by the Department definitively demands that a financial report be formally approved prior to notifying sending districts that tuition may increase. Indeed, under N.J.A.C. 6A:23A-18.2(a)(2) notification to sending districts is required when a private school "proposes" a change in the tuition rate.[4] Conversely, it is the "determination of a final rate" that must be based on a "completed" financial report. Similarly, N.J.A.C. 6A:23A-18.4(a)(11) contains no language requiring that a "proposed" change in tuition postdate formal approval of the private school's financial

[3] Under the regulation, Brookfield should have notified its sending districts that tuition would be adjusted upwards in excess of 10 percent no later than December 15, but did so several weeks earlier, in late November.

[4] The word "propose" does not suggest a final decision. The website "dictionary.com" defines "propose" as "to offer or suggest . . . for consideration, acceptance or action."

data. This latter regulation requires only that a financial report be prepared quarterly using a prescribed format, and be submitted to the school's governing body for approval.

The Department correctly stresses that an agency's interpretation of its own regulations is entitled to deference. Matturi v. Bd. of Tr. of the Judicial Ret. Sys., 173 N.J. 368, 381 (2002). But under the guise of due deference, the agency cannot read a requirement into a regulation that would not be plainly apparent to its readers. Regulations must be clear enough to enable the regulated community to understand what standard it will be required to meet. Youth Consultation Serv., Inc. v. Dep't of Educ., EDU 7893-03, Initial Decision (September 2, 2004), aff'd, Comm'r (October 13, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>. If the Department requires that private schools notify sending districts about proposed tuition increases only after their financials are approved by their governing bodies, it needed to have said so, in unambiguous regulatory language adopted in accordance with the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15 (the Act).

Indeed, it is well established that when an agency requirement constitutes a rule, it must comply with the rulemaking procedures contained in the Act. It is clear that the Department has penalized Brookfield for violating what the agency perceives to be a rule of general application, and one that "is intended to be applied generally and uniformly to all similarly situated persons." N.J.S.A. 52:14B-2(e); Metromedia v. Div. of Taxation, 97 N.J. 313, 331 (1984). Our Supreme Court has recognized that "[W]ithout published rules of procedure and substantive criteria for [the taking of the proposed action, affected parties] have been denied any meaningful opportunity for informal response to the proposed action." Metromedia, supra, 97 N.J. at 330 (1984) (citation omitted); see also Coal. for Quality Health Care v. Dep't of Banking and Ins., 348 N.J. Super. 272, 294–95 (App. Div. 2002).

The Department argues strenuously that its regulatory interpretation is grounded in the goal of "ensuring better budgeting and tracking of expenditures because it provides an additional level of accountability and assurance that the figures used to determine a tuition increase are accurate." (Department's Brief at 11.) But the

regulations also promote an equally, if not more important, goal, that is, the academic success of our state's special needs students. Indeed, our courts have recognized that these regulations "reflect the State Board's determination that the quality of education provided by private schools receiving handicapped pupils is directly related to the amount of tuition that the schools spend on approved educational costs." Council of Private Sch., supra, 205 N.J. Super. at 547. Under the facts presented here, Brookfield's students are best served by allowing Brookfield to charge the tuition needed to adequately meet their educational needs.

For this reason, even if I were persuaded that N.J.A.C. 6A:23A-18.2(a)(2) expressly required formal approval of the financial report prior to proposing a rate increase, I would **CONCLUDE** that the overarching goals of the regulation are best served by a determination that Brookfield substantially complied with the regulation's requirements. Bernstein v. Bd. of Tr., 151 N.J. Super. 71, 76–77 (App. Div. 1977). Brookfield certainly comported itself in a fashion consistent with the regulation's goals. Its actions did not prejudice the Department or the sending school districts, which all received timely notice of the proposed rate increase. Its proposed increase was based on sound financial data, which was approved by the Board of Trustees only one business day after the controverted letter was sent. Id. at 77. It is clear that Brookfield substantially complied with the regulatory requirements contained in N.J.A.C. 6A:23A-18.2(a)(2).

ORDER

Based on the foregoing, the action of the Department of Education limiting the tuition increase for the 2008–2009 school year for the Brookfield Schools to 10 percent is **REVERSED**. It is **ORDERED** that summary decision is granted in favor of Brookfield, approving its request for an increase in tuition of 17.39 percent for the 2008–2009 school year. The Department's motion for summary decision 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, 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 15, 2011

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: June 15, 2011

Date Mailed to Parties: JUN 16 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

304-11

#304-11

OAL DKT. NO. EDU 03151-11
AGENCY DKT. NO. 51-2/11

IN THE MATTER OF THE TENURE	:	
HEARING OF KIRSTEN SMITH,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF JEFFERSON, MORRIS COUNTY.	:	

The record, settlement agreement (Settlement Agreement), and 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 observes that the Settlement Agreement contains several handwritten modifications, including the addition of an entire handwritten paragraph, that have not been initialed by the parties. Since the modifications have not been initialed, it is not clear whether the changes were made before or after the document was executed and/or approved by the parties. Therefore, the Commissioner cannot approve the within settlement agreement in its present form.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/28/11
Date of Mailing: 8/01/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03151-11

AGENCY REF. NO. 51-2/11

IN THE MATTER OF THE TENURE HEARING OF KIRSTEN SMITH, DISTRICT OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY.

Joanne L. Butler, Esq., for petitioner Jefferson Township Board of Education

Sanford R. Oxfeld, Esq., for respondent, Kirsten Smith (Oxfeld Cohen, LLC, attorneys)

Record Closed: June 27, 2011 Decided: June 28, 2011

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

On March 21, 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 June 14, 2011. However, prior to the hearing date, the parties asked to engage in settlement discussions. The parties met with Judge Gerson and were able to reach a settlement.

The parties have agreed to and submitted the attached Settlement Agreement and Release 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 the signature of the parties and/or 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.

6/28/11
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 6-30-11

Date Mailed to Parties: JUN 30 2011
db

Laura Sanders
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 Petitioner

IN THE MATTER OF THE TENURE CHARGES AGAINST KIRSTEN SMITH, JEFFERSON TOWNSHIP BOARD OF EDUCATION, MORRIS COUNTY.,	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDU 03151-11 AGENCY REF NO. 51-2/11

SETTLEMENT AGREEMENT

This Agreement is made by and between the Jefferson Township Board of Education (hereinafter "Board"), having its principal offices at 28 Bowling Green Parkway, Lake Hopatcong, New Jersey, and Kirsten Smith (hereinafter referred to as "Smith"), residing at 3 North Glen Circle, Oak Ridge, New Jersey, in an effort to resolve the Tenure Charges pending before the Commissioner of Education, for hearing at the Office of Administrative law, and the Superior Court litigation bearing Docket Number MRS-L-001391 10, and to resolve all remaining issues between the parties.

WHEREAS, the parties have determined that resolution of this matter without proceeding further in the pending tenure dismissal hearing pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10, et seq., and the pending Superior Court action, is in the interests of the public and consistent with furthering the public good, since the Petitioner District will obtain its goal of no longer employing Respondent as a tenured teacher, without having to resort to a lengthy hearing to address

twenty-three tenure charges, the anticipated number of witnesses to be produced (which may include student and former student witnesses), the anticipated time and expense of the hearing, the loss of services of three top District administrators during the course of the preparation and hearing, as well as the uncertainty of completing the case in the five hearing dates currently scheduled; and

WHEREAS, the parties agree to fully and finally settle and/or release all claims between them arising out of Smith's employment and separation from employment with District;

The parties do hereby agree as follows:

1. The foregoing recitals are incorporated herein.

2. Smith has executed and supplied an irrevocable letter of resignation, which is attached to this Agreement, which will be accepted at the next public Board meeting and which resignation will become effective on Feb. 29, 2012 or the date that this Agreement is approved by the Commissioner of Education, whichever is later.

3. Until the ~~effective~~ date ~~of the resignation or~~ approval of this Agreement by the Commissioner, Smith will continue on ~~paid~~ suspension. Smith will begin to receive compensation upon approval by the Commission of this Settlement Agreement.

4. During the term of said suspension, and in perpetuity following the approval of this Agreement by the Commissioner, Smith will not volunteer for, be a participant in, or attend any program, event, or activity which is at all related to the Jefferson Township Public Schools, which shall include, but not be limited to, any program, event or activity which is sponsored by the Jefferson Township Public Schools, any co-curricular or extra curricular program, event or activity involving the students of the Jefferson Township Public Schools (regardless of location), any program, event or

Said Compensation to be eight (8) months of salary. In addition she will receive payment for health coverage (COBRA) between the date of her resignation and June 30 2012

activity which operates with or uses Jefferson Township Public Schools monies or funding, or any program, event or activity which is located in or on any Jefferson Township Public Schools property (whether owned or leased). This shall not include Smith's participation in or attendance at any program related to her children during such time as they attend District schools.

5. In consideration of the foregoing, the Board will not prosecute the tenure changes against Smith.

6. In consideration of the foregoing, Smith hereby releases and forever discharges the Board and its present and former affiliates, subsidiaries, officers, directors, agents, employees, and their successors and assigns, from any and all actions, causes of action, suits, claims, charges or complaints which Smith may have or may have had, or may claim to have or have had, in the past, currently, ~~or in the future~~, against any of them, except as may be necessary to enforce this Agreement. Smith acknowledges that this general release specifically waives and releases all claims including. but not limited to, claims arising under federal, State, and local laws prohibiting employment discrimination, claims arising under the State education laws, N.J.S.A. 18A:1-1, et seq., including but not limited to the "Tenure" laws set forth in N.J.S.A. 18A:28-1, et seq., and the "Tenure Employees Hearing Law," set forth in N.J.S.A. 18A:6-10, et seq., as well as any and all claims or rights arising under the Civil Rights Acts of 1964 and 1991, 42. U.S.C. 2000(e), et seq., the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., Title VII of the Federal Civil Rights Act of 1964, as amended 42 U.S.C. § 2000 (3), et seq., the Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq. claims arising under State, federal or common law for breach of contract, or claims growing

or any claims arising out of or in any way related to the State Family Leave Act or the Federal Family and Medical Leave Act

out of any legal restrictions on the Board's rights with regard to employment of individuals, or claims arising out of or related to any State workers compensation laws, Smith hereby agrees to voluntarily dismiss, with prejudice, her suit against all the Defendant Board bearing Docket Number MRS-L-001391 10, New Jersey Superior Court, Morris County.

7. This Agreement does not constitute an admission by either party of any wrongful action or violation of any federal or State statute, or common law rights, including those relating to the provisions of any law or statute concerning employment actions, or of any other possible or claimed violation of law or rights.

7A. See attached.

8. The terms of this Agreement shall be kept confidential to the extent permitted by law. Smith agrees not to disclose the fact, terms or amount thereof by any means of communication or media to any person other than Smith's immediate family, accountant, attorney, income tax preparer or similar professional, or taxing authorities, and to NJEA Representative unless otherwise ordered by a court of competent jurisdiction. Smith further agrees that she will not engage in, or encourage others to engage in, communications regarding her employment or the actions of the Board or Administration, and the like, via social media. The District agrees not to disclose the fact, terms or amount thereof to any person other than its Board of Education members, administrators and necessary clerical staff, accountants, auditors, attorneys, tax preparers, or other persons on a need-to-know basis, or unless otherwise ordered by a court of competent jurisdiction or required by a government agency.

9. This Agreement shall be binding upon and inure to the benefit of Smith, the Board, and any of their respective heirs, legal or personal representatives, employees, officers, directors, successors or assigns.

10. This Agreement sets forth the entire Agreement between the parties and supersedes any and all prior agreements or understandings between the parties. Smith represents and acknowledges that she does not rely, and has not relied upon, any representation or statement not set forth in this Agreement made by the Board or its counsel with regard to the subject matter, basis, or effect of this Agreement or otherwise.

11. This Agreement shall be construed in accordance with, and all disputes hereunder shall be governed by, the laws of the State of New Jersey.

12. Smith acknowledges that she has carefully read and fully understands all of the terms of this Agreement, and has fully discussed the terms hereof, including the general release contained herein, with her attorney, Sanford Oxfeld, Esq., that she has had a reasonable period of time to consider the terms hereof, and that she enters into this Agreement voluntarily and with the advice of counsel.

13. In the event of a breach of this Agreement, either party may seek relief, including but not limited to damages, restitution and injunctive relief, at law or in equity, in a court of competent jurisdiction and/or tenure dismissal before the Department of Education and the Office of Administrative Law.

14. The parties agree that this Agreement will be incorporated into an Initial Decision by the

Honorable Carol I. Cohen, the administrative law judge assigned to preside over the pending tenure dismissal action bearing OAL DKT. NO. EDU 03151-11 and AGENCY REF NO. 51-2/11.

15. The parties recognize that if this Agreement is not approved by the Commissioner of Education, the tenure dismissal proceeding will resume before Judge Cohen until completion.

16. The terms of this Agreement are subject to approval by the Jefferson Township Board of Education and will be voted upon at its next meeting

WITNESS

KIRSTEN SMITH
Date: May 25, 2011

THE JEFFERSON TOWNSHIP BOARD OF EDUCATION

6-20-2011
WITNESS

By: H. Ronald Smith, Board President
Date:

Dr Kathaleen Fuchs
Preliminarily for the Board

7A. Smith represents that any perceived teaching performance issues were the result of [redacted] personal and family ~~issues~~ matters and that in accordance with the recommendation of Dr. Moreno, the psychiatrist that Smith was directed to see by the district, she has continued in ~~psychotherapy~~ treatment. The Board acknowledges these representations and states, without admission, that they are consistent with Smith's record. ~~Both parties hereto stipulate that other than the two years of absence she was granted during the 2009-2010 school year, Smith did not request and was not entitled any additional~~

To: Jefferson Township Board of Education
From: Kirsten Smith
Date: May 25, 2012
Re: Letter of Resignation

Gentlepeople:

I hereby tender my irrevocable letter of resignation pursuant to the settlement agreement which I executed this date to be effective at the close of business on February 29, 2012.

Kirsten Smith

ADDENDUM TO SETTLEMENT AGREEMENT

I acknowledge that I have been advised that it is within the discretion of the Commissioner of Education to refer this matter to the State Board of Examiners. I wish to emphasize, however, that in settling this matter I have not admitted that I am guilty of conduct unbecoming, nor that I have done anything that warrants a review of my certificate.

Date: 6/6/11

Kirsten Smith

Date: 6-20-2011

For the Board of Education

JEFFERSON TOWNSHIP BOARD OF EDUCATION
28 Bowling Green Parkway
Lake Hopatcong, NJ 07849

EXTRACT FROM THE MINUTES OF A MEETING OF
THE BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON
MORRIS COUNTY, NJ, TO BE RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of Jefferson in the County of Morris, New Jersey convened in a Regular Meeting on **Monday, June 20, 2011** at 7:00 PM, in the Jefferson Township High School Media Center, 1010 Weldon Road, Oak Ridge, New Jersey.

The following members of the Board of Education were present:

Mrs. Castiglione	Mrs. Poulas
Mr. Cuccio	Mrs. Scott
Mr. Feldmann	Mr. Smith
Mr. Millar	Mr. Stewart

The following member of the Board of Education was absent: Mr. Anzano

The following resolution was offered by Mrs. Scott, seconded by Mr. Feldmann, and adopted by the Board of Education by the following roll call vote:

L.4 Motion to accept the recommendation of the Superintendent to approve and adopt the following addendum to agenda as described below:

WHEREAS, the Board of Education and Kirsten Smith are parties to two separate litigated matters; and

WHEREAS, the Board and Smith have determined that it is in the public interest to settle both cases.

NOW, THEREFORE, BE IT RESOLVED THAT the Board of Education authorizes settlement of both cases, Smith v. Jefferson Township Board of Education bearing Superior Court Docket No. MRS-L-00139110, and In the Matter of the Tenure Charges Against Kirsten Smith, bearing OAL Docket No. EDU 03151-11 and Agency Reference No. 51-2/11, in accordance with the terms of the Agreement presented to the Board for approval; and

BE IT FURTHER RESOLVED THAT as part of that settlement, Smith's letter of resignation be and hereby is accepted; and

BE IT FURTHER RESOLVED THAT the Board Secretary, Board President, and Board Counsel are authorized to take any and all action required to effectuate the settlement in accordance with the terms presented to the Board.

MOTION: Mrs. Scott	SECOND: Mr. Feldmann			
Name	**Ayes**	**Nays**	**Abstain**	**Absent**
Mr. Anzano				X
Mrs. Castiglione	X			
Mr. Cuccio	X			
Mr. Feldmann	X			
Mr. Millar	X			
Mrs. Poulas	X			
Mrs. Scott	X			
Mr. Smith	X			
Mr. Stewart	X			

STATE OF NEW JERSEY}
C NTY OF MORRIS } ss

I, Dora E. Zeno, Secretary of the Board of Education of the Township of Jefferson, in the County of Morris, State of New Jersey, hereby certify that the foregoing June 20, 2011 extract, has been compared by me with the original minutes that will be approved at the July 18, 2011 Jefferson Township Board of Education meeting. I hereunto set my hand and affixed the corporate seal of said Board of Education.

Dora E. Zeno
Board Secretary

#305-11

OAL DKT. NO. EDU 9680-10
AGENCY DKT. NO. 475-8/10

LOIS DAVIS-POSEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, 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' settlement and adopts the Initial Decision as the final decision in this matter. The petition is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/28/11

Date of Mailing: 8/01/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9680-10
AGENCY DKT. NO. 475-8/10

LOIS DAVIS-POSEY,

Petitioner,

v.

BOARD OF EDUCATION OF THE
CITY OF PLAINFIELD, UNION COUNTY,

Respondent.

Jennifer Borja, Esq., for Petitioner (Caruso Pope Smith Edell & Picini, PC, attorneys)

Robert T. Pickett, Esq., for Respondent (Pickett & Craig, attorneys)

Record Closed: June 28, 2011 Decided: June 29, 2011

BEFORE **TAHESHA L. WAY**, ALJ:

The Department of Education transmitted this matter to the Office of Administrative Law where it was filed on September 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. Subsequently, the parties reached an amicable agreement, and the attached Stipulation of Settlement indicating the terms of the agreement (J-1), and certified Board Resolution approving the Settlement (J-2) were provided.

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 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.

June 29, 2011
DATE

TAHESHA L. WAY, ALJ

Date Received at Agency:

Date Mailed to Parties: JUL - 1 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

EXHIBITS:

Joint Exhibits:

J-1 Settlement Agreement

J-2 Certified Resolution approving Settlement Agreement

PICKETT & CRAIG, ESQS.
Attorneys At Law
80 Main Street Ste 430
West Orange, New Jersey 07079
(973) 762-0613
ATTORNEY FOR RESPONDENT
Plainfield Board of Education

Before the Commissioner of Education
of the State of New Jersey
OAL Docket No. EDU 09680-2010N
Agency Ref. No.: 475-8/10

LOIS DAVIS-POSEY,

Petitioner,

VS.

PLAINFIELD BOARD OF EDUCATION,

Respondent.

SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT

This Settlement Agreement is made by and between Lois Davis-Posey, individually ("Petitioner"), whose address is 5 Grace Way, Morristown, New Jersey 07960, and the Plainfield Board of Education ("Respondent District"), with administrative offices located at 1200 Myrtle Avenue, Plainfield, New Jersey 07063, and on the date or dates indicated below.

WHEREAS, on May 24, 2007, Petitioner Lois Davis-Posey was employed by the Board as teacher staff member; and

WHEREAS, Petitioner Lois Davis-Posey was charged with a criminal action for certain acts alleged to have occurred on or about May 27, 2007, while she was in the employ of the Board; and

WHEREAS, on October 6, 2009, the criminal complaint against Petitioner Lois Davis-Posey was dismissed in her favor; and

WHEREAS, on or about August 18, 2010, Petitioner commenced this proceeding against

J-1

Petitioner by way of Petition filed with the Commissioner of Education, the Department of Education for the State of New Jersey, pursuant to *N.J.S.A.* 18A:6-11, *entitled Lois Davis-Posey vs. Plainfield Board of Education, OAL EDU-09680-2010N* (the "Petition").

WHEREAS, Petitioner seeks indemnification and reimbursement for any and all attorneys fees and costs from the Respondent associated with the legal defense of the criminal action against her pursuant to *N.J.S.A.* 18A:16-6.1; and

WHEREAS, the parties have determined that it is their respective best interests to enter into this Settlement Agreement to avoid expensive litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants exchanged herein and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, Petitioner and Respondent hereby memorialize their agreement as follows:

1. **Settlement of Claim** – The Petitioner District and the Respondent agree to settle this Action as follows:

a. The Board, through its insurance carrier, will pay to Lois Davis-Posey the sum of Twenty Thousand and Two Hundred Forty-One Dollars ($20,241.00) in full and complete satisfaction of the amount Lois Davis-Posey is claiming to be due and owing to her from the board for her attorneys' fees, costs and other expenses.

b. This settlement amount will be paid directly to the trust account of Lois Davis-Posey's legal counsel, Caruso, Pope, Smith, Edell, Picini, P.C., (formerly Timothy R. Smith & Associates, LLC), 60 Route 46 East, Fairfield, New Jersey, 07004, following the approval of this Stipulation and Settlement and Release by the Board.

2. **Withdrawal of Petition before the Commissioner Of Education** – Petitioner shall cause her Petition in this proceeding to be withdrawn by advising the Office of

Administrative Law and the Commissioner of Education of her intention and desire to withdraw her claim in this proceeding.

3. **Confidentiality** - No party shall issue or cause to be issued any statement regarding the Action which contradicts the terms of the settlement herein.

4. **No Admission** - It is specifically acknowledged and understood by the parties that this Agreement is not an indication or admission of any violation of any law, statute or regulation or a breach of any duty by Respondent. It is further acknowledged that the payments referenced herein or made hereunder are not indicative of any action or inaction taken by Petitioner District and/or Respondent, their past and present Board members, administrators, agents, employees or attorneys, with respect to the filed and approved tenure charges in this proceeding. It is understood and agreed by the parties that the settlement is being made solely to alleviate the necessary time and expense of a hearing, preparation therefore and/or further proceedings and continued payment of any salary entitlements to Respondent. This Agreement and compliance with this Agreement shall not be construed as an admission by any party of any liability or improper filing of tenure charges whatsoever with respect to any matter in this proceeding. This Agreement may not be introduced into evidence or used in any other way in any other legal or administrative proceeding other than a proceeding seeking enforcement of the terms of this Agreement.

5. **Mutual Releases** – The Petitioner District and the Respondent herein, by mutual agreement and consideration, hereby release each other from any and all obligations in the matter styled, *Lois Davis-Posey vs. Plainfield Board of Education, OAL EDU-09680-2010N.* Whereas, Respondent District and Petitioner have accepted the terms of the settlement in the aforementioned administrative proceeding as set forth herein; and Respondent District and the Petitioner agree, by further mutual agreement and consideration, to release and discharge each other, their representatives, attorneys, successors and assigns and employees, if any, from any

and all actions, causes of action of any kind, suits, charges and obligations, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, sales and purchases, deed of conveyance(s), title deficiencies, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law, admiralty or equity, which against their heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of time to the date of this release and agreement.

6. **Representation and Negotiation by Counsel** - The parties acknowledge that this Agreement is the result of arms length negotiations between the parties, all of whom are represented by counsel. The parties have consulted with their attorneys throughout the negotiations and have been fully advised of all of the ramifications of this Agreement, including the claims and rights they are waiving herein and the affirmative obligations they are agreeing to undertake. The parties are fully satisfied with the services of their counsel with respect to both this Agreement and all other aspects of this case and they enter into this Agreement knowingly, willingly and without any coercion or improper inducements.

7. **Entire Agreement** - This Agreement represents the entire agreement and understanding between the parties with respect to the subject matter hereof. This Agreement may not be modified unless same is in writing, authorized, approved and signed by all parties. Each party agrees to execute such further and additional documents, instruments and writings as may be reasonably necessary, proper, required, desirable or convenient for the purpose of fully effectuating the terms and provisions of this Agreement.

8. **Severability** - If any provision of this Agreement or the application thereof is held invalid, such invalidity shall not affect any other provisions or applications and, to this end, the provisions of this Agreement are declared to be severable.

9. **Law Governing** - This Agreement and all of its terms and conditions shall be governed by and construed in accordance with the laws of the State of New Jersey. The Commissioner of Education, the Department of Education of the State of New Jersey, shall have exclusive jurisdiction over any and all actions or assignments related to or arising out of this Agreement since the Petition herein was filed under the administrative jurisdiction of the Commissioner of Education.

10. This Agreement may be executed in counterparts, each of which shall constitute an original, but all of which shall constitute one and the same agreement.

11. This Agreement is for the benefit of the parties hereto and their successors and assigns.

12. This Agreement constitutes the entire Agreement among the parties hereto, and supersedes any prior understandings, agreements or representations by or between the parties, written or oral, which may have related to the subject matter hereof.

13. This Agreement cannot be amended or waived except in writing signed by all of the parties hereto. No waiver of any provision hereunder or any breach or default shall extend to or affect in any way any other provision of this Agreement or any prior or subsequent breach or default.

14. This Agreement shall be binding on any successor or assignee of the parties hereto.

15. The parties' agreement to the settlement contained herein and their execution of this Agreement shall not be deemed an admission of liability or wrongdoing.

16. Petitioner acknowledges that she has reviewed this Settlement Agreement with her own independent legal counsel and that she enters into it without duress, and for her own free will and volition. She further acknowledges that she fully understands the terms of this Settlement Agreement and the duties and obligations enumerated herein.

17. This Stipulation of Settlement and Release is conditioned upon approval

of the Board.

18. The Board's President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.

19. **Execution** - This Agreement may be signed in several counterparts, all of which when taken together shall constitute a single document.

IN WITNESS WHEREOF, the parties and/or their representative(s) hereto have duly executed this Agreement as of the date first written above.

Pickett & Craig, Esqs.
Attorneys for Respondent
Plainfield Board of Education

By: _____
Robert T. Pickett, Esq.
Authorized to Sign On Behalf of the
Petitioner Plainfield Board of Education

Dated: ~~January~~ April 12th, 2011

Caruso, Pope Smith Edell Picini, PC
Attorney for Petitioner
Lois Davis-Posey

By: _____
Jennifer Borja, Esq.
Authorized to Sign On Behalf of the
Lois Davis-Posey

Dated: January 25th, 2011

Plainfield Board of Education

By: _____
Lisa Logan-Leach, President
Plainfield Board of Education

Dated: ~~January~~ April 5th, 2011

By: _____
Lois Davis-Posey
Petitioner

Dated: ~~January~~ FEBRUARY 1, 2011

Mrs Posey read this agreement and signed it in my presence this date 2/1/11 Jerry M Glassman

JERRY M. GLASSMAN
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 4/3/2011

JERRY M. [illegible]AN
NOTARY PUBL[illegible]SEY
Commission Exp[illegible]

RESOLUTION AUTHORIZING THE SETTLEMENT OF THE LOIS DAVIS-POSEY V. PLAINFIELD BOARD OF EDUCATION PROCEEDING

WHEREAS, on or about August 18, 2010, Petitioner commenced proceedings against Respondent District by way of Petition filed with the Commissioner of Education, the Department of Education for the State of New Jersey; and

WHEREAS, Respondent District and Petitioner desire to avoid the expense and disruption of further litigation with respect to the subject matter of the Action; and

WHEREAS, Respondent District and Petitioner, upon consultation with their respective counsel, have independently concluded that it is in their respective best interests to settle and resolve any and all disputes and controversies which have been, or could have been, raised between them,

NOW, THEREFORE, in consideration of the mutual promises exchanged in the attached Settlement Agreement, the District hereby resolves to settle the matter in accordance with the attached Agreement for the reasons set forth thereon.

Approved on

June 22 2011

Certified by

Gary Ottmann
Board Secretary

Seal

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306-11

#306-11

OAL DKT. NOS. EDU 3804-04, 3772-06, AND 7537-09 (CONSOLIDATED)
AGENCY DKT. NOS. 26-1/04, 52-1/06, AND 115-6/09

JACQUELINE HINKSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this consolidated 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.

Andrew H. Smarick

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/28/11

Date of Mailing: 8/01/11

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3804-04
AGENCY DKT. NO. 26-1/04

JACQUELINE HINKSON,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK, ESSEX COUNTY
Respondent.

OAL DKT. NO. EDU 3772-06
AGENCY DKT. NO. 52-1/06

OAL DKT. NO. EDU 7537-09
AGENCY DKT. NO 115-6/09

Gail Oxfeld Kanef, Esq. for petitioner (Oxfeld Cohen, attorneys)

Bernard Mercado Esq., for respondent (Newark Public School District)

Record Closed: July 15, 2011 Decided: July 15, 2011

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

These matters were consolidated via order dated October 8, 2009. They were transmitted to the Office of Administrative Law on April 27, 2004, April 3, 2006 and July 7, 2009, 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 State Operated School District of the City of Newark has approved the settlement, as evidenced by the signature of the State District Superintendent.

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 15, 2011
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 7-19-11

Mailed to Parties: JUL 19 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-7139
Attorneys for Respondent

13 A 11:21
OFFICE OF ADMIN. LAW

JACQUELINE HINKSON, Petitioner, vs. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NOS. EDUOR-003804-04 EDUOR-003772-06 EDUOR-007537-09 **SETTLEMENT AGREEMENT**

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement that fully disposes of all issues in controversy between Petitioner Jacqueline Hinkson ("Petitioner" or "Hinkson") and Respondent State-Operated School District of the City of Newark ("Respondent" or the "District") involving the above-captioned matters:

1. Petitioner agrees to withdraw, with prejudice, her appeals and requests for hearings filed under OAL Dkt. Nos. EDUOR-003804-04, EDUOR-003772-06 and EDUOR 007537-09.
2. In exchange, Respondent agrees to credit Petitioner's sick day bank with thirty one (31) days that were originally charged to Petitioner.
3. Petitioner will not receive any back pay as part of this settlement.
4. This agreement shall not constitute a precedent in any matters involving other employees.

5. The terms of this agreement shall not be construed as an admission of guilt or wrongdoing by either party and will not be utilized by either party in any subsequent matters that may arise in the future.

6. By entering into this Settlement Agreement, Petitioner releases and discharges the District, its directors, officers and employees with respect to all claims or rights in any court that she may have against the District with the exception of workers' compensation claims and only the claims contained in Petitioner's previously docketed case EDUOR 05466-2010 which is currently still pending before the Court. Except for workers' compensation claims and EDUOR 05466-2010, this release and discharge generally includes without limitation, any and all other 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 or separation from the District to date. 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 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 retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above); 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; and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law 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 terms of her employment with the District, including, but not limited to, any claim for wrongful discharge, back pay, vacation pay, sick pay, physical injury, any incurred medical expenses or costs, wage, commission or bonus payment, attorneys' fees, costs, and/or future wage loss.

7. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this

Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

8. 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 State District Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further.

Dated: June 2, 2011

JACQUELINE HINKSON
Petitioner

Dated: 6/2/11

NANCY OXFELD, ESQ.
Attorney for Petitioner

Dated: _____

CAMI ANDERSON
State District Superintendent

Dated: 6/24/11

BERNARD MERCADO, ESQ.
Attorney for Respondent

CERTIFICATION

I, JACQUELINE HINKSON, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my counsel 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 also understand that if this Settlement Agreement is approved by the ~~Civil~~ Commissioner of Education ~~Service Commission~~, my claim against Respondent will terminate.

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: June 2, 2011

Jacqueline Hinkson
JACQUELINE HINKSON

6/2/2011

TAEA CROSS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a bus driver/utility worker, contended that the Board improperly terminated her employment in December 2010, in violation of her tenure rights. The Board asserted that the petitioner's bus driver position is not entitled to tenure protection, and her services as a utility worker do not meet the full-time criteria for tenure as a custodian. The parties agreed to proceed on a summary basis as the essential facts in the matter were not in dispute.

The ALJ found, *inter alia*, that: petitioner does not qualify for tenure as a bus driver; petitioner was employed under a fixed-term contract, and her fixed-term, part-time employment as a utility worker does not meet the criteria for janitorial tenure under *N.J.S.A.* 18A:17-3. Accordingly, the ALJ concluded that petitioner did not have tenure in her former position and therefore no tenure rights were violated. The ALJ ordered the petition dismissed.

The Commissioner concurred with the ALJ that 1) petitioner could not earn tenure as a bus driver, and 2) as a part-time utility worker with fixed term appointments, she qualified neither for tenure under *N.J.S.A.* 18A:17-3 nor the tenure benefit provided in the applicable collective bargaining agreement. 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.

August 1. 2011

OAL DKT. NO EDU 1522-11
AGENCY DKT. NO. 35-2/11

TAEA CROSS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner challenges her dismissal from employment as a bus driver/utility worker in respondent's district. The petition was filed in February 2011 with an application for emergent relief. The Initial Decision of the Office of Administrative Law (OAL) recites that the parties agreed – on February 15, 2011 – to a summary proceeding, and submitted their respective papers by April 6, 2011.

On June 21, 2011, the Initial Decision was transmitted to the Commissioner.[1] It included a finding that petitioner had not earned tenure in respondent's district, and a conclusion that respondent had not violated petitioner's rights when it dismissed her on December 15, 2010.

Review of the record, initial decision and exceptions leads to the conclusion that the ALJ did not err in recommending dismissal of the petition. As noted by the ALJ, bus drivers – in contrast to teaching staff members and janitorial employees – enjoy no statutory right to tenure. *See, e.g., Albert v. Bd. of Educ. of the Freehold Reg'l High School Dist.*, 1977 *S.L.D.* 594, at 601. Nor does petitioner allege that the applicable collective bargaining

[1] The Initial Decision includes a belated denial of emergent relief which, at the present juncture, the Commissioner regards as moot.

agreement (CBA) bestows tenure upon bus drivers, *per se*. Rather, petitioner appears to rely on the fact that her position involved "utility" duties, which she characterizes as janitorial.

However, neither *N.J.S.A.* 18A:17-3 – the statute setting forth the conditions for tenure of janitorial employees – nor the provisions of the applicable CBA support petitioner's position. The provisions of *N.J.S.A.* 18A:17-3 exclude from tenure those janitorial employees who are appointed for fixed terms. The exhibits annexed to the March 11, 2011 supplemental certification of respondent's Business Administrator/Board Secretary, William Moffitt, indicate that petitioner's employment was renewed annually for a fixed term – via board resolution. Such annual renewal for a fixed term precludes tenure under *N.J.S.A.* 18A:17-3 unless the CBA includes provisions to the contrary.

While the record transmitted to the Commissioner does not include a copy of the applicable CBA, the parties appear to agree that Article VI of the CBA provides that tenure rights shall be acquired after three years of satisfactory services for full-time custodial and maintenance personnel. Relying on such authority as *Wright and East Orange Personnel Ass'n v. East Orange Bd. of Educ.*, 99 *NJ* 112 (1985), petitioner argues that Article VI entitled her to tenure in 2007, after she had completed three years of service in respondent's district.

In *Wright,* the validity of a contractual provision similar to Article VI was at issue. The New Jersey Supreme Court held that "inasmuch as *N.J.S.A.* 18A:17-3 does not preempt a school board's power to grant tenure to custodial employees after three years of satisfactory performance [whether or not the employee's appointment terms were fixed], and inasmuch as a negotiated provision to that effect advances the primary purpose of the statute without significantly interfering with educational policy," the provision was valid. *Wright, supra* at 123. However, respondent maintains – and petitioner does not appear to deny – that

Article VI bestows tenure rights after three years of satisfactory service for full-time custodial and maintenance personnel. As a part-time utility worker, petitioner did not qualify for the tenure benefit provided by Article VI.

As petitioner did not introduce any evidence to refute the allegations of fact – set forth in the Certification dated February 16, 2011 of Richard D. Tomko, respondent's Superintendent – concerning the incidents which led to petitioner's suspension and subsequent dismissal, the determination that petitioner did not acquire tenure constitutes a full disposition of the claims in the petition. Further, pursuant to the "entire controversy doctrine," this matter may not be refiled to adjudicate facts and/or claims which were known or should have been known during the prosecution of this case.[2]

Finally, the Commissioner notes that petitioner's arguments regarding respondent's treatment of another employee are unhelpful to the disposition of this case. The achievement of tenure is dictated by statute. *Spiewak v. Board of Education of the City of Plainfield,* 90 *N.J.* 63 (1982). If, as here, the facts reveal that petitioner did not meet the statutory criteria for tenure, she is foreclosed from claiming the benefits of same.

Accordingly, petitioner's dismissal is upheld and the petition is dismissed.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/28/11
Date of Mailing: 8|01|11

[2] The entire controversy doctrine holds that the adjudication of a legal controversy should occur in one litigation in only one court and that, accordingly, all parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy. *Cogdell v. Hospital Center,* 116 *N.J.* 7, 15 (1989). The entire controversy doctrine is applicable to administrative hearings. *City of Hackensack v. Winner,* 82 *N.J.* 1, 31-32 (1980).

[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

SUMMARY DECISION

OAL DKT. NO. EDU 01522-11

AGENCY DKT. NO. N/A

TAEA CROSS,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,

Respondent.

Harold N. Springstead, Esq., for petitioner (Springstead & Maurice, attorneys)

John E. Croot, Jr., Esq., for respondent (Schwartz, Simon, Edelstein & Celso, attorneys)

Record Closed: April 11, 2011 Decided: June 20, 2011

BEFORE **CARIDAD F. RIGO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Taea Cross claims that the Elmwood Park Board of Education improperly terminated her employment as a bus driver/utility worker on December 15, 2010, in violation of her tenure rights.

Petitioner filed her petition seeking Interim Emergent Relief with the Commissioner of Education on or about February 8, 2011. On February 11, 2011, the matter was transmitted to the Office of Administrative Law (OAL) for a determination as a contested case. On February 15, 2011, the parties appeared at the OAL where the parties agreed to proceed on a summary basis since the essential facts were not in dispute. The record closed on April 11, 2011, upon receipt of written arguments.

ISSUE

Should petitioner's emergent request be granted? Does petitioner have tenure? And, if she does have tenure, was her termination proper?

STATEMENT OF THE FACTS

The pertinent facts pertaining to petitioner's employment are essentially not in dispute. Those **FACTS** are:

Petitioner was hired by the respondent Board of Education of the Borough of Elmwood Park in 2004 as a bus driver/utility worker. Her responsibilities as a bus driver included the transporting of students to and from school, school sponsored activities and field trips, inspecting the buses, reviewing the bus at the conclusion of each trip, cleaning the bus and fixing the bus. As a utility worker she was responsible for transporting the mail throughout the district, she cleans about the school, moves and delivers supplies/packages throughout the district and trash removal.

On or about November 2, 2010, petitioner was suspended with pay.

On or about December 15, 2010, respondent Board terminated petitioner's employment with the district.

DISCUSSION AND CONCLUSIONS OF LAW

The granting of emergent relief is an extraordinary remedy which can only be awarded based upon a showing that irreparable harm will result if it is not granted, and a further showing that there is a likelihood of success on the merits. See N.J.A.C. 1:1-12.6. The New Jersey Supreme Court has set forth a four-prong test for determining whether an applicant is entitled to emergent relief. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982). Those four prongs are:

> 1. The relief should not be granted unless it is necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be adequately redressed by monetary damages.
>
> 2. Such relief should not be granted when the legal rights underlying the claim are unsettled.
>
> 3. In order to prevail on the application for temporary relief, a party must make a preliminary showing of reasonable probability of ultimate success on the merits.
>
> 4. On balance, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

A petitioner seeking emergent relief must meet all four prongs in order to prevail.

The basis of petitioner's claim for emergent relief lies on the fact that she has been terminated and is not receiving a paycheck and her medical benefits have been terminated. "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 standard contemplates that the harm be both substantial and immediate. Subcarrier Commc'n v. Day, 229 N.J. Super. 634, 638 (App. Div. 1977). Petitioner in her arguments does not offer anything indicating she would incur an irreparable harm. In her certifications, petitioner asserts that she is a single mother of two children, ages twelve and four, that she is unemployed and has no health insurance. I **FIND** that

petitioner has not shown irreparable harm; and, if there is harm, it can be repaired monetarily.

On the issue of does petitioner have tenure, the Board argues that she does not have tenure because the tenure law does not afford tenure protection to school bus drivers and that—at best—she was a part-time utility employee. Secondly, the Board presents that, in accordance to N.J.S.A. 18A:17-3, a utility worker must be appointed to an indefinite term in order to qualify for tenure as a utility employee.

Petitioner argues that she does have tenure because: 1) she had dual duties as a bus driver/utility worker and tenure is provided to utility/maintenance workers, 2) the district does not apportion the time petitioner conducts bus-driving and utility duties, 3) it has been the Board's practice to give tenure to bus driver/utility workers and, 4) the Board's records indicate petitioner was to attain tenure on November 1, 2007. See Exhibit-A of respondent's business administrator's certification.

School janitors (utility workers) are given tenure rights under a specific New Jersey statute. [N.J.S.A. 18A:17-3.]

> Every public school janitor of a school district shall, **unless he is appointed for a fixed term**, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 chapter 6 of this title. [Emphasis supplied.]

Based on the oral and written arguments of counsel along with a review of the relevant documentation submitted by the parties, I **FIND** that petitioner does not have tenure.

According to the documentation provided, namely, the attachments to the supplemental certification of the Board's Business Administrator/Board Secretary William Moffitt, petitioner was given a fixed-term contract from April 24, 2007, to April 27, 2011. According to the exhibits provided the Board gave petitioner her first contract on April 24, 2007, seven months short of her alleged and proposed date for attaining tenure. (See Moffitt Certif. with attachments, Exhibit A.)

N.J.S.A. 18A:17-3 does not require tenure for utility workers/janitors. Instead, the Legislature allows boards of education discretion to deny tenure by appointing janitors for a fixed term, it permits boards and utility workers to negotiate terms of employment, and allows boards to determine which utility worker, if any, shall receive tenure. Wright and E. Orange Personnel Ass'n v. E. Orange Bd. of Educ., 99 N.J. 112, 118-19. A claimant of tenure in situations such as this one bears the burden of presenting sufficient competent and credible evidence of facts essential to his or her claim. Here, petitioner must prove by a preponderance of competent and credible evidence that the respondent employed her without a "fixed term" in order for her claim for tenure to succeed. Wright, supra, 99 N.J. at 119.

Based on the foregoing facts and applicable law, I **CONCLUDE** that petitioner was employed with a fixed-term contract and she therefore does not have tenure.

ORDER

It is hereby **ORDERED** 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.

June 20, 2011
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: June 20, 2011

Date Mailed to Parties: JUN 21 2011

DIRECTOR AND
~~CHIEF ADMINISTRATIVE LAW JUDGE~~

lr

APPENDIX

EXHIBITS

For Petitioner:

P-1 Certification of Alfred F. Maurice with Exhibits

P-2 Certification of Taea Cross with Exhibits

For Respondent:

R-1 Certification of William Moffitt with Exhibits

309-11

OAL DKT. NO. EDU 4315-11
AGENCY DKT. NO. 716-12/10
(EDU 233-11 ON REMAND)

IN THE MATTER OF THE TENURE HEARING OF DEBORAH J. PAONE, SCHOOL DISTRICT OF THE TOWNSHIP OF NEW HANOVER, BURLINGTON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record in this matter, the proposed "Separation Agreement with Release and Waiver" (Settlement), a resolution by respondent authorizing the 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 and adopts the Initial Decision as the final decision in this case, with the following observation.

Sections 1.1, 1.2, 2.6, 4.1 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.

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 petition is hereby dismissed, subject to compliance with the settlement terms.

IT IS SO ORDERED.

Andrew N. Smarick

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/28/11
Date of Mailing: 8|01|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4315-11

AGENCY DKT. NO. 716-12/10

(ON REMAND EDU 233-11)

IN THE MATTER OF THE TENURE HEARING OF DEBORAH J. PAONE, SCHOOL DISTRICT OF THE TOWNSHIP OF NEW HANOVER, BURLINGTON COUNTY.

Joan Kane Josephson, Esq., for petitioner (Parker McCay, attorneys)

Steven Blader, Esq., for respondent (Szaferman, Lakind, Blumstein and Blader, PC, attorneys)

Record Closed: June 14, 2011 Decided: June 17, 2011

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

This matter was transmitted to the Office of Administrative Law on January 10, 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 with Release and Waiver, together with a Board Resolution, indicating the terms thereof, which are 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.

June 17, 2011
DATE

DONALD J. STEIN, ALJ

Date Received at Agency: JUN 23 2011

Date Mailed to Parties: JUN 24 2011

cmo

SEPARATION AGREEMENT
with
RELEASE and WAIVER
between
Board of Education of New Hanover Township
and
Deborah J. Paone

2011 FEB -8 A 10:57

WHEREAS the Board of Education of New Hanover Township (Burlington County) (hereinafter the "Board") and Deborah J. Paone agree that it would be in the best interest of both parties to this Agreement to have Deborah J. Paone's employment terminate; and

WHEREAS Deborah J. Paone has agreed to resign effective at the end of the day on January 5, 2011; and

WHEREAS the parties desire to sever the employment relationship; now therefore the parties

RESOLVE and agree to the following terms.

1. **Resignation.**

1.1. Deborah J. Paone hereby submits (and attaches hereto as Exhibit A) her signed letter of resignation, terminating all employment with the New Hanover Township Board of Education, effective at the end of the day on January 5, 2011.

1.2. Ms. Paone resigns her tenured position of Business Administrator/Board Secretary effective January 5, 2011.

1.3. Both parties by the terms of this Separation Agreement and General Release wish to end the tenured employment of Ms. Paone.

1.4. The tenure charges which were certified against Ms. Paone by the Board of Education have been submitted to the State Department of Education for withdrawal

1.5. As soon as possible after receipt of this executed Agreement and the signed letter of resignation, the Board will act at a public meeting to approve the Agreement and accept the letter of resignation.

1.6. Following acceptance by the Board, the resignation cannot be modified or withdrawn, unless Ms. Paone revokes this entire Agreement. (The sole method of revoking this Agreement, and the effect of doing so, are described in section 8 of this Agreement.) If Ms. Paone does not revoke this Agreement in accordance with section 8 of this Agreement, the resignation shall be final and binding, and cannot be rescinded or withdrawn.

2. **Mutual releases and waiver of right to sue.**

2.1. By entering into this Agreement each party releases the other with respect to all claims and rights that either party may have against or involving the other at the present time. This release includes a release of all claims Ms. Paone may have or wish to pursue against the Board and all claims against all agents of the Board. (For purposes of this Agreement, the term "agent of the Board" includes all members of the Board of Education and all employees of the Board.)

2.2. The parties agree that neither party will bring any action or file any suit or claim against the other or against any agent of the Board. Any matters, claims, suits or charges which may be pending at any level shall be withdrawn as soon as this Agreement is signed by the Parties.

2.3. This release includes a waiver of all rights to sue or bring a claim for any reason, including rights secured by Board policy, contract, employment laws, civil rights laws and all other state and federal laws. It is further understood that either party may refer any potential criminal matter to the appropriate legal authorities at any time.

2.4. Ms. Paone also specifically waives the right to sue for any and all claims under the federal Age Discrimination in Employment Act, which protects workers over age 40 from discrimination in the workplace based on age. This waiver applies to events and circumstances which arose prior to the effective date of this Agreement.

2.5. The releases and waivers provided by each of the parties, as described in this section of the Agreement, apply only to facts known by that party on the date of this Agreement.

2.6. Ms. Paone further agrees that her signature on this Agreement constitutes an acknowledgment that she is relinquishing all tenure rights and any other present and future rights to employment and re-employment with the Board as of the close of business on January 5, 2011.

3. **The Department of Education Office of Fiscal Accountability and Compliance (OFAC)**

3.1 On November 30, 2010 OFAC issued a report entitled the New Hanover Township School District Business Administrator Performance Failure.

3.2 The report was referred to the NJDOE Office of Licensure and Credentials and the Attorney General, Division of Criminal Justice for review by both respective offices.

3.3 The Board will not act on its own initiative to bring about any action. However, Ms. Paone understands that the Board will have an obligation to cooperate in the event of any proceeding against her. Ms. Paone reserves all of her rights to assert that no action should be taken against her.

4. **Health benefits after separation.**

4.1. Ms. Paone will be eligible for standard COBRA rights for the continuation of health benefits, after her separation from employment. The Board will reimburse Ms. Paone for (3) three-months' payments of COBRA benefits in a lump sum at her separation from employment and upon the execution and implementation of this agreement. Any additional COBRA rights will be at Ms. Paone's expense.

5. **Inquiries.**

5.1. All inquiries regarding Ms. Paone's employment will be referred to the Superintendent, who will provide (either verbally or in writing, as requested): the position(s) held by Ms. Paone, her most recent annual salary, her dates of service in the District, and her reason for separation from employment (i.e., resignation) only. The District will not release copies of documents from Ms. Paone's personnel file without written authorization from Ms. Paone and payment of such copying fees as may be required.

6. **Time for review and consideration of this Agreement.**

6.1. Ms. Paone has a period of 21 calendar days during which she can review this Agreement prior to signing it. This review period will run from the date it is received by Ms. Paone. Ms. Paone may sign this Agreement at any time during the 21 day review period and up to 5 days thereafter. This Agreement will then be signed by the Board President, following approval by the Board. This Agreement will become final on the eighth day after signing by both parties, unless revoked by Ms. Paone in accordance with section 11 of this Agreement.

6.2. If Ms. Paone does not sign this agreement before the end of the review period described in the preceding section, the offer of settlement will be automatically withdrawn by the Board and this Agreement will have no force or effect.

7. **Right to revoke.**

7.1. For a period of seven calendar days after this Agreement is signed by both parties, Ms. Paone will have an opportunity to revoke this Agreement by providing the Board written notice of her decision to revoke.

7.2. The written notice of the decision to revoke must be provided to the Superintendent.

7.3. In order to be effective, the written notice of the decision to revoke must be received by the Superintendent on or before the seventh day following the signing of this Agreement. If the parties have signed on different days, the seven day period will begin following the date of the later signature.

7.4. If this Agreement is revoked during this period, this Agreement will have no effect and the parties will not be bound to any of its terms. This means that Ms. Paone's resignation will be automatically withdrawn and neither party will have any obligation to carry out the settlement terms established by this Agreement.

7.5. If Ms. Paone does not revoke this Agreement, both parties will become bound by the terms of this Agreement on the eighth day following signing by both parties. After the eighth day this Agreement will be irrevocable.

7.6. In addition to the right to revoke delineated in 7.1 through 7.5, Ms. Paone can revoke this Agreement if the Commissioner of Education or the Administrative Law Judge refuse to accept the withdrawal of the tenure

charges filed on behalf of the New Hanover Board of Education. Such revocation of this Agreement will become effective by written notice to the Board by Ms. Paone within seven days after she receives notice that the withdrawal of tenure charges has been rejected.

8. **Attorney consultation.** The Board hereby specifically advises Ms. Paone to consult with an attorney prior to signing this Agreement, and recognizes that she has done so.

9. **Opportunity to consult attorney; voluntariness.** The parties acknowledge that each has had ample opportunity to seek independent legal counsel, financial or other advice regarding this Agreement. The parties further acknowledge that each party fully understands the terms of this Agreement, and that each party is signing this Agreement freely and voluntarily, without any coercion, duress or pressure from the other party.

10. **Circumstances Justifying Settlement (N.J.A.C. 6A:3-5.6)**

    10.1. The nature of all charges would require many days of hearing to present the charges, and to defend against them, resulting in significant loss of administrative time and an expenditure of considerable funds for legal fees by the Board.

    10.2. This settlement serves the public interest by achieving finality and certainty with a responsible outcome.

11. **Entire agreement.** This document contains the entire agreement of the parties and may not be altered, amended or modified except by instrument in writing signed by the parties.

Please read this Agreement carefully before signing.

New Hanover Township **Board of Education**

by: Charles Rach, President

Witness:

print name: Brian J. McBride

date 2-1-2011

Deborah J. Paone

Deborah J. Paone

Witness: _____

print name: STEVEN BLADER

date 1-24-11

Exhibit A

January 5, 2011

Brian J. McMcBride, Superintendent of Schools
New Hanover Board of Education
122 Fort Dix Street
Wrightstown, NJ 08562

Re: Resignation

Dear Mr. McBride:

Please be advised that I hereby resign from my employment in the District, effective at the end of the day on January 5, 2011. Please provide this letter to the Board of Education for its approval.

Note, however, that this resignation is void if the Administrative Law Judge or the Commissioner of Education refuse to accept the Board's withdrawal of the tenure charges filed against me.

Thank you for your attention.

Very truly yours,

Deborah J. Paone

NEW HANOVER TOWNSHIP BOARD OF EDUCATION
RESOLUTION

WHEREAS, this Board of Education has received sworn charges dated November 30, 2010 filed in writing with the Board Secretary against Deborah J. Paone, Business Administrator/Board Secretary in the employ of this Board of Education, together with a supporting statement of evidence also executed under oath; and

WHEREAS, said documents were transmitted to the said Deborah J. Paone within seventy-two hours of the date upon which they were filed and the said Deborah J. Paone having filed response, dated December 13, 2010, to the said written statements of charges and supporting statements of evidence; and

WHEREAS, this Board of Education met on Thursday, December 16, 2010 at 7:00 p.m. at the New Hanover Township School Library, and has carefully considered said charges, the supporting statement of evidence, and the sworn answer thereto submitted by Deborah J. Paone.

NOW, THEREFORE, BE IT RESOLVED by this Board of Education as follows:

1. There is probable cause to credit the evidence in support of said charges.

2. The said charges, if credited, are sufficient to warrant dismissal pursuant to N.J.S.A. 18A:6-11.

And, **NOW, THEREFORE, BE IT FURTHER RESOLVED,** that the Board Secretary, as the agent of the Board of Education, is herewith directed to notify Deborah

J. Paone of this determination of the Board by certified mail directed to her last known address and that the Board Secretary further forward such written charges together with the responses of Deborah J. Paone and with the certificate of such determination to the Commissioner of Education for a hearing pursuant to N.J.S.A. 18A:6-16.

And, **BE IT FURTHER RESOLVED** that the said Deborah J. Paone is herewith suspended from her duties as a Business Administrator/Board Secretary in the employ of the New Hanover Township Board of Education effective immediately without pay pursuant to N.J.S.A. 18A:6-14.

The above resolution moved by Richard Slater, seconded by Carli Haas and carried by the following roll call vote:

Voting:

Yes: Richard Slater, Christopher Sirak, Rose Marie Winrow, Carli Haas Jamie Clugsten, Christine Smith, Charles Roohr

No: None

Abstain: None

I certify the above and foregoing to be a true copy of a resolution adopted by the New Hanover Board of Education on December 16, 2010.

Kathleen Mandeville

Kathleen Mandeville
Interim School Business Administrator/
Board Secretary

CERTIFICATION OF DETERMINATION AND PROOF OF SERVICE PURSUANT TO N.J.A.C. 6A:3-5.1 and 6A:3-5.2

1. I, the undersigned, am Board Secretary to the New Hanover Township Board of Education.

2. On Thursday, December 16, 2010 at a Board meeting called pursuant to the Open Public Meetings Act, N.J.S.A. 10:4-6 et. seq. the New Hanover Board of Education determined that there is probable cause to credit the tenure charges and evidence in support of the tenure charges dated November 30, 2010 against Deborah J. Paone and that the evidence in support of said charges is sufficient, if true in fact, to warrant dismissal pursuant to N.J.S.A. 18A:6-11.

3. This Board meeting was held Thursday, December 16, 2010, 7:00 p.m. at the New Hanover Township School Library. Also at said time and place the Board of Education moved to suspend Deborah J. Paone without pay pursuant to N.J.S.A. 18A:6-14.

4. The determination of certification of charges to the Commissioner of Education and suspension without pay were made by a majority vote of the whole number of members of the district Board of Education. A copy of the Resolution adopted by the District Board of Education is attached hereto.

5. Subsequent to said meeting, on Thursday, December 16, 2010, I personally served on Deborah J. Paone notification of the determination made by the Board of Education by certified mail, return receipt requested, to her last known address as follows:

Deborah J. Paone
31 Oakford Avenue
New Egypt, NJ 08533

Written notification of the determination has also been served, by legal counsel, on Deborah J. Paone's attorney by certified mail, return receipt requested.

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.

Kathleen Mandeville

Kathleen Mandeville
Interim School Business Administrator/
Board Secretary

Dated: December 17, 2010

NEW HANOVER TOWNSHIP BOARD OF EDUCATION
RESOLUTION

WHEREAS, the Board of Education certified sworn tenure removal charges dated November 30, 2010 against Deborah J. Paone, Business Administrator/Board Secretary in the employ of the Board of Education,

WHEREAS, on February 1, 2011, the Board of Education met and accepted the resignation of Deborah J Paone dated January 5, 2011,

WHEREAS, a Settlement Agreement and Release and Waiver of the tenure removal charges was signed by the parties and submitted to the Court on February 4, 2011.

WHEREAS, the Administrative Law Judge approved the settlement and filed the initial decision with the Commissioner of Education,

WHEREAS, the Acting Commissioner of Education remanded the matter to the OAL for revision of the settlement agreement,

NOW THEREFORE BE IT RESOLVED, that the Board of Education approves the settlement of the tenure removal charges and designates the President of the Board to sign the agreement on its behalf.

New Hanover Board of Education

Charles Roohr, President Date 5-12-11

Kathleen Mandeville, Board Secretary Date 5/12/11

#313-11

IN THE MATTER OF THE TENURE HEARING OF CHRISTINE GILLESPIE, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

In 2003, petitioning Board filed tenure charges of incapacity and excessive absenteeism against respondent, a tenured teacher, and sought to terminate her employment with the district. This matter has been prosecuted parallel to a workers' compensation case, the resolution of which respondent contends is a necessary prerequisite to the disposition of the instant tenure charges.

On or about June 20, 2011, the Office of Administrative Law (OAL) forwarded a notice to the Commissioner, stating that respondent had not appeared at a hearing scheduled for June 10, 2011.

After review of the record and recent correspondence from respondent and petitioner, the Commissioner remanded the matter to the OAL for further proceedings. In so doing, the Commissioner directed the parties to establish a protocol for communications, and found that the facts surrounding respondent's absence at the June 10, 2011 hearing do not support the severe result of summary disposition by default.

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, 2011

OAL DKT. NO. EDU 3399-03
AGENCY DKT. NO. 67-2/03

IN THE MATTER OF THE TENURE HEARING OF CHRISTINE GILLESPIE, SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

This tenure matter – which dates back to 2003 – has been prosecuted parallel to a workers' compensation case, the resolution of which respondent contends is a necessary prerequisite to disposition of the instant tenure charges. Most recently, on April 27, 2011, the Administrative Law Judge (ALJ) in charge of the case denied cross motions, *i.e.,* petitioner's motion for summary disposition and respondent's motion to dismiss the tenure charges.

On or about June 20, 2011, the Commissioner received a notice from the Office of Administrative Law (OAL) stating that respondent had not appeared at a hearing that had been scheduled for June 10, 2011. On June 30, 2011, the Commissioner received a letter from respondent advising 1) that she had received only nine days' notice for said hearing, 2) that she had written both to the ALJ assigned to the case and to the OAL chief ALJ explaining that nine days' notice was insufficient time for her to subpoena witnesses and prepare for the hearing, and 3) that she had contacted the chief ALJ's clerk, who had advised her that hearing notices are generally dispatched several weeks prior to the hearing dates. [1] Respondent further stated that the OAL did not respond to her letters, that she interpreted the silence as agreement to her implied request for a new hearing date, and that the OAL should "correct its report that [she] failed to appear at a scheduled hearing on June 10, 2011."

[1] In the record, there is also a letter dated May, 16, 2011, in which respondent advised the OAL that she had received an empty envelope from it.

Annexed to respondent's June 30, 2011 letter to the Commissioner was a letter addressed to the ALJs referring to her prior correspondence about insufficient notice and, *inter alia,* challenging the OAL's action in processing the case as a "Failure to Appear." Both the letter to the Commissioner and the letter to the ALJs were copied to opposing counsel.

Petitioner answered respondent's filing by way of a letter, dated and received by the Commissioner on July 8, 2011. In the letter, petitioner reported that it had received notice of the June 10, 2011 hearing on May 3, 2011 – four weeks before the notice was received by respondent. When petitioner's counsel received respondent's correspondence revealing that she had not received the hearing notice until June 1, 2011, counsel asked the OAL for direction. It was counsel's understanding that the OAL would contact respondent by phone to set up a teleconference. It appears, however, that no teleconference occurred because the OAL's efforts to reach respondent by telephone were unsuccessful.

In its July 8, 2011 letter, petitioner's counsel also recited procedural history – which the Commissioner does not view as germane to the resolution of the instant issue – and urged that the Commissioner issue a decision on the tenure charges based only upon the record to date. The Commissioner declines.

Respondent submitted another letter to the Commissioner, filed on July 14, 2011, disputing petitioner's characterization of the procedural history in this matter and, *inter alia,* stating that the reason the OAL could not reach her by telephone was that it erroneously dialed her fax number. On July 22, 2011, she filed another letter advising that her workers compensation claim had been reinstated, and asking for back wages.

Taking all of the foregoing into consideration, the Commissioner is constrained to remand this case to the OAL. At the outset, the Commissioner perceives a need for the ALJ and

the parties to establish a protocol for communications. Respondent shall provide the OAL and petitioner with specific contact information within 10 days of the mailing of this order, the OAL and petitioner shall use only that contact information to communicate with respondent, and respondent will not be excused if she fails to reply to notices, pleadings and communications sent to the phone numbers and addresses that she provides.

As regards the progress of this tenure controversy, the Commissioner does not find that the facts surrounding respondent's absence at the June 10, 2011 hearing support the severe result of summary disposition by default. While the procedural history in the present matter has generally been protracted and perhaps arduous, the Commissioner nonetheless finds that respondent's June 3, 2011 letter, together with the May 16, 2011 letter advising that she had received an empty envelope from the OAL, warranted an express response. When attempts to reach respondent by telephone were unsuccessful, written correspondence should have preceded the abandonment of the case.

The matter is thus remanded to the OAL for further proceedings.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/3/11

Date of Mailing: 8/04/11

[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)

314-11

OAL DKT. NO. EDU 13861-10
AGENCY DKT. NO. 714-12/10

CHARLES JACKSON and JANICE WILLIAMS,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY, and GREG GRANT,	:	
RESPONDENTS.	:	

The record of this matter, the proposed stipulation of 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 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: 8/3/11

Date of Mailing: 8/4/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13861-10

AGENCY DKT. NO. 714-12/10

CHARLES JACKSON &
JANICE WILLIAMS,
Petitioners,
v.
BOARD OF EDUCATION
OF THE TRENTON SCHOOL
DISTRICT, MERCER COUNTY,
& GREG GRANT,
Respondents.

Richard A. Friedman, Esq., for petitioners Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Dana M. Lane, Esq. for respondents (Hill Wallack, attorneys)

Record Closed: June 23, 2011 Decided: June 29, 2011

BEFORE **TIFFANY M. WILLIAMS**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 22, 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 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.

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.

June 29, 2011
DATE

Tiffany M. Williams
TIFFANY M. WILLIAMS, ALJ

/bdt

HILL WALLACK LLP
202 Carnegie Center
Princeton, NJ 08543-5226
(609) 924-0808
Attorneys for Trenton Board of Education

2011 JUN 23 A 10: 14

CHARLES JACKSON and JANICE WILLIAMS, Petitioners, vs. CITY OF TRENTON, BOARD OF EDUCATION, MERCER COUNTY and GREG GRANT, Respondents.	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY OAL DOCKET NO.: EDU 13861-2010 S AGENCY REF. NO.: 714-12/10 **STIPULATION OF SETTLEMENT**

WHEREAS, the Board of Education of the City of Trenton ("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 Trenton Public School District; and

WHEREAS, Charles Jackson and Janice Williams are current employees of the Board; and

WHEREAS, Greg Grant was employed by the Board as Head Varsity Boys' Basketball Coach for the 2010-2011 basketball season; and

WHEREAS, Petitioners filed an administrative Petition of Appeal with the Department of Education in December 2010, alleging that Greg Grant was wrongfully employed in the position of Head Varsity Boys' Basketball Coach at Trenton Central High School instead of Charles Jackson; and

WHEREAS, Petitioners filed an application for emergent relief, which after extensive briefing by the parties, was ultimately denied by Administrative Law Judge James-Beavers; and

WHEREAS, Respondents filed an Answer to the Petition of Appeal in January 2011, generally denying the allegations and setting forth factual bases for their position; and

WHEREAS, this Stipulation has been approved by the State-appointed Fiscal Monitor currently assigned to the Board; 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 and the public interest, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by 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. Dismissal of All Claims

This Stipulation is expressly contingent upon and subject to approval by the Commissioner of Education of New Jersey. The parties agree and consent that upon approval of this Stipulation of Settlement by the Commissioner, all claims by and between the parties are to be dismissed. Petitioners further waive any right to any additional compensation or position with the Board that was the subject of this settlement. Upon final approval of this Stipulation, the Board shall forward a settlement check representing the Board's Head Varsity Boys' Basketball Coach stipend for the 2010-2011 school year, minus regular payroll deductions, to Petitioner Charles Jackson. The parties agree, however, that in the event this Stipulation is not approved by the Commissioner of Education, 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. In entering into this Stipulation, neither party admits any wrongdoing, nor to the merits of any party's position in this matter.

2. Public Interest

Settlement of this matter is in the public interest as it avoids the financial, legal and administrative burden which will result from protracted litigation where all parties agree to these terms of settlement. The parties are in agreement that it is in the best interests of all parties and the Trenton public schools for this matter to be resolved in this manner. Therefore, the parties agree to move forward with a prompt settlement and avoid further unnecessary litigation.

3. Release

In exchange for the mutual promises and consideration set forth in this Stipulation, each party and its successors, heirs and assigns hereby irrevocably and unconditionally waives, releases and forever discharges any claims or rights, whether known or unknown, which either party has or may have against the other, specifically for claims which could have been raised in the within matter. Petitioners specifically acknowledge that this settlement agreement does not entitle Petitioner Jackson to appointment to the position of Boys' Head Varsity Basketball Coach for the 2010-2011 school year, nor to any other current or future coaching position with the Board, provided further that entrance into this settlement agreement does not preclude Petitioner

Jackson from applying for any other coaching position, nor does it preclude the Board from appointing him to any such position in the future.

4. Board Approval

The Board President has been duly authorized by the Board at its Executive Session on June 13, 2011 to execute this Stipulation on behalf of the Board of Education. The Board will execute a Resolution adopting the terms of settlement, which shall be attached to this Stipulation and forwarded to the Office of Administrative Law for review, approval and transmittal to the Commissioner of Education for final approval.

5. Assent to Terms

All parties hereby acknowledge having entered into this Stipulation with a full understanding of their rights and that they were fully informed of the implications of this Stipulation by legal counsel. No party enters into this Stipulation under duress. All parties enter this Stipulation by their free will and volition. All parties were given the opportunity to fully consider the terms and conditions of this settlement.

6. Entire Agreement

This Stipulation of Settlement represents the entire understanding of the parties as to the settlement 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.

7. Severability

In the event that a court or agency of competent jurisdiction shall deem any part of this Stipulation of Settlement to be contrary to law, the remaining portions of the agreement shall remain in full force and effect.

8. Governing Law

This Stipulation of Settlement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties have knowingly and voluntarily executed and delivered this Stipulation of Settlement on the dates set forth below.

PETITIONERS

By: Charles Jackson
Charles Jackson

DATED:

By: Janice Williams
Janice Williams

DATED:

RESPONDENT
TRENTON BOARD OF EDUCATION

By: [signature]
~~Nicola Tatum,~~ Board President
TOBY SANDERS

DATED: 6/13/2011

ATTEST:

By: Jayne S Howard
Jayne Howard, Board Secretary

DATED: 6/20/11

By: [signature]
Greg Grant

DATED: 6/21/11

2011 JUN 23 A 10:14

RESOLUTION AUTHORIZING APPROVAL OF SETTLEMENT AGREEMENT WITH CHARLES JACKSON AND JANICE WILLIAMS

WHEREAS, the Trenton Board of Education has reviewed the Stipulation of Settlement Agreement between Charles Jackson and Janice Williams and the Board of Education in regard to OAL Docket No. EDU 13861-2010S; and

WHEREAS, the Board has voted on this date to approve the Stipulation of Settlement Agreement; and

WHEREAS, the Board designates and authorizes the Board President to execute the Stipulation of Settlement on the Board's behalf; now therefore be it

RESOLVED that the Trenton Board of Education approves the Stipulation of Settlement Agreement between Charles Jackson and Janice Williams and the Board of Education

Toby D. Sanders
Board President

Jayne S. Howard
School Business Administrator/Board Secretary

June 13, 2011
ADOPTED

Jayne Howard, Board Secretary, certifies that this is a true copy of the original Board Resolution on file with the Trenton Board of Education.

Jayne S. Howard

2011 JUN 23 A 10: 14

#318-11

OAL DKT. NO. EDU 5704-10
AGENCY DKT. NO. 94-5/10

PATRICIA BELIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION 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 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/4/11

Date of Mailing: 8/05/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5704-10

AGENCY DKT. NO. 94-5/10

PATRICIA BELIN,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld Cohen, attorneys)

Robert T. Pickett, Esq., for respondent (Pickett & Craig, attorneys)

Record Closed: June 30, 2011 Decided: July 1, 2011

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

On or about May 14, 2010, petitioner Patricia Belin filed a Petition of Appeal with the Commissioner of Education contesting her termination of employment by respondent Board of Education of the City of Plainfield (the Board). The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on June 7, 2010, for determination as a contested case. The hearing was scheduled for January 10

and 12, 2011, which was adjourned at respondent's request (as to January 10) and the parties' joint request (as to January 12). Subsequently, the parties reached an amicable resolution of the matter. Under letter dated June 29, 2011, counsel for respondent forwarded the attached Settlement Agreement and the attached Resolution of the Board approving the terms of 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.

July 1, 2011
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency:

Date Mailed to Parties: JUL - 6 2011
jb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

RESOLUTION AUTHORIZING THE SETTLEMENT OF THE PATRICIA BELIN V. PLAINFIELD BOARD OF EDUCATION PROCEEDING

WHEREAS, on or about June 7, 2010, Petitioner commenced proceedings against Respondent District by way of Petition filed with the Commissioner of Education, the Department of Education for the State of New Jersey; and

WHEREAS, Respondent District and Petitioner desire to avoid the expense and disruption of further litigation with respect to the subject matter of the Action; and

WHEREAS, Respondent District and Petitioner, upon consultation with their respective counsel, have independently concluded that it is in their respective best interests to settle and resolve any and all disputes and controversies which have been, or could have been, raised between them, with each party to bear their own counsel fees, costs and disbursements; and

NOW, THEREFORE, in consideration of the mutual promises exchanged in the attached Settlement Agreement, the District hereby resolves to settle the matter in accordance with the attached Agreement for the reasons set forth thereon.

Approved on

March 15, 2011
Certified by:

Gary Ottmann
Board Secretary

Dated: June 7, 2011

PICKETT & CRAIG, ESQS.
Attorneys At Law
80 Main Street Ste 430
West Orange, New Jersey 07079
(973) 762-0613
ATTORNEY FOR RESPONDENT
Plainfield Board of Education

Docket No. OAL EDU-05704-2010N
Agency Docket No. 94-5/10

PATRICIA BELIN,

Petitioner,

VS.

CITY OF PLAINFIELD BOARD OF EDUCATION,

Respondent.

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is made by and between the Plainfield Board of Education ("Respondent District") and Patricia Belin, individually, ("Petitioner") on the date or dates indicated below.

WHEREAS, on or about June 7, 2010, Petitioner commenced proceedings against Respondent District by way of Petition filed with the Commissioner of Education, the Department of Education for the State of New Jersey; and

WHEREAS, Respondent has denied, and continue to deny, the material claims filed against it by the Petitioner in the Action, except those claims admitted in paragraph one below; and

WHEREAS, Respondent District and Petitioner desire to avoid the expense and

disruption of further litigation with respect to the subject matter of the Action; and

WHEREAS, Petitioner was employed by the Respondent District as a secretary from December 8, 2006 through March 10, 2010; and

WHEREAS, the parties acknowledge that Ms. Belin earned tenure as a secretary on or about December 9, 2009; and

WHEREAS on March 10, 2010, the Respondent District notified Petitioner that she would be terminated from her employment with the Respondent District effective March 10, 2010 due to budgetary reasons; and

WHEREAS, the Respondent District paid Petitioner full salary and benefits through May 15, 2010; and

WHEREAS, after March 10, 2010 and through to the present, the Respondent District has continued to employ non-tenured staff in secretarial positions; and

WHEREAS, the employment of non-tenured secretaries is in violation of Petitioner's tenure rights in the Respondent District; and

WHEREAS, Petitioner acquired alternative employment effective September 1, 2010 at a salary rate roughly equivalent to her prior earnings with Respondent; and

WHEREAS, Respondent District and Petitioner, upon consultation with their respective counsel, have independently concluded that it is in their respective best interests to settle and resolve any and all disputes and controversies which have been, or could have been, raised between them, with each party to bear their own counsel fees, costs and disbursements; and

NOW, THEREFORE, in consideration of the mutual promises exchanged herein and for other good and valuable consideration, the receipt and sufficiency of which are

acknowledged, Respondent District and Petitioner hereby memorialize their agreement as follows:

1. **Settlement of Claim** – The Respondent District and the Petitioner agree to settle this Action as follows:

   a. Respondent District shall reinstate Petitioner as soon as practicable in her former position of secretary with the District.
   b. Respondent District hereby acknowledges that Petitioner earned tenure as a secretary on December 9, 2009 and she is entitled to full seniority credit from her date of hire, December 8, 2006 through the date upon which she returns to employment with the Respondent.
   c. In lieu of full back pay and in the interest of resolving this matter amicably, the Respondent District agrees to provide Petitioner with a one-time $5, 000.00 payment (and any required pension payments on the payment) which is W-2 income to Petitioner covering the period from May 15, 2010 to August 15, 2010.
   d. All proceedings in this matter will remain confidential as required by the applicable statute and law and subject to the Open Public Records Act; and

2. **Approval of Settlement By Commissioner Of Education** – Respondent District and Petitioner shall cause the Petition in the Action to be dismissed as to Respondent District with prejudice and without costs and both parties understand that the dismissal of the proceedings and settlement herein are subject to the approval of the Commissioner of Education.

3. **Confidentiality** - No party shall issue or cause to be issued any statement regarding the Action which contradicts the terms of the settlement herein.

4. **No Admission** - It is specifically acknowledged and understood by the parties that this Agreement is not an indication or admission of any violation of any law, statute or regulation or a breach of any duty by Respondent District, except those admissions set forth in paragraph one above. It is further acknowledged that the payments referenced herein or made hereunder are not indicative of any action or inaction taken by Respondent District, its past and present Board members, administrators, agents, employees or attorneys, with respect to this proceeding. It is understood and agreed by the parties that the settlement is being made solely to alleviate the necessary time and expense of a hearing, preparation therefore and/or further proceedings and continued payment of any salary entitlements to Petitioner. This Agreement and compliance with this Agreement shall not be construed as an admission by any party of any liability whatsoever with respect to any matter in this proceeding. This Agreement may not be introduced into evidence or used in any other way in any other legal or administrative proceeding other than a proceeding seeking enforcement of the terms of this Agreement.

5. **Mutual Releases** – The Respondent District and the Petitioner herein, by mutual agreement and consideration, hereby release each other from any and all obligations in the matter styled, *Patricia Belin vs. Plainfield Board of Education, Docket Nos. OAL EDU-05704-20010N.* Whereas, Respondent District and the Petitioner have accepted the terms of the settlement in the aforementioned administrative proceeding as set forth herein; and Whereas, Respondent District and the Petitioner agree, by further mutual agreement and consideration, to release and discharge each other, their representatives, attorneys, successors and assigns and employees, if any, from any and all

actions, causes of action of any kind, suits, charges and obligations, debts, sums of money, accounts, controversies, agreements, promises, damages, judgments, extents, executions, claims, and demands whatsoever, flowing from the matter styled, *Patricia Belin vs. Plainfield Board of Education, Docket Nos. OAL EDU-05704-20010N.*, which against their heirs, executors, administrators, successors and assigns ever had, now have or hereafter can, shall or may have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the aforementioned administrative proceeding to the date of this release and agreement .

6. **Representation and Negotiation by Counsel** - The parties acknowledge that this Agreement is the result of arms length negotiations between the parties, all of whom are represented by counsel. The parties have consulted with their attorneys throughout the negotiations and have been fully advised of all of the ramifications of this Agreement, including the claims and rights they are waiving herein and the affirmative obligations they are agreeing to undertake. The parties are fully satisfied with the services of their counsel with respect to both this Agreement and all other aspects of this case and they enter into this Agreement knowingly, willingly and without any coercion or improper inducements.

7. **Entire Agreement** - This Agreement represents the entire agreement and understanding between the parties with respect to the subject matter hereof.

This Agreement may not be modified unless same is in writing, authorized, approved and signed by all parties.

Each party agrees to execute such further and additional documents, instruments and writings as may be reasonably necessary, proper, required, desirable or convenient for the purpose of fully effectuating the terms and provisions of this Agreement.

8. **Severability** - If any provision of this Agreement or the application thereof is held invalid, such invalidity shall not affect any other provisions or applications and, to this end, the provisions of this Agreement are declared to be severable.

9. **Law Governing** - This Agreement and all of its terms and conditions shall be governed by and construed in accordance with the laws of the State of New Jersey. The Commissioner of Education and the Department of Education of the State of New Jersey shall have exclusive jurisdiction only over any and all actions or assignments related to or arising out of this Agreement flowing from the administrative proceeding in the matter styled, *Patricia Belin vs. Plainfield Board of Education, Docket Nos. OAL EDU-05704-20010N.*

10. This Agreement may be executed in counterparts, each of which shall constitute an original, but all of which shall constitute one and the same agreement.

11. This Agreement is for the benefit of the parties hereto and their successors and assigns.

12. This Agreement constitutes the entire Agreement among the parties hereto, and supersedes any prior understandings, agreements or representations by or between the parties, written or oral, which may have related to the subject matter hereof.

13. This Agreement cannot be amended or waived except in writing signed by all of the parties hereto. No waiver of any provision hereunder or any breach or default

shall extend to or affect in any way any other provision of this Agreement or any prior or subsequent breach or default.

14. This Agreement shall be binding on any successor or assignee of the parties hereto.

15. The parties' agreement to the settlement contained herein and their execution of this Agreement shall not be deemed an admission of liability or wrongdoing except to those admissions set forth in paragraph 1 above.

16. **Execution** - This Agreement may be signed in several counterparts, all of which when taken together shall constitute a single document.

IN WITNESS WHEREOF, the parties and/or their representative(s) hereto have duly executed this Agreement as of the date first written above.

Pickett & Craig, Esqs.
Attorneys for ~~Respondent~~
Plainfield Board of Education

By:_____
Robert T. Pickett, Esq.
Authorized to ~~Sign On Behalf~~ of the
Respondent Plainfield Board of Education

Dated: March 15, 2011

Oxfeld Cohen PC
Attorneys for Petitioner
Patricia Belin

By:_____
Gail Oxfeld Kanef, Esq.
Authorized to Sign On Behalf
Petitioner Patricia Belin

Dated: March _____, 2011

Plainfield Board of Education

By:_____
Lisa Logan-Leach, President
Plainfield Board of Education

Dated: March 15, 2011

By:_____
Patricia Belin
Petitioner
April 13, 2011 P.B.

Dated: March _____, 2011

319-11

IN THE MATTER OF THE TENURE	:	
HEARING OF RANDI TRUE, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
WILLINGBORO, BURLINGTON COUNTY	:	

SYNOPSIS

The petitioning Board certified tenure charges of excessive and chronic absenteeism, unbecoming conduct, insubordination, and other just cause against respondent – a special education teacher employed by the district – for behavior that included excessive tardiness and leaving early, using demeaning language with her students, leaving students unattended in the hallway, pushing one of her students, and disobeying a directive from the superintendent. The Board sought removal of respondent from her tenured position.

The ALJ found, *inter alia*, that – based on the evidence and testimony presented at hearing – the Board met its burden of establishing by a preponderance of the credible evidence that respondent is guilty of: chronic and excessive absenteeism and tardiness, use of name-calling and other demeaning language toward her students, failure to properly supervise the students in her charge; and willfully refusing to comply with an explicit directive from the superintendent. The ALJ dismissed the charge relating to pushing a student for lack of competent and credible evidence. The ALJ concluded that respondent's behavior constituted incapacity, unbecoming conduct, insubordination or other just cause warranting dismissal and, accordingly, ordered respondent dismissed from her tenured employment.

Upon independent review of the record, the Commissioner 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.

August 15, 2011

OAL DKT. NO. EDU 0812-10
AGENCY DKT NO. 44-3/10

IN THE MATTER OF THE TENURE	:	
HEARING OF RANDI TRUE, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
WILLINGBORO, BURLINGTON 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 and the Board of Education's (Board) reply thereto.

In her exceptions, the respondent contends that the Administrative Law Judge (ALJ) erroneously found respondent guilty of unbecoming conduct, insubordination, and other just cause warranting the dismissal of her employment. The respondent argues that the ALJ erred in finding that she was excessively tardy because the documented evidence did not support such a finding. With respect to the Board's charge of excessive absenteeism, the respondent maintains that the ALJ wrongfully determined that the Board satisfied the three prongs required by *In re Tenure Hearing of White*, 92 *N.J.A.R.*2d (EDU) 157, 161 in order to terminate an employee for excessive absenteeism. Specifically, the respondent argues that the Board did not satisfy the third element of the *White, supra,* test because it did not give the respondent the requisite warning that her absences were a concern to the administration.

Additionally, the respondent takes exception to the ALJ's finding that the Board proved that the respondent's use of inappropriate language with her students constituted unbecoming conduct. The respondent argues that the testimony of the three staff members who

testified to the inappropriate language used by the respondent was not credible and that the context of her use of certain words and phrases were explained by the respondent during her testimony. In connection with the charge of failing to supervise her students, the respondent maintains that even if it were determined that she failed to supervise her students on one occasion, that behavior did not rise to the level of conduct that would require removal of her tenure. Finally, the respondent argues that the ALJ erroneously found that the respondent was insubordinate when she sent a text message to another staff member despite the interim superintendent's directive that she was not to contact anyone at the school once she was told of her transfer. The respondent emphasizes that she did not believe that the sending of a text message was part of the directive.

In its reply, the Board urges the adoption of the Initial Decision asserting that the respondent's exceptions are without merit and should be given no weight. The Board contends that the respondent's claim that she only received one written warning regarding her excessive absenteeism is unsupported by the record and overlooks the numerous written and verbal warnings that the respondent received over an extended period of time. The Board also argues that the respondent's exceptions side-step the troubling aspect of the respondent's excessive tardiness, including the fact that she misstated arrival times and left the premises without permission, as well as the negative impact of her numerous late arrivals.

Additionally, the Board notes that the respondent's exceptions challenge the ALJ's credibility determinations in connection with his finding that the respondent used inappropriate language with her students. The Board stresses that the testimony of the other staff members supports the ALJ's findings and it is well settled that the Commissioner may not reject or modify the credibility findings of the ALJ unless they are arbitrary, capricious, unreasonable or

unsupported by the record. Finally, the Board maintains that the respondent's failure to supervise her special needs students coupled with her uncaring attitude justifies her removal.

Upon a comprehensive review of the record in this matter, which included the transcripts of the hearings conducted at the OAL on October 5, October 26, and November 9, 2010, the Commissioner concurs with the ALJ – for the reasons discussed on pages 28-43 of the Initial Decision – that the Board has proved that the respondent is guilty of chronic absenteeism, unbecoming conduct, and insubordination warranting the termination of her employment.

The record demonstrates that the respondent has been chronically absent throughout her employment as a special education teacher in the district, and despite the argument presented by the respondent in her exceptions, she was given several warnings from the administration concerning the impact of her continued absence. The record also illustrates that the respondent has been tardy on numerous occasions, and in fact the respondent generally did not provide any rationale for her lateness nor did she dispute the testimonial evidence except her challenge to one specific occasion where the Board alleged that the respondent arrived late and wrote an earlier time on the sign-in sheet.

With respect to the other charges – including: the respondent's use of inappropriate language with her special needs students; her failure to properly supervise her students; and the charge of insubordination – the Commissioner also finds respondent's exceptions unpersuasive, largely reflecting arguments and objections previously raised before the ALJ and clearly taken into account by him in weighing the testimony and evidence, and in concluding that the record overall supported the Board's charges. Although the respondent either denied the use of certain phrases or attempted to explain the context of others, the ALJ had the opportunity to assess the

credibility of the various witnesses who appeared before him and made findings of fact based upon their testimony. Moreover, the respondent did not deny the fact that she remained in her classroom while two of her special needs students were fighting in the hallway and had to be stopped by other staff members, or that she sent a text message to her co-worker despite the interim superintendent's directive; rather, respondent simply provided spurious excuses for her conduct. Insofar as the ALJ's opinion on these issues is a credibility determination, the Commissioner may not disturb it unless a review of the record discloses that it is arbitrary, capricious or unreasonable. *N.J.S.A.* 52:14B-10c; *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 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 from her tenured employment. Accordingly, for the reasons expressed therein, the Initial Decision of the OAL – directing removal of respondent from her position of tenured employment – is adopted as the final decision in this matter. 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.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8|15|11

Date of Mailing: 8|16|11

* 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 812-10
AGENCY DKT. NO. 44-3/10

IN THE MATTER OF THE TENURE HEARING OF RANDI TRUE, SCHOOL DISTRICT OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY.

Nicholas Celso, II, Esq., for petitioner Randi True (Schwartz, Simon, Edelstein & Celso, LLC, attorneys)

Arnold M. Mellk, Esq., for respondent (Wills, O'Neill & Mellk, attorneys)

Record Closed: March 25, 2011 Decided: June 29, 2011

BEFORE **ISRAEL D. DUBIN, ALJ**:

On March 8, 2010, the Willingboro Board of Education certified tenure charges against Randi True, a tenured special education teacher, alleging that she engaged in conduct constituting chronic absenteeism, unbecoming conduct, insubordination, and other just cause warranting dismissal. N.J.S.A. 18A:28-5. True filed her answer to the statement of tenure charges on March 19, 2010, and the matter was transmitted to the Office of Administrative Law, where it was filed for hearing as a contested case on March 25, 2010. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A pre-hearing conference was held on April 8, 2010, at which time the Board requested a remote hearing date because it had decided to retain a different law firm to serve as its counsel. Therefore, with True's consent, the hearing was scheduled to begin on July 26, 2010. At the request of the parties, the hearing was adjourned due to counsels' unforeseen scheduling conflicts. The hearing was subsequently held on October 5, October 26, November 9 and November 16, 2010.[1] At the conclusion of the hearing, the parties requested and were granted the opportunity to submit post-hearing briefs, the last of which was filed on March 25, 2011, and the record was closed on that date.

The allegations set forth in the tenure charges may be summarized as follows: Charge I, comprising eleven counts, alleges chronic absenteeism; Charge II, comprising three counts, alleges excessive tardiness and leaving early; Charge III, comprising six counts, alleges that she instructed her students in an inappropriate, demeaning and unprofessional manner, left her students unattended in the hallway, and pushed one of her students; and Charge IV, alleges that she disobeyed the superintendent's explicit directive that she not contact students and staff at Twin Hills Elementary School after her transfer. The Board alleges that these charges establish conduct constituting chronic absenteeism, unbecoming conduct, insubordination, and other just cause warranting dismissal.

At the beginning of the hearing, the parties stipulated that Randi True received her Bachelor of Arts Degree from Glassboro College, now Rowan University, in May 1989. She holds an instructional certification with an endorsement for elementary education that was issued by the New Jersey State Board of Examiners in June 1989, and an endorsement for teacher of the handicapped that was issued in December 1994. She began her employment as a special education teacher in the Willingboro School District in or about September 1997 and was assigned to the Hawthorne Elementary School, where she taught for three years before being transferred to the

[1] Prior to going on the record on November 16, 2010, the parties notified me that they would not be calling any additional witnesses. Consequently, the date was used to establish a briefing schedule.

Twin Hills Elementary School. She is currently a tenured teacher assigned to Twin Hills Elementary School.[2] *Stipulation of Facts*, Exhibit J-1.

Testifying on behalf of the Board, Terrell Everett stated that as of the date of the hearing, he had been employed by the Willingboro Board of Education as the director of human resources (HR) for "three years, three months, and five days." His primary responsibility has been overseeing the operations of the HR office, including, among other things, recruitment, benefits, and the maintenance of various records such as attendance records, requests for leaves of absence, transfer forms, evaluation forms, and the like. He was therefore able to identify the following documents:[3]

Classroom Observation Report dated March 17, 1999 (Exhibit P-1).
With two exceptions, True received 3s, performing "at expected level," in all categories using a rating scale of 1 to 3.[4] The first exception was Section III, Classroom Management, for which she received a 2, with the comment, "Consistency with classroom rules still requires strengthening. Continue to strive to improve this area." Ibid. The second exception was Section V, Attendance and Punctuality, for which she also received a 2, with the following comments:

> You are frequently late in the morning and leave early in the afternoon. Plan to arrange you're (*sic*) A.M. and P.M. activities so you will be able to arrive on time and not frequently call in later or sign [in] at a different time from your actual arrival time. Refrain from taking your students to the bus area before the appropriate time. If the students loose (*sic*) three to five minutes each day, it can add up to a large amount of time missed.
>
> [Ibid.]

Attendance Record 07/01/99 – 06/30/00 (Exhibit P-2).

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[2] On January 19, 2010, True was transferred to Memorial School as an inclusion teacher.
[3] Unless otherwise expressly attributed to Mr. Everett, the information in the summaries of these documents was taken directly from the documents themselves.
[4] The rating scale included "1) Unsatisfactory 2) Efforts Need to Be Expanded 3) At Expected Level [and] N/A—Not Applicable."

Everett testified that this document was generated by HR with input at the building level. Days taken are categorized as "P" – Personal; "S" – Sick/Illness; "H" – Half Day; and "X" – Professional. The document indicates that True was charged for 10.5 sick days and 1 personal day during the 1999-2000 school year.

Attendance Record 07/01/00 – 06/30/01 (Exhibit P-3)
This document indicates that True was charged with 8 sick days and 1 personal day, and granted 2 professional days during the 2000-2001 school year. In fact, all of these absences were during the second half of the school year.

Attendance Record 07/01/01 – 06/30/02 (Exhibit P-4).
According to Everett, True was charged for 20.5 sick days and 3 personal days.

Attendance Record 07/01/02 – 06/30/03 (Exhibit P-5).
This document indicates that True was absent a total of 117 times. Of these, 3 days were charged as personal days, 24 full and 4 half-days were charged to her sick bank, and 86 days were designated "SICK ILLNESS . . . N—NO ACTION/NOT CH."

Attendance Record 07/01/04 – 06/30/05[5] (Exhibit P-6).
This document indicates that True was charged with 11.5 sick days and 2.5 personal days.

Attendance Notice 07/01/05 – 06/30/06 (Exhibit P-7).
According to Everett, the difference in the appearance of this attendance report was due to a change in software, which had no effect on the procedures used to input information. This document indicates that True was charged with 8 full sick days, 2 one-half sick days, and 2.5 personal days.

Attendance Calendar 2006-2007 School Year (Exhibit P-8).
Everett testified that just as the format of the *Attendance Notice* was different from that of its predecessor, the *Attendance Record*, due to a change in software, the format of

[5] The Board acknowledged that it did not have a copy of the Attendance Record or any other documentation for the 2003-2004 school year.

the *10 Month Employees' Attendance Calendar* was different from that of the *Attendance Notice* for the same reason. He explained that with this format, the total number of days charged as sick or personal time in the upper right-hand column entitled "Out Date—Charge—Amt—Reason, should reconcile with the number of days "Used" in the bottom box entitled "Charge to Codes." As indicated, True was charged with 9 full sick days, 4 half sick days and 2 half personal days during this school year.

Attendance Calendar 2007-2008 School Year (Exhibit P-9).
This document indicates that True was charged with 12 full sick days, 4 half sick days, and 4 half personal days.

Attendance Calendar 2008-2009 School Year (Exhibit P-10).
Everett testified that in addition to the 18 full sick days, 4 half sick days, 3 personal days and 1 unpaid day she was absent, True also took, but was not charged for, 7 days for a death or deaths in the family. Regarding the latter, he believed that the number of bereavement days provided for in the teachers' contract was dependent upon the teacher's relationship with the deceased. Although he wasn't certain, he believed it may have been five days for a spouse, four for a child, and one for other relatives.

Attendance Calendar 2009-2010 School Year (Exhibit P-11).
This document indicates that True was charged with 4 sick days and 1 personal day. She was not charged for the 2 professional days she took.

According to Everett, Barbara Doneghy, the principal of Twin Hills Elementary School, had expressed a number of concerns regarding True's performance to him during the 2008-2009 school year and, at the end of the year, formally requested that True's increment for the 2009-2010 school year be withheld. Among other things, Doneghy based her request on True's "excessive lateness." *Increment Withholding Letter*, Exhibit P-14. Doneghy's request was submitted to and approved by the Board of

Education at its Special Meeting on June 30, 2009. Shortly thereafter,[6] Everett sent her the letter advising her of the Board's action.

Francis Turner has served as the Willingboro Board of Education's payroll and pensions administrator since 1997. As the payroll administrator, it is his responsibility to ensure that all of the Board's employees are paid "correctly and accurately" on a timely basis. In carrying out this duty, he relies on the information in the attendance records, which have been generated by three different computer programs since he's been in his position.

According to Turner, the first system was the manual system; the second was *EMAPS*, a computerized system that was used from the 1999-2000 school year to the 2006-2007 school year; and the third was *Systems 3000*. The *EMAPS* and *System 3000* reports to which he has had access have been produced in the HR office. In the normal course of events, he'll pull up "[his] side of the Payroll side and monitor it . . . to make sure everything is straight." And in the event something isn't straight, he'll "be up HR's butt" and tell them it needs to be corrected.

Upon examining the attendance records that were produced using *EMAPS*, Turner explained that "N-NO ACTION/NOT CH" meant that a teacher had not been charged as absent on a day she'd attended a professional workshop or training session and there had been no deduction of any kind. Instead, the system indicated that she had taken a professional day, with pay.

Turner also examined the attendance calendars produced using *Systems 3000* and stated that they differed from the *EMAPS* attendance reports. Normally, if the absence was charged as a sick day or personal day, the school made the entry. However, an extended leave of absence had to be requested and, if approved by the Board as an item on the agenda, entered into the system by HR. It was ultimately up to him to authorize or deny payment.

[6] The date of the letter appears to have been covered over by the certified mail receipt, which was dated July 31, 2009.

Turner also stated that under *Systems 3000*, absences due to a death in the family were coded as "O — OTHER," and were not charged. However, there were limits to the number of days a teacher could take. For example, under the contract with the Willingboro Education Association, a teacher would get five days for the death of a member of her immediate family, one day for an uncle, and so on. These absences could be entered at the school level or by HR.

On the other hand, extended leaves of absence with or without pay had to be approved by the Board. In this particular case, the *Minutes of the Board's Regular Meeting of September 23, 2002*, Exhibit P-30, disclose that the Board ratified True's leave of absence with pay for medical reasons effective September 4, 2002 to September 17, 2002. Similarly, the *Minutes of the Board's Regular Meeting of February 25, 2003*, Exhibit P-31, disclose that the Board ratified True's leave of absence with pay for "medical/maternity" effective January 24, 2003 through January 28, 2003.

An additional extended leave was addressed in the *Minutes of the Board's Regular Meeting of February 25, 2003*, Exhibit P-32, which disclose that the Board ratified True's leave of absence, this time without pay, for "maternity/family leave" effective January 29, 2003 through June 30, 2003. That extended leave was modified in the *Minutes of the Board's Regular Meeting of April 28*, 2003, Exhibit P-33. According to Turner, the Board had a policy that enabled teachers, who had been with the District for a certain period of time and had exhausted their allotted number of sick days, to receive their salary, less the amount paid to a substitute.[7] In this instance, her illness began on January 24, 2003, and, based on her salary of $44,359, the first twenty days were paid at a rate of $221.80 per day, or $4,436, less the substitute's pay of $70 per day or $1400, for a total of $3,036.

The *Minutes of the Board's Regular Meeting of August 11*, 2003, Exhibit P-34(a), disclose that the Board also ratified True's leave of absence without pay for "family leave" effective July 1, 2003 through February 1, 2004. Attached to the minutes is a

[7] See N.J.S.A. 18A:30-6, which provides that when a teacher requests sick leave, but has exhausted her accumulated sick leave, the Board may pay the teacher's salary less the pay of a substitute. Under this statute, there is no cap on the number of days for which the teacher may be paid. However, the Board's policy imposed a cap of twenty days.

letter dated January 28, 2004, from the executive director of human resources and administrative services, Marvin Hopkins, to True, asking her if she intended to return to work on February 2, 2004, and to advise him of her intentions. *Hopkins Letter Dated January 8, 2004*, Exhibit P-34(b).

The *Minutes of the Board's Regular Meeting of January 29, 2004*, Exhibit P-35, disclose that the Board next ratified an additional leave of absence without pay for "family leave" effective February 22, 2004 through June 30, 2004. According to Turner, this leave was subsequently continued for the balance of the calendar year, although the *Minutes of the Board's Regular Meeting of October 25, 2004*, Exhibit P-36, disclose that the extended leave was effective September 1, 2004 through October 31, 2004.

Keith Ellerbe is currently employed by the Willingboro Board of Education as a Director of Curriculum and Instruction. Before accepting this position, he also served at various times as principal of Memorial Upper Elementary School, J.C. Stewart Elementary School and the Garfield East Elementary School. True was one of his teachers at J.C. Stewart during the 2004-2005 and 2005-2006 school years.

Ellerbe testified that he'd had concerns about True's chronic tardiness and seeming inability to get to work on time beginning with the 2004-2005 school year. There were times when he'd be doing his morning walk and run into her in the hall, and other times when he'd notice she was not in her assigned classroom when she should have been. It was not unusual for her to come in after the students were already in home room.

Ellerbe explained that he employed several means of getting her attention. Among other things, the names of teachers who signed in late were highlighted in the sign in book that was located in the main office of the school. He also raised the issue of her tardiness in her *Classroom Observation Report Dated March 1, 2005*, Exhibit P-15(b). Specifically, in Section V, Attendance and Punctuality, he gave her a 2 (efforts need to be expanded) with the comment, "Mrs. True needs to improve on punctuality and attendance." Ibid. Simply put, "she [was] attending below standard, the norm." This

assessment was based on her attendance record as set forth in her *Annual Performance Report 2004-2005*, Exhibit 15(c), which indicated that she'd been absent 11 times due to illness and 2.5 days for personal reasons.

Ellerbe stated that he also conducted a post-observation conference with her during which he stressed that attendance and punctuality were areas that she needed to "improve on in reference to becoming an exemplary teacher." As he recalled, she did not disagree with or otherwise challenge the accuracy of his assessment. Instead, she just explained that her tardiness had been due to "family matters," to which he responded that "while those situations do arise, we are responsible for the children here . . . educating the children here at Willingboro public schools."

When the problem persisted the following year, he sent her a letter on November 29, 2005, reminding her that the working hours for teachers were 8:30 a.m. to 3:30 p.m., and that it was her responsibility to render service between those times as set forth in the Willingboro Education Association agreement. He also told her, "This is my first notice concerning these matters and I seriously hope it would [*sic*] be my last." *Ellerbe Letter Dated November 29, 2005,* Exhibit P-15(a). To the best of his recollection, True did not respond either orally or in writing. And although the problem didn't go away, Ellerbe allowed that it "kind of got better."

Nadine Tribbett, who is currently the K-12 Curriculum Director in the Willingboro School District, served as the principal of Hawthorne Elementary School during the 2006-2007 school year. Tribbett testified that as principal, it was her responsibility to provide instruction and direction, implement professional development training, and ensure that "our team was supporting our students in terms of providing an academic environment that was conducive to learning." It was also her responsibility to conduct the teachers' performance observations and evaluations.

On April 27, 2007, Tribbett completed the *Annual Performance Report 2006-2007*, Exhibit P-12(a), for Randi True, who was, at the time, a pull out resource teacher. True's *Professional Improvement Plan*, Exhibit 12(b), was appended to the report. In

completing the performance report, Tribbett culled information from the evaluations, both formal and informal, that she'd performed that year, as well as the attendance records she'd received from the building secretary. Regarding the latter, the report indicated that True had been absent 1 personal day and 5.5 sick days, and been tardy 16 times.

To the best of Tribbett's recollection, a teacher is entitled to take 3 personal days and, while she couldn't be certain, 13 sick days each school year. She was unaware of any policies on tardiness "formalized in black and white." However, when it "showed itself," she would have a conversation with the teacher and ask if there was a reason for it, "because it directly impacts the classroom."

Tribbett also testified that insofar as the classroom observations were concerned, in the normal course of events she would provide teachers with copies of their *Annual Performance Reports* prior to conducting the post-observation conferences. Then she would sit down with them, go over what she'd found, and discuss the things they did not agree with. Since she was responsible for evaluating all of the teachers in the school, some of these conferences were more formal than others. In any event, both she and the teacher she was evaluating would sign off. In True's case, she couldn't specifically recall their conference because it had been held four years before, but allowed that "nothing sticks out."

Barbara Doneghy testified that she has been employed by the Willingboro Board of Education since September 1971, and has served as principal of the Twin Hills Elementary School since 2002. She first met Randi True in September 2008, when True was assigned to Twin Hills, and supervised her until January 2010, when True was transferred. During that period of time she conducted "many" classroom observations of, and wrote evaluations concerning, True's performance as a special education teacher.

According to Doneghy, on March 27, 2009, she observed True teaching the subject of writing in language arts literacy for approximately one hour and fifteen

minutes. Following that observation, she completed a *Classroom Observation Report*, Exhibit P-13, which served as True's annual formative evaluation. This report enabled her to rate True's performance using a scale of 1 to 3, with 1-unsatisfactory; 2- efforts need to be expanded; and 3-at expected level. At the time of the observation, True had 9.5 absences and 8 tardies, which Doneghy noted in Section VI, Professional Responsibilities, with the comment, "Ms. True is often late arriving at school."[8] Ibid.

Doneghy subsequently conducted a post-observation meeting,[9] during which she discussed True's overall evaluation and pointed out certain things that she needed her to work on. In particular, Doneghy stressed that True had to improve her attendance and lateness. She had to be in the building by 8:30 a.m. and was not to leave before 3:30 p.m.

Doneghy testified that as the principal, she was responsible for overseeing attendance in the school and ensuring that staff members signed in and out on time. Therefore, she was "always" near the front door whenever staff, parents, and students were entering or leaving the building. She also had access to the sign in sheets. Insofar as the early departures were concerned, she could recall having paged True on several occasions and not gotten a response. As she put it, True's late arrivals and early departures continued "almost daily."

"Not even a month later, it had to have been early April," True's supervisors told her she needed to start documenting the late arrivals and early departures and, based on their complaints, she started doing so whenever she "felt it was necessary, but it was almost daily." For example, by *Memo Dated April 3, 2009*, Exhibit P-16, she asked True and her union representative to meet with her at 2:30 p.m. that same day to discuss, among other things, her early departure without permission on April 2, 2009, failure to sign out, and failure to sign in the following morning, April 3, 2009.

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[8] Section V of the report indicates that Doneghy rated True's attendance and punctuality a three, "at expected level."

[9] The report notes that the conference was held on March 9, 2009, some eighteen days before the observation was conducted. Given the dates and contexts of subsequent events and documents, it is likely that the conference took place on March 29, 2009.

The meeting took place as scheduled, with True accompanied by her union representative, Patsy Marino. As she had during the post-observation meeting, Doneghy stressed the requirement of arriving at or before 8:30 a.m., signing in with the correct time upon arrival, not leaving before 3:30 p.m., and otherwise adhering to contractual work hours. Since this hadn't been the first time they'd talked about these issues, and had, in fact, discussed them during the post-observation conference, the early departure on April 2 and late arrival on April 3, 2009, without corresponding entries in the sign in book, "should not have happened." True's attendance issues "had gone to a level beyond just talking and writing." Consequently, Doneghy told her that she would be making a recommendation that the Board withhold her increment. Neither True nor Marino disputed the allegations she'd made at that time.

Doneghy stated that True responded in writing the following day, which was "a *modus operandi* of hers." When she did, she usually responded in an "apologetic" tone, refuting Doneghy's claims "in her own way." For example, she would say something like, "I left, but I don't think that you saw me come back." However, she never sent in any proof that she had in fact returned to the building.

In her *Memo Dated April 6, 2009*, Exhibit P-17, Doneghy summarized the subjects they'd discussed during their meeting of April 3, 2009. In item number 3, Doneghy indicated that True "was warned about not signing in as on 4/3/09; she was again told to arrive on or before 8:30am [*sic*]; the requirement to sign in upon arrival with the correct time was stressed as well as adhering to contractual work hours. Ms. True left the premises on 4/2/09 at 2:55pm [*sic*] without permission and without signing out." Ibid. In item number 4, Doneghy also reiterated that she'd be recommending a withholding of True's increment.

By *Memo Dated May 29, 2009*, Exhibit P-18(a), Doneghy notified various administrators including Acting Superintendent David Hespe that True had signed in that morning at 8:37 a.m., even though she had not actually arrived until 8:47 a.m. Doneghy testified that she'd initially been waiting for True in the front foyer, which provided a view of all three wings, because she wanted to talk to her about having left

early the day before. Then she moved to True's room at 8:33 a.m. and, seeing that the two paraprofessionals were eating in the room, asked them to go finish their breakfasts in the teachers' room. A few minutes later, she asked the Spanish teacher to cover True's classroom so she could continue waiting for True in the foyer by the door.

When True arrived at 8:47 a.m., yet signed in as arriving at 8:37 a.m., Doneghy wrote down the correct time, circled it, and initialed it. *Sign In Sheet for Week of 5/25/09*, Exhibit 18(b). According to Doneghy, subsequent examination of the sign in sheet disclosed that True had not signed in or out on Tuesday, May 26, or Wednesday, May 27, 2009.[10] On Thursday morning, May 28, 2009, she'd signed in as arriving at 8:32 a.m. even though it had actually been 8:37 a.m., and while Doneghy initialed the time, she couldn't be certain that she'd changed it. In any event, after watching her for a period of time, it was obvious to her that True was getting in around the same time every day, but always putting down a time earlier than the actual time and that it "had become a pattern."

True failed to sign out Thursday afternoon and Doneghy decided to call her into her office for a meeting the following morning. After watching True sign in as arriving earlier than the actual time that morning, she confronted her and told her that she wanted to meet with her, and that her union representative was already waiting in her office. However, True refused and said she was going to "take a half day; was going to get a lawyer." *Memo Dated May 29, 2009*, supra. With that, True started walking down the hallway toward her classroom and Doneghy followed behind her, directing her to come back. True failed to comply with her request, walked out the side door, and left. This required Doneghy to pull a special education teacher from an inclusion class to cover True's class for the day. As Doneghy recalled, she told Patsy Marino, "See, I did everything to try to talk to her," and Marino agreed with her.

Doneghy stated that on January 19, 2010, following a "pattern of repeated performance and evaluative deficiencies," *Hespe Affidavit*, Exhibit P-27, True was transferred to Memorial School as an inclusion instructor. At that time, Acting

[10] Schools were closed Monday, May 25, 2009, for the observance of Memorial Day. See *Sign In Sheet*, supra.

Superintendent Hespe arranged for True to be escorted by her immediate supervisor, Mrs. Marcellus, to Twin Hills for retrieval of her personal belongings. Hespe also directed True "not to have any contact with Twin Hills Elementary School staff or students and was to cease and desist from contacting any of her former colleagues at Twin Hills." Ibid. A similar directive was sent to the staff at Twin Hills, instructing them not to contact True.

Doneghy testified that later that same day, Carlin Gonzalez, one of the aides in True's class, first showed and then sent her a copy of a text message she'd received from True that afternoon. In that message, True told Gonzalez, "Cant believe u two church going women lied 2 my face. 12 years i knew mrs f and wow im blown away. Good luck 2 u both hope it's a great rest of the year." *True Text Message*, Exhibit P-28. Doneghy, in turn, forwarded copies of the text message to True's immediate supervisors[11] and Superintendent Hespe.

Mary Margaret Theresa Grassie, who has been employed by the Willingboro Board of Education for the past nineteen years, is currently a first grade teacher at Twin Hills Elementary School. She testified that she knew Randi True because they'd both been teachers at Twin Hills, and her classroom had been next to True's during the 2009-2010 school year.

Grassie stated that her students normally left school on an earlier bus than True's students. On the afternoon of January 7, 2010, at about 3:15 or 3:20 p.m., after bringing her students outside, Grassie returned to the hallway where her classroom was located. True's students, who ranged in grade from Kindergarten to second grade—five to seven years of age—and were classified as eligible for special education and related services, had a later dismissal time and were still in their classroom.

As she was standing in the hallway talking to two of her colleagues, Mrs. Boltniew and Ms. Boyle, Mrs. Boltniew suddenly said something like "Oh no" or "Oh my gosh" and started running down the hallway. When she turned in that direction to see

[11] In addition to Marcellus, True's supervisors included T. Sullivan, Director of Pupil Personnel Services, and J. Manning, the interim Assistant Superintendent of Schools.

where Boltniew was going, she observed that one of True's students was on top of another of True's students who was lying on the ground. The student on top had straddled him and was hitting or punching him on the back. When Boltniew approached, the student on top got off of the other. But until Boltniew arrived, both boys had been unattended.

After the boys separated, Grassie, Boltniew and Boyle followed them back into True's classroom to join their classmates. When they entered, True was standing by what they call the "wardrobe," which is a wooden closet. At that point, one of the other teachers told True what had happened and True replied that the boys had been told not to leave the classroom and "shouldn't have left." Grassie stated that one of True's aides, Carlin Gonzalez, later told her that True had been on her cell phone, even though the use of cell phones is prohibited during working hours, "when you're on duty."

Grassie stated that True's reply really bothered her because after an incident like this, where a child could have been seriously hurt, a more appropriate response would have been, at the very least, "Is he okay? What happened?" It shouldn't have been "Well, I told them not to leave the room." Additionally, she could not recall True checking either child to see if there had been any injuries. In her opinion, this showed that True didn't really care what had happened. On January 11, 2010, at Mrs. Doneghy's request, Grassie submitted a written statement, *Grassie Incident Statement*, Exhibit P-19(a), concerning the matter.

On another occasion, Grassie heard a lot of yelling going on in True's adjacent classroom. Among other things, she heard True yelling, "You're animals," or "You're animals, you're nothing but animals, [and] I am not a zoo-keeper" and, at counsel's request, repeated these statements, yelling in the same loud voice she'd heard coming from the other room. She also recalled True calling her students "stupid." However, upon further questioning, Grassie allowed that she did not immediately report what she had heard. It wasn't until later, when she recalled prior incidents and "things started to add up," that she told Doneghy what she'd heard. She also signed an affidavit, *Grassie Affidavit*, Exhibit P-20, memorializing what she'd told her.

Among the incidents that led her to report True was one where she "went running out of her room, down the end of the hall, and out the side door." When Grassie went out to see what the commotion was, True's aides said that she'd left and they didn't know where she'd gone. And there was another occasion when she observed True bringing a television down to her room. Since True had recently been in trouble for something else, she asked her, "Are you crazy? Is showing a movie in your lesson plan?" She asked because the school has a policy that movies can't be shown unless they're in a teacher's lesson plan. Nevertheless, True told her that she was showing the movie because she needed the time to do progress reports, even though progress reports are not supposed to be written when students are in the room. True "didn't care."

Tamera Boltniew is currently a second grade teacher at Twin Hills Elementary School, a position she has held for the last three years. During the 2009-2010 school year, her classroom was located approximately twenty-five steps to the right and across the hall from that of Randi True.

Boltniew testified that on the afternoon of January 7, 2010, she was standing outside her room, talking to Ms. Boyle and Ms. Grassie. True was still in her classroom with her students, as usual, because their bus was frequently late. As they were talking, some of True's students came out into the hallway and one of the boys sat on top of another boy who was lying on his stomach, and started punching him on his back. After watching it for a second or two, she started walking towards True's classroom, yelled at the boy who was doing the punching, and both of them got up off the floor.

When she reached True's classroom, Boltniew walked in, saw True behind one of the open doors of the almost floor to ceiling closet, and said, "you know, they were punching each other, beating each other up." Although she couldn't remember True's exact words, she believed True said "something to the effect of, 'I told them not to and this is what happens,' and that was it." At that point she left the room because she'd only gone there in the first place to make sure there was an adult present. As she

explained, whether or not the instructional part of the day is over, a teacher has a responsibility to supervise and remain with her students until they leave.

Boltniew testified that she did not report the incident to Ms. Doneghy because Grassie had told her she was going to be doing that. In fact, Grassie had asked her if she could add her name to the report, and she'd said, "Yes."

Heather Boyle is currently employed by the Willingboro Board of Education as a pre-school disabled teacher at the W.R. James School. Prior to this assignment, she served as a special education inclusion teacher for five years, including the 2009-2010 school year, during which she worked with Randi True at Twin Hills Elementary School.

Boyle testified that on the afternoon of January 7, 2010, at approximately 3:30 p.m., she was having a conversation with Mrs. Boltniew and Mrs. Grassie in the hallway outside her classroom. At that time, two of True's students came out into the hallway and one boy sat on top of the other, hitting him in the back of the head. Almost immediately, Boltniew turned in their direction, said "Oh no" or "Hey," and started walking towards them. She followed Boltniew and, as they got closer, both of the boys got up and returned to their classroom. They then followed the boys to the classroom and she stood in the doorway. When neither True nor her aide, Carlin Gonzalez, said anything to her, she walked away.

Carlin Gonzalez has been employed by the Willingboro Board of Education as a paraprofessional at Twin Hills Elementary School for approximately seven years. During the 2009-2010 school year she was assigned to Randi True's classroom and worked as a one-to-one. In that capacity, she was required to stay with one of True's behaviorally disabled students, A.L., at all times including lunch, and "if True had a lesson," she was to help him with it. More specifically, she would work with A.L. "on a different level," explaining the lesson and making it easier for him to understand.

Gonzalez testified that although student dismissal time was normally 3:10 p.m., some of True's students routinely remained in the classroom until approximately 3:20

p.m. because they had a later bus. Since her working hours were 8:40 a.m. to 3:40 p.m., she was normally in the classroom when they left.

Recalling the incident of January 7, 2010, Gonzalez stated that she had clocked out early at 3:10 p.m. and had been helping her son with his homework since she and Mrs. Francis had already taken their students to their bus. True was responsible for the remaining children. However, three of them were in the hallway "hitting each other, on top of each other, beating each other up . . . like they were in a [professional] wrestling match." Then two of them started jumping up and down on the third, "giggling and laughing" as they did so. When she heard the student on the bottom scream, "Stop, get off of me," she looked up and noticed that True was texting on her cell phone, so she got up to try and stop the fight herself.

Since the children were very strong and "we're not supposed to put our hands on them," all she could do was tell them to stop, but they didn't listen to her. It was not until Mrs. Boltniew and Mrs. Grassie came down the hallway and told them to stop that they finally stopped and returned to the classroom. At that time, True took them to their bus, and she "grabbed" her son and left.

Later that day, at Ms. Doneghy's request, she submitted a written statement about True calling the students offensive names. *Gonzalez Statement*, Exhibit P-21. Gonzalez wrote that on several occasions True had called them "devils," "stupid," and "crybabies," and told them that her children were smarter than they were. She had also told one student that he was going to end up in jail before he was ten years old, which "upset the child." When she heard this, she shook her head and looked at the other paraprofessional in class, Mrs. Francis, who was also shaking her head.

According to Gonzalez, one of True's "outbursts" occurred in December 2009, when True was giving a lesson and one of Mrs. Francis's students "didn't get it." True "just came out and said, 'Well, stop being stupid.'" Hearing this, she looked up and said "Oh, my goodness." She also recalled several other occasions when the children, who ranged in grade from kindergarten to second grade, had been at the work station and

True had been trying to give them a lesson. True handed them worksheets and tried to explain how to do the work, but the children "didn't get it because they didn't know the lesson. The lesson wasn't taught to them." When they cried, True responded by calling them "crybabies."

Gonzalez also testified that after the January 7 incident took place, her supervisor, Mrs. Marcellus, told her that True had been transferred to another school and that she would be coming in to retrieve her things. Marcellus also told her that True was not supposed to have any contact with students or staff members. However, True sent her a text message, in which she said, "Cant believe u two church going women lied 2 my face. 12 years i knew mrs f and wow im blown away. Good luck 2 u both hope it's a great rest of the year." *True Text Message*, Exhibit 29(a); see also Exhibit P-28, supra. Gonzalez took the text message directly to Doneghy upon receiving it.

Sheila Francis, who has been employed as a paraprofessional by the Willingboro Board of Education for approximately twenty-one years, was assigned to Randi True's class in November 2009. She was also one of True's paraprofessionals the first two or three years True was in the school district, and otherwise talked with her over the years.

Francis testified that she became concerned about what she was seeing and hearing in True's classroom beginning in November 2009. Specifically, during "group lessons," when True taught the class as a whole, if it "didn't go right" or the kids got on her nerves, True would get upset, raise her voice and call them names such as "crybabies." When the kids didn't do their work, "she'[d] holler at them and tell them to do it, and then they'[d] holler back, and then she'[d] holler back and then she['d] just bloat[] out whatever she wanted to bloat out." On a few occasions she told them, "my children are smarter than you." And one time she told one of the children, "Well, you're going to wind up in jail with that behavior that you have."

According to Francis, True generally yelled more at [T.] than the other students because he did whatever he wanted to do and "kind of ran that classroom. He ran the classroom." True would yell at him all the time and he'd yell back, telling her things like

"You're crazy." Then "she'd get angry and she'd tell him to sit down and be quiet in her high voice." At those times she [Francis] would intervene and tell [T.], "That's enough. You have to have respect in the classroom." As she explained, she wouldn't allow the children to disrespect anyone. On the other hand, True "never spoke up to the children when they were out of order . . . I did."

Francis added that she'd been asked to provide a written statement about True's behavior in the classroom. She decided instead to sign the one Gonzalez had already written, even though she hadn't heard True say everything Gonzalez had heard. However, she was quick to add, "If I had known it was going to go this far, I'd have written my own."

Also called as witnesses were three of the students in Ms. True's class during the 2009-2010 school year. All three stated that they knew the difference between telling the truth and a lie; described what would happen to them if they told a lie; said they were not afraid to answer questions; and stated that they would answer the questions truthfully.

T.W. testified that he was seven years old and had been in True's class the previous school year. He said that he didn't like some of the things True had said to him, but couldn't remember what any of them were. Similarly, he didn't like some of the things she had said to his friends, but again, couldn't remember what any of them were. Finally, he could not recall being asked any questions by a Mr. Sullivan.

T.K. testified that he was eight years old and that True had been his teacher last year. He said that True hadn't called him or his friends names or talked to them in a way he didn't like. He also said that True hadn't pushed him.

A.L., who can best be described as a very precocious, high-spirited and entertaining little boy, testified that he was "one, two, three, four, five, six, seven years old," and that he had "like three birthdays at one time.[12] When I be [*sic*] good, I get

[12] A.L. may actually have meant that he'd received three birthday presents at one time.

older, old by the minute, but I think that's all my birthdays, but I think I'll get one more." A.L. also stated that he doesn't lie to anybody "but sometimes I do." However, he assured me that if he did lie, he would tell me.

A.L. went on to say that True was "my old teacher 'til I got here, when I was [gesturing] this size" and sometimes she would talk to him "when I be [*sic*] bad or good. Sometimes she talk [*sic*] to me twice. I don't want her to scream at me like this [A.L. screamed very loudly]. Sometimes when I be [*sic*] bad she screams; my ears get hurt by that." However, she didn't say things he didn't like about himself or his friends, and had no recollection of talking to Mr. Sullivan.

As of the date of the hearing, David C. Hespe, former Commissioner of Education for the New Jersey Department of Education, had been employed by the Willingboro Board of Education as the Interim Superintendent of Schools since January 2010. Prior to assuming this position, he'd served as a consultant to the Board two days a week from February 2009 through June 2009, and as the Assistant Superintendent from July 2009 through December 2009.

Dr. Hespe testified that in or about November 2009, he'd asked Thomas Sullivan, the then-Director of Special Services, to interview some of the students in Randi True's class in order to determine if certain allegations made by staff members of True engaging in name calling and making other verbally abusive statements were true. Following these interviews, which were conducted on February 1, 2010, Sullivan gave him the question and answer forms he'd used and told him that he'd "written down exactly what the students said." Appended to each of these questionnaires was an affidavit of Sullivan in which he attested that he'd written the students' answers down verbatim.

The first student interviewed was T.K., who told Sullivan that "She said im [*sic*] stupid[,] she won't work with me[,] she push [*sic*] me in my chair[,] she said Im [*sic*] not a good student. *T.K. Interview Questionnaire*, Exhibit P-22. The second student, T.W., told him, "She hate [*sic*] me. She said I [*sic*] stupid. . . . T.K. is stupid." *T.W. Interview*

Questionnaire, Exhibit P-23. The third, A.L., told him, "Everybody shut up. She yelled at us real loud to do our work. She called [the other students] stupid." *A.L. Interview Questionnaire*, Exhibit P-24.[13] And a fourth, J.L., told him, "She yelled at us very loud. Ms. True pushed [A.] into a chair and a piece broke off." *J.L. Interview Questionnaire*, Exhibit P-26.

Hespe stated that he and others in the district had been concerned about True's performance as a teacher for quite some time and that they had been discussing what steps they needed to take. Then, in January 2010, he received the reports of misconduct from her fellow teachers and co-workers at Twin Hills. Based on this information, he decided to move True to a classroom that was "much more contained . . . a classroom with another teacher in it and it would be a classroom with older students in it at Memorial, the Grade 5/6 school."

Additionally, since the reports of misconduct had come from her fellow staff members at Twin Hills, Hespe wanted to ensure that there was "no opportunity for any vindictive conduct, any disruptive conduct." Therefore, he advised True that she would be escorted to her classroom at Twin Hills to pack up her things and then escorted out of the building. He also expressly directed her not to have any contact whatsoever with any of her colleagues or the staff at Twin Hills.

On January 19, 2010, he received an e-mail from Mrs. Doneghy, *Doneghy E-Mail*, Exhibit P-28(a), concerning a text message True had sent to her paraprofessionals, Carlin Gonzalez and Sheila Francis, containing what he believed to be threatening language. He deemed True's sending of the text message an act of direct insubordination, particularly because Gonzalez and Francis were both involved in the investigation.

Addressing the issue of True's attendance, Hespe stated his belief that as an educator, a teacher makes a commitment to her classroom, and that commitment is that she will be there—she won't be absent and she won't be late. He added that

[13] Sullivan apparently interviewed A.L. a second time, on February 9, 2010. However, Dr. Hespe could not recall receiving or discussing the interview questionnaire marked for identification as Exhibit P-25.

research has confirmed that if a teacher is absent, student achievement will be hurt. And this is true regardless of the reasons for her absences. "It doesn't make a difference" why she is out.

Hespe further opined that "the fact that the teacher is not in the classroom, in my mind, is sufficient to demonstrate that they're not living up to their professional commitment to their students." That is why attendance is taken into consideration in classroom observation reports and the evaluation process used in the school district. Once a teacher has more than three absences during the course of a school year, and they need not be consecutive absences, there is a problem that needs to be addressed by the building level administrators. And the same is true of tardiness. "If a teacher is not in the classroom teaching, it's a problem that needs to be addressed."

Testifying in her own behalf, Randi True stated that she was employed by the Willingboro School District as a Special Education teacher and, during the 2009-2010 school year, had been assigned to teach students with behavioral disabilities. The class was comprised of seven students, three aides, one of which was A.L.'s one-to-one aide, and herself.

True admitted that she was occasionally late for work and added that when she was, Doneghy wouldn't allow her to sign in. As she put it, Doneghy "wanted to be in control" and would write down the time and sign it, claiming that she, True, had written down the wrong time. "I know I was late, but I would not sign in the book, she would not allow me to if I were late." In fact, Doneghy wouldn't let her "even touch the book or go near it."

True also admitted that she'd had a significant number of absences, as documented in the attendance records. However, she stated that she'd taken a substantial amount of time off as "Family Leave," and still more as maternity leave, and that all of these leaves had been approved by the Board of Education. She had never been told that taking these leaves might have a negative impact on her employment.

Nor had she ever been told that taking family bereavement days could have an impact on her employment.

Recalling the events of January 7, 2010, and, more specifically, the testimony of Carlin Gonzalez concerning them, True stated that every day at 3:00 p.m., Gonzalez and Sheila Francis took their students to the bus and then clocked out, while she stayed in the classroom with the four remaining students. The aides would then either go home or stay in the building—she "guess[ed] they stay[ed] in the building, but they never came back to the room." In any event, she didn't believe that Gonzalez and her son had been in the room at the time of the incident.

While acknowledging that two of her students had, in fact, run out of the room, she explained that she hadn't followed after them because she'd been helping another student pack up and get ready to go home. She also denied having been on her cell phone at the time. Instead, she stated that she'd gone into the closet where the intercom was in order to call the office and get the principal or someone else to go into the hallway and stop them. She acknowledged that, despite the proximity of the closet to the classroom door, she did not go to the door to see where the boys had gone because she "didn't know how far or where the other students were."

According to True, she thought that if she could hurry, pack up the other students, and bring them out with their things, she'd then be able to get the ones who'd left without leaving any of the remaining children unwatched. However, the boys "just came back in." They were followed by Tammy Boltniew and Heather Boyle, who "came down to see if there was a grownup in the room or just to see if I needed anything and if everything was okay and why were these students running out in the hall and to let me know that they were fighting in the hallway."

True stated that she did not examine the boys because they appeared to be fine and were "laughing and giggling" when they came back into the room. However, she did ask them, "Ms. Boltniew told me that the two of you were fighting; did either of you get hurt?" and both boys said no. She did not ask them why they'd been fighting because

"they constantly fight every day. One minute they're best friends, the next minute they're enemies."

According to True, incidents such as fighting have to be reported on an "incident report" that must be submitted to the office. Copies of the report are then sent to the teacher so that they can be placed in the students' files. However, she herself did not submit a report because Doneghy's policy was that only the teachers who saw the fight had to report it and, since she hadn't seen it, she was "forbidden" from doing so. She also stated that she never received copies of any reports that may have been written by Boltniew, Boyle, Grassie, Gonzalez or Francis. And while she had a policy of calling the parents of students who'd been fighting, she could not remember if she had in this instance.

Describing her classroom, True stated that the students had their own desks and that there were large sliding windows looking out onto the yard, "where anybody could actually get in and out of the window if it's not locked." In fact, T.W. frequently opened a window and ran out of the classroom, and she would have to run out, "but not through the window," after him. Sometimes she was able to catch him, and other times he'd come back in through the window. She also stated that she'd wanted to keep the classroom door closed, not only because she knew her class was loud, rambunctious, and noisy, but also because she didn't want the kids to run out the door. However, "Ms. Doneghy always said that the door had to stay open; she worked on an open-door policy."

True denied calling any of her students a "crybaby," "devil," or "stupid." To the contrary, T.K. and T.W. were always calling themselves "stupid," and she'd tried to build up their self-esteem by telling them, "You are not stupid. You're very smart and you shouldn't call yourselves 'stupid.'" And while she acknowledged telling one of them, "you will end up in jail," she explained that T.K. had been a very angry child who would act out by throwing furniture, pencils, crayons, and anything else he could get his hands on. In fact, he once took another student's desk and pushed it against the wall while the student was sitting in it, pinning the student against the wall. She was shocked when

she witnessed this and told him, "That behavior, throwing furniture, destroying property and hurting a child could cause you to go to jail." Still, True insisted that she never threatened him with jail.

True denied calling the students "animals" and telling them that she was not a "zookeeper." She also denied telling the students that her children were smarter than they were, adding that she had seven-and-a-half-year-old boy and girl twins who were in their own special education programs. Additionally, although the students in her class were eligible for special education under the category of behaviorally disabled, some of them were "extremely intelligent," and two of them were reading above their grade level. In this regard, she was initially "very surprised" that they were in a special education class because they did "such a great job with academics;" that is, until she saw their behaviors. Still, she could not recall any of them ever becoming frustrated over their lessons.

True stated that she'd known Sheila Francis for twelve years, and had met her when she was hired to replace a special education teacher who was out on maternity leave. Francis was her teacher assistant and they became very good friends. Three years later, when True was transferred to Stewart Elementary School, they agreed they were going to remain friends. "It didn't matter that we couldn't work together; we had already established a friendship."

As True explained, Francis was approximately ten to fifteen years older than she was, "so at times I felt like one of her daughters, she was like a mother to me." Francis attended her son's bris and her daughter's baby naming, and they often celebrated holidays together. And when True began having difficulty with her behaviorally disabled class, she specifically requested that Francis be reassigned to her class. Consequently, she was "shocked" when Francis co-signed Gonzalez's written statement. She couldn't understand why Francis would lie.

True said she met Carlin Gonzalez for the first time when Gonzalez was assigned to her class as A.L.'s one-to-one. Gonzalez was very helpful in the classroom,

trustworthy, and did a good job assisting A.L. They never had any major disagreements, got along well, and she never had cause to complain about her. She also believed Gonzalez had been mistaken about being in the classroom at the time of the incident for two reasons. First, there had been so many incidents, and in one of them involving three students fighting in the hallway, Gonzalez had had to get help to stop them. Second, had Gonzalez been in the classroom, she wouldn't have needed to buzz the office for help. She would have been able to leave her there, run after the boys, and take care of the problem herself.

True stated that she could not recall exactly when Dr. Hespe told her he was going to transfer her, but said that he allowed her to return to Twin Hills to get her things while her students were at lunch because he didn't want her to talk to them. He also told her that he didn't want her talking to any of the staff members. It was "just get my things and go." He never told her why she was being transferred, and it was only later that day that someone showed her the letters that Grassie, Gonzalez and Frances had written.

She was surprised by the allegations they'd made because they'd never said anything to her about their concerns prior to January 7, 2010. She'd always told them, "I'm very open. If you ever have any problems, come to me and talk to me. If I have any problems I want to be able to talk to you." In fact, at the end of a day, everybody would say, "Okay. Well, we can try to do this better, but everything seemed to be fine, you're doing the best you can with the behaviors of these students that you have."

Finally, True stated that the text message she'd sent to Gonzalez had actually been intended for Gonzalez and Francis, and would have been sent to Francis but for the fact that Francis didn't know how to text. She also stated that she'd sent the text message to let them know she'd been told she couldn't talk to them, even if she didn't say so in the message itself. She assumed they'd understand that was what she meant when she texted, "Hope it's a great rest of the year."

True also explained that her use of the phrase, "u two church going women," referred to the fact that both of them were very into their church. Francis had "even tried to convert me in some way with her spiritual words from God and everything even though she knew I was Jewish . . . they were both these heavy church people." Yet, both of these "God-fearing" women told her that they had no idea why she'd been summoned to the administration building when they both knew exactly why she had. This was her way of telling them "I was still okay."

Finally, when asked how sending the text message had not been in direct contravention of Superintendent Hespe's directive to her, True replied that Hespe had told her she couldn't talk to anybody when she went to the school. She "understood it to be that I could not have any contact or talk to them when I went to get my things, I was just to go in there quietly and get my things so I wouldn't disturb anybody and that I couldn't talk to them." She didn't consider texting to be talking.

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).

In Charge I the Board alleges that True has been chronically absent from, and in Charge 2 tardy arriving for, work as a Teacher of the Handicapped since she began her employment with the District in September 1997. In this regard, it is well settled law that excessive absenteeism constitutes valid grounds for the dismissal of a tenured teacher, even where the absences have been excused or caused by legitimate medical or health-related reasons. State Operated Sch. Dist. of Jersey City v. Pellecchio, 92 N.J.A.R.2d (EDU) 267, 269-70. Even if a teacher's performance in the classroom is sufficient and the absences have been approved leave or taken as sick days to which the teacher was entitled, the absences may nevertheless be considered material to the issue and can justify removal of the teacher. In re Sheets, 1979 S.L.D. 790, 798, adopted, State Bd. of Ed., 1980 S.L.D. 1536. The mere fact that the absences may have been excused does not obviate the possibility that the teacher may be dismissed for excessive absenteeism.

The underlying rationale for this seemingly harsh penalty was explained by the Commissioner in In re Green, 1991 S.L.D. 1103, a case in which many of the teacher's absences had been approved as sick leave. In affirming the removal, the Commissioner pointed out that while "a school district has a responsibility to teachers who are plagued with illness and have medical problems . . . the overarching responsibility of the Commissioner and the local Board of Education is to the children." Id. at 1117. More specifically, repeated and excessive absenteeism of regular teachers poses a threat to the integrity of the educational process with which the board is primarily concerned in that it "disrupt[s] the required continuity of instruction necessary to provide the opportunity for a pupil's maximum educational progress." In the Matter of the Tenure Hearing of Jerome Kacprowicz, 93 N.J.A.R.2d (EDU) 147, 153, affd., State Board of Educ., 93 N.J.A.R.2d (EDU) 604, aff'd., 95 N.J.A.R.2d (EDU) 105 (App. Div.). As the Commissioner more fully explained in In re Reilly, 1977 S.L.D. 403,

> The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the

> regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. . . . The entire process of education requires a regular continuity of instruction with a teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process.
>
> [Id. at 414]

Common sense dictates that the impact of a teacher's continued absences is even more pronounced in a case such as this, where the students have been classified as eligible for special education and require consistency in instruction and discipline even more than their typically developing peers.

The same analysis may be applied to a teacher's chronic tardiness and propensity for leaving early. The schedule of a school day is very precise, with timed periods and specific responsibilities of staff to direct, control, protect and supervise students. The importance of punctuality cannot be overemphasized in this environment. If a teacher is late in arriving or in assuming control of her students, the students are either left unsupervised or another staff member must abandon his or her duties to cover for the tardy staff member. Accordingly, chronic tardiness undermines a positive school environment. In the Matter of the Tenure Hearing of Claudia Ashe-Gilkes, School District of the City of East Orange, OAL Docket No. 7135-08. And while an occasional late arrival is unanticipated, unavoidable and usually beyond one's control, persistent tardiness is inexcusable and reflects irresponsibility on the part of the teacher. Ibid.

The points at which absenteeism and tardiness are judged to be excessive fall within the reasonable judgment and discretion of the local school district. Trautwein v. Bd. of Educ. of Bound Brook, 1980 S.L.D. 1539, certif. denied, 84 N.J. 469 (1980). When that judgment has been made, the teacher's conduct may constitute both "unbecoming conduct" and "incapacity" such as to amount to "just cause" warranting the

suspension or termination of the teacher. In re Kacprowicz, supra, 93 N.J.A.R. 2d at 151. See also West New York v. Bock, 38 N.J. 500, 522 (1962) ("[j]ust cause for dismissal can be found in habitual tardiness or similar chronic conduct.").

In the present case, True has not disputed the accuracy of the Board's attendance records and, having completed my own independent review of these documents, I find that she was absent from the classroom for a full day or half-day the following number of times:

School Year	Sick Days	Personal Days	Professional Days	Other
1998-1999	34 full days[14]	-	-	-
1999-2000	10 full days 1 half-day	1 full day	1 full day	-
2000-2001	8 full days	1 full day	2 full days	-
2001-2002	20 full days 1 half-day	3 full days	-	-
2002-2003	24 full days 4 half-days	3 full days	-	86
2004-2005	11 full days 1 half-day	2 full days 1 half-day	-	-
2005-2006	8 full days 2 half-days	2 full days 1 half-day	-	-
2006-2007	9 full days	2 half-days	-	-

[14] The 34 days are listed in Section V, Attendance and Punctuality, of the *Classroom Observation Report Dated March 17, 1999*. However, the narrative concerns only True's late arrivals and early departures, so it is possible some of the 34 days may be days she arrived late or left early. Since there was no testimony on this point and True did not dispute it, I will treat the days as absences, as pled in Charge I, Count 1, of the Sworn Tenure Charges.

	4 half-days			
2007-2008	12 full days 4 half-days	4 half-days	-	-
2008-2009	18 full days 4 half-days	4 full days	-	7
2009-2010	4 full days	1 full day	2 full days	-

In total, True was absent for a full or half day on 302 occasions, an average of 27.5 times per year.[15]

The focus, however, is not merely on the number of absences. In order for a board of education to terminate a tenured teacher for excessive absenteeism, it must demonstrate (1) that it considered both the number of days and the particular circumstances of the absences; (2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred; and (3) that the teacher received some warning that his or her supervisors were dissatisfied with the teacher's absences. In re the Tenure Hearing of White, 92 N.J.A.R. 2d (EDU) 157, 161 (citing Kelsey v. Bd. of Educ. of the City of Trenton, EDU 5773-88, Comm'r (May 11, 1989)).

Although the first prong of the test requires the Board to consider not only the total number of days, but also the particular circumstances surrounding the absences, the legitimacy of the absences bears little relationship to whether a termination for chronic or excessive absenteeism will be sustained. As the Commissioner has repeatedly held, "excessive absenteeism constitutes valid grounds for dismissal of a tenured teacher even if the absences are excused or caused by legitimate reasons of personal illness or were approved leave or sick days to which the teacher was entitled, even if the teacher's classroom performance is sufficient." State Operated Sch. Dist. of Jersey City v. Pellecchio, supra, 92 N.J.A.R.2d at 269-70; Orange Board of Education

[15] Since the Board could not produce any attendance records for the 2003-2004 school year, and the attendance records for 2009-2010 school year were current only as of March 8, 2010, the day the tenure charges were certified, the actual number of days True was absent during the tenure of her employment is unknown.

v. Grace Folger, OAL Dkt. No. 7379-99 (March 20, 2000), aff'd by Comm'r (May 15, 2000).[16]

Still, the record discloses that the Board was well aware of True's medical conditions, having taken them into consideration in granting her leaves of absence. For example, the minutes of the Board's regular meeting on September 23, 2002, disclose that it approved a leave of absence for "medical" reasons. Similarly, the minutes of its regular meeting on February 25, 2003, disclose that it approved a leave of absence for "medical/maternity." And the minutes of its regular meetings of August 11, 2003, January 29, 2004, and October 25, 2004, disclose that it granted her requests for "family leave," which, by definition, is "a period of leave [granted] upon the birth or placement for adoption of a child or serious health condition of a family member." N.J.S.A. 34:11B-2. It was only when her absences reached a level that it considered to be excessive that the Board had no alternative but to seek her dismissal.

The second prong of the test requires the Board to demonstrate the negative impact "that the absences have had on the continuity of instruction during the period of time in which the absences occur." In re the Tenure Hearing of White, supra, 92 N.J.A.R.2d at 161. However, that does not mean the Board must point to specific instances or examples supporting its contention; rather, it need only demonstrate the likely result of the absences. See, e.g., In the Matter of the Tenure Hearing of Jerome Kacprowicz, supra, 93 N.J.A.R.2d at 152 (common sense dictates that a teacher's continued absences will necessarily disrupt the required continuity of instruction students need to make maximum educational progress); In the Matter of the Tenure Hearing of Ronald Richardson, State Operated District of the City of Paterson, OAL Dkt. No. EDU 5560-97 (July 15, 1998) (student detriment may be found in a lack of continuity in student instruction); Board of Education of the School District of the City of Camden v. Florence Turner Rucker, 94 N.J.A.R.2d (EDU) 190 (detrimental impact may be found simply in the sheer number of absences that a teaching staff member has during a given period of time).

[16] All case citations using OAL Docket Nos. may be found at http://lawlibrary.rutgers.edu/oal/search.html.

In Orange Board of Education v. Grace Folger, supra, OAL Dkt. No. 7379-99, a case remarkably similar to the present matter, Folger, who, like True, taught special needs children in a self-contained classroom, was absent over 334 times in a five year period. Given that fact, the Commissioner held that a detrimental effect may be inferred when special education students are continually taught by substitute teachers instead of a special education teacher with years of experience. As the Commissioner reasoned, the students would never be able to make up that amount of lost instruction time and would need a great deal of remedial work. "From the students' point of view, it does not matter [why a teacher is absent]. The bottom line is whether the regularly scheduled teacher is present to teach or whether he/she is absent a majority of the time." Ibid. In the present matter, True's absences were particularly detrimental in that children with behavioral disorders require consistent discipline.

Finally, the third prong of the test in White requires the board to establish that it gave the teacher notice regarding his or her absences prior to the filing of the tenure charges. Specifically, the board must show "that there be some warning given to the employee that his or her supervisors were dissatisfied with the pattern of absences." Elizabeth Board of Education v. Celese Segall, OAL Dkt. No. EDU 1077-00 (February 25, 2000), aff'd by the Comm'r (April 17, 2000). The nature and sufficiency of the notice may vary widely, depending on the circumstances surrounding the particular absences.

In State Operated Sch. Dist. of Jersey City v. Pellecchio, supra, 92 N.J.A.R.2d 267, the Commissioner found that Pellechio had been provided with ample notice prior to the filing of tenure charges since he had been apprised in letters from his principal in June 1984, March 1985, and December 1985 that his absences were affecting the continuity of instruction to his students and that his increment might be withheld. See also Kochman v. Board of Education of the Borough of Keansburg, 94 N.J.A.R.2d (EDU) 154, aff'd, 95 N.J.A.R.2d (EDU) 212 (App. Div. 1995) (staff member's superiors must specifically convey their concerns that excessive absenteeism is having a negative impact on the continuity of instruction before the staff member's increment may be withheld).

However, the Commissioner has also held that warnings or conveyances of concern need not expressly state that the teacher's absenteeism has had or may have a negative impact on the continuity of instruction; rather, they must simply warn the teacher that his or her repeated absences are a matter of concern to the administration. For example, in In the Matter of the Tenure Hearing of Jerome Kacprowicz, supra, 93 N.J.A.R.2d 147, the court held that a notation in the teacher's annual performance report that he needed to improve his attendance was sufficient. In fact, in Board of Education of the School District of the City of Camden v. Florence Turner Rucker, supra, 94 N.J.A.R.2d (EDU) 190, the court held that warnings are not even necessary when the absences are for legitimate medical reasons because neither sanctions nor warnings can be expected to produce an improvement in the teacher's attendance.

Although warnings were not necessary in the present matter, given the number of absences and the fact that they were for legitimate medical reasons, True knew or certainly should have known that they were a source of concern for the administration. For example, in Section V, Attendance and Punctuality, of her *Classroom Observation Report Dated March 1, 2005*, Keith Ellerbe gave her a 2 with the comment, "Mrs. True needs to improve on punctuality and attendance." Or, as he put it during his post-observation conference, "she [was] attending below standard, the norm."

The correlation between regular teacher attendance and student progress was also included in Section V, Attendance and Punctuality, of the *Classroom Observation Report Dated March 27, 2009*,[17] that True received. More specifically, the Board addressed the importance of attendance as follows:

> The Willingboro Board of Education has the responsibility to encourage daily staff attendance. The Willingboro BOE also recognizes that a direct relationship exists between a teacher's daily attendance and a student's academic performance. Therefore, when 3 or more occasional absences occur, meet with that staff member to discuss the reason(s) for their absences.

[17] Prior to 2009, the standard Classroom Observation Report instructed that if a teacher's "Cumulative Absences or Latenesses are Equal to or Below the Following Guidelines, Rating is a '3.' 1. September 1-October 31, 4 days; November 1-January 15, 7 days; January 16-March 15, 10 days; 4. March 16-June 30, 13 days."

[Ibid.]

True's principals—Keith Ellerbe, Nadine Tribbett and Barbara Doneghy—all testified that they had such meetings with her at one time or another.

Of even greater concern to the administration was True's chronic and excessive tardiness throughout the tenure of her employment. As early as March 17, 1999, True was cautioned by Alma Singleton about her frequent late arrivals and early departures. A few years later, on March 1, 2005, Keith Ellerbe told her she had to improve both her punctuality and attendance. When it continued unabated, Ellerbe sent her a letter dated November 29, 2005, "as another means of bringing your attention to what I hope will not be a continuing problem of tardiness."

Although the problem got "somewhat" better for the remainder of the 2005-2006 school year, as of April 27, 2007, True had been tardy 16 times during the 2006-2007 school year. And as of March 27, 2009, she'd been tardy 8 times during the 2008-2009 school year. Shortly thereafter, the problem became so pronounced that Barbara Doneghy sent her a memo asking her to attend a meeting with her union representative to discuss, among other things, an unauthorized early departure and failure to sign out on April 2, 2009, and a failure to sign in the following morning on April 3, 2009. The meeting was held, as scheduled, on April 3, and Doneghy sent her a memo on April 6, 2009, summarizing their discussion. Among other things, she was "again told to arrive on or before 8:30 [a.m.]," to sign in with the correct time, and otherwise adhere to her contractual working hours by not leaving early. Doneghy also told her that she would be recommending that True's increment be withheld.

Still, True's chronic late arrivals and early departures remained unabated until they ultimately reached critical mass on May 28, 2009, when she left early without permission and without signing out. On the following morning, May 29, she arrived at 8:47 a.m., yet signed in as arriving at 8:37 a.m. What is more, she refused to attend a second meeting with Doneghy and her union representative at that time.

Given every opportunity to offer an explanation for her seeming inability or refusal to comply with her contractual working hours, True said little and did not help herself. Although she admitted to having been "occasionally late," she did not elaborate and, instead of taking responsibility for her actions, attempted to place the blame on Doneghy, who "wouldn't let [her] sign in." Similarly, while she admitted to having been absent for a significant amount of time when she took a maternity leave and subsequent family leave, she again tried to "reverse the charges," by placing the blame on the administration for failing to tell her the leaves of absence could have an adverse impact on her employment. If anything, her flat affect and failure to exhibit any emotion, even when it might have been expected and appropriate, gave one the impression that she either did not care about these proceedings, or was resigned to what she believed would be the probable outcome.

Based on the foregoing, I conclude that the Board has met its burden of establishing by a preponderance of the credible evidence that True's chronic and excessive absenteeism and tardiness constituted incapacity, unbecoming conduct, or other just cause warranting dismissal from her position of teacher in the Willingboro School District.

In Charge III, Counts 2 – 5, the Board alleges that True addressed her students in an inappropriate, demeaning and unprofessional manner by calling them names; left some of her students unattended in a hallway during classroom instructional time; and pushed her students, thereby engaging in conduct constituting unbecoming conduct, insubordination and/or other just cause warranting dismissal.

"Unbecoming conduct" is a broadly defined, elastic term, encompassing any conduct that has a tendency to destroy public respect for government employees and confidence in the operation of public services. Karins v. Atl. City, 152 N.J. 532 (1998). A finding of unbecoming conduct does not require a violation of any specific rule or regulation, but rather may be based on an 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." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). The

school district's legitimate expectation that its employees conduct themselves in a manner that will instill public confidence becomes heightened where, as here, the staff member is employed as a special education teacher. In that capacity, she is a public employee

> . . . to whom the people have entrusted the care and custody 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.
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> [In the Matter of the Tenure Hearing of William Thomas, OAL Dkt. No. EDU 5908-07, (quoting 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).]

As the Hon. Joseph Martone, A.L.J. stated in School Dist. of Parsippany-Troy Hills, Morris County v. Carl A. Hess, III, 97 N.J.A.R.2d (EDU) 34, "the Commissioner of Education has often stressed '. . . that those persons who enter the teaching profession exercise a significant influence upon those they teach and must exercise a high degree of exemplary behavior.'" Id. at 51 (citing In re Tyler, 12 N.J.A.R. 297).

It should be axiomatic that a teacher may not, under any circumstances, engage in name-calling or the use of other derogatory language towards his or her students. In an analogous case, In the Matter of George Zofchak, School District of the City of Trenton, OAL Dkt. No. EDU 146-02, a tenured teacher was dismissed for, among other things, calling his students "monkeys," "gorillas," "f***ing pigs" and "f***ing animals," which was deemed to constitute unbecoming conduct.

Similarly, in the present matter, the Board has alleged that True was overheard telling her students, "You're animals," or "You're animals, you're nothing but animals, [and] I am not a zoo-keeper." She was also overheard calling her students "stupid" and "crybabies;" telling them that her children were smarter than they were; and telling one student that he was going to end up in jail before he was ten years old.

The Board's proofs included question and answer forms completed by then-Director of Special Services Thomas Sullivan following his interviews of four of True's students. However, Sullivan did not testify and was not, therefore, subject to cross-examination. Instead, there is only Hespe's vague recollection of discussions he had with Sullivan before and after the interviews were conducted. Since there is no other evidence concerning the events that gave rise to the interviews, much less the manner in which they were conducted, the statements recorded in these forms are unreliable hearsay.

The Board's proofs also included testimony by three of the students who were interviewed by Sullivan. In evaluating the testimony of these student witnesses, I am guided by the Commissioner's observation as to the caution that should be employed:

> * * * It is the opinion of the Commissioner that testimony of children, especially of those ten years of age, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admissible, the children would be at a teacher's mercy because there is no way to prove certain charges except by the testimony of children.
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> [In the Matter of the Tenure Hearing of Joseph N. Cortese, 1972 S.L.D. 109, 118-119 (quoting Palmer v. Board of Education of Audubon, 1939-49 S.L.D. 183, 188)]

Ironically, with the possible exception of A.L., who testified that True sometimes screamed at him so loudly that it hurt his ears, the three student witnesses proved to be of little help to the Board. Be that as is may, all three were under the age of ten and, with the possible exception of A.L., who saw the witness stand as his stage, seemed to be overwhelmed by the entire experience—looking down at the floor and speaking haltingly in a very quiet voice. The first didn't like some of the things True called his friends, but couldn't remember what they were. The second couldn't recall hearing True say anything he didn't like. And then there was A.L., who admitted to getting into

screaming matches with True, but couldn't remember her saying anything bad to or about his friends. Therefore, at the end of the day, a canvas of their testimony as a whole casts doubt on their ability to accurately remember and relate how True interacted with the students in the class.

On the other hand, Mary Grassie, Sheila Francis, and Carlin Gonzalez had very specific recollections of True's name-calling and use of other demeaning language. Moreover, True herself testified that she did not know whether or why any of them would have had a reason to lie. This was particularly true in the case of Sheila Francis, with whom she enjoyed a very close, mother-daughter-like relationship. And the fact that these witnesses could not name the specific students to whom any one comment or name may have been directed is of no moment—that she was heard using such language in her classroom is enough.

> Teachers hold a sacred position in our society. The teacher provides his students not only book knowledge, but also social and moral values . . . Thus, teachers must be held to a high standard of conduct because they have direct conduct with molding habits and nurturing young minds. Suffice it to say, children mimic what they see and they learn by example.
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> [In re Tenure Hearing of Tally, 94 N.J.A.R.2d (EDU) 395]

Based on the foregoing, I conclude that the Board has met its burden of establishing by a preponderance of the credible evidence that True's use of name-calling and other demeaning language toward her students constituted conduct unbecoming or other just cause warranting dismissal from her position of teacher in the Willingboro School District.

In Charge III, Count 1, the Board alleges that on January 7, 2010, two of True's students who were left unattended engaged in a physical altercation in the hallway outside of her classroom, while she remained in the classroom "oblivious" to the fight. True does not deny that she was still in her classroom when the two boys were in the hallway fighting, as testified to by Mary Grassie, Tamera Boltniew, and Heather Boyle.

Rather, she insists that she could not take any action to stop the fight because to do so would have meant leaving her remaining students in the room unattended. Therefore, she went into the "wardrobe" in order to call the office on the intercom and get the principal or someone else to go into the hallway and stop the fight.

A careful review of her testimony suggests that her explanation was made out of "whole cloth." Although she stated that she went into the wardrobe and called the office for help, she later testified that she thought if only she could hurriedly pack up the other students and bring them out with their things, she'd then be able to get the ones who'd left without leaving any of the remaining children unwatched. However, in the short amount of time that reportedly elapsed, she had only enough time to do one or the other, not both. She did not say that she first called the office and then hurriedly packed up the other children so she could take them with her.

What is more, True was unable to identify the person with whom she spoke on the intercom. And, assuming *arguendo*, that she did, in fact, call the office, it stands to reason that someone, be it Doneghy or someone else, would have responded to the hallway or at least called her back to see if she still needed assistance. However, there is no evidence that anyone other than Grassie, Boltniew, Boyle, and possibly Gonzalez, was present, and True did not mention getting a return call from the office.

Finally, despite the proximity of the wardrobe to the classroom door, True stated that she did not go to the door to see where the boys had gone because she "didn't know how far or where the other students were." Yet, given the tumult that, to all accounts, was right outside her door, and certainly sufficient to attract Grassie's attention some twenty-five feet away, it is hard to believe she had no idea where they were or, even worse, any interest in trying to find out. Fortunately, no one was hurt.

Based on the foregoing, I conclude that the Board has met its burden of establishing by a preponderance of the credible evidence that True's failure to properly supervise the students in her charge constituted unbecoming conduct or other just

cause warranting dismissal from her position of teacher in the Willingboro School District.

In Charge III, Count 6, the Board alleges that during the course of the 2009-2010 school year, True "made inappropriate physical contact with students by pushing them." However, other than the children's accounts in the aforementioned question and answer forms completed by Thomas Sullivan, the Board has not introduced any competent credible evidence establishing that True engaged in such conduct. Accordingly, I conclude that Count 6 should be and is hereby dismissed.

Finally, in Charge IV, the Board alleges that True disobeyed an explicit directive she received from Interim Superintendent Hespe that, upon her transfer to Memorial School, she refrain from further contact with the staff and students at Twin Hills Elementary School. Specifically, the Board alleges that True sent a text message to Carlin Gonzalez and Sheila Francis accusing them of lying.

It is well settled law that willful disobedience of a substantive nature by a tenured teacher towards a supervisor constitutes insubordination. In the Matter of Tenure Hearing of Ingram, OAL Dkt. No. 9068-01, aff'd Comm'r (June 27, 02); Bd. of Educ. of the Borough of Edgewater v. Scarpignato, 1983 S.L.D. 311, 317, aff'd, State Bd. of Educ., 1983 S.L.D. 338, aff'd, App. Div., 1984 S.L.D. 2013. See also In re Bradley, 1990 S.L.D. 790, aff'd, State Bd. of Educ., 1991 S.L.D. 2521 (failure to follow an administrative directive can constitute insubordination and unbecoming conduct by a teacher).

In the present matter, there is more than ample proof that True willfully refused to comply with the directive she received from Hespe, as the text message speaks for itself. Adding insult to injury, her explanation or excuse was that she "understood [Hespe's directive] to be that I could not have any contact or talk to them when I went to get my things. I was just to go in there quietly and get my things so I wouldn't disturb anybody and that I couldn't talk to them. . . . I didn't consider texting to be talking." While I do not for a moment accept that explanation, as texting is but another way of

communicating with an individual, even if it were so, there can be no argument that texting is contacting another person.

Moreover, lest there be any doubt about her intent, the incident of May 29, 2010, speaks volumes. True not only refused to attend a meeting with Doneghy and her union representative, but also turned her back on Doneghy and started walking away. Then, when Doneghy followed her and directed her to come back, she failed to comply with her request, walked out the side door, and left. Although not charged, this incident certainly could have been added as a second count to Charge IV.

Based on the foregoing, I conclude that the Board has met its burden of establishing by a preponderance of the credible evidence that True's failure to comply with Interim Superintendent Hespe's directive constituted insubordination, unbecoming conduct or other just cause warranting dismissal from her position of teacher in the Willingboro School District.

Accordingly, I conclude that Charge 1, Counts 1 through 11; Charge II, Counts 1 through 3; Charge III, Counts 1 through 5; and Charge IV should be and are hereby sustained. Charge III, Count 6 is dismissed. It is therefore ordered that Randi True be dismissed as a teacher in the Willingboro 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.

June 29, 2011

DATE

ISRAEL D. DUBIN, ALJ

Date Received at Agency: 6-29-11 JUN 30 2011

Date Mailed to Parties:

/lam

EXHIBITS

Joint Exhibit

J-1 Stipulation of Facts

For Petitioner:

P-1 Classroom Observation Report for March 17, 1999
P-2 Attendance Record for 1999-2000 School Year
P-3 Attendance Record for 2000-2001 School Year
P-4 Attendance Record for 2001-2002 School Year
P-5 Attendance Record for 2002-2003 School Year
P-6 Attendance Record for 2004-2005 School Year
P-7 Attendance Record for 2005-2006 School Year
P-8 Attendance Record for 2006-2007 School Year
P-9 Attendance Record for 2007-2008 School Year
P-10 Attendance Record for 2008-2009 School Year
P-11 Attendance Record for 2009-2010 School Year
P-12 Annual Performance Report for 2006-2007 School Year
P-13 Classroom Observation Report of March 27, 2009
P-14 Everett Letter to True dated July 31, 2009
P-15 Ellerbe Letter to True dated November 29, 2005
P-16 Doneghy Memo to True dated April 3, 2009
P-17 Doneghy Memo to True dated April 6, 2009
P-18 Doneghy e-mail to Hespe, *et als* with attachments
P-19 Grassie Memo dated January 11, 2009, with supporting affidavit
P-20 Supplemental Grassie Affidavit dated February 16, 2010
P-21 Frances/Gonzalez Memo dated January 7, 2010, with supporting affidavits
P-22 Student (T.K.) Questionnaire dated February 1, 2010, with supporting affidavit

P-23 Student (T.W.) Questionnaire dated February 1, 2010, with supporting affidavit

P-24 Student (A.L.) Questionnaire dated February 1, 2010, with supporting affidavit

P-25 Student (T.K.) Supplemental Questionnaire dated February 1, 2010, with supporting affidavit

P-26 Student (J.L.) Questionnaire dated February 1, 2010, with supporting affidavit

P-27 Hespe Affidavit dated February 8, 2010

P-28 Doneghy e-mail to Marcellus, *et als.*, dated January 19, 2010

For Respondent:

R-1 October 27, 1998 Classroom Observation Report; Conference Date November 5, 1999

R-2 March 17, 1999 Classroom Observation Report; no conference date listed

R-3 October 22, 1999 Classroom Observation Report; Conference Date February 28, 2000

R-4 March 21, 2000 Classroom Observation Report; Conference Date June 19, 2000

R-5 June 5, 2000 Classroom Observation Report; Conference Date June 7, 2000

R-6 September 19, 2000 and October 24, 2000 Classroom Observation Reports; Conference Date October 30, 2000

R-7 March 3, 2001 Classroom Observation Report; no conference date listed

R-8 March 28, 2001 Classroom Observation Report; no conference date listed

R-9 March 1, 2005 Classroom Observation Report with 2005-2006 Personal Improvement Plan (PIP)

R-10 February 26, 2007 Classroom Observation Report; Conference Date March 1, 2007

R-11 March 27, 2009 Classroom Observation Report; Conference Date listed as March 9, 2009
R-12 2000-2001 Annual Performance Report
R-13 2001-2002 Annual Performance Report
R-14 2004-2005 Annual Performance Report
R-15 2006-2007 Annual Performance Report with 2006-2007 PIP
R-16 2008-2009 Annual Performance Report
R-17 Dallah Letter to True dated April 24, 2001
R-18 Hopkins Letter to True dated February 26, 2003
R-19 True Letter to Hopkins dated July 29, 2003
R-20 Hopkins Letter to True dated January 8, 2004
R-21 Petitioner's Answers to Respondent's Interrogatories

LIST OF WITNESSES

For Petitioner:

Keith Ellerbe
Terrell Everett
Francis Turner
Barbara Doneghy
David Hespe
Nadine Tribbett
Mary Grassie
Tammy Boltniew
Heather Boyle
Sheila Frances
Carlin Gonzalez
T.K.
T.W.
A.L.

For Respondent:

Randi True

321-11

OAL DKT. NO. EDU 7361-11
AGENCY DKT. NO. 160-6/11

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION ON
V.	:	APPLICATION FOR EMERGENT RELIEF
LESTER RICHENS, STATE MONITOR,	:	
RESPONDENT,	:	
AND COREY LOWELL,	:	
INTERVENOR.	:	

The record of this matter, including the audio recording of the July 6, 2011 hearing at the Office of Administrative Law, and the order denying petitioner's motion for emergent relief have been reviewed.[1] For the reasons set forth by the Administrative Law Judge as the basis of his order, the Commissioner 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.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8|16|11
Date of Mailing: 8|18|11

[1] Petitioner's exceptions were not considered, as the regulations governing administrative proceedings do not provide for same.

[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

ORDER DENYING
EMERGENT REFLIEF
OAL DKT. NO. EDU 7361-2011
AGENCY DKT. NO. 160-6/11

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,
Petitioner,
v.
LESTER W. RICHENS, STATE MONITOR,
Respondent,
And
COREY LOWELL,
Intervenor.

Nicholas Celso, III, Esq., for petitioner Asbury Park Board of Education (Schwartz, Simon, Edelstein & Celso, attorneys)

Sidney A. Sayovitz, Esq., for respondent Dr. Lester W. Richens, State Monitor (Schenck, Price, Smith & King LLP attorneys)

Kelly Estevam, Esq. for respondent Corey Lowell, Intervenor (Capehart, Scatchard, attorneys)

BEFORE **JOHN SCHUSTER III,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter the City of Asbury Park Board of Education (petitioner) challenges the decision of Dr. Lester W. Richens, State Monitor, (respondent) which overrode the petitioner's decision not to award a renewal contract for the 2011-2012 school year to Ms. Corey Lowell, the District's Business Administrator and Board Secretary. On June 22, 2011, petitioner filed a Petition of Appeal requesting emergent relief. The emergent relief application was transmitted to the Office of Administrative Law (OAL) on June 27, 2011 as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 14F-1 to -13. Ms. Lowell submitted a Notice of Motion requesting the right to intervene. The motion was granted. Hereafter all reference to the positions and arguments of Dr. Richens or respondent include the additional positions and arguments of intervener. Oral argument was held on the emergent relief application on July 6, 2011 and at the conclusion of oral argument the record on that application was closed.

DISCUSSION

The authority to grant emergent relief is governed by the seminal case of Crowe v. DeGioia, 90 N.J. 126 (1982). That case sets forth the standard by which emergency relief can be granted. In order to do so, the petitioner must demonstrate all of the following: (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.

At issue in this case is the renewal of the contract of Ms. Corey Lowell to serve as Business Administrative and Board Secretary in the 2011-2012 school year. It is noted that Ms. Lowell will receive tenure status in her position on August 26, 2011 if her employment contract is renewed. The Board chose not to renew her contract under circumstances set forth below and Dr. Richens overrode that decision and retained Ms. Lowell in her position for the upcoming year.

Petitioner claims it will suffer irreparable harm if Dr. Richens action remains in effect. It argues that irreparable harm, is any harm that cannot be redressed with monetary damages and is substantial and immediate. Since Ms. Lowell will acquire tenure on August 26, 2011, if continued in her position, then she will only be able to be dismissed for neglect, misbehavior or other offense. Petitioner also argues that Ms. Lowell's performance is currently less than adequate as demonstrated by the fact that the current state audit has some continuant negatives and the State Monitor is still assigned to monitor district activities. Dr. Richens argues that any harm claimed by petitioner is speculative and therefore not irreparable. In addition, he states that before tenure sets in, a final decision will be made by the Commissioner of Education on this issue and therefore there is no immediate harm to the petitioner. Finally, it argues, that there is no demonstration of fact set forth by the petitioner of the allegation that Ms. Lowell's performance is less than adequate. Dr. Richens argues that he has found just the opposite in that the district has made substantial fiscal improvements since Ms. Lowell has taken over as Business Administrator and should therefore continue implementing the programs she initiated to alleviate the remainder of the fiscal deficiencies she inherited. The intervenor joined in the argument of Dr. Richens and affirms that Ms. Lowell is performing her duties exceptionally well and the tenure laws provide the District with adequate relief should that not occur in the future.

Petitioner next argues that the legal right underlying petitioner's claim is settled in that N.J.S.A. 18A:11-1 indicates that the Board has the right to oversee the operations of the district whereas Dr. Richens, the State Monitor, is limited only to dealing with fiscal deficiencies. Since this is a non-fiscal matter, Dr. Richens exceeded his authority. It states that the basis for Dr. Richens' position, is that the petitioner cannot override a superintendent's recommendation to renew Ms. Lowell's contract and the Board did not

follow the statutory requirements by complying with the May 15, 2011 notice requirements as set forth in N.J.S.A. 18A:27-10 and 11. In addition, petitioner argues that the Open Public Meetings Act was violated and the May 11, 2011, meeting where Ms. Lowell was reappointed was illegal because it was not a regular meeting as is required by applicable statute. Dr. Richens argues first that Ms. Lowell has a potential claim through litigation if her contract was not renewed because of the irregular procedures followed by the Board in its May 4, 11 and 25 meetings. The reorganization meeting was held on May 4, 2011 and issues of personnel were continued to May 11, 2011. On that date, Ms. Lowell was reappointed to her position as Business Administrator for the 2011-2012 school year and as Board Secretary for thirty days. Subsequently on May 25, 2011, another meeting was held wherein the petitioner rescinded Ms. Lowell's appointment as Business Administrator, claiming that the Board was disorganized and not fully aware of what it was doing when the renewal was voted upon. Respondent says Ms. Lowell's appointment and then retraction of that action creates a potential for successful litigation by Ms. Lowell against the district as it is not clear as to whether or not her appointment was valid, invalid or subject to a reversal by the Board. It follows therefore, that if Ms. Lowell is terminated from her position and is successful in her potential litigation, there would be substantial monetary award granted to her which would adversely affect the district's financial condition and could potentially include a reinstatement of her position along with accumulated benefits. This situation Dr. Richens argues is remarkably analogous to the Commission of Education's decision in Rankins v. Board of Education of the City of Pleasantville, http://lawlibrary.reutgers.edu/oal/html/initial/edu6918-09_1-html, which held on October 26, 2010 that "the exposure to potential legal liability for a school district that is plagued with financial shortcomings is a valid fiscal rationale for making a personnel decision regarding a non-tenured staff member. Therefore, the Commission finds that the Monitor's decision was related to the fiscal management of school funds, and thus falls within the statutory authority of the State Monitor." The respondent also argues the procedural deficiencies alleged are a red herring and not the issue in this matter which is whether or not the State Monitor acted properly. The respondent adds that any violation of the Open Public Meetings Act does not create a void activity but rather one that is voidable by aggrieved party and the irregularities in the May meetings were self-

created and cannot be used by the petitioner to accomplish its agenda. Rather, the only person that can claim that the procedures were improper is Ms. Lowell who would have been the aggrieved party based on the failure to properly advertise the May 11, 2011 meeting.

As to the requirement that the petitioner must demonstrate it has a likelihood of prevailing on the merits on the underlying claim petitioner argues the fiscal monitor cannot interfere with matters that do not have a direct or substantial fiscal consequence. It continues that the monitor's position is based on a flawed analysis of the authority to override the superintendent's recommendation in personnel matters as well as a misinterpretation of the requirements concerning the May 15, 2011 notice procedure as set forth in N.J.S.A. 18A:27-10, 11 and 12. It continues that only the Board of Education has the power to terminate non-tenured staff pursuant to N.J.S.A. 18A:27-4.1. Dr. Richens counters that pursuant to N.J.S.A. 18A:7A-55(a), the State Monitor has direct oversight of districts' business operation and personnel matters. He also cites the Assembly Appropriation Statement that says the "State Monitor is appointed to provide direct oversight of the Board of Education's business operations and personnel matters." Respondent goes on to say that N.J.S.A. 18A:7A-55(b) gives the monitor the authority to (1) oversee fiscal management and expenditures of a school district including payment of the district's bills and claims which Ms. Lowell may have as a result of successful litigation. He also has the power to (4) oversee all district staffing, including the ability to hire, promote and terminate employees as well as (5) override the Board of Education on any matter set forth in this subsection. Based on those sections, Dr. Richens argues that he has total authority to deal with personnel matters and petitioner is incorrect when it says that his decisions are limited to those that have direct or substantial fiscal consequences. He argues there is nothing in the enabling statute which enumerates his authority to limit personnel matters to those with direct or substantial fiscal consequences. In addition he says that putting aside the claim of a flawed legal analysis as to procedures involved in the potential litigation, he did a thorough investigation of Ms. Lowell's performance prior to making his decision. He states he met with the District's superintendent who recommended Ms. Lowell's renewal of employment, Mr. Glenn Forney, Acting Director, New Jersey Department of

Education, Division of Finance and former State Monitor, Bruce Rodman, who both concurred that Ms. Lowell should be continued in her position. In addition, Dr. Richens reviewed the various audits that have been conducted both before and during Ms. Lowell's employment and her evaluations and he confirmed her exceptional performance as business administrator. He argues that in order for petitioner to be successful it would have to show that his conduct in renewing Ms. Lowell's contract would constitute an arbitrary and capricious act and based on her performance that cannot be done. He also argues that maintaining continuity in the position of business administrator by one who is performing admirably is a decision concerning fiscal management and one that is clearly within his authority as it directly concerns the Board of Education's business operations. In addition, he argues the Commissioner of Education's decision in Rankins v. Board of Education of the City of Pleasantville, supra, states "there is no doubt that the State Monitors have the power to make personnel decisions for non-tenured staff members when those decisions are necessary to solve the district's fiscal and audit deficiencies. N.J.S.A. 18A:7A-55. Further, in order to achieve fiscal stability state monitors have the authority to override the vote of the Board of Education. N.J.S.A. 18A:7A-55(b)(5)." Finally, Dr. Richens argues that his basis for maintaining Ms. Lowell in her position was based on a review of her performance which demonstrated an effective effort in dealing with the district's financial condition and therefore his actions were not arbitrary and capricious but rather a demonstration of appropriate motives. Finally, petitioner argues that when the equities and interest of the parties are balanced, it will suffer a greater harm than Dr. Richens. It argues that respondent rushed to a decision without consultation with the Board nor decisions regarding Ms. Lowell's appointment. As such, it claims to be "disenfranchised" with regard to Dr. Richens' decision. Respondent counters that the pertinent statutes regarding the state monitor do not require any effort to collaborate with the Board nor have discussions or negotiate with the Board for a common understanding. Boards of education sometime make decisions for other than fiscally efficient reasons and if they did not do so there would be no need for a state fiscal monitor to be appointed. Dr. Richens argues that as to the equities involved, it is a monitor's obligation to primarily consider the fiscally responsive consequences of its actions and sometimes disenfranchisement is a collateral affect of making those proper

decisions. Therefore, Dr. Richens concludes that granting petitioner its relief could cause him to suffer a greater harm because the action could result in another fiscal deficiency which he is charged with preventing.

LEGAL ANALYSIS

The issue in this matter is whether the Asbury Park Board of Education is entitled to emergent relief reversing the decision of its State appointed monitor rejecting the non-renewal of the contract of the district's business administrator by that Board. For petitioner to be successful, it must meet all four (4) prongs of the Crowe v. Degioia, 90 N.J. 126 (1982) test.

1. Irreparable harm

Petitioner claims it will suffer irreparable harm because the consequence of Ms. Lowell's renewal will grant her tenure status and therefore it will be forced to retain an employee it believes to be performing in a less than adequate fashion. Because a business administrator only holds its position under tenure during good behavior and efficiency and can be dismissed for neglect, misbehavior or other offense, I **CONCLUDE** the Board has a means to address its concerns. Therefore, the harm it is claiming by tolerating the monitor's choice of business administrator for the upcoming year is only temporary, and consequently not irreparable should Ms. Lowell not perform efficiently or neglectful in the future.

2. Petitioner's legal right is settled

Petitioner claims, under the circumstances in this case, it has the right to non-renew Ms. Lowell's contract as business administrator/board secretary. Had a monitor not been appointed by the state to oversee the District's operations I would agree. However, N.J.S.A. 18A:7A-55 b.(5) and (4) give the monitor the power to overturn a Board's decision and renew a contract of employment. There is an open question as to whether a monitor's personnel decisions as set forth in subsection (4) above have to be related to fiscal issues and if so the extent of that relationship. However **I CONCLUDE**

that such a relationship exists because of the potential litigation that might have arisen by the Board's action (See Rankins v. Board of Education of City of Pleasantville, supra.) envisioned by Dr. Richens as well as his finding that Ms. Lowell was performing quite well in her position. In addition a fiscal relationship exists because a monitor must oversee the fiscal management of a district and must have confidence with its business administrator whose charge is to implement the fiscal affairs. Therefore, under these circumstances petitioner's rights to not exceed the authority of the monitor.

3. Likelihood of success on the merits

See number 2 above for the reasons **I CONCLUDE** the monitor did not exceed his authority and therefore petitioner has not met its burden of showing an eventual likelihood of success on the merits.

4. Weighing of interests

I **CONCLUDE** the monitor has a greater interest in deciding whether the current business administrator should continue to be part of his financial management team then the petitioner. Dr. Richens, after a thorough review, determined Ms. Lowell was performing her duties admirably. He clearly has confidence in her. The petitioner has not demonstrated how it might suffer a greater harm than Dr. Richens if his decision is overturned.

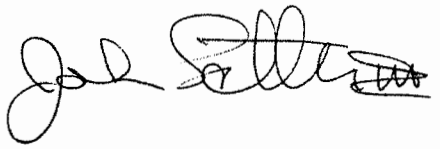
CONCLUSION

For the reasons set forth above, I **CONCLUDE** petitioner has not met the burden of demonstrating its entitlement to emergent relief.

ORDER

I ORDER petitioner emergent relief application be **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 7, 2011
DATE

JOHN SCHUSTER III, ALJ

lz

322-11

#322-11

RAYMOND RUIZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, 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.

The ALJ found, *inter alia,* that: the threshold issue in this case is whether the petitioner earned tenure as a teaching staff member in accordance with *N.J.S.A.* 18A:28-5; to earn tenure, an employee must work for at least three consecutive years and hold a "proper certificate in full force and effect"; petitioner worked for more than three years as a SAC, but held only a provisional certificate, which is not a "proper certificate" for the position; petitioner's failure to earn a standard certificate as a SAC is fatal to his tenure claims; accordingly, the petitioner was not employed under tenure at the time of his reduction in force; and it is not necessary to reach petitioner's 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. The ALJ denied petitioner's appeal and dismissed the case.

Upon a thorough and independent review of the record, the Commissioner remanded the matter to the OAL for factual findings concerning whether or not petitioner satisfied the conditions of provisional certification and the requirements for standard certification. More specifically, the Commissioner found that although prior case law – *i.e., Anson v. Bridgeton Bd. of Ed.*, 1972 *S.L.D.* 638 – held that service under provisional certification might count toward tenure, such tenure was contingent upon the employee's satisfaction of the conditional requirements of that provisional certification. As regards that issue, the record before the Commissioner was inconclusive.

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, 2011

OAL DKT. NO. EDU 8187-10
AGENCY DKT. NO. 153-7/10

RAYMOND RUIZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

This controversy requires an examination of whether petitioner has achieved tenure in respondent's district, which tenure would give him the right to positions held by non-tenured district employees. After review of the Initial Decision of the Office of Administrative Law (OAL) and the record,[1] the Commissioner remands the case to the OAL for further factual findings as discussed *infra*.

Petitioner possesses a standard Educational Services certificate with a School Psychologist endorsement. (Joint Exhibit J-10) Having also been issued a Certificate of Eligibility (CE) to seek employment as a Substance Awareness Coordinator (SAC), Joint Exhibit J-5,[2] petitioner applied for and was accepted to fill such a position in respondent's district,

[1] It was determined by the Administrative Law Judge (ALJ) and parties on January 10, 2011 that this matter was appropriate for summary decision in lieu of a plenary hearing.

[2] The CE states that "[t]he 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, performance evaluation and professional coursework." (J-5.)

effective September 1, 2006. (The credential for Substance Awareness Coordinator is also an endorsement on the educational services certificate.)[3]

In June of 2007, respondent and petitioner executed a New Jersey Department of Education (Department) form entitled "Substance Awareness Coordinator Residency Agreement" (Residency Agreement) wherein respondent consented to provide petitioner with supervised professional experiences and professional guidance and evaluation for six months. (Joint Exhibit J-6) In consideration of this commitment by respondent, the Department agreed, *inter alia,* to issue petitioner a provisional license valid for one year – beginning September 1, 2006. (*Ibid.*)[4]

The Commissioner assumes that the Residency Agreement was, belatedly, executed in connection with *N.J.A.C.* 6A:9-13.2(e). That regulation mandates that a district which hires an individual with a certificate of eligibility for a SAC endorsement must 1) apply for a provisional certificate for that employee and 2) see to it that he or she receives instruction, mentoring and evaluations via a State-approved training or residency program. The Commissioner notes, however, that Joint Exhibit J-6 does not contain the required "State Approval Signature." Nor is there any evidence in the record that a provisional certificate was actually secured for petitioner during the 2006-2007 school year. Joint Exhibits J-8 and J-9 indicate that the original issue date for petitioner's provisional certificate was August 2007 – at which time petitioner had already worked in the SAC position for a year.

Notwithstanding the absence of the signature of a Department representative on the Residency Agreement, the record suggests that respondent provided petitioner with a

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[3] Petitioner's employment in the SAC position continued through the 2009-2010 school year. (Joint Exhibits J-1, J- 2, J-3 and J-4)

[4] It would appear that the form used for Joint Exhibit J-6 may have been out-of-date. More specifically, beginning in 2004, provisional certificates were issued for two-year terms.

residency program. The individual assigned to supervise the program submitted a favorable evaluation of petitioner on October 9, 2007. The evaluation included 1) an express statement that petitioner's residency program had been completed and 2) a recommendation that petitioner be issued a license. (Joint Exhibit J-7) The Commissioner notes that the date of October 9, 2007 is less than six months after the date of the parties' signatures on the Residency Agreement (Joint Exhibit J-6), suggesting that the residency program may have begun before the date of the partially executed Residency Agreement.

It appears that the Department did not accept respondent's October 2007 recommendation for petitioner's licensure as a SAC. Joint Exhibit J-8 denotes that in December of 2009 respondent applied for a renewal of petitioner's provisional certificate, and Joint Exhibit J-9 confirms that such a renewal was issued in August 2009, with expiration in July 2011. Insofar as provisional certificates may only be renewed for one two-year term, *N.J.A.C.* 6A:9-6.2, it appears that petitioner's provisional certification in respondent's district has now expired.[5]

The instant petition was filed in the wake of respondent's April 28, 2010 notice to petitioner that due to a reduction in force he would not be rehired for the 2010-2011 school year. Petitioner asserts that in consequence of his four years of service under a provisional certificate in the SAC position he earned tenure in respondent's district. He further maintains that, pursuant to *Dennery v. Board of Education of the Passaic County Regional High School District #1,* 131 *N.J.* 626 (1993), his tenure rights extend to the standard endorsement for school psychologist that he holds on his educational services certificate. Relying on his contention that he holds such extended tenure rights, he reasons that in 2010 he was entitled to one of two school psychologist

[5] The Commissioner takes official notice that in 2010 petitioner applied to the New Jersey State Board of Examiners for a standard SAC certificate, but was denied same due to a coursework deficit. *In the Matter of the Application of Raymond Ruiz,* State Board of Examiners (June 10, 2010).

positions in respondent's district that had been held – for one year and one and one half years, respectively – by non-tenured employees Reina Sandouk and Pamela Rothman.[6]

In its answer to the petition respondent admitted that petitioner held provisional certification as a SAC during his employment in respondent's district, Respondent's Answer, Para. 2, but maintained that petitioner did not achieve tenure because provisional certification is not "proper" for purposes of *N.J.S.A.* 18A:28-5. In its summary decision brief and reply exceptions respondent inexplicably changed its position, claiming that petitioner held provisional certification only during his fourth year of service, that during the first three years of petitioner's employment he held only a certificate of eligibility, that a certificate of eligibility is a substandard credential, and that petitioner consequently did not achieve tenure. In the alternative, respondent argued that the required amount of time served under provisional certification cannot accomplish tenure unless the employee subsequently attains standard certification in the same position. For this proposition, respondent relies on *N.J.A.C.* 6A:32-5.1(e), a regulatory provision outlining standards for seniority, which provision primarily addresses holders of emergency certificates but also states:

> Upon acquisition of a standard certificate, any periods of service under a provisional certificate shall also be counted toward seniority. (Emphasis added.)

At the outset, the Commissioner reminds respondent that the responsibility for securing provisional certification for a novice professional lies with the school district that hires the staff member. The teaching staff member has some responsibility for ensuring that he is properly certificated, but he or she may not obtain provisional certification for him or herself. In this matter, it appears that the district was delinquent in its duty to apply for petitioner's

[6] An order allowing Reina Sandouk, the holder of one of the school psychologist positions, to intervene in this matter was issued on November 23, 2010.

provisional certificate. More specifically, the district's application for same is dated June 6, 2007, requesting an effective date of September 2006. Consequently, respondent is estopped from arguing that petitioner's time teaching under a provisional certificate was less than that required by *N.J.S.A.* 18A:28-5. Petitioner is deemed to have worked under a provisional certificate for the four years during which he served respondent in the SAC position.

Second, the Commissioner cannot, without more, rely on *N.J.A.C.* 6A:32-5.1(e) – a regulatory provision outlining standards for seniority – in determining whether petitioner achieved tenure.

Third, as petitioner points out, there is language in some past decisions that suggests that the "proper certificate" which *N.J.S.A.* 18A:28-5 requires a teacher to hold when claiming tenure may be either a standard certificate or a provisional certificate. *See, e.g., Breitweiser v. State Operated School Dist. of City of Jersey City, Hudson County*, 286 *N.J. Super.* 633, 639-40 (App. Div. 1996); *Anson, et al., v. Bridgeton Bd. of Ed.*, 1972 *S.L.D.* 638.[7]

Thus, the central question in this controversy is whether petitioner earned tenure in the district under his provisional certificate. The Commissioner is constrained to conclude that the answer to that question cannot be definitively ascertained from the record at hand.

Of the cases cited by the parties, only one, *Anson, et al., v. Bridgeton Board of Education, supra,* provides a holding – as opposed to *dictum* – that tenure can be achieved by service under a provisional certificate for the period of time set forth in *N.J.S.A.* 18A:28-5. In *Anson,* the Commissioner found that one of the petitioners, John L. Henderson – who had taught in the respondent's district for over three consecutive years under provisional certificates – had

[7] Respondent urges that the holding in *Anson* should be discounted because it was issued before certain reforms to licensure requirements in the 1980's. Insofar as respondent has not identified specific changes that might be germane to the present controversy, the Commissioner declines to regard *Anson's* holding as obsolete or in any way superceded.

achieved tenure. This finding, however, was based upon the Commissioner's determination that Henderson had satisfied the conditional requirements of his provisional certificate:

> 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.**
> *Anson, supra*, at 638. (Emphasis added.)

This determination is in keeping with *N.J.A.C.* 6A:9-6.1, which instructs that a standard certificate – the only permanent certificate – is issued only to candidates who have met **all requirements** for state certification. And as the Administrative Law Judge (ALJ) noted below, revision of the laws concerning provisional certification has, if anything, imposed more requirements upon novice teachers, resulting in even less certainty that a candidate with provisional certification will earn a standard SAC endorsement.

With this framework in mind, the present record leaves unresolved the question of whether petitioner satisfied all of the conditional requirements of his provisional certification. The determination of the New Jersey State Board of Examiners in *In the Matter of the Application of Raymond Ruiz, supra,* suggests that one or more requirements may not, in fact, have been met.

Further, in considering whether the record supports the conclusion that petitioner earned tenure in respondent's district, the Commissioner found the discussions in *Breitweiser v. State Operated School Dist. of City of Jersey City, supra,* and *Emily Kubas v. Board of Education of the City of Linden,* 1980 *S.L.D.* 172 (Comm'r of Ed.) to be of some value. In *Kubas v. Board of Education of the City of Linden, supra,* a cosmetology teacher was dismissed after three and one half years of service under an emergency certificate. It was not until after her dismissal that she received standard certification. In determining that three-and-one half years of

teaching under an emergency certificate did not meet the requirements for tenure, the Commissioner reasoned:

> [H]olders of emergency certificates have not satisfied the educational prerequisites for standard certification, nor are they entitled to automatic renewal of the privilege to teach accorded them by the emergency certification process. Because of the uncertainty surrounding continued eligibility to teach, the protection of the tenure laws was not intended to extend to holders of substandard certificates and has not been so extended. *Id.* at 179.

In *Breitweiser v. State Operated School Dist. of City of Jersey City, supra,* the petitioner claimed tenure based upon years of service under a standard certificate, supplemented by time previously served under an emergency certificate. The Appellate Division ultimately rejected petitioner's tenure claim, stating:

> [S]ervice under an emergency certificate may be counted towards the service needed for tenure only when that service is followed by the teacher ultimately obtaining a permanent certificate in the same field as the emergency certificate. *Id.* at 644.

The Appellate Panel's explanation for this rule was articulated as follows:

> The rule we derive from *Delli Santi* and the *K'Burg* cases is quite logical. During service under an emergency certificate, there is no way to be sure that a person will be rehired the next year, let alone receive standard certification in the field. *Id.* at 645.

And further:

> A district may hope that an emergency teacher proves to be qualified rather than merely legally employable. The district may even expect or bank on the likelihood that an emergency teacher will become qualified. An emergency teacher's failure to earn the standard certificate in the emergency discipline, however, indicates that the teacher never became qualified to teach in that area and that the district's hope or expectation of the teacher's progress was not fulfilled. Under such circumstances we consider it consistent with a fair-minded construction of the teacher-tenure law to

> conclude that such a teacher's emergency service was not under an "appropriate certificate" for purposes of the tenure statute.
>
> . . . .
>
> By contrast, ... [a] teacher's acquisition of a standard certificate in the field of emergency service vindicates to a large extent whatever expectation the district had about the emergency teacher's progress towards certification. *Id.* at 646-47.

The Commissioner is mindful that Breitweiser and Kubas taught under emergency certificates, as opposed to the provisional certification for which petitioner Ruiz was eligible. However, the analysis of the issues set forth in those cases is consonant with the holding in *Anson* that Henderson's tenure was conditioned not just upon his years of service under provisional certification, but also upon his timely completion of the academic and professional requirements for standard certification. In the Commissioner's view, that analysis is appropriately applied here.

While holding provisional certification, petitioner appears to have completed some of the regulatory requirements, but it is uncertain whether he satisfied all. As the Appellate Division noted in *Breitweiser*, under such circumstances there is no way to be sure that such a candidate will ultimately receive standard certification in the field. *Id.* at 645. And the ALJ, in her Initial Decision, similarly observed that

> [t]he provisional certificate held by Ruiz is analogous to the emergency certificate held by Breitwieser because it has no permanency; carries with it uncertainty surrounding continued eligibility to serve in a professional capacity in a public school; and its holder has not fully satisfied current requirements for standard certification. (Initial Decision at 8.)

Indeed, in the present case it appears that petitioner never received standard SAC certification, suggesting – in concert with the above-cited Board of Examiners decision – that he

may not have undertaken all of the program elements that are required of provisional employees. Under such circumstances the Appellate Division considered it "consistent with a fair-minded construction of the teacher-tenure law" to conclude that such service should not beget tenure. *Breitweiser, supra,* at 646.

It is clear from the statutory and decisional authority discussed *supra* that the purpose of provisional certification is to provide a novice professional with a reasonable amount of time to complete the requirements for standard certification. The Commissioner cannot find, on the record before him, that petitioner utilized his provisional period to accomplish that goal. Thus, it cannot be concluded that petitioner met the standard for tenure that was set forth in *Anson,* the case most apposite to the instant matter. Until such findings and conclusions are made, the question of whether petitioner earned tenure in respondent's district – and had rights superior to the untenured school psychologists identified in his petition – cannot be answered.

This case is therefore remanded to the OAL for factual findings concerning petitioner's satisfaction, *vel non,* of the conditions of provisional certification and the requirements for standard certification.

IT IS SO ORDERED.[8]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/17/11

Date of Mailing: 8/18/11

[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 08187-10

AGENCY DKT. NO. 153-7/10

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: April 7, 2011 Decided: May 19, 2011

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

STATEMENT OF THE CASE

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.

PROCEDURAL HISTORY

Ruiz filed his appeal with the Commissioner of Education (the Commissioner) on July 15, 2010. An answer was filed on behalf of the Board and the matter transmitted to the Office of Administrative Law (OAL) as a contested case on July 29, 2010. A prehearing order dated September 22, 2010, directed counsel for the Board to advise any employees who may be adversely affected by the outcome of this proceeding of their right to intervene under N.J.A.C. 1:1-16.4. Via letter dated November 2, 2010, Reina Sandouk, a non-tenured school psychologist, advised through counsel that she wished to do so. An order permitting Sandouk to intervene was entered on November 23, 2010.

There was no disagreement as to the underlying facts, and the parties filed a Joint Stipulation on February 5, 2011. Briefs were filed on March 14, 2011. Counsel for Ruiz filed a reply on April 7, 2011, at which time the record closed.

ISSUES PRESENTED

The threshold issue for determination is whether Ruiz earned tenure as a teaching staff member during his employment with the Board, in accordance with the requirements of N.J.S.A. 18A:28-5. Only if this issue is resolved in Ruiz's favor, will it be necessary to determine whether the scope of his tenure protection extended to the positions held by non-tenured school psychologists such as the intervenor, and, if so,

whether Ruiz is entitled to reinstatement, together with back pay and any other benefits and emoluments of employment, retroactive to the date of his termination.

FINDINGS OF FACT

I **FIND** as follows:

1. Ruiz was initially hired by the Board as a SAC, at the start of the 2006-2007 school year, via contact dated September 20, 2006. (J-1.)
2. At the time of his initial appointment, Ruiz held a certificate of eligibility (CE) for the SAC position, which had been issued by the New Jersey State Board of Examiners in April 2002. The CE states that "[t]he 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, performance evaluation and professional coursework." (J-5.)
3. Ruiz was enrolled in a SAC Residency program in June 2007, through which the Department of Education agreed to issue a provisional certificate to him for one year, effective September 1, 2006, and the school district agreed to provide Ruiz with "appropriate professional experiences" and supervise his employment.[1] (J-6.)
4. In accordance with the terms of Ruiz's enrollment in the SAC Residency Program, his performance was evaluated by the district using a Department of Education, Office of Licensing and Credentials, form dated October 9, 2007. (J-7.)
5. The documents offered into evidence by the parties, reflect that a provisional certificate as a SAC was actually issued to Ruiz in August 2007. (J-8.)
6. Ruiz was reappointed by the Board for the 2007-2008 school year, as a SAC, via contract dated April 30, 2007. (J-2.)
7. The Board again reappointed Ruiz as a SAC for the 2008-2009 and 2009-2010 school years. (J-3, J-4.)

[1] The residency agreement was filed a year into Ruiz's employment with the Board, but notes that the issuance of the provisional certificate is retroactive to the date of his initial employment.

8. Based upon his re-employment by the Board for the 2008-2009 school year, the Board filed a Renewal of Emergency or Provisional Certificate form dated December 16, 2009, on Ruiz's behalf.[2] (J-8.)
9. The renewal provisional certificate was issued in August 2009. (J-9.)
10. By letter dated April 28, 2010, Ruiz was advised that the he would not be reappointed for the 2010-2011 school year.
11. Reina Sandouk has been employed by the Board as a school psychologist since September 1, 2009.
12. Pamela Rothman has been employed by the Board as a school psychologist since January 5, 2009.
13. Both Sandouk and Rothman hold standard educational services certificates with the school psychologist endorsement.
14. Throughout his employment with the Board, Ruiz likewise held a standard educational services certificate with the school psychologist endorsement, which had been issued by the State Board of Examiners in March 2003. (J-10.)

The parties moved the job descriptions for the SAC and school psychologist positions into evidence. (J-11, J-12.) It is uncontroverted, and I **FIND**, that the functions of these two positions were entirely dissimilar. The psychologist serves as a member of the Child Study Team (CST), and the focus of his or her job responsibilities is on the evaluation and testing of students referred to the CST. The SAC is responsible for providing drug-prevention leadership and assistance through intervention, referral, and curriculum development. However, I **FIND** that both positions require an educational services certificate, although with differing endorsements to that certificate (school psychologist and substance awareness coordinator). It is uncontroverted that Ruiz was never employed in Fort Lee as a school psychologist.

I further **FIND**, and it is uncontroverted, that at no time during his employment with the Board did Ruiz obtain or hold a standard educational services certificate with the SAC endorsement. The positions to which Ruiz claims an entitlement are those held by Rothman and Sandouk.

[2] It appears that the form had previously been filled out in November 2008 but was not finalized. (J-9.)

ANALYSIS AND CONCLUSIONS OF LAW

Tenure is a legislative status, 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.

By the express terms of N.J.S.A. 18A:28-5, an employee of a local board of education may earn tenure only if he works for the requisite period of time in a position for which a certificate issued by the State Board of Examiners is required, and he is the holder of a "proper certificate in full force and effect." Spiewak, supra, 90 N.J. at 74.

It is uncontroverted that Ruiz was employed in a position that required an educational services certificate issued by the State Board of Examiners, and further it is undisputed that he served in Fort Lee for more than three years and a day. But Ruiz is unable to meet the final requirement of the tenure statute because he never earned a standard educational services certificate with a SAC endorsement while employed by the Board. I **CONCLUDE** 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.

A provisional certificate is a temporary two-year certificate issued to newly employed instructional, administrative, and educational services staff "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; N.J.A.C. 6A:9-2.1. Under the regulatory scheme, a novice educational professional is initially employed under a CE, which has been defined as "a certificate with lifetime validity issued by the State Board of Examiners to candidates who meet degree, academic, and applicable test requirements for teacher certification." N.J.S.A. 18A:27-4a(a). The CE permits its holder to secure employment, but the employing board is then obligated to "immediately register the employment with the Department of Education and request issuance of a provisional certificate." N.J.S.A. 18A:26-2a(b).[3]

To acquire standard certification as a SAC, the candidate must complete a six-month State-approved school residency while employed full time under a provisional educational services certificate with a SAC endorsement. N.J.A.C. 6A:9-13.2(e)(3). The process for obtaining full certification is rigorous, and the residency program in which the candidate participates must "[o]perate in accordance with a residency agreement issued by the Department and entered into by the Department, the employing school, the candidate and the State-approved residency supervisor," and must include professional experiences. N.J.A.C. 6A:9-13.2(e)(3)(i). The novice SAC must be provided with appropriate training and support. N.J.A.C. 6A:9-13.2(e)(3)(f).

The provisional certificate thus is part of the intensive training process that leads to full certification. Only the standard certificate is "a permanent certificate" and it is "issued only to candidates who have met all requirements for State certification." N.J.A.C. 6A: 9-6.1 (emphasis supplied). It is not a foregone conclusion that a standard certificate will be awarded to a teaching staff member at the end of the provisional

[3] The CE and provisional certificate are part of a comprehensive "standards-based" licensure system "that continuously serves to improve the quality of instruction for New Jersey's children so that they are equipped to work and succeed in an ever-changing and increasingly complex global economy." N.J.A.C. 6A:9-1.2.

employment process. Indeed, the regulations provide for an appeals process when a candidate for standard certification receives a recommendation of "disapproved" or "insufficient" at the conclusion of the provisional program. N.J.A.C. 6A:9-17.18(a).

Ruiz was hired under a CE, and the Board took the necessary action, albeit somewhat slowly, to obtain a provisional certificate for him. It executed the necessary documents confirming that it would mentor and evaluate Ruiz, as required by regulation. The statute indicates that once the provisional certificate is issued, its "effective date for all purposes shall be the date on which the novice teacher began employment with the board of education." N.J.S.A. 18A:26-2a(b). Accordingly, I **CONCLUDE** that Ruiz held a provisional certificate throughout his employment by the Board, effective as of the date he was hired in September 2006.

But without earning standard certification while still employed in Fort Lee, Ruiz could not earn tenure. Neither counsel's research nor mine revealed any precedent squarely addressing the tenure entitlements of the holder of a provisional certificate under the present system for teaching staff certification. Case law addressing the rights of the holder of an emergency certificate is instructive, however. At issue in Breitwieser v. State-Operated School District of the City of Jersey City, 286 N.J. Super. 633 (App. Div. 1996), was "whether a teaching staff member can acquire tenure for service under a permanent certificate combined with a prior period of service under an emergency certificate in a different field." Id. at 639. Breitwieser initially was employed as a teacher of the handicapped under an emergency certificate. She then transferred to an elementary education position. Breitwieser held a standard elementary education endorsement on her instructional certificate, but did not work under that certificate for the requisite three years and a day prior to her reduction in force. The court determined that her service under the emergency certificate endorsed as a teacher of the handicapped could not be "tacked on" to her service under the standard certificate, because the emergency certificate was in a different field.

Ruiz cites the following dicta in Breitwieser in support of the proposition that the provisional certificate is "not defined as a substandard certificate" and thus is the "proper certificate" contemplated by the tenure statute: "[a]s the district reminds us, the

'proper certificate' which N.J.S.A. 18A:28-5 requires a teacher to hold when claiming tenure must be either a standard certificate or a provisional certificate." Breitwieser, supra, 286 N.J. Super. at 639. But Breitwieser is more helpful in resolving the issue presented here by looking past its dicta to its rationale for denying tenure to the petitioner there. The court concluded that a teacher may not acquire tenure solely based upon service under an emergency certificate no matter how long he or she serves because:

> [The holders of emergency certificates] have not fully satisfied the educational prerequisites for standard certification, . . . nor are they entitled to automatic renewal of the privilege to teach accorded them by the emergency certification process. Because of the uncertainty surrounding continued eligibility to teach, the protection of the tenure laws was not intended to extend to holders of substandard certificates and has not been so extended.
>
> [Id. at 640 (citing Salerno v. Newark Bd. of Educ., 1980 S.L.D. 439, 446).]

The Breitwieser court astutely noted that "[i]f service under any 'valid' certificate, whether standard or substandard, was counted towards tenure, the exception clause in N.J.S.A. 18A:28-5 would be rendered superfluous, confusing the kind of certificate needed for legal employment as a teacher (merely 'valid') with the kind needed to earn tenure credit ('proper')." Id. at 644. It clearly was not the legislative intent that a staff member with less than permanent credentials be guaranteed permanent employment.

The provisional certificate held by Ruiz is analogous to the emergency certificate held by Breitwieser because it has no permanency; carries with it uncertainty surrounding continued eligibility to serve in a professional capacity in a public school; and its holder has not fully satisfied current requirements for standard certification. Ruiz cites the decision in Anson v. Bridgeton Bd. of Educ., 1972 S.L.D. 638, in support of his contention that tenure may be earned through service exclusively under a provisional certificate. The Commissioner determined that one of the petitioners there was employed under "an appropriate provisional certificate issued by the State Board of Examiners . . ." and thus had earned tenure. Id. at 639. But as Ruiz readily admits in his brief, the provisional certificate when Anson was decided came with far different

standards and requirements. The certificate then 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 **CONCLUDE** 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. Only standard certification is the "proper certification in full force and effect" contemplated by the tenure law. N.J.S.A. 18A:28-5.

Ruiz's failure to earn a standard certificate as a SAC prior to his RIF is thus fatal to his tenure claims. It is well established that a teacher may earn tenure when he or she commenced employment under an emergency certificate, but later earned a standard certificate with the same endorsement. See K'burg v. Lower Alloways Creek Bd. of Educ., 1973 S.L.D. 636; Givens v. Newark Bd. of Educ., 1974 S.L.D. 906; Smith v. Sayreville Bd. of Educ., 1974 S.L.D. 1095. In each of these cases it was clear, however, that tenure could not be earned until the employee acquired a standard certificate. Indeed, where a staff member employed under an emergency certificate was RIF'd prior to acquiring a standard certificate, he was held to have earned no tenure or seniority. Sefcik v. Red Bank Reg'l High Sch. Bd. of Educ., 96 N.J.A.R.2d (EDU) 141.

Ruiz correctly stresses that the tenure laws must be liberally construed, so as to effectuate their intended purpose, which is to provide a measure of security to employees who have faithfully served for the requisite period of time. Viemeister v. Bd. of Educ. of Prospect Park, 5 N.J. Super. 215 (App. Div. 1949). But N.J.S.A. 18A:28-5 cannot be read so liberally that a staff member who has not met the precise

requirements of the statute is awarded tenure. Zimmerman, supra, 38 N.J. at 72. I **CONCLUDE** that Ruiz was not employed under tenure at the time of his reduction in force.

In light of my conclusion that Ruiz did not earn tenure, it is 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. Dennery 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.

May 19, 2011
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 5/19/2011

Date Mailed to Parties: May 20, 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

Joint:

J-1 Contract dated September 20, 2006
J-2 Contract dated April 30, 2007
J-3 Contract dated September 2, 2008
J-4 Board Resolution dated April 13, 2009
J-5 Certificate of Eligibility
J-6 Substance Awareness Coordinator Residency Agreement
J-7 Substance Awareness Coordinator Evaluation
J-8 Renewal of Emergency or Provisional Certificate
J-9 Provisional Certificate
J-10 Standard Certificate
J-11 Job Description
J-12 Job Description

For Petitioner:

None

For Respondent:

None

#323-11

BILLY PERRY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a former custodian in a New Jersey charter school – challenged respondent's determination, pursuant to *N.J.S.A.* 18A:6-7.1, that he is permanently disqualified from school employment as a result of his convictions on multiple drug offenses. Petitioner contended that recent statutory amendments exclude him from the reach of *N.J.S.A.* 18A:6-7.1, and that he has been rehabilitated and should be allowed to continue as a school employee. Respondent asserted that *N.J.S.A.* 18A:6-7.1 mandates petitioner's permanent disqualification from school employment based on his criminal record.

The ALJ found that: *N.J.S.A.* 18A:6-7.1 is clear in its requirement that a school cannot employ a staff member if that individual has a disqualifying criminal history record; petitioner's criminal history record check revealed at least nine convictions for crimes which are permanently disqualifying for employment in schools; the statute applies prospectively, and contains no waiver or appeal process to determine whether an individual is rehabilitated. Accordingly, the ALJ affirmed the respondent's action to disqualify petitioner from school employment, and dismissed the petition.

The Commissioner concurred with the ALJ that the petitioner's appeal must be dismissed, finding that petitioner clearly violated, *inter alia, N.J.S.A.* 18A:6-7.1(b), and the statute contains no provisions for allowing mitigation for alleged rehabilitation. 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.

August 17, 2011

OAL DKT. NO. EDU 11359-10
AGENCY DKT. NO. 478-8/10

BILLY PERRY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	DECISION
RESPONDENT.	:	

Review of the record, Initial Decision and respondent's exceptions reveals that petitioner – a former custodian in a charter school – has been convicted of multiple drug offenses. When a June 18, 2010 fingerprinting exposed this fact, petitioner was notified by respondent that – pursuant to *N.J.S.A.* 18A:6-7.1 – he was permanently disqualified from school employment.[1]

The Commissioner regards as meritless petitioner's arguments 1) that recent statutory amendments exclude him from the reach of *N.J.S.A.* 18A:6-7.1, and 2) that his alleged rehabilitation allows the Commissioner the discretion to save him from the penalty for breach of *N.J.S.A.* 18A:6-7.1. Petitioner clearly violated, *inter alia, N.J.S.A.* 18A:6-7.1(b), and the statute contains no provisions allowing mitigation for alleged rehabilitation. The petition is accordingly dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/17/11
Date of Mailing: 8/18/11

[1] The Initial Decision also cites *N.J.S.A.* 18A:6-4.13, but that statute extends the reach of *N.J.S.A.* 18A:6-7.1 to non-public schools. As petitioner's employer was a charter school – which is a public school (see *N.J.S.A.* 18A:36A-3) – *N.J.S.A.* 18A:6-4.13 is inapposite.

[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 11359-10
AGENCY DKT. NO. 478-8/10

BILLY PERRY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,
Respondent.

Billy Perry, petitioner pro se

Joyce D. Williams, Deputy Attorney General, for respondent (Paula T. Dow, Attorney General of New Jersey, attorney)

Record Closed: June 3, 2011 Decided: July 6, 2011

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

Billy Perry, petitioner, was employed as a custodian in a charter school located in Newark, New Jersey. On June 18, 2010, he was required to undergo a criminal-background check that included fingerprinting. The test results revealed that petitioner

has multiple criminal convictions of the first and second degree that cause him to be disqualified from working as a school custodian. Petitioner argues that he should not have been disqualified from employment because New Jersey Assembly Bill Number 3665 amends N.J.S.A. 18A:6-7.1 and N.J.S.A. 18A:6-4.13, the disqualifying statutes, and he should not be disqualified because he is rehabilitated. N.J.S.A.18A:6- 4.13, extends the disqualification criteria to charter schools. Respondent, New Jersey State Department of Education, Office of Criminal Review Unit, maintains that N.J.S.A. 18A:6-7.1 does not offer a waiver or an appeal process; a petitioner can only challenge the accuracy of the criminal history record and if that does not exist petitioner is permanently disqualified. Respondent also maintains that rehabilitation claims do not exist under the amended version of N.J.S.A. 18A:6-7.1.

PROCEDURAL HISTORY

On August 9, 2010, petitioner filed a verified petition with the New Jersey Department of Education (Department), dated August 5, 2010. The Department transmitted this matter to the Office of Administrative Law (OAL) on October 12, 2010, 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. On November 8, 2010, hearing dates were scheduled for June 2 and 3, 2011. On April 27, 2011, respondent filed a Notice of Motion to Dismiss the Matter on Appeal for Failure to Provide Discovery. The Motion was denied. Testimony was completed on June 2, 2011. Respondent submitted a summary of the disqualifying offenses on June 3, 2011, and on the same date the record was closed.

ISSUES

Was petitioner was rightly disqualified from employment pursuant to N.J.S.A. 18A:6-7.1 and N.J.S.A. 18A:6-4.13, the disqualification statutes? Can petitioner affirmatively demonstrate rehabilitation in order to continue his employment as a charter school custodian?

SUMMARY OF TESTIMONY

Michael Lazur has been a special investigator with the New Jersey Department of Education (DOE) since August 2008. Previously he was employed with the New Jersey State Police and served twenty-one years as a detective. His current job responsibilities with the DOE include completing background checks for persons seeking employment with or in the school system. He also investigates all employees who are in the school system. Lazur's investigations and reports are based on the content of N.J.S.A. 18A:6-7.1, et seq. entitled Criminal Record Check in Public School Employment, Volunteer Service. Lazur said,

> Appeals of a disqualification are only on the accuracy of the criminal record. I reviewed the entirety of respondent's exhibit R-1 the Federal Bureau of Investigation III Criminal History and New Jersey National Fingerprint Criminal History File Search, dated June 18, 2010. The search revealed petitioner's convictions for possession of fire weapons, carrying prohibited weapons, possession of a hand gun, drug possession, drug possession on school property, etc.

Billy Perry the petitioner, testified,

> I do not dispute my convictions, they are there. However, I have changed and no longer handle or take drugs. Getting myself together should stand for something. I have been straight for some time. I want my job as a custodian. I am a new person.
>
> When I read Chapter 116, Laws of 1986 there was no specific charges mentioned about drugs and I had not been involved with or convicted of any of the crimes listed under C.18A: 6-7.1 criminal record check.

FINDINGS OF FACT

Based on the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and to assess credibility, I make the following **FINDINGS of FACT**:

1. Petitioner was employed as a custodian in a charter school in Newark, New Jersey;

2. On June 18, 2010, petitioner underwent fingerprinting as a segment of a criminal history background check. His background check revealed the following convictions:

   (1) Felony conviction drug offense, in violation of NJ 2421-21; offense date 12/9/1981; disposition date 11/16/1984;
   (2) Felony conviction cocaine-possession, in violation of N.J.S.A. 2C:35-10A 1; offense date 4/24/1990; disposition date 10/25/1990;
   (3) Felony conviction for cocaine, in violation of N.J.S.A. 2C:35-5B3; offense date 4/24/1990; disposition date 10/25/1990;
   (4) Felony conviction for Licensing-Registration, in violation of N.J.S.A. 2C:39-3B; offense date 4/24/1990; disposition date 10/25/1990;
   (5) Felony conviction for carrying prohibited weapons, in violation of N.J.S.A. 2C:39-3B; offense date 4/24/1990; disposition date 10/25/1990;
   (6) Felony conviction for possession of CDS or analog, in violation of N.J.S.A. 2C:35-10A(1); offense date 4/27/2000; disposition date 12/08/2000;
   (7) Felony conviction for CDS on school property, in violation of N.J.S.A. 2C:35-7; offense date 3/23/2002; disposition date 10/28/2003;
   (8) Felony conviction for possession of a handgun, in violation of N.J.S.A. 2C:39-5B; offense date offense date 3/23/2002; disposition date 10/28/2003;

3. N.J.S.A. 18A:6-7.1 prevents individuals who have a criminal history record of first- and second-degree convictions to obtain or maintain employment in or with the school system. N.J.S.A. 18A:6- 4.13, extends the disqualification criteria to charter-schools;

4. Petitioner has convictions of the first and second degree.

LEGAL ANALYSIS AND DISCUSSION

N.J.S.A. 18A:6-7.1 reads, in pertinent part,

> A facility, center, school, or school system under the supervision of the Department of Education and board of education, which cares for, or is involved in the education of children under the age of 18 shall not employ for pay or contract for the paid services of any teaching staff member . . . unless the employer has first determined consistent with the requirements and standards of this act, that no criminal history record information exists on file in the Federal Bureau of Investigation, Identification Division, or the State Bureau of Identification, which would disqualify that individual from being employed or utilized in such a capacity or position . . . .
>
> An individual, except as provided in subsection g. of this section, shall be permanently disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction for any crime of the first or second degree; or
>
> . . .
>
> b. An 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.2C:35-1 et al. or "drug paraphernalia" as defined pursuant to N.J.S. 2C:36-1 et seq.;
>
> . . .
>
> g. This section shall first apply to criminal history record checks conducted on or after the effective date of P.L.1998, c. 31 (C: 18A:6-7.1c et al.) . . . .
>
> [Emphasis added.]

The courts in New Jersey favor a prospective application of statutes rather than a retroactive application. The New Jersey Supreme Court recently held:

> We "have long followed a general rule of statutory construction that favors prospective application of statutes."

> This preference is based on our long-held notions of fairness and due process.
>
> Although the rule favoring prospectivity is, "a sound rule of statutory interpretation," "if the Legislature expresses an intent that the statute is to be applied retroactively, the statute should be so applied." As we have recently commented, the Legislature may express its intent explicitly or by implication "in that 'retroactive application may be necessary to make the statute workable or to give it the most sensible interpretation.'"
>
> Consequently, the preference for prospective application is not applied mechanistically to every case. To be sure, retroactivity is appropriate, in general, when it is expressed, when an amendment is curative, or when the expectations of the parties so warrant. Only if one of these grounds is present, will we give a statute retroactive effect.
>
> [Cruz v. Central New Jersey Landscaping, 195 N.J. 33 (2008) (citations omitted).]

The felony conviction drug offense for which petitioner was convicted in 1984 was not specifically listed in N.J.S.A. 18A:6-7.1 as a disqualifying offense. However, more specifically described felony offenses—including the offenses causing for petitioner's 1984, 1990, 2000, 2002, and 2003 convictions were added to the statute in 1989. Petitioner's criminal history record check revealed at least nine disqualifying convictions for crimes specifically listed or referred to by title number as being permanently disqualifying crimes for employment in schools, namely offenses involving controlled dangerous substances, drug paraphernalia, in violation of N.J.S.A. 2C:36-1 et seq. and crimes set forth in N.J.S.A. 2C: 3902 et seq.

Respondent contends that the language contained in subsection g. of the statute is prospective, not retroactive. The provision explicitly states that the section will apply only to "criminal record checks conducted on or after the effective date . . . ." The criminal record check in this matter was conducted in 2010, approximately twelve years after the statute became effective (P.L. 1998, c. 31). Therefore, according to respondent, the statute is clear on its face and is not being applied retroactively.

Relevant case law dictates that the determining factor in similar cases is the date the criminal background check is conducted. The version of the statute in effect at the time the criminal record check is conducted generally applies; therefore, the statute applies prospectively. In Cidoni v. Board of Education of the City of Camden and Department of Education, Office of Criminal History, EDU 6088-03, Initial Decision (December 22, 2005), adopted, Commissioner (February 27, 2006), http://lawlibrary.rutgers.edu/oal/search.html, 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 was performed and uncovered a conviction, which was not disqualifying at the time the petitioner was originally hired. The ALJ and the Commissioner both held that it was the date that the criminal record check is conducted which is important, not whether or not the prior conviction was a disqualifying offense at the time petitioner was hired. If the prior conviction is a disqualifying offense at the time the criminal record check is conducted, the teacher is disqualified. See Cidoni, supra, EDU 6088-03 (Final Decision); see also, Nunez v. Dep't of Educ., EDU 3689-02, Initial Decision (June 9, 2006), http://lawlibrary.rutgers.edu/oal/search.html (The ALJ and Commissioner both held that the date that the criminal record check is conducted is determinative).

Petitioner also argues that he can demonstrate rehabilitation and urges respondent to take into consideration that he is a changed man. Respondent explains that the 1989 amendment to N.J.S.A. 18A: 6-7.1 does not offer a waiver or an appeal process to determine whether an individual is rehabilitated. Persons convicted of a crime of the first and second degree are permanently disqualified from employment or service under N.J.S.A. 18A: 6-7.1.

CONCLUSION

Based on the above, I **CONCLUDE** that petitioner's prior convictions for crimes of the first and second degree were disqualifying offenses at the time the criminal record check was conducted, and therefore petitioner should be disqualified. I also **CONCLUDE** that N.J.S.A. 18A: 6-7.1, does not provide for rehabilitation, and therefore respondent can not take into consideration petitioner's second issue.

ORDER

I **ORDER** that the determination by respondent New Jersey Department of Education Office of Criminal History Review Unit to disqualify petitioner based on his felony convictions in violation of N.J.S.A. 18A: 6-7.1, is **AFFIRMED**.

I also **ORDER** that the relief sought by Billy Perry, petitioner, for consideration of rehabilitation, is **DENIED**, due to unavailability of such relief. I finally **ORDER** that this case 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.

Sandra Ann Robinson

July 6, 2011
DATE

SANDRA ANN ROBINSON, ALJ

Date Received at Agency: July 6, 2011

Laura Sanders

Date Mailed to Parties: JUL - 7 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

WITNESSES

For Petitioner:

Billy Perry, petitioner

For Respondent:

Michael Lazur, Special Investigator

EXHIBITS

For Petitioner:

P-1 (a) Legislative History Checklist N.J.S.A. 18A:6-4.13; Laws of 1998 Chapter 229

(b) Chapter 116, Laws of 1986, page 736 and 737

For Respondent:

R-1 Federal Bureau of Investigation III Criminal History and New Jersey National Fingerprint Criminal History File Search, dated June 18, 2010

R-2 Respondent's Disqualification Letter to petitioner, dated June 22, 2010

R-3 Respondent's Notice of Disqualification to the charter school, dated June 22, 2010

R-4 Disqualifying Conviction List, dated June 3, 2011

324-11

OAL DKT. NO. EDU 11441-10
AGENCY DKT. NO. 548-9/10

SARAH L. SHARPE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ESTELL MANOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, the parties' proposed Settlement Agreement, General Release and Waiver 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. 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: 8|17|11
Date of Mailing: 8|19|11

* The Commissioner is compelled to clarify that Term #1 of the parties' agreement incorrectly states "The Board voluntarily recognizes that Ms. Sharpe has tenure in both categories of: (a) teacher of health and physical education and (b) elementary school grades K-5." Correctly stated this sentence should read: "Ms. Sharpe has tenure under her instructional certificate and *seniority* as (a) teacher of health and physical education and (b) elementary school grades K-5."

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11441-10
AGENCY DKT. NO. 548-9/10

SARAH L. SHARPE,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ESTELL MANOR, ATLANTIC COUNTY,
Respondent.

Keith Waldman, Esq., for petitioner (Selikoff & Cohen, attorneys)

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

Record Closed: July 15, 2011 Decided: July 18, 2011

BEFORE **W. TODD MILLER,** 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 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 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 18, 2011
DATE

W. TODD MILLER, ALJ

Date Received at Agency: JUL 21 2011

Date Mailed to Parties: JUL 21 2011

/sd

RECEIVED
JUL 12 2011
309

GENERAL RELEASE AND WAIVER

In consideration for the promises and undertakings described in the Settlement Agreement dated July 7th, 2011. I hereby release, waive and discharge the City of Estell Manor 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, I specifically release all claims which were or could have been asserted by me in the action entitled *Sarah L. Sharpe v. Estell Manor Board of Education, Atlantic County*, OAL Dkt. No. EDU-11441-2010S, Agency Ref. No. 548-9/10. I also release and waive all claims relating to or arising out of any aspect of my employment with the City of Estell Manor 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 Estell Manor 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.

I also promise not to sue and I waive all claims against the City of Estell Manor Board of Education its successors and assigns, or any related and/or affiliated entities, based upon my claims covered by the Settlement Agreement, this General Release and Waiver.

Notwithstanding the foregoing, this release specifically excludes any pension-based or workers compensation claims. I am 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 ESTELL MANOR 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.

Sarah L Sharpe
SARAH L. SHARPE

Dated: 7/7/11

STATE OF NEW JERSEY :
: S.S.
COUNTY OF ~~ATLANTIC~~ Cape May :

I CERTIFY that on July 7, 2011, Sarah L. Sharpe, 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.

Shannon E Prickett

SHANNON E. PRICKETT
NOTARY PUBLIC
STATE OF NEW JERSEY
MY COMMISSION EXPIRES APR. 28, 2012

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is being entered into between Petitioner, Sarah L. Sharpe ("Ms. Sharpe"), and Respondent, Estell Manor Board of Education ("Board"), with regard to *Sarah L. Sharpe v. Estell Manor Board of Education, Atlantic County*, OAL Dkt. No. EDU-11441-2010S, Agency Ref. No. 548-9/10, having agreed to amicably resolve their differences, it is hereby stipulated and agreed that this matter shall be settled upon the following terms:

1. The Board voluntarily recognizes Ms. Sharpe's tenure rights. Specifically, the Board recognizes that at all times during her employment, Ms. Sharpe has possessed an instructional certificate with: (a) teacher of health and physical education and (b) and as of July 2010, an elementary school grades K-5 endorsement." True copies of Ms. Sharpe's teaching certificates and endorsements are attached to this agreement as Exhibits A and B, respectively. The Board voluntarily recognizes that Ms. Sharpe has tenure in both categories of: (a) teacher of health and physical education and (b) elementary school grades K-5.

2. The Board voluntarily recognizes Ms. Sharpe's seniority rights. Specifically, the Board recognizes that as of the conclusion of the 2010-2011 school year, barring any unanticipated leave of absence this school year, Ms. Sharpe will have worked the following school years within the scope of her teacher of health and physical education endorsement:

January 1, 2005 to June 30, 2005	0 year(s)	6 month(s) 0 day(s)
July 1, 2005 to June 30, 2006	1 year(s)	0 month(s) 0 day(s)
July 1, 2006 to June 30, 2007	1 year(s)	0 month(s) 0 day(s)
July 1, 2007 to June 30, 2008	1 year(s)	0 month(s) 0 day(s)
July 1, 2008 to June 30, 2009	1 year(s)	0 month(s) 0 day(s)
July 1, 2009 to June 30, 2010	0 year(s)	7 month(s) 20 day(s)
(FMLA/Sick leave taken from November 30, 2009 through January 30, 2010)		
July 1, 2010 to June 30, 2011	1 year(s)	0 month(s) 0 day(s)

As such, as of June 30, 2011, the parties recognize and agree that Ms. Sharpe has six (6) years, four (4) months zero (0) days of seniority as a full-time teacher within the scope of her teacher of

health and physical education endorsement and that, with the exception of the FMLA/Sick leave taken from November 30, 2009 through January 30, 2010, her service was and will be considered as seamless for all purposes. The Board further recognizes that as of the start of the 2010-2011 school year, as a tenured teacher with a K-5 endorsement, Ms. Sharpe should have been retained on a 2-1/2 day per week basis in a position within the scope of her K-5 endorsement and should have bumped Aime DiGerolamo who was, at the time, a non-tenured teacher. Under the circumstances, the Board recognizes that with credit for this service and under the tack on principle established by N.J.A.C. 6A:32-5.1(h) as of the conclusion of the 2010-2011 school year, Ms. Sharpe will have ten (10) months days seniority (pro-rated for 2-1/2 days per week) within the scope of her K-5 endorsement, with seniority continuing to tack on in succeeding school years under the tack on principle

3. The Board hereby rescinds its action to reduce Ms. Sharpe's employment from full-time to part-time, which reduction had been effective from July 26, 2010 to October 3, 2010, and which Ms. Sharpe had contended in the above-referenced petition was in derogation of her tenure and seniority rights.

4. The consideration described in Paragraphs 1 and 2 above shall constitute the entire monetary settlement of the matters encompassed by this Agreement.

5. In exchange for the promises and undertakings of the Respondent Estell Manor Board of Education, as set forth in Paragraphs 1and 2 above, Petitioner:

A. Waives the right to back pay for the period of time from July 26, 2010 to October 3, 2010.

B. Agrees to withdraw her petition of appeal with prejudice and without costs as to either party and authorizes attorney to file a Stipulation of Dismissal with

Prejudice with respect to her claims and causes of action with the Commissioner of Education in this action.

C. Agrees to execute a General Release and Waiver ("General Release") to the Respondent in the form annexed. Petitioner expressly acknowledges that this Agreement and the General Release and Waiver are intended to extinguish and waive all claims which she may have against any person or entity identified as a releasee in the General Release and Waiver resulting from anything which has happened up to the date of the execution of the General Release and Waiver and which were or could have been asserted, including those claims unknown to her and claims for attorneys fees and costs. Petitioner hereby acknowledges that the execution of this Agreement and the General Release and Waiver which accompanies it shall absolutely bar any such claim, action or suit against any releasee identified in the General Release and Waiver. This release specifically excludes any workers compensation or pension claims. Ms. Sharpe is unaware of any factual basis for such claims.

6. All documents and information obtained during discovery in this case shall be deemed "confidential." The parties agree that no such documents or information shall be provided or disclosed to or shared with any third party for any purpose whatsoever. This provision shall not apply to third parties and to documents previously filed with the Office of Administrative Law or the Commissioner of Education, but this shall not permit Petitioner to provide copies of such documents to third parties. Petitioner further agrees that she will not use or permit to be used in any other action or matter any information about the Respondents in this action which she obtained as a result of, during the course of or in connection with her

involvement in this action. Petitioner shall not voluntarily assist third parties in pursuit of litigation against Respondent.

7. The parties agree that any breach of any obligation under this Agreement will constitute a breach of this Agreement. In the event of a breach of this Agreement by one of the parties hereto, the breaching party shall pay a penalty to the non-breaching party to be established in the discretion of the Superior Court of New Jersey, Atlantic County, for said breach of any term of this Agreement. In the event that either party is required to commence an action in law or equity to enforce its rights under this Agreement and prevails, the party against whom the action is brought shall be required to pay the prevailing party reasonable attorneys fees and costs in addition to any damages which may be recoverable.

8. It is understood that neither the execution of this Agreement nor any other action taken by the Respondent in connection with this settlement constitutes an admission by the Respondent or, any other person or entity identified in the General Release and Waiver as a releasee, of any violation of any law, duty or obligation, or that any decision or action with respect to the employment of Petitioner was unwarranted, unjustified, retaliatory, discriminatory or otherwise unlawful. The Respondent specifically disclaims any liability to Petitioner or any other person. The parties have entered into this Agreement solely to compromise disputed claims. No findings of any kind have been made or issued by the Commissioner on the merits of the claims in this action and neither party purports to be the prevailing party in this action.

9. The parties to the within petition of appeal agree not to make disparaging statements concerning each other or to defame each other in any manner to any person or entity. The parties also agree not to authorize any person or entity to make any disparaging statements about each other to any person or entity.

10. All parties to this Agreement and their counsel participated in the negotiation and drafting of this Agreement as equals. No particular party shall be deemed the drafter or provider of this Agreement, and the parties agree that the Agreement shall not be construed against any particular party.

11. This Agreement and the General Release and Waiver referred to herein set forth the entire agreement between Petitioner and the Respondents. This Agreement supersedes all prior agreements or understandings, if any, between the parties regarding the subject matter of this Agreement.

12. Petitioner acknowledges that she has consulted with her attorney regarding this Agreement and the General Release and Waiver that accompanies it prior to executing it; that the terms of this Agreement and the General Release and Waiver have been explained to her by her attorney; and that she has represented to her attorney that she has read this Agreement and the General Release and Waiver and fully understands them and agrees to be bound by them. Petitioner has also acknowledged that she has been given a reasonable period of time within which to consider this settlement and the terms of this Agreement and General Release and Waiver prior to executing them.

13. Any notice or other communication under this Agreement shall be in writing and shall be considered given when mailed by regular mail or delivered personally, to the parties at the following addresses:

To Petitioner:

Keith Waldman, Esq.
Selikoff & Cohen
700 East Gate Drive
Mount Laurel, New Jersey 08054

To Respondents:

Frank P. Cavallo, Esquire
Parker McCay PA
P.O. Box 974, 3 Greentree Center
7001 Lincoln Drive West
Marlton, New Jersey 08053

or at such other address as a party may specify by notice to the other.

14. Nothing contained herein or in the Release shall be intended to bar either party from initiating such action as may be necessary to enforce the terms of this Agreement.

15. Conditioned upon the entry of an initial decision by the Administrative Law Judge and the Commissioner's approval of this Agreement without modification, the parties will submit a stipulation of dismissal with prejudice and without costs.

16. The Board's representative certifies that he or she has been duly authorized to sign this agreement by a motion adopted by the Board at a duly-noticed open public meeting. A true copy of the Board's minutes (or of a resolution) adopting the settlement memorialized by this Agreement are (is) attached as Exhibit C.

17. The parties agree that this Agreement may be signed in counterparts and facsimile signatures may be acceptable in lieu of originals.

The foregoing terms and provisions are hereby agreed to and accepted:

7-9-11
Dated:

Sarah L Sharpe
SARAH L. SHARPE

BOARD OF EDUCATION OF CITY OF ESTELL MANOR

Dated:

By: _____

Print Name and Title: _____

Estell Manor School District

128 Cape May Avenue
Estell Manor, New Jersey 08319
609-476-2267
609-476-4205 FAX

John L. Cressey
Superintendent of Schools

I. Elizabeth Edwards
School Business Administrator

Wendy W. Saltzburg
Supervisor of Special Services

July 13, 2011

At the June 13, 2011 Estell Manor Board of Education regular meeting, a motion was made by Mr. Adelman and seconded by Mrs. McDonnell to accept the proposed settlement with employee #2011-1 whose name is available in the personnel office.

Motion carried unanimously by roll call vote, Board members present voting yes:

Mr. Adelman	yes	Mr. Dilg	yes
Mr. Kellner	yes	Mr. Klosek	yes
Ms. McDonnell	yes		

I hereby certify the above to be a true and exact copy of the Minutes of the Regular Meeting of the Estell Manor City Board of Education held on June 13, 2011.

I. Elizabeth Edwards,
Board Secretary

2011 JUL 15 A 11:01

- C -

Congratulations!

The New Jersey State Board of Examiners has authorized issuance of this certificate that permits you to serve as a professional educator in the public schools of New Jersey.

Pursuant to N.J.S.A. 18A:26-2, any person employed as a teaching staff member by a district board of education or a charter school board of trustees shall hold a valid and appropriate certificate. N.J.A.C. 6A:9-5.2(b) requires a newly employed or reassigned teaching staff member to exhibit an appropriate certificate prior to assuming any duties of the new position. Therefore, it is important that you safeguard this certificate.

Please note that it is a violation of N.J.S.A. 18A:26-2 to accept employment under a certificate that you know was printed or issued erroneously. If there are any errors associated with this certificate, please return the original certificate with a brief cover letter to the New Jersey Department of Education, PO Box 500, Trenton, NJ 08625-0500.

Best wishes to you in your endeavors to enhance the academic achievement of New Jersey's children.

WARNING: THIS DOCUMENT CONTAINS MULTIPLE SECURITY FEATURES INCLUDING A CHAIN-LINK WATERMARK.

138-96-8573 593916

The State of New Jersey

Department of Education
State Board of Examiners

Provisional Certificate

This is to certify that

Issued	Expires		County	District
04/06	07/07	SARAH L GIERCYK	01	1410

Has met all of the requirements for provisional employment established by the State Board of Education and is authorized to serve in the following area(s):

Teacher of Health and Physical Education

Lucille E. Davy
Acting Commissioner of Education

Robert R. Higgins
Acting Secretary, Board of Examiners

EXH. A. pg 1 of 2

Congratulations!

The New Jersey State Board of Examiners has authorized issuance of this certificate that permits you to serve as a professional educator in the public schools of New Jersey.

Pursuant to N.J.S.A. 18A:26-2, any person employed as a teaching staff member by a district board of education or a charter school board of trustees shall hold a valid and appropriate certificate. N.J.A.C. 6A:9-5.2(b) requires a newly employed or reassigned teaching staff member to exhibit an appropriate certificate prior to assuming any duties of the new position. Therefore, it is important that you safeguard this certificate.

Please note that it is a violation of N.J.S.A. 18A:26-2 to accept employment under a certificate that you know was printed or issued erroneously. If there are any errors associated with this certificate, please return the original certificate with a brief cover letter to the New Jersey Department of Education, PO Box 500, Trenton, NJ 08625-0500.

Best wishes to you in your endeavors to enhance the academic achievement of New Jersey's children.

WARNING: THIS DOCUMENT CONTAINS MULTIPLE SECURITY FEATURES INCLUDING A CHAIN-LINK WATERMARK.

XXX-XX-8573
Tr# 547479

Cert# 785234

The State of New Jersey

Department of Education
State Board of Examiners

Standard Certificate

This is to certify that

Issued	Expires		County	District
07/10		SARAH L SHARPE	00	0000

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 indicated below:

Elementary School Teacher in Grades K - 5

Bret Schundler
Commissioner of Education

Robert R. Higgins
Secretary, Board of Examiners

EXH. A pg 2 of 2

325-11

JOSEPH WONSETLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – formerly a custodian employed in respondent's district under a series of one year contracts – challenged the Board's termination of his employment in the middle of his annual contract. Petitioner contended that following his termination he was denied a written statement of reasons and an appearance before the Board, contrary to his right to such an appearance pursuant to *Donaldson v. Board of Education of North Wildwood*, 65 *N.J.* 236 (1974). The Board argued that petitioner had failed to state a claim upon which relief can be granted, as no such right to an appearance before the Board exists. The matter was transferred to the Office of Administrative Law (OAL) as a contested case, and both parties filed motions for summary decision.

The ALJ found, *inter alia*, that: the essential facts in the matter were not in dispute, and the matter was ripe for summary decision; resolution of this matter lies in the application of the statutory provisions of *N.J.S.A.* 18A:27-4.1 (a) and (b); the plain language of *N.J.S.A.* 18A:27-4.1 (a) applies to matters involving a Board decision to remove an employee who has no tenure protection, and includes no requirement for any notification of the recommendation to remove, nor does it contain any language incorporating a right to a written statement of reasons for termination or an informal appearance before the Board; these rights *are* included in the language of subsection (b) of the above, which deals specifically with non-renewal determinations; and accordingly, there is no support for applying the principles of *Donaldson, supra,* in cases involving removals or terminations. The ALJ ordered the petition dismissed.

Upon full review and consideration, the Commissioner concurred with the ALJ that petitioner's rights were not violated when the Board terminated his employment pursuant to *N.J.S.A.* 18A:27-4.1 (a), without providing him with a written statement of reasons or a *Donaldson* hearing. Accordingly, the Commissioner 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 17, 2011

OAL DKT. NO. EDU 4504-11
AGENCY DKT. NO. 54-3/11

JOSEPH WONSETLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF WOODBURY, GLOUCESTER 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 and the Board's reply thereto – filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

Petitioner challenges the Administrative Law Judge's (ALJ) conclusion – on page 7 of his decision – that "[w]hile there may be much to say for the inclusion of *Donaldson*[1] rights in removal/terminations..., in the face of [*N.J.S.A.* 18A:27-4.1] (a) and (b) by the Legislature, there is no support for applying *Donaldson* to this sort of termination." In so concluding, petitioner charges, the ALJ failed to recognize the legislative history which resulted in the adoption of *N.J.S.A.* 18A:27-4.1 in 1995. (Petitioner's Exceptions at 1)

Petitioner advances that in 1974, *Donaldson, supra,* set forth the guiding principle that an employee who is not retained should have an opportunity for an informal appearance before the Board. Such right, petitioner maintains, exists independent of any statutory enactment. He charges that what happened in 1994 and 1995 is no more than a legal red herring in this matter.

[1] *Donaldson v. North Wildwood Bd. of Ed.*, 65 *N.J.* 236 (1974)

Specifically, he avers, in 1994 the Appellate Division overturned the State Board of Education and ruled that a local school board had the authority to employ a teacher who had not been recommended by the chief school administrator.[2] In 1995 the Legislature reacted, petitioner maintains, by adopting *N.J.S.A.* 18A:27-4.1, which – according to the sponsor's statement to the legislation – was to correct the law as a consequence of this Appellate Division decision. Therefore, petitioner contends – notwithstanding that this later legislative enactment in some measure "parrots the rights set forth by the New Jersey Supreme Court in *Donaldson*" – the enactment of *N.J.S.A.* 18A:27-4.1 did not serve to abrogate *Donaldson,* but was only intended to clarify the Appellate Division in *Rotondo*. Because *Donaldson* did not interpret a right granted by statute, petitioner argues, the Legislature – through the enactment of this statute – did not or could not abrogate the right conferred by *Donaldson.* (*Id.* at 2)

In reply, the Board proposes that – irrespective of the petitioner's reliance on *Donaldson – N.J.S.A.* 18A:27-4.1 embodies all the protection a terminated or non-renewed school employee is entitled to. Citing the New Jersey Supreme Court's decision in *Leang v. Jersey City Bd. of Educ.*, 198 *N.J.* 557, 578-79 (2009) – wherein the Court stated:

> Those statutory rights (pursuant to *N.J.S.A.* 18A:27-3.2 and *N.J.S.A.* 18A:27-4.1) are the embodiment of the process created by the Legislature through which plaintiff could seek to challenge and to be heard about the Board's non-renewal decision…

– the Board posits that it is clear that school employees who are transferred or removed pursuant to *N.J.S.A.* 18A:27-4.1 (a) are entitled to only those rights enunciated by the statute, which does not include a hearing for a terminated employee. The Board argues that, significantly, the Donaldson Court did not contemplate encroaching on the role of the Legislature, as evidenced when it stated:

> It must be borne in mind that our Legislature has not at any time said that no reasons need be given when a nontenured teacher is not rehired. Bills bearing generally on the subject have been introduced periodically but **thus far no pertinent legislation has been enacted; in the circumstances it is clear that no controlling inference as to intent may be drawn from the legislative silence.** (65 *N.J.* at 240, emphasis added)

[2] *Rotondo v. Carlstadt-East Rutherford Regional High School District*, 276 *N.J. Super.* 36 (App. Div. 1994).

Rather, the Board proposes, it is obvious that the Court intended its holding to be a gap-filler for law that had been considered by the Legislature but not yet enacted. Subsequently, it points out, the Legislature broke its silence and closed the gap by enacting a statutory provision which addresses separately the termination of an employee and the non-renewal of an employee, according different procedural rights to each. (Board's Reply Exceptions at 1-2, quotation at 2)

Wholly irrelevant, the Board argues, is petitioner's allegation that the sponsor's statement to *N.J.S.A.* 18A:27-4.1 indicates that this provision was designed to correct the law as a consequence of the Appellate Division's decision in *Rotondo, supra.* The plain language of this statute, it avers, is abundantly clear:

> [s]ubsection (b) of [this provision] addresses the renewal or nonrenewal of employees and describes the rights of employees subject to nonrenewal: notice, a written statement of reasons, and a formal appearance before the Board. Subsection (a), which addresses the removal or termination of employees, does not articulate the same procedural rights as those articulated in subsection (b). The plain language of the statute "occupies the field" previously addressed by *Donaldson*, compelling the conclusion that the petitioner, as a terminated employee, is not entitled to a hearing before the Board. (*Id.* at 2-4, quotation at 4)

Finally, the Board advances – even assuming, *arguendo*, that the Commissioner were to determine that petitioner was entitled to a hearing pursuant to *N.J.S.A.* 18A:27-4.1 – petitioner would not be entitled to the relief he seeks here, *i.e.*, back pay and attorney's fees. It cites to *Roseann E. Brown v. Board of Education of the City of Camden, Camden County and Annette D. Knox, Superintendent*, Commissioner Decision #262-05, decided July 22, 2005, which in turn cited to *Dore v. Bd. of Educ. Of Bedminster Twp., Somerset County*, 185 *N.J. Super.* 447, 455 (App. Div. 1982), for the proposition that "[a] school board's lack of strict compliance with *N.J.S.A.* 18A:27-4.1 is not sufficient reason to order the board to provide the employee with a financial reward." (*Id.* at 6) Moreover, it points out, even though *N.J.S.A.* 18A:27-4.1(b) sets forth a procedure to be utilized when non-renewing employees, it nonetheless does not provide any penalty should a board fail to follow these procedures. The Board, therefore, urges that because the

Legislature has conferred no power to impose a penalty for non-compliance with this statute, the Commissioner does not have independent authority to either reinstate or impose a financial penalty on the Board. Consequently, it proffers, even if petitioner were to prevail in this matter, he would be entitled to no greater relief than the award of a hearing. (*Id.* at 6-7)

Upon full review and consideration, the Commissioner – finding petitioner's exception arguments without merit – concurs with the Administrative Law Judge, for the reasons clearly presented in his decision, that petitioner's rights were not violated when the Board terminated his employment, pursuant to *N.J.S.A.* 18A:27-4.1(a), effective December 8, 2010, without providing him with a written statement of reasons or a *Donaldson*[3], *supra,* hearing.

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.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8|17|11
Date of Mailing: 8|19|11

[3] As recognized by the ALJ, the *Donaldson* case itself was a non-renewal action, not a removal or termination.

[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 04504-11

AGENCY DKT. NO. 54-3/11

JOSEPH WONSETLER,

Petitioner,

v.

WOODBURY CITY BOARD OF EDUCATION,

Respondent.

Mark Cimino, Esq., for petitioner

Jennifer M. Herrmann, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: June 21, 2011 Decided: July 8, 2011

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

Joseph Wonsetler was employed by the Woodbury City Board of Education as a custodian. He worked under a series of one year contracts, the last of which became effective on July 1, 2010, and was to expire on June 30, 2011. On December 22, 2010, the Board of Education voted to ratify and affirm his termination, effective December 8, 2010. On December 29, 2010, Mr. Wonsetler's attorney advised the Board that he believed that the termination had been effectuated in derogation of Wonsetler's rights under Rice v. Union County Regional High School Bd. of Ed., 155 N.J. Super. 64 (App. Div. 1977)(Rice), and that he was also requesting an informal appearance before the Board pursuant to Donaldson v. North Wildwood Bd. of Ed., 65 N.J. 236

(1974)(Donaldson). The Board did not accord him such an appearance and he filed a petition with the Commissioner of Education, alleging that his legal rights had been violated and seeking an order that the Board permit Wonsetler to appear before it to address his removal, that he receive back pay from the date of his termination to the date of such appearance, interest and attorney's fees. The Board moved to dismiss the Petition, arguing that Wonsetler had failed to state a claim as no such right to an appearance as he claimed existed and that his claims for back pay and attorney's fees sought relief that the Commissioner was not empowered to grant, even if the right to an appearance were found to exist. Wonsetler then moved for summary decision, pursuant to N.J.A.C. 1:1-12.5. The Commissioner transferred the contested case to 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 parties filed briefs and replies, each asserting that the legal issue in the case could be resolved without the necessity for a testimonial hearing. The record closed for purposes of the motion on June 21, 2011.

Prior to discussing the matter, it will be helpful to review N.J.S.A. 18A:27-4.1(a) and (b).

> 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 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 nontenured officer or employee who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed. Prior to notifying the officer or employee of the nonrenewal, the chief school administrator 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 pursuant to section 2 of P.L.1975, c.132 (C.18A:27-3.2) 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 chief school administrator shall notify the officer or employee of the nonrenewal pursuant, where applicable, to the provisions of section 1 of P.L.1971, c.436 (C.18A:27-10).
> c. The provisions of this section shall not apply to the appointment, transfer, removal, renewal or nonrenewal of a person who is a treasurer of school moneys, election officer, board auditor, board attorney or board secretary, except a board secretary who performs business administration functions.
>
> [N.J.S.A. 18A:27-4.1(a) and (b)]

The petitioner argues that this case should be decided in accordance with the Donaldson principal, which the Legislature adopted when it enacted subsection (b) above. Donaldson was decided in 1974, N.J.S.A. 18A:27-4.1(b) was enacted in 1995. Each accords to the non-tenured employee a right to a notice and to request an informal hearing. The rationale for this was set out by Justice Jacobs, speaking for the Donaldson majority,

> 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 nonretention 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 (435 F. 2d at 1184-1185); and perhaps the very requirement that reasons be stated would, as suggested in Monks (58 N.J. at 249), serve as a significant discipline on the board itself

> against arbitrary or abusive exercise of its broad discretionary powers.
>
> [Donaldson v. Bd. of Ed. of the City of North Wildwood, 65 N.J. 236 (1974) at 245]

In response, the Board notes that subsection (b) and Donaldson deal with an employee whose contract the board of education does not contemplate renewing, whereas in the current matter the Board instead decided to terminate petitioner's contract in December, far in advance of the date upon which the one-year contract was due to expire. And whereas subsection (b) clearly incorporates the Rice and Donaldson concepts of notice and informal appearance, the Legislature, in adopting subsection (a), which addresses instances of "appoint[ment], transfer or remov[al]," conspicuously did not address the requirements for such notice and appearance set out in detail in (b). Given that the Legislature did not mimic the (b) language incorporating these principles in (a), it must be that the Legislature did not deem these applicable and thus Wontsetler's petition must therefore be dismissed.

In reply, the petitioner cites the decision issued in Lachenauer v. State-Operated School District of the City of Newark, EDU 11820-08, Initial Decision, (February 3, 2009), adopted in part, Comm'r. (March 18, 2009)<http://lawlibrary.rutgers.edu/oal/search.html>. In Lachenauer, a non-tenured teacher had a contract that ran from September 1, 2007, until June 30, 2008. The principal of East Side High School recommended that the contract not be renewed for the forthcoming year. On April 25, 2008, the District notified Lachenauer that it intended to exercise its right, as set forth in the employment contract, to terminate the contract on thirty days notice. Upon receipt of the letter, Lachenauer wrote to the State District Superintendent, requesting a written notice of the reasons for non-reemployment and advising of an intention to request an informal appearance. The Board responded that as this was a termination of employment, the regulation incorporating a right to an informal appearance did not apply. On summary decision, the administrative law judge determined that the fact that Lachenauer's case involved a termination rather that a non-renewal did not affect his right to the Donaldson appearance, citing Justice Jacob's discussion quoted above, and N.J.S.A. 18A:27-4.1(b). However, as the Board had correctly challenged the timeliness

of Lachenauer's Petition, the judge concluded that despite his view on the appearance question, Lachenauer's claim had to be dismissed. On review, the Commissioner of Education agreed that the Petition was untimely and dismissal was the proper disposition of the case. Addressing the judge's discussion of the Donaldson issue, the Commission wrote

> The Commissioner does not, however, adopt that portion of the Initial Decision that suggests that, in general, the principles set forth in Donaldson – pertaining to non-renewals, i.e., employment actions taken outside the four corners of the employment contract – must necessarily be applied to actions taken pursuant to a mutual contract termination provision.
> Most importantly, there was no need, in this case, to address those principles. It is axiomatic that, in most cases, issues not essential to the disposition of a controversy should not be adjudicated and do not create precedent. See, e.g. Emma Wendt v. Bergen Savings Bank, et al., 133 N.J. Eq. 34, 35-36 (1943), in which the New Jersey Court of Errors and Appeals referred to a portion of the decision of the lower court:
>
> > We do not think that a determination of this point was necessary for the disposition of the case, and we pass over that question here, neither approving nor disapproving of any application to the instant case the court below may have intended to make by citing cases on this point.
>
> [Lachenauer, supra, final decision at 2.]

Respondent contends that the Commissioner did not agree with the judge's conclusion that the Donaldson principle was "imported" into "actions taken pursuant to a mutual contract termination provision." Ibid.

Summary decision is an appropriate means of resolving disputed issues where the parties do not disagree as to the material facts. Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995). In this case the parties each assert that there is no genuine dispute as to the material facts and on review of the submissions, I **FIND** that there is no such dispute. As such, the matter can be resolved

by summary decision. The issue is one in which the resolution lies in the application of the statutory provisions that the parties rely upon to these undisputed facts.

The plain language of N.J.S.A. 18A:27.4.1(a) applies to matters involving a Board decision to remove an employee who has no tenure protection. The provision includes no requirement for any notification of the recommendation not to renew nor does it contain any language incorporating a right to a written statement of reasons for the termination or for an informal appearance before the Board. These rights are conspicuously included in subsection (b) which deals with non-renewal determinations. The Donaldson case itself was a non-renewal action, not a removal or termination. It is always necessary, when considering the language of a statute, to first look at the words themselves and accord them their ordinary meaning, and where statutory clauses are compared, to consider any differing language.

> It is well settled that statutes should be interpreted in accordance with their plain meaning. Fisch v. Bellshot, 135 N.J. 374, 383 (1994); Phillips v. Curiale, 128 N.J. 608, 617-18 (1992); State Dep't of Law & Pub. Safety v. Bigham, 119 N.J. 646, 651 (1990). Where a statute is clear and unambiguous, a court may not impose an interpretation other than the statute's ordinary meaning. Ocean Pines, Ltd. v. Borough of Point Pleasant, 112 N.J. 1, 7 (1988); State v. Butler, 89 N.J. 220, 226 (1982); In re Jamesburg High School, 83 N.J. 540, 547 (1980).
>
> [Jose Munoz v. New Jersey Automobile Full Insurance Underwriting Association, 145 N.J. 377, 384-85 (1996).]

The Legislature is presumed to know the law as it exists, including the decisions of the Judiciary as they may affect any subject of legislative concern, and it is presumed that legislative choices in the language used in any legislation have meaning.

> It is a "well-established canon of statutory interpretation" that the Legislature is presumed to know the judicial construction of its enactments. Johnson v. Scaccetti, 192 N.J. 256, 276 (2007) (citing DiProspero, supra, 183 N.J. at 494). We "cannot 'write in an additional qualification which the Legislature pointedly omitted in drafting its own

> enactment.'" DiProspero, supra, 183 N.J. at 492 (quoting Craster v. Bd. of Comm'rs of Newark, 9 N.J. 225, 230 (1952)). Nor may we "'engage in conjecture or surmise which will circumvent the plain meaning of the act.'" Ibid. (quoting In re Closing of Jamesburg High Sch., 83 N.J. 540, 548 (1980)). Therefore, if the meaning of those words is clear, the analysis is complete, and we need look no further. Mason, supra, 196 N.J. at 68.
>
> [Return of Weapons in the Matter of R.B., (App. Div. 2010), 2010 N.J. Super. Unpub. LEXIS 2659, cert. denied, In re R. B., 205 N.J. 520 (N.J. 2011)]

Thus, one cannot ignore that the Legislature was surely aware of the Rice and Donaldson principles when it adopted (b) and also when it chose, in the words used in (a), to not include therein that same language. The initial decision in Lachenauer did not make any mention of subsection (a). While the Commissioner cannot be read to have decided the Donaldson issue in Lachenauer, as he made quite clear that there was no reason to do so due to the untimely nature of the petition and cannot be understood to have both denied the need to decide the issue and decided it at the same time, it is fair to say that the issue of the applicability of Donaldson to removal/termination matters under (a) has not been decided by either the Commissioner or, in any initial decision that has been cited. While there may be much to say for the inclusion of Donaldson rights in removal/ terminations and the rationale of Justice Jacob's comments for the Court may be seen as properly applied to such situations as faced by Lachenauer and Wonsetler, in the face of the later adoption of the varying language of (a) and (b) by the Legislature, there is no support for applying Donaldson to this sort of termination. As such, the petition must 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.

July 8, 2011
DATE

JEFF S. MASIN, ALJ

Date Received at Agency: July 8, 2011

Date Mailed to Parties: July 8, 2011

mjm

EXHIBIT LIST

FOR THE PETITIONER:

None

FOR THE RESPONDENT:

Exhibit A-Petition

Exhibit B-Series of employment contracts between Board of Education of the City of Woodbury and Joseph Wonsetler (7 pages)

326-11

JANET CARLSON GIARDINA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, formerly the Director of Guidance and Counseling for the respondent Board's school district, alleged that the Board violated her tenure rights when it created the position of Director of Pupil Personnel Services, approved a job description for the position that required a "Principal Certificate," and subsequently eliminated petitioner's position and reduced her salary. At a prehearing conference, the parties agreed that no genuine issues of fact existed, and filed cross motions for summary decision.

The ALJ found, *inter alia,* that: there are no genuine issues of material fact and the matter can be decided by summary decision; the Board acted arbitrarily in creating the new position of Director of Pupil Personnel Services (PPS), which is not a recognized title in the regulations, was not approved by the County superintendent, and required a "Principal Certificate" – a certificate which does not exist in regulations; pursuant to regulations, the Board should have required an Administrative Certificate with an appropriate endorsement for the new position, which includes in its duties district-wide oversight of the administration of special education; neither tenure nor seniority applies across certificates; and accordingly, the petitioner was not entitled to hold the position of Director of PPS as it currently exists. The ALJ ordered that: the respondent Board is required to conform the job description for the Director of PPS pursuant to *N.J.A.C.* 6A:9-13.7; the unrecognized title be submitted to the County superintendent for approval; and petitioner's motion for summary decision is denied and respondent's motion is granted.

Upon a thorough and independent review of the record, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, with clarification.

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, 2011

OAL DKT. NO. EDU 2374-09
AGENCY DKT. NO. 5-1/09

JANET CARLSON GIARDINA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner sought and was granted a significant extension of time within which to file exceptions to the Initial Decision.[1] However, ultimately, no exceptions were filed by petitioner.

Upon his full consideration, the Commissioner initially concurs with the Administrative Law Judge (ALJ) as to the first issue in this matter, *i.e.*, that the Board acted arbitrarily in creating the new position of Director of Pupil Personnel Services in that 1) it created a position with an unrecognized title which was not approved by the County Superintendent and 2) such position had inappropriate certification requirements for the duties set forth in its job description. As to 1), when the Board approved the creation of the position of Director of Pupil Personnel Services, it created an unrecognized title. Pursuant to *N.J.A.C.* 6A:9-5.5, a board of education is required either to assign position titles that are recognized in the regulations or – if it chooses to assign an alternative position title – it must

[1] It is noted that the extended due date for petitioner's exceptions was two days before the Commissioner's decision in this case was due. Because subsequent to the filing of petitioner's exceptions the Board is accorded a regulatory period of time to file a reply, the Commissioner was required to seek an extension for the issuance of his decision.

request approval from the county superintendent for this unrecognized title, which admittedly was not done here. As to 2), the Commissioner notes that this position, as it currently exists, entails district-wide responsibility for special education, guidance and health services and, as such, requires dual certification. Those duties in the job description of this particular position which call for district-wide oversight of guidance and counseling require that the incumbent possess an Educational Services Certificate with a Director of School Counseling Services endorsement (*N.J.A.C.* 6A:9-13.7). Those duties under this position which require district-wide oversight of the administration of special education require that the incumbent possess an Administrative Certificate with an endorsement or certificate of eligibility as a School Administrator (*N.J.A.C.* 6A:9-12.3(a).[2] [3]

As to the second issue in this case, whether petitioner's tenure rights were violated by the Board's not placing her in the newly created position, the Commissioner again agrees with the ALJ that they were not. Notwithstanding that petitioner had tenure status under her Educational Services Certificate, she cannot claim entitlement to a position which, as part of its stated duties, oversees the administration of special education because she does not have an Administrative Certificate. As correctly recognized by the ALJ, "[s]ince neither tenure nor

[2] Pursuant to *N.J.A.C.* 6A:9-12.3(a), a School Administrator endorsement is required for any position that involves services as a *district-level* administrative officer. (Such positions include Director-titled positions.) Pursuant to *N.J.A.C.* 6A:9-12.3(b), a Principal's endorsement is required for any position that involves service as an administrative officer *of a school or other comparable unit within a school district.* (Such positions include Director- titled positions.)

[3] The Commissioner is compelled to clarify that the *Director* of Pupil Personnel Services is not one of the separately tenurable positions enumerated in *N.J.S.A.* 18A:28-5, as stated by the ALJ on page 10 of her decision.

seniority applies across certificates...petitioner was not entitled to hold the position of Director of Pupil Personnel Services as it currently exists." [4] (Initial Decision at 11)

Accordingly, the recommended decision of the OAL – as expounded upon above – is adopted as the final decision in this matter. It is hereby ordered that the Board conform the job description for the Director of Pupil Personnel Services to reflect the certification requirements stated above and that this unrecognized title be submitted to the County Superintendent for approval. The instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.[5]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8|17|11

Date of Mailing: 8|19|11

[4] Additionally, it is also evident that this position – which effectively combines the duties of two positions – is not substantially similar to petitioner's Director of Guidance and Counseling position so as to provide her any entitlement claim.

[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
SUMMARY DECISION
OAL DKT. NO. EDU 2374-09
AGENCY DKT. NO. 5-1/09

JANET CARLSON GIARDINA,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,
Respondent.

David Nash, Esq., for petitioner

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

Record Closed: April 28, 2011 Decided: June 13, 2011

BEFORE **LISA JAMES-BEAVERS,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, Janet Carlson Giardina, filed a Petition of Appeal before the Commissioner of Education on or about January 14, 2009, alleging that the respondent, Winslow Township Board of Education (Board), violated her tenure rights when it

created the position of Director of Pupil Personnel Services and approved a job description for the position that, among other things, requires possession of a "Principal Certificate," and subsequently eliminated petitioner's position as a Director of Guidance and Counseling.

The Board filed its Answer on January 30, 2009, denying the allegations set forth in the petition. The case was forwarded to the Office of Administrative Law (OAL), where it was filed on March 3, 2009, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A pre-hearing telephone conference was held, and at that time the relevant issues in the case were set forth and a discovery schedule was developed. The parties represented at the pre-hearing conference that they would be filing cross-motions for summary decision. The petitioner filed her motion for summary decision on November 2, 2009. The respondent filed its motion for summary decision on November 12, 2009. Petitioner filed her reply brief on December 24, 2009. The Board filed a reply brief on December 31, 2009.

On September 14, 2010, when the case was scheduled for oral argument on the motion, the parties advised that they had reached a settlement in the case. However, the settlement required approval of disability retirement by the Bureau of Pensions. Knowing that it would take a great deal of time before Pensions made a ruling on petitioner's application, I did not schedule the case for review again until December 14, 2010. At that time, the parties advised that the settlement would not be facilitated by petitioner's ability to obtain disability retirement and, therefore, they were going to proceed with the motions. On January 28, 2011, I heard oral argument on the motions. The parties were given an opportunity to submit additional arguments. Inadvertently, I did not close the record until April 28, 2011.

STIPULATION OF FACTS

The petitioner and the respondent have stipulated to the following facts:

1. Respondent hired petitioner Janet Carlson Giardina as Director of Guidance and Counseling effective September 1, 2005. See copy of Job Description: Director of Guidance and Counseling attached as Exhibit A.

2. Petitioner holds an Educational Services Certificate with an endorsement as Director of Student Personnel Services that was issued by the State of New Jersey in January of 1999. See Petitioner's Resume attached as Exhibit B.

3. The Educational Services Certificate with endorsement as Director of Student Personnel Services meets the qualifications as set forth in the job description for Director of Guidance and Counseling.

4. Petitioner obtained tenure in the position of Director of Guidance and Counseling on September 1, 2008.

5. On November 19, 2008, the Winslow Township Board of Education approved the job description Director of Pupil Personnel Services. See Board Minutes of November 19, 2008 attached as Exhibit C and Job Description: Director of Pupil Personnel Services attached as Exhibit D.

6. On December 17, 2008, the Winslow Township Board of Education approved the abolishment of the position of Director of Guidance and Counseling, effective January 12, 2009, and the abolishment of the position of Supervisor of Student Support Services, effective December 31, 2008. See Board Minutes of December 17, 2008 attached as Exhibit E.

7. The job description approved by the Winslow Township Board of Education requires a principal certificate for the Director of Pupil Personnel Services. See **Exhibit D**.

8. Petitioner does not possess a principal certificate.

9. Respondent reduced petitioner's annual salary effective on January 11, 2009 from $97,099.00 to $78,300.00.

LEGAL ISSUES

1. Can this matter be decided by summary decision?

2. Did the Board act arbitrarily in creating the position of Director of Pupil Personnel Services?

3. Was the petitioner, who was tenured in the position of Director of Guidance and Counseling, entitled to the newly created position of Director of Pupil Personnel Services when her position was abolished?

LEGAL DISCUSSION

1. Can this matter can be decided by summary decision?

The rules governing practice in the Office of Administrative Law provide that a motion for summary decision may be granted if there is no genuine issue of material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5. This provision mirrors 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 that may have been filed with the application. In order for the adverse party, 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 Court in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment:

> [T]he 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 the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

The parties have stipulated to all of the relevant facts in the case. Therefore, based on the briefs and affidavits presented by the parties, I **FIND** that there is no genuine issue of material fact and the matter can be decided by summary decision.

2. Did the Board act arbitrarily in creating the new position of Director of Pupil Personnel Services?

Petitioner argues in her summary decision motion that respondent created an unrecognized title with improper qualifications when it created the position Director of Pupil Personnel Services. Further, she argues that the proper certification requirement for a position with responsibility for district-wide oversight of guidance and counseling services is the Educational Services Certificate with either the Director of School Counseling endorsement, pursuant to N.J.A.C. 6A:9-13.7, or the prior Director of Pupil Personnel Services endorsement, pursuant to the prior regulation, N.J.A.C. 6:11-11.11. Last, she argues that her tenure rights were violated when the Board eliminated her position and created a new one with district-wide responsibility for guidance and counseling and failed to place petitioner in the newly created position. Her last argument is a separate issue that will be addressed below.

The Board argues that petitioner's prior position focused exclusively on guidance services, whereas the newly created position focuses on guidance plus special education services, administration of health and medical services, substance abuse

intervention and supervision of instructional staff. For these responsibilities, the Board argues, the qualified applicant must have an Administrative Certificate.

The New Jersey State Board of Education (State Board) has established a certificate system requiring that "any person employed as a teaching staff member by a district board of education shall hold a valid and appropriate certificate." N.J.A.C. 6A:9-5.1(a). The Board has provided for three distinct types of certificates—Instructional, Educational Services, and Administrative. N.J.A.C. 6A:9-2.1; N.J.A.C. 6A:9-5.2. In addition to the different types of certificates, the State Board has also provided for special endorsements, which are affixed to a specific certificate. These endorsements "coincide with the educational subjects or positions that share common attributes and thus are grouped under a particular certificate." Dennery v. Bd. of Educ., 131 N.J. 626, 633 (1993).[1] Accordingly, a person is qualified to teach in a particular area or work in the particular field based upon the endorsement(s) enumerated on the certificate.

Again, there are two separate issues. First, whether the position was properly created, and second, whether petitioner's tenure rights were violated by not placing her in the newly created title. When the Board approved the creation of the position of Director of Pupil Personnel Services, it created an unrecognized title. N.J.A.C. 6A:9-5.5 requires that a board of education assign position titles that are recognized in the regulations, and if a board wishes to assign an alternate position title it shall request approval from the county superintendent for an unrecognized title. It is undisputed that the new title Director of Pupil Personnel Services is not a recognized title and it is not disputed that the title was not approved by the County superintendent. Had the Board sought approval, the County superintendent could have clarified and approved the appropriate certification to require for the title.

[1] Endorsements for Instructional Certificates typically range from subject areas (Art, English, Math, etc.) to specific grade-level specialization (Elementary Education, etc.). Endorsements for an Educational Services Certificate include fields such as School Psychologist, Social Worker, Speech Therapist, etc. Administrative Certificate endorsements cover positions such as Principal, Supervisor, etc.

In Perri v. Board of Education of Belleville, EDU 1395-07, Comm'r (September 10, 2008) <http://lawlibrary.rutgers.edu/oal/search.shtml>, the Commissioner held that the Belleville School District had to eliminate its unrecognized directorship and either reform the duties of the Supervisor of Student Personnel Services/Guidance position to be consistent with lesser levels of responsibility, or appropriately title and staff the new position embodying the higher-level duties previously assigned the petitioning former Director of Student Services. Perri applies to the present case because it sets forth that the duties of the position of Supervisor of Student Personnel Services/Guidance continue to fall substantially within the scope of the Director of School Counseling Services endorsement and cannot be performed by staff without the requisite certification. The endorsements petitioner Perri had for a School Administrator or Principal on the Administrative Certificate were not enough. Thus, as in Perri, the appropriate recognized title that should have been used for a position with district-wide responsibility for oversight of guidance and counseling was "Director of Student Personnel Services/Guidance" and the appropriate certificate to be required for the position is the Educational Services Certificate with the Director of School Counseling Services endorsement. N.J.A.C. 6A:9-13.7. In the present case, the Board provided in the job description that the position required possession of a "Principal Certificate/School Administrator Certificate." As there is no such thing as a "Principal Certificate," this was also in error. The Board should have required an Administrative Certificate with a Principal endorsement. N.J.A.C. 6A:9-5.2; N.J.A.C. 6A:9-12.3. However, because a person with an Administrative Certificate cannot hold district-wide responsibility for oversight of guidance and counseling under Perri, the creation of the position with an unrecognized title, unapproved by the County superintendent, with inappropriate certification requirements for the duties set forth, was an arbitrary action by the Board. I therefore **CONCLUDE** that the Board acted arbitrarily in creating the new position of Director of Pupil Personnel Services.

3. Was the petitioner, who was tenured in the position of Director of Guidance and Counseling, entitled to the newly created position of Director of Pupil Personnel Services when her position was abolished?

Respondent Board argues that the petitioner does not meet the qualifications of the newly created position and did not perform any duties in the areas of special education and health services. The newly created position requires an Administrative Certificate with a Principal endorsement and entails district-wide responsibility for special education, in addition to guidance and health services. Petitioner argues that as long as the new position has district-wide responsibility for guidance and counseling, her tenure rights were violated when the respondent failed to place her in the newly created position.

Educational personnel are tenured in New Jersey under the Tenure Act, N.J.S.A. 18A:28-1 to -18. The tenure statute prevents school boards from abusing their superior bargaining power over teachers in contract negotiations and protects teachers from dismissal for unfounded, flimsy or political reasons. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982) (citations omitted). An employee of a board of education is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time. Id. at 74; N.J.S.A. 18A:28-5.

"[T]enure 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." Nelson v. Bd. of Educ., 148 N.J. 358, 366 (1997) (citing Ellicott v. Bd. of Educ., 251 N.J. Super. 342, 348 (App. Div. 1991)). The Court in Nelson reaffirmed the opinion 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." Nelson, supra, 148 N.J. at 366 (citing Dennery, supra, 131 N.J. at 634). Although transfer of tenure is authorized between endorsements, tenure is not transferable between

certificates. See Dennery, supra, 131 N.J. at 635–36, which reversed 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."

A school district may not avoid an individual's tenure rights by creating a new position that, while it may have a different name or include additional requirements, is substantially similar to the prior position. Dennery, supra, 131 N.J. at 639. A mere overlap of responsibilities does not mean that two positions are equivalent for tenure purposes. McGriff v. Bd. of Educ. of Montclair, EDU 10927-04, Comm'r (July 13, 2006) <http://lawlibrary.rutgers.edu/oal/search.shtml>. If a newly created position is similar to a tenure holder's abolished position, but also requires additional duties, the newly-created position is not considered to be substantially similar to the former position. Ibid. The facts of the present case appear to be more like those of McGriff.

The job description sets forth that the Director of Pupil Personnel Services "coordinates the planning, development of guidance programs, health services and special education programs and services." The qualifications set forth in the description include, "Demonstrate an understanding of the regulations regarding the operation of special education programs, including those outlined in N.J.A.C. Title 6, Chapters 26 and 28, . . . and Section 504 of the Rehabilitation Act of 1973." However, the performance responsibilities include, "Administer guidance programs and services." This includes, to paraphrase, district-wide oversight of guidance and counseling. All of the counselors report to this new director, who is to "develop program proposals, action plans, budget details and evaluative reports as required." (Exhibit D of Stipulations of Fact). In eliminating the more narrowly focused positions of Director of Guidance and Counseling and Supervisor of Student Support Services, the Board consolidated them into the one position with greater responsibility. However, in so doing, the Board combined duties for which two different certificates are required.

N.J.A.C. 6A:9-12.3(a) sets forth that 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. N.J.A.C. 6A:9-13.7 sets forth that an Educational Services Certificate is required for a position that involves district-wide responsibility for guidance and counseling services.

Petitioner acquired tenure in the District as a result of her employment as Director of Guidance and Counseling. Petitioner was qualified for that service by virtue of her Educational Services Certificate and Director of Student Personnel Services endorsement. N.J.A.C. 6A:9-13.7. Petitioner never served in the position of Supervisor of Student Support Services for the District or in any other position that required a Principal endorsement. Further, petitioner did not possess any experience in special education; thus, petitioner was not qualified to hold a position requiring oversight of special education. Pursuant to the express terms of N.J.S.A. 18A:28-5, petitioner cannot transfer the tenure she acquired as a Director of Guidance and Counseling to the separately tenurable position of Director of Pupil Personnel Services, the duties for which she accrued no work experience and require a different certificate and endorsement.

CONCLUSION

For the foregoing reasons, I **CONCLUDE** that the title of Director of Pupil Personnel Services was unrecognized and therefore must be approved by the County superintendent. I further **CONCLUDE** that when the duties of a position require district-wide oversight of guidance and counseling, the appropriate certificate to be required is the Educational Services Certificate with a Director of School Counseling Services endorsement. However, I also **CONCLUDE** that when the duties of a position require district-wide oversight of the administration of special education, the appropriate certificate to be required is an Administrative Certificate. I therefore **CONCLUDE** that the respondent's motion for summary decision must be granted and petitioner's motion for summary decision denied on the basis that, despite petitioner's tenure status under the Educational Services Certificate, she does not have rights to a position that

oversees special education because she does not have an Administrative Certificate with a Principal endorsement. Since neither tenure nor seniority applies across certificates, the petitioner was not entitled to hold the position of Director of Pupil Personnel Services as it currently exists.

ORDER

It is hereby **ORDERED** that respondent be required to conform the job description for Director of Pupil Personnel Services to reflect the requirement that the applicant hold an Educational Services Certificate with a Director of School Counseling Services endorsement pursuant to N.J.A.C. 6A:9-13.7, and that the unrecognized title be submitted to the County superintendent for approval. It is further **ORDERED** that petitioner's motion for summary decision be **DENIED** and respondent's motion for summary decision be **GRANTED** because the positions are not substantially similar and petitioner's tenure is under a different certificate than the Director of Pupil Personnel Services position requires.

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 13, 2011
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: June 14, 2011

Date Mailed to Parties: June 14, 2011

cmo

329-11

A.T., on behalf of minor child, S.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the December 2010 determination of the respondent Board to remove his minor child, S.T., from the first grade and enroll him in a split-day kindergarten/first grade program. The petitioner requested that S.T. be promoted to second grade in September 2011, and sought tutoring to compensate for the time missed since S.T. was transferred from a full-time first grade classroom. The Board asserted that its placement determination was made correctly and in good faith, based upon the professional judgment of teachers and administrators who felt that S.T. was not thriving in a full-day first grade classroom. The Board's enrollment policy for first grade requires that a student must be six years old on or before October 1, or be six years old by December 31 and have a transfer card that reflects successful completion of a private kindergarten program. Students meeting this second enrollment criterion are closely monitored to ensure that their placement is developmentally appropriate. S.T. turned six on October 6, 2010, and had completed a private kindergarten program.

The ALJ found, *inter alia,* that: boards of education are granted discretionary authority under *N.J.S.A.* 18A:4-24 to adopt policies and rules for grade promotion; appropriate deference must be given to professionals in a school district when assessing the appropriate placement of a student; the Commissioner will not substitute his judgment for that of the board of education unless the board's action is shown to be arbitrary, without rational basis or induced by improper motives; in the instant matter, S.T.'s class placement was based on the advice of experienced education professionals who were motivated only by genuine concern for the child's happiness and educational growth; and, accordingly, petitioner has not met his burden of proving arbitrary, capricious or unreasonable Board action. The ALJ denied petitioner's application for relief, and dismissed the petition.

Upon consideration and review, the Commissioner 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 03640-11
AGENCY DKT. NO. 64-3/11

A.T., on behalf of minor child, S.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. [1] 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 that the Board's decision to move S.T. into a kindergarten/first grade split program during the 2010-2011 school year and to place S.T. in first grade for the 2011-2012 school year was not arbitrary, capricious or unreasonable.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8|17|11
Date of Mailing: 8|19|11

[1] The record did not contain a copy of the transcripts from the hearing conducted at the Office of Administrative Law on June 10, 2011 and June 24, 2011.

[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
OAL DKT. NO. EDU 03640-11
AGENCY REF. NO. 64-3/11

A.T. ON BEHALF OF S.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RUTHERFORD, BERGEN COUNTY,

Respondent.

A.T., appearing pro se

Rodney T. Hara, Esq., for respondent (Fogarty and Hara, attorneys)

Record Closed: June 24, 2011 Decided: July 13, 2011

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

STATEMENT OF THE CASE

Petitioner, A.T., is the father of S.T., a student enrolled in the Rutherford Public Schools. Petitioner challenges the determination of the Rutherford Board of Education (the Board), through its administration, to remove his son from the first grade, effective December 2010, and enroll him in a split-day kindergarten/first grade program. Petitioner asks that S.T. be promoted to second grade in September 2011. Additionally,

A.T. seeks tutoring to compensate for the time missed since his son's transfer from a full-time first grade classroom.

The Board asserts that its determination regarding grade placement was made correctly and in good faith, based on the professional judgment of teachers and administrators who felt that S.T. was not thriving in first grade last year.

PROCEDURAL HISTORY

A petition of appeal with accompanying application for emergent relief pursuant to N.J.A.C. 1:1-12.6 was filed by petitioner with the Commissioner of Education (the Commissioner) on April 4, 2011, and was immediately transmitted to the Office of Administrative Law (OAL). The Board filed a brief and certification in opposition to the emergent relief application on April 8, 2011, and filed an answer to the underlying petition on April 11, 2011.

Oral argument was heard and the emergent application was denied via order dated April 11, 2011. The emergent order was affirmed by the Commissioner in a decision dated April 28, 2011. A plenary hearing was conducted on June 10 and June 24, 2011, at which time the record closed.

STATEMENT OF FACTS

The background facts are essentially uncontroverted and I **FIND** as follows:

S.T. is a six-year-old student, who completed kindergarten at a non-public school, and was enrolled in the Rutherford Public Schools as a first grader in September 2010. The Board's enrollment policy provides that a student seeking to enroll in the first grade must be six years old on or before October 1, 2010, or be six years old by December 31, 2010, and have a transfer card that reflects successful completion of kindergarten. Lincoln School Principal Jeanna Velechko clarified that students who miss the cut-off, but enroll as first graders because they have attended a private kindergarten, are closely monitored to ensure that their placement is

educationally appropriate. In the past, students have been returned to kindergarten if they appear developmentally unready for the first-grade curriculum.

S.T. turned six years of age on October 6, 2010. His parents felt that S.T. had a successful kindergarten experience, and he was initially enrolled in a first grade classroom in Rutherford. At the hearing they shared a report card and note from his kindergarten teacher at Saint Joseph School, Joyce Gardner, who advised that "[S.] worked up to kindergarten level and was able to stay on task and produce what was expected of him." (P-10.) Consistent with Velechko's description of district policy and practice, S.T.'s adjustment to and progress in first grade was closely monitored.

As early as October, 2010, S.T.'s classroom teacher began to document concerns about his academic performance, including an inability to remain on task, follow instructions, work well with the class group, hand in assignments on time, and participate appropriately in class discussions. Student progress reports were forwarded to his parents noting these concerns on October 26, 2010, and again on November 8, 2010. (R-2, R-3.)

By November 12, 2010, S.T.'s case had been brought to the attention of the district Intervention Referral Services Committee (IRSC) due to concerns about S.T.'s academic and social functioning in the classroom. The IRSC is a multi-disciplinary team of school professionals that includes a reading specialist, social worker and psychologist. S.T.'s teacher reported failing grades and an inability to work independently to the IRSC. Socially, he appeared to be unhappy, sad and lonely, and he lacked peer relationships.

The IRSC met on November 30, 2010, and determined that it was in S.T.'s best interest to either return to kindergarten, or be enrolled in a split-day program where he would attend both kindergarten and first grade.[1] He was determined not to be developmentally ready for first grade, and accordingly, under either plan would be registered in kindergarten. The Committee stated that its preference was the split-day

[1] Rutherford has a half-day kindergarten program.

program, and S.T.'s parents were given until December 6, 2010, to make a choice. To ensure that the view of the IRSC was the correct one, Velechko arranged for additional testing of S.T., and she carefully reviewed his academic performance. She confirmed that he was performing below average, and was struggling at the first-grade level.

A.T. advised that he did not wish his son to be returned to kindergarten, and desired that he remain in the first grade. The change to a split-day program was made over A.T.'s objection. This petition followed.

The Parents' View

A.T. presented his case on his son's behalf with passion and tenacity. He firmly believes that his son is best served by attending second grade next year, and that he was unfairly transferred. Petitioner argued that there is no precedent for a split-grade assignment in either local policy or State law, and that since kindergarten is not a mandatory grade, the transfer of his son back to kindergarten was improper and illegal. He asserted that his son was not given the chance to succeed in first grade, noting that S.T. began the school year ill and exhausted, having just returned from a trip to India. A.T. urged that school personnel unreasonably denied his requests for a transfer to another first grade class, suggesting that S.T.'s original first grade teacher, Elizabeth Reenstra, lacked sufficient experience to properly address S.T.'s needs.

A.T. advised that other neighborhood children are moving to second grade this fall, that S.T. feels badly that he will not be joining them, and that the whole family has been upset by the district's actions. Somewhat surprisingly, A.T. described the day that S.T. was returned to kindergarten as his "personal September 11th." He was advised about the social and academic difficulties that S.T. experienced at the start of the school year, and heard the testimony of school personnel. Nonetheless, A.T. remained adamant that the school professionals who felt S.T. was properly returned to kindergarten were simply parroting a party line; were more concerned about overall district test scores than individual children; and did not have his son's best interest at heart. A.T. shared copies of S.T.'s class work, and graphically presented his son's

school tests and seat-work grades in an effort to demonstrate that S.T. performed well in the first grade. (P-7, P-8.)

But the real cornerstone of A.T.'s presentation, and what clearly motivated his unwavering insistence that S.T. should be placed in the second grade, was the results of independent testing conducted by Mae Balaban and Associates in January and May 2011. Two reports were admitted into evidence in accordance with the generally accepted notion that hearsay is admissible in administrative proceedings. These reports were not supported by the testimony of their author, thus affording neither me nor opposing counsel the opportunity to delve deeper into the impressions of the evaluator or to fully understand the relevance of the test scores to the specific academic issue presented here; that is, grade-level placement. The January 1, 2011, report reflects that Learning Consultant Deborah Ann Weyland administered two assessments at her offices in January in response to a parental request for an "independent appraisal of [S.T.'s] language arts literacy skills." (P-12.) She determined, based on these test results, that S.T.'s overall oral language and reading functioning was within or above first-grade level.

Weyland tested S.T. again in May 2011. (P-1.) This assessment was conducted "in order to obtain an independent appraisal of [S.T.'s] academic levels of achievement within the areas of Reading and Mathematics," and to assist with educational planning for the 2011-2012 school year. She again assessed S.T. solely on the basis of two testing instruments, and concluded that S.T.'s "achievement scores reflect functioning that is average to superior relative to peers in first grade." Weyland stated in her report that "he has the ability to meet the demands of a second grade class for the 2011-2012 school year." Based on this report, petitioner argues that there can be no basis whatsoever for the district's contrary view as to his son's abilities.

The District Rationale for the Change to Kindergarten and for a First Grade Placement in 2011-2012

But the district urged, persuasively, that S.T. is more complex than his performance on tests administered in an office setting might suggest. In making the

decision to place S.T. in a split-day program last year, and enroll him in first grade next year, the district relied on test performance but also an analysis of his actual functioning in the classroom. The district offered the testimony of several members of its professional staff to explain why S.T.'s educational needs were best served by the mid-school year transfer to kindergarten, and by placement for the upcoming school year as a first grade student. These included his teachers, the building principal and a district learning consultant. Each of these educators testified with professionalism and credibility that their decisions regarding grade placement for S.T. were motivated exclusively by a desire to see him happy and successful in school. Velechko put it best when she emphasized that the easy thing would have been to accede to his parents' wishes, but that this would not have been the right thing educationally for S.T.

Reenstra was S.T.'s first grade teacher at the start of the 2010-2011 school year, and immediately perceived that he was making a poor adjustment to the first grade class both academically and socially. I **FIND** that upon entering first grade S.T. was tense and quiet, and resisted any overtures by his classmates to join in their conversation or play. An Early Literacy Assessment conducted by Reenstra reflected that S.T. lacked the reading skills needed to successfully meet the demands of the first grade curriculum. She offered the example of "tracking the print," a reading strategy employed by most entering first grade students, but not one yet mastered by S.T. Reenstra noted that S.T. seemed unable to comply with classroom routines, and she became concerned that he was not developmentally ready for first grade.

Reenstra brought her concerns to his parents' attention. His mother requested that S.T. be given some more time to acclimate to the classroom, and Reenstra agreed and continued to monitor his progress closely. But Reenstra testified that as the year progressed S.T. continued to seem very immature compared to his peers. Reenstra described two situations where other children claimed S.T. had taken supplies from their desks. Although this testimony angered A.T., who clearly perceived that his son was being accused of being a thief, this was not Reenstra's point. She noted that S.T. was not a "bad" boy, but rather seemed too young to fully understand classroom etiquette or the consequences of his conduct.

A Developmental Reading Assessment (DRA) reflected that S.T. was in the lower quadrant for reading.[2] Reenstra noted that in November the average class score on the DRA was a 12, while S.T.'s score was a 4. Likewise, S.T. seemed unready to meet the demands of the first-grade math curriculum. Although math was a relative strength for him, he experienced difficulty working independently on math problems and required constant redirection. His test scores were poor. Reenstra ultimately shared her observations with the IRSC. According to Reenstra, S.T. was failing the first grade. As the months progressed, S.T. fell further and further behind, exacerbating his sadness and frustration. Reestra informed the IRSC that in her classroom S.T. presented as a discouraged, withdrawn and sad child. In her professional opinion, a change in grade placement was in S.T.'s overall best interest.

Velechko echoed Reenstra's concerns about S.T.'s start to the 2010-2011 school year. As building principal she listened carefully to his parents' input, factoring their concerns into her ultimate professional judgment that S.T. was ill-served by continuing in the first grade. Indeed, to ensure that his teacher was correctly advising a return to kindergarten, Velechko observed S.T. herself and tested him in November 2010. The Gesell Developmental Observation reflected that developmentally S.T. was squarely at his chronological age, and Velechko reiterated that his birth date placed him in kindergarten under Board policy. The Qualitative Reading Inventory confirmed that S.T. was not functioning at a first grade level. (R-13.)

Velechko testified that it was the opinion of the IRSC educational professionals that S.T. was an "over placed" child that was not a good match for first grade. The team did note some academic strengths—particularly in his math performance—and thus proposed the kindergarten/first grade-split program as a way to individualize S.T.'s program to meet his unique needs. After the change in placement, which took place in December, Velechko continued to monitor S.T.'s progress, and asked the school psychologist to do so as well. She noted that, to her observation, S.T. made a good

[2] Reenstra and the other school district witnesses testified that the DRA is an excellent indicator of reading levels, including the comprehension skills that are key to a successful educational experience. The DRA allows the teacher to diagnose strengths, weaknesses and patterns of performance, and is more reliable than a standardized multiple-choice test in understanding reading ability.

adjustment to kindergarten. He interacted with the other children, participated in class and seemed happy. Velechko felt he "blossomed" in kindergarten.

S.T. was enrolled in Lorraine DeCaprio's kindergarten class in the morning and Paula Risoli's first grade class in the afternoon. The testimony of these two highly experienced educators confirmed that the IRSC had correctly recommended a change in placement for S.T., and that as Velechko had stated, he was now "blossoming." DeCaprio has thirty-four years of classroom experience. She observed that S.T. was shy at first, but quickly acclimated to the classroom and its routines. S.T. engaged well in all classroom activities and was socially well-adjusted. According to DeCaprio, he made friends, and was happy. His social interactions were those of a typical kindergarten student. Academically, S.T. was in the top third of DeCaprio's class, and he successfully met the academic goals in her classroom. But DeCaprio noted some ongoing deficits in reading comprehension and stated that her recommendation was for placement next year in first grade. She did not feel that S.T. was academically ready for second grade.

DeCaprio's testimony was echoed by that of Risoli, a teacher with fourteen years experience. She recounted S.T.'s performance in her classroom both at the start of his enrollment and as the year progressed. Risoli immediately recognized that it was difficult for S.T. to keep up with his first grade peers. He had difficulty doing his math work independently and continued to count using his fingers; a strategy typically abandoned by children in first grade. He required frequent prompts to keep up with the class. S.T. likewise did not meet grade-level expectations in language arts. S.T.'s reading comprehension skills were weak, even though he read with fluency. Risoli noted deficits in S.T.'s ability to infer facts or make predictions based on what he had read, both indicators of higher-level reasoning skills that typically develop in first grade. Risoli noted that the DRA score for a rising second grader should be a level 20, and at the end of the 2010-2011 school year S.T. scored at a level 8. Math continued to be a strength but S.T. nonetheless lagged behind his peers.

In terms of S.T.'s behavioral and social skills, Risoli observed immaturity and a lack of independence. She offered such examples as failing to blow his nose

independently, or tie his shoes, or problem-solve real-life situations in the classroom. When asked to join a table that lacked enough chairs, Risoli pointed out that an average first grader would typically know to pull a chair from another table, but that S.T. lacked the maturity to problem solve in this fashion. S.T. remained very quiet in her class, rarely participating in class discussions and lacking confidence. His overall affect was sad, and he did not engage his peers in cooperative play during unscheduled time. Overall, even at the end of his time in Risoli's classroom, S.T. functioned like an entering first grade student. Risoli strongly felt that S.T. was properly placed for the 2011-2012 school year in the first grade.

Thus, the testimony of three teachers who taught S.T., and the testimony of a building principal who also closely monitored his performance, unequivocally supported the soundness of the decision not to promote S.T. to the second grade. Additionally, the testimony of district learning consultant Kathleen Gonzales clarified why the district did not feel that it could agree to a second-grade placement for the coming year despite the independent testing results offered by S.T.'s parents. Gonzales is an educator with thirty-five years experience, formerly as an elementary classroom teacher, and for the past eight years as a learning consultant in Rutherford.

Gonzales emphasized that testing completed by Weyland consisted of portions of the Woodcock-Johnson, a test that she was quite familiar with, but that is typically used to diagnose learning disabilities and determine special education eligibility. Gonzales felt this assessment was not the best tool for determining grade placement, and instead favored the DRA, which, she noted, more authentically reflects actual classroom performance. She indicated that she reviewed S.T.'s seatwork and test scores and spoke with his teachers about his functional performance. Gonzales joined with her colleagues in opining that S.T. was correctly returned to kindergarten, and that he is best served next year by a placement in the first grade.

CONCLUSIONS OF LAW

The Commissioner has consistently held that local boards of education may promote or place students in public school grade levels according to their own rules and

regulations. Shenkler v. Ho-Ho-Kus Bd. of Educ., 1974 S.L.D. 772, aff'd, 1975 S.L.D. 1157; Boulogne v. Bd. of Educ. of the City of Jamesburg, 1964 S.L.D. 107; Wilcox v. Bd. of Educ. of the Borough of Oceanport, 154-55 S.L.D. 75; see also N.J.S.A. 18A:4-24, which provides that while the Commissioner may inquire into whether a local district is providing a thorough and efficient education, "nothing in this section shall affect the right of each district to prescribe its own rules for promotion." Thus, generally, the Commissioner will defer to local board discretion in the area of grade-level placement.

The Commissioner's view is consistent with the generally accepted notion that he will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008), <http://lawlibrary.rutgers.edu/oal/search.html> (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)). The Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). Our courts have held that "[w]here 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 Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, in order to prevail, A.T. must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M. v. Moorestown, supra, EDU 2780-07.

I **CONCLUDE** that A.T. has not met his burden of proving arbitrary, capricious or unreasonable Board action. This record presents no evidence that Rutherford school personnel were motivated by anything other than S.T.'s educational best interest in making the determination that he was not developmentally ready for first grade and that he should return to kindergarten. The district's decision was based on the advice of experienced educational professionals, who conferred as a committee and reviewed both informal observational data and testing data. The determination that S.T. should

remain in first grade for the 2011-2012 year likewise was based on the judgment of knowledgeable classroom teachers, and the building principal.

A.T. clearly is a devoted father, who was motivated only by love and concern for his child in bringing this petition. But the law does not permit me to second guess the decision of seasoned educational professionals, particularly not when they too were clearly motivated only by genuine concern for S.T.'s happiness and educational growth.

For the reasons expressed in this decision, I **CONCLUDE** that the request for tutoring should likewise be **DENIED**.

ORDER

Based on the foregoing, I **ORDER** 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.

July 13, 2011
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: July 13, 2011

Date Mailed to Parties: JUL 14 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Petitioner:

A.T.

R.T.

For Respondent:

Elizabeth Reenstra

Jeanna Velechko

Lorraine DeCaprio

Paula Risoli

Kathleen Gonzales

EXHIBITS

For Petitioner:

P-1 Report from Balaban and Associates

P-2 Documents regarding October absence issue

P-3 January 2011 school work

P-4 February 2011 school work

P-5 March 2011 school work

P-6 May 2011 school work

P-7 Chart

P-8 Chart

P-9 Math test

P-10 Information from St. Joseph School

P-11 Letter dated January 11, 2011

P-12 Balaban report

For Respondent:

R-1 Note home

R-2 Progress report

R-3 Note home

R-4 Progress Report

R-5 Note home

R-6 Referral to Intervention Team

R-7 DRA Levels

R-8 Certification of J. Velechko

R-9 Test Comparison

R-10 Compilation of School Work

R-10(a) Smaller sampling of school work

R-11 Report Card

R-12 Letter dated November 10, 2010

R-13 Letter dated December 3, 2010

R-14 IRSC Action Plan

R-15 Modifications

R-16 December 3, 2010, letter

R-17 DeCaprio summary

R-18 DeCaprio summary

R-19 Risoli summary

R-20 Risoli summary

R-21 Report Card

R-22 Risoli summary

OAL DKT. NO. EDU 842-11
AGENCY DKT. NO. 647-11/10

BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
Y.A. and L.J. on behalf of minor child I.J.,	:	
RESPONDENTS.	:	

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 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: 8|17|11

Date of Mailing: 8|19|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 00842-11

AGENCY DKT. NO. 647-11/10

BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

Petitioners,

v.

Y.A. AND L.J. ON BEHALF OF MINOR CHILD I.J.,

Respondent.

Robert A. Kosicki, Esq., for petitioner (Brach Eichler, LLC, attorneys)

Jessica G. de Koninck Esq., for respondent

Record Closed: July 5, 2011 Decided: July 7, 2011

BEFORE **IMRE KARASZEGI,** ALJ:

On January 7, 2011, 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 Stipulation of Settlement and 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.

July 7, 2011
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: July 11, 2011

Date Mailed to Parties: July 11, 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

Jessica G. de Koninck, Esq.
South Orange Maplewood School District
525 Academy Street
Maplewood, NJ 07040
(973) 762-5600, ext. 1849
Attorney for Respondent

SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, PETITIONER,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
V.		
Y.A. AND L.J. ON BEHALF OF I.J. RESPONDENT(S).	:	PETITIONER

SETTLEMENT AGREEMENT

WHEREAS, I.J. is ninth grade student attending Columbia High School in Maplewood and residing in Newark; and

WHEREAS, the South Orange–Maplewood School District, on the recommendation of the County Superintendent of Schools, filed a petition for a determination concerning the domicile of I.J. for the purpose of attending public school in the State of New Jersey; and

WHEREAS, I.J.'s Parents and the Board of Education wish to avoid a continuing dispute concerning the domicile of I.J.

The parents and Board agree to resolve their disagreements as follows:

1. This Settlement Agreement (hereinafter referred to as the "Agreement") shall cover the period of time beginning September 2010 through June 2011.

2. Simultaneously with the signing of this agreement, the parents shall execute a withdrawal form withdrawing I.J. from the South Orange–Maplewood School District effective June 27, 2011

3. I.J. shall be permitted to complete the 2010-2011 school year at Columbia High School.

4. Should I.J.'s parents fail to sign the withdrawal form, I.J. will, nonetheless, be dropped from the roles of the South–Orange Maplewood School district effective June 27, 2011.

5. Provided the parents execute the withdrawal form, no payment for tuition shall be due on behalf of I.J.

6. The district shall transmit all student records for I.J. to the Newark School District upon request from that district for same.

7. Should the parents, in the future, re-establish residence in the South Orange–Maplewood School District, they will be required to establish proof of such residence before I.J. will be permitted to be enrolled in the district.

6. It is agreed that this Agreement and all of its terms are and will remain confidential to the maximum extent permitted by Law. The Parents are expressly allowed to share this agreement with any school district in which they may become domiciled.

9. 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. The Parents did consult with a representative and acknowledge that they understand the contents of this Settlement Agreement.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals.

Brian Osborne, Superintendent

South Orange/Maplewood Board of Education

Elizabeth Davis – Board President

7/1/11

Date

Yvonne Adams Linwood Kyles

Yolanda Adams and Linwood Jones

6/13/11

Date

South Orange & Maplewood School District

525 Academy Street, Maplewood, New Jersey 07040 Tel: 973-762-5600 Fax: 973-378-7649

Student Withdrawal Form

Student Information

Last Name	First Name	Middle Name	Student Number
Jones	Esaiah	Louis	16671

Current Address	NJ StateID
98 Montrose Street, Newark, NJ 07106	4656796572

New Address			
		Date of Birth	Gender
Withdrawal Date: 7/1/2011 (T4)	Parent/Guardian: Yvonne Adams-Edwards	10/15/1996	Male

Sending School	Receiving School
School Name: Columbia High School	School Name:
Street Address: 17 Parker Avenue	Street Address:
City, State, and Zip Code: Maplewood, NJ 07040	City, State, and Zip Code:
Telephone: (973) 762-5600	Telephone:
Last Grade Attended: 9	School Type:

Records To Be Released

- District Assessments
- State Assessments
- Child Study Team Records

Is student is ESL or a Bilingual Program?
[ ] Yes [X] No

Has student ever been referred for Special Education Services?
[ ] Yes [X] No

If yes, please indicate the specific classification, if any:

_____

_____

I hereby give my permission for release of the above records to my child's new school.*

Signature of Parent/Legal Guardian (circle one) 6/15/11 — Signature of Student (18 or above) — Date 6/27/2011

*In addition to the release of the above records to which you consent, we will be releasing the following mandated records for which your consent is not required: transcript of grades, health records, attendance records, and disciplinary records pursuant to NJ.A.C.6:3-6.5.

Signature of Principal — Date

Form SOM15

SCHOOL DISTRICT OF SOUTH ORANGE AND MAPLEWOOD, NJ
PUBLIC BOARD MEETING
June 20, 2011

FOR ACTION

RESOLUTION 2772

SUBJECT: APPROVE RESIDENTIAL SETTLEMENT AGREEMENT

BE IT RESOLVED, that the Board of Education approves a settlement agreement for student #16671, and authorizes the Board President to execute the settlement agreement.

MOTION made by Mr. Gleason, seconded by Mrs. Wren-Hardin, to approve Resolution 2772.

ROLL CALL: Motion 2772 passed; 7 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 June 20, 2011 by the roll call vote set forth above and remains in full force and effect.

Cheryl Schneider

Cheryl Schneider, Board Secretary

331-11

OAL DKT. NO. EDU 08578-11
AGENCY DKT. NO. 195-7/11

CONCORD ENGINEERING GROUP, INC.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY AND CAMP DRESSER & MCKEE, INC.,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

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.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/18/11

Date of Mailing: 8|19|11

* 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
EMERGENCY RELIEF
OAL DKT. NO. EDU 8578-11
AGENCY DKT. NO. 195-7/11

CONCORD ENGINEERING GROUP, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY AND CAMP DRESSER & MCKEE, INC.,

Respondents.

Joan Howell Osborne, Esq., for petitioner Concord Engineering Group, Inc. (Hoagland Longo, attorneys)

Jonathan M. Busch, Esq. and **Douglas M. Silvestro**, Esq., for respondent Board of Education of the Township of Livingston, Essex County (Schwartz, Simon, Edelstein & Celso, attorneys)

Theodore C. Schlette, appearing pursuant to N.J.A.C. 1:1-5.4(a)(5), for respondent Camp Dresser & McKee, Inc.

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

STATEMENT OF THE CASE

Concord Engineering Group, Inc., alleges that the Livingston Board of Education's award of an Independent Commissioning Services contract to Camp Dresser & McKee, Inc., was in violation of the New Jersey Public Schools Contract Law.

PROCEDURAL HISTORY

Concord Engineering Group, Inc., (Concord) and Camp Dresser & McKee, Inc., (CDM) each submitted proposals in response to a Request for Proposal for Independent Commissioning Services from the Livingston Board of Education (Board). On June 6, 2011, a unanimous resolution was passed by the Board, awarding the commissioning services contract to CDM.

On July 19, 2011, Concord filed a motion for emergency relief and stay with the Department of Education to enjoin the Board from entering into a contract with CDM for independent commissioning services and to enjoin CDM from performing any such services as set forth in its proposal. According to Concord, the Board's award of the contract to CDM was in violation of the New Jersey Public Schools Contract Law.

On July 21, 2011, the Department of Education 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 July 21, 2011. Oral argument was heard on July 27, 2011.

FINDINGS OF FACT

The Board has contracted for renovations to existing schools in the Township of Livingston (District), and sought proposals for independent commissioning services for

the Livingston Renovation Project to ensure that all systems are complete and functioning properly upon occupancy and that the staff has adequate system documentation and training. To that end, a written Request for Proposal for Independent Commissioning Services (RFP) was prepared by the Board. The RFP seeks the services of a qualified commissioning provider (CP) for a construction project estimated to cost $38 million. The RFP sets forth the background, objectives, scope of work, including construction phase and warranty period, systems to be commissioned, desired qualifications, proposal requirements, selection process and other requirements and exhibits. Upon recommendation of the Board's architect, the RFP was provided to three professional engineering firms. The Board received proposals only from Concord and CDM.

According to the RFP, the CP is not responsible for construction management. The systems to be commissioned are mechanical systems, conveyance systems and electrical systems. A bachelor's degree in mechanical or electrical engineer is strongly preferred and a professional engineer certification is required. Exhibits to the RFP reflect extensive commissioning facilitation review.

The selection process set forth in the RFP is as follows:

> Owner shall review all proposals and select and rank the most qualified Consultants. The selection and ranking shall be based on the following criteria:
>
> - Proposed approach to the project.
> - Past experience in performing similar projects.
> - Expertise of the team in performing the services required by the Project.
> - Fee proposal.
>
> The Owner will negotiate/interview with the highest ranked Consultant on the tasks, staffing, schedule and fee proposal. Negotiations may be formally terminated if they fail to result in a contract within a reasonable time period. Negotiations will then ensure with the second ranked Consultant, and if necessary, the third ranked Consultant. If the second and third round of negotiations fail to result in a contract within a

reasonable time period, the solicitation may be formally terminated.

The proposals were reviewed by a committee consisting of the Superintendent of Schools, the project architect, the project construction manager, and the District Business Administrator. On June 6, 2011, the Board unanimously approved a resolution as follows:

3.17 Award of Contract – Commission Services

Whereas, the Livingston Board of Education ("Board") is currently engaged in a construction project involving facility upgrades to a number of the Board's schools ("Project"); and

Whereas, the Project entails upgrades to a number of the systems at the various schools, including, but not limited to HVAC, lighting, and elevators; and

Whereas, the Board has determined that it is in the best interests to retain a professional engineering firm to provide professional commissioning services ("Services") in order to ensure that all of the systems affected by the Project have been completed and are fully operational within the requirements of the Project Specifications; and

Whereas, the Board solicited proposals from multiple professional engineering firms to provide the Services; and

Whereas, the Board received two (2) proposals in response to its solicitation; and

Whereas, the Board has determined that the proposal submitted by Camp Dresser & McKee, Inc, Philadelphia, PA, is responsive to the Board's solicitation, is the most advantageous to the Board, and that Camp Dresser & McKee, Inc. has the appropriate expertise to provide the Services; and

Whereas, N.J.S.A. 18A:18A-5 permits the board of education to negotiate and award a contract for professional services without public advertising and bidding [therefor]; and

Whereas, the Services constitute professional services as defined by the Statute.

> **Now, Therefore, Be It Resolved**, that in accordance with the provisions of N.J.S.A. 18A :18A-1 et. seq., the Board hereby awards a contract for the Services to Camp Dresser & McKee, Inc. in an amount not to exceed Three Hundred Forty Four Thousand Seven Hundred Dollars ($344,700.00); and
>
> **Be It Further Resolved**, that the Board hereby authorizes the Business Administrator, with the assistance of the Board's Special Counsel for Construction to negotiate and prepare the contract for the Services with Camp Dresser & McKee, Inc.; and
>
> **Be It Further Resolved**, that in accordance with the provisions of N.J.S.A. 18A:18A-5, that the Business Administrator cause to be printed once, in an official newspaper, a brief notices stating the nature, duration, service and amount of the contract, and that the resolution and contract are on file and available for public inspection at the Board's offices.

On June 9, 2011, a public notice of the award of contract for commissioning services was printed. No other public notices relative to the RFP were printed. The Board did not pass a resolution authorizing the use of competitive contracting. The Board did not publish a notice regarding the availability of the RFP in a newspaper.

LEGAL STANDARDS

Standards for Emergency Relief

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)

Public Schools Contract Law

N.J.S.A. 18A:18A:4.1 authorizes boards of education to use competitive contracting in lieu of public bidding as follows:

> Notwithstanding the provisions of any law, rule or regulation to the contrary, competitive contracting may be used by boards of education in lieu of public bidding for procurement of specialized goods and services the price of which exceeds the bid threshold, for the following purposes:
>
> a. The purchase or licensing of proprietary computer software designed for board of education purposes, which may include hardware intended for use with the proprietary software. This subsection shall not be utilized for the purpose of acquiring general purpose computer hardware or software;
>
> b. The hiring of a for-profit entity or a not-for-profit entity incorporated under Title 15A of the New Jersey Statutes for the purpose of:
>
> (1) the operation, management or administration of recreation or social service facilities or programs; or

(2) the operation, management or administration of data processing services;

c. Services performed by an organization engaged in providing energy conservation education and training services to train employees of a board of education to reduce consumption of energy;

d. Telecommunications transmission or switching services that are not part of a tariff or schedule of charges filed with the Board of Public Utilities;

e. The purchase of specialized machinery or equipment of a technical nature, or servicing thereof, which will not reasonably permit the drawing of specifications;

f. Food services provided by food service management companies when not part of programs administered by the New Jersey Department of Agriculture, Bureau of Child Nutrition Programs;

g. Driver education courses provided by licensed driver education schools;

h. At the option of the board of education, any good or service that is exempt from bidding pursuant to N.J.S.A. 18A:18A-5;

i. Laboratory testing services;

j. Concessions;

k. The operation, management or administration of other services, with the approval of the Division of Local Government Services in the Department of Community Affairs.

Any purpose included herein shall not be considered by a board of education as an extraordinary unspecifiable service pursuant to paragraph (2) of subsection a. of N.J.S.A.18A:18A-5.

N.J.S.A. 18A:18A-5 sets forth multiple exceptions to the requirement for advertising, including that "[a]ny 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 the subject matter thereof consists of professional services. N.J.S.A. 18A:18A-5(a). The board of education must in such instance state supporting reasons for its action in the resolution

awarding each contract and shall forthwith cause to be printed once, in an official newspaper, a brief notice stating the nature, duration, service and amount of the contract, and that the resolution and contract are on file and available for public inspection in the office of the board of education. N.J.S.A. 18A:18A-5(a)(1).

The local public and public school contracts laws at N.J.A.C. 5:34-1.1 et. seq. apply to all boards of education unless specifically stated to the contrary. Both N.J.S.A. 18A:18A-2 and N.J.A.C. 5:34-1.2 define "professional services" as services rendered or performed by a person authorized by law to practice a recognized profession, whose practice is regulated by law, and the performance of which services requires knowledge of an advanced type in a field of learning acquired by a prolonged formal course of specialized instruction and study as distinguished from general academic instruction or apprenticeship and training. Professional services may also mean services rendered in the provision or performance of goods or services that are original and creative in character in a recognized field of artistic endeavor. Id.

DISCUSSION AND CONCLUSIONS OF LAW

The RFP specifically states that a "bachelor's degree in mechanical or electrical engineering is strongly preferred" and that "P.E. certification is required."

> Engineering is an important and learned profession. There are over 750,000 graduate engineers in the United States, of whom about 325,000 are registered as professional engineers. Registration requirements vary from State to State, but usually require the applicant to be a graduate engineer with at least four years of practical experience and to pass a written examination. About half of those who are registered engage in consulting engineering on a fee basis. They perform services in connection with the study, design, and construction of all types of improvements to real property -- bridges, office buildings, airports, and factories are examples.
>
> National Soc. of Professional Engineers v. United States, 435 U.S. 679, 681-682 (U.S. 1978)

Accordingly, there can be little dispute that the request for proposal sought "professional services." As such, the contract would have been excepted from the advertising requirement because N.J.S.A. 18A:18A-5 would be the operative statute. However, at the option of the board of education, competitive contracting may be used by boards of education in lieu of public bidding for procurement for any good or service that is exempt from bidding pursuant to N.J.S.A. 18A:18A-5. N.J.S.A. 18A:18A-4.1(h).

In the present case, Concord argues that N.J.S.A. 18A:18A-4.1 et. seq. is applicable to the contract, because even if it was not applicable on its face, the conduct of the Board triggered competitive contracting.

In order to initiate competitive contracting, the board of education must pass a resolution authorizing the use of competitive contracting each time specialized goods or services enumerated in N.J.S.A. 18A:18A-4.1 are desired to be contracted. N.J.S.A. 18A:18-4.3(a). The competitive contracting process must utilize request for proposal documentation in accordance with N.J.S.A. 18A:18A-4.4, and N.J.S.A. 18A:18A-4.5 sets for the manner by which competitive contracting proposals must be submitted, including that "[u]nder no circumstances shall the provisions of a proposal be subject to negotiation by the board of education."

Review of N.J.S.A. 18A:18A-4.1 reveals that "professional services" does not fall within the various enumerated purposes for which competitive contracting may be used, unless used at the option of the Board, and Concord's argument that the Board utilized competitive contracting is overborne by evidence in the record that the Board did not utilize competitive contracting. Concord relies upon the RFP itself, which does meet some of the criteria for a competitive contracting requests for proposals set forth at N.J.S.A. 18A:18A-4.4. However, the resolution twice referenced N.J.S.A. 18A:18A-5, and in accordance therewith, the Board caused a brief notice of the award of the contact to be printed in an official newspaper. Although Petitioner argues that the resolution was passed after the fact, and should not be evidence that the Board intended to utilize the professional services statute rather than the competitive contracting statute, there is no dispute that the Board did not comply with and/or violated numerous requirements of N.J.S.A. 18A:18A-4.1 et. seq. The Board did not pass a resolution authorizing the use

of competitive contracting as required by N.J.S.A. 18A:18A-4.3 and the RFP did not comport with certain provisions of N.J.S.A. 18A:18A-4.5, including that it did not cause a notice of availability of request for proposal documentation to be published in a newspaper at least twenty days prior to the date established for submission of proposals. Instead, the RFP was provided only to three entities specifically named by the architect on the Livingston Renovation Project. Further, the RFP reflects that the contract would be negotiated, which is expressly prohibited in competitive contracting by N.J.S.A. 18A:18A-4.5(b).

In light of the foregoing, I **CONCLUDE** that Concord has failed to establish a likelihood of prevailing on the merits of the underlying claim.

In order to prevail on an application for emergent relief, Petitioner must meet all four conjunctive prongs set forth in Crowe. Inasmuch as petitioner has failed to establish a likelihood of success on the merits of the underlying claim, the other Crowe criteria are not addressed.

ORDER

It is hereby **ORDERED** that Concord's application for emergency relief is **DENIED**.

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.

July 28, 2011
DATE

Kelly J. Kirk
KELLY J. KIRK, ALJ

sj/dr

332-11

G.D.M. and T.A.M., on behalf of minor child, G.D.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL, HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In 2009, petitioners challenged the Board's adoption and implementation of Regulation 6145, entitled "Extracurricular Activities," which set forth requirements related to students' conduct both on and off school grounds and specifies consequences for failure to comply therewith. Consequences of violating the requirements of the regulation include the temporary revocation of participation in extracurricular activities. Petitioners contended that Regulation 6145 was unconstitutional, overbroad, and in violation of their constitutional rights. The case was heard in the OAL and the Commissioner subsequently issued a final decision finding that Regulation 6145 was unlawful and directing the Board to revise its policy to bring it into compliance with *N.J.A.C.* 6A:16-7.1 and *N.J.A.C.* 6A:16-7.6. In October 2010, the Board adopted a revised version of Regulation 6145. The instant appeal was filed in November 2010, in which petitioners allege that the revised regulation is unlawful and does not comply with the Commissioner's final decision.

The ALJ found, *inter alia,* that: there are no material facts in dispute and the matter is ripe for summary decision; the Board's argument that the petitioners' appeal should be dismissed because their claims are barred by the doctrine of res judicata is without merit; Regulation 6145 as revised is still unlawful, as it is not in compliance with the requirements of *N.J.A.C.* 6A:16-7.1 and *N.J.A.C.* 6A:16-7.6, and is unconstitutional and overreaches a school board's authority. The ALJ granted the petitioners' motion for summary decision and directed the Board to revise its policy to bring it into compliance with the regulation.

Upon consideration and review, the Commissioner rejected the Initial Decision of the ALJ and dismissed the petition. The Commissioner determined that Regulation 6145 as revised does comply with the requirements of *N.J.A.C.* 6A:16-7.1 and *N.J.A.C.* 6A:16-7.6, finding, *inter alia*, that the key inquiry relating to the suspension from extracurricular activities based on off-school-grounds conduct is not whether the conduct was unlawful or whether the student was arrested, but rather whether the suspension is reasonably necessary to protect the well-being of the student, other students or the school staff, and whether the conduct interferes with the requirements of appropriate discipline in the operation of a school.

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.

Mailed 6/23/11

OAL DKT. NO. EDU 13033-10
AGENCY DKT. NO. 638-11/10

G.D.M. and T.A.M., on behalf of minor child, G.D.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL, HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
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 Board of Education. This case involves the interpretation of the Board's revised version of Regulation 6145, which contains a provision that enables the Board to deny participation in extracurricular activities based on student conduct away from school grounds.[1]

The Board takes exception to the Administrative Law Judge's ("ALJ") determination that the revised version of Regulation 6145 still does not comply with *N.J.A.C.* 6A:16-7.1 and *N.J.A.C.* 6A:16-7.6. The Board argues that Regulation 6145 was revised to fully comply with governing regulations, and the exact language contained in *N.J.A.C.* 6A:16-7.6(a) is included in Regulation 6145. In its exceptions, the Board stresses that Regulation 6145 no longer enables the Board to suspend a student from extracurricular activities without a finding

[1] On September 13, 2010, the Commissioner issued a decision finding that the original version of Regulation 6145 was unlawful and ordered the Board to revise Regulation 6145 to bring it into compliance with the governing regulatory provisions.

that the out-of-school conduct relates to and affects the management of the school and its efficiency.

Additionally, the Board takes exception to the ALJ's interpretation of a "consequence" under *N.J.A.C.* 6A:16-7.6(a). The Board contends that once an alleged violation of the District's Code of Conduct occurs, the school administrator holds a conference with the student, his or her parents and the appropriate personnel in order for the administration to determine if a student should be suspended from extracurricular activities as a result of the out-of-school conduct. The Board argues that it is not the holding of the conference that amounts to a consequence contemplated by the Administrative Code, but rather the consequence is the suspension from extracurricular activities. Finally, the Board takes exception to the ALJ's finding that Regulation 6145 is unconstitutional.

After consideration and review, the Commissioner finds that the revised version of Regulation 6145 complies with the requirements outlined in *N.J.A.C.* 6A:16-7.1 and *N.J.A.C.* 6A:16-7.6 relating to the Board's authority to discipline students for conduct that occurs away from school grounds. The New Jersey Administrative Code contains provisions that establish the parameters by which all boards of education are bound in the establishment of student conduct codes. *N.J.A.C.* 6A:16-7.1 provides, in pertinent part:

> 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. [*N.J.A.C.* 6A:16-7.1(a)].

Further, "[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." *N.J.A.C.* 6A:16-7.1(e). Under *N.J.A.C.* 6A:16-7.6, a board also has the authority 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." The board, however, can only exercise that authority when:

> 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" [*N.J.A.C.* 6A:16-7.6(a)1] 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." [*N.J.A.C.* 6A:16-7.6(a)2.]

Based on the Commissioner's September 13, 2010 decision, the Board revised the original version of Regulation 6145 by incorporating the exact language contained in *N.J.A.C.* 6A:16-7.6(a). Specifically, Regulation 6145 expressly states that "no consequence shall be imposed upon a student for conduct occurring away from school grounds/events, unless the administrative personnel" determine that the requirements contained in *N.J.A.C.* 6A:16-7.6(a), have been met.[2] Therefore, with the addition of those safeguards, the Board has brought Regulation 6145 into compliance with *N.J.A.C.* 6A:16-7.6(a), and significantly, the Board has not afforded itself more authority than was contemplated by the adoption of the regulatory provisions.

Additionally, the Commissioner finds that the administration's holding of a conference as provided for in Regulation 6145 does not amount to a consequence as envisioned by *N.J.A.C.* 6A:16-7.6(a). The consequence for the student's off-school-grounds conduct is the

[2] The full version of Regulation 6145 is contained in the Initial Decision and will not be repeated here.

suspension from extracurricular activities, not the administration's meeting to discuss the nature and extent of the conduct. The petitioners' argument that *N.J.A.C.* 6A:16-7.6(a) prohibits the administration from even holding a conference until the link between the conduct and the school environment is established is too restrictive a reading of the regulation. Certainly, it is not unreasonable for the Board to hold a conference to gather information before determining whether the off-school-grounds conduct should result in a suspension from extracurricular activities based on the requirements contained in *N.J.A.C.* 6A:16-7.6(a). In fact, the information obtained during the conference may be an essential component in the administration's mission to appropriately ascertain whether the necessary link exists. Moreover, the absence of such fact-finding would almost certainly result in complaints from parents that disciplinary decisions were being haphazardly made without the administrators incorporating the requisite analysis.

The petitioners also contend that Regulation 6145 is unconstitutional based on the fact that an arrest for conduct away from school grounds triggers a conference with the student, which the petitioners argue is really an unlawful hearing on the criminal guilt or innocence of the student.[3] The petitioners maintain that the holding of the conference violates the student's First Amendment right against self-incrimination, compelled speech and the right to privacy. As the Board points out, however, the conference is not mandatory for the student nor is it an interrogation as the petitioners argue, but instead is an opportunity for the student to present his or her side of the story before the administration determines whether a suspension from extracurricular activities is warranted. Further, the student is not required to speak at the

[3] According to Regulation 6145, "[w]ith respect to conduct occurring away from school grounds/events, an alleged violation of the above conduct requirements shall occur if a student is formally charged and/or arrested by law enforcement for an alleged violation of the New Jersey Code of Criminal Justice, and/or applicable municipal codes or ordinance provisions". To the extent that this language is not clear, the Commissioner emphasizes that the arrest or charge is not a violation of the Student Code of Conduct but merely a trigger for a conference to enable the administration to determine whether the student's out-of-school conduct should result in a suspension from extracurricular activities. In addition, the Commissioner contemplates that there will be instances where it is so clear that there is no nexus between the alleged conduct and the school environment, no conference will be required.

conference or to incriminate him or herself in any way. As such, the conference is simply part of the process whereby the administration determines whether the student should be suspended from extracurricular activities in accordance with *N.J.A.C.* 6A:16-7.6(a), and the inclusion of the provision directing the administrators to hold a conference does not violate the student's constitutional rights.

It is important to recognize that the key inquiry relating to the suspension from extracurricular activities based on off-school-grounds conduct is not whether the conduct was unlawful or whether the student was arrested, but rather whether the suspension is reasonably necessary to protect the well-being of the student, other students or the school staff, and whether the conduct materially and substantially interferes with the requirements of appropriate discipline in the operation of the school. *N.J.A.C.* 6A:16-7.6(a)(1) and (2). Regardless of the role that the student plays in connection with the conference, the Board is still obligated to meet the requirements enumerated in *N.J.A.C.* 6A:16-7.6(a) – and duplicated in Regulation 6145 – before a student can be suspended from extracurricular activities based on out-of-school conduct.

Accordingly, the revised version of Regulation 6145 is lawful and in compliance with *N.J.A.C.* 6A:16-7.1 and *N.J.A.C.* 6A:16-7.6; therefore, the recommended decision of the ALJ is rejected, and the petition of appeal is dismissed.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/22/11

Date of Mailing: 8/23/11

[4] 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 13033-10
AGENCY DKT. NO. 638-11/10

G.D.M. and T.A.M. ON BEHALF OF
MINOR CHILD G.D.M.,
Petitioners,
v.
BOARD OF EDUCATION OF THE
RAMAPO INDIAN HILLS REGIONAL
HIGH SCHOOL DISTRICT, BERGEN COUNTY,
Respondent.

G.D.M., Esq., for petitioners (Price, Meese, Shulman & D'Arminio, attorneys)

Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: February 14, 2011 Decided: July 6, 2011

BEFORE **CARIDAD F. RIGO**, ALJ:

BACKGROUND AND PROCEDURAL HISTORY

On June 22, 2009, respondent, Ramapo Indian Hills Regional High School District Board of Education (the Board) adopted Regulation 6145, entitled "Extracurricular Activities," which sets forth requirements related to students' conduct—

both on and off school grounds—and specifies consequences for failure to comply therewith. In pertinent part, Regulation 6145 provides:

> 1. General Behavioral Expectations:
>
> a. Students are expected to comply with all of the Board's policies and regulations at all times . . . and the District's Code of Student Conduct.
>
> b. Students are required to conform to reasonable standards of acceptable behavior, to respect the rights, person and property of others, to preserve the degree of order necessary for the conduct of the educational program, and to obey those in authority.
>
> c. Students shall not engage in activities that constitute criminal offenses or juvenile delinquency as defined by law.
>
> 2. Use of Alcoholic Beverages and/or Drugs:
>
> a. Expectations: All student participants in Board-sponsored extracurricular activities must refrain from the use, possession or distribution of any alcoholic beverage or other drugs (unless prescribed by a physician) both on and off school grounds, during the season or activity in which the student wishes to participate in the extracurricular activity.
>
> . . .
>
> Consequences for Violations of Conduct Requirements:
>
> 1. Alleged violations of the above behavioral expectations occurring on school grounds and/or at school sponsored events will be reported by supervising staff member to the building administrator. With respect to conduct occurring away from school grounds/events, an alleged violation of the above conduct requirements shall occur if a student is formally charged and/or arrested by law enforcement for an alleged violation of the New Jersey Code of Criminal Justice, and/or applicable municipal codes or ordinance provisions.
>
> 2. Following notification of a student's alleged violation, the building administrator shall conduct a conference with the student and his/her parents, which shall include the

student assistance counselor ("SAC") and other district personnel, as appropriate, at which time the student shall be provided the opportunity to address the alleged violation.

3. At the conclusion of the conference, the administrative personnel shall determine whether or not a violation of this Policy and Regulation has occurred.

4. If a violation has occurred, appropriate consequences under this Policy and Regulation shall be determined following consideration of all the facts and circumstances of a particular situation, but shall include as a minimum the following

a. First Violation: The student may not participate in any extracurricular activities for seven (7) school days, and/or, at the discretion of the administrator, through and including the next scheduled competitive game and/or event.

b. Second Violation: The student may not participate in any extracurricular activities for ninety (90) school days.

c. Third Violation: The student may not participate in any extracurricular activities for one-hundred eighty (180) school days.

Challenge to Regulation 6145

On September 2, 2009, G.D.M. and T.A.M., together with their then-minor-daughter B.M.M., brought an action challenging Regulation 6145 on the grounds that the policy was unconstitutional, overbroad, and ultra vires, in violation of their constitutional rights.

On June 11, 2010, Administrative Law Judge (ALJ) Richard McGill held that the Board's policy was overbroad and its link between conduct away from school grounds and participation in extracurricular activities constituted a violation of constitutional principles concerning parental rights. See G.D.M. and T.A.M. o/b/o B.M.M. v. Ramapo Indian Hills Reg'l Sch. Dist. BOE (B.M.M. I), EDU 11597-09, Initial Decision (June 11, 2010), <http://lawlibrary.rutgers.edu/oal/search.html>.

In his decision, ALJ McGill noted that provisions of the United States Constitution and New Jersey statutes and regulations "indicate that the authority of a district board of education over students is subject to limitations." Ibid. He explained:

> The powers of a district board of education are no greater than the authority conferred by statute. With limited exceptions, the authority of the board of education applies to student conduct on school grounds and at various school-sponsored functions. The right to impose a consequence for conduct away from school grounds is specifically limited to situations where the exercise of that authority 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.
>
> [Ibid. (Emphasis added).]

Consequently, he determined the Board disregarded the limitations on its authority over conduct of students away from school grounds by purporting in Regulation 6145 to require students to refrain from use, possession or distribution of any alcoholic beverage or other drugs both on or off school grounds; while the regulation additionally applies to violations of the New Jersey Code of Criminal Justice and/or applicable municipal code or ordinance provisions. Ibid. He found the Board has no authority whatsoever to enforce, determine guilt, or otherwise impose a consequence for alleged violations (or violations) of the New Jersey Code of Criminal Justice and/or applicable municipal codes or ordinance provisions and held the adoption of Regulation 6145 was ultra vires and unlawful. Ibid.

ALJ McGill also determined that Regulation 6145 was "grossly overbroad" and that it "disregarded parental rights protected by the Fourteenth Amendment to the United States Constitution." Ibid. He further explained:

> dealing with charges against a teenager unrelated to school is the proper function of the parents without interference from school authorities. This is particularly true where the student's alleged misconduct occurred in the parent's home.
>
> [Ibid.]

On September 13, 2010, the Acting Commissioner of Education (Commissioner) issued a Final Decision in which she adopted ALJ McGill's decision with respect to his finding that Regulation 6145 is unlawful. See G.D.M. and T.A.M. o/b/o B.M.M. v. Ramapo Indian Hills Reg'l Sch. Dist. BOE (B.M.M. II), EDU 11597-09, Final Decision (September 13, 2010), <http://lawlibrary.rutgers.edu/oal/search.html>. The Commissioner explained there was no need to explore the constitutional arguments presented by the parties as discussed by ALJ McGill, as the case could be decided by evaluating whether Regulation 6145 is consistent with the Administrative Code sections, N.J.A.C. 6A:16-7.1 and N.J.A.C. 6A:16-7.6, which govern the Board's authority to deny participation in extracurricular activities for conduct that occurs off school grounds that is unrelated to a school event.

In sum, the Commissioner concluded and adopted ALJ McGill's Initial Decision that Regulation 6145 was unlawful and directed the Board to revise its policy to bring it into compliance with the requirements of N.J.A.C. 6A:16-7.1 and N.J.A.C. 6A:16-7.6. B.M.M. II, supra, EDU 11597-09.

Both parties have filed Notices of Appeal to the Superior Court, Appellate Division and that matter is pending.

On October 11, 2010, the Board adopted a revised version of Regulation 6145 (Revised Regulation). The Revised Regulation is identical to the original Regulation 6145, except for the insertion of an additional paragraph, labeled as "5," which provides:

> 5. Notwithstanding any provision of this or any other Board Policy or Regulation to the contrary, no consequence shall be imposed upon a student for conduct occurring away from school grounds/events, unless the administrative personnel finding a violation of the Policy and Regulation as set forth above, also determines that:
>
> > a. the imposition of consequences, as set forth above, 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; and

> b. 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.

Paragraph 2 of the Revised Regulation (Use of Alcoholic Beverages and/or Drugs) still contains the same language ("both on and off school grounds") as the original version of Regulation 6145.

Challenge to Revised Regulation's Compliance

On November 1, 2010, G.D.M. and T.A.M., together with their minor son, G.D.M., (petitioners) filed the instant petition, in which they allege that the Revised Regulation is unlawful and does not comply with the Commissioner's Final Decision. On November 19, 2010, the Board filed a motion to dismiss in lieu of an answer. On December 9, 2010, petitioners filed a brief in opposition to respondent's motion to dismiss and in support of their respective motion for summary decision. On January 11, 2011, the Board filed a substitution of attorney. Consequently, on January 31, 2011, the superseding attorney filed a letter brief in support of the Board's motion for summary decision and in opposition to the petitioners' motion for summary decision. Respondent Board claims petitioner is barred by the doctrine of res judicata in that there is no genuine issue of material fact to dispute that the revised policy complies with the Acting Commissioner's Final Decision. On February 7, 2011, petitioners filed a reply brief in opposition to respondent's motion to dismiss and in support of their respective motion for summary decision.

The motions are now ripe for resolution.

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:

> [T]he 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:

> [D]esigned 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 and Trust Co. of Westfield, 17 N.J. 67, 74.]

As explained by the court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995):

> [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.

[Id. at 540 (citations omitted).]

Since the underlying facts are not in dispute, this matter is ripe for summary decision concerning: (1) whether the doctrine of res judicata bars petitioners' present action and (2) whether the Revised Regulation complies with the Commissioner's Final Decision.

Is Petitioner's Action Barred by the Doctrine of Res Judicata?

At the outset, the Board argues petitioners' petition should be dismissed because their claims are barred by the doctrine of res judicata. The Board contends all the elements of the doctrine have been met and that claim preclusion applies not only to matters actually determined, but also to all relevant matters that could have been determined. Specifically, the Board avers the petitioners' primary contention in this matter is that a conference with school district personnel after a student has been arrested or charged by law enforcement constitutes a "consequence," which must meet the dual standards of N.J.A.C. 6A:16-7.6 before it can be held. The Board argues the petitioners chose not to raise this issue in their prior litigation; but instead they focused on the issue of whether suspension from extracurricular activities was a consequence invoking the regulatory standards. It avers the petitioners' failure to raise this issue in the prior matter precludes them from raising it in the instant matter.

Petitioners, on the other hand, argue their claim should not be barred by the doctrine of res judicata. They contend the Revised Regulation has never been reviewed to determine whether it is legal or consistent with the Commissioner's Final Decision and claim if it was barred by res judicata, it would violate their due process rights, leave them without adequate remedy, and leave the Board free to disregard the Commissioner's directive outlined in the Final Decision. Petitioners also rebut the Board's claim that they failed to raise the issue concerning the mandatory attendance at a conference portion of the original and the Revised Regulation concerning the mandatory attendance at a conference previously.

The doctrine of res judicata or claim preclusion provides "that a cause of action between parties that has been finally determined on the merits by a tribunal having jurisdiction cannot be relitigated by those parties or their privies in a new proceeding." Velasquez v. Franz, 123 N.J. 498, 505 (1991). "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. Insurance Co. of N. Am., 115 N.J. 451, 460 (1991). Res judicata requires three basic elements: (1) the judgment in the prior action must be valid, final and on the merits; (2) the parties in the later action must be identical to or in privity with those in the prior action; and (3) the claims in the second action must arise from the same transaction or occurrence as the claims in the first one. Velasquez, supra, 123 N.J. at 505-06. Res judicata applies not only to all matters litigated and determined by such judgment but also as to all relevant issues which could have been presented, but were not. Culver, supra, 115 N.J. at 463. To determine whether two claims or causes of action are the same for res judicata purposes, a court must consider: (1) whether the acts complained of and the demand for relief are the same; (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same; and (4) whether the material facts alleged are the same. Id. at 461-62.

The Board's argument that petitioners' petition should be dismissed because their claims are barred by the doctrine of res judicata is without merit. The Board's res judicata argument ignores the fact that the petitioners are not challenging the same conduct policy that was the subject of their prior action. They are challenging the Revised Regulation adopted by the Board after the original Regulation 6145 was found to be unlawful. The application of the res judicata doctrine "requires substantially similar or identical causes of action and issues, parties, and relief sought." Id. at 460. Because the issue in this matter (whether the Revised Regulation complies with the Commissioner's Final decision) differs from their previous application, res judicata does not apply. The Board's attempt to fashion a res judicata argument around its contention that the petitioners' instant application is barred due to their failure to raise their current arguments in their previous application fails to recognize the petitioners' distinct and separate challenges to each of the versions of Regulation 6145. That is, does the

Revised Regulation comply with the requirements rendered in the Commissioner's Final Decision? See B.M.M. II, supra, EDU 11597-09.

DISCUSSION OF THE LAW AND ANALYSIS

The Board argues that petitioners' petition should be dismissed because the Revised Regulation does comply with the Commissioner's Final Decision. The Board claims that the language inserted in the Revised Regulation (Paragraph 5, outlined above) mirrors the language of N.J.A.C. 6A:16-7.6(a)(1) and (a)(2) and brings it into compliance with the requirements delineated in the Commissioner's Final Decision. B.M.M. II, supra, EDU 11597-09. In addition, it claims the revised policy does not infringe on either the parents' or students' constitutional rights. Ibid.

Petitioners, on the other hand, contend the Revised Regulation does not comply with the Commissioner's Final Decision. They claim it is still overbroad, ultra vires, and in violation of constitutional principles. Specifically, they argue the Revised Regulation still requires that all students charged with the violation of any law or municipal ordinance, no matter when or where occurring, be brought before a school committee for a hearing prior to the Board determining whether or not the student's alleged conduct has any nexus to the school. They claim that this hearing amounts to an "interrogation" that infringes on parental, as well as, student rights. They further contend extracurricular activities are a right rather than a privilege and support their contention by emphasizing the importance the Board has placed on extracurricular activities in its district as well as the importance that colleges place on student participation in these activities when making admission decisions. In addition, they cite New Jersey Supreme Court decisions and State Legislature enactments they contend emphasize the importance of extracurricular activities.

At the outset, it should be noted that the Commissioner's pronouncement in reviewing the original version of Regulation 6145 that, although there were constitutional arguments presented by the parties, the case could be decided by evaluating whether the policy is consistent with N.J.A.C. 6A:16-7.1 and N.J.A.C. 6A:16-7.6 (the regulations governing the Board's authority to deny participation in

extracurricular activities for conduct that occurs off school grounds that is unrelated to a school event) is equally apropos here. See B.M.M. II, supra, EDU 11597-09. As the Commissioner stated, "[i]t is against this backdrop that Regulation 6145 must be evaluated." Ibid.

N.J.A.C. 6A:16-7.1 provides in pertinent part,

> 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.
>
> [N.J.A.C. 6A:16-7.1(a).]

N.J.A.C. 6A:16-7.1 further provides, "[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." N.J.A.C. 6A:16-7.1(e).

Therefore, while it is undisputed that the Board has an obligation to establish a code of conduct for students, and the Board's desire to limit drug and alcohol abuse is reasonable, the New Jersey Administrative Code establishes parameters by which all boards of education are bound in the establishment of student conduct codes.

Under N.J.A.C. 6A:16-7.6, a board has the authority 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." The board, however, can only exercise that authority when:

> 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.
>
> [N.J.A.C. 6A:16-7.6(a)(1) and (2).]

Therefore, while there is no doubt that under certain circumstances a board may deny participation in extracurricular activities, there are limits on a board's authority to deny participation in extracurricular activities for conduct that occurs off school grounds that is unrelated to a school event.

In reviewing the original version of Regulation 6145, the Commissioner determined the Board's policy did not meet the elements contained in N.J.A.C. 6A:16-7.6(a). The Commissioner found the plain language of Regulation 6145 "encompasses too many potential violations that would not meet the elements of N.J.A.C. 6A:16-7.6(a)." B.M.M. II, supra, EDU 11597-09. She explained her holding as follows:

> Although the purpose behind Regulation 6145 is the deterrent of drug and alcohol abuse, the Regulation can also be violated if a student is merely charged with any "violation of the New Jersey Code of Criminal Justice, and/or applicable municipal codes or ordinances." It is too much of a stretch to find that all off-school-grounds conduct that may result in one of those violations would automatically make it necessary for the Board to suspend or revoke a student's ability to participate in extracurricular activities in order to protect the well-being of the student, other students or the school staff. Further, the requirement in N.J.A.C. 6A:16-7.6(a)(2) that authorizes a board to revoke a student's ability to participate in extracurricular activities when the student's off-school-grounds conduct "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school" emphasizes the notion that there must be some link between the conduct and the school environment. See also R.R. v. Bd. of Educ., Shore Reg'l High Sch., 109 N.J. Super. 337, 343-44 (Ch. Div. 1970).
>
> Finally, the Commissioner is mindful that Regulation 6145 contains a due process provision that gives the student an opportunity to be heard once a charge is reported to the Board. However, Regulation 6145 does not require the

> Board to take into consideration the mandates contained in N.J.A.C. 6A:16-7.6(a) before the Board suspends or revokes participation in extracurricular activities. Regulation 6145 equates to a blanket authorization permitting the Board to suspend participation in extracurricular activities based on off-school-grounds conduct without the requirements imposed by N.J.A.C. 6A:16-7.6(a).
>
> [Ibid.]

The Board claims that the language inserted in Paragraph 5 of the Revised Regulation, specifically "mirrors the exact language" of N.J.A.C. 6A:16-7.6(a)(1) and (a)(2) and brings it into compliance with the requirements delineated in the Commissioner's Final Decision. The petitioners, on the other hand, say the way the Revised Regulation is drafted still provides the Board with greater authority than that conferred by the governing administrative code provisions. They argue N.J.A.C. 6A:16-7.6(a)(1) and (a)(2) does not grant the Board the authority to conduct a hearing on a student's conduct that occurs off campus that does not have a material and substantial impact upon the operation of the school.

In evaluating the Revised Regulation against the backdrop of N.J.A.C. 6A:16-7.6, it is clear, to me, that the Revised Regulation suffers from the same infirmity as the original policy. The requirements in N.J.A.C. 6A:16-7.6(a)(2) that authorize a board to review a student's ability to participate in extracurricular activities for a student's off-school grounds conduct limits the school's authority over off-school grounds conduct to conduct that materially and substantially interferes with the requirements of appropriate discipline in the operation of the school. There must be some link between the conduct and the school environment. The Board argues the conference from which the administrative personnel determines whether or not a violation of the policy has occurred is not a form of discipline in and of itself; but is instead merely a layer of due process built into the policy to afford students the opportunity to be heard. However, the Board's argument fails to recognize that the scope of the school's authority pursuant to N.J.A.C. 6A:16-7.6 over out-of-school conduct is limited to conduct which directly relates to and affects the management of the school and its efficiency. Because the Revised Regulation, as it is written, still includes conduct that does not directly relate to and affect the management of the school and its efficiency, the Revised Regulation

continues to give the Board more authority than is authorized by the New Jersey Administrative Code.

I **FIND** and **CONCLUDE** that the Revised Regulation is unlawful and the Board should be directed to revise its policy to bring it into compliance with the requirements of N.J.A.C. 6A:16-7.1 and N.J.A.C. 6A:16-7.6. I further **CONCLUDE** that respondent's Revised Regulation 6145 is unconstitutional and overreaches a school board's authority.

ORDER

Based upon the above, it is herein **ORDERED** that petitioner's current motion for Summary Decision is **GRANTED** and respondent's motion for Summary Decision is **DENIED**. Respondent's Revised Regulation 6145 is null and void.

It is further **ORDERED** that respondent shall refrain from enforcing or applying Revised Regulation 6145.

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 6, 2011
DATE

CARIDAD F. RIGO, ALJ

Date Received by Agency: July 6, 2011

Date Mailed to Parties: JUL - 7 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

EXHIBITS

For Petitioner:

P-1 Petition of Appeal

P-2 Reply Briefs and Opposition to Respondent's Motion

For Respondent:

R-1 Motion to Dismiss the Petition

#347-11

347-11

CELEBRATE THE CHILDREN, *ET AL.*	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE	:	
RESPONDENT.	:	

SYNOPSIS

Petitioners in this consolidated case are five private schools for the handicapped (PSH) which have been approved by the New Jersey Department of Education (Department) to receive public school special education students on a tuition basis. Petitioners challenged the Department's determination to restrict its 2008-2009 tuition rate to a 10% increase over its tentative per diem rate. Each school had established a tentative per diem tuition rate at the beginning of the 2008-2009 school year, but their costs per pupil escalated during the course of the year, resulting in final certified tuition rates that exceeded their tentative rates by more than 10 percent. The Department contends that its action in restricting the tuition rate was warranted by the failure of these private schools to timely comply with *N.J.A.C.* 6A:23A-18.2(a)(2), which requires PSHs to notify sending districts in a timely manner when proposed tuition increases will exceed 10%. The petitioners contend that the Department has imposed requirements that are not clearly expressed in the regulatory language, and that they have complied with the letter and spirit of the regulation. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue, and the case is ripe for summary decision; petitioners have met their burden of demonstrating that the Department's determination to restrict their tuition rates was arbitrary, capricious or unreasonable as there is nothing in *N.J.A.C.* 6A:23A-18.2(a)(2) that advises that private schools must notify sending districts quarterly that year-to-date rates have increased by more than 10%; rather, the petitioners' actions in waiting to "propose" a tuition increase until later in the school year were consistent with both the express requirements of *N.J.A.C.* 6A:23A-18.2(a)(2) and the goals of the regulation; such goals are not achieved when notice to the public schools of a "proposed" increase in the final tuition rate is based on premature or artificially inflated information; the Department has penalized the petitioning schools for violating what it perceives to be a rule of general application, and if it requires that these schools notify sending districts when year-to-date figures exceed 10% of the tentative rate, rather than only when they intend to actually "propose" a tuition increase, it needed to say so in clear and unambiguous language. Accordingly, the ALJ ordered summary decision in favor of petitioners.

Upon full consideration, the Commissioner concurred with the ALJ – for the reasons comprehensively presented in her decision – that summary decision is appropriately granted to the petitioners. The Initial Decision was adopted as the final decision in this matter, and respondent's determination limiting the tuition increases allowably charged by the respective petitioners to 10% was reversed. Petitioners' respective requests for tuition increases of between 11.61 and 29.43% for the 2008-2009 school year were granted.

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 29, 2011

OAL DKT. NOS. EDU 7771-10, EDU 10870-10, EDU 11176-10, EDU 11792-10, and EDU 12102-10
AGENCY DKT. NOS. 132-6/10, 510-9/10, 520-9/10, 583-9/10, and 582-9/10

(CONSOLIDATED)

CELEBRATE THE CHILDREN :

PETITIONER, :

V. :

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE :

RESPONDENT. :

CREATIVE ACHIEVEMENT ACADEMY : COMMISSIONER OF EDUCATION

PETITIONER, : DECISION

V. :

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE :

RESPONDENT. :

INNOVATIVE EDUCATION PROGRAMS, LLC, :

PETITIONER, :

V. :

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE :

RESPONDENT. :

CEREBRAL PALSY CENTER OF BERGEN CO. INC. d/b/a THE CHILDREN'S THERAPY CENTER, :

PETITIONER, :

V. :

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE :

RESPONDENT. :

WILLOWGLEN ACADEMY-NEWTON,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE

RESPONDENT.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent sought and was granted an extension of time within which to file exceptions to the decision, and such exceptions were received in accordance with the extended timeline. These and petitioners' reply exceptions were fully considered by the Commissioner in reaching his determination herein.

Respondent's exceptions merely re-advance its arguments presented before the Administrative Law Judge (ALJ) below. As it is determined that all of these were fully considered and addressed by the ALJ in her decision, they will not be revisited here.

Upon full consideration, the Commissioner concurs with the ALJ – for the reasons comprehensively presented in her decision – that summary decision is appropriately granted to petitioners.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. Respondent's determination limiting the tuition increases allowably charged by the respective petitioners for the 2008-09 school year to 10 percent is reversed. Rather, Celebrate the Children's request for a tuition increase of 24.65 percent; Innovative Education's request for a tuition increase of 11.61 percent for its Saybrook program and 29.43 percent for its Krumbiegel program; Creative Achievement Academy's request for a tuition increase of 15.81 percent;

Willowglen Academy's request for a tuition increase of 12.93 and Children's Therapy Center's request for a tuition increase of 15.27 percent – all for the 2008-09 school year – are hereby granted.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/29/11

Date of Mailing: 8/30/11

[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

CELEBRATE THE CHILDREN,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,
Respondent.

OAL DKT. NO. EDU 07771-10
AGENCY DKT. NO. 132-6/10

CREATIVE ACHIEVEMENT ACADEMY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,
Respondent.

OAL DKT. NO. EDU 10870-10
AGENCY DKT. NO. 510-9/10

INNOVATIVE EDUCATION PROGRAMS, LLC,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,
Respondent.

OAL DKT. NO. EDU 11176-10
AGENCY DKT. NO. 520-9/10

CEREBRAL PALSY CENTER OF BERGEN CO., INCORPORATED d/b/a THE CHILDREN'S THERAPY CENTER,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

Respondent.

OAL DKT. NO. EDU 11792-10
AGENCY DKT. NO. 583-9/10

WILLOWGLEN ACADEMY–NEWTON,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

Respondent.

OAL DKT. NO. EDU 12102-10
AGENCY DKT. NO. 582-9/10

David B. Rubin, Esq., for petitioners Celebrate the Children, Innovative Education Programs, LLC, Creative Achievement and The Children's Therapy Center

Christopher D. Quinn, Esq., for petitioner Willowglen Academy (Morris, Downing & Sherred, attorneys)

Susan M. Huntley, Deputy Attorney General, for respondent (Paula T. Dow, Attorney General of New Jersey, attorney)

Record Closed: June 23, 2011 Decided: July 14 ,2011

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

STATEMENT OF THE CASE

Petitioners are private schools for the disabled, which have been approved by the New Jersey Department of Education (the Department) to receive public school students on a tuition basis. The schools challenge the Department's determination to restrict their 2008–2009 tuition to a 10 percent increase over their tentative per diem rate. The Department contends that its action was warranted by the failure of these private schools to timely comply with the notice provisions contained at N.J.A.C. 6A:23A-18.2(a)(2). The petitioning schools contend that the Department has imposed requirements that are not clearly expressed in the regulatory language, and that they have complied with the letter and spirit of the regulation.

PROCEDURAL HISTORY

This matter commenced with the filing of five separate petitions of appeal. Celebrate the Children filed a petition with the Commissioner of Education (the Commissioner) on June 24, 2010. An answer was filed on July 8, 2010, and the contested case was transmitted to the Office of Administrative Law (OAL) on July 8, 2010. Innovative Education Programs filed its petition of appeal with the Commissioner on September 2, 2010. An answer was filed on September 21, 2010, and the contested case was transmitted to the OAL on September 29, 2010. Creative Achievement filed a petition with the Commissioner on September 3, 2010. An answer was filed on September 21, 2010, and the contested case was transmitted to the OAL on September 22, 2010.

The Department asserted that two of the petitions were untimely. The Children's Therapy Center filed a petition of appeal with the Commissioner on September 29, 2010. The Department filed a motion to dismiss in lieu of an answer on October 20, 2010, and the contested case was transmitted to the OAL on October 21, 2010. Willowglen Academy filed its petition on October 15, 2010. The Department filed a motion to dismiss in lieu of an answer on October 18, 2010, and the contested case was transmitted to the OAL on October 21, 2010.

The Department's motions to dismiss were denied via letter order dated December 15, 2010. The five petitions of appeal were consolidated via order dated December 20, 2010. Cross-motions for summary decision were filed by the Department and Celebrate the Children, Innovative Education Programs, Creative Achievement and the Children's Therapy Center on April 29, 2011. Simultaneous replies were filed on June 3, 2011. Via letter dated April 29, 2011, Willowglen joined in the motion filed by the remaining private schools for the disabled.

On June 20, 2011, I conferred with counsel to obtain clarification regarding several of the submissions filed in support of the cross-motions. Counsel for Innovative Education Programs filed a letter and accompanying certified answers to interrogatories on June 23, 2011, at which time the record closed.[1]

FINDINGS OF FACT

The relevant facts are uncontroverted and I **FIND** as follows:

The five petitioning schools are private schools for the disabled, and are approved by the Department to receive special needs students from local public school districts. As such, they are required to comply with Department regulations governing tuition and bookkeeping. Among these requirements is the obligation to timely notify sending public school districts that tuition may increase. During the 2008–2009 and 2009–2010 school years, the Department issued guidance to approved private schools in the form of a document entitled "Financial Accounting for New Jersey Private Schools for Students with Disabilities—The Audit Program." In both years, the document, at page 68, addressed the notice requirements contained at N.J.A.C. 6A:23-4.2(a)(2),[2] and the requirement that private schools notify sending public districts when they

[1] Exhibit E to the Department's brief, a Request for Admissions, gave the false impression that Innovative Education Programs admitted that it had failed to comply with regulatory notice provisions. Counsel's June 22, 2011, letter clarified that discovery as a whole reflects that the answer in the Request for Admissions was an error. His letter also clarified a discrepancy regarding the tuition figures certified by Innovative Education Programs.

[2] Now recodified as N.J.A.C. 6A:23A-18.2(a)(2).

propose to charge a final tuition rate in excess of 10 percent above the tentative rate, stating:

> [the school] shall notify each sending district board of education and the Assistant Commissioner, Division of Finance that such an increase will be charged and the reason for the increase on or before the following dates: December 15th for the first quarter, March 15th for the second quarter, June 15th for the third quarter and September 15th for the fourth quarter.
>
> [Petitioners' Brief, Exhibit H.]

In August 2010 the Department issued a revised document which contained the following, significant addition to the instructions on page 68:

> If a school's YTD Per Diem Tuition Rate is in excess of 10 percent of the Tentative Per Diem Tuition Rate Charged, the notification must be filed by the date indicated in the regulations. The directions indicate the following on page 5, item #7K, "If the YTD Per Diem Tuition Rate is greater than 10% of the Tentative Per Diem Tuition Rate Charged, the private school must comply with N.J.A.C. 6A:23-4.2(a)2 in order to charge a Final Tuition Rate in excess of 10% of the Tentative Tuition Rate Charged." . . . Therefore, when a school's YTD Per Diem Rate is in excess of 10 percent of the Tentative Tuition Rate Charged, it triggers the requirement that the [school] make the required notification to the parties in accordance with N.J.A.C. 6A:23-4.2(a)2 (now N.J.A.C. 6A:23A-18.2(a)2). The timing of the notification is not at management's discretion.
>
> [Petitioner's Brief, Exhibit I.]

A Department document entitled "Prescribed Financial Report for Private Schools for Students with Disabilities," issued in June 2008, likewise states that "[i]f the YTD Per Diem Tuition Rate is greater than 10% of the Tentative Per Diem Tuition Rate Charged, the private school must comply with N.J.A.C. 6A:23-4.2(a)2 in order to charge a Final Tuition Rate in excess of 10% of the Tentative Rate Charged." (Department's Brief, Exhibit V.)

In accordance with Department regulations, each of the petitioning schools established a tentative per diem tuition rate at the commencement of the 2008–2009 school year. Their costs per pupil escalated during the course of the year, resulting in final certified tuition rates that exceeded their tentative rates by more than 10 percent. The specifics relative to each school, its tuition and the notice it supplied to sending districts are as follows:

Celebrate the Children

At the start of the 2008–2009 school year, Celebrate the Children established a tentative per diem tuition rate of $275.20. Its quarterly financial report for September 30, 2008, reflected a year-to-date per diem tuition rate of $502.77, an increase of greater than 10 percent. Celebrate the Children's audited financial statements for June 30, 2009, certified a final per diem rate of $343.05, an increase of 24.65 percent. Via letter dated February 23, 2009, Celebrate the Children corresponded with the business officials for its sending districts, advising that due to increased costs and expenses, its tuition rate was anticipated to increase by more than 10 percent.

Via letter dated April 28, 2010, Jim Verner, section supervisor of the Office of Fiscal Policy and Planning for the Department, wrote to Monica Osgood, executive director for Celebrate the Children. He advised that the school was being restricted to a 10 percent increase in tuition, or $302.72 per diem. Verner found that Celebrate the Children had failed to comply with the requirements of N.J.A.C. 6A:23-4.2(a)(2) (now N.J.A.C. 6A:23A-18.2(a)(2), stating:

> Based upon the information provided to the Department, the school's quarterly financial report for September 30, 2008 indicated a year-to-date tuition rate of $502.77 and a tentative per diem rate charged of $275.20 an increase in excess of 10 percent which would require notification to the required parties by December 15, 2008. However, the school did not make the required notification in accordance with N.J.A.C. 6A:23-4.2(a)2 until February 23, 2009.

On May 27, 2010, Celebrate the Children, through counsel, wrote to Yut'se Thomas, acting assistant commissioner, Division of Finance, and appealed Verner's determination. Via letter dated June 17, 2010, Thomas upheld Verner's findings, reiterating that "[s]ince the school's YTD Per Diem Tuition Rate was in excess of 10 percent of the Tentative Per Diem Tuition Rate Charged in the quarter ending September 30, 2008, the notification should have been filed by December 15, 2008. The school is considered to be in non-compliance." (Department's Brief, Exhibit Q.)

Celebrate the Children asserts that it has traditionally based its notification to sending districts on data from two quarters. It explains that it runs a 180-day-a-year program, but still incurs personnel, rent, insurance and other costs during the summer months. Since in September 2008 school was in session for only 19 days, the per-pupil cost was skewed upward because "three months' expenses were applied to a low average daily enrollment." (Petitioners' Brief at page 4, citing certified answers to interrogatories.) For this reason it relies on data from two quarters before proposing a tuition adjustment. Celebrate the Children states that the action of the Department in disallowing its requested increase resulted in a tuition loss of approximately $600,000.

Innovative Education Programs

Two programs operated by Innovative Education Programs are at issue. At the start of the 2008–2009 school year, Hillside School for Students with Disabilities—Saybrook established a tentative tuition rate of $185.36.[3] Its quarterly financial report for September 30, 2008, reflected a year-to-date per diem tuition rate of $214.27, an increase in excess of 10 percent over the tentative rate. Saybrook's audited financial statements for June 30, 2009, certified a final per diem rate of $201.83, an increase of 11.61 percent.

At the start of the 2008–2009 school year, Hillside School for Students with Disabilities—Krumbiegel established a tentative tuition rate of $180.83. Its quarterly

[3] Counsel for Innovative Education Programs clarified in a letter dated June 22, 2011, that the figures in the request for admissions served by the Department were slightly off—in a telephone conference with counsel it was confirmed that the figures in counsel's letter were correct. Hence, these are the figures incorporated in this decision.

financial report for September 30, 2008, indicated a year-to-date per diem tuition rate of $375.27, an increase in excess of 10 percent over the tentative rate. Krumbiegel's audited financial statements for June 30, 2009, certified a final per diem rate of $234.05, an increase of 29.43 percent. Via letter dated February 13, 2009, both Saybrook and Krumbiegel corresponded with the business officials for their sending districts, advising that due to increased costs and expenses, their tuition rates were anticipated to increase by more than 10 percent.

Via letters dated April 28, 2010, Verner wrote to Dr. Melanie North, principal of the Saybrook and Krumbiegel programs. He advised that each program was being restricted to a 10 percent increase in tuition, or $198.91 and $306.38 per diem respectively. An appeal was unsuccessfully filed with Thomas. Deputy Commissioner Andrew Smarick replied on her behalf, and upheld Verner's determination via letter dated August 20, 2010. He too reiterated that if the year-to-date cost per pupil is 10 percent higher than the tentative rate, notification to sending districts must issue on or before December 15. Smarick thus concurred with Verner that Innovative Education Programs was in noncompliance with the regulation.

Like Celebrate the Children, Innovative Education Programs urges that notifying its sending districts during the first quarter that it might propose a tuition increase would present artificially inflated data to these public schools. It contends that the Department's action cost it approximately $54,000 in tuition. Both schools assert that they have historically waited to notify sending districts until the end of the second quarter, with no objection by the Department.

Creative Achievement Academy

At the start of the 2008–2009 school year, Creative Achievement Academy established a tentative tuition rate of $197.94. The school's quarterly financial report for September 30, 2008, reflected a year-to-date per diem tuition rate of $383.57, an increase in excess of 10 percent over the tentative rate. Creative Achievement Academy's audited financial statements for June 30, 2009, certified a final per diem

rate of $229.24, an increase of 15.81 percent. Via letter dated April 3, 2009, Creative Achievement Academy corresponded with the business officials for its sending districts, advising that due to increased costs and expenses, its tuition rate was anticipated to increase by more than 10 percent.

Via letter dated April 28, 2010, Verner corresponded with Sharon Bruno, director of Creative Achievement Academy, and advised that the school was being restricted to a 10 percent increase over its tentative per diem rate, or $217.73. He cited a failure to comply with the requirements of N.J.A.C. 6A:23A-18.2(a)(2). An appeal was filed with Thomas, who upheld Verner's determination via letter dated June 9, 2010, again stressing the Department view that "if a school's YTD Per Diem Tuition Rate is in excess of 10 percent of the Tentative Per Diem Tuition Rate Charged, the notification must be filed by the date indicated in the regulation." (Department's Brief, Exhibit R.)

Creative Achievement asserts that historically its financial data early in the school year has reflected an increase in costs that exceeds 10 percent, but that it never charged sending districts for these increases because third-quarter enrollment always increased enough to adjust the final certified rate downward to within 10 percent of the tentative rate. The 2008–2009 school year was the first time that the anticipated third-quarter rise in enrollment failed to materialize. Upon so realizing in April 2009, Creative Achievement notified its sending districts that tuition would rise.

Willowglen Academy

At the start of the 2008–2009 school year, Willowglen Academy established a tentative tuition rate of $251.38. The school's quarterly financial report for September 30, 2008, indicated a year-to-date per diem tuition rate of $314.43, an increase in excess of 10 percent over the tentative rate. Willowglen's audited financial statements for June 30, 2009, certified a final per diem rate of $283.88, an increase of 12.93 percent. Via letter dated February 16, 2009, Willowglen corresponded with the business officials for its sending districts, advising that due to increased costs and expenses, its tuition rate was anticipated to increase by more than 10 percent.

Via letter dated April 28, 2010, Verner wrote to Susan Hackett, director of Willowglen, and advised that its final tuition rate would be restricted to a 10 percent increase over the tentative rate, or $276.52, again citing noncompliance with the regulatory notice requirements. An appeal was filed with Thomas, who upheld Verner's determination via letter dated June 8, 2010.

Cerebral Palsy Center of Bergen County (d/b/a The Children's Therapy Center)

At the start of the 2008–2009 school year, the Children's Therapy Center established a tentative tuition rate of $278.53. The school's quarterly financial report for September 30, 2008, indicated a year-to-date per diem tuition rate of $351.75, which is an increase in excess of 10 percent over the tentative rate. The Children's Therapy Center's audited financial statements for June 30, 2009, certified a final per diem rate of $321.06, an increase of 15.27 percent. Via letter dated March 1, 2009, the Children's Therapy Center corresponded with the Department and the business officials for its sending districts, advising that due to increased costs and expenses, its tuition rate was anticipated to increase by more than 10 percent.

Via letter dated April 28, 2010, Verner wrote to Marvin Leiken, executive director of Children's Therapy Center, and advised that its final tuition rate would be restricted to a 10 percent increase over the tentative rate, or $306.38, citing noncompliance with the regulatory notice requirements. An appeal was filed with Thomas, who upheld Verner's determination via letter dated June 8, 2010.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

The parties have cross-moved for relief under 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) (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 (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 251–52, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

It is clear from the submissions of the parties that they do not disagree as to the facts, only as to how those facts should affect the ability of the five petitioning private schools to increase their tuition rates under the regulatory scheme. Accordingly, I **CONCLUDE** that this matter is ripe for summary decision.

The petitioning private schools are approved to receive public school special needs students pursuant to N.J.S.A. 18A:46-15, and, as such, must comply with complex statutory and regulatory provisions that govern the tuition they may charge. N.J.S.A. 18A:46-21 states that these schools may determine a tuition rate to be paid by

their sending boards of education, "but in no case shall the tuition rate exceed the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the State Board of Education." The statute recognizes that tuition is paid to approved schools for the disabled with public funds, and that these funds are utilized to educate public school students with multifaceted needs that cannot be met within their home school districts. Council of Private Sch. for Children with Special Needs, Inc. v. Cooperman, 205 N.J. Super. 544 (App. Div. 1985). Accordingly, the clear intent of the statute is that the tuition charged be reasonably related to the educational services actually provided by the private school. Regulations promulgated by the Department are designed to implement this statutory intent. N.J.A.C. 6A:23A-18.1 to -18.16.

A private school and a sending district typically establish an initial agreement for the provision of services based upon a tentative tuition rate. N.J.A.C. 6A:23A-18.2(h). In order to establish a final tuition rate that is based on the certified actual cost per pupil, the private school must prepare quarterly financial reports in a format approved by the Department. N.J.A.C. 6A:23A-18.4(a)(11). These reports must be submitted to the private school's governing body for approval, and the acceptance of the report must be documented in the governing body's minutes. Once a final rate is established an adjustment is made. Thus, if the tentative rate does not adequately reflect the actual cost per pupil, the private school may bill its sending public districts for "all or part of the difference owed." N.J.A.C. 6A:23A-18.2(m).

Consistent with the goal of ensuring the proper and orderly expenditure of public funds, the regulations expressly direct private schools for the disabled to give timely notice of anticipated tuition adjustments, as follows:

> 2. If the approved private school for students with disabilities proposes to charge a final tuition rate in excess of 10 percent above the tentative tuition rate charged, the private school shall notify each sending district board of education and the Assistant Commissioner, Division of Finance that such an increase will be charged and the reason for the increase on or before the following dates: December 15th for the first quarter, March 15th for the

> second quarter, June 15th for the third quarter and September 15th for the fourth quarter, or the next business day when applicable. The determination of a final tuition rate in excess of 10 percent above the tentative tuition rate charged shall be based on the completion of the required quarterly financial report in accordance with N.J.A.C. 6A:23A-18.4(a)11.
>
> > i. If the sending district board of education and the Assistant Commissioner, Division of Finance are not notified on or before the dates noted in (a)2 above, the approved private school for students with disabilities shall charge an increase not to exceed 10 percent of the tentative tuition rate charged.
>
> [N.J.A.C. 6A:23A-18.2(a)(2).]

Petitioners bear the burden of demonstrating that the Department's determination to restrict their tuition rates was arbitrary, capricious or unreasonable. Titusville Acad., Inc. v. N.J. Dep't of Educ., EDU 00651-06, Initial Decision (May 21, 2007), adopted, Comm'r (July 6, 2007) <http://lawlibrary.rutgers.edu/oal/search.html>; Catholic Family and Cmty. Servs. v. N.J. Dep't of Educ., EDU 01051-01, Initial Decision (January 14, 2003), adopted, Comm'r (March 3, 2003), adopted, State Bd. (July 2, 2003) <http://www.nj.gov/education/legal/>. I **CONCLUDE** that petitioners have met their burden. It is well established that an administrative regulation is subject to the same canons of construction as a statute. In re N.J.A.C. 14A:20-1.1, 216 N.J. Super. 297, 306 (App. Div. 1987). When interpreting a statute or regulation, our courts assume that the framers intended to ascribe to words their ordinary meaning. Jablonowska v. Suther, 195 N.J. 91, 105 (2008). The intent of a statute or regulation should be gleaned from a view of the whole and of every part of the statute, with the real intention prevailing over the literal sense of its terms. Schierstead v. City of Brigantine, 29 N.J. 220 (1959).

It is clear from the correspondence forwarded to petitioners by Verner, Thomas and Smarick that they have interpreted N.J.A.C. 6A:23A-18.2(a)(2) to require that once the year-to-date tuition rate exceeds the tentative rate by more than 10 percent, the notification requirement is triggered. But the year-to-date per diem rate is nowhere

mentioned in the regulation. The only express requirement is that private schools notify sending districts when they "propose" to charge a "final tuition rate in excess of 10 percent above the tentative tuition rate charged." N.J.A.C. 6A:23A-18.2(a)(2) (emphasis supplied). Petitioners persuasively argue that they assumed that "no notice was necessary until and unless they actually 'propose[d]' a [final] tuition increase above the 10 percent threshold." (Petitioners' Brief at page 9.) Their assumption was understandable. That is, after all, precisely what the regulation says. If the agency felt that an increase in the year-to-date per diem rate warranted notification to sending public schools, I am hard pressed to understand why the regulation could not have simply stated as follows:

> The private school will notify its sending districts if, during any quarter of the school year, the year-to-date per diem rate exceeds the tentative tuition rate by more than 10 percent. Notification shall be made by the following dates: December 15th for the first quarter, March 15th for the second quarter, June 15th for the third quarter and September 15th for the fourth quarter, or the next business day when applicable.

The regulation as written does not set an objective event as the trigger for notification, but rather requires notification based on the private school's subjective decision to "propose" an increase in its final rate.[4] I **CONCLUDE** that petitioners' actions in waiting to "propose" a tuition increase until later in the school year were consistent with both the express requirements of N.J.A.C. 6A:23A-18.2(a)(2), and the goals of the regulation.

Indeed, it is noteworthy that for each of the petitioning schools, the final certified tuition rate for the 2008–2009 school year was well less than the year-to-date rate for the first quarter. Celebrate the Children presents perhaps the most dramatic example. While it proposed a tentative rate of $275.20, by September 30, 2008, its costs had nearly doubled, escalating the rate to $502.77. But by the time it was ready to certify a final per diem rate, that rate was only $343.05. The facts presented by Creative

[4] The inclusion of quarterly dates in the regulation in no way advises the reader of the regulation that private schools must notify sending districts quarterly that year-to-date rates have increased by more than 10 percent.

Achievement are also instructive. Historically, Creative Achievement held back on a tuition-increase proposal, and rightly so, as in the end no increase was warranted.

The Department urges that N.J.A.C. 6A:23A-18.2(a)(2) was enacted to encourage private schools to track expenditures and provide timely notice of tuition adjustments that may result in back billing and that the actions of these schools showed a disregard for these regulatory goals. But the overarching purpose of the regulation is the educational success of our special needs students, and N.J.A.C. 6A:23A-18.2(a)(2) recognizes that "the quality of education provided by private schools receiving handicapped pupils is directly related to the amount of tuition that the schools spend on approved educational costs." Council of Private Sch. for Children with Special Needs, Inc. v. Cooperman, supra, 205 N.J. Super. at 547.

With the fiscal constraints all schools face today, at a per diem rate of $502.77 a public school that is successfully sending a student to Celebrate the Children might be forced to consider withdrawing him, and sending him elsewhere. The potential for disruption to the student's program is obvious. The potential for conflict, including litigation, with the student's parents is likewise obvious. I **CONCLUDE** that the goals of the regulation are not achieved when notice to the public schools of a "proposed" increase in the final tuition rate is based on premature or artificially inflated information.

The Department correctly stresses that an agency's interpretation of its own regulations is entitled to deference. Matturri v. Bd. of Tr. of the Judicial Ret. Sys., 173 N.J. 368, 381 (2002). But under the guise of due deference, the agency cannot read a requirement into a regulation that would not be plainly apparent to its readers. Regulations must be clear enough to enable the regulated community to understand what standard it will be required to meet. Youth Consultation Serv., Inc. v. Dep't of Educ., EDU 7893-03, Initial Decision (September 2, 2004), aff'd, Comm'r (October 13, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>.[5] It is well established that when an agency requirement constitutes a rule, it must comply with the rulemaking

[5] The administrative law judge in Youth Consultation noted that changes to the regulation that post-dated the filing of the petition before him now made the regulatory intent more clear. But the present dispute, which concerns five separate private schools, makes it readily apparent that many private schools for the disabled rightly remain unable to discern what is expected of them by the agency.

procedures contained in the Act. I **CONCLUDE** that the Department has penalized these schools for violating what it perceives to be a rule of general application, and one that "is intended to be applied generally and uniformly to all similarly situated persons." N.J.S.A. 52:14B-2(e); Metromedia v. Div. of Taxation, 97 N.J. 313, 331 (1984). If the Department requires that private schools notify sending districts when year-to-date figures exceed 10 percent of the tentative rate, rather than only when they intend to actually "propose" a tuition increase, it needed to have said so, in unambiguous regulatory language adopted in accordance with the requirements of the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15.[6]

ORDER

Based on the foregoing, the action of the Department of Education limiting the tuition increase for the 2008–2009 school year for the five petitioning private schools to 10 percent is **REVERSED**. It is **ORDERED** that summary decision is granted as follows:

1. In favor of Celebrate the Children, approving its request for an increase in tuition of 24.65 percent for the 2008–2009 school year.

2. In favor of Innovative Education Programs, approving its request for an increase in tuition of 11.61 percent for the 2008–2009 school year for its Saybrook program and 29.43 percent for its Krumbiegel program.

3. In favor of Creative Achievement Academy, approving its request for an increase in tuition of 15.81 percent for the 2008–2009 school year.

4. In favor of Willowglen Academy, approving its request for an increase in tuition of 12.93 percent for the 2008–2009 school year.

[6] The Department had clarified the notice requirements as early as June 2008 in written guidance to private schools, but obviously realized that its interpretation of the regulation remained unclear. It thus added the language cited by petitioners in the Financial Accounting clarification document issued in August 2010. In any event, none of these informal agency rule clarifications have the authority of a binding regulation.

5. In favor of The Children's Therapy Center, approving its request for an increase in tuition of 15.27 percent for the 2008–2009 school year.

The Department's motion for summary decision 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, 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 14, 2011
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: July 14, 2011

Date Mailed to Parties: JUL 15 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

#348-11

R.S. on behalf of minor child I.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAKEHURST, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

In March 2011, the petitioner filed a *pro se* residency appeal on behalf of her minor child, I.N., contending that the family did in fact live in Lakehurst. A hearing in the matter was scheduled for July 8, 2011 at the Office of Administrative Law (OAL). Petitioner received appropriate notice of the hearing, but failed to appear and provided no explanation for her nonappearance. Having received no explanation from the petitioner for her non-appearance, the OAL returned the file to the Commissioner.

There being no explanation filed, the Commissioner ordered I.N. disenrolled from respondent's school district 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.

August 29, 2011

OAL DKT. NO. EDU 4313-11
AGENCY DKT. NO. 61-3/11

R.S. on behalf of minor child I.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF LAKEHURST, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The notice from the Office of Administrative Law (OAL), memorializing the petitioner's failure to appear at the July 8, 2011 OAL hearing, and the record of this matter – including a copy of the notification sent to the parties by the OAL on May 18, 2011, informing them that the hearing in this matter would be held on July 8, 2011 – have been reviewed. It is noted that the OAL hearing notice was sent to the address petitioner entered on her petition.

The above referenced July 14, 2011 notice from the OAL to the parties 1) recited that petitioner had failed to appear at the July 8, 2011 hearing, 2) explained that the matter would be transmitted back to the Department of Education, and 3) advised petitioner that if she desired to offer an explanation for her failure to appear, it would be necessary to submit same in writing to the Commissioner within thirteen days.

The thirteen day period has expired and petitioner has offered no explanation for her nonappearance on July 8, 2011. Accordingly, the petition is dismissed and petitioner's minor

child is disenrolled from respondent's school district. As respondent filed no counterclaim, no tuition is due.

IT IS SO ORDERED. [1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/29/11

Date of Mailing: 8/30/11

[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)

349-11

OAL DKT. NO EDU 5467-10
AGENCY DKT. NO. 65-3/10

M.F. and L.B. on behalf of their minor child,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, a document executed by petitioners – entitled "Release" – and a June 28, 2011 resolution of the respondent board of education approving a settlement of the instant matter have been reviewed.

Upon review, the Commissioner approves the settlement terms with the following comment. Correspondence in the record indicates that certain actions referenced in the Release 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: 8/29/11
Date of Mailing: 8/30/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 05467-2010
AGENCY DKT. NO. 65-3/10

M.F. & L.B. o/b/o their MINOR CHILD,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,
Respondent.

M.F. and L.B. petitioners, appearing pro se

Eric L. Harrison[1], Esq, on behalf of respondent

Record Closed: July 14, 2011 Decided: July 15, 2011

BEFORE **JOANN LASALA CANDIDO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners demanded monetary compensation for transportation costs for a period of time which the respondent district did not provide busing. The case was transmitted to the Office of Administrative Law ("OAL") from the New Jersey State

[1] Michelle Schott was initially assigned to this matter.

Department of Education on May 28, 2010, for a hearing 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 September 15 and November 16, 2010. Prior to the November hearing date respondent's former counsel Michelle Schott and the petitioner submitted a joint request for an adjournment. A telephone status conference was scheduled for December 9, 2010. During the pendency of the conference the parties reached a tentative settlement subject to Board approval. The next Board meeting was to be held on or about December 14, 2010. On December 16, 2010 the undersigned scheduled a status conference for January 12, 2011. On that date my secretary was advised that Mrs. Schott was no longer with the firm. My secretary inquired on several occasions regarding the Board's approval of the settlement to no avail.

May 20, 2011 a paralegal from respondent's firm contacted the OAL to provide two phone numbers for petitioners. A detailed message was left on petitioner's voicemail. No one responded. The matter was scheduled for hearing on June 29, 2011 which was adjourned to allow counsel time to submit a copy of the Board Resolution. The hearing was rescheduled for July 15, 2011. On July 14, 2011 respondent's counsel submitted a copy of the Board Resolution, which is attached hereto for reference.

I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is **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, 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 15, 2011
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency:

Date Mailed to Parties: JUL 18 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

RELEASE

This Release, ("Release") dated May 23, 2011, is given

BY the Releasors, MICHAEL FERNANDEZ and LYNN FERNANDEZ,

hereafter referred collectively to as "I" (or "They"),

TO Releasee, Westfield Board of Education,

hereafter referred to as "You".

1. Release. MICHAEL FERNANDEZ and LYNN FERNANDEZ, in consideration for the sum of One Thousand Three Hundred Dollars ($1,300.00), receipt of which is hereby acknowledged, hereby remise, release and forever discharge You from any and all claims and rights which they now have, hereafter can, shall or may have against You for, upon or by reason of any cause or thing whatsoever whether known or unknown for anything that has happened up to now arising from or related to:

Any and all claims of reimbursement for expenses incurred or related to their providing transportation to their child to and from Roosevelt Intermediate School in Westfield, for the time period between September 2008 and March 2010, or any other claims for compensation that may be alleged to arise out of or be related to their providing transportation as described above, which is the subject matter of a Petition filed by MICHAEL FERNANDEZ and LYNN FERNANDEZ in the State of New Jersey, Office of Administrative Law, Newark, New Jersey, OAL Docket Number: EDU 05467-2010.

2. Payment. It is agreed that MICHAEL FERNANDEZ and LYNN FERNANDEZ will be paid a total of One Thousand, Three Hundred Dollars ($1,300.00) in full payment for making this Release. Payment will be made to them thirty (30) days after receipt by the Westfield Board of Education of this Release executed by MICHAEL FERNANDEZ and LYNN FERNANDEZ. I agree not seek anything further from You including any other payment.

3. Confidentiality and Non-Disclosure. MICHAEL FERNANDEZ and LYNN FERNANDEZ and the WESTFIELD BOARD OF EDUCATION agree that the terms, conditions, fact of payment, amount of payment and the underlying facts of the settlement stated in this Release shall be held strictly confidential. Both parties further agree that they shall not describe, characterize or disclose any such information in any manner whatsoever directly or indirectly, orally or in writing, to anyone not a Party to this Release, except to the extent required by law or to say, "the matter has been resolved" or words to that effect, if asked. All parties may disclose the terms of this Release where legally obligated to do so, and MICHAEL FERNANDEZ and LYNN FERNANDEZ may disclose the terms of this Release to immediate family (i.e. parents, siblings and any future spouse), accountants, or financial

advisors and attorneys, provided those individuals agree to be bound to confidentiality and non-disclosure terms in Paragraph 3 of this Release.

4. 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.

5. Signatures. I understand and agree to the terms of this Release.

IN WITNESS WHEREOF, and intending to be legally bound, MICHAEL FERNANDEZ has executed this Release as of the date set forth below.

By _____ Dated: May 23 2011
MICHAEL FERNANDEZ

STATE OF NEW JERSEY, COUNTY OF Hudson ;

I CERTIFY that on the 23 day of May, 2011, MICHAEL FERNANDEZ personally came before me and acknowledged under oath, 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 or her act and deed.

_____ (Raised Seal)
(Notary Public)

Sworn to and subscribed before me
this 23 day of May, 2011

JOAN SORRENTINO
Notary Public
State of New Jersey
My Commission Expires Feb 1, 2012

2/3

IN WITNESS WHEREOF, and intending to be legally bound,
LYNN FERNANDEZ has executed this General Release as of the date set forth below.

By Lynn Fernandez
LYNN FERNANDEZ

Dated: May 23 2011

STATE OF NEW JERSEY, COUNTY OF Hudson ;

I CERTIFY that on the 23 day of May, 2011, LYNN FERNANDEZ personally came before me and acknowledged under oath, 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 or her act and deed.

Joan Sorrentino
(Notary Public)

(Raised Seal)

Sworn to and subscribed before me
this 23 day of May, 2011

JOAN SORRENTINO
Notary Public
State of New Jersey
My Commission Expires Feb 1, 2012

RELEASE

This Release, ("Release") dated May 23, 2011, is given

BY the Releasors, MICHAEL FERNANDEZ and LYNN FERNANDEZ,

hereafter referred collectively to as "I" (or "They"),

TO Releasee, Westfield Board of Education,

hereafter referred to as "You".

1. Release. MICHAEL FERNANDEZ and LYNN FERNANDEZ, in consideration for the sum of One Thousand Three Hundred Dollars ($1,300.00), receipt of which is hereby acknowledged, hereby remise, release and forever discharge You from any and all claims and rights which they now have, hereafter can, shall or may have against You for, upon or by reason of any cause or thing whatsoever whether known or unknown for anything that has happened up to now arising from or related to:

Any and all claims of reimbursement for expenses incurred or related to their providing transportation to their child to and from Roosevelt Intermediate School in Westfield, for the time period between September 2008 and March 2010, or any other claims for compensation that may be alleged to arise out of or be related to their providing transportation as described above, which is the subject matter of a Petition filed by MICHAEL FERNANDEZ and LYNN FERNANDEZ in the State of New Jersey, Office of Administrative Law, Newark, New Jersey, OAL Docket Number: EDU 05467-2010.

2. Payment. It is agreed that MICHAEL FERNANDEZ and LYNN FERNANDEZ will be paid a total of One Thousand, Three Hundred Dollars ($1,300.00) in full payment for making this Release. Payment will be made to them thirty (30) days after receipt by the Westfield Board of Education of this Release executed by MICHAEL FERNANDEZ and LYNN FERNANDEZ. I agree not seek anything further from You including any other payment.

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WESTFIELD BOARD OF EDUCATION

302 ELM STREET
Westfield, New Jersey 07090-3199
(908) 789-4402
Fax No: (908)789-4180

JULIA WALKER, President
RICHARD MATTESSICH, Vice President
ANN CARY
JANE CLANCY
DAVID FINN
MARK FRIEDMAN
ROSANNE KURSTEDT
GINNY LEIZ
MITCHELL SLATER

Certified Copy of Action Taken at the Regular Board Meeting
June 28, 2011

Upon motion of Mr. Mattessich, seconded by Mrs. Walker, it was moved to approve the following Finance motion:

BE IT RESOLVED that the negotiated settlement agreement in the matter of M.F. and L.F. v. Westfield Board of Education, (Agency Dkt. No. 65-3/10, OAL Dkt. No. EDU 05467-2010N), is hereby approved.

ROLL CALL: Yes: Ms. Cary, Mrs. Clancy, Mr. Finn, Mr. Friedman, Ms. Kurstedt, Mrs. Leiz, Mr. Mattessich, Mr. Slater, Mrs. Walker
No: None
Absent: None

I HEREBY CERTIFY that the foregoing is a true and exact copy of the motion that was adopted at the Regular Meeting of the Westfield Board of Education on June 28, 2011.

Vincent Yaniro
Interim Board Secretary

This fax was sent with GFI FAXmaker fax server. For more information, visit: http://www.gfi.com

363-11 L

363-11

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

September 1, 2011

Frank P. Cavallo, Jr., Esq.
Parker McCay
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054-1539

Sean M. Benoit, Esq.
Disability Rights New Jersey
210 South Broad Street, 3rd Floor
Trenton, New Jersey 08608

Re: *M.M., on behalf of minor child, E.M. v. Board of Education of the Township of Maple Shade, Burlington County. Agency Dkt. No. 149-6/11.*

Dear Counsel:

I have reviewed the Petition filed in the matter of *M.M. o/b/o E.M. v. Board of Education of the Township of Maple Shade, Burlington County, Agency Dkt. No. 149-6/11*, along with the proposed settlement agreement and general release. Upon such review, I approve the settlement terms. Accordingly, the Petition is hereby dismissed subject to compliance with the terms of the settlement.

Sincerely,

Christopher D. Cerf
Acting Commissioner

c: County Superintendent
State Law Library

CDC/MKD/JKH

VIA REGULAR MAIL

350-11

BARRY E. STATON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro-se petitioner – formerly a Teacher of the Handicapped, whose teaching certificate was revoked by consent in 2007 after the New Jersey State Board of Examiners (Board of Examiners) issued an Order to Show Cause following petitioner's failure of two drug tests in which he tested positive for cocaine – appealed the revocation of his certificate. Respondent agreed in 2009 to allow petitioner, who had presented evidence of rehabilitation related to his drug problem, to apply for certification after revocation on condition that he meet current certification requirements at the time of his application. Subsequently, petitioner filed the instant petition which sought to overturn the 2007 revocation because in order to be reinstated under the present regulatory scheme, he would need to return to school to meet the current the requirements for certification as a teacher of students with disabilities.

The ALJ found that petitioner's appeal was not timely filed pursuant to *N.J.A.C.* 6A:9-17.20(a), which requires that a motion to reconsider a Board of Examiner's decision must be filed no later than 15 days from the mailing date of the decision, which in this case was in June 2007. Accordingly, the ALJ granted the Board of Examiner's motion for summary decision and dismissed the petition.

The Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, finding that the time within which petitioner could have applied for reconsideration of the 2007 revocation has expired, and that petitioner may not be recertified unless he satisfies the current requirements for a teacher of students with disabilities endorsement. 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.

August 31, 2011

OAL DKT. NO. EDU 935-11
AGENCY DKT. NO. 697-11/10

BARRY E. STATON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

Upon review of the record of this matter and the Initial Decision of the Office of Administrative Law,[1] the Commissioner concludes that 1) the time within which petitioner could have applied for reconsideration of the 2007 revocation of his certification as a teacher of the handicapped has expired and 2) petitioner may not be recertified unless he satisfies the current requirements for a teacher of students with disabilities endorsement.

Accordingly, the Commissioner adopts the Initial Decision – which granted respondent's motion for summary disposition and dismissed the petition – as the final decision in this case.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8|31|11
Date of Mailing: 8|31|11

[1] Neither party filed 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
OAL DKT. NO. EDU 935-11
AGENCY DKT. NO. 697-11/10

BARRY E. STATON,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMINERS,
Respondent.

Barry E. Staton, petitioner, pro se

Diana Sierotowicz, Deputy Attorney General (Paula T. Dow, Attorney General of New Jersey, attorney)

Record Closed: July 19, 2011 Decided: July 22, 2011

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

STATEMENT OF THE CASE

Petitioner appealed respondent's action accepting his voluntary surrender of his Teacher of the Handicapped certificate.

PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was transmitted to the OAL and filed January 25, 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 respondent filed a Motion for Summary Decision on June 29, 2011. Petitioner's response was received on July 19, 2011, and the record closed.

FINDINGS OF FACT

Petitioner was issued a Teacher of the Handicapped (TOH) certificate in October 1993. In October 2004, the Examiners issued an Order to Show Cause why petitioner's TOH certificate should not be suspended or revoked after he failed two drug tests on June 1, 2004, testing positive for cocaine.

Ultimately, petitioner signed an affidavit and consent order stating he would surrender his TOH certificate, that he consented to its revocation, and that he used cocaine which produced positive drug test results. He was represented by counsel at the time.

On May 3, 2007, the Examiners voted to accept petitioner's voluntary surrender of his TOH certificate. The Order stated that the voluntary surrender had the force and effect of a revocation.

Subsequently, after completing a drug program, petitioner wrote a letter to the Commissioner requesting reinstatement of his TOH certificate. By letter dated September 8, 2008, the Commissioner responded, explaining that current regulations did not permit reinstatement of a certificate after its revocation, but that petitioner could file an application for certification after revocation pursuant to N.J.A.C. 6A:9-17.10. The Commissioner's letter also reminded petitioner that he must meet all criteria for the issuance of a certificate in effect at the time of his application.

Petitioner then filed an application for certification after revocation, which was granted by the Examiners at its meeting on September 17, 2009. The Examiners voted to allow petitioner to apply for certification after revocation because he presented evidence of rehabilitation related to his drug problem.

Thereafter, petitioner continued to send letters to the Examiners objecting to the condition that he had to reapply for certification and meet current requirements, because the requirements differed from when he received his standard TOH certificate in 1993. The Examiners considered the petitioner's motion for reconsideration at its April 29, 2010, meeting, but ruled that the regulations require an applicant to meet current certification requirements at the time of application after revocation.

On June 10, 2010, the Examiners issued a written decision denying petitioner's motion for reconsideration, stating "the Board has no authority to waive its regulations" and therefore, petitioner "must satisfy all criteria in effect at the time of [his] new application."

Following the Examiners' denial of his motion for reconsideration, petitioner filed a Petition of Appeal on July 14, 2010, and an Amended Petition of Appeal on September 22, 2010. The petition of appeal challenges the 2007 revocation of his Teacher of the Handicapped certificate.

LEGAL DISCUSSION

Summary decision in the Office of Administrative Law is controlled by the provisions of N.J.A.C. 1:1-12.5(b), which states, in pertinent part:

> (b) 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.

This case is complicated by the fact that petitioner has filed his petition pro se; as a result, the petition is not artfully drawn. But a careful reading of the petition demonstrates that its purpose is to challenge the Board of Examiners' June 12, 2007, Order accepting his voluntary surrender of his TOH certificate. Petitioner seeks to overturn the revocation because in order to be reinstated under the present regulatory scheme, he will have to meet the requirements necessary to obtain a new certification as a teacher of students with disabilities, a certification that did not exist when he was initially certified in 1993. According to petitioner's numerous submissions, in order to obtain that certificate, he will have to return to school for a period in excess of two years. At age fifty-four, he wishes to avoid this lengthy and arduous process, and has therefore moved to set aside his voluntary surrender.

The problem with petitioner's argument is that his opportunity to seek reversal of the Board of Examiners' action has long since passed. N.J.A.C. 6A:9-17.20(a) provides as follows:

> (a) Any party may file with the Board of Examiners and serve on all other parties a motion to reconsider the Board of Examiners' decision. The party shall file the motion no later than 15 days from the mailing date of the decision.

Pursuant to the regulation, petitioner had until June 27, 2007, to file his petition. He missed that deadline by in excess of three years. He is well out of time to move for reconsideration and, accordingly, the petition must be **DISMISSED**. The Board's motion for summary decision must be **GRANTED**.

ORDER

I **ORDER** that the Board of Examiners' motion for summary decision be **GRANTED**.

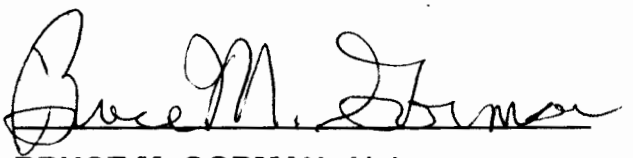
I **ORDER** that the petition be **DISMISSED**.

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, 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.

7-22-11
DATE


BRUCE M. GORMAN, ALJ

Date Received at Agency: 7-22-11

Date Mailed to Parties: JUL 27 2011

/sd

DOCUMENTS CONSIDERED

Respondent's Motion for Summary Decision and attached supporting documentation

Petitioner's Response to Respondent's Motion for Summary Decision

JAMIE RUDD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – formerly a non-tenured social worker in respondent's district – received notice on May 13, 2010 that she would be terminated from her employment as part of a reduction in force (RIF) at the end of the 2009-2010 school year. She challenged the Board's determination not to reemploy her when she responded to a job posting for two social worker positions in July 2010. Petitioner was interviewed for these vacancies, but was notified during a meeting with the district superintendent on August 12, 2010 that she would not be offered reemployment because of concerns about her performance. At no point did petitioner request a written statement of reasons for her termination pursuant to *N.J.S.A.* 18A:27-3.2 or an informal appearance before the Board as authorized under *N.J.A.C.* 6A:32-4.6. She filed her petition of appeal on October 14, 2010. The respondent Board contended that the petition must be dismissed as untimely.

The ALJ found, *inter alia*, that: the petitioner was not fully aware of the information forming the basis of her appeal at the time of the May 13, 2010 notification letter, because the letter did not mention any substantive cause for her non-renewal; consequently, petitioner could not have known that her non-renewal was performance-based until she was told so by the superintendent on August 12, 2010, and therefore her appeal was timely; petitioner, however, failed to seek a written statement of reasons clarifying the basis for her non-renewal and did not seek an informal appearance before the Board, but rather filed her appeal solely based upon the statements of the superintendent during her meeting on August 12, 2010 – which statements cannot be considered the reasons for the Board's action, since the superintendent is not synonymous with the board of education; accordingly, since petitioner cannot establish the reason for the Board's action, she cannot prove that the action was arbitrary and capricious. The ALJ ordered the petition dismissed.

Upon review, the Commissioner concurred with the ALJ that the petition should be dismissed, but noted that there were two different employment decisions made by the Board, constituting two separate Board actions; the instant petition was timely pursuant to the second Board action, but must fail because petitioner did not allege any violation of constitutional or legislatively-conferred rights and the Board was well within its rights to decline to rehire petitioner based upon performance concerns. Accordingly, the Commissioner 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 1, 2011

OAL DKT. NO. EDU 12796-10
AGENCY DKT. NO. 597-10/10

JAMIE RUDD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	DECISION
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's 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 contends that her petition of appeal was timely filed and that she has set forth a valid cause of action. The petitioner maintains that her performance was the real reason that the Board did not renew her, and as a result the Board acted in bad faith when it issued the non-renewal letter. Additionally, the petitioner points out that she had no reason to request a statement of reasons or a *Donaldson* hearing because she relied on the representations made in the May 13, 2010 non-renewal letter. Petitioner also takes exception to the ALJ's determination that she should have requested a statement of reasons in August 2010, following her meeting with the superintendant. Finally, the petitioner takes exception to the ALJ's determination that the superintendent and the Board of Education are not synonymous.

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's exceptions are generally a replication of its motion for summary decision and other papers filed below in which it argued that the Board's decision not to renew the petitioner was based on a valid reduction in force, and the Board's decision not to re-employ the petitioner was not arbitrary, capricious or unreasonable. In its exceptions, the Board emphasizes that when challenging a non-reemployment decision, a non-tenured staff member must plead that the adverse action is in violation of a constitutional or some legislatively created right in order to avoid dismissal, which petitioner has not done in this case.

Upon a comprehensive review of the record in this matter, the Commissioner is in accord with the ALJ's determination that the instant petition of appeal should be dismissed. The Commissioner further finds, however, that the ALJ failed to properly articulate the distinction between the two different employment decisions made by the Board. In order to adequately evaluate the timeliness of the petition and whether the petitioner's claims should survive summary decision, it is important to recognize that the Board's decision not to renew the petitioner for the 2010-2011 school year was the first employment decision, and the Board's subsequent decision not to rehire the petitioner was a separate Board action.

It is undisputed that on May 13, 2010, petitioner – a non-tenured social worker – was notified that she would not be renewed for the 2010-2011 school year. [1] The notification letter was the general non-renewal letter that was sent to over 200 employees stating that the non-tenured professional staff members would not be renewed for the 2010-2011 school year due to reasons of economy and budgetary considerations. After the petitioner received the letter

[1] The facts related to the timeline of events are not in dispute.

she did not request a statement of reasons pursuant to *N.J.S.A.* 18A:27-3.2 or a *Donaldson* hearing under *N.J.S.A.* 18A:27-4.1.

In July 2010, petitioner discovered that the Board posted positions for social workers, and she informed the Board that she was ready to assume one of those positions. On August 9, 2010, the petitioner met with the Director of Special Education and other supervisors about the available social worker positions. On August 12, 2010, the petitioner attended a meeting with the superintendent during which she was informed that she would not be re-employed based on certain performance issues, and her failure to demonstrate significant improvement during her three years with the district.

Pursuant to *N.J.A.C.* 6A:3-1.3(i), a petition must be filed "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." With respect to petitioner's non-renewal, the Commissioner finds that the 90-day statute of limitation period began to run on May 13, 2010 when the petitioner received notice that she would not be renewed for the 2010-2011 school year. See, *Middletown Education Assoc. on Behalf of Meredith McGee and Nicole Sansone v. Board of Educ. of the Township of Middletown, Monmouth County*, Commissioner Decision No. 328-07, decided August 16, 2007. The Commissioner is not persuaded by the exceptions filed by the petitioner in which she argues that despite having notice of the non-renewal in May 2010, it was the meeting in August 2010 with the superintendant that triggered the 90-day limitations period because that is when she learned that the Board believed she had performance issues. After the petitioner received the May 13, 2010 non-renewal letter, she did not avail herself of her statutory right to request a statement of reasons pursuant to *N.J.S.A.* 18A:27-3.2 or a *Donaldson* hearing before the Board

under *N.J.S.A.* 18A:27-4.1 – during which she could have challenged the validity of the reduction in force or the budgetary considerations, and she could have attempted to convince the members of the board to offer her reemployment. Instead, the petitioner waited until October 14, 2010 to file the instant petition of appeal challenging the validity of her non-renewal. Therefore, because the challenge to her non-renewal was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i), the Commissioner finds that the petitioner's claim is time barred.

To the extent the petition of appeal challenges the Board's decision not to rehire the petitioner, that claim is not untimely under *N.J.A.C.* 6A:3-1.3(i) because the petitioner did not receive notice of the Board's decision until she met with the superintendent on August 12, 2010. Notwithstanding the timeliness of that challenge, the Commissioner fully recognizes that a district board has virtually unlimited discretion in terminating or reemploying non-tenured staff members. *Dore v. Bedminster Twp. Bd. of Ed.*, 185 *N.J. Super.* 447 (App. Div. 1982) "[A]bsent 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 teacher who has no tenure and is regarded as undesirable by the local board." *Id.* at 456. As such, where a non-tenured teacher challenges a district board's decision to terminate her employment on the grounds that the reasons provided by the board are not supported by the facts, she is entitled to litigate that question only if the facts she alleges, if true, would constitute a violation of constitutional or legislatively-conferred rights. *Guerriero v. Board of Education of the Borough of Glen Rock*, decided by the State Board of Education February 5, 1986, *aff'd.* Docket #A-3316-85T6 (App. Div. 1986).

In this case, the petitioner has not alleged a constitutional or legislatively-conferred right, but rather she purely argues that the Board did not rehire her for one of the available social worker positions based upon alleged performance issues. The Board was well within its rights to decline to rehire the petitioner based upon performance concerns, and as such – in the absence of the existence of any constitutional or legislatively-conferred right – the Board's decision was not arbitrary, capricious or unreasonable. Accordingly, the Board is entitled to summary decision and the petition is dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9|01|11

Date of Mailing: 9|06|11

[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
OAL DKT. NO. EDU 12796-10
AGENCY DKT. NO. 597-10/10

JAMIE RUDD,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY.

William F. Koy, Esq., for petitioner

Jennifer M. Herrmann, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: July 6, 2011 Decided: July 19, 2011

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

STATEMENT OF THE CASE

Respondent moves for Summary Decision seeking dismissal of the petition.

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. Respondent filed a Motion for Summary Decision seeking

dismissal of petitioner's complaint. Oral argument was held on May 26, 2011, and the record remained open until July 6, 2011, for submission of final briefs.

FACTUAL DISCUSSION

For purposes of respondent's Motion for Summary Decision, the following facts are undisputed. Petitioner was employed as a Social Worker with the Vineland Public School Child Study Team from September 1, 2007, through June 30, 2010. On May 13, 2010, respondent's Superintendent of Schools, Dr. Maryann Banks, forwarded to petitioner a letter which stated as follows:

> I regret to inform you that in accordance with N.J.S.A. 18A:27-10 and formal action taken by the Board of Education meeting on May 12, 2010, you as a non-tenured professional staff member will not be offered employment for the 2010-2011 school year. This action is based upon the projected return of tenured teachers from leave of absence, reduction in number of pupils, reasons of economy, budgetary considerations, change in the administrative or supervisory organization of the district, restructuring of program components, current limited contract and/or other good cause. This action is not based upon your performance. In the event any or all of these factors change, including but not limited to budgetary considerations, the Board of Education may then, but is not obligated to offer you employment for the 2010-2011 school year. Please be advised that you will continue to keep your benefits through August 31, 2010. On behalf of the Vineland Board of Education, I would like to thank you for your services to the children and hope, but cannot guarantee, that you will be re-employed with us at some future time.

This letter was one of many sent out by the Superintendent as part of a proposed reduction in force.

On July 1, 2010, petitioner saw a job posting stating that two social work positions with the Board of Education were available. Petitioner promptly advised respondent that she was ready, will and able to assume one of those positions.

On August 9, 2010, petitioner met with the Director of Special Education, Ruth Ann Polof, and three other special education supervisors about the social worker position. Petitioner was surprised to learn that this meeting was considered to be an "interview."

On August 12, 2010, petitioner met with Superintendent Banks. At that time, Banks advised petitioner that, "You are an excellent social worker but a lousy (child study) team member." Dr. Banks advised that Polof told her petitioner had not made significant improvement over three years. She then declined to rehire petitioner.

At no time did petitioner seek a statement of reasons pursuant to N.J.S.A. 18A:27-3.2 or an informal appearance before the Board of Education as authorized under N.J.A.C. 6A:32-4.6. Instead, on October 14, 2010, she forwarded a petition of appeal to the Commissioner. Respondent now asserts that said petition is time barred.

LEGAL DISCUSSION

The Board based its motion on the provisions of N.J.A.C. 6A:3-1.3(i). That regulation states:

> (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.

The case turns upon which of two dates triggered the 90-day appeal period. The first date is May 13, 2010, the date petitioner was notified she would not be renewed because of an anticipated reduction in force. The second date is August 12, 2010, the date of petitioner's meeting with Superintendent Banks, when she learned that her non-renewal was performance based.

The commencement of the 90-day appeal period is controlled by two cases. The first case is Eisenberg v. Board of Education of the Borough of Fort Lee, State Board of Education, November 5, 2003. In that case, the petitioner received notice of non-renewal on April 3, 2001. He requested a statement of reasons and was afforded an informal appearance before the Board of Education on July 2, 2001. Several days after the July 2 meeting, petitioner received additional information which caused him to believe that the statement of reasons provided to him had been fallacious. Petitioner then filed a petition of appeal with the Commissioner on September 29, 2001.

Eisenberg's petition was referred to the Office of Administrative Law for hearing. The Board moved before the ALJ to dismiss based upon the 90-day limitation set forth in N.J.A.C. 6A:3-1.3. The ALJ denied the motion. The Commissioner reversed, finding that the April 3 notice triggered the 90-day period.

The State Board of Education reversed the Commissioner's decision, citing Kaprow v. Board of Educ. of Berkeley Tp., 131 N.J. 572 (1993), the State Board held that:

> The 90-day period for filing a petition of appeal with the Commissioner of Education commences when a petitioner learns of facts that would enable him to file a timely claim. Kaprow v. Board of Educ. Of Berkeley Tp., 131 N.J. 572 (1993). In Burd v. New Jersey Tel. Co., 76 N.J. 284, 291 (1988), cited by the Court in Kaprow, the Court reiterated that the limitations period for commencing an action begins to run when "plaintiff learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action." As the Court explained in Kaprow, supra, at 587:
>
> > A limitations period has two purposes. The first is 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. Ochs. V. Federal Ins. Co., 90 N.J. 108, 112, 447 A.2d 163 (1982). The second purpose is "to penalize dilatoriness and serve as a measure of repose'" by giving security and

> stability to human affairs. Ibid. (quoting Farrell v. Votator Div., 62 N.J. 111, 115, 299 A.2d 394 (1973)).
>
> > When a plaintiff knows or has reason to know that he has a cause of action against an identifiable defendant and voluntarily sleeps on his rights so long as to permit the customary period of limitations to expire, the pertinent considerations of individual justice as well as the broader considerations of repose, coincide to bar his action. [Farrell, supra, 62 N.J. at 115, 299 A.2d 394.]
>
> Adequate notice under N.J.A.C. 6:24-1.2 should accommodate both parties. That is, 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-RIF cause of action. See Burd v. New Jersey Tel. Co., 76 N.J. 284, 291, 386 A.2d 1310 (1978). 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, 48 120 A.2d 721 (1956).

Therefore, Eisenberg stands for the proposition that the 90-day filing period commences when the petitioner learned of facts that would enable her to file a timely claim.

The holding in Eisenberg was refined in Charapova v. Board of Education of the Township of Edison, Middle County, EDU 6722-2005 WL 4794046 (N.J. Admin. 2007). On April 18, 2005, the Edison Board of Education adopted a resolution non-renewing the contracts of 177 non-tenured teachers. As occurred in the case at bar, the Board

issued a blanket notice to each teacher advising of the non-renewal. Charapova received her notice on April 19, 2005.

Subsequent to the passage of the new budget in May 2005, Charapova learned that the Board of Education had begun rehiring some of the riffed personnel. When she was not rehired, Charapova concluded that the failure of the Board to re-employ her must have been the result of discrimination. Consequently, on August 5, 2005, she filed a petition of appeal with the Commissioner.

The State Board distinguished Charapova, stating:

> In Eisenberg, the information which alerted the petitioner to the existence of an allegation of intentional wrongdoing on the part of the Board in effectuating his non-renewal – i.e., his positive performance evaluations were missing from his personnel file, and 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 – was not known by him until several months after he received his nonrenewal letter. In concluding that the petitioner had filed his position in a timely manner, the State Board found that he could not have made the same allegations prior to his becoming aware of such information.
>
> In the matter now before us, the petitioner challenges the fact that "[her] contract ha[d] not been renewed," Petition of Appeal, at 2, and she received notice of such action by the Board in the April 19, 2005 letter. *The record reveals that the petitioner was fully aware of information which she believed demonstrated age and national origin discrimination at the time she received that letter.*
>
> [Emphasis added.]

Therefore, the dividing line between Eisenberg and Charapova is established. If the petitioner was fully aware of the information forming the basis of her appeal at the time of the initial notification, then that letter triggers the 90-day period. Conversely, if

the petitioner was not fully aware of the information forming the basis of appeal at the time of initial notification, then 90-day appeal period is tolled.

In the present case, the Board cannot argue that petitioner was aware of the substantive cause for her non-renewal. The May 13, 2010, notification letter specifically states: "his action is *not* based upon your performance."(Emphasis added.)

Consequently, petitioner could not have known that her non-renewal was performance based until she was told so by Superintendent Banks on August 12, 2010. Therefore, the 90-day period of appeal must be deemed tolled until August 12, 2010, and the petitioner's appeal is therefore timely. The Board cannot profit from its own misstatement.

But the analysis cannot end there. The gravamen of petitioner's appeal is that, "The actions of the respondent are ***arbitrary and capricious*** in its termination of petitioner. That assertion necessarily connotes that the reason or reasons for respondent's action are known.

The petition bases its assertion of arbitrary and capricious conduct upon the statements of Superintendent Banks during the August 12, 2010, interview. The problem with petitioner's argument is that Superintendent Banks is not the respondent in this action. The respondent designated in the caption is the Vineland Board of Education. It is well settled that the Superintendent and the Board of Education are not synonymous. To the contrary, the Superintendent of Schools is an employee of the Board of Education. See N.J.S.A. 18A:17-15.

The statutory/regulatory scheme sets forth a specific procedure for ascertaining the reasons why a Board of Education terminates a teaching staff member. N.J.S.A. 18A:27-3.2 states:

> Any teaching staff member receiving notice that a teaching contract for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such nonemployment which

> shall be given to the teaching staff member in writing within 30 days after the receipt of such request.

Once a non-tenured teaching staff member has received the written statement of reasons, N.J.A.C. 6A:32-4.6 provides her with a specified procedure to appear before the Board of Education to dispute those reasons. At the conclusion of that appearance, the Board is required to take action as follows:

> (i) Within three days following the informal appearance, the district board of education shall notify the affected teaching staff member, in writing, of its final determination. The board may delegate such notification to its chief school administrator or board secretary.

If the Board declines to rehire the teacher, that final determination constitutes a ratification of the statement of reasons. In short, at that point in time, the statement of reasons can be formally attributed to the Board. If the non-tenured teaching staff member believes the reasons to be arbitrary and capricious, she can appeal to the Commissioner.

In this case, it is undisputed that after she learned that her non-renewal was performance based on August 12, 2010, petitioner failed to seek a written statement of reasons clarifying the basis for her non-renewal, an action she was required to take within fifteen days, a time limit that expired on August 27, 2010. She likewise failed to seek an informal appearance before the Board of Education. She filed her petitioner solely in reliance upon the statements of Superintendent Banks.

As stated above, Superintendent Banks and the Board of Education are not synonymous. The petitioner cannot now assert that the action of the Board was arbitrary and capricious because she has no basis to establish the reasons for the Board's action. Since she cannot establish the reason for the Board's action, she cannot prove that the Board's action was arbitrary and capricious.

Consequently, petitioner's appeal fails because she has failed to set forth a cause of action upon which relief can be granted.

Pursuant to N.J.S.A. 18A:27-3.2, petitioner had fifteen days to request a written statement of reasons. That fifteen day period commenced on August 12, 2010, when she learned that the reason set forth in the May 13, 2010, notice were inaccurate. Consequently, her time period to establish those reasons is now time barred. Since petitioner cannot establish reasons for the Board's actions, she cannot demonstrate that those reaons were arbitrary and capricious. Consequently, her petitioner must be **DISMISSED** for failure to set forth a cause of action upon which relief can be granted.

ORDER

I **ORDER** that respondent's Motion for summary decision be **GRANTED.**

I **ORDER** 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.

7-19-11
DATE

Bruce M. Gorman
BRUCE M. GORMAN, ALJ

Date Received at Agency: 7-19-11

Date Mailed to Parties: 7-19-11

/sd

365-11L

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

September 1, 2011

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Re: *In the Matter of the Tenure Hearing of Anthony Coluccio, New Jersey State Department of Corrections, Edna Mahon Correctional Facility for Women, Agency Dkt. No. 158-7/09.*

Dear Counsel,

I have reviewed the materials filed in connection with Anthony Coluccio's Motion for Reconsideration of the Acting Commissioner's July 5, 2011 decision finding Mr. Coluccio guilty of unbecoming conduct and dismissing him from his tenured position with the Department of Corrections, along with Mr. Coluccio's exceptions to the Initial Decision and the Department's reply thereto.[1]

Pursuant to *N.J.A.C.* 6A:3-1.15(b)2., a motion for reconsideration shall be considered based upon the following:

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 purposes of this section;

[1] Mr. Coluccio was afforded an opportunity to file exceptions to the Initial Decision after the Acting Commissioner's July 5, 2011 decision was issued in this matter because Mr. Coluccio's counsel at the time claimed that he never received a copy of the Initial Decision and as a result was not given an opportunity to timely file exceptions to the Initial Decision.

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 could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

Upon full review and consideration of the parties' submissions, I find that Mr. Coluccio has failed to satisfy any of the requisites for granting such relief specified in *N.J.A.C.* 6A:3-1.15(b)2. Further, despite Mr. Coluccio's contentions to the contrary, I find no basis in the record – which includes transcripts of four days of hearing – 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. Insofar as his opinion on these issues is a credibility determination, the Commissioner may not disturb it unless a review of the record discloses that it is arbitrary, capricious or unreasonable. *N.J.S.A.* 52:14B-10c; *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). I also find that the ALJ's fact-finding analysis and conclusions as to the truth of the Department's allegations and the characterization of Mr. Coluccio's behavior and unbecoming conduct to be fully supported by the record and consistent with applicable law.

Accordingly, the Motion for Reconsideration is hereby DENIED.[2]

Sincerely,

Christopher D. Cerf
Acting Commissioner

c: County Superintendent
State Law Library

CDC/MKD/JKH

Via Regular Mail Date of Mailing 9|02|11

[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)

366-11

IN THE MATTER OF THE TENURE HEARING	:	
OF EDITH CRAFT, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF FRANKLIN,	:	DECISION
SOMERSET COUNTY.	:	

SYNOPSIS

The petitioning Board filed tenure charges of conduct unbecoming and other just cause against respondent, a tenured special education teacher who has been employed in the district since 2004. The charges were based upon a single incident in November 2010 during which respondent slapped a handicapped student across his face with an open hand. Respondent contends that the slap was a reflexive action which occurred after the student slapped her, that she was remorseful and felt that she did not handle the situation correctly, and that her teaching record prior to this single incident was unblemished. The petitioning Board sought revocation of respondent's tenure and termination of her employment.

The ALJ found, *inter alia*, that: on November 1, 2010, a special education student in respondent's class was agitated and acting out throughout the morning, kicking and hitting at another student and at respondent despite efforts to redirect him; the child finally slapped respondent in the face; respondent then struck the student after he struck her; respondent's action was reflexive after she was hit in the face; respondent was not punishing the child for any misbehavior and was immediately remorseful for her conduct; while respondent's conduct was not acceptable behavior for a teacher, there was evidence of provocation in the form of repeated slaps from the student; respondent did not inflict corporal punishment on the student, and he was not injured or visibly upset by the incident. However, the evidence supports the charges against respondent, and she did engage in conduct unbecoming a teacher. Accordingly, the ALJ determined that under the circumstances, dismissal from employment would be excessive and the appropriate penalty for respondent's unbecoming conduct is the loss of employment and adjustment increases for one year as well as the forfeiture of the 120 days of pay withheld following the certification of tenure charges. The ALJ ordered the Board to reinstate petitioner to her tenured position.

Upon independent review of the record, the Commissioner concurred with the ALJ that respondent is guilty of unbecoming conduct, but modified the penalty to impress upon respondent the seriousness of her errors in judgment displayed in this matter. Accordingly, respondent was reinstated, but will be suspended for an additional four months without pay in addition to the penalty recommended 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.

OAL DKT. NO. EDU 1751-11
AGENCY DKT NO. 24-2/11

IN THE MATTER OF THE TENURE HEARING	:	
OF EDITH CRAFT, SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF FRANKLIN,	:	DECISION
SOMERSET 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 and the Board of Education (Board).

This case involves tenure charges brought by the Board against the respondent Edith Craft, a special education teacher in the Franklin Township School District. The Board charged the respondent with unbecoming conduct based on one incident during which the respondent slapped a third-grade student in the face. The Administrative Law Judge ("ALJ") found that the respondent was guilty of unbecoming conduct, and recommended that the respondent receive a 120 day suspension without pay and lose one year's salary increment.

The respondent takes exception to the ALJ's determination that the appropriate penalty is the loss of one year's increment, and the loss of 120 days' salary. 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. In her exceptions, respondent cites cases where she believes the teacher's conduct was more egregious yet they suffered lesser penalties. The respondent also contends that her penalty should be modified to take into account the reflexive

nature of her action, the student's provocation, the fact that the student was not harmed, the respondent's remorse, and her unblemished teaching record.

In its exceptions, the Board urges the Commissioner to adopt the ALJ's determination that the respondent engaged in conduct unbecoming a teaching staff member, but takes exception to the penalty recommended by the ALJ. The Board maintains that the respondent's unbecoming conduct warrants the dismissal of respondent from her tenured teaching position. The Board takes exception to the ALJ's determination that the respondent's act of slapping the student was "reflexive" after the student had slapped her, pointing out the testimony of Ms. Wilson, a staff member who observed the conduct. Mr. Wilson testified that after the respondent slapped the student, she stated to him "Now you know how that feels," which the Board contends suggests more than an unthinking reaction.

The Board also argues that the ALJ erroneously based her recommendation on the fact that there was provocation by the student. In its exceptions, the Board stresses that the testimonial and documentary evidence established that although the student had repeatedly slapped the respondent from the start of the school day, there was a cooling off period where the student was behaving before he again slapped the respondent – at which time she slapped him back. As a result, the Board argues that the recommended penalty should be modified to provide for termination of respondent's employment with the Franklin Township School District.

Upon a comprehensive review of the record in this matter, which included the transcript of the hearing conducted at the OAL on May 9, 2011, the Commissioner concurs with the ALJ that the Board has established that respondent is guilty of unbecoming conduct. The Commissioner finds the ALJ's conclusions as to the truth of the Board's allegations and the characterization of respondent's behavior as unbecoming conduct to be fully supported by the

record and consistent with applicable law. Certainly under circumstances where a teacher slaps a student in the face, when force was not necessary under *N.J.S.A.* 18A:6-1(1)-(4)[1], there is very little scrutiny required to conclude that the teacher's inexcusable behavior amounts to unbecoming conduct.

The more complex aspect of this case includes the analysis required to determine the appropriate penalty to be imposed on the respondent. The Commissioner is mindful that 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 Ostergren, Franklin School District*, 1966 *S.L.D.* 185; *In re Hearing of Kittell, Little Silver School District*, 1972 *S.L.D.* 535, 541; *In re Fulcomer,* 93 *N.J. Super.* 404 (App. Div. 1967). It is also well recognized that by virtue of the unique position they occupy, educators must be held to an enhanced standard of behavior.

The Commissioner is in accord with the ALJ that based on all of the circumstances and considerations existing in this matter, removal of respondent from her tenured position is an unduly harsh penalty. Notably, there is no indication that her conduct was "premeditated, cruel or vicious, or done with the intent to punish." See, *In re Fulcomer, supra,* 93 *N.J. Super.* at 421. Additional mitigating factors that go against dismissal include the fact that this was a single isolated incident; there is no evidence that the respondent has ever been the subject of any discipline during her seven years with the district; the evidence presented established that the student first hit the respondent and she reacted to that action; and the student

[1] Pursuant to *N.J.S.A.* 18A:6-1, reasonable force may only be used when "necessary: (1) to quell a disturbance, threatening physical injury to others; (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil; (3) for the purpose of self-defense; and (4) for the protection or persons or property.

was not injured. Further, despite her lapse in judgment, the evidence does not establish that the respondent is unfit to discharge the duties and functions of her position as a teacher. The respondent has acknowledged that she did not handle the situation properly and is remorseful for her behavior.

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, and finds that the penalty recommended by the ALJ must be modified to reflect the fact that the inexcusable use of physical force in the school environment will not be tolerated. [2] Moreover, the Commissioner finds the respondent's behavior particularly troubling under the circumstances in this case because her actions essentially communicated to an eight-year-old special education student – with documented behavioral problems – that hitting is an appropriate response to frustration. 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's intolerable conduct and unprofessional behavior validated the very impulses and violence that the student has difficulty controlling. That type of negative reinforcement can serve to thwart any progress made by the teaching staff in their ongoing effort to help the student conquer the behavior difficulties that he struggles with on a daily basis.

Therefore, the Commissioner finds and concludes that the loss of respondent's employment and adjustment increments for 2011-2012 and the 120 days salary withheld

[2] 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).

pursuant to *N.J.S.A.* 18A:6-14 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.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9|01|11

Date of Mailing: 9|06|11

[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 1751-11
AGENCY DKT. NO. 24-2/11

IN THE MATTER OF THE TENURE HEARING OF EDITH CRAFT, SCHOOL DISTRICT OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY.

John E. Collins, Esq., for petitioner Franklin Township School District (Parker McCay, attorneys)

Arnold M. Mellk, Esq., for respondent Edith Craft (Wills, O'Neill and Mellk, attorneys)

Record Closed: June 8, 2011 Decided: July 21, 2011

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent Edith Craft was employed by petitioner school district Franklin Township Board of Education (Board) as a special education teacher under tenure, pursuant to N.J.S.A. 18A:28-5. On January 25, 2011, the Board certified charges of unbecoming conduct and other just cause against respondent to the Commissioner of Education (Commissioner) pursuant to N.J.S.A. 18A:6-10 and 6-11. Respondent filed an answer denying the allegations on February 15, 2011. On February 16, 2011, the

matter was transmitted to the Office of Administrative Law (OAL), where it was filed on February 17, 2011. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The hearing was held on May 9, 2011. At the request of counsel, the record remained open for the receipt of briefs by May 27, 2011, and for reply briefs by June 8, 2011, at which time the record closed.

FINDINGS OF FACT

Karen Wilson, an occupational therapist (OT) with thirty years' experience, was employed through a contractor by the Franklin Township school district for three years. She worked three days per week at the Conerly Road Elementary School (CRS). An OT provided services to optimize the learning environment. She had worked for one year with D.S., age eight, a third-grade student in a self-contained classroom.

On November 1, 2010, Wilson was going to D.S.'s classroom to pick up another student and was waiting for that student to finish his activity at his desk. She could see the front of the classroom. As she was waiting for her student, D.S. and the respondent were having a verbal exchange. She could see they were both agitated, but could not hear the words. D.S. was speaking, but he does not speak clearly. They were in close proximity, facing each other. D.S.'s hands "were going," and Wilson saw respondent hit him in the cheek area of his face. Respondent was upset and said, "Now you know how that feels." D.S. then went and sat down in his seat.

Although it did not appear to be a defensive action to Wilson, she thought the hit was in retaliation for D.S. hitting respondent. She noted that D.S. did not act any differently from how he usually was, but he was no longer agitated, and sat in his seat and sucked his thumb as he usually did. He was not crying. He looked fine and did not appear injured.

Wilson then provided services to her student for an hour and a half. When she returned she saw D.S. still in class. Wilson asked the respondent if she wanted to take

the afternoon off and respondent said no. Wilson thought respondent might need this time because she had lost control and maybe needed to remove herself from the situation.

Wilson reported the incident to her supervisor and then went and spoke with Theresa Seaman, the case manager for the students, about an hour later. Ms. Seaman went to the principal and wrote a brief report. Wilson also met with the principal, who wrote a summary of that interview, which was accurate except that the time sequence was a little off.

When a student did well in the classroom, "high fives" were sometimes given. It was a way of saying that the student did a good job. Wilson did not observe respondent give a high five to D.S.; nothing had occurred that warranted a high five.

On cross-examination, Wilson said she saw D.S. at least once per week on an individual basis, and in a group session every Friday. She wrote her first report and typed it after seeing the principal. The principal did not mention other witnesses. Although it was hard to remember everything, her statement of November 1 was accurate. In her statement Wilson said she saw respondent strike D.S. on his face after being struck by him. In her testimony, Wilson did not recall that she had seen D.S. strike the respondent.

Wilson did not know what actions respondent was engaged in with D.S., as they were in the front of the classroom where there is a computer. The computer was used as a reward for D.S.—if he did not do anything wrong, he was given computer time as a reward. Wilson was aware that D.S. would hit or strike other students and teachers, and that it was not unusual for him to do this.

She spoke with Karen Duffy after the event but not on the day it occurred, and she did not recall what Duffy said.

Karen Duffy had worked in the school district as a paraprofessional aide for more than fifteen years. She assisted children in the classroom and helped them with their schoolwork.

On November 1, 2010, she was assigned to help a new student. She knew D.S. from before this date and would see D.S. running out of the classroom or with other aides chasing him. The school used a timer with D.S. For every five minutes he followed the directions of an instructor or aide, he would receive a sticker. Once D.S. had fifteen stickers he would be rewarded with a walk, the use of the computer, or extra recess.

On that morning, Duffy was assigned to D.S. and was trying to get him to follow instructions. D.S. was going round and round the classroom. She followed him and then D.S. went to the blackboard. Respondent was busy trying to do the attendance on the computer and D.S. was pushing the monitor buttons. At about 9:45 a.m. he was at the board with respondent. Duffy was by D.S.'s desk, about ten feet away, and respondent was writing on the board.

D.S. had hit another student on the head and kicked another student that morning before hitting respondent. D.S. was first attempting to hit respondent, and then he hit her and she hit him back with an open hand on the side of the face. D.S. went back to his seat and sat down. There were no visible injuries to D.S. After he sat down he tried to get up, and Duffy told him to stay in his seat. She did not recall respondent saying anything when the incident happened. Duffy was surprised because she had never witnessed something like that before. She had never seen a student smack a teacher as D.S. did to respondent.

Duffy believed respondent's slap was a reaction; there was barely any lapse in time, just a reflexive slap to the face by respondent. D.S. stayed in the classroom and was not crying, and she saw no injuries. Duffy worked with D.S. that day, and five minutes after the incident he was hitting her with his elbow. She did not touch him, and after repeating her directions a few times, D.S. responded.

Duffy was there from the beginning of the school day, but Wilson was not. Duffy saw Wilson come in to get her student. She did not recall seeing Sonia Thomas, a cafeteria aide, in the classroom that day. Respondent did not give D.S. a high five at 9:45 a.m.

Duffy's report was written after she went to her union representative, who said she had to put it in writing to the principal.

Dr. Donna S. Burnett, principal of the CRS for six years, was employed by the district for thirty-one years. She was familiar with D.S., and had known respondent for five years. Respondent had come to CRS in September 2010. She first became aware of the incident from Wilson, who had told the school's psychologist and was told to go to the principal's office.

Burnett interviewed Wilson at about 12:15 p.m. on November 1, 2010. Wilson said she saw respondent slap D.S., and Burnett told Wilson to write a statement. Burnett interviewed Wilson again on November 3 and prepared a summary report of that interview.

Burnett interviewed Duffy on November 2, 2010. She thought she should have been made aware of the incident immediately, so that Orvyl Wilson, the director of student advocacy and the lead administrator for this, could have been told. Burnett received a report from Sonia Thomas, who was also in the room. Burnett did not interview respondent, because, when the incident was reported, respondent said she was entitled to representation and said nothing further.

Burnett reported the matter to the Division of Youth and Family Services (DYFS) and to the local police department, but neither took any action. She would have been notified if DYFS had substantiated abuse.

Edith Craft has been employed by the Board as a special education teacher since January 5, 2004. She obtained tenure in January 2007.

She testified that she had been a special education teacher for twelve years, and that she loved the children and watching them progress, as well as the challenge of teaching.

There were seven children in her class. They would usually come in at 8:50 a.m. and there was always work on their desks to "Do Now." Early in the morning on November 1, 2010, respondent had spoken with Duffy and asked her for help with D.S., as he did not want to do anything but go on the computer. After the students came in, respondent was trying to take attendance on the teacher computer. D.S. would not sit down and was hitting, and then was hitting her on the right side and slapping at her head. She told him to sit down and do the "Do Now" work. D.S. continued to interfere. D.S. was hitting at her and Duffy helped divert him. Respondent is four feet, ten and a half inches tall, so she and D.S. are almost the same height.

The children sat in a semicircle, but D.S. sat against the wall. Respondent tried to keep the other six children (all boys) away from him. There was one tiny boy that liked D.S. and yet D.S. would kick him. On that morning, D.S. was bothering this boy, kicking and slapping him.

D.S. had hit respondent before that day, and on that day he had knocked off her glasses. D.S. was violent, unruly and non-compliant. That was why his timer was for only five minutes. Respondent was not able to calm him down that morning.

After the morning math meeting and announcements were concluded, respondent was trying to get D.S. to get up. He got up and then he slapped her. He was supposed to be answering questions at the board. They were doing calendar math and D.S. was successful. He answered questions but resisted getting back in his seat. Then he jumped up and slapped her.

Respondent agreed that Wilson's statement and the memo from Burnett to Brian Bonanno were accurate. But she was not seeking to punish D.S. Respondent dealt with D.S. as she usually had to get him to learn; she had no anger toward him.

The statement of Sonia Thomas accurately described what was happening in the classroom before the incident, that D.S. was very agitated that morning and tried to hit respondent a few times, that respondent tried to calm him down by speaking to him, and that after a while he calmed down somewhat and participated in the class. (R-6.) However, Thomas left the classroom before the incident happened.

Respondent was relieved of her teaching duties. Burnett told her to leave the classroom and requested her lesson plans for two days. Respondent went to the teachers' lounge and was alone for a while. She was told to get a representative and go see the principal. It was so emotional for her. (She was crying on the witness stand.) She did not want to talk. She stayed until the children went home, and then went to the classroom to prepare detailed lesson plans, as she wanted to make sure it was all done right.

She agreed that in her answers to interrogatories, in answer to the question asking why she denied the charges, she had stated that she had gently tapped D.S. and had given him a high five, and that this was not accurate. She was not attempting to give him a high five that morning. The slap was an action/reaction to D.S.'s slap to her face. She had been struck many times before by D.S. and she could not explain why she reacted as she did that day. He used both hands and had previously hit her many times.

Respondent was never interviewed by DYFS or the police, except for a brief talk that day. A few weeks later a detective called her and said there was no case against her.

On cross-examination, respondent repeated the day's events as follows:

The children arrived at 8:50 a.m.

D.S. came to her when she was working on the computer close to 9:00 a.m. taking attendance.

D.S. was under Duffy's observation. Respondent and Duffy had a conversation about the plans of the day before 8:50 a.m.

They did not discuss what to do if D.S. got agitated.

They would focus on trying to keep D.S. on task.

Duffy was supposed to help D.S. with the "Do Now" math worksheet.

D.S. wanted only the computer. He was on respondent's right side and then the other side, slapping and hitting her on her face. Then he turned off the computer and she rebooted it.

Duffy was responsible only for D.S. They used strategies of the timer to keep D.S. from the computer and to set up the laptop for him.

Duffy should have assisted D.S. with the "Do Now" work. She had a timer for him so he could earn computer credit.

D.S. was attempting to hit respondent and she put her arms up to keep him away.

After he hit her on the right side, he went to her left, but Duffy was able to get him to sit.

Then they were at the morning mat period, where they wait for public-address-system announcements. Duffy was with D.S.

Respondent was trying to help all the children; she was not focused on D.S. during the announcements because he was with Duffy.

The children come to the carpet for morning math on the mat. D.S. was in a bean bag chair, which kept him away from the other children and appealed to D.S.'s tactile issues.

At the morning mat period, there were usually stories, social stories, hurrays, and other social components.

On the bean bag chair that morning, D.S. was fidgeting.

Respondent called D.S. to the board, where each student makes a mini-presentation. Everyone was sitting on the carpet together.

D.S. was called up shortly before 9:45 a.m. Thomas had been present at the beginning of the school day, but she had not remained in the classroom.

D.S. jumped up and did not want to answer the questions.

D.S. was staring at respondent. He was always a concern. He was spontaneous and had to be watched, but respondent did not want to leave him out of class activities.

When D.S. was called up he did not want to answer questions, but he did, and he got them right, and then plopped down again.

Then everyone was told to return to their regular seats, including D.S.

D.S. jumped up and slapped respondent once, then she slapped her hand against his face and he walked away. She recalled saying, "I cannot take it anymore." She had been hit so many times by him and could not say what happened that day. She was immediately extremely remorseful. She felt that she had not handled the situation correctly, and that the strategies given to her to help the child did not work to help D.S. learn.

No previous disciplines against respondent were noted.

After reviewing the testimony and the written evidence, I make the following findings of facts.

I **FIND** that on the morning in question D.S. was acting out and was agitated for some reason. Efforts by both respondent and D.S.'s aide to redirect him were only partially successful. D.S. was kicking and hitting at another student and at respondent. When it appeared he had calmed down somewhat and was asked to participate in the class's opening lesson, he did so, but then became agitated again, striking out at respondent, who then struck back. D.S. reacted by sitting down. He was not upset, nor did he appear injured, and acted in his normal manner.

I **FIND** that respondent struck D.S. after he struck her. Not only did the respondent testify to that event, but the other witnesses in the classroom who had the opportunity to see what had occurred corroborated that, particularly Duffy, who was present for the entire morning and was in a position to see what had happened since the beginning of the school day.

I **FIND** that the action by respondent was a reflexive action after she had been struck in the face. The respondent and D.S. are about the same size, and respondent was not in a position to overwhelm or overpower the child. She was immediately remorseful for her conduct, feeling that she had failed the child in getting him to learn. Respondent was not punishing the child for any misbehavior but was reacting to

repeated slaps to her face and head during the course of the morning. This was further substantiated by no criminal or DYFS charges being filed.

LEGAL ANALYSIS

The issue in this matter is whether a single, isolated incident in which respondent, a tenured special education teacher, reflexively slapped a student who slapped her warrants her dismissal and loss of tenure.

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)); N.J.S.A. 18A:28-1 to -18; N.J.S.A. 18A:6-10 to -18.1 ("Tenure Employees Hearing Law"). As such, a tenured teacher may not be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after the procedural requirements under the Tenure Employees Hearing Law have been met.[1] N.J.S.A. 18A:28-5; N.J.S.A. 18A:6-10.

Physical Contact with Student

A teacher may not use corporal punishment on a student.[2] N.J.S.A. 18A:6-1. However, a teacher may use such force as is reasonable and necessary (1) to quell a disturbance, threatening physical injury to others; (2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil; (3) for the purpose of self-defense; and (4) for the protection of persons or property. Ibid. Such acts, or any of them, shall not be construed to constitute corporal punishment. Ibid.

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[1] As ALJ Dubin explained in 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)), 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 functions of the position."

[2] Corporal punishment is not defined in the school laws. See N.J.S.A. 18A:1-1 to 76-4. However, corporal punishment has been defined by the Commissioner as "any punishment causing or intended to cause bodily pain or suffering." Craze v. Bd. of Educ. of Allendale, 1938 S.L.D. 585, 586.

A review of judicial and administrative law cases supports the conclusion that Craft's conduct warrants a penalty short of removal. In In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967), the Appellate Division determined that a single, isolated instance of inappropriate physical contact with a student did not warrant the dismissal of a teacher.[3] As the Commissioner described the incident in a proceeding below,

> while [Fulcomer] was teaching an eighth grade arithmetic class, a girl's pocketbook was passed among several pupils until it came to rest beside the desk of Donald Yowell. The teacher, becoming aware of inattention and discovering its source, dropped his textbook on the first pupil's desk, went to Donald and laid hands upon him. When released, the boy went to the front of the room, was directed to resume his seat by the teacher, made as though to do so, but instead ran toward the door in the rear to leave the classroom. The teacher pursued the boy, again laid hands upon him, and both of them fell to the floor.[4]
>
> [In re Fulcomer, supra, 93 N.J. Super. at 420.]

The Appellate Division agreed with the Commissioner that Fulcomer's behavior could not be condoned, but diverged with the Commissioner's holding, affirmed by the State Board of Education, that Fulcomer's misconduct warranted dismissal. The Appellate Division stated:

> We hold no brief for the teacher's conduct in this case. Other proper means were available to him to maintain discipline or compel obedience. Nor have we any doubt that unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant. See Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), affirmed o.b. 131 N.J.L. 326 (E. & A. 1944).
>
> Here, however, there is 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

[3] This matter has a long procedural history. For the full history, see In re Fulcomer, 1967 S.L.D. 201, 215–17.

[4] The Commissioner noted conflicting testimony with respect to whether the teacher struck the boy with his fist or hand, but determined that such conflict was immaterial to the question of whether Fulcomer engaged in conduct unbecoming a teacher. In re Fulcomer, supra, 93 N.J. Super. at 420.

> punishment. Rather, they bespeak a hasty and misguided effort to restrain the pupil in order to maintain discipline.
>
> Although such action certainly warrants disciplinary action, the forfeiture of the teacher's rights after serving for a great many years in the New Jersey school system is, in our view, an unduly harsh penalty to be imposed under the circumstances.
>
> [Id. at 421.]

The Appellate Division found that dismissal would have an adverse impact on Fulcomer's teaching career, and noted that Fulcomer had twenty-three years of teaching experience, that his "teaching record was good and his teaching ability unquestioned," and that he had not previously been disciplined by Holland Township during his seven years under its employ and had consistently received annual pay raises. Id. at 421–22. As a result, the Appellate Division held:

> The matter is therefore remanded to the Commissioner of Education for the purpose of making an affirmative decision as to the proper penalty to be imposed. Such 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.
>
> [Id. at 422.]

On remand, the Commissioner applied these factors for determining the proper penalty for Fulcomer's misconduct. The Commissioner first noted that "[t]he record discloses no indication of any particular aggravation or provocation or other extenuating circumstances which might serve to explain the teacher's conduct" and that "[s]uch childish behavior is not extraordinary and would be expected to have been controlled in simple and routine fashion by the teacher." In re Fulcomer, supra, 1967 S.L.D. at 217. The Commissioner found that "the use of such extraordinary physical restraint was

unnecessary and inexcusable" and that Fulcomer's "act constituted a grave offense against the pupil and the good order of the school and as such it cannot be lightly excused." Id. at 217–18. The Commissioner next considered Fulcomer's twenty-three years of teaching service and noted that the charge against Fulcomer was "the only instance of improper conduct which has been established against" him. Id. at 218. The Commissioner also found that "there is no indication that the teacher's act was premeditated, cruel or vicious, or done with the specific intent to inflict corporal punishment," and that the teacher appeared to have "acted on impulse in the mistaken and misguided notion that physical restraint was called for." Ibid.

According to the Commissioner, Fulcomer's misconduct did not have "any lasting effect on the continued operation of the school"; however, the Commissioner noted that whether this would have occurred had Fulcomer been there was mere speculation because Fulcomer had been relieved of his teaching duties since the incident. Ibid. Thus, the Commissioner stated that "in the light of his prior record, length of service, approaching retirement and other factors considered *ante*, the fact of this single, isolated instance of misconduct does not, under all the circumstances, call for as severe a penalty as summary dismissal." Id. at 219. Instead, the Commissioner ordered Fulcomer reinstated to his teaching position. The Commissioner reasoned:

> The teacher has been suspended from his former employment since early in 1962. During that time he has had to seek work elsewhere, has inevitably suffered damage to his professional reputation, and has endured the mental anguish attendant upon the uncertainty of his future and his involvement in this protracted litigation. The Commissioner believes this to have been sufficient punishment for his one instance of misconduct.[5]
>
> [Ibid.]

In In re Lomakin, 1971 S.L.D. 331, 333, the Commissioner of Education dismissed tenure charges against a gym teacher who "put his arms around [a] student, walked him into the equipment room despite his resistance and his attempt to 'hold his

[5] The Commissioner issued his decision on remand on August 9, 1967.

ground' and called the dean" after the student cut gym class and refused to report to the dean. In reaching his conclusion, the Commissioner explained that

> [s]ome adults react instinctively, under provocation of adolescents, in a purely physical manner. However, such reaction, as exhibited by respondent in the instant matter, is not responsible professional behavior and cannot be condoned. A major responsibility of the teaching profession is to demonstrate restraint in the face of child-like behavior on the part of those in their charge. In this instance respondent did not shoulder this responsibility in a manner which could be reasonably expected of a member of the teaching profession. . . .
>
> The Commissioner further finds, however, that no physical harm was done to the student, nor has there been established that there was any intent to inflict pain or suffering.
>
> [Lomakin, supra, 1971 S.L.D. at 335.]

The Commissioner held that the teacher's misconduct did not warrant his dismissal or reduction of his salary, and ordered dismissed the charge against him. Ibid.

In In re Nogaki, 1984 S.L.D. 1986, the State Board of Education upheld the administrative law judge's (ALJ's) finding that a gym teacher engaged in corporal punishment and unbecoming conduct when he punched two students in the chest for failing to follow his instructions, and it adopted the ALJ's recommended penalty of the forfeiture of an annual salary increment and one month's pay. In adopting the ALJ's recommendation, the State Board rejected the Commissioner's holding that the teacher's unbecoming conduct warranted his dismissal. The State Board found persuasive the ALJ's findings that a gym class is a setting that allows for physical interaction between teachers and students, that the teacher did not intend to inflict corporal punishment, and that there was "no indication of premeditation, cruel or vicious actions" by the teacher. Nogaki, supra, 1984 S.L.D. 1986. The State Board also considered its "obligation to protect the children of this State from corporal punishment and a concomitant obligation to remove unfit teachers from the classroom" and "the individual interest of the Respondent in a career encompassing 13 years of service"

with the school district. Id. at 1987. The State Board concluded that the incident was not "so egregious" or "sufficiently flagrant" as to warrant the teacher's dismissal, and held that the Commissioner's "dismissal of Respondent for this single, isolated incident is unreasonable and excessive." Id. at 1987–88.

In Board of Education of New Brunswick v. Murphy, 92 N.J.A.R.2d (EDU) 527, a teacher forfeited the 120 days' salary withheld during her suspension based on a finding that she engaged in two instances of corporal punishment of her students. In reaching his conclusion that the teacher engaged in corporal punishment but that her actions did not warrant removal, ALJ Masin explained the importance of intent in cases in which a teacher has engaged in corporal punishment:

> Where the teacher intended to inflict pain and suffering on a pupil with possible resulting physical harm the commissioner has viewed the matter severely. Where the circumstances indicate that the contact "was not of a punitive nature" then, depending upon all the circumstances, the commissioner has considered the matter to be less serious and to require a more measured response in terms of the penalty to be imposed.
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> [Murphy, supra, 92 N.J.A.R.2d (EDU) at 535 (citation omitted).]

With respect to the first of two incidents that formed the basis of the tenure charges brought against the teacher, ALJ Masin found that the teacher yelled at a student and touched her on the head with a book. ALJ Masin concluded that this touching constituted corporal punishment, but that "[t]he evidence is insufficient to support a conclusion that the intent was to 'inflict pain and suffering.'" Id. at 535. As for the second incident, ALJ Masin found that the teacher tried to control an unruly student by slapping the student in the face and shaking the student by her arms. ALJ Masin concluded that this incident also constituted corporal punishment, and that the teacher had no right "to physically assault the student in the absence of the kinds of threats and need for protection which constitute the exception to the definition of corporal punishment in N.J.S.A. 18A:6-1." Id. at 536.

However, ALJ Masin stated that "[w]hile the conduct was inexcusable, it nevertheless appears to be an isolated manifestation in an otherwise highly commendable career," and determined that the teacher was not feeling well physically or emotionally and "did not willfully and deliberately act in a manner calculated or intended to inflict pain and suffering and injury to the child." Ibid. As a result of his findings, ALJ Masin ordered that the teacher be reinstated to her position "at the same annual salary that she was paid during her suspension, without benefit of any adjustment or increment which might otherwise pertain." Ibid. The Commissioner of Education adopted ALJ Masin's findings of fact, but modified the recommended penalty. In reaching his conclusion on the appropriate penalty, the Commissioner stated:

> [w]hile the Commissioner concurs with the ALJ that dismissal is not warranted in this matter, he disagrees with the ALJ's recommendation that withholding of increment is a sufficient consequence for respondent's behavior. Even though respondent's record is otherwise unblemished and it appears that there was no premeditation, cruelty or deliberate attempt to injure children in the actions underlying the charges against her, inappropriate touching and loss of control of the type demonstrated in this matter cannot be countenanced in public school teachers under any circumstances. Therefore, to impress upon respondent and others the seriousness of the conduct at issue herein, the Commissioner directs that in addition to the employment and adjustment increments recommended by the ALJ, respondent shall forfeit the 120 days' pay withheld from her during her suspension following certification of charges to the Commissioner.
>
> [Ibid. (citation omitted).]

In applying the factors set forth in the above cases, respondent undoubtedly engaged in unbecoming conduct. As the Commissioner stated in Lomakin, "[a] major responsibility of the teaching profession is to demonstrate restraint in the face of child-like behavior on the part of those in their charge." Here, respondent failed to demonstrate the necessary restraint when she was hit in the face by D.S. However,

while her actions should not be condoned, the totality of circumstances supports the imposition of a penalty short of dismissal and loss of tenure.

First, similar to the actions of the teachers in Fulcomer, Lomakin, Nogaki, and Murphy, respondent's misconduct was not premeditated, cruel or vicious, or done with intent to punish or to inflict corporal punishment. She testified that she slapped D.S. as a reaction to an action and that she did not intend to slap D.S. Duffy, who witnessed the incident, attested that the slap by respondent appeared reflexive. Respondent acknowledged that the altercation was a situation that she did not handle correctly and that she was extremely remorseful. She said that she did not hit D.S. as punishment for hitting her and that she did not have any anger toward D.S. at the time she hit him; it was simply an immediate reaction to the slap in her face.

Second, as in Fulcomer, Nogaki, and Murphy, respondent has taught for many years without exhibiting a pattern of misconduct. Here, there was no evidence that respondent had engaged in any other misconduct while employed by the district. Instead, respondent's interaction with D.S. represented a single, isolated incident in a teaching career otherwise unmarked by wrongdoing.

Third, the Board has presented no evidence showing that respondent's conduct had an injurious effect on the maintenance of discipline and the proper administration of the school system. While none of the children present at the time of the incident testified at the hearing, speculation lends itself to the assumption that any child who witnessed the incident would have been at least somewhat shocked by what he or she saw. In addition, Wilson testified that she asked respondent if she needed to take off the rest of the afternoon, and Duffy testified that she was surprised to see such physical contact between a teacher and a student. However, as in Fulcomer, there was no indication that the altercation had a "lasting effect on the continued operation of the school" or a lasting effect on D.S.'s performance in school.

Fourth, the incident did not appear to have any immediate impact on D.S. According to Duffy, after respondent slapped D.S., D.S. simply returned to his seat.

Duffy stated that D.S. did not appear agitated or injured, and he did not cry. Instead, according to Duffy, D.S. went back to his seat and he sat there and sucked his thumb as he normally did on any other day. Thus, as with the teachers in Lomakin and Murphy, respondent's misconduct did not appear to physically or emotionally harm D.S.

Finally, there is some evidence here of provocation. While respondent's conduct is not acceptable behavior for a teacher, the evidence did show that the repeated slaps from D.S. that morning up to and including the last slap after the start of the school learning session caused the reaction from respondent in which she reflexively slapped D.S. Respondent was not angry with D.S. and did not intend to punish him for slapping her. Instead, respondent slapped D.S. as a reaction to his action.

Corporal Punishment

While respondent engaged in unbecoming conduct, she did not inflict corporal punishment on D.S. The Commissioner has defined corporal punishment as "any punishment causing or intended to cause bodily pain or suffering." Craze, supra, 1938 S.L.D. at 586. Here, as explained above, respondent did not act with intent to harm or punish D.S. Rather, respondent slapped D.S. as a reflex after she was slapped in the face by D.S. Thus, respondent's conduct should not be considered corporal punishment, and therefore there is no need to determine whether her actions could be characterized as force reasonable and necessary under N.J.S.A. 18A:6-1 for the purpose of self-defense or for the protection of persons.

While respondent should not have hit D.S., she did not inflict corporal punishment on him. She did not act with intent to harm or punish D.S.; rather, her reaction was an instantaneous one after being slapped. Moreover, none of the witnesses described D.S.'s behavior as changing. He did not appear to be upset; he was not crying. He returned to his seat and sucked his thumb as he usually did.

In all tenure matters, the moving party, in this case the Board, bears the burden of proving the charges by a preponderance of the competent, relevant, and credible

evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). After having examined and considered all of the evidence and testimony presented, as well as after having considered all the arguments advanced, I **CONCLUDE** that the evidence supports the charges preferred against respondent, and that she engaged in conduct unbecoming a teacher and other just cause.

Penalty

The next issue to be determined is the appropriate penalty for respondent's conduct. In mitigation, respondent has been teaching for twelve years (almost seven years in the district) without incident. Her conduct did not contemplate harm or punishment to the child but was reflexive after being slapped in the face. The child did not appear to be upset or injured and he returned to his seat, behaving in his normal manner. Under these circumstances, dismissal would not be appropriate and would be an excessive penalty. While respondent's conduct was unbecoming a teacher, this single, isolated incident in an otherwise unblemished career was not sufficiently flagrant to demonstrate respondent's unfitness as a teacher or to warrant her dismissal.

However, such behavior by a tenured teacher does require an appropriate discipline. In lieu of dismissal, such a penalty would be a forfeiture of respondent's employment and adjustment increments as well as the pay withheld from her during her suspension. Such a result is supported by the Commissioner's decision in Murphy. In Murphy, a teacher was not dismissed from her position despite her involvement in two instances of corporal punishment and unbecoming conduct. Murphy, supra, 92 N.J.A.R.2d at 536–37. However, the Commissioner increased the ALJ's recommended penalty of withholding of a salary increment. Id. at 537. According to the Commissioner in Murphy, despite mitigating factors that militated against the teacher's dismissal, "inappropriate touching and loss of control of the type demonstrated in this matter cannot be countenanced in public school teachers under any circumstances." Ibid. As a result, the Commissioner imposed a penalty of forfeiture of employment and adjustment increments and forfeiture of the 120 days' pay withheld from the teacher during her suspension. Ibid.; see also Randolph Twp. Bd. of Educ. v. DiPillo, 93

N.J.A.R.2d (EDU) 13, 25 (holding that appropriate penalty for teacher misconduct included loss of 120 days' pay and salary increment).

Accordingly, under the particular circumstances of this matter, the appropriate penalty would be the one suggested by the Board as an alternative to dismissal, namely, the loss of "employment and adjustment increments as well as [the forfeiture of] the 120 days' pay withheld from [respondent] following the certification of tenure charges to the Commissioner of Education." This penalty should impress upon respondent and other teachers the seriousness of respondent's misconduct, and that this type of conduct cannot be condoned by the Board.

ORDER

Based on the foregoing findings of fact and conclusions of law, this matter is decided in favor of petitioner and the charges against respondent are sustained. I **ORDER** that respondent be reinstated to her position as a tenured special education teacher in the district with restoration of any pay or benefits that have been withheld, except that she is subject to the loss of employment and adjustment increments as well as the forfeiture of the 120 days' pay withheld from her following the certification of the charges.

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.

7/21/11
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

Date Received at Agency: 7/21/11

Date Mailed to Parties: 7/21/11

WITNESSES

For petitioner:

Edith Craft

For respondent:

Karen Wilson

Karen Duffy

Dr. Donna Burnett

EXHIBITS

For petitioner:

None

For respondent:

R-1 Statement of Karen Wilson dated November 1, 2010

R-2 Memo from Dr. Burnett to Wilson dated November 2, 2010

R-3 Memo from Dr. Burnett to Brian Bonanno dated November 3, 2010

R-4 Statement of Karen Duffy dated November 1, 2010

R-5 Memo from Dr. Burnett to Orvyl Wilson dated November 2, 2010

R-6 Statement of Sonia Thomas dated November 1, 2010

R-7 Memo from Dr. Burnett to Orvyl Wilson dated November 1, 2010

#367-11

OAL DKT. NO. EDU 03008 AND 03253-10 (CONSOLIDATED)
AGENCY DKT. NO. 25-1/08 AND 34-2/10

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, UNION COUNTY,	:	
RESPONDENT.	:	

The records of these consolidated matters, the proposed Settlement Agreement (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 matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/01/11

Date of Mailing: 9/06/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
(CONSOLIDATED CASES)
OAL DKT. NO. EDU 03008-08
AGENCY DKT. NO. 25-1/08

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, UNION COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, UNION COUNTY,
Respondent.

and

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, UNION COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, UNION COUNTY,
Respondent.

OAL DKT. NO. EDU 03253-10
AGENCY DKT. NO. 34-2/10

David Rubin, Esq., for petitioner

Vito Gagliardi, Jr., Esq., (Porzio, Bromberg and Newman, attorneys) for respondent

Record Closed: July 14, 2011 Decided: July 18, 2011

BEFORE **IMRE KARASZEGI,** ALJ:

On February 13, 2008 and on March 22, 2010, the matters were transmitted to the Office of Administrative Law for determination as contested cases.

The parties have agreed to an amicable resolution of the matter and submitted the attached Stipulation of Settlement and 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 these matters 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 18, 2011
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 7-21-11

Date Mailed to Parties: JUL 21 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

14 P 1:21
OF ADMIN LAW

DAVID B. RUBIN, P.C.
Attorney At Law
44 Bridge Street
P. O. Box 4579
Metuchen, New Jersey 08840
(732) 767-0440
Attorney for Petitioner

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, UNION COUNTY, Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, UNION COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency Dkt. No. 25-1/08 OAL Dkt. No. EDU 03008-2008

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, UNION COUNTY, Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS, UNION COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency Dkt. No. 34-2/10 OAL Dkt. No. EDU 03253-10 SETTLEMENT AGREEMENT

Whereas, the Mountainside Board of Education ("Mountainside"), and the Berkeley Heights Board of Education ("Berkeley Heights"), have asserted various claims against each other in consolidated proceedings before the Commissioner of Education entitled Board of Education of the Borough of Mountainside v. Board of Education of the Township of Berkeley Heights, OAL Dkt. No.s EDU 03008-2008 and EDU 03253-10, Agency Dkt. No.s 25-1/08 and 44-2/10 ("the Action"), and

Whereas, the parties have amicably resolved their differences and desire to memorialize a settlement of the Action by this Agreement,

Now, Therefore, Be It Agreed, as follows:

1. All affirmative claims that were, or could have been, asserted by Mountainside or Berkeley Heights against the other in the Action shall be deemed dismissed, with prejudice, immediately upon the approval of this Agreement by the Commissioner of Education.

2. Commencing with school year 2011-2012, and for each school year thereafter that the parties remain in a sending-receiving relationship, charges by Berkeley Heights to

Mountainside for resource room services to Mountainside-resident students shall be calculated pursuant to N.J.A.C. 6A:23A-17.1(e)(5)(vi) and (e)(9), and Policy Bulletin 100-1; provided that a) such charges shall be calculated solely based on Berkeley Heights' costs related to provision of resource room services at Governor Livingston High School, and not at other schools in the Berkeley Heights School District, which costs shall be defined as employees' salaries, classroom supplies and materials, purchased services directly related to the class, and related costs and services such as field trips; and b) charges shall be based upon enrollment of Mountainside-resident students as reflected in their IEPs, not necessarily their actual daily attendance.

3. To enable Mountainside to make budgetary preparations to meet its responsibilities hereunder, and to facilitate the validation of Berkeley Heights' resource room charges to Mountainside, Berkeley Heights shall furnish to Mountainside, on a monthly basis, the following documentation concerning students for whom resource room services charges are assessed: a) a list of Mountainside-resident students, identified by initials, currently receiving resource room services; b) the weekly number of IEP-required resource room minutes for each student so identified; c) the actual salaries of teachers and classroom

aides assigned to resource room classes at Governor Livingston High School; d) the actual scheduled pupil contact time for the teachers and classroom aides so identified; and e) the total number of resource room hours taught to all Governor Livingston High School students, regardless of residency. The parties agree that charges to Mountainside pursuant to this Agreement shall be invoiced on a monthly basis. To the extent the documentation suggests that the monthly budgeted amount should be adjusted, the parties shall agree on a modified amount to take effect with the February invoice.

4. Upon formal approval of this Agreement by the parties, and full execution and exchange hereof, Mountainside shall pay to Berkeley Heights the sum of $155,414.00, representing the amount budgeted by Mountainside for resource room services for school year 2010-2011. It is understood that the parties shall reconcile this amount to the actual costs incurred in accordance with N.J.A.C. 6A:23A-17.1 and Policy Bulletin 100-1, following the completion of the annual audit report and review by the New Jersey Department of Education.

5. In addition to resource room charges assessed annually as provided for above, commencing with school year 2011-2012, and continuing through school year 2015-2016, Mountainside shall

pay to Berkeley Heights a lump sum of $66,000.00 annually, no later than July 31st of each school year, for a total of $330,000.00, in full satisfaction of all claims that were or could have been asserted by Berkeley Heights against Mountainside in the Action. With respect to school year 2011-2012, said payment shall be made by July 31, 2011, or within 20 days of receipt of written approval of this Agreement by the Acting Commissioner of Education, whichever comes later. To the maximum extent permitted by law, Mountainside shall be entitled to an annual general fund tax levy CAP adjustment of up to $66,000.00, for the purpose of making the annual payments agreed-upon herein.

6. Berkeley Heights shall retain complete control over program and placement decisions regarding Mountainside-resident special education students enrolled in the Berkeley Heights School District as provided for by law; however, Berkeley Heights' staff involved with IEP development shall afford Mountainside's staff involved with IEP development a timely opportunity to review the IEP of each Mountainside-resident student prior to implementation. The purpose of said review shall be solely for the purpose of offering non-binding input based upon Mountainside's knowledge of the student, or specific

Mountainside resources to assist in educating the student, and avoiding unnecessary expenditure of either party's funds.

7. This Agreement is entered into for the purpose of avoiding the expense and inconvenience of continued litigation, and does not reflect a concession by either party of the correctness of the other party's factual or legal positions in the Action.

8. Both parties shall execute such additional documents as may be necessary to effectuate the purposes hereof.

9. With the exception of the payment to be made pursuant to paragraph 4 hereof, this Agreement is otherwise subject to, and shall take effect immediately upon, approval: a) by the respective parties, by resolutions adopted at duly convened public meetings; b) by the Administrative Law Judge presiding in the Action; and c) by the Acting Commissioner of Education.

10. The parties agree that the venue for resolution of any disputes concerning the interpretation or enforcement of this Agreement shall be the Superior Court of New Jersey, Union County Vicinage. The parties further agree that any future disputes concerning their sending-receiving relationship, other than those concerning the interpretation or enforcement of this Agreement, shall be submitted to the Union County Executive

County Superintendent for non-binding mediation prior to commencement of any litigation.

MOUNTAINSIDE BOARD OF EDUCATION

By: _____
JAMES W. RUBAN, JR., PRESIDENT

_____
DANIEL SARAGNESE, INTERIM BOARD SECRETARY

Dated: 2/1/11

BERKELEY HEIGHTS BOARD OF EDUCATION

By: _____
JOHN SINCAGLIA, PRESIDENT

_____
DONNA FELEZZOLA, BOARD SECRETARY

Dated: _____

Mountainside Board Of Education

Beechwood School, 1497 Woodacres Dr., Mountainside, NJ 07092

OFFICE OF ADMIN LAW
PM P 1:21

Certified Extract of Board Minutes

VIII. President's Report

1. **BE IT RESOLVED THAT,** the Mountainside Board of Education hereby approves a settlement of litigation in the consolidated matters of Board of Education of the Borough of Mountainside v. Board of Education of the Township of Berkeley Heights, Agency Dkt. No. 25-1/08, OAL Dkt. No. EDU 03008-2008; Agency Dkt. No. 34-2/10, OAL Dkt. No. EDU 03253-10, on terms set forth in a written settlement agreement agreed to by the parties, and which the Board President is hereby authorized to execute upon approval of same by the Berkeley Heights Board of Education (Attachment #2 as amended).

   Moved: Mr. Minks Seconded: Mrs. Jakositz

   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 regular meeting of May 24, 2011.

W. Daniel Saragnese
School Business Administrator/Board Secretary

BERKELEY HEIGHTS
BOARD OF EDUCATION

Donna A. Felezzola
School Business Administrator/Board Secretary

OF ADMIN LAW
P 1:21

The following resolution was adopted by the Berkeley Heights Board of Education at its Combined Conference & Regular Meeting held June 2, 2011:

APPROVAL – SETTLEMENT – DOCKET # EDU 03008-2008 - BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE V. BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY HEIGHTS It was moved by Mrs. Kirsch and seconded by Ms. Walsh to accept the settlement agreement as detailed in Attachment F.
A roll call indicated unanimous approval.

I certify that the above is a true and accurate copy of the resolution adopted by the Berkeley Heights Board of Education at its Combined Conference & Regular Meeting held June 2, 2011.

Donna A. Felezzola
School Business Administrator/Board Secretary

#368-11

IN THE MATTER OF THE TENURE	:	
HEARING OF LISA ROSA, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF JERSEY CITY,	:	DECISION
HUDSON COUNTY.	:	

SYNOPSIS

The petitioning Board certified tenure charges of chronic and excessive absenteeism, constituting unbecoming conduct and other just cause, against respondent – a middle school science teacher employed by the district in its accelerated program for high-performing students – for excessive absences over the four year period from the 2006-2007 school year through the 2010-2011 school year. The Board sought removal of respondent from her tenured position.

The ALJ found, *inter alia*, that: the Board had provided respondent with ample warning of its dissatisfaction with her attendance through written evaluations and the withholding of three consecutive annual salary increments; petitioner's argument that she should not be terminated because none of the Board's communications specifically warned her in advance that she would be terminated if her record of attendance did not improve is without merit; and the Board sustained its burden of proving that respondent should be dismissed for unbecoming conduct and other just cause pursuant to *N.J.S.A.* 18A:6-10. Accordingly, the ALJ ordered the tenure charges against respondent upheld.

Upon independent review of the record, the Commissioner 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.

September 1, 2011

OAL DKT. NO. EDU 5602-11
AGENCY DKT. NO. 103-5/11

IN THE MATTER OF THE TENURE	:	
HEARING OF LISA ROSA, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF JERSEY CITY,	:	DECISION
HUDSON COUNTY.	:	

The petitioning district certified tenure charges against respondent in consequence of four years of chronic and excessive absenteeism, as to which respondent had been both admonished in memoranda, observation forms and evaluations, and penalized by way of increment withholdings. Petitioner did not allege that the reasons for respondent's absences were inappropriate, but rather that the excessive absences hurt the students by consistently interrupting the continuity and coherence of instruction and destabilizing the classroom environment. Upon review of the record, Initial Decision of the Office of Administrative Law (OAL) and respondent's exceptions,[1] the Commissioner concurs with the Administrative Law Judge's recommendation to uphold the charges.

For each of the four years at issue, respondent was absent or tardy for over one quarter of the total days constituting the school year. In fact, during the 2009-10 academic year respondent missed over half of the 182 days of school. This level of absenteeism cannot fail to have a substantial and negative effect upon the quality of the students' education. Thus, the Commissioner and other authorities have previously found that an employee may properly be dismissed for excessive absenteeism, even where valid personal reasons such as illness underlie

[1] The Commissioner was not provided with a transcript of the July 20, 2011 hearing.

the absenteeism. *See, e.g., In the Matter of the Tenure Hearing of Grace Folger, Board of Education of the Township of Orange,* Commissioner Decision No. 147-00, decided May 15, 2000; *In the Matter of the Tenure Hearing of Jerome Kacprowicz, State Operated School District of the City of Jersey City, Hudson County,* 93 *N.J.A.R.*2d (EDU)152, *aff'd,* State Bd., 93 *N.J.A.R.*2d (EDU) 604, *aff'd,* App. Div., 95 *N.J.A.R.*2d (EDU)105; *In the Matter of the Tenure Hearing of Vincent Pellecchio, State-Operated Sch. Dist. of Jersey City*, 92 *N.J.A.R.*2d (EDU) 271, *aff'd,* State Bd., 93 *N.J.A.R.*2d (EDU) 30.

In her exceptions, respondent asserts that the problems that caused her excessive absenteeism are behind her, and she will now be able to perform her duties without the frequent interruptions which characterized the past four years. However, under the circumstances of this case, the Commissioner cannot find that petitioner's decision not to take a chance on further disruption is arbitrary, capricious or unreasonable. In the record, examples of the negative effects of respondent's absenteeism are identified. Respondent's high-performing students fell behind their peers in accelerated science classes and had to be reassigned to other full-time science teachers. Parents registered complaints, and undue use of substitute teachers was necessitated.

In sum, the Commissioner finds that respondent has met the standards for termination of a tenured employee for excessive absenteeism as articulated in such cases as *In the Matter of the Tenure Hearing of Lena White, State Operated School District of the City of Jersey City, Hudson County,* 92 *N.J.A.R.*2d (EDU) 157, 161. More specifically, petitioner 1) considered both the number and the particular circumstances of the absences, (2) assessed the impact of the absences on the continuity of instruction, and (3) gave respondent warning that her supervisors were dissatisfied with the pattern of the absences.

Accordingly, the Initial Decision of the OAL upholding the respondent's dismissal from her tenured position with the Jersey City School District is adopted as the final decision in this matter. This matter 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: 9/01/11

Date of Mailing: 9/06/11

[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 05602-11
AGENCY DKT. NO. 103-5/11

IN THE MATTER OF THE TENURE HEARING OF LISA ROSA, SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY.

R. Scott Eveland, Assistant General Counsel, for petitioner School District of the City of Jersey City (Paula Mercado-Hak, General Counsel)

Nancy I. Oxfeld, Esq., for respondent Lisa Rosa (Oxfeld Cohen, attorneys)

Record Closed: July 20, 2011 Decided: July 25, 2011

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE

The School District of the City of Jersey City (District) dismissed tenured teacher Lisa Rosa for unbecoming conduct and 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 Rosa had been chronically and excessively absent from her duties as a middle school science teacher despite previous warnings and the withholding of

three salary increments. The issues are whether Rosa engaged in the alleged conduct, and, if so, what is the appropriate penalty.

PROCEDURAL HISTORY

The District certified charges against Rosa to the Bureau of Controversies and Disputes of the Department of Education (Commissioner) on May 2, 2011. Upon the receipt of Rosa's Answer on May 16, 2011, the Director of the Bureau of Controversies and Disputes referred the tenure charges to the Office of Administrative Law (OAL) on May 17, 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. A hearing was scheduled for July 20, 2011.

Although Rosa's counsel appeared on the scheduled day of the hearing, Rosa did not appear, and she advised her counsel, when called, that she had discovered a flat tire on her motor vehicle outside her home. When I suggested, through counsel, that we would wait for her to appear later on July 20 after replacing the tire or taking public transportation, Rosa conveyed to her counsel that the offer was not feasible. Because of the mandate to expedite tenure proceedings, I declined to adjourn the hearing, but, with the consent of counsel and Rosa, the hearing proceeded with Rosa participating and testifying by telephone. Based on the issues raised in prehearing conferences, it became evident that the proposed testimony of Rosa would not turn on the need to make credibility determinations. I held a hearing on July 20, 2011, and closed the record that day.

FINDINGS OF FACT

The parties stipulated to the following, which I **FIND** as **FACTS**.

Rosa has been absent from her duties as a middle school science teacher in the Academy I Middle School in the following manner:

A. 2010–2011 school year—as of March 25, 2011, a total of 51 days absent

B. 2009–2010 school year—a total of 107 days absent

C. 2008–2009 school year—a total of 36 days absent and 22 days tardy

D. 2007–2008 school year—a total of 52 days absent

Rosa's number of absences from the 2007–2008 school year through the 2010–2011 school year, as of March 25, 2011, totaled 246 days. The school year for the District students consists of 182 days.

The District warned Rosa in writing that her attendance was unsatisfactory and needed improvement as follows:

October 18, 2010, Formative Observation Form—"Absenteeism interferes with continuity of instruction." Nine days of absence were noted from September 9, 2010, through October 4, 2010.

December 8, 2009, Formative Observation Form—"Ms. Rosa's attendance has come to the observer's attention due to the many times she has stopped by and Ms. Rosa is absent. Ms. Rosa has been absent 4 days in December . . . . This impacts the continuity of instruction."

November 12, 2009, Formative Observation Form—"Absenteeism interferes with continuity of instruction." Nine days of absence were noted from September 16, 2009, through November 10, 2009.

June 10, 2009, Summative Evaluation—"Areas Needing Improvement: Ms. Rosa has been absent 32 days this school year. The fact that Ms. Rosa has been excessively absent disrupts the continuity of instruction for her students. Ms. Rosa must be present on a consistent basis in order to develop an effective classroom environment."

June 22, 2008, Summative Evaluation—"Areas Needing Improvement: Ms. Rosa's complete disregard for the welfare of her students is evidenced by her excessive absence (49). The lack of continuity for teaching and learning is exacerbated by the fact that she is not present on a consistent basis in class to maintain an effective and nurturing classroom environment. Her students suffer because there are no formal expectations set to develop high standards for learning in her classes. . . . Because Ms. Rosa is frequently absent, she often does not attend the professional development offered in the morning . . . ."

The principal and acting principal of Academy I Middle School provided Rosa with memos on the following dates expressing disappointment with her attendance/lateness: January 14, February 1, February 16, and March 4, 2011; January 25, 2010; May 31, 2009; January 15, March 26, and November 5, 2008. Rosa did not receive the 2011 memos on the dates they were created because she was absent on those dates. She received the 2011 memos that were in her school mailbox upon her return from her absences.

The District withheld Rosa's salary increments for 2008–2009, 2009–2010, and 2010–2011 because of attendance.

I **FIND** additional **FACTS** based on the unrebutted testimony of Academy I Middle School (Academy I) principal Grace Moriarty. The school is one of the District's premier middle schools, providing an accelerated and enrichment program for high-performing students and a bridge program for students who need extra assistance. Rosa was a science teacher with a primary responsibility in the accelerated program, where the high-performing students needed to be challenged with an advanced curriculum. Rosa's absences impeded the continuity and coherence expected in the accelerated program. Moriarty received complaints from parents about Rosa's absences and students fell behind their peers because of her absences. Although Moriarty used substitute teachers for a long time when Rosa would be absent, she reassigned Rosa's students to other full-time science teachers in 2010–2011.

The District has not challenged the bona fides of Rosa's absences, but has instead limited its charge to that of chronic and excessive absenteeism. Therefore, although the numerosity rather than reasons for Rosa's absences is relevant, Rosa testified as to the cascade of issues that affected her admitted attendance record for the four school years raised in the Statement of Charges. She became pregnant in August 2006 and was diagnosed with a chemical imbalance and severe depression. She missed work for repeated periods of time during the pregnancy, and her doctor finally required her to stay out of work for the remainder of the pregnancy. Although her daughter was born on March 14, 2007, she remained at home for the rest of the 2006–2007 school year. She intended to return to school for the 2007–2008 year, with the anticipation that her retired husband would provide full-time childcare services. That autumn Rosa's husband was diagnosed with multiple sclerosis. His symptoms were unpredictable. Occasions of falling, temporary paralysis, and exhaustion rendered him incapable of providing the childcare. Rosa did not make alternate childcare arrangements until March 2008. She thereafter missed work to care for her daughter, who was exposed to the illnesses of other children in her daycare center. Rosa's long absences in 2009–2010 and 2010–2011 were due to the difficulty in stabilizing and controlling her severe depression. Rosa testified that, with therapy and appropriate medication, her condition of depression is now under control.

LEGAL ANALYSIS AND CONCLUSIONS

The District has brought tenure charges against Rosa alleging unbecoming conduct. 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 the 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., Lackawanna 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) (citation omitted). 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).

A school district should not be burdened with a part-time teacher in a full-time job. Other staff or substitutes cannot be expected to cover for absent colleagues for unreasonable periods of time or under unreasonable circumstances, as such circumstances cause hardship and dissension in the workplace and disrupt the continuity of instruction for that teacher's students. An employer has the right to expect a consistency of employee attendance in order to properly fulfill its mission. Attendance is an essential function of most jobs. See, e.g., Muller v. Exxon Research and Eng'g Co., 345 N.J. Super. 595, 605–06 (App. Div. 2001) (under the Law Against Discrimination, excess absenteeism need not be accommodated even if it is caused by a disability otherwise protected by the Act); Svarnas v. AT&T Commc'ns, 326 N.J. Super. 59, 78 (App. Div. 1999) ("reasonably regular, reliable, and predictable attendance is a necessary element of most jobs. An employee who does not come to work cannot perform any of [the] job functions, essential or otherwise.").

Chronic conduct is conduct that continues over a long time or recurs frequently. Good v. N. State Prison, 97 N.J.A.R.2d (CSV) 529, 531. "Excessive" is defined as "exceeding a normal, usual, reasonable, or proper limit." American Heritage Dictionary 638 (3d ed. 1992). Under any reasonable standard, absences totaling 246 days in a

four-year period where the school year is but 182 days in duration are chronic and excessive.

The District has not accused Rosa of being a malingerer or of using specious excuses for her absences. Rather, it has limited its charges to conduct unbecoming a teacher through chronic and excessive absenteeism. It is unfortunate that Rosa and her family have suffered from various medical and childcare situations that required her to miss such a large amount of work days. However, excessive absenteeism constitutes valid grounds for dismissal of a tenured teacher even if the absences were excused or caused by legitimate reasons of personal illness and even if the teacher's classroom performance was sufficient. Orange Bd. of Educ. v. Folger, EDU 7379-99, Final Decision (May 15, 2000) <http://lawlibrary.rutgers.edu/oal/search.shtml>; In re Kacprowicz, 93 N.J.A.R.2d (EDU) 147, aff'd, State Bd., 93 N.J.A.R.2d (EDU) 604, aff'd, App. Div., 95 N.J.A.R.2d (EDU) 105; State-Operated Sch. Dist. of Jersey City v. Pellecchio, 92 N.J.A.R.2d (EDU) 269, aff'd, State Bd., 93 N.J.A.R.2d (EDU) 30.

The Commissioner in Folger emphasized that, from the students' point of view, it does not matter whether their teacher is absent for an excessive amount of time for legitimate medical excuses or illegitimate excuses. The bottom line is whether a tenured teacher is present to teach or whether she is absent much of the time. Principal Moriarty aptly testified as to the loss of continuity and coherence in Rosa's classroom during her absences, particularly in view of the demanding curriculum in her school's accelerated program. Frequent absences by teachers from regular classroom activity surely disrupt the continuity of the instructional process. Regular contact of students with their assigned teachers is vital to the success of this instructional process. In re Reilly, 1977 S.L.D. 403.

The District had provided Rosa with ample warning of its dissatisfaction with her attendance through comments on her periodic Formative Observation Forms and Summative Evaluations. She was further put on notice with memos from 2008 through March 2011. It is of no moment that she did not receive the last four memos in 2011 until she returned to school because of her own absences. Finally, the withholding of three consecutive annual salary increments for the stated reason of attendance clearly

put Rosa on notice that her attendance was not acceptable. In view of the repeated presentations of dissatisfaction with her attendance, I reject Rosa's argument that she should not be terminated because none of those communications specifically warned her in advance that she would be terminated if her record of attendance did not improve. The number of notices should have put any reasonable person on notice that the continuation of an unacceptable attendance record would jeopardize continued employment.

I **CONCLUDE** that the District has sustained its burden of proving that Rosa should be dismissed for unbecoming conduct and other just cause in accordance with N.J.S.A. 18A:6-10.

ORDER

I **ORDER** that the tenure charges against Lisa Rosa 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, 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 25, 2011
DATE

JESSE H. STRAUSS, ALJ

Date Received at Agency: 7/25/11

Date Mailed to Parties: JUL 26 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

APPENDIX

LIST OF WITNESSES

For Petitioner:

Grace Moriarty

Dr. Hermione McNeil

For Respondent:

Lisa Rosa

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

P-A Rosa Attendance Record, 2010–2011

P-B Rosa Attendance Record, 2009–2010

P-C Rosa Attendance Record, 2008–2009

P-D Rosa Attendance Record, 2007–2008

P-E Formative Observation Form, October 18, 2010

P-F Formative Observation Form, December 8, 2009

P-G Formative Observation Form, November 12, 2009

P-H Summative Evaluation, June 10, 2009

P-I Summative Evaluation, June 22, 2008

P-J Memo, Moriarty to Rosa, March 4, 2011

P-K Memo, Moriarty to Rosa, February 16, 2011

P-L Memo, Moriarty to Rosa, February 1, 2011

P-M Memo, Moriarty to Rosa, January 14, 2011

P-N Memo, Moriarty to Rosa, January 25, 2010

P-O Memo, Galano to Rosa, June 3, 2009

P-P Memo, Moriarty to Rosa, November 5, 2008

P-Q Memo, Moriarty to Rosa, March 26, 2008

P-R Memo, Moriarty to Rosa, January 15, 2008

P-S Increment Withholding, August 24, 2010

P-T Increment Withholding, August 7, 2009

P-U Increment Withholding, August 11, 2008

P-V Rosa Employee Absence Report, 2006–2007

For Respondent:

None

#369-11

ERIN MARKAKIS,	:	
	:	
PETITIONER,		
	:	
V.		COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW,	:	DECISION
	:	
RESPONDENT.		
	:	

SYNOPSIS

Petitioner, a tenured fourth grade teacher, appealed the Department's determination disqualifying her from school employment pursuant to *N.J.S.A.* 18A:6-7.1(c) following her guilty plea to assault by auto pursuant to *N.J.S.A.* 2C:12-1c(2). Such guilty plea was a consequence of a three car accident in which petitioner failed to maintain control of her vehicle, crossed over the center line into oncoming traffic, and caused a crash which resulted in injuries to five individuals, including serious internal injuries to a three year old child who was airlifted from the scene and hospitalized for 24 days as result of the trauma. Petitioner was found to have a blood alcohol level of .197%, more than twice the legal limit. Cross motions for summary decision were filed by both parties.

The ALJ found that: the facts in the matter are not in dispute, and the matter is ripe for summary decision; the crime petitioner was charged with – and pled guilty to – was a 3rd degree crime under *N.J.S.A.* 2C:12-1(c)(2), which involves serious bodily injury; her conviction falls within the purview of the disqualification statute, *N.J.S.A.* 18A:6-7.1(c)(1); reckless behavior can form the basis of a conviction of aggravated assault and manslaughter, crimes listed as disqualifiers under *N.J.S.A.* 18A:6-7.1(c)(1); the facts in *Christopher Parshelunis v. New Jersey Department of Education, Office of Criminal History Review*, are distinguishable from the instant case. Accordingly, the ALJ granted respondent's motion for summary judgment and affirmed petitioner's disqualification from school employment.

The Commissioner adopted the Initial Decision as the final decision in this matter, and affirmed petitioner's disqualification from school employment.

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 1, 2011

OAL DKT. NO. EDU 13275-10
AGENCY DKT. NO. 586-10/10

ERIN MARKAKIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and respondent's reply thereto[1] were fully considered by the Commissioner in reaching his determination herein.

Petitioner's exceptions, in relevant part, recast and reiterate her arguments made before the Administrative Law Judge (ALJ) below, again relying on *Christopher Parshelunis v. New Jersey Department of Education, Office of Criminal History Review*, Commissioner's Decision #458-08, decided November 25, 2008, as dispositive in this matter. As it is determined that petitioner's arguments were fully considered and addressed in the Initial Decision, they will not be revisited here.

Upon full review and consideration, the Commissioner concurs with the ALJ that petitioner is permanently disqualified from school employment, pursuant to *N.J.S.A.* 18A:6-

[1] It is noted that respondent sought and was granted an extension of time within which to file reply exceptions which were duly submitted in accordance with the extended timeline.

7.1(c)(1). In so concluding, the Commissioner notes the following uncontroverted facts: On August 13, 2010, petitioner pled guilty to third degree Assault by Auto in violation of *N.J.S.A.* 2C:12-1c(2). Such guilty plea was a consequence of a three car automobile accident which occurred on August 18, 2009, where petitioner – who was ultimately determined to have a blood alcohol level of .197%, more than twice the legal limit – failed to maintain control of her vehicle, crossed over the center line of the road into oncoming traffic and crashed into a vehicle containing a woman and three young children, which vehicle then collided with a third vehicle containing only the driver. All five individuals were injured and required medical treatment. The most seriously injured were A.Y. – a three year old child – who was hospitalized for 24 days as a consequence of his injuries and his mother – the driver of the car initially struck by petitioner – who was hospitalized for 4 days. By letter dated August 17, 2010, the Department's Office of Criminal History Review advised petitioner that – as a result of her conviction – she was permanently disqualified from school employment pursuant to *N.J.S.A.* 18A:6-7.1.

N.J.S.A. 18A:6-7.1, *et. seq.*, in pertinent part, provides

> An individual...**shall be permanently disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction for** any crime of the first or second degree or
>
> c. (1) **A crime involving the use of force or the threat of force to or upon a person or property**, including, but not limited to, robbery, aggravated assault, stalking, kidnapping, arson, manslaughter and murder...(emphasis added)

The Commissioner is in full accord with the ALJ's legal analysis of this statutory provision vis a vis the circumstances existing in this case:

> The disqualification statute enumerates a series of crimes representative of those the Legislature determined involved the use of force or threat of force that are automatic disqualifiers – robbery, aggravated assault, stalking, kidnapping, arson, manslaughter and murder. This is not an exhaustive list pursuant to the Statute, and these crimes are a sampling of the type of serious crimes the Legislature contemplated should act as automatic disqualifiers. The majority of these crimes

> are all acts in which the actor affirmatively directs or threatens force upon a specific person or property. However, at least two of these crimes, aggravated assault and manslaughter, can be committed with the mens rea of recklessness, not requiring an affirmative direction of force or a specific intent to injure. A person is guilty of assault by auto in the third degree [*N.J.S.A.* 2C:12-1c(2)] when they drive a vehicle recklessly while in violation of *N.J.S.A.* 39:4-50, and cause serious bodily injury to another. A specific intent to injure, or the mens rea of intentional or knowing behavior, is not required.[2] In the same way, the mens rea of intentional or knowing behavior, is not required for a finding of guilt for aggravated assault [*N.J.S.A.* 2C:12-1b(1)] and manslaughter [*N.J.S.A.* 2C:11-4a(1)].[3] The facts in this record suggest that the type of reckless behavior committed by petitioner may form a connection between the act and injury that appears to be contemplated by *N.J.S.A.* 18A:6-7.1(c)(1) as evidenced by the words "use of force or the threat of force to or upon a person or property," and by the choice of examples provided in the statute, especially the examples of aggravated assault and manslaughter.
>
> Petitioner was convicted of a crime, the elements of which are driving recklessly while intoxicated, and in the course of so doing, causing serious bodily injury. A third degree crime of assault by auto involving drunk driving and a resulting serious injury can be deemed to be on the same level as the crimes enumerated as representative of those that are automatic disqualifiers. These crimes also clearly involve the use of force or threat of force. There is no indication in this case that the petitioner intended to use force or threat of force, but she did act recklessly in using force upon another person or property. (Initial Decision at 6-7)

The Commissioner's determination here is not altered by petitioner's continued exception reliance on *Parshelunis, supra,* where that petitioner – under what petitioner in the instant matter asserts is a similar factual pattern – was not disqualified from school employment. Rather, the

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[2] "[t]he intent element of assault by auto only requires a showing that the defendant caused serious bodily injury by driving the vehicle recklessly, which means defendant was aware that he or she was operating a vehicle in such a manner or under such circumstances as to create a substantial and unjustifiable risk of serious bodily injury to another. (Criminal Model Jury Charges, June 14, 2004)." (Respondent's Reply Exceptions at 5)

[3] "[T]he elements of Aggravated Assault, in violation of *N.J.S.A.* 2C:12-1b(1), are: (1) that the defendant caused serious bodily injury to another; and (2) that the defendant acted **recklessly under the circumstances** acted purposely or knowingly or manifesting extreme indifference to the value of human life. (Criminal Model Jury Charges, May 16, 2005) (emphasis added)." (Respondent's Reply Exceptions at 4)

"The elements for Aggravated Manslaughter, in violation of *N.J.S.A.* 2C:11-4a, are: (1) that the defendant caused the victim's death, and; (2) that [t]he defendant **did so recklessly**, and; (3) that the defendant did so under circumstances manifesting extreme indifference to human life. (Criminal Model Jury Charges, March 22, 2004) (emphasis added)" (Respondent's Reply Exceptions at 4-5)

Commissioner finds and concludes, as did the ALJ, that the operative facts of the *Parshelunis, supra,* matter are distinguishable from the instant case. Specifically,

> [the petitioner in that matter] pled guilty to a fourth degree offense, rather than the third degree offense for which the petitioner herein pled guilty. The petitioner in *Parshelunis* [was involved in a one car accident causing] minor injury to his passenger's ankle, and his blood alcohol level was 0.186%. The petitioner herein caused serious bodily injury to a mother and her toddler, requiring both to be airlifted from the scene. The toddler suffered severe internal injuries, and spent twenty-four days in the hospital. The mother suffered fractures and lacerations, requiring a four day hospital stay. Three others were also injured and required medical treatment as a result of the accident. Two independent eye witnesses stated that petitioner caused the accident by crossing over the center line and into oncoming traffic. The accident occurred during the late afternoon of a weekday. Petitioner's blood alcohol level was 0.197%, nearly two-and-one-half times higher than the legal limit of .08%. (Initial Decision at 7)

The Commissioner is additionally compelled to clarify that to the extent *Parshelunis, supra,* might be read as inconsistent with the opinion in the within matter, it is specifically disavowed.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein. Petitioner's disqualification from school employment is hereby AFFIRMED.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/01/11

Date of Mailing: 9/06/11

[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 GRANTING
SUMMARY DECISION
OAL DKT. EDU 13275-10
AGENCY DKT. NO. 586-10/10

ERIN MARKAKIS,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW,
Respondent.

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

Joyce D. Williams, Deputy Attorney General, for respondent (Paula T. Dow, Attorney General of New Jersey, attorney)

Record Closed: June 10, 2011 Decided: July 25, 2011

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals from a determination that her guilty plea to assault by auto, pursuant to N.J.S.A. 2C:12-1c(2), constitutes a disqualification from school employment pursuant to N.J.S.A. 18A:6-7.1(c). The matter was filed at the Office of Administrative

Law (OAL) on November 30, 2010, for a hearing as a contested case, in accordance with N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to -15. The case was presented without hearing on a motion for summary decision submitted by petitioner, and a cross-motion for summary decision submitted by respondent. Upon receipt of all submissions, including an amended joint stipulation of facts, and oral argument on June 10, 2011, the record closed on June 10, 2011.

FACTUAL DISCUSSION

Petitioner is a duly certificated, tenured fourth grade teacher employed by the Bedminster Township Board of Education. (See Verified Petition dated September 28, 2010, para. 1.) The parties have stipulated to the following amended statement of facts (J-13), and I therefore **FIND** the following as **FACT**:

1. On or about August 18, 2009, petitioner was involved in a three car automobile accident.

2. Officers from the Hillsborough Township Police Department were dispatched to the scene of the accident at 5:05 p.m.

3. The police investigation revealed that petitioner was traveling on Dukes Parkway West when she failed to maintain directional control of her vehicle and crossed over the center lines into oncoming traffic where she struck a Sports Utility Vehicle ("SUV"), driven by Emily Yap and carrying three minor passengers, M.Y. age 12, A.Y. age 3, and K.Q. age 6. (See Exhibits J-5 through J-9.)

4. As a result of the first collision, the SUV collided with the third vehicle, a BMW that was traveling behind the SUV. (See Exhibits J-5, J-7, and J-9.)

5. The BMW was driven by Penny Sweeney, the sole occupant of that vehicle. (See Exhibits J-5 and J-9.)

6. Two independent eye witnesses, Amy Richter and Nichole Miezejewski, reported to the police that petitioner caused the three car automobile accident. (See Exhibits J-5 through J-9.)

7. All persons involved in the accident were injured and had to receive medical treatment. (See Exhibits J-5 and J-6.)

8. Emily Yap and her toddler, A.Y., suffered the most serious injuries and had to be flown to the Robert Wood Johnson Hospital. (See Exhibits J-5 and J-6.)

9. A.Y. suffered blunt abdominal trauma, perforation of the upper portion of the small intestine requiring that portion to be cut away, blood clot in the inferior vena cava, and liquid in the left lung. Due to his injuries, A.Y. was hospitalized for 24 days, from August 18, 2009, through September 11, 2009. (See Exhibit J-12.)

10. As a result of the accident, Emily Yap fractured her left transverse process of L-2 and L-3, had a disc bulge at L5 S-1, fractured the left C-6 transverse process, lacerated her spleen, and suffered from a right breast contusion. Emily Yap was hospitalized for 4 days, from August 18, 2009, through August 22, 2009. (See Exhibit J-12.)

11. M.Y. suffered from a laceration of the left elbow which required eight sutures, left wrist soft tissue swelling, and pain in the left hip and shoulder. (See Exhibit J-12.)

12. K.Q. suffered from left shoulder and lower right quadrant abrasions. (See Exhibit J-12.)

13. Penny Sweeney, the driver of the third vehicle, was treated for a neck strain. (See Exhibit J-12.)

14. At the hospital, petitioner had a blood test, which revealed that petitioner's blood alcohol content was .197%, more than twice the legal limit. (See Exhibits J-5, J-10 and J-11.)

15. On November 5, 2009, an Affidavit/Certification in support of Probable Cause was issued, charging petitioner with two counts of third degree Assault by Auto in violation of N.J.S.A. 2C:12-1c(2) and two counts of fourth degree Assault by Auto in violation of N.J.S.A. 2C:12-1c(2). (See Exhibit J-12.)

16. On November 9, 2009, petitioner was arrested by Hillsborough Township Police Department in Somerset County for causing the three-car motor vehicle accident on August 18, 2009, and driving while intoxicated. (See Exhibit J-4.)

17. On or about August 13, 2010, petitioner pled guilty to third degree Assault by Auto/Vessel in violation of N.J.S.A. 2C:12-1c(2).

18. By letter dated August 17, 2010, the Department determined that petitioner was permanently disqualified from school

employment with any school or contractor under the Department's supervision pursuant to N.J.S.A. 18A:6-7.1.

19. Attached hereto as Exhibit J-1 is a true and accurate copy of the Department's letter dated August 17, 2010.

20. Attached hereto as Exhibit J-2 is a true and accurate copy of a letter sent to the Department on behalf of petitioner, dated September 14, 2010, disputing the disqualification.

21. Petitioner was sentenced on September 24, 2010. (Exhibit 1 at J-3, ¶3.)

22. On or about October 1, 2010, petitioner filed a Petition of Appeal challenging the Department's determination. A true and accurate copy of the Petition is attached hereto as Exhibit J-3.

LEGAL ANALYSIS

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 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. The resolution of the within matter rests upon the interpretation of N.J.S.A 2C:12-1c(2) as applied to N.J.S.A. 18A:6-7.1, the Criminal History Review statute.

In issuing the disqualification after the petitioner pled guilty to drunk driving and assault by auto, respondent relies upon the broad powers of the New Jersey Department of Education, State Board of Examiners, pursuant to N.J.S.A. 18A:6-7.1, to protect public school students from contact with individuals whom are deemed a danger to them. Petitioner pled guilty to the third degree crime of assault by auto, and respondent contends that the elements of assault by auto are similar to the elements of aggravated assault and manslaughter, crimes specifically listed as requiring the disqualification of a teacher from employment pursuant to N.J.S.A. 18A:6-7.1. Respondent recites the necessary elements to a finding of guilt for aggravated assault: causing serious bodily injury to another, and under circumstances manifesting extreme indifference to the value of human life, recklessly causing such injury. N.J.S.A 2C:12-

1b(1). Aggravated assault can also be committed by recklessly causing bodily injury to another with a deadly weapon. N.J.S.A 2C:12-1b(3). The elements for a finding of guilt for manslaughter are recklessly causing a victim's death, and doing so under circumstances manifesting extreme indifference to human life. N.J.S.A 2C:11-4a(1).

Respondent argues that the elements of assault by auto in violation of N.J.S.A 2C:12-1c(1) requires a showing that the defendant caused serious bodily injury by driving a vehicle recklessly. Therefore, there is a similar mens rea of recklessness for each of the aforementioned crimes of assault by auto, aggravated assault and manslaughter. Accordingly, the mens rea (recklessness) required for assault by auto in the third degree falls under the purview of N.J.S.A. 18A:6-7.1, in the same way as does aggravated assault and manslaughter. Respondent also asserts that petitioner's blood alcohol level, in conjunction with the serious bodily injury and property damage caused by petitioner, makes her offense a disqualifying offense pursuant to N.J.S.A. 18A:6-7.1. Finally, respondent argues that the facts in this case bring it under the purview of In the Matter of the Certificate of Bryan Scalzo, Dkt. No 0607-104 (Order of Revocation, March 29, 2007), in which the Examiners found that a "conviction of a crime such as assault by auto falls squarely within" the meaning of a disqualifying offense, and that the decision in Parshelunis v. New Jersey Dept. of Educ. Ofc. Of Criminal History Review, EDU 10282-07 (Oct.16, 2008), aff'd Comm'r Dec. No. 458-08 (Nov.25, 2008), can be distinguished because the defendant therein pled guilty to the fourth degree offense of assault by auto, rather than the third degree offense as set forth herein. In addition, the extent of injuries suffered to the victim in Parshelunis was substantially more insignificant than those suffered by the victims in this matter.

Petitioner asserts that the sole distinction between Parshelunis and this matter is that the individuals involved in the crash involving petitioner suffered from more serious injuries, making the crime one of the third, rather than fourth degree. There is no suggestion or proof that petitioner herein had any intention whatsoever to use or threaten to use force against the other persons involved in the crash, but that she recklessly operated a motor vehicle while intoxicated, and caused a serious injury. Therefore, the only distinction between the offenses in the two cases is the severity of the injury, and the severity of the injury is something which neither of the respective

actors contemplated or controlled. As such, the decision in Parshelunis should be applicable and binding, and petitioner be allowed to maintain her teacher's license.

N.J.S.A. 18A:6-7.1, the Criminal History Review statute, provides in pertinent part, that an individual shall be permanently disqualified if the criminal history background check reveals a conviction for "a crime involving the use of force or threat of force to or upon a person or property including, but not limited to, robbery, aggravated assault, stalking, kidnapping, arson, manslaughter and murder." Petitioner pled guilty to N.J.S.A. 2C:12-1c(2), which provides that:

> Assault by auto is a crime of the 3rd degree if the person drives the vehicle while in violation of R.S. 39:4-50 . . . and serious bodily injury results.

The disqualification statute enumerates a series of crimes representative of those the Legislature determined involved the use of force or threat of force that are automatic disqualifiers – robbery, aggravated assault, stalking, kidnapping, arson, manslaughter and murder. This is not an exhaustive list pursuant to the Statute, and these crimes are a sampling of the type of serious crimes the Legislature contemplated should act as automatic disqualifiers. The majority of these crimes are all acts in which the actor affirmatively directs or threatens force upon a specific person or property. However, at least two of these crimes, aggravated assault and manslaughter, can be committed with the mens rea of recklessness, not requiring an affirmative direction of force, or a specific intent to injure. A person is guilty of assault by auto in the third degree when they drive a vehicle recklessly while in violation of N.J.S.A. 39:4-50, and cause serious bodily injury to another. A specific intent to injure, or the mens rea of intentional or knowing behavior, is not required. In the same way, the mens rea of intentional or knowing behavior is not required for a finding of guilt for aggravated assault [N.J.S.A 2C:12-1b(1); N.J.S.A 2C:12-1b(3)], and manslaughter [N.J.S.A 2C:11-4a(1)]. The facts in this record suggest that the type of reckless behavior committed by petitioner may form a connection between the act and injury that appears to be contemplated by N.J.S.A. 18A:6-7.1(c)(1) as evidenced by the words "use of force or the threat of force to or upon

a person or property," and by the choice of examples provided in the statute, especially the examples of aggravated assault and manslaughter.

Petitioner was convicted of a crime, the elements of which are driving recklessly while intoxicated, and in the course of so doing, causing serious bodily injury. A third degree crime of assault by auto involving drunk driving and a resulting serious injury can be deemed to be on the same level as the crimes enumerated as representative of those that are automatic disqualifiers. These crimes also clearly involve the use of force or threat of force. There is no indication in this case that the petitioner intended to use force or threat of force, but she did act recklessly in using force upon another person or property.

The Examiners' decision in Scalzo may not be dispositive of the case herein because the facts of that case are not completely known. However, it is certainly true, as the Examiners noted in Scalzo, that a teacher's behavior outside the classroom may be relevant in determining that person's qualifications and fitness to retain a certificate and that one incident, if sufficiently flagrant, is enough to demonstrate unfitness to hold a position in a school system. Scalzo, supra, citing In Re Grossman, 127 N.J. Super 13, 30 (Sup. Ct. 1943), aff'd, 131 N.J.L 326 (E&A 1944), 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).

On the other hand, the facts in Parshelunis are distinguishable because the defendant pled guilty to a fourth degree offense, rather than the third degree offense for which the petitioner herein pled guilty. The petitioner in Parshelunis caused minor injury to his passenger's ankle, and his blood alcohol level was 0.186%. The petitioner herein caused serious bodily injury to a mother and her toddler, requiring both to be airlifted from the scene. The toddler suffered severe internal injuries, and spent twenty-four days in the hospital. The mother suffered fractures and lacerations, requiring a four day hospital stay. Three others were also injured and required medical treatment as a result of the accident. Two independent eye witnesses stated that petitioner caused the accident by crossing over the center line and into oncoming traffic. The accident occurred during the late afternoon of a weekday. Petitioner's blood alcohol level was 0.197%, nearly two-and-one-half times higher than the legal limit of .08%.

The facts in this case represent a sufficiently flagrant incident that warrants a disqualification of petitioner from employment in public education, and warrants consideration outside of the analysis presented in Parshelunis. Petitioner cannot hide from, and is responsible for, the ultimate outcome resulting from her actions. While petitioner may be unfortunate in that her victims suffered serious bodily injury, she cannot escape that result, and her case must be examined in light of that outcome. Petitioner's conviction does fall within the purview of N.J.S.A. 18A:6-7.1(c)(1). While this single offense may not lead to the conclusion that petitioner cannot perform effectively as a classroom teacher, the Legislature has mandated that a crime involving the use of force upon a person or property may result in that individual's disqualification from employment. While the crime of assault by auto is not specifically mentioned, the law is clear that a disqualification is not limited to the crimes listed therein.

While petitioner may not have intended to cause the injury and harm that she caused, a mens rea of intent to harm is not a requirement of the statute. Reckless behavior is all that is required for a conviction for assault by auto, and petitioner admitted she was reckless by pleading guilty to the charge of assault by auto. Reckless behavior can also form the basis for a conviction of aggravated assault and manslaughter, crimes listed as disqualifiers under N.J.S.A. 18A:6-7.1(c)(1). Petitioner caused serious bodily injury by the use of force upon another. I **CONCLUDE** that a third degree conviction of assault by auto under these circumstances does warrant a disqualification of petitioner's employment in public education.

DECISION AND ORDER

Based on the foregoing, the motion for summary decision filed by the petitioner, Erin Markakis, is hereby **DENIED,** and the cross-motion for summary decision filed by the respondent New Jersey State Department of Education, Office of Criminal History Review, is hereby **GRANTED.** The disqualification of petitioner's school employment is hereby **AFFIRMED,** and I **ORDER** that the petitioner is disqualified from employment in public 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 25, 2011
DATE

EDWARD J. DELANOY, JR., ALJ

JUL 27 2011

Date Received at Agency:

JUL 27 2011

Date Mailed to Parties:

/lam

APPENDIX

LIST OF WITNESSES

For petitioner:

None

For respondent:

None

LIST OF EXHIBITS

Joint:

J-1 Letter to Erin Markakis from Carl Carabelli, dated August 17, 2010

J-2 Letter to Carl Carabelli from Edward Cridge, dated September 14, 2010

J-3 Verified Petition

J-4 New Jersey State Police Conviction Notification, Arrest Notification and Complaint Narrative Inquiry

J-5 Hillsborough Township Police Investigation Report, dated August 18, 2009

J-6 Hillsborough Township Police Investigation Report, Supp. No. 2, dated August 18, 2009

J-7 Hillsborough Township Police Investigation Report, Supp. No. 3, dated August 18, 2009

J-8 Hillsborough Township Police Investigation Report, Supp. No. 4, dated August 18, 2009

J-9 Hillsborough Township Police Investigation Report, Supp. No. 5, dated August 18, 2009

J-10 Blood Test Certification from Robert Wood Johnson Hospital, dated August 18, 2009

J-11 Certified Laboratory Report Toxicology Analysis, dated September 20, 2009

J-12 Affidavit/Certification in Support of Probably Cause, dated November 5, 2009

J-13 Joint Stipulation of Facts

#370-11

DELORES KOPKO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the termination of her employment as a secretary in respondent Board's district as the result of a reduction in force (RIF). She contended that she had acquired tenure protection through her prior position in the school district as an assistant traffic coordinator (ATC), and was entitled to be retained over other non-tenured employees. The Board asserted that petitioner has no claim to employment as she did not acquire tenure in her prior position as ATC, and had not yet acquired tenure in the secretarial position.

The ALJ found, *inter alia*, that: the central issue in this case is whether the duties of the position of ATC formerly held by petitioner could be considered secretarial or clerical in nature, such that petitioner would have obtained tenure in that position pursuant to *N.J.S.A.* 18A:17-2; review of petitioner's responsibilities as an ATC reveals that she routinely exercised independent authority and coordinated the transportation department in her supervisor's absence; petitioner's duties in the ATC position went well beyond the role of a secretarial or clerical employee, whose function is to assist those in authority with carrying out their duties; and the preponderance of evidence proves that petitioner had more duties and responsibilities than a secretarial or clerical employee, and cannot be considered as having been employed as a secretary or clerk while in the ATC position. Accordingly, petitioner did not acquire tenure in her position as an ATC and has no claim to employment based upon tenure rights. The ALJ ordered the petition dismissed.

The Commissioner concurred with the ALJ that petitioner's position as an ATC cannot be characterized as secretarial or clerical in nature, and she therefore did not acquire tenure in this position. Accordingly, petitioner has no justified claim to employment with the Board based on a violation of her tenure rights. The Commissioner 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 7, 2011

OAL DKT. NO. EDU 7302-10
AGENCY DKT. NO. 123-6/10

DELORES KOPKO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH 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 and the Board's reply thereto – filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

Petitioner's exceptions essentially recast and reiterate her arguments advanced before the Administrative Law Judge (ALJ) below. As it is determined that such arguments were fully considered and addressed by the ALJ in her decision, they will not be revisited here.

Upon his full consideration of the record in this matter, which included a transcript of the hearing conducted at the OAL on March 21, 2011, the Commissioner concurs with the ALJ – for the reasons presented on pages 13-14 of her decision – that petitioner's position as an Assistant Traffic Coordinator with the Board cannot be characterized as secretarial or clerical in nature and, consequently, petitioner did not acquire tenure in this position. As such, petitioner has no justified claim to employment with the Board based on a violation of her tenure rights.

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: 9/07/11

Date of Mailing: 9/08/11

* 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 7302-10
AGENCY DKT. NO. 123-6/10

DELORES KOPKO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN,
Respondent.

Kathleen Naprstek Cerisano, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Christopher B. Parton, Esq., for respondent (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: June 10, 2011 Decided: July 25, 2011

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

Petitioner Delores Kopko appeals the termination of her employment as a secretary to the Child Study Team (CST) as the result of a reduction in force by respondent Middletown Township Board of Education, Monmouth County (Board). She

alleges that she acquired tenure protection through her prior position in the school district as an assistant traffic coordinator (ATC), and would therefore be entitled to employment retention over other non-tenured employees who were retained. Respondent denies that appellant acquired tenure in her prior position, and therefore she has no claim to employment based upon any alleged tenure or seniority right.

PROCEDURAL HISTORY

On or about March 26, 2010, petitioner was advised by the Board that her employment with the CST was terminated effective June 30, 2010. On June 16, 2010, petitioner filed an appeal with the Department of Education. The contested case was transmitted to the Office of Administrative Law, where it was filed on July 9, 2010. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was conducted on March 21, 2011. The record remained open for the submission of briefs and reply briefs until June 10, 2011.

FINDINGS OF FACT

The parties stipulated to the following facts:

1. In May 2002, petitioner commenced employment with the Board in the twelve-month position of ATC, and served in that position in an exemplary manner.

2. The duties of the position included answering telephones, communicating with parents, preparing spreadsheets and using the time system and SASI computer systems.

3. In October 2007, petitioner was reassigned, at her request, to the position of secretary to the Child Study Team (CST), a ten-month tenurable position.

4. On or about March 26, 2010, petitioner was advised by the Board that her employment would be terminated as of June 30, 2010, as the result of a reduction in force. Petitioner worked through that date.

5. The petitioner would have been eligible for tenure in the position of secretary to the CST due to her employment from October 2007 to June 2010, but the amount of time she worked there was insufficient to confer tenure upon her.

6. If petitioner's employment from 2002 to 2007 as an ATC were characterized as a secretarial or clerical position, then she would have acquired tenure in that position, and would be considered as tenured for all relevant purposes.

The testimony

Delores Kopko is a high school graduate, with one year completed at Brookdale Community College. After college she became employed as a secretary at Coldwell Banker, later did telemarketing with another corporation, and worked as a dispatcher/secretary with a trucking company. In 2000 she started working for the Middlesex Regional Educational Services Commission as a secretary for student transportation, dealing with parents, obtaining information from school districts, and sourcing out the transportation.

Someone at one of the bus companies knew that Kopko had the credentials for a job that was opening at the Board in the transportation unit, and told her that she should apply. After being interviewed by Barbara Vining, she was hired by the Board as the ATC in May 2002 at a salary of approximately $27,000. She did not recall if she had a job description in writing. Although the district preferred a candidate to have a State certification in the ATC position, she did not.

Kopko's job duties consisted of answering the phones, speaking with parents, working with the computer systems, and talking to school administrators. At the beginning of the work day the unit was concerned with the students' arrival at school, and at the end of the day, it worked on departures.

When Kopko started with the transportation unit, it was just the transportation coordinator (Barbara Vining), a part-time secretary and her. About halfway through her

time in the unit, the secretary became full-time. A review of the definitions of the job description indicated that as far as busing policy was concerned, everyone in the unit was responsible. Bus lists were also a joint effort. For student discipline, the bus drivers would let them know, and then the schools would be faxed the information. If a transportation vehicle broke down, the unit was notified and the schools were contacted. Kopko had no responsibility for operations, contractual programs, contract changes or any legal aspects. She typed up contracts and would input the contracts into the system, but she never actually prepared the terms of the contracts. The secretary took care of accident reports, but generally speaking the unit was not involved in those matters. Special trips by students and faculty were done by the secretary of the unit.

As to County and State reports, she and the secretary made sure the students were on the correct bus routes. She had nothing to do with purchasing recommendations, but she did order office supplies. She did not serve as an adviser, nor was she responsible for the budget. She did some payroll, including the spreadsheet and the mail merge. Kopko and the other people in the unit handled public relations and complaints, speaking with the schools, the bus companies, and the parents.

In general, her duties consisted of answering the phones, putting students in and out of the transportation system, dealing with the public, doing spreadsheets about the transportation, working on special education routes, and using the computer system for special education students to find out about them to assess their transportation needs.

Kopko never just added in a bus stop for a student, but she could prepare and make a change in the schedule. The routes had been developed prior to her appointment to the position. Basically she would look up the route and figure out where the child could get on. She would discuss with Vining whether she could add a stop to the route. She usually did not make any changes on her own, but discussed them first with Vining. She and Viking checked on school aides and who the drives were. She drove out to check on the buses, sometimes accompanied by Vining, and sometimes alone. But this was done only toward the end of her time on the unit.

Kopko loved her job, but transferred to the CST as a secretary after she had a baby, as she wanted the summers off. She took a pay cut, but it was not too bad because she worked only ten months per year and saved on childcare costs during the summer months. She chose to go to the CST because she thought it was a good fit for her life at the time. Although the job with the CST started in August 2007, she was asked to stay on at her old position of ATC until October to help with the new students coming into the transportation system at the start of the school year, and agreed to do so.

As a Category 2 (ten-month) CST secretary, she answered the telephones, dealt with the public, did spreadsheets, and inputted student information and their classifications. As far as her personal responsibilities, she performed secretarial duties. Although she did not open the mail, she distributed it. She kept records and kept schedules. She scheduled appointments and maintained a log of visitors. She ordered supplies. She thought many of her duties as an SCT secretary were the same duties she had as the ATC.

While in the position of ATC, she had once been told that they were trying to make her position tenured. She did not think that she could get tenure in the position, but she did not discuss this with anyone.

On cross-examination, she stated that she did not have the State certification preferred for the position of ATC. She thought the job description of what she did was rather outdated, as Middletown did not have its own school buses. She could make bus changes on her own. She dealt with classified students all the time. She made sure they were on the correct buses, and got the appropriate forms for the CST. She did all the special education students on her own. She did not need to review the individualized education plan (IEP), except for the classification and the transportation needs. If there was room in the bus, she could add a student to that route without difficulty.

As far as participating and changing routes, what really changed during the summer depended on the students. If a bus was not needed because of a change in

the IEP, she would discuss it with Barbara Vining. Many times she handled student crises such as a non-pickup. She would have to call the bus company and find out what happened and try to resolve the dispute. At the end of her time as ATC, she and Barbara Vining would do spot-checks in the field. This was the result of a lawsuit that had been filed against the district. She would make sure that it was the same driver and the same aide. She also answered phones and spoke with the parents.

Kopko never had anything to do with the bidding and had no authority as far as bidding was concerned. As the ATC, she dealt with crises and calls from parents, and she also did that as a CST secretary when she would try to talk to the parents and get them to calm down. She was commended for her work.

Her contract for 2007–2008 said the contract could be terminated at any time by either party with sixty days' written notice. She did nothing to challenge her classification. She had spent six years in the district, and when she went to the CST, a lot of things were similar. She did not ordinarily spend any time with vendors as a CST secretary, but did spend time with them if a parent called concerning a bus driver. The Middletown Township Education Association (MTEA), which is the local bargaining unit of the New Jersey Education Association, represented certain employees who are under their contract. Petitioner was not a member of the union while in the position of ATC, but did join after becoming a CST secretary.

At one time the MTEA argued or tried to negotiate to include ATC's as part of the union and to try to make the position tenured. The Public Employment Relations Commission ruled on the issue and did not include ATC's as part of that union.

Barbara Vining has been the traffic coordinator since 2000. She has a State supervisor's certification for pupil transportation. Her job duties include interacting with parents and dealing with contractors, principals and school personnel. The school district has 10,500 students, of whom 75 percent are bused to seventeen different schools. She is also responsible for non-public school students' transportation needs, as well as for transportation to out-of-district placements for special education students, for a total of approximately 12,500 students under her direction.

The district has no school buses or drivers of its own, rather, private bidding is done by private bus companies for the routes. Vining constantly deals with the bus companies. She is involved in bidding, changing bus routes, handling parent complaints, and spot-checking drivers.

The ATC also deals with bus companies constantly. The majority of the ATC's work is not filing or typing or any kind of clerical work, as most of the work is interacting with schools and making changes to the bus routes to accommodate students' schedules.

The first contact that people have with the school transportation unit about busing is the unit's secretary. However, the secretary has no independent authority to make changes to the bus routes, nor does she have access to the computer system, which Kopko did.

Kopko was the ATC working with Vining from 2002 to 2007. Vining had hired her and knew her employment history. Kopko did not have a transportation certificate, which was preferred, but she was more than qualified for the position. Kopko's pupil transportation experience showed in a positive way. She was an outstanding employee and had superior telephone skills in dealing with parents. Vining presented a letter complimenting Kopko on how good she was in resolving a parent's complaint. Vining had no complaints about Kopko and noted that her evaluations were outstanding or satisfactory. Kopko stopped working in the unit in 2007 because she wanted her summers off after having a baby.

Viking described Kopko's job and her own job as similar. She would not classify Kopko as clerical, as Kopko was in constant communication with the bus companies. The bus routes are subject to change each year, and Kopko would coordinate these changes with the bus company. She would take care of special education routes and new routes by following the route books from the previous year. When the routing was complete, Kopko would send it to the contractor.

Kopko's personal attendance record was excellent. When Vining was not present, Kopko would be in charge. Kopko was very competent to make any changes that were necessary. Vining described Kopko as her best employee, the most independent, and the most effective in the position of ATC.

Vining was aware that the union (MTEA) had tried to include the ATC as a secretarial position, but was not successful.[1] She believed that the ATC position is not a secretarial position, as the work performed is similar to Vining's but without the added responsibilities Vining has for evaluating staff and handling bidding.

In addition to the stipulated facts, I **FIND** the following with regard to the work performed by the petitioner as an ATC: Her duties included answering the phones, putting students in and out of the transportation system, dealing with the public, doing spreadsheets about the transportation, working on special education routes, and using the computer systems for special education students to find out about them to assess and meet their transportation needs. Petitioner made bus changes on her own, and exercised independent authority. She made sure the classified students were on the correct buses. She dealt with crises and calls from parents. Petitioner (and Vining) also went off-site into the field to check on buses, drivers, and school aides. When Vining was not present, petitioner was in charge of the office. Petitioner handled the responsibilities of this position in an exemplary manner.

LEGAL ANALYSIS AND CONCLUSION

The issue presented is whether the duties of the position of ATC performed by petitioner could be characterized as secretarial or clerical in nature, such that petitioner would have obtained tenure in that position under N.J.S.A. 18A:17-2, and therefore would have tenure for all relevant purposes.

[1] The PERC decision declining to add the title of ATC to the bargaining unit was entered on May 17, 2004.

N.J.S.A. 18A:17-2 provides as follows:

> a. Any secretary, assistant secretary, school business administrator or business manager of a board of education of any school district who has or shall have devoted his full time to the duties of his office and has or shall have served therein for three consecutive years, and
>
> b. Any person holding any secretarial or clerical position or employment under a board of education of any school district or under any officer thereof, after
>
> > 1. The expiration of a period of employment of three consecutive calendar years in the district or such shorter period as may be fixed by the board or officer employing him, or
> >
> > 2. Employment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year, an academic year being the period between the time when school opens in the district after the general summer vacation and the beginning of the next succeeding summer vacation, and
>
> c. Any person, who has acquired, or shall hereafter acquire, tenure in any secretarial or clerical office, position, or employment under the board of education of a school district and has been appointed district clerk or secretary, or shall hereafter be appointed secretary of said district, as such secretary,
>
> shall hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.

Petitioner claims that the duties she performed in the position of ATC were predominantly those that were commonly performed by individuals in today's secretarial and/or clerical workforce, regardless of the title of the position or the fact that the position was not part of the bargaining unit represented by the local education association, and regardless of the fact that her supervisor found the characterization of that position as secretarial and/or clerical to be somewhat demeaning. Respondent

contends that although some of the functions performed by the petitioner in her position as ATC could be characterized as those traditionally done by one denominated as a secretary or clerk (such as answering the phone, compiling spreadsheets, etc.), most of her duties went well beyond routine office functions. Thus, this matter turns on the nature of the work performed by petitioner in her position of ATC. If the facts show that the work was more like that of a secretarial position, then she would have gained tenure in that employment. If not, then she would not.

In Barnes v. Board of Education of Jersey City, 85 N.J. Super. 42, 45 (App. Div. 1964), the court noted that the tenure statute was to be construed liberally, and that it was the nature of the duties performed by an employee that determined whether tenure rights were acquired, and not the title of the position. Similarly, in Beaute v. Board of Education of North Arlington, Commissioner (September 14, 1981), aff'd, State Board (February 3, 1982), the petitioner claimed that she had obtained tenure as a clerical employee. She had begun employment on September 1, 1976, in a clerical position which included handling the telephone switchboard, attending to the mail, keeping attendance records, bookkeeping chores, ordering of supplies, etc. Although she was advised that a new telephone system would be installed and that her new job description would be that of receptionist-switchboard operator, she continued with most of her clerical duties until September 11, 1979, when she was advised that her job had been abolished. She appealed, and the administrative law judge (ALJ) ruled in her favor, stating,

> the petitioner's employment should be viewed in light of the actual duties performed. A mere change in title or creation of a paper job description, without any substantial change in specific duties is an evasion that should not be permitted to erode an employee's right in the continuing accrual of tenure. The duties performed, rather than the title of the position, should be controlling, and we should look to the substance rather than the form.

Petitioner also relies on Mount v. Board of Education of Tinton Falls, Initial Decision, EDU 120-00 (December 29, 2000), adopted, Commissioner (February 7, 2001) <http://lawlibrary.rutgers.edu/oal/search.shtml>. In this case, Mount was initially employed full time in the position of ATC from 1990 to July 1995. Her duties included

organizing and scheduling the transportation program for the district, preparing the bus routes (including those of children with special needs), providing transportation for after-school functions, assisting with bids for various transportation needs, preparing reports, interacting with parents, and maintaining employee attendance records. She used computer systems and word-processing programs. She also maintained a filing system, drafted spreadsheets, typed memoranda, and photocopied documents.

In 1995 the position was reduced to half time and renamed transportation secretary. Mount continued in that position, performing many of the same functions. The position was abolished on December 31, 1999, and Mount was terminated. She contested her termination and claimed that the district had retained four non-tenured individuals in secretarial positions to which she was entitled. However, the issue in this case was not whether Mount had acquired tenure, as the Board agreed that she had as the result of her employment in the two positions. Rather, the Board contended that Mount was not qualified to perform the particular secretarial duties of the other positions. The ALJ concluded that tenure rights are not acquired as to a particular position, but as to the position of a secretary within the district. The ALJ and the Commissioner concluded that the duties of the disputed positions held by the non-tenured employees were not so specialized or unique that Mount was not capable of performing them, and so, as the result of her tenure status, she was entitled to one of them.

It should be noted that in Mount there was no dispute as to whether the petitioner was a secretary, as both parties agreed that Mount was; rather, it was whether Mount had tenure as a secretary within the entire school district, independent of the particular position held by her.

Respondent relies on Effenberger v. Board of Education of the Toms River Regional School District, Appellate Division, 96 N.J.A.R.2d (EDU) 690. In this case, Effenberger served as an ATC under the direction of the head of the department. In the Initial Decision, 95 N.J.A.R.2d (EDU) 66, the ALJ found that while the job performed by the employee contained some functions that could be classified as clerical, performing nominal clerical duties did not make the employee a clerical employee within the

meaning of the statute. The ALJ noted that Effenberger had responsibility for the department in the absence of the department head, including the responsibility "for all aspects in the area of in-district special needs transportation." 95 N.J.A.R.2d (EDU) at 70. Such responsibilities "evidenced duties encompassing great discretion and independence." Ibid. The Commissioner of Education adopted the Initial Decision, holding that Effenberger was not a clerical employee as defined by law, and the State Board of Education affirmed, 95 N.J.A.R.2d (EDU) 203.

On appeal, the Appellate Division, 96 N.J.A.R.2d (EDU) 690, 692, defined a clerical position as one "in which the employee performs the rote record-keeping duties that are typical of office operations, such as answering telephone calls, typing, photocopying and filing." The court found that Effenberger's day-to-day responsibilities went well beyond that definition, and included "handling parent complaints, substitute dispatching, and resolving various problems that would come into the office." 96 N.J.A.R.2d (EDU) at 691. It was noted that Effenberger acted independently and had independent authority to resolve transportation issues.

In Hibo v. Board of Education of the West Essex Regional School Districts, EDU 1226-96, Initial Decision (November 12, 1997), aff'd, Commissioner (December 29, 1997), aff'd, State Bd. (June 3, 1998) <http://lawlibrary.rutgers.edu/oal/search.shtml>, two part-time employees, who were employed under the job title of secretary and whose positions were eliminated, argued they were entitled to be hired by the district over other non-tenured secretaries. The ALJ found that they had been hired as secretaries, characterized in their jobs as secretaries, and evaluated as secretaries. They performed duties commonly associated with secretarial functions, including typing or word processing documents under the supervision of a boss, entering data into a computer, organizing files, greeting visitors and answering telephones.

And in Fink v. Board of Education of Hunterdon County Polytech, EDU 6435-06, Initial Decision (September 28, 2009), aff'd, Commissioner (November 2, 2009) <http://lawlibrary.rutgers.edu/oal/search.shtml>, the ALJ and the Commissioner rejected the petitioner's claims that her time working as coordinator of adult education counted toward her tenure right as a secretary or clerk. The ALJ found that the position involved

day-to-day responsibilities that far exceeded the clerical and supportive responsibilities of a secretarial position. The ALJ concluded:

> Because the duties of an adult education coordinator involve analysis, self-direction and similar higher-level responsibilities, they cannot in any way be considered equivalent to those of a secretarial position which, by its nature, involves assisting a person in authority in performing such higher-level duties and responsibilities.
>
> [Fink, supra, EDU 6435-06, Initial Decision (September 28, 2009) <http://lawlibrary.rutgers.edu/oal/search.shtml>.]

Mount and Hibo were represented by their local bargaining units, which represented all secretaries in the district. Neither Effenberger nor Fink was represented by a bargaining unit. While this is not dispositive as to whether a position should be characterized as secretarial or clerical, in the present matter the local teachers' and secretaries' union (the MTEA) had previously sought to include the ATC as a member of the bargaining unit. This matter was litigated before the New Jersey Public Employment Relations Commission in 2004, and the MTEA lost. The final order of PERC excluded the position of ATC from the MTEA.

Applying the law to the facts presented herein, the only conclusion that can be drawn is that petitioner's position as an ATC cannot be characterized as secretarial or clerical in nature. The petitioner routinely exercised her independent authority in changing or accommodating bus routes, reviewing and implementing the transportation requirements of IEP's, addressing parent crises and concerns, performing field checks of bus routes and personnel, and running the department in her supervisor's absence. Petitioner performed her job in an exemplary manner, her supervisor noting that she could go on vacation with the confidence that petitioner would run the department well in her absence. Such authority would not be conferred upon a secretary or clerical employee whose role was to assist those in authority with carrying out their duties.

The independent problem-solving tasks designated to petitioner and the authority she held to handle crises on a day-to-day basis belie her argument that she could be classified as a secretarial or clerical employee. Although she did perform some routine

office tasks, the additional responsibilities conferred upon her removed her position from one of a secretarial classification to one of authority. I **CONCLUDE** that given the facts stipulated and proven by a preponderance of the evidence, petitioner had more duties and responsibilities than a secretarial or clerical employee, and she cannot be considered as having been employed as a secretary or clerk. As a result, petitioner did not acquire tenure in her position as an ATC and has no claim to employment based upon an alleged violation of her tenure rights.

ORDER

I hereby **AFFIRM** the determination of the Board that petitioner did not acquire tenure in her position as an ATC and, therefore, she has no claim to employment based upon an alleged violation of her tenure rights. I **ORDER** that the 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.

July 25, 2011
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

Date Received at Agency: 7/25/11

Date Mailed to Parties: 7/25/11

mph

WITNESSES

For petitioner:

Delores Kopko

For respondent:

Barbara Vining

EXHIBITS

For petitioner:

P-1 Job Description for ATC

P-2 Job Description for Secretary

For respondent:

R-1 Employment Contract for 2007-2008

R-2 Letter from BOE to petitioner dated July 26, 2007

R-3 Agreement between the MTEA and the MTBOE 2008–2011

R-4 Agreement between the MTEA and the MTBOE 2001–2005

R-5 Agreement between the MTEA and the MTBOE 2005–2008

R-6 PERC Hearing Examiner's Report and Recommended Decision May 17, 2004

R-7 Letter from PERC indicating decision became final on July 4, 2004

R-8 Letter commending petitioner for job performance by parent dated September 22, 2002

R-9 Performance evaluation for petitioner dated December 30, 2003

R-10 Performance evaluation for petitioner dated February 6, 2006

R-11 Performance evaluation for petitioner dated June 29, 2007

377-11E

OAL DKT. NO. EDU 09501-11
AGENCY DKT. NO. 216-8/11

MARK ZYDIAK,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF TRUSTEES OF THE PLEASANTECH ACADEMY CHARTER SCHOOL AND KATHY McDAVID, CHIEF SCHOOL ADMINISTRATOR,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

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 the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9|13|11
Date of Mailing: 9|14|11

* 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 9501-11
AGENCY DKT. NO. 216-8/11

MARK ZYDIAK,
Petitioner,
v.
BOARD OF TRUSTEES OF THE PLEASANTECH ACADEMY CHARTER SCHOOL AND KATHY McDAVID, CHIEF SCHOOL ADMINISTRATOR,
Respondents.

Mark Zydiak, petitioner, pro se

Jennifer Paganucci, Esq., for respondents (Schwartz, Simon, Edelstein & Celso, attorneys)

BEFORE **W. TODD MILLER**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On August 4, 2011, Marc Zydiak (petitioner) filed a petition with the Commissioner of Education (Commissioner) seeking a determination that the Board of Trustees of the Pleasantech Academy Charter School's (Pleasantech or district)

decision to non-renew petitioner for the 2011-2012 school year was a violation of his tenure and seniority rights. A request for emergent relief was submitted with the petition. 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. For the reasons discussed below, petitioner's request for emergent relief is **DENIED**. The case is scheduled for a plenary hearing on August 30, 2011.

STATEMENT OF FACTS

Mark Zydiak was employed by Pleasantech on September 1, 2005. Petitioner holds the following Certifications/Endorsements[1]: Teacher of Science (May 1976); Principal/ Supervisor (October 1979); Business Administrator (November 1984); Affirmative Action – Next Phase (February 6, 1986); and Supervisory Management, successful completions of Levels 1, 2 and 3 of New Jersey Certified Public Manager Program (December 1986). (See petition for supporting exhibits).

The positions held by petitioner during the 2005-2011 timeframe were as follows: Supervisor/Curriculum Coordinator 2005-2006; Principal/Assistant School Administrator (2005-2011)[2]; Supervisor of Curriculum and Instruction 2006-2007; Director of Curriculum 2007-2009; Supervisor of Technology 2007-2009; and Supervisor of Planning Research and Evaluation 2009-2010, and , and Administrative Assistant to the Chief School Administrator for 2010-2011.

[1] There are only three categories of educational certificates, to wit: 1) instructional, 2) administrative, and 3) educational services. N.J.A.C. 6A:9-5.2. Certificates should not be confused with endorsements. Endorsements identify a specific area in which the certificate holder is authorized to serve. See N.J.A.C. 6A:9-9.1, et seq.

[2] Petitioner claims he periodically served in the capacity as a Principal in 2009-2011. The district employs a Principal but Pleasantech argued that petitioner never actually served in the capacity as Principal or Interim Principal. He was not employed or appointed in such capacity. Rather petitioner merely filled in when the Principal was not in the building, which is not tantamount to working in the position for the requisite period for tenure. N.J.S.A. 18A:28-5. Petitioner argues that during times when the actual Principal was absent (not on the property, on vacation, leave or otherwise) he was a de facto Principal as a matter of law. Consequently, petitioner argues that he has acquired tenure rights while a serving as a de facto Principal. See Petition, ¶¶ 17, 18.

By letter dated May 13, 2011, Cathy McDavid, the Chief School Administrator, notified petitioner that his contract would not be renewed for the 2011-2012 school year (H-6). Petitioner held the title of Administrative Assistant to the Chief School Administrator for 2010-2011 school year and was therefore not tenured in the promotional title.

Petitioner seeks emergent relief. He argues that he should be immediately put back to work with pay and/or the district should be precluded from filling any positions to which he may have acquired tenure or seniority rights, pending a plenary hearing.

Pleasantech asserts that petitioner's last position was Administrative Assistant to the Chief School Administrator. He held that position for the period 2010-2011. He was not tenured in that position because he only held it for one year. Consequently, petitioner was non-renewed in a position for which he was not tenured. Pleasantech is a small charter school. It only has about five administrative positions. Any position for which petitioner would hold tenure rights would be in the category of supervisor under an administrative certificate. Pleasantech thus argues that there are no other existing positions for which petitioner has seniority or reemployment rights.

Pleasantech advertised for a supervisor's position in August 2011. The requirements for the job included a Supervisor Certification, five years of supervisor experience in the education field, excellent communication skills, experience in writing curriculum data, [and] data analysis. (Petitioner's Emergent Brief, August 4, 2011, Exhibit M-1.) Pleasantech now argues that the position of Supervisor is no longer needed and will not be filled. (Certificate of Verna Foreman, ¶4.)

However, 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, Pleasantech is hiring qualified individuals in the (Administrative) Supervisor's category. Petitioner's pleadings indicate that he holds a Principal/Supervisor [administrative] Certification since October 1979. (Petition, B2) Thus petitioner suggests he is tenured as a Supervisor because he has been with the district for over

six years and held supervisory positions for at least two years. See N.J.S.A. 18A:28-6. At a minimum petitioner would hold seniority rights to the position of Supervisor of Special Education, even without any special endorsement.

LEGAL STANDARDS AND CONCLUSIONS

The Tenure Act, N.J.S.A. 18A:28-1 to -18, and N.J.A.C. 6A:11-6.1 (Charter Schools) specifically defines the conditions under which teaching staff members are entitled to the security of tenure. Spiewak v. Board of Educ. of Rutherford, 90 N.J. 63, 72 (1982). 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). Sometimes special tacking rights apply but evidence of same must be presented at a plenary hearing N.J.S.A. 18A:28-5; -6.

N.J.A.C. 1:1-12.6(a) provides for the granting of emergency relief 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. In such circumstances, emergency relief pending a final decision may be ordered upon the application of a party. Subparagraph (f) of this section provides that temporary relief may be granted if there is a finding that immediate and irreparable harm will probably result, if there is the likelihood that the moving party will prevail, and if the relief is as limited in scope and as temporary as possible.

The foregoing regulation embodies the principles of law announced by the court in Crowe v. DeGioia, 90 N.J. 126, 132 (1982). These legal principles may be summarized as follows:

1. Emergency relief should not issue except when necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be

redressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Pecuniary damages may be inadequate because of the nature of the injury or of the right affected.

2. Emergency relief should be withheld when the legal right underlying the claim of the requesting party is unsettled.

3. Emergency relief should not issue where all material facts are controverted. Thus, to prevail on an application for emergency relief, the party requesting the relief must make a preliminary showing of a reasonable probability of ultimate success on the merits. That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. The point of emergency relief is to maintain the parties in substantially the same condition when the final decision is issued, as they were when the litigation began.

4. The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief. The relief granted should be no broader than necessary to preserve the status quo pending a full hearing on the merits.

Irreparable Harm

There must be a showing of irreparable harm. Petitioner argues that his reputation, character, emotional state and household finances will be irreparable harmed if he is not immediately reinstated. Ordinarily monetary damages do not form the basis of irreparable harm. In the event that petitioner is successful, he will be awarded the appropriate remuneration, including back pay.

Petitioner further argues that if the administrative or supervisory positions he seeks are filled by the district, he would have waived his rights to those positions had he not filed for emergent relief. Since petitioner filed for emergent relief seeking to

enjoin the district from filling any administrative/supervisory positions, he has procedurally protected his interest. Moreover, counsel for the district indicated on the record that if tenured or seniority rights are determined favorably for petitioner, any person hired hereafter would have to yield their position to petitioner. Thus, the district accepts that risk. On this basis, I **CONCLUDE** that petitioner will not suffer irreparable harm.

Rights to the Underlying Claim Must Be Settled

The second requirement is that the underlying claim of the requesting party must be settled. Stated differently, the petitioner must show that there is a clear body of law that favors a determination for petitioner. Here the rights underlying petitioner's claims are unclear and can only be determined by a full evidentiary hearing. The validity of the positions held by petitioner as a supervisor or principal, and whether he acquired tenure rights, need to be developed by an evidential hearing. I **CONCLUDE** therefore that the underlying claim asserted by petitioner is not settled.

Requirement to Show Reasonable Probability of Prevailing on the Merits

Here the party requesting relief must make a preliminary showing of reasonable probability of ultimate success on the merits. Again, petitioner asserts that he has established seniority as a supervisor and/or in the capacity of a principal. Some or all of these facts are contested, particularly as to petitioner's argument that he has acquired tenure or seniority in the capacity of a principal. Petitioner held various titles and positions with Pleasantech over a six year period. He was promoted or reassigned several times. This presents a complex overlay as to petitioner's seniority or promotional seniority claim. These claims must be presented at a plenary hearing so that the validity and credibility determinations can be made. That said, petitioner has made an initial demonstration that he would have a reasonable probability of success in establishing tenure as a supervisor, since he has been employed in such positions within the district during the past six years. See, Sahagian v. North Bergen Bd. of Educ., 1989 S.L.D. 2878, 2883-84 (holding that because petitioner was tenured as a

supervisor, having served under the endorsement with his administrative certificate, he is entitled, by virtue of his tenure status as a supervisor, to any other supervisory position in the district over a non-tenured individual.) However, Pleasantech asserted through counsel that it is a small school with very few administrative positions. And any administrative/supervisory positions for which petitioner is qualified, do not exist. Again, these were arguments presented without supporting testimony. In the absence of evidence and testimony, petitioner's tenure or seniority rights cannot be determined at this time. I so **CONCLUDE**.

The parties should be mindful that the certification requirements for charter schools found at N.J.A.C. 6A:11-5.1(b)1 provide that:

> (b) the board of trustees of a charter school shall employ or contract with:
>
> 1. 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**...
>
> [Emphasis added]

These provisions seem to empower petitioner with authority to supervise special education staff. No endorsement appears necessary to supervise a Special Education Department in the same way a Principal or Superintendent may. See N.J.A.C. 6A:9-9.2(b)6. A Special Education endorsement is only required to instruct in class, provide consulting services, or supportive resources.

Relative Hardship to the Parties

The final test is whether the granting of emergent relief to preserve the status quo will impose a hardship on one of the parties. This action was filed in August 2011. The ensuing school year is only a few weeks away. Pleasantech is operating with an interim Superintendent. Denying Pleasantech the ability to fill its administrative positions would, without a doubt, impose a hardship (i.e. three weeks before school is scheduled to commence). On the other hand, if petitioner were to prevail at a plenary hearing, he would be reinstated with back pay. The harm to Pleasantech would be broad based. It would impact the daily operations of the school and potentially impact its students. The impact upon petitioner is personal and can be rectified by monetary remedies. I therefore **CONCLUDE** that the relative hardship favors Pleasantech.

CONCLUSION

Based upon the foregoing, I **CONCLUDE** that petitioner has failed to establish existence of irreparable harm; that petitioner established some likelihood of prevailing on the merits as to a supervisor's position; and that the relative hardship will fall upon Pleasantech rather than petitioner. The relief sought by petitioner is therefore **DENIED**.

ORDER

For the reasons stated above, I **ORDER** that petitioner's request for emergency relief is **DENIED**. This case shall be scheduled for a plenary hearing on **August 30, 2011,** at 9:30 a.m. at the Office of Administrative Law, 1601 Atlantic Avenue, Suite 601, Atlantic City, New Jersey, before the undersigned ALJ.

I am mindful that this date is expedited and may present discovery problems for the parties. Therefore, I have also scheduled a telephone status conference call for **August 29, 2011, at 10:00 a.m.** to determine if the case can proceed on the scheduled plenary hearing date mentioned herein.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISIONER 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 (45) days following the entry of this order. If the **COMMISIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) 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 17, 2011
DATE

W. TODD MILLER, ALJ

/sd

OAL DKT. NO EDU 8832-11
AGENCY DKT. NO. 164-6/11

IN THE MATTER OF THE TENURE :
HEARING OF MARYANN NUNEZ-LEAKE, :
SCHOOL DISTRICT OF THE CITY OF :
JERSEY CITY, HUDSON COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

The record and notice of withdrawal transmitted to the Commissioner by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.2 have been reviewed. The Commissioner approves the withdrawal of the instant tenure charges, since there is no basis on which they may proceed in the wake of respondent's unilateral resignation from employment with the Board and her application for retirement from the Teachers Pension and Retirement Fund. 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 excessive absenteeism, and the circumstances underlying its withdrawal.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9|14|11
Date of Mailing: 9|14|11

WITHDRAWAL FORM

OAL Docket No(s): EDU 8832-11

CASE NAME: MARYANNE NUNEZ-LAKE vs. Jersey City School District

DATE(S) SCHEDULED:

ALJ: Cohen NOTIFIED: (person & date)

CALL/LETTER RECEIVED FROM: R. Scott Eveland (Telephone #)

CALL/LETTER RECEIVED BY: AO (Initials) DATE RECEIVED: 8-3-11

DATE ENTERED IN CTS: 8-3-11 OPERATOR (Initials)

COMMENTS:

DUPLICATE OF: OAL Docket No. RETURN: RESCIND: (please check box if applicable)

THE JERSEY CITY PUBLIC SCHOOLS
346 CLAREMONT AVENUE
JERSEY CITY, NEW JERSEY 07305
(201) 915-6231

Paula Mercado Hak
General Counsel

R. Scott Eveland
Assistant General Counsel

LEGAL DEPARTMENT
FAX: (201) 915-6230

August 3, 2011

Via Telefax and Regular Mail

Carol I. Cohen, A.L.J
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: In the Matter of the Tenure Hearing of Maryann Nunez-Leake,
School District of the City of Jersey City, Hudson County
Agency Dkt. No. 164-6/11

Dear Judge Cohen:

Please allow this to confirm that the teacher with regard to the above-referenced matter has resigned and the District has accepted her resignation, thereby rendering this matter moot. I have enclosed copies of the correspondence confirming same for Your Honor's reference.

Please advise if you require any further information. Thank you.

Very truly yours,

R. Scott Eveland
Assistant General Counsel

Encl.

CC: Philip Feintuch, Esq.
Paula Mercado Hak, Esq.
Dr. Hermoine McNeil

2011 JUN 27 P1:12:40

Mary Ann Nunez-Leake
41 Prospect Avenue
Little Ferry, NJ 07643

July 1, 2011

Dr. Charles T. Epps
Superintendent of Schools
346 Claremont Avenue
Jersey City, NJ 07305

Re: Mary Ann Nunez-Leake

Dear Dr. Epps:

It is with great sadness that I resign my position as a teacher with the New Jersey public school effective November 1, 2011.

Because of residual complaints from a serious motor vehicle accident, I cannot maintain a responsible work day schedule.

I have enjoyed my years working as a teacher but I must for reasons mentioned, resign as of November 1, 2011.

The purpose of this advanced date is that I have applied for retirement from the Teachers Pension and Retirement Fund.

Sincerely,

Mary Ann Nunez-Leake

OAL DKT. NO. EDU 05328-11
AGENCY DKT. NO. 28-2/11

IN THE MATTER OF THE TENURE	:	
HEARING OF SALVATORE PICCOLI,	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARMENT OF	:	DECISION
CORRECTIONS, ALBERT C. WAGNER	:	
YOUTH CORRECTIONAL FACILITY.	:	

The record of this matter, the parties' proposed Settlement and Release, the supplemental certification from the respondent, 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 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: 9|14|11
Date of Mailing: 9|14|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05328-11
AGENCY DKT. NO. 28-2/11

IN THE MATTER OF THE TENURE HEARING OF SALVATORE PICCOLI, NEW JERSEY DEPARTMENT OF CORRECTIONS, ALBERT C. WAGNER YOUTH CORRECTIONAL FACILITY

Christopher C. Josephson, Deputy Attorney General, for petitioner
Rosemarie Cipparulo, Esq. for respondent

Record Closed: July 26, 2011 Decided: July 27, 2011

BEFORE **LISA JAMES-BEAVERS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on January 30, 2007, 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.

Respondent Salvatore Piccoli was a tenured teaching staff member employed by the Albert C. Wagner Youth Correctional Facility, Department of Corrections (DOC) for

approximately ten years. The DOC accused Piccoli of conduct unbecoming an employee, N.J.A.C. 4A:2-2.3(a)6 and other sufficient cause, N.J.A.C. 4A:2-2.3(a)11.

A telephone conference was conducted on June 8, 2011, at which time a hearing was scheduled for July 21 and 22, 2011. Prior to the date of the hearing petitioner's counsel advised that the parties reached an agreement that resolves all issues in dispute and requested that the hearing dates be adjourned. I received the Stipulation of Dismissal on July 26, 2011.

In accordance with the decision of the State Board of Education in In re Cardonick, 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 interest.

Based upon my review of the record I **FIND**, the proposed settlement is consistent with the public interest for the following reasons:

1. Mr. Piccoli shall apply for disability retirement; however, if his application is denied, the DOC agrees to modify his removal from service effective January 28, 2011, to a resignation in good standing, effective the date it is approved by the Commissioner of Education.
2. The Board agrees to withdraw the charges that are currently pending before the undersigned. Mr. Piccoli's retirement or resignation renders the tenure charges moot.
3. The Board will not pay Mr. Piccoli any back pay as he agrees to serve a 120-day suspension without pay and have the remaining time between the suspension and the date of his retirement or resignation considered a leave of absence without pay.

4. The parties agree that the resolution of this matter upon the terms set forth herein is both in their interest and in the public interest for the following reasons:
   a. to avoid disruption of the youth correctional facility required by having to call employed individuals to testify in these proceedings; and
   b. to avoid a lengthy, expensive hearing on the charges and any possible appeals; and
   c. to avoid the expenditure of additional public funds to pursue charges against an employee who is willing to relinquish his present employment position with the Department of Corrections and who is barred from obtaining employment with the Department of Corrections or Department of Human Services.
5. Mr. Piccoli was represented by counsel in the case and entered into this agreement with a full understanding of his rights.

Having reviewed the contents of the attached Stipulation of Dismissal, 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.

7/27/11
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: AUG - 1 2011

Mailed to Parties: AUG - 1 2011

DATE

OFFICE OF ADMINISTRATIVE LAW

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625-0112

PAULA T. DOW
Attorney General

ROBERT M. HANNA
Director

2011 JUL 26 A 11:05

July 25, 2011

SENT VIA OVERNIGHT MAIL
Hon. Lisa James-Beavers, A.L.J.
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, N.J. 08625-0049

Re: I/M/O the Tenure Hearing of Salvatore Piccoli
OAL Docket No. EDU 05328-2011S
Agency Ref. No. 28-2/11

Dear Judge James-Beavers:

Enclosed herein please find the Stipulation of Settlement that was executed in the above-listed matter, which has been signed by all interested parties and which fully disposes of all issues in this matter. Please advise if you need any additional information. Thank you.

Sincerely yours,

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY

By: Christopher C. Josephson
Christopher C. Josephson
Deputy Attorney General

c: Rosemarie Cipparulo, Esq.

PAULA T. DOW
Attorney General of New Jersey
Attorney for Petitioner,
New Jersey Department of Corrections
R.J. Hughes Justice Complex
PO BOX 112
Trenton, New Jersey 08625

By: Christopher C. Josephson
Deputy Attorney General
(609)292-8550

In the Matter of the Tenure Hearing of SALVATORE PICCOLI, Department of Corrections	OAL Dkt. No.: EDU 5328-2011S Agency Ref No.: 28-2/11
	STIPULATION OF SETTLEMENT

The Department of Corrections, Office of Educational Services (DOC), with offices located at Whittlesey Road, P.O. Box 863, Trenton, New Jersey 08625, represented by PAULA T. DOW, Attorney General of New Jersey, Christopher C. Josephson, Deputy Attorney General, appearing; and Salvatore Piccoli, a "Teacher I," and a tenured employee of the DOC who is assigned to the Albert C. Wagner Youth Correctional Facility (ACWYCF), as represented by Rosemarie Cipparulo, Esq. appearing; by way of this Stipulation of Settlement say:

WHEREAS, the DOC initiated the filing of tenure charges against Mr. Piccoli, having filed the charges with the Commissioner of Education on or about February 3, 2011; and

WHEREAS, Mr. Piccoli was charged in the tenure charges with Conduct Unbecoming a Public Employee and Other Just Cause; and

WHEREAS, the tenure charges alleged that Salvatore Piccoli brought his personal cell phone inside of the perimeter of ACWYCF and intentionally left the phone in an area of ACWYCF frequented by inmates, namely, under a box on top of the Institutional Mailboxes in the ACWYCF Front House Lobby; and

WHEREAS, the DOC sought the dismissal of Mr. Piccoli on the above charges, which were transferred to the Office of Administrative Law for a hearing; and

WHEREAS, Mr. Piccoli disputed the charges; and

WHEREAS, the matter was initially referred to the Office of Administrative Law for a hearing in July 2011; and

WHEREAS, the parties wish to enter into an amicable resolution of the tenure charges filed against Mr. Piccoli; and

WHEREAS, it is in the best interest of the parties and the public to enter into this Stipulation of Settlement;

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties agree as follows:

1. DOC agrees to modify the disciplinary action contained therein, removal from service effective January 28, 2011, to a disability retirement, or, in the alternative, if Piccoli's application for a disability retirement is denied, a resignation in good standing, to be effective on the date that the Commissioner of Education approves settlement of this matter. The DOC will neither support or oppose Piccoli's application for a disability

retirement.

2. Piccoli agrees to serve a 120-day suspension without pay, with credit for time already served, and will not receive any back pay, benefits, counsel fees, costs or any other monetary relief as a result of this settlement. Piccoli further agrees to no longer seek or accept future employment with the New Jersey Department of Corrections and New Jersey Department of Human Services.

3. Upon the effective date of his retirement or resignation, the Department of Corrections shall record Mr. Piccoli as having retired or resigned in good standing. Any time between the end of Piccoli's suspension and the date of his retirement or resignation will be considered a leave of absence without pay.

4. The Commissioner's approval of this Settlement Agreement shall constitute a withdrawal of the tenure charges brought by the DOC against Mr. Piccoli.

5. Settlement of this matter is justified and in the public interest because it obtains Mr. Piccoli's removal without the need for the parties to devote further substantial resources to a contested tenure hearing with an uncertain result. This settlement provides the relief that the DOC sought by bringing the charges.

6. This Agreement constitutes a final and complete resolution of the disciplinary action in this matter and fully disposes of all issues in controversy between the parties hereto except any pending Workers Compensation or Disability Retirement

claims. Mr. Piccoli agrees not to appeal the terms of this Agreement in any administrative, arbitral or judicial forum.

7. This Agreement shall not constitute a precedent in any other matter involving Mr. Piccoli or any other employee.

8. Should the Commissioner fail to approve this Agreement, the parties shall make every reasonable effort to reform their Agreement to meet any objections.

9. Mr. Piccoli 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 (N.J.A.C. 6A:3-5.6(a)(6)).

10. Mr. Piccoli has been further advised of the DOC's legal duty, pursuant to N.J.S.A. 43:1-3.3, to disclose the within Settlement Agreement to the board of trustees of Piccoli's pension fund or retirement system so that it can determine whether to order the forfeiture of all or part of Piccoli's earned service credit, pension or retirement benefit.

11. This Agreement shall only become effective when the Commissioner of Education approves it. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter further.

This Agreement is made in good faith. The parties have read the Agreement and freely and voluntarily agree to its provisions.

For the Employee:

Salvatore Piccoli — Dated: 7/19/11

Rosemarie Cipparulo, Esq. — Dated: 7/19/11
Attorney for Salvatore Piccoli

For the Department of Corrections:

Dated: 7/25/11

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY

By: Christopher C. Josephson — Dated: 7/25/11
Deputy Attorney General

OAL DKT. NO. EDU 5466-10
AGENCY DKT. NO. 62-4/10

JACQUELINE HINKSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX 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' 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: 9|15|11

Date of Mailing: 9|15|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05466-10
AGENCY DKT. NO. 62-4/10

JACQUELINE HINKSON,
Petitioners,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Nancy I. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Bernard Mercado, Esq., for respondent

Record Closed: July 29, 2011 Decided: August 1, 2011

BEFORE **IMRE KARASZEGI,** ALJ:

On May 28, 2011, 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.

Aug. 1, 2011
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 8-3-11

Date Mailed to Parties: AUG - 3 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-7139
Attorneys for Respondent

JACQUELINE HINKSON, Petitioner, vs. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDUOR-05466-2010N Agency Ref. No. 62-4/10 **SETTLEMENT AGREEMENT**

The parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement that fully disposes of all issues in controversy between Petitioner Jacqueline Hinkson ("Petitioner" or "Hinkson") and Respondent State-Operated School District of the City of Newark ("Respondent" or the "District"):

1. Petitioner agrees to withdraw, with prejudice, her appeal and request for a hearing filed under OAL Dkt. No. EDUOR-05466-2010N.
2. In exchange, Respondent agrees to remove the "AWOL" designations from Petitioner's attendance records from November 9, 2009 to December 2, 2009.
3. Respondent also agrees to credit Petitioner's sick day bank with the twenty three (23) days that were originally charged to Petitioner from December 7, 2009 to January 15, 2010.
4. Petitioner will not receive any back pay as part of this settlement.
5. This agreement shall not constitute a precedent in any matters involving other employees.

6. The terms of this agreement shall not be construed as an admission of guilt or wrongdoing by either party and will not be utilized by either party in any subsequent matters that may arise in the future.

7. By entering into this Settlement Agreement, Petitioner releases and discharges the District, its directors, officers and employees with respect to all claims or rights in any court that she may have against the District with the exception of workers' compensation claims and only those claims contained in Petitioner's following three (3) docketed cases which are currently still pending before the Court: EDUOR 003804-04, EDUOR 003772-06 and EDUOR 007537-09. Other than the claims contained in these three (3) previously docketed cases, this release and discharge contained herein generally includes without limitation, any and all other 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 or separation from the District to date. It specifically includes, without limitation, all other 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 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 the retaliation provisions of New Jersey Workers' Compensation Law including (and including any and all amendments to the above); 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; and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law 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 terms of her employment with the District, including, but not limited to, any claim for wrongful discharge, back pay, vacation pay, sick pay, physical injury, any incurred medical expenses or costs, wage, commission or bonus payment, attorneys' fees, costs, and/or future wage loss.

8. The parties respectively acknowledge that counsel has advised them regarding this Settlement Agreement and that each is signing this Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

9. 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 State District Superintendent. Any disapproval by the Superintendent shall not interfere with the rights of either party to pursue the matter further.

Dated: June 21, 2011

JACQUELINE HINKSON
Petitioner

Dated: 6/21/11

NANCY OXFELD, ESQ.
Attorney for Petitioner

Dated: 7-27-11

CAMI ANDERSON
State District Superintendent

Dated: 7/1/11

BERNARD MERCADO, ESQ.
Attorney for Respondent

CERTIFICATION

I, JACQUELINE HINKSON, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my counsel 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 also understand that if this Settlement Agreement is approved by the Commissioner of Education, my claim cited herein against Respondent will terminate.

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: June 21, 2011

Jacqueline Hinkson
JACQUELINE HINKSON

FELIX ROQUE, INDIVIDUALLY AND AS MAYOR OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JANET PASSANTE AND ALEXANDER LOCATELLI,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

In this controversy, petitioner – the current mayor of West New York – charged that the appointment of respondents to the municipality's school board by the former mayor subsequent to his defeat for re-election is violative of the law, and sought removal of these individuals from the Board. Respondents contended that they were legitimately appointed by the outgoing mayor, and should be allowed to serve out their respective terms. The matter was transmitted to the Office of Administrative Law (OAL) for an emergent relief hearing; however, the Administrative Law Judge (ALJ) determined to resolve the case on its merits rather than address it as an emergent relief issue.

The ALJ found that: the parties agreed that they are governed by *N.J.S.A.* 18A:12-7 and *N.J.S.A.* 18A:12-8, relevant sections of which provide that board members be appointed between April 1 and April 15 to terms that commence on May 16, and board vacancies be filled to the unexpired term of the departing member within thirty days; respondent Passante was appointed to a full term on May 13, 2011, which is plainly outside the statutory time frame; *N.J.S.A.* 40:73-5, which applies to Commission forms of government, makes unlawful any appointment between the first and third Tuesday in May of an election year; and respondent Locatelli's appointment falls within this time period. The ALJ concluded that the appointments of both respondents to the West New York Board of Education were improper and, accordingly, respondents must be removed from the school board.

Upon comprehensive review, the Commissioner concurred with the ALJ's ultimate conclusion that the appointments of both respondents were improper and, consequently, they must be immediately removed from the Board. The Commissioner, however, found that *N.J.S.A.* 40:73-5 – the foundational premise for the ALJ's recommendation – is not relevant to the Town of West New York, and respondent Locatelli's appointment was invalidated by the fact that he was already a sitting Board member when he was appointed to another seat on the Board, which is clearly violative of *N.J.S.A.* 18A:12-7 and respondent Passante's appointment violated the express terms of *N.J.S.A.* 18A:12-8. Accordingly, the Commissioner ordered the removal of respondents as board members of the West New York Board of Education.

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 8348-11
AGENCY DKT. NO. 186-7/11

FELIX ROQUE, INDIVIDUALLY AND AS MAYOR OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JANET PASSANTE AND ALEXANDER LOCATELLI,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Primary exceptions of both petitioner and respondents, and respondents' reply exceptions – 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 herein.[1]

Petitioner's exceptions are in agreement with the ALJ's recommendation that both respondents should be immediately removed from the West New York Board of Education for the reasons stated in the judge's decision. He does, however, disagree with the ALJ's determination that an additional reason justifying the removal of Alexander Locatelli – *i.e.*, that he was appointed by outgoing Mayor Vega on May 13, 2011 to fill the unexpired term of another Board member while he was already serving as a Board member under a term which was not due

[1] It is noted that this matter was transmitted to the OAL for hearing and subsequent recommended Order on Emergent Relief. Apparently, the Administrative Law Judge (ALJ) on his own accord determined to resolve the case on its merits rather than address it as an emergent issue as requested by the Agency. Notwithstanding that the ALJ captioned his subsequent decision as an "Initial Decision on Emergent Relief," *N.J.A.C.* 1:1-12.6 makes no provision for the issuance of an Initial Decision on Emergent Relief. Accordingly, with the receipt of exception arguments of the parties, the Commissioner has reviewed this matter as a regular Initial Decision and any and all references to the prior emergent nature of this matter have been deemed irrelevant.

to expire until May15, 2011 – was inconsequential. Petitioner contends, as he did below, that Locatelli's May 13, 2011 appointment was invalid because he could not simultaneously hold two Board of Education seats. The ALJ erroneously rejected this argument, petitioner maintains, reasoning that because "Locatelli could have resigned the seat that was about to expire in favor of the seat held by Mr. Lopez...the error is minor and that the situation self-corrected on May 15, 2011, when Mr. Locatelli's earlier term expired." [Initial Decision at 2] (Petitioner's Exceptions at 2) Irrespective of the fact that Locatelli *could have* resigned, petitioner argues, the plain fact of the matter is that he did not do so. Petitioner cites to *Georgia v. Suruda*, 154 *N.J. Super*. 439, 445 (Law Division 1977) for the proposition that the law is clear that "a person could be appointed to a new position inconsistent with a former one, but only after a resignation from the former position had been accepted." (*Id.* at 2-3) Petitioner, furthermore, adamantly disagrees with the ALJ that "the error is minor." Pursuant to *N.J.S.A.* 18A:12-7, he points out, the Mayor is limited to appointing "a qualified person to fill the vacancy..." At the time he was appointed, petitioner posits, Locatelli was not a qualified person. Formal requirements such as this exist in order that vacancies are filled in a measured manner to help insure that government functions effectively. It is without question, petitioner avers, that Locatelli was not eligible to be appointed on May 13, 2011 – the date of his appointment – and must, therefore, be immediately removed. (*Id.* at 3)

In reply, respondents argue that Mayor Vega's May 13, 2011 appointment letter which, in relevant part, stated "...I appoint you to a position of the West New York Board of Education, effective May 13, 2011 to finish the term vacated by Mr. Domingo Lopez. Your term will expire May 15, 2015," cannot reasonably be read to mean that Mr. Locatelli would occupy two positions simultaneously. Clearly, respondents maintain, the appointment was intended "to

take effect on May 16, 2011 when the Board met," and after Mr. Locatelli completed his existing term on May 15, 2011. The overlap of only two days during which Mr. Locatelli was "technically" completing one term while already appointed to another term whose duties had not yet begun was, they argue – and as the ALJ recognized – a minor, self-correcting error, particularly in light of the fact that Mr. Locatelli did not engage in any Board business or meetings during this two-day overlap. (Respondents' Reply Exceptions at 1-6, quotation at 2)

Respondents' primary exceptions make two specific relevant exceptions to the Initial Decision: 1) *N.J.S.A.* 40:73-5 applies to "second class cities" and does not apply to the *Town* of West New York, and 2) The Town of West New York is governed by *N.J.S.A.* 18A:12-7 and *N.J.S.A.* 18A:12-8 under which the appointments of both respondents are legal. With respect to the first of these – the ALJ found that respondents' appointments were illegal because they were made between the first Tuesday in May and the third Tuesday in May – which is prohibited by *N.J.S.A.* 40:73-5. Such a finding is clearly erroneous, respondents argue, as – for the following reasons – this statutory provision is not applicable in this matter.

The heading of *N.J.S.A.* 40:73-5 specifically defines its applicability – this provision is entitled "Appointment in *second class cities* in certain years (emphasis added)." The language of this provision prohibits certain appointments "...in any *city of the second class* governed by the commission form of government (emphasis added)." West New York, respondents offer, *is not a second class city*, it is a *Town,* incorporated as such by an act of the New Jersey Legislature on March 2, 1898; the statute was adopted by the inhabitants on July 5, 1898 and the results were certified on July 6, 1898. Notwithstanding that West New York is a *Town*, respondents aver, the ALJ found that this statutory provision –

which, pursuant to its own terms, is applicable *only* to *second class cities* – governed the Town of West New York. Respondents point out:

> The terms "city" and "town" have special well-recognized meanings. They are two (2) of several ways in which municipalities are classified in the State of New Jersey, including for example borough, town, township, city and village. *N.J.S.A.* 40:70-2. Cities themselves are further divided into four (4) classifications based upon population and location: (1) First Class (cities with a population over 150,000); (2) Second Class (cities with populations between 12,000 and 150,000); Third Class (other cities except Atlantic Ocean resorts cities); and Fourth Class (cities which are Atlantic Ocean resorts). *N.J.S.A.* 40A:6-4. The governance of *towns* such as West New York is set forth in *N.J.S.A.* 40A:6-4 through *N.J.S.A.* 40A:6-8.
>
> Certain laws, rules and regulations apply to all types of municipalities. Other laws, rules and regulations apply to only one type of municipality or a subset of municipalities. The decision with respect to what laws apply to what type of municipality is properly left to the legislature. (Respondents' Exceptions at 3-4)

Moreover, respondents advance, the Walsh Act, *N.J.S.A.* 40:70-3, which is entitled "An act relating to, regulating and providing for the government of cities, towns, townships, boroughs, villages and other types of municipalities governed by boards of commissioners or improvement commissioners of this state," does not specify, nor does it imply, that all legislative provisions under this Act apply uniformly to each type of municipality. To the contrary, that each type of municipality is listed separately acknowledges that all types of municipalities are not to be treated the same way for all purposes. Respondents submit that "[w]hen the legislature intends that a statute applies to all municipalities, it either uses the term 'municipality,' such as in *N.J.S.A.* 40:73-1 through *N.J.S.A.* 40:73-3, or it makes no governmental designation at all, such as in *N.J.S.A.* 40:73-4. However, they maintain, when the legislature intends that a law is to apply to a specific type of municipality, it says so," pointing to *N.J.S.A.* 40:71-9.1 "Boards of fire commissioners in townships"; *N.J.S.A.* 40:72-9 "Assignment of deputy by director in second class cities and certain forth class cities"; and *N.J.S.A.* 40:73-9 "Borough under 5000; tax

collector or treasurer; waiver of residency requirement" as examples. A principal precept of statutory construction, respondents urge, is that the plain language of a statute should be used as the primary indicator of legislative intent. (*Id.* at 4-5)

Respondents point out that in this matter petitioner had the burden of proving that the statute at issue did not mean what it clearly says, a burden, they assert, he did not satisfy and the ALJ's conclusions based on petitioner's arguments are clearly erroneous, as evidenced by: 1) Neither petitioner nor the ALJ cite any legislative history or case law with respect to *N.J.S.A* 40:73-5 which would support their expanded interpretation of this provision; 2) the ALJ stated that "*N.J.S.A.* 40A:6-4 classifies for legislative purposes cities of the second class as having between 12,000 and 150,000 people" (Initial Decision at 3) From that and nothing more, he improperly concluded that a *town* with a population in that range is really a *second class city*; 3) the ALJ relied on *N.J.S.A.* 40A:70-2 which lists the various types of municipalities and bootstraps this listing to conclude that the term municipality "subsumes all of the various names taken by local government," and thus the legislature had no purpose for using the word "city" in *N.J.S.A.* 40:73-5; 4) the ALJ bolstered his expanded application of this provision by questioning at hearing whether respondents believed the legislature was concerned about lame duck appointments in second class cities but not in towns. In response to this – respondents offer – the short answer is that the legislature defines its concerns and has done so in this case in plain and unambiguous language. Utilizing the ALJ's leap of logic, *N.J.S.A.* 40:73-5 would also apply to first, third and fourth class cities along with townships, boroughs, villages, etc. (*Id.* at 6-7) Respondents conclude their arguments on this particular issue by re-emphasizing that the plain meaning of the words in the statute at issue here unequivocally demonstrate that its prohibitions were not intended to be applicable to Towns like West New York. (*Id.* at 9-10)

Respondents' second exception – *i.e.*, that appointments in Type 1 School Districts like the Town of West New York are governed by *N.J.S.A.* 18A:12-7 and *N.J.S.A.* 18A:12-8, under which the appointments of both respondents are valid – may be summarized as follows. Preliminarily in this regard, respondents argue that the applicable statutory provisions do not prohibit appointments being made by a lame duck mayor. To the contrary, citing *Cordasco v. Board of Education of the Town of West New York*, 96 *N.J.A.R.* 2[d] (EDU) 661 which specifically dealt with this very issue, the ALJ in that case stated:

> Despite arguments engaged in by the parties dealing with their respective interpretations of related or collateral case law, the clear fact remains that the petitioner's appointment by [the outgoing mayor] was validly accomplished in strict compliance with the requirements of *N.J.S.A.* 18A:12-7. *The statute contains no condition or prohibition against being exercised by a lame-duck mayor.* (emphasis added)

Respondents point out that such ruling was upheld by the Commissioner. (Respondents' Exceptions at 10-11)

With respect to the appointment of respondent, Alexander Locatelli, he was appointed by Mayor Vega – pursuant to a letter dated May 13, 2011 – to fill a vacancy, namely the unexpired term of Domingo Lopez. Mr. Locatelli's appointment is governed by *N.J.S.A.* 18A:12-7 which lists the requirements for such appointment, namely, 1) the vacancy must be reported to the mayor, and 2) the appointment of a qualified person is to be made by the mayor within 30 days thereafter. Respondents argue that Mayor Vega's appointment of Mr. Locatelli was in full compliance with the stated requirements of the statute and must be upheld. (Respondents' Exceptions at 11-12)

As to respondent Janet Passante, she was appointed by the outgoing Mayor on May 13, 2011 to a full five year term of office. *N.J.S.A.* 18A:12-8 – which *initially* governed her appointment – specifies that appointments to a full term of office are to be made between April 1

and April 15 for terms to begin on May 16. Although respondents concede that her appointment was made outside the statutory timeframe, they claim this was merely an "administrative oversight." They contend that case law dealing with the time periods specified in this statute is sparse. They, however, cite to *Board of Education of the City of Orange*, 233 *N.J. Super.* 242 (App. Div. 1989) for the proposition that this time period is unrelated to the outcome of municipal elections but, instead, was designed to conform to the schedule of school budget dates. Respondents argue that, nonetheless, on May 16, 2011 the Board position to which Mayor Vega intended to assign Ms. Passante became *vacant*, thus allowing this appointment to be made pursuant to *N.J.S.A.* 18A:12-7. The appointment of Ms. Passante, respondents posit – as was the case with Mr. Locatelli's – complied with the terms of this statute and must be permitted. (*Id.* at 12-13)

Upon his comprehensive review, the Commissioner agrees with the ALJ's ultimate conclusion that the appointments of both Alexander Locatelli and Janet Passante to the school board of West New York were improper and, consequently, these individuals must be immediately removed from the Board. In so concluding, however, the Commissioner rejects the ALJ's foundational premise of his recommendation, *i.e.*, that the appointments are prohibited by *N.J.S.A.* 40:73-5. Rather, the Commissioner finds – for the reasons cogently presented by respondents in their exceptions – that this statutory provision, by its stated terms, applies solely to second class cities and, therefore, is not relevant to the Town of West New York.

It is noted that the record of this matter establishes the following uncontested facts:

- The Town of West New York operates under a Commission form of government

- West New York is a Type 1 School District where appointments to the board are made by the Mayor for a term of five years
- Municipal elections were held in West New York on May 10, 2011, and all incumbent commissioners, including Mayor Silverio Vega were defeated
- By letter dated May 13, 2011, Mayor Vega appointed Janet Passante to a full five year term, effective May 15, 2011
- By letter dated May 13, 2011, Mayor Vega also appointed Alexander Locatelli to fill the unexpired term of Domingo Lopez, who had resigned the previous day. This letter of appointment established an effective date of May 13, 2011
- On May 13, 2011 Alexander Locatelli was a sitting member of the West New York Board of Education whose term was due to expire on May 15, 2011
- The new Mayor took office on May 17, 2011

It is uncontroverted that board appointments in a Type 1 School District are covered by *N.J.S.A.* 18A:12-7 **Boards; appointments; vacancies** [addressing the handling of board vacancies] which, in pertinent part, specifies: "The boards of education shall be appointed by the mayor…of the municipality constituting the district. Any vacancy occurring in the membership of the board shall be reported forthwith by the secretary of the board to the mayor…, who shall within 30 days thereafter appoint a qualified person to fill the vacancy for the unexpired term," and *N.J.S.A.* 18A:12-8 **When appointed; commencement of terms** [addressing full term appointments] which, in pertinent part, specifies: "…the members of the board shall be appointed between April 1 and April 15 and their terms of office shall begin on May 16, next succeeding…"

The Commissioner determines that the appointments of respondents made by outgoing Mayor Vega on May 13, 2011 were violative of law and, therefore, void *ab initio*. Specifically, Janet Passante was appointed to a full five year term and, pursuant to the plain, unambiguous language of *N.J.S.A.* 18A:12-8, such appointment was required to be made between April 1 and April 15. As her appointment was clearly outside this requisite statutory period, it is invalid. (*Orange Tp. Bd. of Educ. V. Brown,* 233 *N.J. Super.* 242)[2] Similarly, the appointment of Alexander Locatelli – a sitting Board member on the appointment and effective date of May 13, 2011 – is also violative of the pertinent governing statute, *N.J.S.A.* 18A:12-7. As was pointed out in petitioners' exceptions, absent his resignation from his current board seat, it is an impossibility for an individual to occupy two board positions simultaneously (*Georgia v. Suruda*, supra.). Consequently, on May 13 Mr. Locatelli was not a "qualified person to fill the vacancy" pursuant to this statute. The Commissioner strongly disagrees with the ALJ's determination that the May 13th appointment was no more than a "minor" error which "self-corrected on May 15, 2011." (Initial Decision at 2) Rather, an appointment which is violative of law at its inception cannot "self-correct" by the passage of time no matter how short. At this point, however, the Commissioner is compelled to point out that if either or both of these appointments had been made by outgoing Mayor Vega on May 16, 2011, pursuant to *N.J.S.A.* 18A:12-7, the results in this matter would have been altered.

Finally, the parties are hereby reminded that the fact that the two respondents were not legally able to serve on the Board subsequent to May 16, 2011 does not serve to nullify

[2] Respondents' attempt to re-categorize Ms. Passanti's appointment as a "vacancy," and thus subject to the dictates of *N.J.S.A.* 18A:12-7, is unavailing. This provision applies only where an unexpected vacancy occurs because a board member has left office before the end of his or her term, thereby leaving the board with fewer than its full complement of members. (*See Orange Tp. Bd. of Educ. v. Brown*, supra). An appointment made on May 13, 2011 to be effective on May 15, 2011 cannot logically be termed one to fill a vacancy which doesn't exist until May 16, 2011.

or invalidate any Board actions after that date on which these individuals voted. It is long-established law that – during this period – respondents were *de facto* board members "because they held office under color of a known election or appointment and their ineligibility was unknown to the public at the time they were seated." *Maxine J. Pijeaux v. Board of Education of the City of Orange, Essex Co.*, 94 *N.J.A.R.* 2d 345, 346

Accordingly, the recommended decision of the OAL directing respondents immediate removal from the West New York Board of Education is adopted for its conclusion only. For the reasons detailed above, Janet Passante and Alexander Locatelli are hereby removed as board members of the West New York Board of Education.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9|19|11

Date of Mailing: 9|19|11

[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 ON
EMERGENT RELIEF
OAL DKT. NO. EDU 8348-11
AGENCY DKT. NO. 186-7/11

DR. FELIX ROQUE, INDIVIDUALLY AND AS MAYOR OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,
Petitioner,
v.
JANET PASSANTE AND ALEXANDER LOCATELLI,
Respondents

David F. Corrigan, Esq., for petitioner (The Corrigan Law Firm, attorneys)

Gerald L. Dorf, Esq., for respondents (Dorf & Dorf, attorneys)

Record Closed: August 11, 2011 Decided: August 15, 2011

BEFORE **SOLOMON A. METZGER**, ALJ t/a:

This matter arises out of a petition and motion for emergent relief filed with the Commissioner of Education on July 14, 2011, by Dr. Felix Roque, the current Mayor of West New York, pursuant to N.J.S.A. 18A:6-9. He seeks to oust respondents from their appointment to the school board, made in the last days of the prior administration. The matter was transmitted to the Office of Administrative Law as a contested case

pursuant to N.J.S.A. 52:14F-1 to – 23. Briefs were submitted, and oral argument was heard on August 11, 2011. This opinion follows.

The facts for purposes of the motion are undisputed. The Town of West New York operates under a Commission form of government. Municipal elections were held on May 10, 2011, and all incumbent commissioners, including Mayor Silverio Vega were defeated. During this time period the Board of Education had five members and appointments were made by the Mayor for a term of five years. On May 13, 2011, Mayor Vega appointed respondent Janet Passante to a full term, effective May 15, 2011. On May 13, 2011, Mayor Vega also appointed respondent Alex Locatelli to fill the unexpired term of Domingo Lopez, who resigned the day before. The letter of appointment establishes an effective date of May 13, 2011. The new Mayor took office on May 17, 2011. This is the substance of the record.

The parties agree that they are governed by N.J.S.A. 18A:12-7 & 8. As relevant here these sections provide that board members be appointed between April 1, and April 15 to terms that commence on May 16. Board vacancies are to be filled to the unexpired term of the departing member within thirty days. Janet Passante was appointed to a full term on May 13, 2011, which is plainly outside the statutory time frame, see, Orange Tp. Bd. Of Educ. V. Brown, 233 N.J. Super. 242, (App. Div. 1989).

Mayor Vega's appointment of Mr. Locatelli to fill an unexpired term poses different questions. It appears that on May 13, 2011, Mr. Locatelli was already serving on the school board, filling an unexpired term that was to end May 15, 2011. Petitioner argues that there is in this an inherent conflict of interest that permanently taints the appointment, see, City of Wildwood v. DeMarzo, 412 N.J. Super.105, (App. Div. 2010). Respondents regard this as a small oversight. Had anyone attached import to the issue, Mr. Locatelli could have resigned the seat that was about to expire in favor of the seat held by Mr. Lopez, the term of which extends to May 2015. I agree the error is minor and that the situation self-corrected on May 15, 2011, when Mr. Locatelli's earlier term expired. Apparently the Board did no business during this overlap and I would not unseat an appointee on the strength of this argument.

Petitioner argues also that N.J.S.A. 40:73-5 prohibits both appointments outright. The section, which applies to Commission forms of government, makes unlawful appointments between the first and third Tuesday in May of an election year. Mayor Vega's May 13, 2011 appointment of Mr. Locatelli falls within this period. No conflict arises in this instance between N.J.S.A. 40:73-5 and N.J.S.A. 18A-12-7 because there was ample time for the new mayor to name a replacement. Respondents argue; however, that the section by its terms applies to cities of the second class, and West New York is not a city of the second class. There are no certifications as to the population of West New York, but counsel for petitioner represents it as 49,708 souls, according to the 2010 census. N.J.S.A. 40A:6-4 classifies for legislative purposes cities of the second class as having between 12,000 and 150,000 people. I see no disagreement with the population figure in any of the arguments presented by respondents. Thus, the only basis of disagreement seems to be that West New York is a town, not a city.

The Walsh Act, or Commission form of government, came into being in New Jersey in 1911 and its dips and turns are many, Grogan v. DeSapio, 11 N.J. 308 (1953). Briefs, hurriedly prepared, do not develop the issue at any depth. Nonetheless, it appears the point belongs to petitioner. Respondents do not suggest that West New York fails the population test for cities of the second class. They say simply that it is in name a town. This is not a substantive distinction and is of a type that has long been rejected, Schwartz v. Wachlin, 89 N.J.L. 39 (1916). The term municipality subsumes all of the various names taken by local governments, N.J.S.A. 40:70-2, and nothing in the arguments presented suggests any specialized abstruse purpose for the use of the word "city" in N.J.S.A. 40:73-5.

The moving party in a motion seeking emergent relief must establish; irreparable harm, that the law is settled, a likelihood of success on the merits, and on balance that the equities favor the action sought, Crowe v. DeGioia, 90 N.J. 126 (1982); N.J.A.C. 6A:3-1.6. To allow improperly appointed members to sit casts doubt on decisions taken and generally undermines public trust. Thus, the standard is met.

Based on the foregoing, I **CONCLUDE** that the Passante/Locatelli appointments were improper and that they be removed from the local school board. There appearing to be no additional issues of fact or law, the matter is being resolved in the form of an initial decision.

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 15, 2011
DATE

SOLOMON A. METZGER, ALJ

Date Received at Agency: 8/15/11

Date Mailed to Parties: 8/15/11

mph

OAL DKT. NO. EDU 418-11
AGENCY DKT. NO. 707-12/10

E.Y., on behalf of minor children V.Y. and A.Y.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, the 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 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: 9|19|11

Date of Mailing: 9|20|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00418-11
AGENCY DKT NO. 707-12/10

E.Y. o/b/o minor children V.Y. & A.Y.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,
Respondent.

Marla Moss, Esq., for petitioners

James Plosia, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, P.C.)

Record Closed: July 29, 2011 Decided: August 1, 2011

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On December 13, 2010, petitioner, E.Y., filed a residency appeal on behalf of his children, A.Y, a special education student at Leona Middle School, Leonia and V.Y. fourth grade student at J Spencer Smith School in Tenafly, New Jersey. On January

13, 2011, the Borough of Tenafly Board of Education (BOE) filed a response with the State Department of Education seeking reimbursement from petitioner for the costs of tuition incurred by the attendance of his minor children in the BOE's school district from November 2007, to present. The matter was transmitted to the Office of Administrative Law (OAL) on January 18, 2011, for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. Several status conferences were conducted the last one being April 4, 2011 during which time the hearings in this matter were scheduled for April 27, 2011, June 15 and 27, 2011. Prior to the June hearing date the parties reached a tentative settlement and requested the hearings be adjourned. A control date was scheduled for July 27, 2011. The July hearing was converted into a telephone status conference wherein the parties advised that the settlement agreement was approved by the Tenafly Board of Education. On July 29, 2011 the undersigned received a copy of the Stipulation of Settlement and Board Resolution.

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.

8/1/11
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: 8-3-11

Date Mailed to Parties: AUG - 3 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

Tenafly
PUBLIC SCHOOLS

Louis P. Mondello
Business Administrator/Board Secretary
Email: lmondello@tenafly.k12.nj.us

500 Tenafly Road, Tenafly, NJ 07670
Tel: 201-816-4505 – Fax: 201-569-3711

July 27, 2011

Mr. James L. Plosia, Jr.
Apruzzese, McDermott, Mastro & Murphy
25 Independence Blvd.
Warren, NJ 07059

A motion was made by Ms. Lynne W. Stewart and seconded by Mr. Donald H. Kaplan to approve Resolution F-10.

RESOLUTION F-10 APPROVAL OF STIPULATION OF SETTLEMENT

WHEREAS, there is currently pending a matter before the New Jersey Department of Education, E.Y. and R.Y. o/b/o A.Y. and V.Y., OAL Docket No. EDU 00418-2011N, Agency Reference No. 707-12/10; and

WHEREAS, a proposed Stipulation of Settlement has been negotiated between counsel for the Tenafly Board of Education and counsel for the parents that would fully resolve all outstanding claims, issues and disputes involving the parties; and

WHEREAS, the proposed Stipulation of Settlement would avoid a significant expenditure of time and resources on the part of the Board and its officials that would be necessary for the continuation of the pending litigation;

NOW, THEREFORE BE IT RESOLVED that at its Board meeting on July 26, 2011, the Board approves the Stipulation of Settlement and authorizes Lynn Trager, Superintendent of Schools to execute the written Stipulation of Settlement.

Certified to be a true copy of a motion passed by the Tenafly Board of Education, excerpted from the official Board minutes, on July 26, 2011.

Louis P. Mondello
Business Administrator/Board Secretary

APRUZZESE, McDERMOTT,
MASTRO & MURPHY, P.C.
P.O. Box 112
Liberty Corner, New Jersey 07938
(908) 580-1776
Attorneys for Respondent
Tenafly Board of Education

Emerson & Rachel Yang o/b/o A.Y. and V.Y., Petitioners v. TENAFLY BOARD OF EDUCATION, Respondent	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU 00418-2011N AGENCY REF. NO.: 707-12/10 **STIPULATION OF SETTLEMENT**

This Stipulation of Settlement is made and entered into by and among Emerson and Rachel Yang ("Petitioners") and the Tenafly Board of Education "Respondent").

In consideration of the mutual promises contained herein, it is agreed as follows:

1. **Payment:** In total and complete settlement of this matter, and all claims referred to herein, including attorneys' fees and costs of suit, the Petitioners will pay Respondent the total gross sum of Eleven Thousand Dollars ($11,000) payable over a two year period upon the following terms: 24 months in equal monthly payments of $458.34 per month. The first payment will be due by the end of the month following the month in which this Stipulation of Settlement is issued as a Final Decision by the Commissioner of Education. Subsequent

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Mastro & Murphy
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(908) 580-1776

payments will be due each month thereafter. Said payments will be made by Petitioners to the Tenafly School Business Administrator, Louis Mondello, by way of a check payable to the Tenafly Board of Education.

2. **Enforcement:** Should the Tenafly School District not receive the monthly payment by Petitioners by the end of any particular month in which the payment is due, the District will send a written notice to Petitioners requesting that the monthly payment be immediately made by Petitioners. If, within 30 days after the date of this written notice, said payment has not made by Petitioners to Respondent, the Board shall have the right to initiate an enforcement action in Bergen County Superior Court to obtain a judgment for the entire remaining sum which is due and owing to Respondent as of that date. In this enforcement action, Petitioners agree that they will have no defenses to a ruling that all of the monies are immediately due and owing. In addition, Petitioners will be required to reimburse Respondent for the full costs and attorneys fees incurred by the Board in said enforcement action.

3. **Dismissal:** Petitioners hereby agree to dismiss their Petition of Appeal in the above-captioned matter with prejudice.

4. **Release:** The parties hereby release any and all claims they have or otherwise may have had against the other from the beginning of time to the date of this Stipulation, including but not limited to claims against Petitioners by Respondent for back tuition, and claims of discrimination, harassment, etc. by Petitioners against Respondent. Each party shall bear their

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own costs and attorneys' fees. This settlement is being made without any admission of liability by either party.

5. **Who is Bound**: Petitioners and Respondent, their agents, employees, heirs, successors, personal representatives and assigns are bound by this Stipulation of Settlement. Those who succeed to their rights and responsibilities, such as successors, assigns, heirs, executors, or personal or legal representatives, are also bound. This Stipulation of Settlement is made for the benefit of the Petitioners and Respondents, and all who succeed to their rights and responsibilities, such as any successors and/or assigns.

6. **Entire Agreement**: This Stipulation of Settlement contains the sole and the entire agreement between Petitioners and Respondents, and fully supersedes any and all prior agreements and understandings between the parties.

7. **No Representation**: Petitioners represent and acknowledge that, other than what is set forth in this Stipulation of Settlement, they have not relied upon any representation or statement by any Respondent, or their counsel or representatives, with regard to the subject matter of this Stipulation of Settlement. No other promises or agreements shall be binding unless in writing, signed by the party making said promise or agreement, and expressly stated to be a modification of this Stipulation of Settlement.

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IN WITNESS WHEREOF, the undersigned, each being duly authorized, have executed this Stipulation of Settlement as of the day and year written below:

EMERSON YANG

Dated: 06-30-2011

RACHEL YANG

Dated: 06/30/2011

TENAFLY BOARD OF EDUCATION

By: _____
Lynn Trager, Superintendent of Schools

Dated: July 26, 2011

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K.N. on behalf of minor child A.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAINLAND REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her child, A.N., was not eligible for a free public education in the Mainland Regional School District during the 2010-2011 school year. The petitioner asserted that she and A.N. have been living at various addresses in Northfield – which is located within respondent's district – since she separated from her husband in 2006, and she has not established a permanent address because of continuing financial difficulties. Petitioner maintained that she and A.N. lived primarily with her sister in Northfield during the 2010-2011 school year, but sometimes stayed at the home of petitioner's parents in Ventnor. The Board contends that petitioner and her daughter were not domiciled within the district, and demanded reimbursement for tuition.

The ALJ found, *inter alia*, that: based upon the credible evidence presented by the Board at the OAL hearing, petitioner and her daughter were not domiciled in the Mainland Regional district during the 2010-2011 school year, as they resided primarily in Ventnor with petitioner's parents; petitioner and her family, however, were homeless under New Jersey school law; and, pursuant to *N.J.S.A.* 18A:7B-12(c), tuition for homeless students must be paid by the last district of residence for up to one year. Accordingly, the ALJ concluded that the Board is not entitled to tuition reimbursement as the petitioner's last residence before becoming homeless was in Northfield.

Upon a full and independent review, the Commissioner found that petitioner and her daughter were homeless during the 2010-2011 school year. Thus, neither resolution of the factual dispute regarding exactly where they were residing during that period nor an analysis of their "domicile" during the 2010-2011 school year was necessary for the disposition of this controversy. Accordingly, the Commissioner reversed the Board's residency determination and concluded that no tuition is due from petitioner for the 2010-2011 school year.

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 19, 2011

OAL DKT. NO. EDU 6079-11
AGENCY DKT. NO. 97-4/11

K.N. on behalf of minor child A.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAINLAND REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

This matter was initiated by a *pro se* petition challenging respondent's determination that A.N., petitioner's minor child, was ineligible to receive a free public education in respondent's district for the 2010-2011 school year. Although the petition lacks a specific request for relief and the file does not contain a transcript of the proceedings, the Commissioner concludes that petitioner seeks an order finding that respondent was responsible for A.N.'s education during the 2010-2011 school year. Upon review of the record and Initial Decision of the Office of Administrative Law (OAL),[1] the Commissioner finds that such an order is appropriate and modifies the decision of the Administrative Law Judge (ALJ) as follows.

The facts below are undisputed. In August 2006 – in consequence of a marital separation – petitioner and her two children[2] commenced residence with petitioner's sister in Northfield, a jurisdiction within respondent's school district. In December 2008 petitioner

[1] Neither party filed exceptions.

[2] This controversy concerns the younger of petitioner's two children, the older having completed high school prior to the 2010-2011 school year.

moved from her sister's residence to an apartment in Northfield, where she and her children remained until June 1, 2009. On or about that date petitioner was constrained to vacate the apartment for lack of funds, and return to her sister's Northfield residence. On November 1, 2009, petitioner and her children moved into another apartment in Northfield, but once again had to vacate same for lack of funds – in or about April 2010. Thus, it is established that from August 2006 through at least April 2010 petitioner and A.N. lived in Northfield.

The factual dispute presented to the ALJ at the OAL related to where petitioner and A.N. resided after April 2010. Petitioner maintained that they returned to the home of her sister in Northfield. Respondent contended that surveillance by a third party investigator established that between November 30, 2010 and April 6, 2011, petitioner and A.N. lived with petitioner's parents in Ventnor – part of the Atlantic City High School District.

The Commissioner finds that resolution of the latter factual dispute is not necessary for the disposition of this controversy. Whether petitioner and A.N. were living with the sister in Northfield or the parents in Ventnor – or both – from November 30, 2010 through April 6, 2011 (the period of surveillance ordered by respondent), the fact remains that they were homeless during that period, *i.e.,* they "temporarily lack[ed] a fixed, regular and adequate residence," *N.J.S.A.* 18A:7B-12(c). As such, their district of residence was "the district in which the parent or guardian last resided prior to becoming homeless." *Ibid. See, also, N.J.S.A.* 18A:38-1(f). That district was the respondent's district, since petitioner and A.N. had resided in a Northfield apartment before their return to living with relatives in 2010.[3]

In light of the foregoing, no tuition is due from petitioner for the 2010-2011 school year. The Commissioner makes no findings about the current school year, to which –

[3] As the petitioner was homeless, the issue of domicile does not come into play for the school year in question.

depending upon facts not before the Commissioner – *N.J.S.A.* 18A:38-1(d) may apply. As the ALJ noted, the pleadings did not raise that issue.

Accordingly, the petition is granted and respondent's determination that A.N. was ineligible for a free education in its district for the 2010-2011 school year is reversed.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: **9|19|11**

Date of Mailing: **9|20|11**

[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
OAL DKT. NO. EDU 6079-11
AGENCY DKT. NO. 97-4/11

K.N. ON BEHALF OF
MINOR CHILD, A.N.,
Petitioner,
v.
BOARD OF EDUCATION OF
THE MAINLAND REGIONAL SCHOOL
DISTRICT, ATLANTIC COUNTY,
Respondent.

K.N., petitioner, pro se

Louis J. Greco, Esq., for respondent

Record Closed: July 21, 2011 Decided: August 5, 2011

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE

On April 28, 2011, K.N., mother of A.N., filed a pro se residency appeal pursuant to N.J.S.A. 18A:38-1. Petitioner's daughter attended Mainland Regional High School (Mainland) for the 2010-2011 school year. Mainland contends that petitioner's daughter did not properly reside in the District pursuant to school law and, therefore, must reimburse the District for tuition. For the reasons discussed below, the relief

sought by petitioner is **DENIED.** Petitioner was not a domiciled in the Mainland district for the 2010-2011 school year. However, petitioner was homeless; therefore tuition is not awarded.

PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was filed at the OAL on May 26, 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 matter was heard on July 21, 2011, and the record closed.

FINDINGS OF FACT

Petitioner K.N. is the mother of A.N. A.N. was a student at Mainland High School for the 2010-2011 school year. Mainland seeks tuition from petitioner for A.N. for the 2010-2011 school year. K.N. also has a son, C.N. C.N. graduated from Mainland High School prior to the 2010-2011 school year. No action for tuition is pending for C.N. K.N. separated from her husband, T.N. in 2006.

K.N.'s separation from her husband in 2006 caused significant financial distress. Her living arrangements and employment subsequent to the separation have been chaotic.

From 2006 through 2008 petitioner stayed with her sister, B.M., at 104 [C.] Court in Northfield. Petitioner's daughter, A.N., and son, C.N., resided there as well. From 2006 through 2008 petitioner's daughter, A.N. attended the Northfield Middle School for grades seven and eight. Her son, C.N., attended Mainland Regional High School for grades nine through twelve. The Mainland Regional District encompasses Northfield, Linwood and Somers Point.

Petitioner became tired of residing with her sister in 2008. Everyone was getting on each the other's nerves. On October 16, 2008, petitioner entered into a lease for property known as 7 [J.L.] Drive, Northfield, New Jersey. The lease term was from

December 1, 2008, through November 30, 2009 (P-1:7). Due to lack of adequate income, petitioner was unable to stay for the full lease term. She voluntarily vacated the property on or around June 1, 2009. She moved back in with her sister at 104 [C.] Court in Northfield, from June 1, 2009, through October 20, 2009.

In 2009 petitioner believed she had adequate income to again rent her own property. Petitioner entered into a lease for 4 St. [A.] Drive, Northfield. The lease term was from November 1, 2009, through October 31, 2010 (P-1:33). Again petitioner could not afford to stay for the full lease term. She vacated the 4 St. [A.] Drive property in April 2010. Petitioner asserts that she moved back in with her sister at 104 [C.] Court, Northfield, for the period April 2010 to present (encompassing the 2010-2011 year at issue).

Petitioner informed the Mainland Board of Education that she was separated and experiencing financial difficulties prior to the 2010-2011 school year. Mainland made accommodations for petitioner. Petitioner's son, C.N., was permitted to attend the Mainland Regional High School while petitioner sought to regain income and re-establish housing. Mainland believed that petitioner was staying with her sister in Northfield. Therefore, petitioner's son, C.N., attended Mainland Regional High School for four years. C.N. graduated and now attends college.

Mainland provided accommodations to petitioner's daughter, A.N. However, during the 2010-2011 school year, Mainland became suspicious that petitioner and/or her daughter were not residing at the sister's home in Northfield. Mainland hired an investigator to conduct a surveillance at the sister's home, as well as at the home of petitioner's parents. The parent's home was located at 512 [S.] Avenue, Ventnor, New Jersey. Ventnor is part of the Atlantic City High School district.

On Tuesday, November 30, 2010, the investigator arrived at the Ventnor address at 5:30 a.m. Initial observations were noted, including those individuals active around the property and the types of vehicles situated at or near the property. At 7:26 a.m., a teenage female was observed leaving the home with a backpack. The female walked a

dog for several minutes and went back into the home. At 7:29 a.m., petitioner and her daughter were observed leaving the home. They entered a vehicle and proceeded through Margate, over the Margate Bridge, and on to Mainland Regional High School. They arrived at the Mainland High School at 7:52 p.m. Various photographs were taken of petitioner and her daughter on this date (R-1).

On Thursday, December 2, 2010, the investigator arrived at the same Ventnor address at 6:02 a.m. Initial assessments and observations were noted. A black PT Cruiser was noted outside the property. At 7:26 a.m., petitioner was observed walking a dog around the property. At 7:30 a.m., petitioner and her daughter were observed getting into the black PT Cruiser. They proceeded through Ventnor and Margate, over the Margate Bridge, and arrived and Mainland High School at 7:50 p.m. Various photographs were taken during this period (R-1).

On Tuesday, January 25, 2011, the investigator arrived at the Ventnor property at 6:00 a.m. Initial observations and notations were made. At 7:25 a.m., petitioner's daughter was observed leaving the home with a backpack. She walked a dog for a few minutes and went back into the home. Petitioner and her daughter exited the home and entered a yellow Ford at 7:28 a.m. They proceeded through Ventnor and Margate, went over the Margate Bridge, and arrived at the Mainland High School at 7:49 a.m. Again, photographs of petitioner's activities were obtained (P-1).

On Wednesday, January 26, 2011, the investigator arrived at the Ventnor property at approximately 6:00 a.m. Initial notations and assessments were made. At 7:26 a.m., petitioner and her daughter left the property in a yellow Ford. They went over the Margate Bridge at approximately 7:38 a.m. and arrived at the Mainland High School at approximately 7:52 a.m. Photographs of petitioner and her daughter were also obtained on this date (P-1).

On Monday, April 4, 2011, the investigator conducted a surveillance at the 104 [C.] Court property in Northfield, owned by petitioner's sister. The investigator arrived at the property at approximately 6:04 a.m. There were no familiar vehicles, including the

yellow Ford or black PT Cruiser. At approximately 8:07 a.m., a female who appeared to be in her 40s exited the residence. She had dark hair. It was not petitioner. There was no student with her. The investigator remained at the Northfield property until 8:27 a.m. At no time during the surveillance period was a high school aged female transported from the Northfield property to Mainland Regional High School.

On Wednesday, April 6, 2011, the investigator again engaged in surveillance at the property at 104 [C.] Court, Northfield. He arrived at the property at approximately 6:08 a.m. Initial assessments were made. There were no familiar vehicles. At approximately 7:48 a.m., an unidentified male exited the property. He was removing trash from the home. The investigator remained at the property until 8:26 a.m. Neither petitioner nor her daughter were observed leaving the property or transported to the Mainland Regional High School.

Petitioner asserts that she resides and is domiciled at her sister's house at 104 [C.] Court in Northfield. Petitioner testified that she is at her sister's house the majority of the time. She also indicated that the majority of her belongings were at her sister's house. Evidence supporting petitioner's (Northfield) domicile claim include her driver's license, various bills and statements, tax returns, medical insurance statements, real estate license, and other miscellaneous and sundry items that contain the 104 [C.] Court address in Northfield. (P-1).

Petitioner's sister, B.M., testified. B.M. confirmed that her sister did reside with her at the 104 [C.] Court address for 2010-2011. B.M. was emphatic that sisters should take care of each other. Petitioner is in a time of need and B.M.'s house remains open to her sister whenever needed. B.M. has adequate resources. She has a six bedroom home and most of her children live outside the home. She has adequate living space for her sister and her children.

However, B.M.'s testimony noticeably differed from that of petitioner. B.M. confirmed that petitioner stays at her home only three or four days per week and resides at her parent's house in Ventnor approximately three days per week. Petitioner

freely comes and goes with no particular certainty or schedule. The majority of petitioner's belongings are at her parent's home in Ventnor. This holds true for petitioner's daughter, A.N., as well. There is no formal arrangement, lease or other obligation tying petitioner to her sister's home in Northfield. No such agreement is necessary between sisters.

CONCLUSIONS

Petitioner filed a residency appeal contending that she and her daughter, A.N., were domiciled in Northfield for 2010-2011. Northfield is part of the Mainland school district. The district's investigation suggests that petitioner and her daughter were residing in Ventnor at least on school days for 2010-2011.

Public schools shall be free to persons over five and under 20 who are domiciled within the school district. N.J.S.A. 18A:38-1. Domicile is the place of a person's abode where he or she has the present intention of remaining and to which, if absent, he intends to return. Mercadante v. City of Patterson, 111 N.J. Super. 35, 39 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). A person may have multiple residences, but may have only one true or legal domicile. State v. Benny, 20 N.J. 238, 251 (1955). If there are several residences, domicile is that place which the person regards as his or her true and permanent home. In re Jaffe, 74 N.J. 86, 90-91 (1977). A domicile, once established, continues until it is superseded by a new one. In re Estate of Gillmore, 101 N.J. Super. 77, 87 (App. Div. 1968), certif. denied, 52 N.J. 175 (1968). The question of domicile is one of fact and must be determined on a case by case basis. Lea v. Lea, 18 N.J. 1, 7 (1955).

Some of the more important factors in determining the domicile of a person who has more than one residence are:

(1) The physical characteristics of each [residence],

(2) the time spent and the things done in each place,

(3) the other persons found there,

(4) the person's mental attitude toward each place, and

(5) whether there is or is not an intention, when absent, to return.

Mercadante, supra, 111 N.J. Super. at 39-40.

In the Matter of Unanue, 255 N.J. Super. 362 (Law Div. 1991), the court stated that it is "clear...that a choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." Id. at 376. Persuasive evidence of actual domicile may include:

> Recitals as to domicile in a will, trust, tax return or other formal document, as well as statements to others as to domicile, are evidential of the actual domicile. But they are not all conclusive. They are of value evidentially to the extent that they are not intended to deceive and other proofs support such domicile. Id. at 377.

Intent is the decisive factor in establishing a domicile. It is the manifestation of a person's intent that converts a residence from a mere place in which a person lives to a domicile. State v. Benny, 20 N.J. supra, at 251. In the event a person divides her time between two places where she lives, it is her intention that makes one or the other her domicile. Ibid. A person's true intent is determined by the acts, statements and conduct of the individual as viewed in light of all the circumstances. Collins v. Yancey, 55 N.J. Super. 514 (Law Div. 1959).

Petitioner's conduct is dispositive of her intent. Petitioner and her daughter were confirmed leaving at the Ventnor home on four random occasions, early in the morning during the 2010-2011 year. They arrived at Mainland High School each time. Petitioner and A.N. were not at her sister's home in Northfield on two random occasions during the 2010-2011 year. The investigator performed a total of six random home visits, each on a school day. His findings, on a statistical basis, reveal that petitioner and her daughter were residing at petitioner's parents home in Ventnor. This data was reliable and the investigator's testimony was credible. His testimony was supported by

photographs. Petitioner and B.M. confirmed that petitioner and A.N. stay with K.N.'s parents in Ventnor. Petitioner downplayed the amount of time she spent at her parents to one to two days per month. But the witnesses were sequestered and B.M. indicated that petitioner stays at her parents two to three time per week. According to B.M., the majority of their belongings (petitioner's and A.N.'s) are at the parents' home in Ventnor.

The record suggests that petitioner uses her sister's home as a residence for weekends, as well as for mail, bills and the like. But school days are spent at the Ventnor location. Petitioner admitted she uses her father's car (yellow Ford). Petitioner did not have her own vehicle most of the 2010-2011 school year. The Ventnor home has three bedrooms, sufficient space for petitioner and A.N. Petitioner's brother lives next door to his parents. Petitioner's daughter babysits for petitioner's brother in Ventnor. There is a broader family connection in Ventnor. These factors adequately establish that petitioner was domiciled in Ventnor for the 2010-2011 school year. There was a nexus between petitioner and A.N. living at the Ventnor and A.N. going to school. I am mindful that many of petitioner's records contain her sisters address in Northfield. But petitioner's 2010-2011 actions, conduct, and behavior outweigh the Northfield address on her license and tax returns in terms if domicile under school law.

I **CONCLUDE** that petitioner and her daughter A.N. were domiciled in Ventnor for the 2010-2011 school year.

TUITION REIMBURSEMENT AND HOMELESSNESS

Mainland seeks tuition reimbursement in the amount of $12,348 for the 2010-2011 school year. (R-2). I **CONCLUDE** that petitioner does not owe tuition for the 2010-2011 school year.

This record indisputably established that petitioner is experiencing financial problems. She is a realtor working in an extraordinarily poor economy and is separated. She has no home of her own. She is living between the homes of her parents and sister. This is not a tuition subterfuge case. Petitioner vacated two leased

properties due to the lack of income. She has moved between the leased properties, her sister's home and her parent's home during the last two years.

A homeless child is one who lacks a fixed, regular and adequate residence. N.J.S.A. 18A:7B-12; N.J.A.C. 6A:17-2.3. If the child is determined to homeless, the district where the parent or guardian last resided shall be the district of residence. N.J.S.A. 18A:7B-12(c).

N.J.S.A. 6A:17-2.3(a) sets forth several factors to be used in determining homelessness. One such factor is when the family resides with "relatives or friends with whom the homeless child is temporarily residing out of necessity because the family lacks a regular or permanent residence of its own." N.J.A.C. 6A:17-2.3(a)3. N.J.S.A. 18A:38-1(d) sets forth the criteria for determining eligibility for a free public education when a child is homeless. The statute states, in part:

> d. Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but any person who has had or shall have his all-year-round dwelling place within the district for **one year** or longer shall be deemed to be domiciled within the district for the purposes of this section;
>
> [Emphasis added]

Here, petitioner had no fixed or permanent home of her own in 2010-2011. She lived between her sister's home in Northfield and her parents' home in Ventnor. Indeed petitioner's last fixed and regular residence was in Northfield in 2009. Petitioner leased property at 4 St. [A.] Drive, Northfield on November 1, 2009, and vacated it in April 2010. Petitioner was a continuous Northfield resident for several years prior to 2009 as is evident from prior leases and temporary arrangements with her sister. As a homeless family in 2010-2011 tuition must be paid by the last district of residence for one up to one year. N.J.S.A. 18A:38-1(d); N.J.S.A. 18A:7B-12(c). In this instance Northfield was the last district of residence.

This resolves petitioner's residency appeal as well as Mainland's claim for tuition for the 2010-2011 school year. The issue of A.N.'s high school arrangements for the 2011-2012 is not before me. She will be a senior. Ventnor City is in the Atlantic City High School district. A.N. may seek to attend Atlantic City or Mainland if she meets the residency/domicile requirements or homeless standards for the 2011-2012 school year. In the event a contested case ensues the Atlantic City and Mainland districts should be placed on notice with the right to intervene.

ORDER

I **ORDER** that petitioner was domiciled in Ventnor under school law, for the 2010-2011 school year. I further **ORDER** that Mainland is not entitled to tuition reimbursement from petitioner as the family was homeless under school law, for the 2010-2011 school year. Petitioner's last residence before becoming homeless was in Northfield which is already part of the Mainland 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.

8-5-11 — DATE

W. TODD MILLER, ALJ

Date Received at Agency: 8-5-11

Date Mailed to Parties: 8-5-11

/sd

WITNESSES

For petitioner:

K.N., petitioner, pro se
B.M., petitioner's sister

For respondent:

Mark Pincus, Investigator
Dr. Thomas Baruffi
Javhan O'Neal-Cox

EXHIBITS

For petitioner:

P-1 Petitioner's submission

For respondent:

R-1 Investigation Report
R-2 Invoice for Tuition

393-11

MAUREEN MILLER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

SYNOPSIS

Petitioner appealed the termination of her employment as a secretary in respondent Board's district as the result of a reduction in force (RIF). Petitioner was hired by the district as a secretary on August 13, 2007, and was employed under annual contracts for the 2007-2008, 2008-2009, and 2009-2010 school years. Her annual contract was renewed again for the 2010-2011 school year, but petitioner was notified by letter on July 21, 3010 that her employment would be terminated under the 30 day notice provision in her contract, effective August 26, 2010. She was further informed that her termination was part of a reduction in force (RIF) and that she was not to report to work subsequent to the date of the letter, July 21, 2010. Petitioner contended that she had acquired tenure in her position and had been improperly terminated. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this matter, and the case is ripe for summary decision; the central issue is whether petitioner acquired tenure as a secretary under *N.J.S.A.* 18A:17-2, considering that the Board passed a resolution stating that petitioner's employment was being terminated effective August 26, 2010, but notified her on July 21, 2010 of the termination and directed her not to report to work after July 21, 2010; petitioner followed the directive not to report to work and did not perform any services for the Board after July 21, 2010; the Board effectively dismissed petitioner on July 21, 2010 and merely paid her through August 26, 2010 in accordance with the 30 day notice provision in her contract; petitioner did not work beyond July 21, 2010 and therefore did not satisfy the requirements of *N.J.S.A.* 18A:17-2(b)(1). Accordingly, petitioner did not acquire tenure in her position and has no claim to employment based upon tenure rights. The ALJ ordered the petition dismissed.

The Commissioner concurred with 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.

September 21, 2011

OAL DKT. NO. EDU 11444-10
AGENCY DKT. NO. 555-9/10

MAUREEN MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON 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 requirements of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

Petitioner's exceptions essentially recast and reiterate her arguments advanced before the Administrative Law Judge (ALJ) below. Because it is determined that such arguments were fully considered and addressed by the ALJ in his decision, they will not be revisited here.

Upon full review and deliberation, the Commissioner finds and concludes that summary decision is appropriately granted to the Board. For the reasons cogently presented by the ALJ on pages 4-10 of his decision, the Commissioner concurs that petitioner did not acquire tenure as a secretary because she did not satisfy the requirements of *N.J.S.A.* 18A:17-2 in that she did not *serve as a secretary in the district for three consecutive calendar years*.

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: 9|21|11

Date of Mailing: 9|21|11

* 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 11444-10
AGENCY DKT. NO. to 555-9/10

MAUREEN MILLER,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CLINTON, HUNTERDON COUNTY,

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Kerri A. Wright, Esq., appearing for respondent (Porzio, Bromberg and Newman, P.C., attorneys)

Record closed: July 25, 2011 Decided: August 9, 2011

BEFORE **JOHN R. FUTEY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an Initial decision issued relative to a summary decision motion filed by respondent, the Board of Education of the Township of Clinton (hereinafter " Clinton"). The matter was originally transmitted to the Office of Administrative Law as a contested

case on October 20, 2010 under the provisions of N.J.S.A. 52:14B -1 through 15 and N.J.S.A. 14F – 1 through 13. A response to the motion was submitted by petitioner, Maureen Miller (hereinafter "Miller"), and a reply brief thereto was received from Clinton, as a result of which oral argument was heard on May 3, 2011. At that time, certain legal concerns at the hearing were further identified which required additional research. Upon completion of those issues, the matter closed for purposes of the instant motion on July 25, 2011. Further, based upon that analysis, an initial decision is being rendered since it is dispositive of all the relevant issues raised by the transmittal in this matter.

The essential issue is whether petitioner Miller, who was hired as a secretary with respondent Clinton on August 13, 2007, acquired tenure under N.J.S.A. 18A:17-2 due to the fact that Clinton passed a resolution stating that Miller's employment would be terminated effective August 26, 2010, even though Clinton notified her on July 21, 2010, that she would be terminated and directed her not to report to work after July 21, 2010, a direction which she followed. A determination of her entitlement to tenure will dictate whether or not she retains any employment rights relative to the instant matter.

STATEMENT OF FACTS

After having considered all of the evidence presented and the arguments advanced regarding the threshold issue in this matter, the following constitute the relevant facts adduced from both sides herein. This matter arises from petitioner Miller's appeal of respondent Clinton's decision to terminate her employment as a secretary with Clinton. On August 13, 2007, Miller began her employment as a secretary with Clinton. See Petition of Appeal, ¶ 1. Clinton renewed Miller's employment contract for the 2008-2009, 2009-2010, and 2010-2011 school years. (J-5). However, on July 21, 2010, the Superintendent of Schools for Clinton, Kevin J. Carroll, wrote a letter to Miller stating that "I am recommending to the Board of Education at its meeting on July 26, 2010 that your employment be terminated, subject to the 30-day provision in your contract. As we discussed, there has been a need to reduce support staff for reasons of economy." See Carroll Cert., Exhibit A. The notice also stated that "you are not to report to work after today (July 21, 2010)" and

"[a]ssuming that the Board accepts my recommendation, your last day of employment will be August 26, 2010, and you will continue to receive salary and benefits through that date." Ibid. On July 26, 2010, Clinton passed a resolution "terminat[ing] the employment of Maureen Miller effective August 26, 2010." (J-1). Miller did not report to work or perform any services for Clinton after July 21, 2010. See Carroll Cert., ¶ 4.

LEGAL DISCUSSION AND ANALYSIS

The tenure of secretarial employees of school districts is governed by N.J.S.A. 18A:17-2. Under that provision, a secretary shall hold her/his position under tenure after either "[t]he expiration of a period of employment of three consecutive calendar years in the district or such shorter period as may by fixed" by the employing school district or "[e]mployment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year, an academic year being the period between the time when school opens in the district after the general summer vacation and the beginning of the next succeeding summer vacation."[i] Ibid. A secretary must meet the precise conditions of N.J.S.A. 18A:17-2 in order to acquire tenure. Given v. Bd. of Educ. of the East Windsor Reg'l Sch. Dist., 1978 S.L.D. 43.

The pleadings submitted and the oral argument received with reference to the instant motion center squarely upon whether or not Clinton acted appropriately in causing the denial of tenure for Miller. This being soley an issue of law, it is appropriate for summary disposition. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995). The inquiry is "whether the evidence presents a sufficient disagreement to require submission to [a fact finder] or whether it is so one-sided that one party must prevail as a matter of law. Liberty Surplus Insurance Corp., Inc. v. Nowell Amoroso, P.A., 189 N.J. 436 (2007). For the reasons stated hereinafter, I **FIND** that Clinton's motion for summary decision should be granted on the issue of whether Miller acquired tenure as a secretary because Miller did not satisfy the requirements of N.J.S.A. 18A:17-2. Moreover, I also **FIND** that leave of absence principles are inapplicable here.

[i] The New Jersey Supreme Court has interpreted "calendar year" in a similar statutory provision, N.J.S.A. 18A:28-5. as "compris[ing] any period of 365 days or 12 calendar months." Bd. of Educ. of Twp. of Manchester v. Raubinger, 78 N.J. 90, 99-100 (1963).

Clinton appropriately relies on Canfield v. Bd. of Educ. of the Bor. of Pine Hill, 51 N.J. 400 (1968), for the proposition that Miller did not acquire tenure in her secretarial position. In Canfield, the Supreme Court reversed the judgment of the Appellate Division in Canfield v. Bd. of Educ. of the Bor. of Pine Hill, 97 N.J. Super. 483 (App. Div. 1967) and instead adopted the dissenting opinion of Judge Gaulkin of the Appellate Division. In Canfield, Pine Hill appealed the decision of the State Board of Education granting tenure to a teacher, Gladys Canfield. Canfield, supra, 97 N.J. Super. at 485. Ms. Canfield had been employed by Pine Hill under four one-year contracts. Ibid. The first contract provided that her employment began on November 19, 1962. Ibid. The fourth and final contract provided for her employment from September 1, 1965, to June 30, 1966, and included a mutual clause for termination based on 60 days' notice to the other party. Ibid. On November 15, 1965, Pine Hill notified Ms. Canfield that Pine Hill was "terminating your teaching contract, to take effect immediately, with this District, giving you two months pay." Ibid. As the Appellate Division explained, Pine Hill did not dispute that because Ms. Canfield's "employment began on November 19, 1962, 'employment on November 20, 1965 would provide for her the equivalent of more than three academic years within the period of four consecutive academic years beginning with the 1962-1963 academic year" under the tenure statute, but instead argued that Ms. Canfield did not acquire tenure because her employment effectively ended on November 15, 1965, the date on which Pine Hill provided Ms. Canfield with 60 days' notice pursuant to her contract and five days before she would have acquired tenure if she had remained in Pine Hill's employ. Id. at 486. The Appellate Division affirmed the State Board's decision and determined that Ms. Canfield had acquired tenure, finding that Ms. Canfield's employment did not end on November 15, 1965, but instead 60 days from that date on which she received her termination notice, and that as such, Ms. Canfield was still employed and acquired tenure on November 20, 1965. Ibid. According to the Appellate Division,

> The notice served by the Pine Hill board on November 15, 1965 "terminating [petitioner's] teaching contract, to take effect immediately," clearly was ineffective to that end in face of the express contract provision permitting its termination only on 60-days' prior notice. There is no

> suggestion or claim that there is any authority for terminating the contract other than the reserved right to terminate. To exercise that right on November 15, 1965 required service of notice of termination at least 60 days prior thereto.
> [Id. at 487.]

However, in his dissent, Judge Gaulkin, disagreed with the majority's reasoning:

> It seems to me that tenure and contract are two different concepts; tenure is statutory and arises only by passage of the time fixed by the statute, and the discharge of an employee before the passage of the required time bars tenure, even if the discharge is in breach of an employment contract which, if not breached, would have extended to a date which would have given tenure . . .
>
> I contend that the contract was properly cancelled (subject to plaintiff's right to 60 days' salary) when the notice of cancellation was given but, even if the contract did not become legally terminated until 60 days after the notice of dismissal, the notice itself barred tenure.
>
> Finally, I find nothing in the contract which justifies the conclusion reached by my Brothers that the dismissal was not effective on the date the notice of dismissal was given. If this were a dispute arising out of the breach of the contract itself in which the question of the date of termination of the contract became important, it might be held that the termination was not effective until 60 days after the notice of dismissal was given . . .
>
> But here we are concerned not with the contract or its breach, but with the status of the plaintiff - - i.e., tenure. It seems to me that the dismissal immediately stopped the running of the time to tenure.
>
> [Id. at 490-93.]

While Canfield addressed a teacher's claim for tenure, and before me is a secretary's claim for tenure, the same principles enunciated by Judge Gaulkin apply. In particular, as Judge Gaulkin concluded in Canfield, "[t]he contract was properly cancelled (subject to plaintiff's right to 60 days' salary) when the notice of cancellation was given but, even if the contract did not become legally terminated until 60 days after the notice of dismissal, the notice itself barred tenure." Thus, Judge Gaulkin determined that the notice effectively barred Canfield from acquiring tenure. Here, as in

Canfield, Clinton, through the letter from Superintendent Carroll, provided Miller with timely and unequivocally clear notice that she was going to be dismissed. She was told not to report to work after July 21, 2010, and in fact, she did not work after July 21, 2010. While Clinton passed a resolution on July 26, 2010, "terminat[ing] the employment of Maureen Miller effective August 26, 2010," Miller was timely notified of her dismissal on July 21, 2010 and did not work thereafter. That Clinton paid Miller through August 26, 2010 in accordance with her contract does not change the conclusion that, under Judge Gaulkin's reasoning, "the notice itself barred tenure." Thus, Miller could not have acquired tenure because she did not serve as a secretary for three consecutive calendar years.[ii]

Miller improperly relies on McGlynn v. Bd. of Educ. of the Twp. of Lumberton, 1972 S.L.D. 28, and Emmett v. Bd. of Educ. of the Twp. of Gloucester, EDU 2379-05, Initial Decision (October 27, 2005), rejected, Comm'r. (December 6, 2005) <http://lawlibrary.rutgers.edu/oal.search.html>, for her argument that she acquired tenure as a secretary. In McGlynn, the Commissioner held that McGlynn, a superintendent who had been promoted from his tenured position as principal, had acquired tenure as a superintendent under N.J.S.A. 18A:28-6 because he served as superintendent until after the "expiration of a period of employment of two consecutive calendar years in the new position" as then provided by the statute.[iii] Id. at 33. Under the facts of that case, McGlynn was employed as a superintendent by Gloucester under two one-year contracts, the first of which ran from July 1969 to June 30, 1970, and the second of which ran from July 1970 to June 30, 1971. Id. at 29. In April 1971, Gloucester notified McGlynn that he would not be offered a new contract for the 1971-1972 school year. However, McGlynn worked as superintendent until the end of the day on June 30, 1971. While Gloucester argued that the April notice effectively barred

[ii] Moreover, Miller's 2010-2011 contract provides that "[i]t is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other 30 days' notice in writing of intention to terminate the same." Thus, despite the wording of Clinton's July 26, 2010, resolution, the July 21, 2010, letter from Superintendent Carroll arguably terminated Miller's employment by providing her with 30 days' written notice in accordance with her contract. Either way, Clinton provided Miller with notice barred Miller's acquisition of tenure.

[iii] In 1991, the Legislature passed and Governor James Florio signed into law an act "concerning certain supervisory personnel in local school districts, amending N.J.S.A. 18A:17-15, N.J.S.A. 18A:17-20 and N.J.S.A. 18A:28-5, and supplementing Title 18A of the New Jersey Statutes." L. 1991, c. 267. While that act replaced lifetime tenure with contract tenure for superintendents, N.J.S.A. 18A:17-20.4, which is part of that act, states that "[a] superintendent of

McGlynn from acquiring tenure as a supervisor, the Commissioner found that "[t]he day of June 30 [1971] marked 'the expiration of a period of employment of two consecutive calendar years in the new position' that [McGlynn] held," and that McGlynn had acquired tenure by serving as superintendent through that date. Id. at 33. In reaching this conclusion, the Commissioner relied on Judge Gaulkin's opinion in Canfield, supra, and explained that:

> [Gloucester] could have removed [McGlynn] from the performance of his duties as Superintendent at any time prior to June 30, 1971, and thus barred a new tenure status for him, even though the contract was in full force and effect, if it had chosen to do so. Under such circumstances, [Gloucester] would have been obligated to pay [McGlynn's] salary according to the contracts terms, but [McGlynn's] service as Superintendent would have ceased and he would not have acquired a new tenure status. As Justice Gaulkin said, 'such a (discharge) before the "passage of the required time"' would have barred the new tenure right.
> However . . . [Gloucester] did not discharge petitioner from the performance of his duties. Tenure therefore accrued at the expiration of a period of two calendar years, and [Gloucester's] letter of April 27, 1971, in which it stated that [McGlynn] would 'not be offered' a contract for the 1971-1972 school year is of no effect.
>
> [Id. at 33-34.]

Here, unlike in McGlynn, Clinton actually removed Miller from her position prior to the date on which she would have acquired tenure and she thus did not perform her duties for the required period under N.J.S.A. 18A:17-2. Thus, unlike in McGlynn, but consistent with Canfield, such a discharge barred Miller's right to tenure.

In Emmett, a secretary was employed by Gloucester under various contracts from January 1, 2002 to June 30, 2002; July 1, 2002 to June 30, 2003; July 1, 2003 to June 30, 2004; and July 1, 2004 to June 30, 2005. According to the facts found by Judge John Schuster III, "[o]n December 13, 2004, [Gloucester] adopted a resolution terminating [Emmett] from her secretarial position effective December 31, 2004.

---

schools promoted from within a district shall retain all tenure rights accrued in any position which was previously held by the superintendent in the district." Ibid.

[Emmett] physically worked until 2:00 p.m. on December 23, 2004 when the winter holiday commenced." Judge Schuster had concluded that Emmett "must be denied tenure benefits because she was noticed prior to her third year completion of employment that she was being terminated." The Commissioner disagreed, finding that,

> [T]he facts reveal that [Gloucester] – notwithstanding a clear intent to deny [Emmett] tenure by voting to terminate her employment on notice-concomitantly acted to establish an effective termination date that permitted [Emmett] to remain a [Gloucester] employee sufficiently long to complete the years of service required for her to obtain tenure pursuant to law, in this case N.J.S.A. 18A:17-2(b)1.

Here, like in McGlynn, the facts in Emmett are distinguishable. In Emmett, Gloucester allowed Emmett to work despite providing her with notice of her dismissal and she would have served in her position until December 31, 2004 but for the winter break. Thus, in Emmett, as determined by the Commissioner, "regardless of its intent, [Gloucester] in fact enabled [Emmett] to fulfill the statutory condition for tenure acquisition." Here, however, in the matter before me, Clinton prevented Miller from serving in her position for three years by both (1) providing her with notice of her dismissal and (2) by telling her not to report to work after July 21, 2010, more than three weeks before the date on which Miller would have satisfied the requirements of N.J.S.A. 18A:17-2(b)(1). [Emphasis supplied].

Based upon the foregoing,I **FIND** that the actions and intent of Clinton are the same. While the resolution indicated that Miller's employment was to be terminated effective August 26, 2010, on July 21, 2010, the Superintendent Carroll nonetheless notified her that she was being dismissed and directed her not to come in to work thereafter. Clinton merely paid Miller through August 26, 2010 in accordance with the 30 day notice provision in her contract. Thus, Superintendent Carroll effectively barred Miller from acquiring tenure through his notice and direction to Miller on July 21, 2010, and Miller did not meet the tenure requirements of N.J.S.A. 18A:17-2.

I further **FIND** that leave of absence principles are inapplicable here. In Kletzkin v. Bd. of Educ. of the Bor. of Spotswood, 136 N.J. 275 (1994), the Supreme Court addressed the effect of leaves of absence on tenure rights. In Kletzkin, the Court held

that a teaching staff member who took a leave of absence pursuant to N.J.S.A. 18A:30-2.1 acquired tenure under N.J.S.A. 18A:28-5 despite actively serving as a learning disabilities teacher consultant and school psychologist for only twenty-eight months. In Kletzkin, petitioner served as a learning disabilities teacher consultant and school psychologist continuously from January 1986 until November 1988, when she took an involuntary leave of absence from her duties due to a work-related injury. Id. at 277. In April 1989, while petitioner was on her leave of absence, Spotswood terminated her employment. Ibid. In finding that petitioner had acquired tenure in January 1989 despite taking leave pursuant to N.J.S.A. 18A:30-2.1 before she served thirty months, the Court stated that "[a] teacher's employment begins with the actual performance of service, not the date of hiring. Further, 'continuous employment' exists notwithstanding the 'mere occasional absence of a teacher by reason of illness or excuse.'" Id. at 279 (quoting Bd. of Educ. v. Wall, 119 N.J.L. 308, 309-10 (Sup.Ct. 1938)). The Court found support for its holding that petitioner remained employed during her involuntary sick leave from the language of N.J.S.A. 18A:30-2.1, stating that,

> [b]y referring to a teacher on sick leave as an 'employee,' and by requiring a school board to 'pay to such employee the full salary or wages for the period of such absence,' the statute recognizes that teachers are employed while on sick leave.
>
> [Id. at 280.]

The Court also noted that,

> [w]e recognize the importance of a probationary period as a means of assessing a teacher's performance . . . [u]nder the unusual circumstances of this case, we conclude that Kletzkin's brief period of sick leave did not deprive the Board of its opportunity to evaluate her before she acquired tenure. In another case, a more extended leave of absence could lead to a different result.
>
> [Id. at 280-81.]

In the instant matter, application of leave of absence principles would be inappropriate because Miller (1) did not take a leave of absence; rather, she was fired, (2) did not work after receiving notice of her termination, and (3) was paid after she

stopped working at Clinton in accordance with her contract. The time between her last day of work and the last day on which she was paid is not comparable to "the 'mere occasional absence of a teacher by reason of illness or excuse.'"

CONCLUSION AND ORDER

Based on all of the foregoing and after having given deference to the arguments advanced by both sides, I **CONCLUDE** that respondent timely determined to terminate the employment of Miller and so notified her prior to the time when she would have otherwise been vested with school secretarial tenure accrual, notwithstanding the fact that she received employment benefits pursuant to her contract for a period of time thereafter. Miller did not acquire tenure as a secretary because Miller did not satisfy the time requirements of N.J.S.A. 18A:17-2.

I further **CONCLUDE** that Miller has failed to demonstrate any entitlement based upon leave of absence principles for the reasons stated hereinabove. I make all of these findings and form all of these conclusions by a preponderance of a credible evidence.

It is therefore, **ORDERED** that the motion for summary decision by Clinton is **GRANTED** and the appeal of Maureen Miller be, and hereby, is **DISMISSED** for all the reasons stated hereinabove.

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, 2011
DATE

JOHN R. FUTEY, ALJ

Date Received at Agency: August 10, 2011

Date Mailed to Parties:

#394-11A

STATE BOARD OF EXAMINERS DKT. NO. 0708-203
AGENCY DKT NO. 1-1/11A

IN THE MATTER OF THE	:	
REVOCATION OF THE CERTIFICATES	:	COMMISSIONER OF EDUCATION
OF ERIN MARKAKIS BY THE	:	DECISION
STATE BOARD OF EXAMINERS.	:	

Order of Revocation by the State Board of Examiners, May 12, 2011

For the Respondent-Respondent, Edward Cridge, Esq.

For the Petitioner-Respondent State Board of Examiners, Joyce D. Williams, 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 respondent's appeal of the State Board of Examiners' Order of May 12, 2011, revoking her teacher of elementary school in grades K-5 certificate of eligibility with advanced standing and her teacher of elementary school in grades K-5 certificate. In her submission, the respondent does not dispute her conduct, but rather requests that the matter be transmitted to the Office of Administrative Law for hearing to determine if her conduct was a product of her psychiatric illness justifying a penalty less than revocation.

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 respondent 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 respondent 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 submissions, the Commissioner concludes that respondent received the due process to which she was entitled. In her November 24, 2010 response to the Order to Show Cause issued by the Board, the respondent argued that revocation was too severe a penalty based on her documented psychiatric illness that she alleges contributed to her conduct. The Board also provided the respondent with an additional opportunity to appear before the Board to provide testimony on the penalty issue or to submit further documentation, but the respondent declined to do so. The Board was fully aware of the respondent's psychiatric illness and its potential impact on her behavior when it issued the May 12, 2011 revocation Order; further, the undisputed evidence in the record provides ample support for the Board's revocation decision. 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.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/19/11

Date of Mailing: 9/21/11

*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
ERIN MARKAKIS	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 1011-109

At its meeting of September 16, 2010, the State Board of Examiners (Board) reviewed information received from the Office of Criminal History Review indicating that respondent Erin Markakis was convicted in August 2010 of third degree Assault by Auto. Markakis currently holds a Teacher of Elementary School in Grades K-5 Certificate of Eligibility With Advanced Standing, issued in July 2006 and a Teacher of Elementary School in Grades K-5 certificate, issued in April 2007. Upon review of the above information, the Board voted at its meeting of October 28, 2010 to issue Markakis an Order to Show Cause why her certificates should not be revoked.

The Board sent Markakis the Order to Show Cause by regular and certified mail on November 3, 2010. The Order provided that Markakis must file an Answer within 30 days. Markakis responded on November 24, 2010.

In her Answer, Markakis indicated that she was currently serving 364 days in County jail as the result of her conviction. (Answer, p. 1.) She stated that she was ashamed about what had occurred and was thankful that those injured in the accident were able to recover. (Answer, p. 1.) Markakis also noted that she had apologized directly to those she had injured. (Answer, p. 1.) She added that even though she was guilty, she did not believe her teaching certificates should be revoked, since the accident did not take place during the school year and did not affect her teaching. (Answer, p. 2.) Markakis claimed that, at the time of the accident, she was suffering from an eating disorder that had resurfaced and that she was being treated for anxiety and depression. (Answer, p. 3.) She stated that the night before the accident, she drank all night and

took medication for her depression. (Answer, p. 3.) She drank the next morning and took additional medication and got into her car three hours later. (Answer, p. 3.) After her accident, Markakis was diagnosed with Bipolar Disorder and began receiving treatment for her alcohol abuse, bipolar disorder and eating disorder. (Answer, p. 4.) She stated that she completed a total of six months of rehabilitation programs and planned to continue with AA and individual therapy. (Answer, p. 4.) She added that she never intended on hurting anyone. (Answer, p. 4.) Markakis stated that she was a very good teacher who had a wonderful relationship with students, parents and other teachers. (Answer, p. 5.) She added that many parents wrote letters of support for her when she was facing criminal charges. (Answer, p. 5.) She noted that revoking her certificates "would take a qualified and caring teacher out of the schools, and it would tear the life right out of me." (Answer, p. 6.) Markakis claimed that she did not know what she would do if she could no longer teach. (Answer, p. 6.) She reiterated that she was "a very good person who made a very poor choice" and had no intentions of ever hurting anyone. (Answer, p. 7.)

Thereafter, pursuant to *N.J.A.C.* 6A:9-17.7(e), on December 10, 2010, the Board sent Markakis a hearing notice by regular and certified mail. The notice explained that it appeared that no material facts were in dispute. Thus, Markakis 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 found just cause to take action against her certificates. It also explained that upon review of the charges against her and the legal arguments tendered in her defense, the Board would determine if her offense warranted action against her certificates. Thereupon, the Board would also determine the appropriate sanction, if any.

Markakis was also offered the opportunity to appear before the Board to provide testimony on the sanction issue. The certified mail receipt was signed and returned and the regular mail copy was not returned. Markakis did not file a response.

The threshold issue before the Board in this matter is whether Markakis' conviction constitutes conduct unbecoming a certificate holder. At its meeting of March 31, 2011, the Board reviewed the allegations in the Order to Show Cause and Markakis' Answer. The Board determined that no material facts related to Markakis' offense were in dispute since she admitted that she had been convicted of the offense charged and had been sentenced accordingly. 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 Markakis' conviction, as set forth in the Order to Show Cause, represents just cause to act against her 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. The Commissioner has long held that teachers serve as role models for their students. "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, 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 instance, Markakis' conviction for third degree Assault by Auto demonstrates behavior that falls far short of a role model.

Furthermore, her offense is egregious enough to warrant revocation. It is well established that the Board has the right to revoke a certificate where the teacher was involved in criminal activities, even if the activities were unrelated to the classroom. *See Cox v. State Board of Examiners,* (App. Div. Docket No. A-3527-81T3) (November 18, 1983); *State Board of Examiners v. Krupp,* 3 *N.J.A.R.* 285 (1981). In this case, Markakis has been convicted of a crime that is predicated upon her having knowingly driven while under the influence of drugs and alcohol and caused serious bodily injury to others. A teacher's behavior outside the classroom may be relevant in determining that person's qualifications and continued fitness to retain her certificates. *In re Grossman*, 127 *N.J. Super.* 13, 30 (App. Div. 1943), cert. denied 65 *N.J.* 292 (1974).

Finally, notwithstanding Markakis' contentions of rehabilitation, this is not the proper context for such considerations. The purpose of this proceeding is "to permit the individual certificate holder to demonstrate circumstances or facts to counter the charges set forth in the Order to Show Cause, not to afford an opportunity to show rehabilitation." *See In the Matter of the Revocation of the Teaching Certificate of Gloria Jackson by the State Board of Examiners*, 96 *N.J.A.R.* 2D (EDE) 1, 16 *aff'd,* App. Div. Dkt. No. A-1246-96T5 (September 9, 1997) citing *In the Matter of the Revocation of the Teaching Certificate of James Noll*, State Bd. of Examiners decision (February 7, 1990). Thus, the fact that Markakis has undergone treatment for her bipolar disorder, alcohol abuse and eating disorder, while a step in the right direction, has no bearing on the decision the Board of Examiners must make with regard to her certification.

Accordingly, on March 31, 2011, the Board voted to revoke Erin Markakis' Teacher of Elementary School in Grades K-5 Certificate of Eligibility With Advanced Standing and her Teacher of Elementary School in Grades K-5 certificate. On this 12th day of May 2011 the Board voted to adopt its formal written decision and it is therefore ORDERED that the revocation of Markakis' certificates be effective immediately. It is further ORDERED that Markakis 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 the provisions of *N.J.S.A.* 18A:6-38.4.

#395-11R

OAL DKT. NO. EDU 4145-09
AGENCY DKT. NO. 26-2/09
APP. DIV. DKT. NO. A-2969-09T2

REMOND PALMER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT	:	DECISION

For the Petitioner: Raymond L. Hamlin, Esq.
Hunt, Hamlin & Ridley

For the Respondent: Jennifer L. Campbell, Deputy Attorney General
(Paula T. Dow, Attorney General of New Jersey)

This controversy arose when petitioner challenged the 2008 determination of the Criminal History Review Unit of the New Jersey Department of Education (respondent) that, pursuant to *N.J.S.A.* 18A: 6-7.1, petitioner's 1989 South Carolina conviction for possession of cocaine disqualified him for school employment in New Jersey. On January 12, 2010, the Commissioner upheld respondent's determination. Petitioner filed an appeal with the Appellate Division of the Superior Court on February 25, 2010, and on April 28, 2011 respondent moved for a remand of the case to the Commissioner for supplementation of the record. The Appellate Division responded with an order granting remand on May 13, 2011.

On June 28, 2011, respondent submitted its brief. The only supplementation to the record to be found therein appears to be citations to certain South Carolina Statutes governing pardons. After being granted two extensions to file opposition papers, petitioner has failed to reply to respondent's brief.

The legal issue currently before the Commissioner is the same as it was in 2009, *i.e.,* whether petitioner's South Carolina conviction bars him from school employment in New Jersey. The controlling statute – *N.J.S.A.* 18A: 6-7.1 – provides, in pertinent part, that:

> an individual . . . shall be permanently disqualified from employment or service under this Act if the individual's criminal history record check **reveals a record of conviction for . . .**
>
> **b. an 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 . . .**
> (Emphasis added.)

Since petitioner has a record of conviction for cocaine possession, *N.J.S.A.* 18A:6-7.1 bars him from employment in New Jersey schools.

In his 2009 arguments to the Commissioner, petitioner had contended that a 2002 pardon for the possession offense that he had received from the South Carolina Department of Probation, Parole and Pardon removed him from the reach of *N.J.S.A.* 18A: 6-7.1. The Commissioner, however, rejected that argument. Citing *Donald v. Jones,* 445 *F.* 2d, 601 (5th Cir), *cert. den.* 404 *U.S.* 992 (1971), the Commissioner noted that a pardon is an act of executive clemency – as opposed to a judicial determination of innocence – and does not render a person innocent of the offense for which he or she was convicted; nor does a pardon eliminate the record of conviction. *Remond Palmer v. New Jersey State Department of Education, Criminal History Review Unit,* Commissioner's Decision No. 8-10, decided January 12, 2010, at 1-2. *See, also,* Opinion of the South Carolina Attorney General, dated November 18, 1988 and entitled "Effect of Pardoned Conviction on Multiple Offender Acts." 1988 *S.C. AG LEXIS* 220.

Moreover, the Commissioner noted that South Carolina does not allow expungement of convictions for possession of such controlled dangerous substances as cocaine. *Palmer, supra,* at 2. Indeed, in South Carolina, where an individual has been pardoned, the

underlying conviction still exists and will not be expunged. *See,* Opinion of the South Carolina Attorney General, *supra*, citing 1984 *OP.ATTY.GEN.* 268; 1980 *OP.ATTY.GEN.* 110. Petitioner consequently still has a record of conviction for drug possession, which New Jersey courts have no jurisdiction to expunge. That record of conviction triggers *N.J.S.A.* 18A: 6-7.1(b) and bars petitioner from employment in New Jersey Schools.

Thus, the record – as supplemented by respondent – still upholds the determination of the Criminal History Review Unit of the Department of Education that, pursuant to *N.J.S.A.* 18A: 6-7.1(b), petitioner's South Carolina conviction disqualifies him from obtaining a teaching certificate in New Jersey. The Commissioner once again determines that the petition must be dismissed.[1]

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/22/11

Date of Mailing: 9/22/11

[1] It appears that in its May 13, 2011 remand order, the Appellate Division dismissed petitioner's appeal without prejudice. The Commissioner infers from said dismissal that the Appellate Division elected not to retain jurisdiction.

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

#396-11E

OAL DKT. NO. EDU 09886-11
AGENCY DKT. NO. 234-8/11

MUSTANGS TRAVEL SPORTS CLUB,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, UNION COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
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.[1]

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/22/11

Date of Mailing: 9/22/11

[1] The Commissioner is in full accord with the ALJ's determination that petitioner's challenge to the Board's classification of the petitioner as a Group Four organization is untimely filed pursuant to *N.J.A.C.* 6A:3-1.3(i).

[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

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 09886-11
AGENCY DKT. NO. 234-8/11

MUSTANGS TRAVEL SPORTS CLUB,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAINSIDE, UNION COUNTY

Respondents.

Polina Dostalik, Esq., for petitioner Mustangs Travel Sports Club (Bressler, Amery & Ross, attorneys)

Lisa Grosskreutz, Esq., for respondent Borough of Mountainside Board of Education (Machado Law Group)

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the Borough of Mountainside Board of Education's (Board) determination that Petitioner is an organization that is not qualified to use school athletic fields for free. On August 18, 2011, petitioner filed a Motion for Emergent Relief classifying petitioner as a "Group One" organization pursuant to Policy 7510 and

granting it free use of school athletic fields. In support of the motion, petitioner submitted a verified petition, brief and certification of service. Respondents submitted a letter brief opposing petitioner's motion on August 25, 2011. Oral argument on the motion was held on August 26, 2011.

FACTUAL DISCUSSION

I **FIND** the following to be the **FACTS** of this matter.

The Board is a Type II school district comprised of the all of the area within the municipal boundaries of the Borough of Mountainside. The Board has the authority to regulate the use of its land and facilities, including athletic fields, pursuant to N.J.S.A. 18A:20-20. The Board has a policy to govern the use of school facilities, namely Mountainside Board of Education Policy 7510. "Policy 7510"

Policy 7510 classifies organazations seeking to use school facilities including athletic fields as Group One, Group Two, Group Three or Group Four. Group One organizations are defined as including school affiliated groups, "youth service groups and youth and recreation groups under the auspices of the township recreation program or other non-profit organazations ..." Group One organazations are permitted to use school facilities for free, provided that the membership of the group is comprised of not less than seventy five percent Mountainside residents and is open for participation by any Mountainside citizen.

Group Four organazations are defined as including "private, for profit organazations such as sports camps, private ball clubs and teams." Group Four organazations are accessed fees according to a fee schedule included in Policy 7510.

On March 22, 2011, at a public meeting, the Board granted petitioner Group One status under Policy 7510. Two of the board member's votes were qualified pending receipt of further documentation. At a subsequent public meeting on April 5, 2011, the Board decided to re-evaluate its decision to grant petitioner Group One status. At the

conclusion of that meeting the Board revoked petitioner's Group One status and classified them as a Group Four organization because petitioner's selection process was not open to all Mountainside residents.

On April 18, 2011, Petititioner received a letter from Dr. Jeanette Baubles (Baubles), Chief School Administrator for Mountainside confirmining petitioner's Group Four status as well as stating the dates and times of availability for the field at Beechwood School. The letter also stated Petitioner would have to pay $100 per hour with a minimum of three hours use of the facility. Petitioner was not prohibited from using the field, but it was required to pay a fee.

Petitioner demanded the Board reconsider its decision in a letter dated April 28, 2011. Petitioner and Baubles communicated by email on May 2, 2011, May 3, 2011 and May 15, 2011. On May 19, 2011, petitioner was informed by email from David Rubin (Rubin), General Counsel for the Board, that the Board's saw no reason to revisit its decision. On August 18, 2011, petitioner filed a Motion for Emergent Relief.

LEGAL DISCUSSION AND CONCLUSIONS

The Commissioner has specifically addressed the time in which a petitioner must initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws. N.J.A.C. 6A:3-1.3(i) requires that:

> 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.

Such a rule represents a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws and falls within the scope of authority granted to the Commissioner. Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 582 (1993). 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. Ibid. Its purposes are 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 and to penalize dilatoriness and serve as a measure of repose by giving security and stability to human affairs. Id. at 587.

The ninety-day requirement is to be strictly construed and is mandatory. Wise v. Bd. of Educ. of the City of Trenton, EDU 160-00, Comm'r (September 11, 2000), aff'd, State Bd. of Educ. (January 3, 2001), <http://lawlibrary.rutgers.edu/oal/search.html>. A petitioner must file a petition within ninety days from a notice of adverse action and not within ninety days of her exhaustion of other avenues and mechanisms she might have employed in seeking renewal of employment. Id. Informal attempts to resolve a dispute do not serve to toll the statute of limitations. See Kaprow supra at 588. Also, the ninety-day period for filing a petition of appeal commences when a petitioner learns of facts that would enable her to file a timely claim. Id. at 587. "Adequate 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." Ibid. (citation omitted).

Petitioner was informed by letter dated April 18, 2011, that the Board determined it was a Group Four organization and was required to pay fees to use the fields. Petitioner had until July 17, 2011 to file its petition within 90 days. Petitioner's demand for reconsideration does not toll the ninety days. The Board, in fact, did not reconsider petitioner's classification as a Group Four organization as stated in the email of David Rubin.

I **CONCLUDE** that the petition of appeal failed to comply with the requirements of N.J.A.C. 6A:3-11.3(i).

Even if the petition of appeal had been timely filed 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 it will suffer irreparable harm because of the following: it has had significant difficulty finding practice fields for practice and games; the children have been excluded from community field use for the majority of the season: and petitioner has suffered and will continue to suffer significant financial harm.

Petitioner has not shown that it will suffer irreparable harm. Petitioner can use the the fields for a fee, Group Four organazations are not precluded from using the fields. Petitioner has been either paying for the use of facilities or has found facilities that are free. Petitioner has participated in organized baseball. If it is later determined that petitioner should be classified as a Group One organization, it could receive monetary compensation.

I **CONCLUDE** that petitioner has failed to shoulder its burden of proving that it will suffer irreparable harm.

Petitioner claims that there is a likelihood of prevailing on the metits of the underlying claim. The Petition of Appeal states that petitioner accepts every child. The Board's position, as stated in the letter of Rubin is that petitioner's selection process more closely resembled a private club than one truly open to all Mountainside youth. One reason for the Board's decision is that petitioner does not hold open try-outs for all interested Mountainside residents. The letter goes on to state that the Board based its decision on what was stated by the Mustang representatives at the meeting. There is an issue as to whether petitioner's selection process is open to all interested Mountainside residents. Based on the above, petitioner has not proved that it has the likelihood of prevailing on the merits of the underlying claim.

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. I further **ORDER** that since the petition was not timely filed the peititon is **DISMISSED**.

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.

August 26, 2011

DATE

KIMBERLY A. MOSS, ALJ

ljb

#397-11

BETHLEHEM TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BETHLEHEM, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought to compel the respondent Board to set a school year start date on or after September 1 rather than the August 24, 2011 date which petitioner alleged was arbitrarily imposed. A motion for emergent relief in this matter was denied on July 8, 2011 as untimely. The case continued in the Office of Administrative Law (OAL) to determine whether any further issue needed to be decided, and to conclude the case.

The ALJ found that: the threshold matter in this case is the timeliness of petitioner's appeal; the Board took action at a public meeting on September 21, 2010 which established August 24, 2011 as the first day of school for the 2011-2012 school year; pursuant to *N.J.A.C.* 6A:3-1.3(i), the 90-day window for filing a challenge to this action was December 20, 2010; and petitioner did not file the instant petition until June 3, 2011. Accordingly, the ALJ concluded that the petition was clearly out of time, and dismissed the petition.

Upon consideration, the Commissioner concurred with the ALJ that the petition was not timely filed in accordance with *N.J.A.C.* 6A:3-1.3(i) and dismissed the 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.

September 22, 2011

OAL DKT. NO. EDU 6313-11
AGENCY DKT. NO. 142-6/11

BETHLEHEM TOWNSHIP EDUCATION ASSOCIATION, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF BETHLEHEM, HUNTERDON 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 concurs with the Administrative Law Judge that the petition was not timely filed in accordance with *N.J.A.C.* 6A:3-1.3(i). Accordingly, the petition of appeal is dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/22/11
Date of Mailing: 9/22/11

* 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 6313-11

AGENCY DKT. NO. 142-6/11

BETHLEHEM TOWNSHIP EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF BETHLEHEM TOWNSHIP, HUNTERDON COUNTY,

Respondent.

William P. Hannan, Esq, for petitioner (Oxfeld Cohen, PC, attorneys)

Joseph L. Roselle, Esq., for respondent (Schenk, Price, Smith and King, attorneys)

Record Closed: August 4, 2011 Decided: August 9, 2011

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE and PROCEDURAL HISTORY

The Bethlehem Township Education Association, petitioner, sought emergent relief ordering respondent Bethlehem Township Board of Education to set a start date for the 2011-2012 school year after September 1, 2011. Petitioner filed a petition of

appeal and brief with the Commissioner of Education Bureau of Controversies and Disputes on June 3, 2011. Petitioner simultaneously filed an Unfair Practice Charge with the Public Employment Relations Commission, which is still pending. On June 6, 2011, the Bureau transmitted the 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. On June 8, 2011, respondent filed a brief and certification in Answer to the petition. The case was scheduled for oral argument on the emergent relief application on June 9, 2011. On that date, I heard oral argument and closed the record.

On July 8, 2011, the Acting Commissioner of Education adopted the Order of the OAL and denied the requested relief. On July 22, 2011, counsel for the respondent Bethlehem Board of Education inquired as to whether the Acting Commissioner's decision dismissed the matter as time-barred. By letter dated July 22, 2011, Kathleen Duncan, Director of the Bureau of Controversies and Disputes, responded that the case is still open and that the administrative law judge will need to issue an initial decision in order to resolve the entire case. On August 4, 2011, I held a conference call with counsel to provide them with the opportunity to state whether any other issue needed to be decided. This decision now concludes the case before the OAL.

CONCLUSIONS OF LAW

As a threshold matter, respondent argued that the petition is procedurally deficient and has been filed outside of the ninety-day limitations period within which claims may be brought before the Commissioner. N.J.A.C. 6A:3-1.3(i) sets forth that 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, . . . which is the subject of the requested contested case hearing." I concluded that because the Board took the action at a public meeting, petitioner was aware as early as September 21, 2010, that the first day of school for Bethlehem students would be August 24, 2011. Ninety days from that date is December 20, 2010. When petitioner did not file the present petition until June 3, 2011, almost nine months after the petitioner had notice of the Board's action, the petition was clearly out of time.

Therefore, in accordance with N.J.A.C. 6A:3-1.3(i), I **CONCLUDED** that the petition must be dismissed as out of time. By decision of July 8, 2011, the Acting Commissioner agreed and denied the application for emergent relief.

ORDER

It is hereby **ORDERED** that petitioner's application for emergent relief is **DENIED** and the 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.

August 9, 2011
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: August 11, 2011

Date Mailed to Parties: August 11, 2011

cmo

#399-11

NINOSKA L. LAZO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	DECISION
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 alleged incident in which two children were left on her bus in September 2010 when petitioner failed to conduct the mandated visual inspection at the end of her route. Petitioner asserted that she could explain how the children came to be left on the bus during a hearing. Respondent filed a motion for summary decision.

The ALJ found, *inter alia*, that: on September 7, 2010, petitioner drove a school bus upon which several children had been placed; at the end of her route, petitioner failed to perform the mandated visual inspection of the vehicle's interior before exiting, as is required by *N.J.S.A.* 18A:39-28; as a result, petitioner failed to discover that two children remained on the bus; petitioner contended that she could explain how the children had come to be left on the bus, but presented no evidence in opposition to the facts showing that two children remained on the bus at the end of the route. Accordingly, the ALJ granted summary decision in favor of respondent, ordered a six-month suspension of the petitioner's school bus endorsement – which is the mandatory penalty for a first offense pursuant to *N.J.S.A.* 18A:39-28 – and dismissed the petition.

Upon full review and consideration of the record, the Commissioner concurred with the ALJ that the Office of Criminal History Review is entitled to summary decision in this matter. 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 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.

September 26, 2011

OAL DKT. NO. EDU12143-10
AGENCY DKT. NO. 564-9/10

NINOSKA L. LAZO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	DECISION
RESPONDENT.	:	

Petitioner appeals the Department of Education's determination to suspend the S endorsement to her driver's license for a period of six months – in consequence of her failure to insure that all children had left her bus at the end of her assigned run. Upon review of the record and Initial Decision of the Office of Administrative Law,[1] both of which reveal that petitioner concedes that two children remained on the bus at the end of her route, the Commissioner adopts the Initial Decision for the reasons set forth therein.

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 endorsement and to notify petitioner's employer that she is ineligible for the period of suspension for continued employment as a school bus driver.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/26/11

Date of Mailing: 9/27/11

[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 12143-10
AGENCY DKT. NO. 564-9/10

NINOSKA L. LAZO,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,

Respondent.

Eralides E. Cabrera, Esq., for petitioner

Bryant Lawrence Horsley, Jr., Deputy Attorney General, for respondent (Paula T. Dow, Attorney General of New Jersey, attorney)

Record Closed: June 24, 2011 Decided: August 10, 2011

BEFORE **IMRE KARASZEGI, JR.**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Respondent, the New Jersey Department of Education, Criminal History Review Unit, intends to suspend Ninoska L. Lazo's "S" endorsement on her driver's license,

permitting her to drive a school bus. Respondent alleges that on or about September 7, 2010, Lazo left two children on the bus she had been driving after completion of her afternoon bus route. Lazo does not dispute that the children were in fact in the bus at the end of her route; however, Lazo contends that she should be provided an opportunity to be heard prior to her suspension.

On September 15, 2010, respondent advised Lazo by letter that it intended to suspend her "S" endorsement to operate a school bus, pursuant to N.J.S.A. 18A:39-29(a). Lazo filed a Petition of Appeal with the Commissioner of Education on September 23, 2010. On November 8, 2010, the Department of Education transmitted the matter to the Office of Administrative Law (OAL).

Respondent has moved for summary decision, pursuant to N.J.A.C. 1:1-12.5. In support of its motion, respondent has presented a brief and relied on the sworn petition of appeal submitted by Lazo. Respondent has also presented Lazo's handwritten statement in Spanish and its English translation provided by petitioner's counsel. In arguing on behalf of its motion, respondent contends that the sole factual issues material to the matter are that children were left on Lazo's bus at the end of her route on September 7, 2010. Respondent argues that the materials offered in support of the motion establish these facts and that Lazo has failed to affirmatively deny or dispute respondent's findings. As such, Lazo has failed to demonstrate the existence of any genuine dispute of material fact that might defeat summary decision and require a full evidentiary hearing.

Petitioner's response to the motion asserts that no conclusion can be made pursuant to N.J.S.A. 18A:39-29(a) without first providing petitioner with an opportunity to be heard. Petitioner's counsel argues in his opposition brief to respondent's motion to dismiss:

> Respondent hammers away at the fact that the Petitioner did not contest that the children were in the bus at the end of the route. Petitioner cannot contest this issue because the children were in fact in the bus. She was truthful in her statement and she answered the questions that were posed

> to her at that moment, however, there were other facts that revolve around this issue and that have not yet been allowed to surface and that can only come to light at a hearing. If the Petitioner is allowed to testify she can explain how it came to be that the children were or had to be delivered by her at the school office and how it came to pass that she did not see the children in the bus even after a visual inspection.

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 procedure is equally applicable in judicial as well as executive-branch administrative cases. N.J.A.C. 1:1-12.5. The standards for determining motions for summary judgment are contained in Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74–75 (1954). The Supreme Court later elaborated on the motion and its standard in Brill v. Guardian Life Insurance Co. of America, 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, 17 N.J. 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, 142 N.J. at 530. Brill concludes that the same analytical process used to decide motions for a directed verdict is used to resolve

summary decision motions. "[T]he 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 one 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 (1986)). 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" that would apply at trial on the merits, whether that is the preponderance-of-the-evidence standard 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.

While Lazo claims that summary decision should not be granted because she has not had an opportunity to testify at a hearing, the very essence of the summary decision procedure is that in the appropriate case, the issues necessary to decide the case, that is, the material facts to which the applicable law must be applied to decide the matter, are not themselves the subject of any genuine dispute and, therefore, there is no need for a testimonial proceeding. If, instead, the examination of the affidavits, certifications, and documentary evidence offered for and against the motion shows that there is a genuine dispute about any of these material facts, the motion must fail.

The statutes that underlie the proposed suspension are very simple in form and there are few facts that must exist to form the basis for action thereunder. N.J.S.A. 18A:39-28 only requires that a driver perform a visual inspection at the end of a route. The reason for this is stated as the need to assure that no pupil is left on the bus. Thus, evidentially it is necessary to establish that Lazo was the driver of the bus in question. Neither party disputes the fact that Lazo was the driver of the bus. If a child is left on the bus at the end of the route, the driver is to be suspended. Evidentially, that a child is left on a bus at the end of a 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. The evidence offered by the Department of Education, in the form of its brief, Lazo's petition of appeal and her statement, demonstrates that the children were placed on the bus, transported on the bus and later found on the bus at the end of petitioner's route. There is clearly a prima facie showing that the children were not properly removed from the bus. Taken together, this evidence leads to a seemingly inevitable conclusion that the children were left on the bus at the end of the route, obviously without having been discovered there by the driver whose duty it was to inspect the bus and assure that no child was left behind.

It is the responsibility of a party opposing a motion for summary decision to present certifications or other evidence to establish the existence of genuine disputes of material fact. Lazo has offered nothing in response to the respondent's evidence. Lazo simply asserts that she could explain how this situation "came to be" at a hearing. In the context of a motion for summary decision, the failure of the opposing party to offer any evidence whatsoever to support a dispute of material fact in opposition to the motion can itself support the grant of the motion. It is only where a properly pled motion is opposed by evidence of genuine dispute of the material issues that the motion is doomed. Lazo has not offered anything to suggest that there is any genuine issue as to the material facts of this case. She does not dispute that the children were in fact in the bus at the end of her route. Her contention that she should be provided an opportunity to be heard prior to her suspension because there are other facts that can "only come to light at a hearing" ignores the very purpose of a motion for summary decision.

Based upon the evidence offered by the respondent, and giving all reasonable inferences to the opposing party, Lazo, I **FIND** that on September 7, 2010, Ninoska L. Lazo drove a school bus upon which several children had been placed. I **FIND** that at the end of her route, Lazo failed to properly inspect the bus, as required by N.J.S.A. 18A:39-28. As a result, she failed to discover that two children remained on the bus. I **FIND** that the evidence presented by Lazo does not establish any material facts in dispute. 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, the arguments offered by the

respondent amply support summary decision in its favor. And given the mandatory nature of the penalty for a first-time violator of the mandate, the six-month suspension is the only outcome where the violation is proven. N.J.S.A. 18A:39-29(a). Respondent's motion for summary decision is hereby **GRANTED** and it is hereby **ORDERED** that the 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.

Aug. 10, 2011
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 8/10/11

Date Mailed to Parties: AUG 11 2011

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

id

APPENDIX

LIST OF WITNESSES

For Petitioner

None

For Respondent

None

LIST OF EXHIBITS IN EVIDENCE

For Petitioner

None

For Respondent

None

OAL DKT. NO. EDU 12068-09
AGENCY DKT. NO. 246-9/09

DIA BELL AND MARGARET CANNIN-SCHUCK,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LONG BEACH ISLAND CONSOLIDATED SCHOOL DISTRICT, OCEAN 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 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9|26|11

Date of Mailing: 9|28|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12068-09

AGENCY DKT. NO. 246-9/09

DIA BELL AND MARGARET CANNIN-SCHUCK,

Petitioners,

v.

BOARD OF EDUCATION OF THE LONG BEACH ISLAND CONSOLIDATED SCHOOL DISTRICT, OCEAN COUNTY,

Respondent.

Richard A. Friedman, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum & Friedman attorneys)

Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: July 26, 2011 Decided: August 9, 2011

BEFORE **ANA C. VISCOMI**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 23, 2009, 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. Petitioners alleged that respondent's action to reduce their

respective work hours was arbitrary and capricious and made in bad faith. They also alleged breach of contract, thereby creating a potential jurisdictional issue herein.

The parties have agreed to a settlement and have prepared a Settlement Agreement and General Release indicating the terms thereof, which is attached and fully incorporated herein. (J-1, J-2). A review of that agreement indicates that it is being submitted to resolve this pending matter as well as a complaint filed in the Superior Court of New Jersey, Ocean County, under Docket No. OCN-L-3668-09. This Initial Decision Settlement addresses the petition filed with Commissioner of Education and subsequently transmitted to the OAL. All other matters addressed in the agreement are not within the purview of OAL jurisdiction.

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. (J-1, J-2). The Board of Education has passed a resolution adopting the agreement. (R-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.

August 9, 2011
DATE

ANA C. VISCOMI, ALJ

AUG 16 2011

Date Received at Agency:

AUG 16 2011

Date Mailed to Parties:
/lam/lmz

SETTLEMENT AGREEMENT
AND
GENERAL RELEASE

2011 JUL 26 A 11:32

THIS GENERAL RELEASE (hereinafter referred to as the "Release") is made by Dia Bell and Margaret Cannin-Schuck (hereinafter referred to as "Bell and Schuck") and includes themselves and their legal representatives and agents), for the benefit of Board of Education of Long Beach Island Consolidated School District, Ocean County (hereinafter collectively referred to as "the Board" including its administrators, officers, agents and employees) for the following purposes and with reference to the following background.

BACKGROUND

A. Bell and Schuck have been employed by the Board of Education of Long Beach Island Consolidated School District; and

B. Bell and Schuck filed a complaint in the Superior Court of New Jersey, Ocean County, under Docket No. OCN-L-3668-09, and filed a Petition of Appeal with the Commissioner of Education under Agency Docket No. 246/09, alleging that their terms of employment for the 2009-2010 school year were altered inappropriately; and

C. Long Beach Island Board of Education has denied, and continues to deny, any and all liability for all the claims alleged by Bell and Schuck and denies that the Board violated any laws or engaged in any unlawful or wrongful conduct, or discriminated or retaliated against Bell and Schuck or deprived them of any of their rights in any manner; and

D. The Parties desire to make a full and final settlement and release of any and all of Bell and Schuck's claims and potential claims against the Board, asserted or unasserted, based on any facts, events, acts or omissions, whether now known or unknown which were or could have been asserted in the Superior Court Complaint and in the Petition of Appeal,

without any judicial, administrative, or arbitral resolution of them, and without any admission with respect to any issues presented or capable of being presented by any of the parties, provided that this Settlement Agreement and Release is limited to things and events which occurred prior to the signing of this Release by Bell and Schuck. NOW THEREFORE, in consideration of the mutual promises contained herein and for other good and valuable consideration, and intending to be legally bound, the undersigned parties agree as follows:

1. Non-Admission. This Release is not, and shall not in any way be considered or construed as, an admission by the Board of any tortious conduct, or of any violation of any law, common law, or federal, state or local statute or regulation, or of any alleged duty owed by the Board to Bell and Schuck, or of any unlawful or wrongful acts whatsoever by the Board as detailed herein. The payment hereunder is made solely to avoid the inconvenience and cost of litigation and to resolve completely all of Bell and Schuck's claims asserted against the Board. In addition, the signing of this release by Bell and Schuck shall not be deemed an admission or suggestion by them that their claims were not meritorious or warranted.

2. Cooperation. Bell and Schuck agree to cooperate fully in connection with any steps required to be taken as part of their obligations under this Release.

3. Withdrawal and Dismissal of Lawsuit and Promise Not to Sue.

Bell and Schuck understand that the Superior Court of New Jersey will dismiss their lawsuit with prejudice as to the Board. Bell and Schuck further understand that their Petition before the Commissioner of Education will be dismissed with prejudice. They agree not to re-file, revive, or reopen this lawsuit or petition in any way, provided that the terms of this Release are implemented and honored by the Board. Bell and Shuck further agree not to file any

other charges, suits, claims, causes of action, etc with any state or federal agency against the Board and/or any of its employees, agents or administrators, whether in their individual capacity, or in their capacity as employees, agents or administrators of the Board provided that their Agreement as set forth herein is limited to things and events which occurred prior to the signing of this Release by Bell and Schuck, whether now known or unknown.

Bell and Schuck further agree that neither they, nor any person, organization, agency, or other entity on their behalf, will file, charge, claim or sue, or cause to be filed, charged, claimed or sued, any other lawsuit, legal proceeding, action, or claim of any nature with any court or agency (including any action for damages, attorneys fees, injunction, declaratory, monetary, equitable or other relief) against the Board, and/or any of its employees, agents or administrators, whether in their individual capacity, or in their capacity as employees, agents or administrators of the Board, provided that their Agreement as set forth herein is limited to things and events which occurred prior to the signing of this Release by Bell and Schuck, whether now known or unknown.

Bell and Schuck understand and agree that they will not be considered a prevailing party under any statute, common law, or otherwise as a result of this Release.

4. Payment. In exchange for the promises, Releases, and legal releases stated herein, and other good and valuable consideration, Bell will be paid a lump sum of Fourteen Thousand ($14,000.00) Dollars, and Schuck will be paid a lump sum of Twelve thousand five hundred ($12,500.00) Dollars, each within thirty (30) days from the effective date of this Release and approval of this Settlement Agreement and Release by the Commissioner of Education. The effective date of this Release shall be the date upon which the Board receives Bell's and

Schuck's signed and notarized Releases, W-9 forms, and child-support search reports for each from their attorney.

The payment of these sums shall not be subject to any withholding and will be taxed in the manner of a 1099 form, and all payments shall be made to Zazzali, Fagella, Nowak, Kleinbaum & Friedman, to be held in trust for Bell and Schuck, and it shall be the responsibility of Bell and Schuck's counsel to distribute to Bell and Schuck their portion of their settlement proceeds to them.

5. General Release and Waiver of all Claims by Bell and Schuck. In consideration for the payment and promises described in paragraph 4 and elsewhere in this Agreement, Bell and Schuck fully release and forever discharge the Board and all of the Board's former or current directors, officers, administrators, trustees, shareholders, agents, supervisors, employees, attorneys, legal representatives, servants, insurers, any and all benefit plans, and successors and assigns, and each of them (herein "the Board" and/or "Released Parties"), of and from any and all grievances, claims, actions, causes of action, contracts, agreements, compensation, pay, promises, charged, judgments, obligations, rights demands, debts, sums of money, salaries, wages, benefits claims which could have been asserted in the Superior Court Complaint or in the Petition of Appeal, for anything which occurred prior to the signing of this Release, claims for back pay, front pay, physical injury, pain, suffering, emotional distress, compensatory damages, punitive damages, attorneys' fees, expenses, costs, losses, liabilities, damages, or accountings of whatever nature, whether known or unknown, disclosed or undisclosed, asserted or unasserted, in law or equity, contract or tort or otherwise (herein collectively designated "Claim" or "Claims"), including, but not limited to, any and all Claims of race, gender, sex, age and national origin discrimination, retaliation, and any and all tort

Claims or Claims for general damages, and any and all Claims arising under, made, regarding, or involving: any federal, state or local laws or under the common law; violations of any federal, state or local fair employment practices or civil rights laws or ordinances; Claims for personal injury, defamation, wrongful conduct, or wrongful discharge; the Civil Rights Acts of 1866 and 1871, as amended, 42 U.S.C. §1981; the Civil Rights Act of 1964, as amended, including Title VII; the Americans with Disabilities Act; the Age Discrimination in Employment Act, as amended; the Older Workers Benefit Protection Act; the Employee Retirement Income Security Act; the Fair Labor Standards Act; the Rehabilitation Act of 1973; Executive Order 11246; the federal Family and Medical Leave Act; state family and medical leave acts; Claims alleging retaliation under the Worker's Compensation Act; the Unemployment Compensation Law; the National Labor Relations Act, as amended; any and all state wage payment and collection laws; Pickering's policies, practices,; any Claims arising out of any relationship, including employment relationship, between or among Bell and Schuck and the Released Parties predating the effective date of this Agreement; and all Claims for employment, reemployment, or reinstatement of employment to the Board; any and all grievances, or demands for mediation or arbitration, or Claims or demands under the Board's policies and procedures; and any and all Claims asserted, or which could have been asserted, in a federal court Lawsuit referenced above, including any Claims against any current or former agents or employees of the Board, provided that nothing herein shall reduce or limit any rights that Bell or Schuck may have under any individual employment contract, collective bargaining agreement, or Board policy as an employee of the Board or as members of a collective bargaining unit which are separate and apart from the allegations, claims and related facts set forth in the Complaint and Petition for Appeal.

Subject to the above limitation, Bell and Schuck hereby specifically waive, release and give up all Claims and rights, as described in the preceding paragraph, whether now known or unknown, which they have or may have, against the Board and the Released Parties, based on any fact, act, event, or omission, whether now known or unknown, provided that their Agreement as set forth herein is limited to things and events which occurred prior to the signing of this Release by Bell and Schuck.

6. Bell and Schuck's Tax Liability. Bell and Schuck agree that they will be responsible for the taxes on all income to them as may be required pursuant to applicable Federal or State tax requirements, and as such will reimburse the Board for any and all tax liabilities that may be assessed on monies paid to Bell and Schuck for which they are required to pay taxes on but fail to do so.

7. Full and Complete Settlement. Bell and Schuck agree that the payment described in paragraph 4 will be received by Bell and Schuck in full and complete settlement of all known or unknown claims, asserted or unasserted, of Bell and Schuck, which are included in Paragraph 5 above, allegedly arising out of any and all conduct or actions of the Board and/or their relationship with the Board, provided that their Agreement as set forth herein is limited to things and events which occurred prior to the signing of this Release by Bell and Schuck, whether now known or unknown.

8. Attorneys' Fees, Costs, and Expenses. Each party shall be responsible solely for its or their own attorneys' fees, costs and expenses. Bell and Schuck specifically waive all claims to attorneys' fees, costs, and expenses from the Board including all claims for reimbursement to the Board or its attorneys, agents, or family members, of any attorneys' fees, costs, and expenses they have incurred or paid, or which were paid on their behalf.

9. Applicable Law and Severability. This Release shall be governed by and construed in accordance with the laws of New Jersey, except where federal law controls. Should any provision of this Release be declared or determined by any Court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of this Release.

10. Non-Disparagement, Confidentiality and Non-Disclosure. Bell and Schuck agree that the terms, conditions, facts of payments, and underlying facts of the settlement stated in this Agreement, but not the fact that the case was settled, shall be held confidential to the extent permissible by law, subject to the following provisions.

Bell and Schuck may disclose the terms of this Agreement to their immediate family members, accountants, financial advisors, attorneys, to the Long Beach Island Education Association and its officers, and to the NJEA Legal Services Plan, provided that disclosure to the NJEA Legal Services Plan shall be limited to the extent required by the NJEA Legal Services Plan. In addition, Bell and Schuck may make disclosure when legally obligated to do so.

Bell and Schuck further agree that they will refrain from making negative or disparaging comments or remarks about the Board and its members, or issue statements regarding the Board, as relating to the facts alleged in the Petition of Appeal and in the Complaint, and related circumstances, referenced herein.

The Board agrees, and its members agree that it and they will refrain from making negative or disparaging remarks about Bell and Schuck, or issue statements regarding Bell and Schuck, relating to the facts alleged in the Petition of Appeal and in the Complaint, and related circumstances, referenced herein.

11. Entire Release. This Release sets forth the entire Release between the parties and fully supersedes any and all prior Releases or understandings between the parties.

12. Bell and Schuck's Certification. Bell and Schuck agree, certify, acknowledge, and represent: (a) that they have been and are hereby advised in writing to consult with an attorney of their choice and at their expense, prior to signing this Release; (b) that they have had adequate time and opportunity to review and discuss, and has reviewed and discussed, all of the terms and sections of this Release thoroughly with their attorney; (c) that their attorney has explained this entire Release to them; (d) that they do not waive any rights or claims that may arise after the date this Release becomes effective; (e) that they shall have, and were given, at least twenty-one (21) days to consider the terms and conditions of this Release before signing it; (f) that their waiver of Claims and this General release shall not become effective until the effective date of this Release.

If Bell or Schuck decides to sign this Release before the expiration of the 21-day period, Bell or Schuck, as the case may be, specifically acknowledges that they have had sufficient time and opportunity to review and understand the terms of this Release and specifically waive and give up any rights for additional time or opportunity to review it.

BELL AND SCHUCK FURTHER CERTIFY, ACKNOWLEDGE, AND REPRESENT THAT THEY ARE ABLE TO READ AND UNDERSTAND ENGLISH, THAT THEY UNDERSTAND ALL OF THE PROVISIONS HEREIN, WITH THE ADVICE AND ASSISTANCE OF THEIR ATTORNEY, AND THAT THEY MAKE THIS RELEASE KNOWINGLY AND VOLUNTARILY. BELL AND SCHUCK ACKNOWLEDGE THAT THEY HAVE NO PHYSICAL OR MENTAL PROBLEM, CONDITION, OR IMPAIRMENT OF ANY KIND WHICH HAS INTERFERED WITH THEIR ABILITY TO READ AND

UNDERSTAND THE MEANING OF THIS RELEASE OR ITS TERMS. BELL AND SCHUCK FURTHER REPRESENT THAT IN SIGNING THIS RELEASE, THEY DO NOT RELY ON ANY PROMISES OR REPRESENTATIONS MADE BY ANYONE OTHER THAN THOSE STATED SPECIFICALLY HEREIN.

13. Full Knowledge. Bell and Schuck further warrant, represent, and agree that in signing this Release, they do so with full knowledge of any and all rights which they may have with respect to the Board, other Released Parties, or the Lawsuits.

14. Headings. The headings of the paragraphs in this Release are for convenience only and shall not control or affect the meaning or construction of, or limit the scope or intent of, any of the provisions of this Release.

15. Effective Date. The effective date of this Release shall be the date upon which the Board receives the signed and notarized Releases from Bell and Schuck, W-9 forms, and child-support search reports from their attorney.

14. Board Ratification. It is explicitly understood that this Agreement is subject to Board Ratification.

THIS REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK.

Page 10 is intentionally left blank.

IN WITNESS WHEREOF, and intending to be legally bound, Margaret Cannin-Schuck has executed this General Release as of the date set forth below.

Dated: 3-1-11

By Margaret Cannin-Schuck
Margaret Cannin-Schuck

STATE OF NEW JERSEY]
]§:
COUNTY OF]

I CERTIFY that on 3-1-11, 2010, Margaret Cannin-Schuck personally came before me and acknowledged under oath, to my satisfaction, that she is the person named herein and personally affixed her signature thereto, signing sealing and delivering this document as her act and deed.

Sworn to and Subscribed
before me this 1st day
of March, 2010. RAF 3/1/11

Name: AN ATTORNEY AT Law of NJ
A Notary Public of the State of New Jersey

AFFIX SEAL

SETTLEMENT AGREEMENT
AND
GENERAL RELEASE

THIS GENERAL RELEASE (hereinafter referred to as the "Release") is made by Dia Bell and Margaret Cannin-Schuck (hereinafter referred to as "Bell and Schuck") and includes themselves and their legal representatives and agents), for the benefit of Board of Education of Long Beach Island Consolidated School District, Ocean County (hereinafter collectively referred to as "the Board" including its administrators, officers, agents and employees) for the following purposes and with reference to the following background.

BACKGROUND

A. Bell and Schuck have been employed by the Board of Education of Long Beach Island Consolidated School District; and

B. Bell and Schuck filed a complaint in the Superior Court of New Jersey, Ocean County, under Docket No. OCN-L-3668-09, and filed a Petition of Appeal with the Commissioner of Education under Agency Docket No. 246/09, alleging that their terms of employment for the 2009-2010 school year were altered inappropriately; and

C. Long Beach Island Board of Education has denied, and continues to deny, any and all liability for all the claims alleged by Bell and Schuck and denies that the Board violated any laws or engaged in any unlawful or wrongful conduct, or discriminated or retaliated against Bell and Schuck or deprived them of any of their rights in any manner; and

D. The Parties desire to make a full and final settlement and release of any and all of Bell and Schuck's claims and potential claims against the Board, asserted or unasserted, based on any facts, events, acts or omissions, whether now known or unknown which were or could have been asserted in the Superior Court Complaint and in the Petition of Appeal,

J-1

without any judicial, administrative, or arbitral resolution of them, and without any admission with respect to any issues presented or capable of being presented by any of the parties, provided that this Settlement Agreement and Release is limited to things and events which occurred prior to the signing of this Release by Bell and Schuck. NOW THEREFORE, in consideration of the mutual promises contained herein and for other good and valuable consideration, and intending to be legally bound, the undersigned parties agree as follows:

1. Non-Admission. This Release is not, and shall not in any way be considered or construed as, an admission by the Board of any tortious conduct, or of any violation of any law, common law, or federal, state or local statute or regulation, or of any alleged duty owed by the Board to Bell and Schuck, or of any unlawful or wrongful acts whatsoever by the Board as detailed herein. The payment hereunder is made solely to avoid the inconvenience and cost of litigation and to resolve completely all of Bell and Schuck's claims asserted against the Board. In addition, the signing of this release by Bell and Schuck shall not be deemed an admission or suggestion by them that their claims were not meritorious or warranted.

2. Cooperation. Bell and Schuck agree to cooperate fully in connection with any steps required to be taken as part of their obligations under this Release.

3. Withdrawal and Dismissal of Lawsuit and Promise Not to Sue.

Bell and Schuck understand that the Superior Court of New Jersey will dismiss their lawsuit with prejudice as to the Board. Bell and Schuck further understand that their Petition before the Commissioner of Education will be dismissed with prejudice. They agree not to re-file, revive, or reopen this lawsuit or petition in any way, provided that the terms of this Release are implemented and honored by the Board. Bell and Shuck further agree not to file any

other charges, suits, claims, causes of action, etc with any state or federal agency against the Board and/or any of its employees, agents or administrators, whether in their individual capacity, or in their capacity as employees, agents or administrators of the Board provided that their Agreement as set forth herein is limited to things and events which occurred prior to the signing of this Release by Bell and Schuck, whether now known or unknown.

Bell and Schuck further agree that neither they, nor any person, organization, agency, or other entity on their behalf, will file, charge, claim or sue, or cause to be filed, charged, claimed or sued, any other lawsuit, legal proceeding, action, or claim of any nature with any court or agency (including any action for damages, attorneys fees, injunction, declaratory, monetary, equitable or other relief) against the Board, and/or any of its employees, agents or administrators, whether in their individual capacity, or in their capacity as employees, agents or administrators of the Board, provided that their Agreement as set forth herein is limited to things and events which occurred prior to the signing of this Release by Bell and Schuck, whether now known or unknown.

Bell and Schuck understand and agree that they will not be considered a prevailing party under any statute, common law, or otherwise as a result of this Release.

4. Payment. In exchange for the promises, Releases, and legal releases stated herein, and other good and valuable consideration, Bell will be paid a lump sum of Fourteen Thousand ($14,000.00) Dollars, and Schuck will be paid a lump sum of Twelve thousand five hundred ($12,500.00) Dollars, each within thirty (30) days from the effective date of this Release and approval of this Settlement Agreement and Release by the Commissioner of Education. The effective date of this Release shall be the date upon which the Board receives Bell's and

Schuck's signed and notarized Releases, W-9 forms, and child-support search reports for each from their attorney.

The payment of these sums shall not be subject to any withholding and will be taxed in the manner of a 1099 form, and all payments shall be made to Zazzali, Fagella, Nowak, Kleinbaum & Friedman, to be held in trust for Bell and Schuck, and it shall be the responsibility of Bell and Schuck's counsel to distribute to Bell and Schuck their portion of their settlement proceeds to them.

5. General Release and Waiver of all Claims by Bell and Schuck. In consideration for the payment and promises described in paragraph 4 and elsewhere in this Agreement, Bell and Schuck fully release and forever discharge the Board and all of the Board's former or current directors, officers, administrators, trustees, shareholders, agents, supervisors, employees, attorneys, legal representatives, servants, insurers, any and all benefit plans, and successors and assigns, and each of them (herein "the Board" and/or "Released Parties"), of and from any and all grievances, claims, actions, causes of action, contracts, agreements, compensation, pay, promises, charged, judgments, obligations, rights demands, debts, sums of money, salaries, wages, benefits claims which could have been asserted in the Superior Court Complaint or in the Petition of Appeal, for anything which occurred prior to the signing of this Release, claims for back pay, front pay, physical injury, pain, suffering, emotional distress, compensatory damages, punitive damages, attorneys' fees, expenses, costs, losses, liabilities, damages, or accountings of whatever nature, whether known or unknown, disclosed or undisclosed, asserted or unasserted, in law or equity, contract or tort or otherwise (herein collectively designated "Claim" or "Claims"), including, but not limited to, any and all Claims of race, gender, sex, age and national origin discrimination, retaliation, and any and all tort

Claims or Claims for general damages, and any and all Claims arising under, made, regarding, or involving: any federal, state or local laws or under the common law; violations of any federal, state or local fair employment practices or civil rights laws or ordinances; Claims for personal injury, defamation, wrongful conduct, or wrongful discharge; the Civil Rights Acts of 1866 and 1871, as amended, 42 U.S.C. §1981; the Civil Rights Act of 1964, as amended, including Title VII; the Americans with Disabilities Act; the Age Discrimination in Employment Act, as amended; the Older Workers Benefit Protection Act; the Employee Retirement Income Security Act; the Fair Labor Standards Act; the Rehabilitation Act of 1973; Executive Order 11246; the federal Family and Medical Leave Act; state family and medical leave acts; Claims alleging retaliation under the Worker's Compensation Act; the Unemployment Compensation Law; the National Labor Relations Act, as amended; any and all state wage payment and collection laws; Pickering's policies, practices,; any Claims arising out of any relationship, including employment relationship, between or among Bell and Schuck and the Released Parties predating the effective date of this Agreement; and all Claims for employment, reemployment, or reinstatement of employment to the Board; any and all grievances, or demands for mediation or arbitration, or Claims or demands under the Board's policies and procedures; and any and all Claims asserted, or which could have been asserted, in a federal court Lawsuit referenced above, including any Claims against any current or former agents or employees of the Board, provided that nothing herein shall reduce or limit any rights that Bell or Schuck may have under any individual employment contract, collective bargaining agreement, or Board policy as an employee of the Board or as members of a collective bargaining unit which are separate and apart from the allegations, claims and related facts set forth in the Complaint and Petition for Appeal.

Subject to the above limitation, Bell and Schuck hereby specifically waive, release and give up all Claims and rights, as described in the preceding paragraph, whether now known or unknown, which they have or may have, against the Board and the Released Parties, based on any fact, act, event, or omission, whether now known or unknown, provided that their Agreement as set forth herein is limited to things and events which occurred prior to the signing of this Release by Bell and Schuck.

6. Bell and Schuck's Tax Liability. Bell and Schuck agree that they will be responsible for the taxes on all income to them as may be required pursuant to applicable Federal or State tax requirements, and as such will reimburse the Board for any and all tax liabilities that may be assessed on monies paid to Bell and Schuck for which they are required to pay taxes on but fail to do so.

7. Full and Complete Settlement. Bell and Schuck agree that the payment described in paragraph 4 will be received by Bell and Schuck in full and complete settlement of all known or unknown claims, asserted or unasserted, of Bell and Schuck, which are included in Paragraph 5 above, allegedly arising out of any and all conduct or actions of the Board and/or their relationship with the Board, provided that their Agreement as set forth herein is limited to things and events which occurred prior to the signing of this Release by Bell and Schuck, whether now known or unknown.

8. Attorneys' Fees, Costs, and Expenses. Each party shall be responsible solely for its or their own attorneys' fees, costs and expenses. Bell and Schuck specifically waive all claims to attorneys' fees, costs, and expenses from the Board including all claims for reimbursement to the Board or its attorneys, agents, or family members, of any attorneys' fees, costs, and expenses they have incurred or paid, or which were paid on their behalf.

9. Applicable Law and Severability. This Release shall be governed by and construed in accordance with the laws of New Jersey, except where federal law controls. Should any provision of this Release be declared or determined by any Court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term, or provision shall be deemed not to be a part of this Release.

10. Non-Disparagement, Confidentiality and Non-Disclosure. Bell and Schuck agree that the terms, conditions, facts of payments, and underlying facts of the settlement stated in this Agreement, but not the fact that the case was settled, shall be held confidential to the extent permissible by law, subject to the following provisions.

Bell and Schuck may disclose the terms of this Agreement to their immediate family members, accountants, financial advisors, attorneys, to the Long Beach Island Education Association and its officers, and to the NJEA Legal Services Plan, provided that disclosure to the NJEA Legal Services Plan shall be limited to the extent required by the NJEA Legal Services Plan. In addition, Bell and Schuck may make disclosure when legally obligated to do so.

Bell and Schuck further agree that they will refrain from making negative or disparaging comments or remarks about the Board and its members, or issue statements regarding the Board, as relating to the facts alleged in the Petition of Appeal and in the Complaint, and related circumstances, referenced herein.

The Board agrees, and its members agree that it and they will refrain from making negative or disparaging remarks about Bell and Schuck, or issue statements regarding Bell and Schuck, relating to the facts alleged in the Petition of Appeal and in the Complaint, and related circumstances, referenced herein.

11. Entire Release. This Release sets forth the entire Release between the parties and fully supersedes any and all prior Releases or understandings between the parties.

12. Bell and Schuck's Certification. Bell and Schuck agree, certify, acknowledge, and represent: (a) that they have been and are hereby advised in writing to consult with an attorney of their choice and at their expense, prior to signing this Release; (b) that they have had adequate time and opportunity to review and discuss, and has reviewed and discussed, all of the terms and sections of this Release thoroughly with their attorney; (c) that their attorney has explained this entire Release to them; (d) that they do not waive any rights or claims that may arise after the date this Release becomes effective; (e) that they shall have, and were given, at least twenty-one (21) days to consider the terms and conditions of this Release before signing it; (f) that their waiver of Claims and this General release shall not become effective until the effective date of this Release.

If Bell or Schuck decides to sign this Release before the expiration of the 21-day period, Bell or Schuck, as the case may be, specifically acknowledges that they have had sufficient time and opportunity to review and understand the terms of this Release and specifically waive and give up any rights for additional time or opportunity to review it.

BELL AND SCHUCK FURTHER CERTIFY, ACKNOWLEDGE, AND REPRESENT THAT THEY ARE ABLE TO READ AND UNDERSTAND ENGLISH, THAT THEY UNDERSTAND ALL OF THE PROVISIONS HEREIN, WITH THE ADVICE AND ASSISTANCE OF THEIR ATTORNEY, AND THAT THEY MAKE THIS RELEASE KNOWINGLY AND VOLUNTARILY. BELL AND SCHUCK ACKNOWLEDGE THAT THEY HAVE NO PHYSICAL OR MENTAL PROBLEM, CONDITION, OR IMPAIRMENT OF ANY KIND WHICH HAS INTERFERED WITH THEIR ABILITY TO READ AND

UNDERSTAND THE MEANING OF THIS RELEASE OR ITS TERMS. BELL AND SCHUCK FURTHER REPRESENT THAT IN SIGNING THIS RELEASE, THEY DO NOT RELY ON ANY PROMISES OR REPRESENTATIONS MADE BY ANYONE OTHER THAN THOSE STATED SPECIFICALLY HEREIN.

13. Full Knowledge. Bell and Schuck further warrant, represent, and agree that in signing this Release, they do so with full knowledge of any and all rights which they may have with respect to the Board, other Released Parties, or the Lawsuits.

14. Headings. The headings of the paragraphs in this Release are for convenience only and shall not control or affect the meaning or construction of, or limit the scope or intent of, any of the provisions of this Release.

15. Effective Date. The effective date of this Release shall be the date upon which the Board receives the signed and notarized Releases from Bell and Schuck, W-9 forms, and child-support search reports from their attorney.

14. Board Ratification. It is explicitly understood that this Agreement is subject to Board Ratification.

THIS REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK.

IN WITNESS WHEREOF, and intending to be legally bound, Dia Bell has executed this General Release as of the date set forth below.

Dated: 3/1/11

By _____
Dia Bell

STATE OF NEW JERSEY]
]§:
COUNTY OF]

I CERTIFY that on 3/1/11 , ~~2010,~~ Dia Bell personally came before me and acknowledged under oath, to my satisfaction, that she is the person named herein and personally affixed her signature thereto, signing sealing and delivering this document as her act and deed.

Sworn to and Subscribed
before me this 1st day
of March , 2010.

_____
Name:
A Notary Public of the State of New Jersey

AFFIX SEAL

Long Beach Island Consolidated School District

Barnegat Light Harvey Cedars Surf City Ship Bottom Long Beach Township

Riding the Waves of Excellence

ETHEL A. JACOBSEN SCHOOL
200 S. Barnegat Avenue
Surf City, New Jersey 08008
Phone: (609) 494-2341
Fax: (609) 494-2921
Roger A. Caruba, Interim Superintendent
Email: rcaruba@lbi.k12.nj.us

LONG BEACH ISLAND GRADE SCHOOL
201 20th Street
Ship Bottom, New Jersey 08008
Phone: (609) 494-8851
Fax: (609) 494-8035
Fran Meyer, Principal
Email: fmeyer@lbi.k12.nj.us

Extract from the minutes of the July 19, 2011 meeting of the Long Beach Island Board of Education of Surf City, Ocean County, New Jersey as recorded in the official minute book.

Settlement Agreement Resolution Amendment:

RESOLVED, the Board of Education, approves a motion to amend its Resolution of June 28, 2011, as follows:

RESOLVED THE Board of Education, upon the recommendation of the Superintendent, approves the settlement agreement pertaining to Docket No.: OCN-L-3668-09 and OAL Agency Docket Number 246/09, as previously distributed to the Board of Education from the Superintendent, and as reflected in the June 28,2011, Board of Education meeting minutes.

Moved by Mrs. Hartmann and seconded by Mr. Deakyne

Ayes: 7 (Picaro, Little, Deakyne, Bott, Hartman, Wasilewski, Kain
Nays: 1 (Larkin)
Absent: 1 (Raber)

I certify that the foregoing extract is a true and complete copy of the original resolution adopted.

Christina M. Galvao

Christina M. Galvao
School Business Administrator

2011 JUL 26 A 11:32

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OAL DKT. NO. EDU 5702-10
AGENCY DKT. NO. 64-4/10

LINDA KRISTIANSEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HIGH POINT REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
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. Section 1 of the Agreement references 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9|26|11
Date of Mailing: 9|28|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05702-10

AGENCY DKT. NO. 64-4/10

LINDA KRISTIANSEN,

Petitioner,

v.

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

Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Jonathan Busch, Esq., for respondent (Schwartz, Simon, Edelstein & Celso, attorneys)

Record Closed: August 10, 2011 Decided: August 10, 2011

BEFORE **IMRE KARASZEGI, JR.,** ALJ:

On June 7, 2010, 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.

Aug. 10, 2011
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 8-12-11

Date Mailed to Parties: AUG 12 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

SCHWARTZ SIMON
EDELSTEIN & CELSO LLC
44 Whippany Road, Suite 210
Morristown, New Jersey 07962
(973) 301-0001
Attorneys for Respondent High Point
Regional High School Board of Education

LINDA KRISTIANSEN,

Petitioner,

v.

HIGH POINT REGIONAL HIGH SCHOOL BOARD OF EDUCATION, SUSSEX COUNTY

Respondent.

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY

OAL DOCKET No.: EDU 05702-2010N
AGENCY Ref. No.: 64-4/10

SETTLEMENT AGREEMENT
AND RELEASE

The Respondent High Point Regional High School Board of Education and Petitioner Linda Kristiansen (collectively, the "Parties") hereby agree to settle the above-captioned matter subject to the terms and conditions contained herein:

WHEREAS, Petitioner commenced her employment with Respondent on September 1, 2005; and

WHEREAS, Petitioner served in twelve month secretary positions throughout the 2005-2006, 2006-2007 and 2007-2008 school years; and

WHEREAS, Petitioner voluntarily sought and accepted Respondent's offer to serve as Assistant Transportation Coordinator, at the commencement of the 2008-2009 school year; and

WHEREAS, Petitioner served in the position of Assistant Transportation Coordinator until she was terminated by Respondent on February 22, 2010, effective February 5, 2010; and

WHEREAS, it is the contention of Respondent that the position of Assistant Transportation Coordinator is a non-tenure eligible position; and

WHEREAS, Petitioner filed a Verified Petition of Appeal before the Commissioner of Education on or about April 6, 2010 ("Petition") claiming, among other things that Petitioner "is a tenured secretarial employee" of Respondent and that Respondent was not entitled to terminate her; and

WHEREAS, the Petition was transmitted by the Department of Education to the Office of Administrative Law on June 2, 2010 and after denial of a Motion for Summary Decision, a hearing in this matter was scheduled to commence on March 17 and 25, 2011; 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 and Release ("Agreement");

NOW, THEREFORE, the parties enter into this 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 her pro-rated contractual salary associated with the position of Assistant Transportation Coordinator for the period from February 6, 2010 through June 30, 2010 in the total amount of $15,480.03. This payment shall be subject to all applicable State and Federal taxes and withholdings, including pension deductions. 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 except for any legal claims presently filed and pending in another forum.

2. Respondent shall retroactively grant Petitioner an unpaid medical leave for the period from September 1, 2010 through September 30, 2010.

3. 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 this Petition with respect to Petitioner's claimed entitlement to tenure are hereby dismissed with prejudice. No further action can be filed regarding the tenure issue as raised in this Petition in this or any other forum. Additionally, the Petitioner agrees that she will not seek employment with the Respondent at any time in the future.

4. This Agreement shall not be construed as an admission of liability by Petitioner in this or any other proceeding.

5. 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.

6. 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.

7. 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 she is represented by competent counsel, and that she understands the contents of this Agreement. Respondent consulted with Nathanya G. Simon, Esq. of the firm Schwartz Simon Edelstein & Celso, LLC and acknowledges that it is satisfied with her representation and that the contents of this Agreement are fully understood.

8. 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.

9. This Agreement shall be signed and notarized by the Petitioner, and shall be authorized for signature by Board Resolution by the Respondent.

HIGH POINT REGIONAL HIGH SCHOOL BOARD OF EDUCATION

WALTER STUMPF, JR.
Board President

Date: 8/5/2011

LINDA KRISTIANSEN

Date: July 6, 2011

ATTEST:

LINDA ALVAREZ
Board Secretary/Business Administrator

Date: 8/5/2011

THE MINUTES OF
A MEETING OF THE BOARD OF EDUCATION
OF HIGH POINT REGIONAL HIGH SCHOOL DISTRICT
SUSSEX COUNTY, N. J. AS RECORDED
IN THE OFFICIAL MINUTE BOOK

The Regular Meeting and Annual Reorganization Meeting of the Board of Education of the High Point Regional High School District was held on Monday, July 18, 2011 at 7:00 P.M. at the High Point Regional High School Cafeteria Annex on Pidgeon Hill Road, Wantage, New Jersey.

MEMBERS PRESENT Mr. Walter Stumpf Jr, President
Mr. Thomas Case
Mr. Paul Derin
Mrs. Pamela Flynn
Mr. Joseph Hoffmann
Mr. Charles Musilli, III
Mr. Edward Vander Berg

MEMBERS ABSENT Mr. Kenneth Nelson and Mr. Charlie Rolan, III

Also Present: Dr. John W. Hannum, Superintendent; Ms. Linda A. Alvarez, Business Administrator/Board Secretary; and members of the public and High Point staff members.

A motion was made by Mr. Vander Berg, duly seconded by Mr. Musilli, that the Board approve the following resolutions:

RESOLVED, that the Board approve the attached Settlement Agreement and Release in Kristiansen v. High Point Regional High School Board of Education, OAL Docket No.: EDU 05702-2010 N, Agency Ref. No.: 64-4/10, which incorporates an unpaid medical leave for former employee Linda M. Kristiansen for the period from September 1, 2010 through September 30, 2010. The Board president and Business Administrator Secretary are hereby authorized to execute the Settlement Agreement and Release on behalf of the th board of Education.

The motions unanimously carried by a voice vote.

AYES:	Mr. Walter Stumpf Jr.	Mrs. Pamela Flynn	Mr. Charles Musilli, III
	Mr. Thomas Case	Mr. Joseph Hoffmann	Mr. Edward Vander Berg
	Mr. Paul Derin		
NOES:	None		

State of: New Jersey }
County of Sussex } SS:

I, Linda A. Alvarez, Secretary of the High Point Regional High School Board of Education in the County of Sussex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of said district duly called and held on July 18, 2011 has been compared by me with the original minutes as officially recorded in my office in the minute book of said High Point Regional High School 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 the 5th day of August 2011.

(AFFIX SEAL)

Linda A. Alvarez

BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Respondent has a sending-receiving relationship with petitioner, whereby Saddle River sends its students to Northern Highlands for grades nine through twelve. Petitioner's appeal, filed in 2010, sought a tuition rate adjustment to cover the cost of a full-time aide for T.F. – a special education student from Saddle River who graduated at the end of the 2005-06 school year – and reimbursement for the cost of one-to-one instruction in English for G.L. – a special education student from Saddle River who is currently enrolled at Northern Highlands. Respondent filed a motion for summary decision, which was opposed by petitioner.

The ALJ found, *inter alia*, that: there are no material facts in dispute, and the matter is ripe for summary decision; pursuant to *N.J.A.C.* 6A:23A-17.1(f)(6), a receiving district must make a tuition-rate adjustment for a student enrolled in a special education class no later than the end of the second school year following the contract year, and *N.J.A.C.* 6A:3-1.3(i) requires that a petition of appeal be filed within 90 days from the end of that time period; petitioner's appeal is clearly out of time as it relates to a tuition rate increase for T.F., who graduated in 2006; under the parties' current send-receive agreement, Northern Highlands cannot charge Saddle River for G.L.'s one-to-one instruction in English because it is part of his educational program and not a related service. Accordingly, the ALJ granted respondent's motion for summary decision and dismissed the petition.

Upon full consideration, the Commissioner concurred with 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.

September 26, 2011

OAL DKT. NO. EDU 7133-10
AGENCY DKT. NO. 118-6/10

BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN 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 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 did not file reply exceptions.

Petitioner's exceptions, in relevant part, essentially recast and reiterate its arguments advanced before the Administrative Law Judge (ALJ) below. In that it is determined that these were sufficiently considered and addressed in the ALJ's decision, they will not be revisited here.

Upon a contemplative review, the Commissioner concurs with the ALJ that Summary Decision is appropriately granted to the respondent. In so determining, the Commissioner is in complete accord with the ALJ that the portion of the instant petition of appeal, filed in June 2010, which is seeking payment for special education student T.F.'s full-time aide for the 2003-04, 2004-05 and 2005-06 – some 4 years after this student graduated – must be dismissed because it 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] With respect to that portion of the instant petition of appeal which seeks to charge respondent for the provision of one-on-one English instruction for special education student G.L. for the 2008-09 and 2009-10 school years, the record reflects that one-on-one instruction is how G.L. is required to receive his mandatory English credits necessary for graduation. The Commissioner agrees with the ALJ – for the reasons presented on pages 6-7 of his decision – that petitioner cannot charge for that instruction under its send-receive agreement with Saddle River.

Accordingly, the recommended decision of the OAL is adopted and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9|26|11

Date of Mailing: 9|28|11

[1] To the contrary, preventing litigants from "sitting on their rights" through their own negligence is one of the express purposes of *N.J.A.C.* 6A:3-1.3(i).

[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 07133-10
AGENCY DKT. NO. 118-6/10

BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY,

Respondent.

James L. Plosia, Esq., for petitioner (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Fedric J. Sirota, Esq., for respondent (Wiley, Malehorn, Sirota & Raynes, attorneys)

Record Closed: August 15, 2011 Decided: August 19, 2011

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

T.F.

T.F. was a special education student from Saddle River who graduated from Northern Highlands at the end of the 2005-06 school year. In 2010, Northern Highlands sought a tuition-rate adjustment. Is Northern Highlands out of time? Yes. Under the governing regulation, a receiving district must make a tuition-rate adjustment for a special education student no later than the end of the second school year following the contract year.

G.L.

G.L. is a special education student from Saddle River who is currently enrolled at Northern Highlands under a send-receive agreement through which he receives one-to-one instruction in English as part of his educational program. Is Northern Highlands entitled to reimbursement for that instruction? No. Under their send-receive agreement, Northern Highlands cannot charge Saddle River any additional tuition or other charges for Saddle River special education students.

PROCEDURAL HISTORY

Saddle River has a sending-receiving relationship with Northern Highlands by which Saddle River sends its students to Northern Highlands for grades nine through twelve. In 2009, Northern Highlands discovered that it had not billed Saddle River for the cost of a one-to-one aide for a student for the 2003-04, 2004-05, and 2005-06 school years. Similarly, Northern Highland discovered that it had not billed Saddle River for the cost of one-to-one instruction for a student for the 2008-09 and 2009-10 school years. Given these circumstances, Northern Highlands sought reimbursement from Saddle River.

When Saddle River refused to pay, Northern Highlands filed a Petition of Appeal with the Department of Education, which 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.

After a prehearing conference, Saddle River filed a motion for summary decision, which Northern Highlands opposed.

FINDINGS OF FACT

Based upon the papers submitted, including the certifications or affidavits, I **FIND** the following as fact:

Saddle River has a sending-receiving relationship with Northern Highlands in which Saddle River sends its students to Northern Highlands for grades nine through twelve. This relationship began in 1998 under the first of two send-receive agreements. The first agreement covered the school years 1998 through 2008; the second agreement covers the school years 2008 to 2018.

T.F.

T.F. was a multiply disabled student from Saddle River who attended Northern Highlands from 2002 until his graduation in 2006. In November 2009, Northern Highlands discovered that it had not billed Saddle River for the cost of a one-to-one aide it had provided to T.F. for the 2003-04, 2004-05, and 2005-06 school years. The invoice totaled $98,177.

On March 15, 2010, Northern Highlands sent a letter to Saddle River requesting payment for the one-to-one aide.

G.L.

Similarly, Northern Highlands discovered that it had not billed Saddle River for the cost of one-to-one instruction it had provided to G.L. for the 2008-09 and 2009-10 school years.

Northern Highlands requested payment for that instruction as well.

G.L. is a multiply disabled student from Saddle River who has been attending Northern Highlands since 2008 and has been receiving one-to-one instruction in English by a Northern Highlands employee as part of his educational program since that time.

On June 9, 2010, Northern Highlands filed its Petition of Appeal with the Department of Education.

On August 2, 2011, the Department of Education determined that this one-to-one instruction in English is not a related service.

CONCLUSIONS OF LAW

Summary decision may be rendered if the papers submitted, together with the affidavits, show that no genuine issue of material fact exists and the moving party is entitled to summary decision as a matter of law. N.J.A.C. 1:1-12.5(b). In this case, no genuine issue of material fact exists. Accordingly, Saddle River is entitled to summary decision as a matter of law.

T.F.

Under N.J.A.C. 6A:23A-17.1(f)(6), a receiving district shall make a tuition-rate adjustment for a student enrolled in a special education class no later than the end of the second school year following the contract year:

> § 6A:23A-17.1 Method of determining tuition rates for regular public schools
>
> . . .
>
> (f) The receiving district board of education and the sending district board of education shall establish by written contractual agreement a tentative tuition charge for budgetary purposes. Such tentative charge shall equal an amount not in excess of the receiving district board of education's "estimated cost per student" for the ensuing school year for the purpose or purposes for which tuition is being charged, multiplied by the "estimated average daily enrollment of students" expected to be received during the ensuing school year. Such written contract shall be on a form prepared by the Commissioner.
>
> . . .
>
> 6. If the Commissioner later determines that the tentative tuition charge established by written contractual agreement, except for a contractual agreement for a student enrolled in a special education class, was greater than the actual cost per student during the school year multiplied by the actual average daily enrollment received, the receiving district board of education shall return to the sending district board of education in the second school year following the contract year the amount by which the tentative charge exceeded the actual charge as determined above, or, at the option of the receiving district board of education, shall credit the sending district board of education with the excess amount. The receiving district board of education shall make such adjustment for a contractual agreement for a student enrolled in a special education class no later than the end of the second school year, following the contract year.
>
> [Emphasis added.]

In addition, N.J.A.C. 6A:3-1.3(i) requires that a petition of appeal be filed within 90 days from the end of that time period. See Lord Sterling Sch. v BOE of the Morris Sch. Dist., DOE Dkt. No. 129/4-02, Comm'r (July 19, 2002), <http://www.nj.gov/education/legal/commissioner/index.html>.

In this case, Northern Highlands had until the end of the 2005-06, 2006-07, and 2007-08 school years—or no more than 90 days from the end of those school years—

to file its petition for the tuition rate adjustments for the 2003-04, 2004-05, and 2005-06 school years. Northern Highlands, however, did not seek reimbursement until 2010. Therefore, I **CONCLUDE** that its Petition of Appeal is out of time for each of those contract years.

G.L.

Under the Send-Receive Agreement for 2008-18, all Saddle River students in grades nine through twelve, who require the services of the Northern Highlands Child Study Team, shall receive such services at no additional cost:

> All Saddle River students in grades 9 through 12 requiring the services of the Northern Highlands Child Study Team shall receive such services at no additional expense to Saddle River . . . .
>
> [(Exhibit B, Certif. of John Keenan, Section 3.1 (June 2, 2010.)]

Similarly, Northern Highlands will not charge Saddle River any additional tuition or other charges for Saddle River special education students, except for related services—unless those services are provided by a Northern Highlands employee:

> Northern Highlands will not charge Saddle River any additional tuition or other charges for Saddle River special education students who are enrolled in the Northern Highlands Regional High School regular education program, except as provided below (related services). Northern Highlands will not charge Saddle River for the cost of providing related services to Saddle River special education students so long as such services can be provided by Northern Highlands employees. However, if such services cannot be provided by Northern Highlands staff, but rather must be provided by persons not working as Northern Highlands employees, Saddle River will be responsible for the full payment of such costs.
>
> [(Ibid.)]

In this case, G.L. required the services of a one-to-one instruction in English as part of his educational program. Under the Send-Receive Agreement for 2008-18, Northern Highlands cannot charge Saddle River for that instruction. Although Northern Highlands argues that the one-to-one instruction is a related service for which it can charge, such instruction was still provided by a Northern Highlands employee. Therefore, I **CONCLUDE** that Northern Highlands cannot charge for that instruction under its send-receive agreement with Saddle River.

Moreover, I note that the Department of Education has already determined that this instruction is not a related service—a determination with which I agree as a matter of law:

> Further, as it relates to the circumstances of this dispute, it should also be noted that the opinion of the Department of Education is that a "related service" as defined in 20 U.S.C. § 1401 is a supportive service (and not instruction) designed to enable a student with a disability to receive a free appropriate education as described in their IEP. One-to-one English instruction is part of the instruction program and not a related service.
>
> [(Exhibit A, Letter of Frederic J. Sirota, Esq. (August 4, 2011.)]

Therefore, I also **CONCLUDE** that Northern Highlands cannot charge for the one-to-one instruction in English even if it is not provided by a Northern Highlands employee.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that Saddle River's motion for summary decision be **GRANTED** and that this case 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.

8/19/11
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

8-19-11
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: AUG 22 2011

dr

#403-11

IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD SALAAM,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF IRVINGTON, ESSEX COUNTY.	:	

SYNOPSIS

In April 2011, the petitioning Board certified charges of conduct unbecoming against respondent – a tenured special education teacher employed in the District's Alternative Program – based on an incident during which respondent advised a group of male students on how to engage in sexual acts with women. Following transmittal of the matter to the Office of Administrative Law (OAL) as a contested case, respondent submitted to the petitioning Board an irrevocable letter of resignation from his position.

The ALJ found and concluded that tenure charges against respondent have been rendered moot by his resignation, and accordingly the charges should be dismissed. In so determining, the ALJ noted that *N.J.A.C.* 6A:9-17.4 requires that if a tenured staff member resigns while accused of unbecoming conduct, the Board – through its Superintendent of Schools – is obliged to notify the State Board of Examiners (State Board). Accordingly, the ALJ ordered the tenure charges dismissed as moot, and ordered the Board to notify the State Board that respondent resigned while tenure charges were pending against him.

Upon review, the Commissioner concurred with the ALJ that the tenure charges are moot based on the respondent's resignation, and accordingly adopted the Initial Decision of the OAL as the final decision in this matter. In so determining, the Commissioner noted that the inexcusable conduct alleged in this case, if true, would clearly amount to conduct unbecoming and demand significant consequences.

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 26, 2011

OAL DKT. NO. EDU 04486-11
AGENCY DKT NO. 74-4/11

IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD SALAAM,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF IRVINGTON, ESSEX COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] This case involves tenure charges brought by the Board against the respondent Donald Salaam, a teacher in the Irvington Township School District. The Board charged the respondent with unbecoming conduct based on an incident during which the respondent, who taught special education in the District's Alternative Program, advised a group of male students how to engage in sexual acts with women. The Administrative Law Judge ("ALJ") found that this matter was rendered moot by the respondent's resignation and that the tenure charges should be dismissed.

The Commissioner concurs with the ALJ that the tenure charges are moot based on the respondent's resignation.[2] Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the tenure charges are dismissed as moot. This matter 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.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/26/11
Date of Mailing: 9/27/11

[1] The parties did not file exceptions.

[2] The Commissioner further notes that the conduct that was alleged in this case is extremely disconcerting. Undoubtedly, if the allegations are true there is very little analysis required to conclude that this type of inexcusable behavior amounts to unbecoming conduct which would demand significant consequences.

[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 04486-11
AGENCY REF. NO. 74-4/11

IN THE MATTER OF THE TENURE HEARING OF DONALD SALAAM, SCHOOL DISTRICT OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY.

Ronald C. Hunt, Esq., for petitioner (Hunt Hamlin and Ridley, attorneys)

Sheldon Pincus, Esq., for respondent (Bucceri and Pincus, attorneys)

Record Closed: August 17, 2011 Decided: August 22, 2011

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

PROCEDURAL HISTORY AND FINDINGS OF FACT

Donald Salaam was employed by petitioner, the Irvington Board of Education (the Board), as a teacher under tenure, pursuant to N.J.S.A. 18A:28-5. On March 16, 2011, tenure charges were filed with the Board by Superintendent of Schools Ethel J. Hasty, and served on Salaam. On March 31, 2010, the Board determined that probable cause existed to credit the evidence in support of the charges, and that the charges, if so credited, warranted Salaam's dismissal from his employment. The Board suspended Salaam without pay, in accordance with N.J.S.A. 18A:6-14.

On April 1, 2011, the Board certified charges of unbecoming conduct against Salaam pursuant to N.J.S.A. 18A:6-10 et seq. An answer was filed and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case on April 19, 2011. On July 11, 2011, I conferred via telephone with counsel who advised that Salaam had irrevocably tendered his resignation from the school district via letter dated July 7, 2011. (R-1) At its meeting of July 29, 2011, the Board formally accepted Salaam's resignation. (P-1)

CONCLUSIONS OF LAW

I **CONCLUDE** that the tenure charges against Salaam have been rendered moot by his resignation, and that this matter should be dismissed. An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For reasons of judicial economy and restraint it is appropriate to refrain from decision-making when an issue presented is hypothetical, judgment cannot grant effective relief, or the parties do not have a concrete adversity of interest. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff'd, Comm'r (May 3, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>; S.J. v. Bd. of Educ. of Mountain Lakes, EDU 07081-03, Initial Decision (October 7, 2003), aff'd, Comm'r (Nov. 17, 2003), aff'd, St. Bd. (Feb. 3, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>.

The Commissioner has uniformly held that a tenured staff member's resignation moots pending tenure charges. In Re Saez, EDU 11306-05, Initial Decision, (February 22, 2006), aff'd Comm'r (April 4, 2001) <http://lawlibrary.rutgers.edu/oal/search.html>; In Re Castel, EDU 03428-07, Initial Decision, (February 7, 2008), aff'd Comm'r (March 17, 2008) <http://lawlibrary.rutgers.edu/oal/search.html>. Salaam's resignation makes a determination whether to terminate his employment meaningless, and renders the issues raised by the pleadings academic. Accordingly, the charges should be dismissed.

Importantly, N.J.A.C. 6A:9-17.4 requires that if a tenured teaching staff member resigns while accused of unbecoming conduct, the district chief school administrator "notify the Board of Examiners." Ibid. See also: N.J.A.C. 6A:3-5.6 (d). Pursuant to the regulation, the Board, through its Superintendent of Schools, is obliged to notify the Board of Examiners that Salaam resigned during the pendency of tenure charges against him.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the tenure charges are **DISMISSED** as moot. The Board, through its Superintendent of Schools, is **ORDERED** to notify the State Board of Examiners that Salaam resigned while tenure charges were pending against him.

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 22, 2011

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: August 22, 2011

Mailed to Parties: AUG 23 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

For Petitioner:

P-1 Letter of resignation

For Respondent:

R-1 Board Resolution

#404-11

OAL DKT. NO. EDU 10514-10
AGENCY DKT. NO. 542-9/10

IN THE MATTER OF THE TENURE HEARING OF DEANNA LOPEZ, SCHOOL DISTRICT OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY.	COMMISSIONER OF EDUCATION DECISION

The record of this matter, the proposed "Mutual Release and Settlement 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 in compliance with *N.J.A.C.* 6A:3-5.6.

The Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following observation. Section 2 and other provisions 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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/26/11
Date of Mailing: 9/27/11

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10514-10
AGENCY DKT. NO. 542-9/10

IN THE MATTER OF THE TENURE HEARING OF DEANNA LOPEZ, SCHOOL DISTRICT OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY.

John O. Bennett, Esq., for petitioner

Marcie L. Mackolin, Esq., (Chamlin, Rosen, Uliano & Witherington, attorneys) and **Stephen B. Hunter**, Esq., (Detzky & Hunter, attorneys) for respondent

Record Closed: August 19, 2011 Decided: August 19, 2011

BEFORE **JOSEPH F. MARTONE**, ALJ:

The Borough of Keansburg, petitioner, brings tenure charges against the respondent for conduct unbecoming a teacher as defined in N.J.S.A. 18A:6-10. This matter was transmitted to the Office of Administrative Law on October 4, 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 and assigned to the Honorable Israel D. Dubin. During the time that Judge Dubin presided over this matter, the parties negotiated a proposed settlement. An executed Mutual Release and Settlement Agreement indicating the terms of the

settlement, which is attached, was submitted for Judge Dubin's approval on July 6, 2011. A copy of the Resolution of the Board of Education adopting the settlement was also attached.

Because of the retirement of Judge Dubin on June 30, 2011, prior to the settlement agreement being received, it became necessary to have this case reassigned to another judge. The matter was reassigned to me, and after I familiarized myself with the case record and with the terms of the settlement, and after conferring with counsel on August 19, 2011, 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 19, 2011
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

AUG 22 2011

Date Received at Agency:

Date Mailed to Parties:

mph

MUTUAL RELEASE AND SETTLEMENT AGREEMENT

This Mutual Release and Settlement Agreement (the "Agreement") is entered into by and between the Keansburg Board of Education (the "Board"), Deanna Lopez ("Employee") and is effective as of January 2, 2011.

WHEREAS, the Keansburg Board of Education ("Board") is currently engaged in litigation with regard to Deanna Lopez; and

WHEREAS, after due consideration both Parties believe that an amicable settlement is in the best interest of the school district; and

WHEREAS, the reason for the settlement in this instance was revealed after an exchange of discovery between parties. Though there was an initial statement made by the Board of certain conduct which was unbecoming by Deanna Lopez, sufficient evidence to support this statement is not available to the Board.

WHEREAS, it would appear that the ongoing and continuing course of conduct which was of significant concern to the Board would not be readily established at the time the tenure hearing. Though the Board believes that a portion of the charges would be sustained, the likelihood of the penalty of dismissal is substantially lessened.

WHEREAS, as a result of the above findings, the Board has made a determination that settling this matter would avoid potential protracted litigation and the time and cost savings would be a benefit to the public; and

WHEREAS, the Board of Education has been presented the above information and it has determined to withdraw the Tenure Charges previously Certified to the Commissioner of Education. It is the Board's considered opinion, in light of the settlement reached, that the Tenure Charges need not be pursued by the Board and the Board specifically requests that the

Commissioner of Education allow the Board to withdraw its Certification of Charges in this instance.

WHEREAS, this matter will not result in a loss of position, Ms. Lopez is aware that the Commissioner may refer the matter to the Board of Examiners for possible suspension or revocation of her teaching certificate.

WHEREAS, Ms. Lopez enters into this agreement with a full understanding of her rights.

NOW THEREFORE, the parties hereto voluntarily resolve all disputed matters and enter into the following Settlement Agreement, which fully resolves and disposes of all issues in controversy between them:

1. Ms. Lopez's increment for 2010 would be withheld and the tenure charges are hereby withdrawn by the Board.

2. Ms. Lopez will return to classroom effective January 2, 2011.

3. Unpaid salary based on Ms. Lopez's rate of pay without her 2010 increment step would be paid in full to Ms. Lopez less any costs paid by the Board for unemployment benefits.

4. Ms. Lopez's Facebook account for students will be discontinued.

5. Although Ms. Lopez will not be advanced one step on the salary guide for the 2010-2011 school year she would receive the negotiated salary increase for the salary step that she is presently placed.

6. This agreement is being entered into in full compliance and incorporating the standards set forth in *In re Cardonick*, 1990 *S.L.D.* 842, 846: codified at *N.J.A.C.* 6A:3-5.6(a).

7. The laws of the State of New Jersey, without regard to its choice of law provisions, shall govern this Agreement.

8. Neither this Agreement nor any act done or admitted in furtherance thereof, shall be construed as an admission by any party of any fact or claim, nor shall they be admissible into evidence in any action or proceeding to construe or establish any fact or claim, except in an action to enforce the provisions of this Agreement. This Agreement is made as a compromise to avoid expense and to terminate all controversies and/or claims for injuries or damages of any nature, known or unknown, including future developments thereof, in any way growing out of or in connection with the matters described above.

9. The Parties expressly waive and assume the risk of any and all claims for damages for the matters stated in this Agreement that may arise in the future, but which they do not know of or suspect to exist, whether through ignorance, oversight, error, fraud, negligence, or otherwise, and which, if known, would materially affect their decision to enter into this Agreement.

10. If, for any reason whatsoever, any part of this Agreement shall be declared void and invalid, by operation of law or otherwise, in any jurisdiction, then as to such jurisdiction only such parts shall be void and the remaining provisions of this Agreement shall remain in all other respects valid and enforceable and shall not invalidate or render unenforceable such provision in any other jurisdiction.

11. The Parties represent that they have full authority to enter into this Agreement and IN WITNESS WHEREOF, the authorized representatives of the Parties have executed this Agreement on the dates indicated below:

[SIGNATURES APPEAR ON THE FOLLOWING PAGE]

For:

Deana Lopez

By: _____

For:

Keansburg Board of Education

By: _____

Deanna Lopez

Sworn to and subscribed
before me on this 17th day
of June, 2011.

Notary Public

DEBORAH L ZOLEZI
Notary Public
State of New Jersey
My Commission Expires Sep 15, 2013

Judy Ferraro, Board President

By:
Joan Saylor, Board Secretary

Sworn to and subscribed
before me on this day
of June 29, 2011.

Notary Public

NOTARY PUBLIC OF NEW JERSEY
ID #227-505
My Commission Expires April 19, 2016

7001889_1

Keansburg Public Schools
Board of Education
100 Palmer Place
Keansburg, New Jersey 07734
732-787-2007 x2400
FAX 732-787-4399

JOAN NESENKAR SAYLOR
Interim Business Administrator/Board Secretary
EMAIL: jsaylor@KEANSBURG.K12.NJ.US

NICHOLAS M. EREMITA
Superintendent

CERTIFICATION OF ABSTRACT OF MINUTES

I, Joan Nesenkar Saylor, Interim Board Secretary of the Keansburg Board of Education certify that the attached abstract is a true and exact copy of the minutes of the meeting of December 21, 2010. The recorded vote is as follows for agenda item:

SUPERINTENDENT'S REPORT: PERSONNEL ADDENDUM 1. RESOLUTION OF THE KEANSBURG BOARD OF EDUCATION APPROVING SETTLEMENT OF THE TENURE CHARGES AGAINST DEANNA LOPEZ

Motioned by: Steve Rogan

Seconded by: Michael Donaldson

	Yes	No	Abstain	Absent
Ms. Bartram	X			
Ms. Best	X			
Ms. Blum	X			
Ms. Commarato	X			
Mr. Donaldson	X			
Mr. Ketch				X
Mr. Rogan	X			
Ms. Moran				X
Ms. Ferraro	X			
Total Votes	7	0	0	2

Signed: _____
Joan Nesenkar Saylor
Interim Board Secretary

Dated: January 10, 2011

ADDENDUM:
PERSONNEL:

1. RESOLUTION OF THE KEANSBURG BOARD OF EDUCATION APPROVING SETTLEMENT OF THE TENURE CHARGES AGAINST DEANNA LOPEZ

WHEREAS, the Keansburg Board of Education ("Board") is currently engaged in litigation with regard to Deanna Lopez; and

WHEREAS, after due consideration both Parties believe that an amicable settlement is in the best interest of the school district; and

WHEREAS, a settlement agreement has been reviewed by the Board and recommended by the Superintendent and Board Secretary.

NOW, THEREFORE, BE IT RESOLVED by the Board that the charges pending in the New Jersey Office of Administrative Law be withdrawn subject to the following:

(1) Ms. Lopez's increment for 2010-2011 would be withheld.
(2) Ms. Lopez would return to the classroom on January 3, 2011.
(3) Ms. Lopez would return to a new building teaching a grade level consistent with her teaching certification.
(4) Unpaid salary less credit for unemployment benefits paid and based on Ms. Lopez's rate of pay without her 2010-2011 increment step would be paid in full to Ms. Lopez.

BE IT FURTHER RESOLVED that copies of this resolution be sent to:

a. Board Attorney
b. Superintendent
c. Board Secretary
d. Attorneys for Deanna Lopez

406-11R

OAL DKT. NO. EDU 8965-11
(EDU 3151-11 ON REMAND)
AGENCY DKT. NO. 51-2/11

IN THE MATTER OF THE TENURE	:	
HEARING OF KIRSTEN SMITH,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF JEFFERSON, MORRIS COUNTY.	:	

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: 9 29 11
Date of Mailing: 9 29 11

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION-
SETTLEMENT
OAL DKT. NO. EDU 08965-11

IN THE MATTER OF THE TENURE HEARING OF KIRSTEN SMITH, SCHOOL DISTRICT OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY.

ON REMAND:
OAL DKT. NO. EDU 03151-11

Joanne L. Butler, Esq., for petitioners Jefferson Township Board of Education (Schenck, Price, Smith & King, attorneys)

Sanford R. Oxfeld, Esq., for respondent Kirsten Smith (Oxfeld Cohen, LLC, attorneys)

Record Closed: August 23, 2011 Decided: August 23, 2011

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

On March 21, 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 June 14, 2011. However, prior to the hearing date, the parties asked to engage in settlement discussions. The parties met with Judge Gerson and were able to reach a settlement.

The parties had agreed to and submitted the attached Settlement Agreement and Release indicating the terms of the agreement. The matter was forwarded to the Department of Education who remanded it back to the Office of Administrative Law on July 28, 2011 in order to have the handwritten portions of the settlement initialed by the parties. Counsel had their respective clients initial the handwritten modifications of the settlement agreement and returned it to the undersigned on August 16, 2011.

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.

8/23/11
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 8-25-11

Date Mailed to Parties: AUG 25 2011

db

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 Petitioner

IN THE MATTER OF THE TENURE CHARGES AGAINST KIRSTEN SMITH, JEFFERSON TOWNSHIP BOARD OF EDUCATION, MORRIS COUNTY.,

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 03151-11
AGENCY REF NO. 51-2/11

SETTLEMENT AGREEMENT

This Agreement is made by and between the Jefferson Township Board of Education (hereinafter "Board"), having its principal offices at 28 Bowling Green Parkway, Lake Hopatcong, New Jersey, and Kirsten Smith (hereinafter referred to as "Smith"), residing at 3 North Glen Circle, Oak Ridge, New Jersey, in an effort to resolve the Tenure Charges pending before the Commissioner of Education, for hearing at the Office of Administrative law, and the Superior Court litigation bearing Docket Number MRS-L-001391 10, and to resolve all remaining issues between the parties.

WHEREAS, the parties have determined that resolution of this matter without proceeding further in the pending tenure dismissal hearing pursuant to the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10, et seq., and the pending Superior Court action, is in the interests of the public and consistent with furthering the public good, since the Petitioner District will obtain its goal of no longer employing Respondent as a tenured teacher, without having to resort to a lengthy hearing to address

twenty-three tenure charges, the anticipated number of witnesses to be produced (which may include student and former student witnesses), the anticipated time and expense of the hearing, the loss of services of three top District administrators during the course of the preparation and hearing, as well as the uncertainty of completing the case in the five hearing dates currently scheduled; and

WHEREAS, the parties agree to fully and finally settle and/or release all claims between them arising out of Smith's employment and separation from employment with District;

The parties do hereby agree as follows:

1. The foregoing recitals are incorporated herein.

2. Smith has executed and supplied an irrevocable letter of resignation, which is attached to this Agreement, which will be accepted at the next public Board meeting and which resignation will become effective on Feb. 29, 2012 or the date that this Agreement is approved by the Commissioner of Education, whichever is later.

3. Until the ~~effective~~ date ~~of the resignation or~~ approval of this Agreement by the Commissioner, Smith will continue on ~~paid~~ suspension. Smith will begin to receive compensation upon approval by the Commission of this Settlement Agreement.

4. During the term of said suspension, and in perpetuity following the approval of this Agreement by the Commissioner, Smith will not volunteer for, be a participant in, or attend any program, event, or activity which is at all related to the Jefferson Township Public Schools, which shall include, but not be limited to, any program, event or activity which is sponsored by the Jefferson Township Public Schools, any co-curricular or extra curricular program, event or activity involving the students of the Jefferson Township Public Schools (regardless of location), any program, event or

Said Compensation to be eight (8) months of salary. In addition she will receive payment for health coverage (COBRA) between the date of her resignation and June 30, 2012

activity which operates with or uses Jefferson Township Public Schools monies or funding, or any program, event or activity which is located in or on any Jefferson Township Public Schools property (whether owned or leased). This shall not include Smith's participation in or attendance at any program related to her children during such time as they attend District schools.

5. In consideration of the foregoing, the Board will not prosecute the tenure changes against Smith.

6. In consideration of the foregoing, Smith hereby releases and forever discharges the Board and its present and former affiliates, subsidiaries, officers, directors, agents, employees, and their successors and assigns, from any and all actions, causes of action, suits, claims, charges or complaints which Smith may have or may have had, or may claim to have or have had, in the past, currently, ~~or in the future~~, against any of them, except as may be necessary to enforce this Agreement. Smith acknowledges that this general release specifically waives and releases all claims including. but not limited to, claims arising under federal, State, and local laws prohibiting employment discrimination, claims arising under the State education laws, N.J.S.A. 18A:1-1, et seq., including but not limited to the "Tenure" laws set forth in N.J.S.A. 18A:28-1, et seq., and the "Tenure Employees Hearing Law," set forth in N.J.S.A. 18A:6-10, et seq., as well as any and all claims or rights arising under the Civil Rights Acts of 1964 and 1991, 42. U.S.C. 2000(e), et seq., the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., Title VII of the Federal Civil Rights Act of 1964, as amended 42 U.S.C. § 2000 (3), et seq., the Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq. claims arising under State, federal or common law for breach of contract, or claims growing

State Family Leave Act or the Federal Family and Medical Leave Act

out of any legal restrictions on the Board's rights with regard to employment of individuals, or claims arising out of or related to any State workers compensation laws, Smith hereby agrees to voluntarily dismiss, with prejudice, her suit against all the Defendant Board bearing Docket Number MRS-L-001391 10, New Jersey Superior Court, Morris County.

7. This Agreement does not constitute an admission by either party of any wrongful action or violation of any federal or State statute, or common law rights, including those relating to the provisions of any law or statute concerning employment actions, or of any other possible or claimed violation of law or rights.

7A. See attached.

8. The terms of this Agreement shall be kept confidential to the extent permitted by law. Smith agrees not to disclose the fact, terms or amount thereof by any means of communication or media to any person other than Smith's immediate family, accountant, attorney, income tax preparer or similar professional, or taxing authorities, unless otherwise ordered by a court of competent jurisdiction. Smith further agrees that she will not engage in, or encourage others to engage in, communications regarding her employment or the actions of the Board or Administration, and the like, via social media. The District agrees not to disclose the fact, terms or amount thereof to any person other than its Board of Education members, administrators and necessary clerical staff, accountants, auditors, attorneys, tax preparers, or other persons on a need-to-know basis, or unless otherwise ordered by a court of competent jurisdiction or required by a government agency.

and the NJEA Report

9. This Agreement shall be binding upon and inure to the benefit of Smith, the Board, and any of their respective heirs, legal or personal representatives, employees, officers, directors, successors or assigns.

10. This Agreement sets forth the entire Agreement between the parties and supersedes any and all prior agreements or understandings between the parties. Smith represents and acknowledges that she does not rely, and has not relied upon, any representation or statement not set forth in this Agreement made by the Board or its counsel with regard to the subject matter, basis, or effect of this Agreement or otherwise.

11. This Agreement shall be construed in accordance with, and all disputes hereunder shall be governed by, the laws of the State of New Jersey.

12. Smith acknowledges that she has carefully read and fully understands all of the terms of this Agreement, and has fully discussed the terms hereof, including the general release contained herein, with her attorney, Sanford Oxfeld, Esq., that she has had a reasonable period of time to consider the terms hereof, and that she enters into this Agreement voluntarily and with the advice of counsel.

13. In the event of a breach of this Agreement, either party may seek relief, including but not limited to damages, restitution and injunctive relief, at law or in equity, in a court of competent jurisdiction and/or tenure dismissal before the Department of Education and the Office of Administrative Law.

14. The parties agree that this Agreement will be incorporated into an Initial Decision by the

Honorable Carol I. Cohen, the administrative law judge assigned to preside over the pending tenure dismissal action bearing OAL DKT. NO. EDU 03151-11 and AGENCY REF NO. 51-2/11.

15. The parties recognize that if this Agreement is not approved by the Commissioner of Education, the tenure dismissal proceeding will resume before Judge Cohen until completion.

16. The terms of this Agreement are subject to approval by the Jefferson Township Board of Education and will be presented at its next meeting

WITNESS

KIRSTEN SMITH
Date: May 25, 2010

WITNESS
6.20.2011

THE JEFFERSON TOWNSHIP BOARD OF EDUCATION

By: H. Ronald Smith, Board President
Date:

Dr Kathaleen Fuchs
Preliminarily for the Board

(01162822:1 /JLB)

7A. Smith represents that any perceived teaching performance issues were the result of [redacted] personal and family ~~issues~~ matters and that in accordance with the recommendation of Dr. Moreno, the psychiatrist that Smith was directed to see by the district, she has continued in ~~psychotherapy~~ treatment. The Board acknowledges these representations and states, without admission, that they are consistent with Smith's record. ~~Both parties hereto stipulate that other than the two terms of absence she was granted during the 2009-2010 school year, Smith did not request and was not entitled any additional~~

TO: Jefferson Township Board of Education
FROM: Kirsten Smith
DATE: May 25, 2012
RE: Letter of Resignation

Gentlepeople:

I hereby tender my irrevocable letter of resignation pursuant to the settlement agreement what I executed this date to be effective at the close of business on February 29, 2012.

Kirsten Smith

ADDENDUM TO SETTLEMENT AGREEMENT

I acknowledge that I have been advised that it is within the discretion of the Commissioner of Education to refer this matter to the State Board of Examiners. I wish to emphasize, however, that in settling this matter I have not admitted that I am guilty of conduct unbecoming, nor that I have done anything that warrants a review of my certificate.

Date: 6/6/11

Kirsten Smith

Date: 6/30/2011

For the Board of Education

JEFFERSON TOWNSHIP BOARD OF EDUCATION
28 Bowling Green Parkway
Lake Hopatcong, NJ 07849

EXTRACT FROM THE MINUTES OF A MEETING OF
THE BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON
MORRIS COUNTY, NJ, TO BE RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of Jefferson in the County of Morris, New Jersey convened in a Regular Meeting on **Monday, June 20, 2011** at 7:00 PM, in the Jefferson Township High School Media Center, 1010 Weldon Road, Oak Ridge, New Jersey.

The following members of the Board of Education were present:

Mrs. Castiglione	Mrs. Poulas
Mr. Cuccio	Mrs. Scott
Mr. Feldmann	Mr. Smith
Mr. Millar	Mr. Stewart

The following member of the Board of Education was absent: Mr. Anzano

The following resolution was offered by Mrs. Scott, seconded by Mr. Feldmann, and adopted by the Board of Education by the following roll call vote:

L.4 Motion to accept the recommendation of the Superintendent to approve and adopt the following addendum to agenda as described below:

WHEREAS, the Board of Education and Kirsten Smith are parties to two separate litigated matters; and

WHEREAS, the Board and Smith have determined that it is in the public interest to settle both cases.

NOW, THEREFORE, BE IT RESOLVED THAT the Board of Education authorizes settlement of both cases, Smith v. Jefferson Township Board of Education bearing Superior Court Docket No. MRS-L-00139110, and In the Matter of the Tenure Charges Against Kirsten Smith, bearing OAL Docket No. EDU 03151-11 and Agency Reference No. 51-2/11, in accordance with the terms of the Agreement presented to the Board for approval; and

BE IT FURTHER RESOLVED THAT as part of that settlement, Smith's letter of resignation be and hereby is accepted; and

BE IT FURTHER RESOLVED THAT the Board Secretary, Board President, and Board Counsel are authorized to take any and all action required to effectuate the settlement in accordance with the terms presented to the Board.

MOTION: Mrs. Scott	SECOND: Mr. Feldmann			
Name	**Ayes**	**Nays**	**Abstain**	**Absent**
Mr. Anzano				X
Mrs. Castiglione	X			
Mr. Cuccio	X			
Mr. Feldmann	X			
Mr. Millar	X			
Mrs. Poulas	X			
Mrs. Scott	X			
Mr. Smith	X			
Mr. Stewart	X			

STATE OF NEW JERSEY}
COUNTY OF MORRIS } ss

I, Dora E. Zeno, Secretary of the Board of Education of the Township of Jefferson, in the County of Morris, State of New Jersey, hereby certify that the foregoing June 20, 2011 extract, has been compared by me with the original minutes that will be approved at the July 18, 2011 Jefferson Township Board of Education meeting. I hereunto set my hand and affixed the corporate seal of said Board of Education.

Dora E. Zeno
Board Secretary

#407-11LM

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

September 28, 2011

Melvin C. Randall, Esq.
Love & Randall
57 Washington Street
East Orange, New Jersey 07017

Robert Schwartz, Esq.
Monroe Centre at Forsgate
12 Centre Drive
Monroe Township, New Jersey 08831

Re: *Elbert Smith v. Board of Education of the City of Orange, Essex County. OAL Dkt. No. EDU 11566-09, Agency Dkt. No. 194-8/09 (Consolidated Cases)*

Dear Counsel,

I have reviewed the Board's submission in connection with the Board's motion for leave to file exceptions out of time in the above-captioned matter. Within seven days after receipt of this letter, the Board shall file exceptions to the Initial Decision. The petitioners' shall have five days after receipt of the Board's exceptions to file a response thereto, if any.

Accordingly, the Board's motion to file exceptions out of time is hereby granted.

Sincerely,

Christopher D. Cerf
Acting Commissioner

c: County Superintendent
State Law Library

CDC/MKD/JKH

#408-11SEC

AGENCY DKT. NO. 242-8/11
SEC DKT. NO. C29-10

EDWARD A. KLISZUS	:	
COMPLAINANT,	:	
V.	:	COMMISSIONER OF EDUCATION
RHONDA WILLIAMS BEMBRY, HACKENSACK BOARD OF EDUCATION, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter contains a Consent Order and supporting Affidavit of Rhonda Williams Bembry, a member of the Hackensack Board of Education, that sets forth the terms and conditions of a proposed settlement agreement of the parties resolving all issues raised by the instant ethics complaint against her, wherein the parties agree that respondent has violated the Code of Ethics for School Board Members and shall be subject to the penalty of reprimand. Such agreement further specifies that by agreeing to this penalty, the respondent agrees to waive any and all hearings to which she is entitled and further agrees not to oppose or appeal the reprimand. At its meeting of August 23, 2011, the School Ethics Commission ("Commission") determined to accept the parties' proposed settlement and forwarded its decision along with the record to the Commissioner for review of the recommended sanction.

Upon his thorough review, the Commissioner accepts – for the reasons succinctly presented in the Commission's decision – that a sanction of reprimand is the appropriate penalty in this matter.

Accordingly respondent Rhonda Williams Bembry is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/28/11

Date of Mailing: 9/30/11

[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).

DR. EDWARD A. KLISZUS	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
RHONDA WILLIAMS BEMBRY ***HACKENSACK BOARD OF EDUCATION*** ***BERGEN COUNTY***	: : : :	**SEC Docket No. C29-10** **OAL Dkt. No. 04301-11** **DECISION ON SETTLEMENT**

PROCEDURAL HISTORY

This matter arises from a complaint filed on October 4, 2010 by Dr. Edward A. Kliszus, Superintendent of Schools, against Rhonda Williams Bembry, a member of the Hackensack Board of Education alleging that the respondent violated N.J.S.A. 18A:12-24.1(b), (c), (d), (e), (f), (g), (h) and (i) of the Code of Ethics for School Board Members. After being granted an extension for good cause shown, on January 19, 2011, a Motion to Dismiss in Lieu of Answer was filed on behalf of the respondent. The motion included an allegation that the complaint was frivolous pursuant to N.J.S.A. 18A:12-29(e). Pursuant to N.J.A.C. 6A:28-8.2(a), a responsive statement was filed on behalf of the complainant on February 3, 2011.

At its meeting on February 22, 2011, the Commission voted to grant the respondent's Motion to Dismiss the allegations in Counts 1, 2, 3 and 4 that the respondent violated N.J.S.A. 18A:12-24.1(h) and the allegations in Counts 2 and 3 that the respondent violated N.J.S.A. 18A:12-24.1(c). The Commission voted to deny the motion as to all other allegations and further found that the complaint was not frivolous, in accordance with the standard set forth at N.J.A.C. 6A:28-1.2. Pursuant to N.J.A.C. 6A:28-10.8(a), the Commission voted to transmit this matter to the Office of Administrative Law (OAL) for hearing, after the respondent filed her answer to the remaining claims.

After transmittal of this matter to the OAL, the parties submitted a Consent Order and supporting Affidavit of Rhonda Williams Bembry which sets forth the terms and conditions of a proposed settlement of the issues raised in the complaint. The Administrative Law Judge (ALJ) concluded that the Consent Order meets the requirements of N.J.A.C. 1:1-19.1 and the matter was returned to the Commission for review. Pursuant to N.J.S.A. 52:14B-10(c) and N.J.A.C. 1:1-18.8 and for good cause shown, the Commission was granted an extension of time in which to issue its final decision in this matter.

The Initial Decision of the ALJ approving the Consent Order was reviewed by the Commission at its July 26, 2011 meeting. The Commission determined to accept the proposed settlement.

ANALYSIS

In her affidavit, the respondent acknowledged: (1) that she engaged in communication both publicly and by email that was improper for a Board member; (2) that she made improper comments at Board meetings on June 8, 2010 and August 23, 2010; and (3) that she engaged in conduct and communication regarding the hiring of personnel that was improper. The respondent further acknowledged that her conduct violated N.J.S.A. 18A:12-24.1(b), (d), (e), (f), (g) and (i) of the Code of Ethics for School Board Members. (Affidavit of Rhonda Williams Bembry at pp. 1-2) The Consent Order states that the settlement of the within matter "shall not constitute precedent or be considered an admission of guilt in other pending or future litigation." (Consent Order at p. 2) The parties agree that the respondent shall be subject to a penalty of reprimand and that by agreeing to this penalty, the respondent agrees to waive any and all hearings to which she is entitled; she further agrees not to oppose or appeal the reprimand. (Id.)

While the Commission takes note of the numerous allegations that were raised by the complainant in this matter and is admittedly troubled by the complainant's willingness to consent to a resolution which includes a penalty inconsistent with the Commission's prior rulings, given the multiple violations acknowledged by the respondent in this matter,[1] the Commission also recognizes:

> the strong public policy of this State favoring the settlement of litigation, including contested cases before the OAL. Settlements permit parties to resolve disputes on mutually acceptable terms rather than exposing themselves to the uncertainties of litigation. See Morris County Fair Hous. Council v. Boonton Township, 197 N.J. Super. 359, 366, 484 A.2d 1302 (Law Div. 1984), aff'd o.b., 209 N.J.Super. 108, 506 A.2d 1284 (App. Div. 1986). "Settlements also save parties litigation expenses and facilitate the administration of the courts by conserving judicial resources." Ibid. Consequently, settlements are generally upheld absent clear and convincing evidence of fraud or other compelling circumstances. See Nolan v. Lee Ho, 120 N.J. 465, 472, 577 A.2d 143 (1990) Ocean County Walton League v. DEP, 303 N.J.Super. 1, 10 (App. Div. 1997).

Additionally, where the parties to the matter are school officials, the conservation of public resources necessarily becomes a compelling factor to be weighed.

---

[1] See, I/M/O Julia Hankerson, Woodbine Bd. of Ed., Cape May County, C36-02 (June 24, 2003) Commissioner of Education Decision No. 475-03SEC, decided August 14, 2003; Nathalie Yafet v. Elbert Smith, Hillside Bd. of Ed., Union County, C24-07 (October 27, 2008), aff'd, Commissioner of Education Decision No. 156-09A, decided May 15, 2009; and Jacobs v. Delbury, Sussex Wantage Reg'l Bd. of Ed., Sussex County, C44-07 (November 23, 2008) Commissioner of Education Decision No. 7-09SEC, decided January 9, 2009.

DECISION

For the reasons set forth above, the Commission adopts the Initial Decision of the ALJ accepting the Consent Order signed by the parties in this matter.

PENALTY

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the recommended sanction of reprimand.

Robert W. Bender
Chairperson

Mailing Date: August 24, 2011

Resolution Adopting Decision – C29-10

Whereas, pursuant to N.J.A.C. 6A:28-10.8(a), the Commission voted to transmit this matter to the Office of Administrative Law (OAL) for hearing; and

Whereas, while at the OAL, the parties to this matter executed a Consent Order setting for the terms and conditions of a settlement; and

Whereas, the Administrative Law Judge concluded that the Consent Order met the requirements of N.J.A.C. 1:1-19.1; and

Whereas, at its meeting on July 26, 2011, the Commission determined to accept the proposed settlement; and

Whereas, the Commission finds that the within decision accurately memorializes its adoption of the Initial Decision accepting the Consent Order;

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

Robert W. Bender, Chairperson

I hereby certify that this Resolution
was duly adopted by the School Ethics
Commission at it public meeting on
August 23, 2011.

Joanne Boyle, Executive Director
School Ethics Commission

421-11L

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 7, 2011

Raymond l. Hamlin, Esq.
Hunt Hamlin and Ridley
Military Park Building
60 Park Place, Suite 1602
Newark, NJ 07102

Keith Waldman, Esq.
Selikoff and Cohen
Laurel Corporate Center
700 East Gate Drive, Suite 502
Mount Laurel, NJ 08054

Re: In the Matter of the Tenure Hearing of Rena Graves, School District of the City of Pleasantville, Atlantic County
Agency Dkt. No. 257-9/11

Dear Parties:

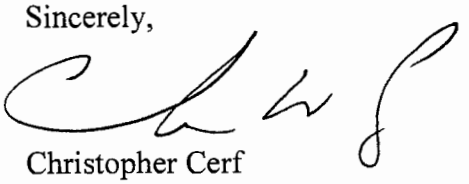
I have reviewed the petition and answer filed in the matter referenced above and, having done so, have determined to dismiss the appeal for failure to state a claim cognizable before the Commissioner of Education.

In its petition, the school district, seeks dismissal of respondent Graves by way of tenure charges alleging excessive absenteeism. By way of answer, respondent points out that she has been serving in petitioner's district as an instructional aide and is therefore not a statutorily tenured employee.

After a review of the supporting documents, it is clear that the inapplicability to respondent of the school laws governing tenure leaves me with no issue or claim within my jurisdiction or upon which I may grant relief.

I hereby decline to continue with contested case proceedings and dismiss the petition of appeal.*

Sincerely,



Christopher Cerf
Acting Commissioner of Education

c: Executive County Superintendent
State Law Library

* 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. NOS. EDU 10056-09, EDU 10374-09 (CONSOLIDATED)
AGENCY DKT NOS. 218-8/9, 277-10/09

IN THE MATTER OF THE TENURE HEARING OF KATHRYN CORNFORTH, SCHOOL DISTRICT OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
KATHRYN CORNFORTH,	:	DECISION
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF CINNAMINSON, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

Review of the record and the Initial Decision of the Office of Administrative Law (OAL) in this consolidated matter reveal that the tenure charges brought by the Cinnaminson Board of Education (the Board) have been mooted by the death of Kathryn Cornforth. Further, Ms. Cornforth's counsel has requested withdrawal of her petition challenging the Board's withholding of her increment for the 2009-2010 school year.

Accordingly, the Commissioner adopts the Initial Decision dismissing both the tenure charges that were brought against Ms. Cornforth and her petition contesting the withholding of her increment.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10|07|11
Date of Mailing: 10|07|11

[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. NOs. EDU 10056-09 AND
EDU 10374-09
AGENCY DKT. NOs. 218-8/09 AND
277-10/09
(CONSOLIDATED)

IN THE MATTER OF
THE TENURE HEARING OF KATHRYN CORNFORTH,
BOARD OF EDUCATION OF THE TOWNSHIP OF
CINNAMINSON, BURLINGTON COUNTY, AGENCY
DOCKET NO. 218-8/09.

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

Steven R. Cohen, Esq., for respondent (Selikoff & Cohen, PA, attorneys)

Record Closed: July 25, 2011 Decided: August 25, 2011

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

The Cinnaminson Board of Education (Board) brought charges against respondent Kathryn Cornforth, a tenured teacher in the District, alleging incapacity, conduct unbecoming, insubordination and excessive absenteeism. Kathryn Cornforth

also filed a petition against the Board charging that the Board's determination to withhold her increment for the 2009-2010 school year was arbitrary, capricious, unreasonable and in violation of N.J.S.A. 18A:29-14.

PROCEDURAL HISTORY

On August 31, 2009, the Board filed charges against Ms. Cornforth with the New Jersey Commissioner of Education. On September 10, 2009, Ms. Cornforth filed an Answer. The petition and answer were transmitted to the Office of Administrative Law where they were filed on September 17, 2009, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 for determination as a contested case. On October 9, 2009, Ms. Cornforth filed a petition of appeal with the New Jersey Commissioner of Education. On October 9, 2009, the Board filed an answer. The petition and answer were transmitted to the Office of Administrative Law where they were filed on October 14, 2009. On November 4, 2009, Administrative Law Judge Israel Dubin issued an Order consolidating the two cases for hearing. On March 8, 2010, Judge Dubin signed a Consent Protective Order protecting the confidentiality of the information designated as such during the course of discovery and trial.

Hearing dates were scheduled for June 2010 and September 2010, but adjourned to allow counsel time to reach a settlement. Subsequently, several status conferences were held on the case, the last of which was scheduled for June 16, 2011. Prior to that status conference, counsel for the Board and counsel for Ms. Cornforth wrote separate letters, attached hereto as P-1 (Board) and P-1 (Cornforth) on June 13, 2011, advising that Ms. Cornforth had passed away and asking that the petitions be dismissed as moot. Subsequently, Judge Dubin retired and the case was transferred to bring to a conclusion. After being assigned, I convened a telephone conference on July 25, 2011, to discuss the case and counsel were in agreement that there were no further issues pending and the cases could be dismissed based on the statements in their letters.

CONCLUSION AND ORDER

The only issue to be determined is whether the two petitioners' claims should be dismissed as moot due to the untimely death of Ms. Cornforth. It is well settled that "questions that have become moot or academic prior to judicial scrutiny generally have been held to be an improper subject for judicial review." Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976). See Oxfeld v. New Jersey State Bd. of Education, 68 N.J. 301 (1975) (proceeding challenging the constitutionality of a school regulation governing student distribution of pamphlets on school grounds was moot where petitioners were no longer students at the school). An action is moot when it no longer presents a justiciable controversy because the issues involved have become academic, or when a decision is sought on a matter which, when rendered, will have no practical effect on the existing controversy. Victoria v. Woodbridge Twp. Bd. of Educ., 1982 S.L.D. 1, 5.

Applying these standards, I agree with the Board's and Ms. Cornforth's positions as set forth in their letters of June 13, 2011, that there is no longer a justiciable controversy and the decision initially sought will have no practical effect. Further, since Ms. Cornforth is now deceased, there is no concern pursuant to N.J.A.C. 6A:3-5.6 regarding her license. I therefore **CONCLUDE** that the Board's tenure charges and Ms. Cornforth's challenge to the Board's determination to withhold her increment are now moot. I therefore **ORDER** that the above-captioned petitions 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.

August 25, 2011
DATE

Lisa James-Beavers
LISA JAMES-BEAVERS, ALJ

Date Received at Agency: August 26, 2011

Date Mailed to Parties: August 26, 2011

APPENDIX

EXHIBITS

P-1 (Board) Letter from Stephen Mushinski to Judge Dubin dated June 13, 2011

P-1 (Cornforth) Letter from Steven R. Cohen to Judge Dubin dated June 13, 2011

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

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her grandson, L.A.V., was not eligible for a free public education in the South Plainfield school district between March and September 2011, when L.A.V. was living with his grandparents. The respondent contended that L.A.V. did not meet the requirements for enrollment as a non-resident affidavit student, and filed a counterclaim for tuition.

The ALJ found that: the testimony of M.E.M. and her daughter, G.M.T. – L.A.V.'s mother – was believable, credible and persuasive; G.M.T. does not contribute anything to the support of L.A.V.; petitioner has proven by a preponderance of the credible evidence that she supports L.A.V. gratis; L.A.V. was removed from his mother's care by petitioner because of the violence she witnessed and the emotional strife that L.A.V. was inflicting upon his mother and siblings; the emotional discord and financial insecurity experienced by the family resulted from the long illness and subsequent death of L.A.V.'s stepfather, and clearly qualified as family hardship. Accordingly, the ALJ concluded that petitioner had met her burden to prove family hardship, and that L.A.V. is entitled to a free public education in the district as an affidavit student. Subsequent to the issuance of the ALJ's initial decision, the respondent Board submitted a motion to reopen the record in which it advised that L.A.V. had gone to live with his biological father in New York State and inferred that this turn of events negated any finding of economic hardship and precluded L.A.V.'s entitlement to a free public education pursuant to *N.J.S.A.* 18A:38-1b.

Upon a full and independent review, the Commissioner denied respondent's motion to reopen the record and granted petitioner's appeal with respect to the time period from March to September 2011. In so doing, the Commissioner found, *inter alia,* that: respondent's motion was heavily dependent on speculation; L.A.V. was removed from the family home because of behavioral problems that resulted from emotional and financial problems in the wake of the death of his stepfather; and the hardship that justifies a free education for affidavit students is not limited to economic hardship.

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 4726-11
AGENCY DKT. NO. 72-3/11

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

This controversy arose when the respondent school district determined that L.A.V. – who lived in South Plainfield with his grandparents between March and September 2011 – was not entitled to a free public education in its district during that period of time. Upon review of the record and the Initial Decision of the Office of Administrative Law (OAL) – including the witness credibility determinations made therein – the Commissioner adopts the Administrative Law Judge's (ALJ) determination that L.A.V.'s move to his grandparents' home in South Plainfield was the result of hardships that he, his mother, and his siblings were experiencing, and that his situation met the standards set forth in *N.J.S.A.* 18A:38-1(b) warranting a free public education for "affidavit" students.

The Commissioner acknowledges the motion to reopen the record which respondent filed on September 14, 2011. In that motion, respondent: 1) advised that L.A.V. has gone to live with his biological father in New York State; 2) urged the Commissioner to presume that L.A.V.'s father could have cared for him from March 2011 forward; 3) inferred that L.A.V. did not, then, live with his grandparents as a result of economic hardship; and 4) concluded that L.A.V. was

consequently not entitled to a free public education in its district under *N.J.S.A.* 18A:38-1(b). No response to the motion has been filed on behalf of petitioner.

At the outset, the Commissioner notes that respondent's motion is heavily dependent upon speculation. Equally significant, however, is the fact that – separate and apart from the financial capabilities of L.A.V.'s biological father – the record indicates that M.E.M. removed L.A.V. from his mother's home because he was exhibiting behavioral problems in the wake of his stepfather's death. That death was clearly hard on the family, emotionally and financially, and appeared to precipitate aggressive behavior by L.A.V.

Nothing in respondent's motion refutes those facts, which were proffered by testimony that the ALJ found to be credible.[1] Moreover, the hardship that justifies a free education for an affidavit student is not limited to economic hardship. The child's parent is required to file a sworn statement that "he is not capable of supporting **or providing care** for the child due to a **family** or economic hardship." *N.J.S.A.* 18A:38-1(b)(1) (emphasis added). Such was the case here.

Accordingly, respondent's motion to reopen the record is denied. The ALJ's determination that L.A.V. qualified for a free public education under *N.J.S.A.* 18A:38-1 is adopted, the petition is granted with respect to the time period from March to September 2011, and respondent's counterclaim is dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10|07|11

10|07|11

[1] The Commissioner will not disturb the ALJ's credibility determination unless it is arbitrary, capricious, unreasonable or unsupported by 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). No such grounds for rejection of the ALJ's credibility determinations exist in the present case.

[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 04726-11
AGENCY DKT. NO. 72-3/11

M.E.M. ON BEHALF OF MINOR CHILD L.A.V.,
Petitioner,
v.
BOROUGH OF SOUTH PLAINFIELD BOARD OF EDUCATION, MIDDLESEX COUNTY,
Respondent.

Nashon Hornsby, Esq., for petitioner

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

Record Closed: August 30, 2011 Decided: September 2, 2011

BEFORE **CARIDAD F. RIGO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, M.E.M., appealed the determination by respondent, Board of Education of the Borough of South Plainfield (Board/District), that her minor grandson, L.A.V., was not entitled to a free public education in the District. Petitioner claimed that the minor child was entitled to a free public education pursuant to N.J.S.A. 18A:38-1(b).

Respondent answered that the application had not shown family or economic hardship or otherwise satisfied the requirements of N.J.S.A. 18A:38-1b(1). On or about March 2011, the Board denied petitioner's application to have her grandson, L.A.V., admitted to school in the District. On or about March 25, 2011, the petitioner filed a residency appeal pursuant to N.J.S.A. 18A:38-1 concerning this residency dispute. The Board filed an answer denying the allegations in the petition, with a counterclaim for tuition.

On April 25, 2011, the Department of Education transmitted the matter to the Office of Administrative Law for a hearing as a contested case. A hearing was scheduled for August 11, 2011, at which time the matter was heard. The record remained open for the submission of post-hearing briefs. Post-hearing submissions were received by August 30, 2011 and the record was closed.

ISSUE

Is L.A.V., eligible to attend the South Plainfield Public School District free of charge in accordance with N.J.S.A. 18A:38-1(b)?

FACTS

Summary of Testimony

M.E.M.

M.E.M. is the petitioner and the grandmother of L.A.V. M.E.M. is seventy-seven years old, she and her husband, the minor's grandfather who is eighty-one years of age, have lived in South Plainfield for more than fifty-five years. She raised all four of her children in South Plainfield; all of her children attended the South Plainfield schools. They own their home. Her husband suffers from dementia and diabetes and needs constant care.

M.E.M. said that L.A.V. came to live with them in March 2011 because he was physically aggressive with his mother and younger siblings; he was disrespectful to his

mother and was otherwise acting out. M.E.M. testified that in March 2011, she actually saw L.A.V. push his mother up against a wall and really rough her up. M.E.M. said that immediately after that incident she told her daughter that she was taking L.A.V. with her to South Plainfield. According to M.E.M., L.A.V. developed a pattern of misbehaving and aggressive acting out in late 2010, shortly after his father died.

M.E.M. testified that she went to the South Plainfield High School to complete the necessary paper work to properly enroll L.A.V. in the high school, and it was during this enrollment process that the current issue developed.

She stated that L.A.V. lives in the house with her and her husband. According to petitioner L.A.V. is her child. She does not consider him a grandchild but actually her child. She cares and attends to him as if he were her minor child. She does not receive any money from L.A.V.'s mother, who is her daughter, for L.A.V.'s care and maintenance. She said that she did not provide any checks or receipts for any expenses for L.A.V. because she has not kept any records of what she spends and has spent on L.A.V. L.A.V. is her child now and she is not keeping track of how much money she spends on him. She gives L.A.V. money every day for his lunch. She also gives him cash for whatever else he needs.

At home M.E.M. said L.A.V. has his own room. He does his chores around the house and helps her out with the care of her husband, his grandfather. L.A.V. mows the lawn, does the laundry for the house, cleans the house; she said L.A.V. is like having a child around the house again. She said L.A.V. has not given her a bit of trouble. L.A.V. attends school regularly and is doing well in school. She has not received any negative reports from South Plainfield High School about L.A.V.

L.A.V. spends the weekends at home with her in South Plainfield, he has visited his mother in Willingboro once or twice since moving to South Plainfield.

M.E.M. testified that she did not ask her daughter to move L.A.V. to South Plainfield with her because of the school district but because of the emotional and financial hardship her daughter was experiencing since the death of her daughter's

husband. It was not the school district that prompted the move but the situation in her daughter's home. M.E.M. said her daughter is struggling financially having to support three young children on Social Security. She believes the death of her son-in-law after a long illness from cancer emotionally destroyed L.A.V. She also believes that seeing his mother stressing over the death and financial affects resulting from his father's long illness caused L.A.V. to have a breakdown of sorts.

M.E.M. stated that she needed to help her daughter and by removing L.A.V. from her care she was able to ease some of her daughter's burdens. And, at the same time she would be helping L.A.V. L.A.V. is happy in school, does odd jobs for neighbors, stays home and has not exhibited any of the negative behaviors he had when in Willingboro with his mother.

M.E.M. testified that L.A.V. was always very respectful to her and his grandfather. She said she know L.A.V. loves her and his grandfather and would never do or say anything inappropriate to them. She testified that she has never had to call L.A.V.'s attention to anything. In fact, she said that when she saw L.A.V. attack his mother she was taken aback and could not believe her own eyes or ears. She said that was the first and last time she witnessed or heard about such actions about L.A.V.

Gustavia Karen Tirado

Gustavia Karen Tirado is the mother of L.A.V. and the daughter of M.E.M. She lives in Willingboro, New Jersey. She has three children ages seven, nine and L.A.V. who is sixteen. Tirado testified that her husband, L.A.V.'s stepfather, died of cancer after being seriously ill for three years.

Tirado said L.A.V. began acting out shortly after her husband died. She said prior to this L.A.V. was a model child. She said L.A.V. was angry with his stepfather's death. L.A.V. was attending Willingboro High School. According to Tirado, L.A.V. would yell, scream and curse at her and his younger siblings. She said L.A.V. stole money out of her purse, locked his seven year old sister out of the house on a cold winter evening, and he locked her out as well. He fought his nine year old brother to the

point that she was scared that L.A.V. would really physically hurt him. She said L.A.V. ran away from her house twice and she had to call the police. L.A.V. actually picked her up and pinned her against the wall. He picked her up and threw her on the floor and was about to strangle her when her mother, M.E.M., who was visiting, stopped him. It was that very day that her mother took L.A.V. with her to South Plainfield. She said that day she decided that L.A.V. could no longer stay in the house with her and the other children. She said the police had to be called to her house numerous times because of L.A.V.'s behavior.

She and L.A.V. tried to work things out by attending anger management classes and counseling but it was of no help.

Tirado stated that she worked as a customer service representative for nine years. She had to reduce her hours to part-time when her husband's illness took a turn for the worse and needed more home care. She said ultimately she had to stop working to care for her husband full-time. She owns a house in Willingboro however she is two months in arrears with the mortgage. Her only source of income is $2,200 from Social Security. Her mortgage is $1,200. She stated that her husband had a small life insurance policy and with those proceeds she purchased a car, prior to that the family did not have a car. She said she used the balance of the proceeds of the life insurance policy to pay mostly medical bills. She is on Family Care-Medicaid.

Tirado testified that she sees L.A.V. on the weekends when she goes to South Plainfield.

Tirado said she does not contribute anything towards L.A.V.'s living expenses. She said her parents have not asked her for any money nor have they asked her to reimburse them. She says she wants to care for her son but at the moment she just cannot. She wants to do what she is supposed to do for her children but she can not and needs the help from her parents.

Since attending South Plainfield High School L.A.V. has not fought or been suspended in school; he attends school regularly and is doing well. She says all reports

about L.A.V. have been positive. She envisioned having to put L.A.V. in some sort of out of home placement because she could not handle him but then her parents took him and it has worked out very well.

LEGAL DISCUSSION AND CONCLUSION

The statute governing this matter, N.J.S.A. 18A:38-1, 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.

Accordingly, the "affidavit student" provision authorizes boards of education to challenge the validity of affidavits submitted by parents and relatives or friends to determine if the pupil is entitled to a free education in the particular district.

Based upon the "affidavit student" law, petitioner is required to satisfy a four-prong test by demonstrating that (1) petitioner is domiciled within respondent's school district; (2) petitioner is supporting L.A.V. gratis; (3) Tirado is not capable of supporting or providing care for L.A.V. due to family or economic hardship; and (4) L.A.V. is not residing with petitioner solely for the purpose of receiving a free public education in respondent's school district. The burden of proof is on the petitioner to demonstrate each and every element. N.J.S.A. 18A:38-1(b).

The first prong is not at issue in this dispute, as the record is clear that M.E.M. resides within the respondent's school district. Moreover, there is no evidence in the record even suggesting that L.A.V. is residing with M.E.M. solely for the purpose of receiving a free public education in respondent's school district. Accordingly the first and fourth prongs of the statutory requirements have been satisfied and I so **FIND**.

With regard to the second prong, the term "gratis" is not defined within the statute. Black's Law Dictionary 708 (7th ed. 1999) defines "gratis" to mean "free; without compensation." in the context of N.J.S.A. 18A:38-1(b)(1) the term means that a person undertakes the support of a child without charging or seeking reward. I **FIND** that M.E.M. is caring for L.A.V. free, without compensation.

In the matter *of* E.L. v. Board of Education of Morris Hills Regional School District, EDU 3172-97, Initial Decision (January 3, 2000), aff'd and modified, Comm'r (February 15, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>, the administrative law judge held that although the mother had ample means to support her daughter and contributed $200 per month to the grandparents for the child's living expenses, the petitioner nevertheless met the "gratis test," finding that the motivation of the grandparents "arose solely out of love and concern for their grandchild and was not dependent on making money." In the within matter the motivation of M.E.M. appears to be the same.

CREDIBILITY FINDINGS

It is the obligation and responsibility of the undersigned to weigh the credibility of the witnesses in this matter in order to make a determination. Credibility is the value that a fact finder gives to a witness's testimony. The word contemplates an overall assessment of a witness's story 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). Credible testimony is testimony that must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super 6, 24 (App. Div. 1955). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973).

There is no mechanical formula for determining the truth. One factor to determine which party's version of the incident has the "reasonable probability of truth" is that 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. 1952). Further, "[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). Also, it is the function of the trier of fact to determine credibility based on the internal consistency or improbability of the witnesses' testimonies using experience and everyday affairs to give additional guidance. Whether petitioner has met the burden of proving each element of the statute depends on the credibility of the evidence. Thus, I have also considered factors such as the witnesses' demeanor, as well as external measures of credibility.

In the within matter the District's determination was based on M.E.M.'s affidavit to the District marked Exhibit J-1., where Tirado states that she will provide financial

support for L.A.V. Tirado testified that such a comment was not to be taken literally. She meant to convey that L.A.V. would not be a financial burden to the public or to the school district. She also stated that it was her pride that prevented her from stating outright that she could not afford to care for her children. I **FIND** the testimony of M.E.M. and Tirado to be believable, credible and persuasive. I **CONCLUDE** that Tirado does not contribute anything to the support of L.A.V. and that petitioner has proven by a preponderance of the credible evidence that she supports L.A.V. gratis, thereby satisfying the second prong of the statute.

The remaining requirement is that a family or economic hardship exist that prevents Tirado from supporting or providing care for L.A.V. The District contends that petitioner has not proven that a family hardship exists. In the matter of K.M. v. Board of Education of Ocean Township, 96 N.J.A.R.2d (EDU) 632, a fourteen-year-old student had been living with her mother and brother in a two-bedroom apartment in Neptune, N.J. The student and her brother shared a bedroom, which was deemed inappropriate by the family as the student reached her teenage years. The student's mother could not afford a three-bedroom apartment, so the student moved into the grandmother's home in Ocean Township. The commissioner, in these circumstances, found that a sufficient economic hardship existed to justify the student's enrollment in the Ocean Township district schools. In the matter of McClean v. Board of Education of Township of Ocean, 96 N.J.A.R.2d (EDU) 632, it was found to be inappropriate for a child entering adolescence to share a bedroom with her brother when their parents could not afford a larger apartment. Under the circumstances a hardship was found to exist. In the matter of Y.I.S. v. Northern Valley regional High School District, EDU-10964-97, Initial Decision (December 6, 2001), adopted, Comm'r (January 8, 2002) aff'd., State Board (May 2, 2002), the travel schedule and working hours of a single parent were found to constitute a hardship on a parent.

In the case at bar, L.A.V. was removed from his mother's care by M.E.M. because of the violence she witnessed and the emotional strife L.A.V. was inflicting on his mother and siblings. M.E.M., as a mother and a grandmother made the decision that it was best for the family if L.A.V. was not living with his mother in Willingboro. She moved L.A.V. out of Willingboro and in with her in South Plainfield. I **FIND** that this

highly charged emotional situation, resulting from the long illness and subsequent death of L.A.V.'s stepfather, coupled with the consequential financial problems all clearly rise to the level of saying that this is a family going through a hardship.

Based upon all of the foregoing, I **CONCLUDE** that petitioner has met the burden of proving that these circumstances constitute a family hardship, thereby satisfying the third prong of the test.

Therefore based upon all of the foregoing, I **CONCLUDE** that L.A.V. is entitled to a free public education in the District.

ORDER

It is **ORDERED** that L.A.V. is eligible to receive a free public education in the South Plainfield School District.

ORDER

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.

September 2, 2011
DATE

CARIDAD F. RIGO, ALJ

Date Received by Agency: September 2, 2011

Date Mailed to Parties: SEP - 8 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

WITNESSES

For Petitioner

M.E.M.
Gustavia Karen Tirado

For Respondent:

None.

EXHIBITS

Joint:

J-1 Sworn Statement

For Respondent:

R-1 Certification as to tuition from Mary Muglia

#426-11

IN THE MATTER OF THE TENURE	:	
HEARING OF SUSAN PAREZO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF LAKEHURST, OCEAN COUNTY.	:	

SYNOPSIS

The petitioning Board certified two charges of unbecoming conduct against respondent – a physical education teacher employed by the district – for a June 2010 incident during which the respondent allegedly balled up pieces of clear tape, placed them on the person of J.H., one of the second graders in her gym class, and allowed and/or encouraged other students to follow her lead, thereby humiliating and embarrassing said student. Respondent also allegedly placed a piece of tape on J.H.'s mouth, and subsequently made false statements denying her role in the incident. The Board sought removal of respondent from her tenured position.

The ALJ found, *inter alia*, that: the incident upon which these tenure charges are based was disturbing and serious; respondent failed to properly consider the consequences of her actions and the impact upon J.H. and the other second graders in the class; respondent's assertions that her actions were innocent, spontaneous, and in the spirit of fun fail to justify the unsettling behavior that subjected a young student to ridicule and embarrassment; respondent has taught for 21 years, and should have realized that her actions were inappropriate and unacceptable for a teaching professional; respondent's unwillingness to either own up to her responsibility for her behavior or to appropriately apologize to the victim and his family further demonstrate her failure to maintain her proper role as a leader in the school setting. Accordingly, the ALJ found that – based on the evidence and testimony presented at hearing – the Board met its burden of establishing by a preponderance of the credible evidence that respondent is guilty of unbecoming conduct, and concluded that her behavior warrants dismissal from her tenured employment.

Upon independent review of the record, the Commissioner 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.

October 12, 2011

OAL DKT. NO. EDU 13216-10
AGENCY DKT NO. 646-11/10

IN THE MATTER OF THE TENURE	:	
HEARING OF SUSAN PAREZO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF LAKEHURST, OCEAN COUNTY.	:	
	:	

The record of this matter and the Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. At the request of the respondent, the parties were granted a significant extension of time within which to file exceptions and reply exceptions to the Initial Decision.[1] Both submissions were filed within the extended timelines.

Respondent's exceptions are essentially a replication of her Post Hearing and Post Hearing Reply Briefs advanced before the Administrative Law Judge (ALJ) below, recasting the arguments therein to support her contention that the ALJ erroneously found the Board had established its charges against her. Respondent additionally challenges the ALJ's credibility determinations which found the Board's witnesses to be credible – particularly the young children who testified to different versions of the alleged incident – while finding her testimony unpersuasive. Finally, respondent maintains that the ALJ's recommended penalty of removal from her tenured position is severe and disproportionate to the charges against her which were "limited to one incident that lasted mere minutes involving an activity that was conducted in a fun and playful atmosphere." (Respondent's Exceptions pages 1-70, quote at 63)

[1] The grant of these extensions necessitated the Commissioner seeking an extension of time for the completion of his decision in this matter.

In reply, the Board argues that the ALJ's findings and conclusions were reasonably reached and founded on sufficient credible evidence in the record. As to penalty, the Board concedes that the recommended penalty, while severe, is fully warranted because:

> [t]he Respondent is an educated professional who has a duty, not only to educate her students, but to set an example of proper conduct. Such a position requires the trust of the school district who employs her; the trust of the parents whose children she is teaching; the trust of her co-workers; and most importantly, the trust of her students.
>
> The Respondent violated this trust. She used her position to single out and belittle a student in front of his peers; she encouraged her students to stick tape on a fellow student; and she placed tape over the mouth of a child. Perhaps most importantly, when confronted with her conduct unbecoming, the Respondent lied to her supervisors, her peers, her students, and to the trial court. Such a serious violation of trust conduct warrants dismissal. [sic] (Board's Reply Exceptions, pages 1-11, quote at 11)

Upon comprehensive review and consideration of the entire record of this matter, which included transcripts of the proceedings at the OAL,[2] together with exhibits, post-hearing briefs, and the parties' exception and reply arguments, the Commissioner agrees with the conclusion of the ALJ that the District has established that respondent is guilty of unbecoming conduct warranting removal from her tenured position.

In so determining, the Commissioner finds respondent's exceptions unpersuasive, largely reflecting arguments and objections raised before the ALJ below and clearly taken into account by him in weighing the testimony and evidence, and in concluding that the record overwhelmingly supported the Board's charges. Based on his overall assessment of the Board's witnesses, the ALJ found them to be "highly credible and worthy of belief." It is also especially

[2] The record contains transcripts of proceedings conducted on April 1 (including a second transcript containing the testimony of J.H. only, which took place in a separate hearing room on the same day), April 5, April 8 (including a second transcript containing the testimony of C.C. only, which took place in a separate hearing room on the same day), April 11 and April 20, 2011.

evident from his decision that the ALJ recognized his obligation with respect to the care which must be taken in evaluating testimony provided by young students. Specifically he explained:

> (A)fter having considered and closely scrutinized the oral statements made at hearing by J.H., C.C. and Z.W., and the testimony of Bixby, as well as having considered under the residuum rule the largely corroborating statements made by the fellow students A., J., A., and J. to Hamilton and Davis in their respective investigations..., the much greater weight of the evidence supports the conclusion that Parezo specifically, intentionally and unequivocally affixed tape to the mouth of J.H. and then removed it as Bixby entered the area. The activity was observed by the students, who were clearly in the best position to observe what had happened. As part of the analysis, I carefully considered the answers provided at hearing by J.H. and C.C., neither one of whom had any vested interest in the outcome other than to tell me the truth. Their answers were refreshing and straightforward. I detected absolutely no hesitation on the part of either one of them regarding what they had observed and/or experienced. Similarly, although to a slightly lesser degree I afforded credibility and appropriate weight to the statements of Z.W. as well, even though her vantage point was not nearly as good as the two second graders who were immediately in front of Parezo. (Initial Decision at 51)

In contrast, the ALJ found that respondent's "account of the events is not credible and is not worthy of belief." (Initial Decision at 50) The ALJ having had the opportunity to assess the credibility of the various witnesses who appeared before him, 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)]

Notwithstanding respondent's arguments to the contrary, the Commissioner finds no basis whatsoever in the record to reject the ALJ's recitations of testimony, his determinations of witness credibility, or his fact finding analysis and conclusions as to the truth of the Board's allegations and the characterization of respondent's behavior as unbecoming conduct.

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).

While duly considering respondent's 21 years of apparently unblemished service in the District,[3] the Commissioner, nonetheless, is in full accord with the ALJ's evaluation as to the "disturbing and serious" nature of the incident here:

> Based upon all of the relevant proofs, I FIND that [respondent] inappropriately singled out one student, J.H. and made him the butt of her "fun" time in the presence of all of his classroom peers plus the eighth grader Z.W. She then placed tape on his shoulders and fostered and encouraged the opportunity for his fellow students to do the same on him. She then placed a piece of flat tape over his mouth as well as at or immediately near his cheek. And then, at or about the time of the arrival of Kathleen Bixby, the second grade teacher, she removed the tape from the mouth of J.H., all of this being witnessed by the students and Bixby. The tape briefly left a red rectangular mark on the child's face. Her role in this process as the adult leader was deplorable, whether she felt it was a fun activity or not. The child even received some taunts from his classmates, such as "tape boy." Despite what Parezo contends, the child J.H. expressed clearly that he was humiliated by the experience and then, as he described it at the hearing, he then felt anger at his teacher for having done what she did. This is hardly a reason to instill confidence in children or their families in the community by the adult educational leadership. [sic] In fact, the child was so upset that he feared going

[3] The Commissioner notes with interest the ALJ's observation that respondent's long service in the District might in some measure be viewed as a negative factor in light of her behavior. "There was absolutely no excuse for [her]conduct. Perhaps a less experienced teacher could be given some margin of leniency based upon the rationale or justification of immaturity. This was not the case here, however. Given the evolving nature of awareness and sensitivity to such violations of individual rights and the increasingly focused efforts in school districts to address such improprieties against children generally, this experienced teacher should have known much better under the circumstances." (Initial Decision at 54)

> back to school. The impact on the child was significant and distinguishes it from other cases in which innocent play got out of hand. This definitely indicates that damage had been done to the child, whether or not Parezo personally felt it was neither punitive, bullying or malicious. Also, his parents were appropriately and understandably upset with the misconduct by Parezo. Curiously, for all of that, Parezo never even truly apologized to the child for what she had done. Her "apology", such as it was, was lame and feeble at best. All she had to really say at that time was what Mrs. H. had requested, which was the two magic words: "I'm sorry." Instead, she gave a response which indicated that she was only sorry for the matter having gone to that point. That hardly sounds like an apology for misconduct, especially where she violated the child so deliberately in front of his peers. The activity may have been fun for Parezo and the other students, but it definitely did not impact similarly for J.H., who was the victim. As a result, she violated the interests of J.H., as set forth in the first charge in this matter...The parent's reactions demonstrate how upset the entire family was by the incident. And yet, for all that, she never really apologized.
>
> And then, to further compound her inappropriate conduct, Parezo was not truthful with either Superintendent Hamilton or Principal Davis when they conducted their respective investigations with her, which has been set forth specifically in Charge #two herein. (Initial Decision at 49-50)

Finally, particularly disturbing here is respondent's refusal – even at this late date – to recognize the seriousness of her actions or take responsibility for them. Rather, she continues to view the whole incident as *de minimus* in nature and scope and remains adamant that the Board's witnesses lied, for one reason or another, about what they saw. Given her steadfast attitude in this regard, the Commissioner is not persuaded that such conduct would not be repeated in the future. Under these circumstances, the Commissioner cannot entertain the prospect of respondent's return to the District and the resultant potential for the perpetration of an unhealthy educational environment.

Accordingly, the recommended decision of the OAL is adopted for the reasons comprehensively detailed therein. Respondent is hereby dismissed from her tenured teaching position with the School District of the Borough of Lakehurst. This matter 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.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/12/11

Date of Mailing: 10/13/11

[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 13216-2010
AGENCY DKT. 646-11/10

IN THE MATTER OF THE TENURE HEARING OF SUSAN PAREZO, SCHOOL DISTRICT OF THE BOROUGH OF LAKEHURST, OCEAN COUNTY.

Steven A. Zabarsky, Esq., appearing for petitioner, Lakehurst Borough Board of Education, (Citta, Holzapfel and Zabarsky, attorneys)

Jason E. Sokolowski, Esq., appearing for respondent, Susan Parezo, (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Record Closed: June 27, 2011 Decided: August 8, 2011

BEFORE **JOHN R. FUTEY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, Petitioner, the Lakehurst Board of Education (hereinafter "Lakehurst" or the 'Board' ") charges respondent, Susan Parezo (hereinafter "Parezo") a tenured teacher, with unbecoming conduct and seeks her removal. Parezo appealed the action.

This matter was transmitted to the Office of Administrative Law ("OAL") on December 6, 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. It was assigned to this administrative law judge on December 9, 2010. On January 4, 2011, a prehearing conference was scheduled and held in the above captioned matter, after which, by agreement, the case was scheduled for hearing and to be heard on March 2, April 1, 5, 8 and 11, 2011 at the OAL, Mercerville, New Jersey, after the original dates of February 21 and 28, 2011, were rejected by respondent's counsel due to personal family reasons. Notwithstanding the specific agreement of the parties regarding the scheduling of the matter, the first day of hearing (March 2, 2011) was converted into a case management conference at the request of the parties, who advised that they needed an additional opportunity to complete discovery. At that time the additional date of April 20, 2011 was added to the calendar. The remaining dates on the scheduling calendar remained the same, however.

At the conclusion of the testimony on April 20, 2011, the parties sought transcripts in accordance with statute. However, upon their receipt of those transcripts, the parties then advised they did not have transcripts from the in camera examinations of two minor students who had appeared in this matter. After obtaining those additional transcripts, the briefing schedule was set and, upon receipt of those briefs, the hearing record was to be closed on June 24, 2011. The reply brief by respondent was not received until June 27, 2011. However, in the interest of justice, the hearing record closed at that time after a full consideration of that reply brief.

CHARGES AGAINST PAREZO

Two charges were preferred against Parezo by Theresa M. Hamilton, Interim Superintendent, on September 30, 2010, to wit:

(1.) Unbecoming conduct: That on or about June 11, 2010, Parezo, a tenured physical education teacher with

Lakehurst, placed a piece of clear tape on the mouth and shoulder of J.H., a student in the second grade, during school hours. Further, that Parezo, on the same date, caused or allowed to be caused at least one or more students to place tape on the person of J.H., a student in the second grade during school hours and that, further, that conduct by Parezo caused the student J.H. to be humiliated and embarrassed.

(2.) Unbecoming conduct: That on or about June 14, 2010, Parezo, a tenured physical education teacher with Lakehurst, did knowingly, intentionally and willfully making false statements to Theresa M. Hamilton, interim superintendent of Lakehurst, when questioned about the incident involving J.H., a second grade student, occurring on or about June 11, 2010, by denying placing tape on the mouth of J.H.. Further, when she was questioned about that incident by Carmen M. Davis, principal of the Lakehurst School on a separate occasion, did knowingly, intentionally and willfully making false statements by denying placing tape on the mouth of J.H., a second grade student.

BASIC FACTS

The basic facts in this matter reveal that Parezo was employed by Lakehurst for 21 years as a teacher of health and physical education for students in kindergarten through grade eight. During 2010, she shared such teaching and instructional responsibilities with Bryan Vargas, a fellow teacher at Lakehurst, during which time they mostly alternated teaching the two components to all of the grades assigned to them at the Lakehurst School (hereinafter the "School"). For example, during any one marking period Parezo would teach the physical education sessions to the various grade levels,

while Vargas would teach health to them. And then they would switch those assignments periodically.

On Friday, June 11, 2010, which was at the end of the school year, she conducted a gym class for Kathleen Bixby's second grade class, during which time she engaged them in "line up kick ball" in the exercise yard adjacent to the school gym. At the end of that class, she brought the students back into the gym through the back door, at which time she observed an eighth grade student whom she knew, Z.W., across the way near her office in the gym. She then proceeded to ask four or five of her students to help her remove the various colored "shapes" which she had lining the gymnasium walls since the school year was coming to an end. One of those students was J.H. The shapes had been affixed to the wall by single-sided tape which was looped around to make it double sided. As she stood in the center of the gym, those students brought the shapes to her. Each of them had four or more of the shapes, which tape they proceeded to remove. Since there were no trash cans available in the immediate area, she proceeded to stick the used tape on her arm. It was at that point that, as Parezo described it at the hearing, she started "being silly" with those students, at which time she stuck tape on J.H., followed by two or three of the other students who also stuck tape on him. She viewed this as being a fun time, even though J.H. was the only one who got tape placed on him. She then claimed that she only "pretended" to stick tape on the face of J.H. It was at or about that point that the classroom teacher, Kathleen Bixby came to the gym to pick up her class, at which time she made certain observations about that activity, which she ultimately and eventually reported to interim superintendent Theresa Hamilton. It was that activity which was the subject of the charges which were brought by Lakehurst in this matter.

TESTIMONY OF THE WITNESSES

In addition to the above recited basic facts, twelve witnesses testified in this matter and their relevant testimonies are summarized as follows.

Carmen Maria Davis

Carmen Maria Davis (hereinafter "Davis") has served as the principal of the School since August 8, 2007, after having previously served as a music teacher in the High Bridge Elementary School. She obtained her bachelor's degree in music education from Morgan State University, Baltimore, Maryland, in 2000 and her Master of Arts degree in educational leadership from Fairleigh Dickinson University in 2005.

Upon arrival at the School, she became involved with all issues related to the management of the school environment. The School has a student population of pre-K through eighth grade and comprises between 450 and 470 students. The Lakehurst Naval facility, which is now part of the Joint Base McGuire/Dix/Lakehurst, is located approximately one mile away from the School.

On a Monday in June, 2010, a situation was brought to her attention by Interim Superintendent Theresa Hamilton, who advised her that a problem had happened between one of her teachers and a student the previous Friday while she was out of the school environment. At that time she received an informal directive from Hamilton to conduct a formal investigation. She proceeded to meet separately with members of the adult staff which included Parezo, Bixby, and Marianne Capasso (a teacher's aide) regarding an incident which had happened at the school gym while Parezo was conducting a "special", which included members of Bixby's second grade class, along with some other students. She first met with Parezo in Davis's office along with two representatives on behalf of Parezo, who were Barbara DeCicco, president of the Teachers Association of Ocean County and Susan Tatlow, a grievance representative on behalf of the local teachers union. The date of that initial meeting escaped her. At that time Davis wanted to know what had happened with Bixby's class on June 11, 2010. Parezo indicated that, as the class was ending, a small group of second grade students helped to remove some wall art or shapes that some students had created the week before. As a result, she asked several of the students to take them down which she viewed as being a routine task. The process was a "fun activity" which the pupils

seemed to really enjoy. The pupils peeled the tape away from the shapes. Then one of the pupils made an attempt to place tape on J.H.'s mouth near to his lips but before he was able to actually do it she was able to stop it from happening. Then several of the students began to place tape balls on J.H., who was the only student who it was being done to. All of the students were just "joking around." (What was lost in the story told to Hamilton was that the students had been joking around. In her discussions with Parezo, Hamilton had asked if the pupils had ended the day as they ordinarily would have, to which Parezo indicated was a bit chaotic but not unusual.) In response to what happened next, Davis said:" I don't' really remember specifics, but I know she also said that, " The kids had peeled the tape from the plastic shapes that were stuck on the gym walls," and that she had –I'm just going to stop there. I just need to read. Yes. I'll stop there." (T-C.D.-43-3).

She separately interviewed Capasso and Bixby and later met separately with five or six of those children who were identified as having been in the center of the gym with Parezo at the time. Those meetings with the children occurred in either the counseling room of Mrs. Hughes or the lunchroom. She did not automatically recall the children's names. As part of that process she spoke to J.H. and got his statement. In her affidavit which was submitted in support of the tenure charges (P-10), she then stated "I interviewed J.H. and he said he didn't like having tape placed on his shoulders because the tape was attached to the wall." He stated that Ms. Parezo and several students placed it on his shoulder. He stated that he did not understand why this happened. J.H. also stated that he noticed a few students were laughing at him while Ms. Parezo placed a piece of tape over his lips. J.H. stated that he was upset but did not say anything." (P-10 at 2).

In addition, on that same page of that report she indicated that several of the students had advised her that Parezo had directed several of them to "place the tape on J.H.", that several of them were consistent with their observation that she had also placed a piece of tape on J.H.'s lips and that some of them had also recalled calling out the name "tape boy" to J.H. She submitted her report to Hamilton (which was undated) and later signed the above-noted affidavit on September 29, 2010.

On cross-examination, she acknowledged that she actually had had two separate, independent meetings with Parezo before the end of that school year. The first meeting was a standard "end of year" meeting to review activities from the previous year. The incident was not discussed at that time since she felt that the topics were separate in nature. The second meeting focused on the incident, however. She did not recall any joint meeting with Hamilton and Parezo.

She also noted that her board of education gave her an instruction under policy #3218 about how to conduct a full investigation if there was an allegation of misconduct, which there was in this case. She only gave her report to Hamilton, however.

When asked how she conducted the interview with the various children, she indicated that she did not interview them in the classroom because she did not want to bring attention to it. Her focus was on the six or seven students who had been involved in removing the shapes and not the twelve or fifteen children who were otherwise in Bixby's class since they had been apparently on the other side of the gym doing other activities at the time of the shapes removal. On further cross-examination, she once again confirmed that all of those interviewed students had said that Parezo had put the tape on J.H.'s lips and had directed them to place "tape on [J.]". In addition, Bixby said in her interview that she had only observed Parezo remove the tape from J.H.'s lips and that she had noticed at the time that his face was red. Bixby also told her that she made her observation while she was standing in the doorway of the gym to, which was approximately 15 to 20 feet away from the center of the gym where Parezo stood with those children. In further questioning on cross-examination, she reiterated that Bixby saw what happened, which was that Parezo ripped the tape off the child's mouth. But Bixby admitted that she never reported it for three days. She did not know why, although the incident had occurred on a Friday but she only reported it the next Monday.

Davis acknowledged that Z.W., an eighth grader, was also present in the gym at the time, so she also interviewed her during the same week. Z.W. told her that she had

seen the second grade students in the central area of the gym where they were playing with the tape and removing it from the construction paper (aka shapes). She did not see Parezo put any tape on J.H.'s mouth. However, she understood that Z.W. had not been in the gym during the class. Instead, she had gone down to the gym in order to confirm her attendance for a field trip and needed the approval of Parezo in that regard.

She was also questioned on cross-examination about J.H.'s progress report (R-31, which is the same as P-27), which indicated that J.H. exhibited "poor self-control" in the physical education/health class during one reporting period. That class, as she previously indicated, was teams taught by Parezo and Vargas. Bixby contended that Parezo authored those comments and not Vargas.

She was also examined about her understanding regarding an incident which involved Parezo during the 2009-2010 school year with a kindergarten child and which involved a lunch time incident at which time Parezo had chastised the child for having worn sandals during the recess phase of a lunch period. It was Davis' understanding that Parezo did not allow the child to finish her lunch first. Instead, she had taken her to the nurse to see if there were any extra shoes. The child had been upset and thought that Parezo had been very mean to her. As a result, the child did not want to go back to school and was quite upset about the incident. Parezo later apologized and the incident was resolved "happily." Davis felt that Parezo has handled herself professionally and wrote that in an e-mail response to her. (R-11.) She never got disciplined for that incident.

She was also aware that Parezo had been involved in another incident in March, 2010 with another student when she determined that a student had lied about not having lunch money. Parezo, who was then acting as a luncheon monitor, reported him and gave him three days of recess detention. Davis supported her in that action. (R-10.) Further, Davis completed a teacher evaluation regarding Parezo on June 25, 2010, which has two weeks after the incident with J.H. and gave her a positive review. (R-27.) Davis also signed off on her professional development plan at the same time. (R-28.) She also noted that she had previously observed Parezo on January 25, 2010,

at which time she viewed her as being an asset to the school. (R-29.) However, she noted that placing tape on a child would not make her an asset under the circumstances.

Kathleen Bixby

Kathleen Bixby is employed by Lakehurst as a second grade teacher, where she has been so employed since approximately 1989. She received her bachelor's degree in education (K to 8) in 1979 from Georgian Court University and her teaching certificate (K to 8) in the same year. She previously taught seventh and eighth grade science at Saint Dominic's Elementary School, Brick, New Jersey in 1979-1980, and reading/language arts at Saint Vincent's Elementary School (Petaluma, California) for five or six years before becoming employed at Lakehurst.

At Lakehurst she teaches all of the core subjects except for the "specials" which includes art, music, physical education and library. Her classroom is located in a different wing of the school from the gymnasium. As a result, it has been her practice to walk her children to the gym in a straight line, where she would wait for the gym teacher, get the "high sign" and then leave. She then picks up the children and takes them back in a reverse procedure. During the 2009-2010 school year she had fourteen students in her class. Parezo and Vargas were the physical education/health teachers. They were together approximately ten years, to her knowledge.

On a Friday in early June, 2010, at approximately 1:40 PM, she went to the gym to pick up her class upon the completion of that session with Parezo. She stopped at the door of the gym and could see well into it. Her class was in a noisy huddle and not in line. She saw the whole class and saw Parezo with them. (See P-31 at point B of her diagram.) She heard "chaotic sounds" which was like laughing and talking, although she did not make out any specific words. J.H. and a couple of other students were apart from the main body, however. Then she observed Parezo remove tape from the mouth of J.H. She admitted that she never saw Parezo put the tape on him. She immediately turned away in disbelief, uncertainty and confusion and walked down the

hall for approximately 30 seconds but then she returned to her original spot (see P- 31 at point A.) and announced loudly two times (with the second command louder than the first), "Mrs. Bixby's class, line up!". The class came out in "drips and drabs" with J.H. and a female student, "A." coming out last and together. She observed that they they were talking to each other but J.H. appeared to be quite shy with his head down and embarrassed. She decided to talk to him quietly at the back of the line and she asked him what had happened. Before he could respond, A. responded and said that Parezo had taken tape off of the mouth of J.H. This was consistent with her own observations. She then indicated that Parezo had put it there. Then J.H. said "maybe because [he] talked too much." She then finished up her class for the day, since that was the last part of the school day before they were released for home, and she immediately went to the principal's office to report the incident to Davis, at which time she was told that Davis was not in that day. So she packed up and went home and only spoke to a friend about it over the weekend. She did not sleep well over the weekend because of what had happened to one of her students and she wondered what she should do as a result. On the next Monday, she went back to the office to report to Superintendent Hamilton on her prep period about what happened, which she said was "probably morning." (T-K.B.-192-211.) Hamilton listened and took notes. Bixby did not speak directly to Parezo about it. She noted that although J.H. is generally shy, he appeared be a little bit "less bubbly" after the incident.

On further direct examination, she was asked about the progress report which had been generated regarding J.H. earlier in the year in which it was stated in physical education that J.H. had had "poor self-control." She ascribed that comment to Parezo and not Vargas since she had received an e-mail from the mother of J.H. (P-14) who had complained that Parezo had been responsible for chastising J.H. in class but had failed to give her a thorough explanation in the progress report and, further, that J.H. had told his mother that Parezo was a "little mean" to him in gym. The mother asked Bixby to look into it all. Bixby then emailed Parezo about the mother's concerns regarding self control in gym and also put a copy of it in her mailbox. Within a day or two, Bixby spoke to the mother and suggested that she should take up the issue directly with Parezo. She never recalled speaking directly to Parezo about that Incident and she

stepped away from the matter. She also indicated that the comment in the progress report (P-27) could have been either from Vargas or Parezo. She also noted that she had never witnessed poor self control by him in her own class.

On cross-examination she conceded that her diagram made at the due process hearing (P-31), may not be much to scale. However, she indicated that she was approximate 30 to 32 feet away from the center of the activity between Parezo and the children in the gym. After she saw Parezo remove the tape, she walked away because she did not want to be part of it. She could not imagine any student having anything removed from his mouth. She did feel that J.H. was in distress when she then saw him walking out with A. She felt that he was "quite humiliated" at the time and possibly distressed but she was unable to address him immediately because of her class requirements and commitments. She tried to get the children engaged in their lesson in order to refocus their energies before they were released, this being near to the end of the school day. Thus, although she did not send him to a nurse at the time, she did try to report it to Davis immediately after the class was released for the day. When she could not get through to Davis, she later spoke to Kathy Hughes, a guidance counselor at the school, at the end of the day who encouraged her to report it, although Hughes did not volunteer to have J.H. sent to her at the time. (School had already been let out.) She reported it to Hamilton the next Monday morning, however.

J.H.

J.H. was interviewed in camera by this administration law judge in the presence of only his father (his mother being excused from the interview) and OAL legal intern staffer Lori Glover while the parties listened in the hearing room on the other side of the building. He is eight years old and presently in the third grade. In June, 2010 and three other pupils in his then second grade class were told by Parezo to remove shapes from the walls of the gym, at which time they assembled around her with those shapes and proceeded to take the tape off of the shapes. At that time Parezo was the first to take a piece of the tape and stick it on to him, first on his arm and then another piece on his left shoulder. He indicated that he was initially "surprised" but then he began to feel

"afraid" and "scared" when she applied the second piece of tape because he thought that she was going to do even something else to him at that point. Instead, at that point another second grade student took a piece of the used tape which Parezo had given him and also stuck it on J.H.'s shoulder "because he thought it was a joke and stuff." (Transcript (hereinafter "T")-J.H.-36-13). Then Parezo proceeded to put another piece of tape on his mouth and pressed it there over his whole mouth. He explained that it was clear tape, which was the same type that had been placed on his shoulders. He demonstrated the size of the tape which was verbally identified and confirmed by this tribunal as being 5 or 6 inches wide and approximately an inch and a half to 2 inches high, based upon his physical demonstration at the interview. When asked how he then felt he said that he was "angry at Ms. Parezo" (T-J.H.-40-4) because she put the tape on his mouth. He could not move his lips under the tape and, as result, could not talk at all. Then Bixby came in and Parezo removed the tape from his mouth. It had been on his lips for about ten seconds, according to J.H., before Parezo removed it. He said that it hurt when she took it off. It was kind of a fast motion by her. He said "Oww." (sic).(T-J.H.-41-25). Two of the other students, who were not really his friends, were giggling and pointing at him and laughing, although he did not know why other than the fact that they thought he looked funny once he had the tape on his mouth. He did not think it was funny, however. She did not put any tape on anyone else. After the incident he "felt pretty mad at Ms. Parezo and embarrassed and kind of sad." (T-J.H.-46-19). He was sure that she had deliberately put it on his lips and had not placed it there accidentally by trying to put it near his cheek area. When asked why Parezo removed the tape when Bixby arrived, he stated "so she wouldn't get in trouble, but she did it at the wrong time." (T-J.H.-47-10). The rest of the class was approximately 30 feet away from him standing in line when the incident occurred and that is where he rejoined them upon the arrival of Bixby. He told his mother about it when she confronted him during the evening. When he was later questioned about it, he cried "like once sort of" (T-J.H.-56-10To) after he and his mother had told their story to Mrs. Hamilton.

C.C.

C.C. was also interviewed in camera by this tribunal in the same setting separate and apart from the litigants in this matter, this occurring on a day separate from the interview of J.H.. Present were C.C's mother, F.F. and the OAL's Ms. Glover once again. C.C. is now nine years old and in the third grade. She was in the same class with J.H. in June, 2010 at which time Parezo had her remove the shapes along with J. H. and other students in the gym class. She recalled that the tape was flat and in strips. Parezo told several students to put the tape on J.H.'s shoulder, so they did, including C.C. but she did not think that it was right to do that. (T-C.C.-35-10). Parezo did not instruct C.C. or any other student to put it on themselves. She was surprised that J.H. was singled out to have tape stuck on him. Then Parezo put a flat piece straight across his mouth. (T-C.C.-38-20). Parezo it took the used tape, stretching out the tape straight across his mouth. She was surprised that she did that "because she's a very nice teacher, I didn't think she would do that." (T-C.C.-39-19). Parezo never told them why she was doing it. J.H. tried to talk with the tape on and was laughing at that point but he did not laugh when she pulled it off, which motion she described as being in the "middle", that is to say, between fast and slow. She initially indicated that J.H. did not say anything at that point. But then she corrected herself by saying he did say "Ow." (T-C.C.-42-9). C.C. saw a red mark on the mouth of J.H. after the tape was removed. (T-C.C.-40-2). She also then saw Bixby in the hallway as they "catched up to the class." (sic). (T-C.C.-43-5). Bixby also saw the red mark on the mouth of J.H. She also indicated she was surprised that Parezo put tape on J.H. since there was a garbage can in her office and she did not know why she could not put in there. She also did not believe that it was a good idea to put any tape even on the shoulder of J.H. The tape that Parezo put on J.H.'s was not balled up. It was flat. In fact, when she pulled her tape off of her shape, it was still flat and it was not crunched up or balled up. But then she and the others crunched them up to stick them on the shoulder of J.H. The tape on his mouth was flat, however.

Z.W.

Z.W. was interviewed by telephone and on speaker phone by this tribunal on April 8, 2011, with all the principle parties in attendance in the original hearing room. It was also recorded. She presently lives in a town approximately twenty miles south of Houston, Texas, and was in the office of and in the presence of principal, Daryl Alexander of the Manville High School during the telephone interview. She is presently fifteen years old and is in the ninth grade. In June, 2010 she was then an eighth grader at the School and thereafter moved to Texas in July, 2010. Sometime in June, 2010, she was in the gym when she observed Parezo and several "kids" take tape off the back of the shapes and stick it on to "one kid... and they were playing around. The kid was laughing and everything." (T-Z.W.-89-17). She then indicated that she saw Parezo put a piece of tape "next to the kids cheek, like kind of on it but not really." (T-Z.W.-89-24). She then observed another teacher (later identified as Bixby by her) in the doorway, "and she looked at her kind of in a dirty look like she was upset with something. Bixby called out Parezo's name indicating they were late and they were supposed to be lined up and leaving. And then, Ms. Parezo had the kids take the tape off him and hand it to her, and then, the kids left." (T-Z.W.-90-1). Upon further questioning, Z.W. indicated that the whole class was engaged in the process of removing the shapes from the walls of the gym, which she further acknowledged could have been potentially fifteen students. She never actually heard Parezo instruct them to put the tape on a certain student. But they were all "kind of playing around and one kid put it on and then the other kid decided to do it." (T-Z. W.-93-18). But Parezo never stopped them since they were all playing around. They were not doing it in a mean or bullying way, however. She then joined them in that play and she then touched his cheek, but the tape wasn't stuck to his cheek. However, Z.W. then admitted that Parezo did remove it from his cheek after being then asked if she had actually put it on his cheek. (T-Z.W.-9419). She estimated that she was twelve to fourteen feet away from the scene of the action between Parezo and the students.

However, in her handwritten statement dated June18, 2010, she stated, in relevant part, "I walked into the gym and saw Mrs Perso (sic) asking some of her little kids to help take the shapes off the wall. About five of them did then (sic) the kids and Mrs. Perso (sic) were taking the tape of (sic) the back and placing it on one kids (sic) shoulder. As a playing around kind of thing Mrs. Perso (sic) placed a piece of balled up tape on his cheek. And right before that Ms. Bixby walked in and saw what she was doing. She stared at Mrs. Perso (sic) for a little bit then asked the kids to go with her. (R-6). Thereafter, in another handwritten note, dated as being received by someone on June 22, 2010, which was apparently attached to an affidavit of Susan Parezo and submitted to Lakehurst's Barry Parliman (R-11), Z.W. repeated essentially what she had stated in her prior note except that, this time, she stated that, "in a joking around kind of way Mrs. Perso (sic) put a ball of tape on the side of the kids (sic) face." In that same note, Z.W. stated that Parezo had asked some of the little kids to help her take down the shapes on the wall and asked four of them to help her take the tape off the back of them.

Theresa M. Hamilton

Theresa M. Hamilton has served as the interim superintendent of Lakehurst since June 1, 2009. A graduate of Saint Peter's College with a bachelor of science degree in natural science and recipient of a certificate of natural sciences in 1974 as well as certificated as a teacher in grades K. through 12, she then attended Jersey City State College (now, Jersey City State University) where she received her master of arts degree in education administration and supervision in urban school districts in 1996. Prior to her current job, she previously served as a part time instructor at Lacey Township, a science teacher in grades seven through twelve at the Pinelands Regional schools (seven years), vice principal in the Keyport schools (two and a half years), assistant superintendent at Point Pleasant Beach (two and a half years), superintendent in Seaside Park (seven years) and interim superintendent at Seaside Park (one year). In her most recent job at Lakehurst, served as the chief administrator of the district and reported directly to its board of education. During 2009-2010,

Carmen Davis was the principal, whose office was adjacent to hers. Davis reported directly to her.

On Monday, June 14, 2010, an incident was brought to her attention regarding Parezo, who was a health/physical education teacher there. Late in the day but during school hours, Kathleen Bixby came to her, appeared upset and wanted to speak to her. Bixby's demeanor suggested that something was on her mind but appeared to be uncomfortable to initially tell her. So she stood next to Hamilton's desk and proceeded to tell her that something had happened on Friday which upset her because it had involved another staff member. Bixby told her that the previous Friday, June 11, 2010, as she went to pick up her students at the gym, she observed Parezo remove tape from the mouth of a student identified as J.H., who was a second grade student in her class. Bixby was surprised by what she saw, so much so that she walked away initially down the hall but then returned to retrieve her students. She was very concerned for the child and what happened to him and it had bothered her all weekend.

Hamilton immediately commenced her investigation regarding inappropriate conduct by a staff member pursuant to board of education policy. As a starting point she determined to speak to Parezo immediately and as soon as she would be free. She found out that she was in her office in the gym so she advised her that she had to speak to her in her office that day and suggested that she bring a representative with her. Parezo said she would try to get someone. Hamilton enlisted Dr. Clifford Barnaman, director of the special education program to also sit in, since Principal Davis was out at the time. Parezo brought Barbara DeCicco. The meeting took place at approximately 2:45 PM at the end of the school day. At that time she advised them all about the Friday incident. Parezo's initial response was that she was not aware about what Hamilton was referencing.

Hamilton then explained that it involved the shapes on the walls of the gym, at which point Parezo seemed to recollect the incident. She then said that she asked several students to remove the shapes from the walls after a gym class was concluding from an outside activity. As part of that process, they were taking pieces of tape which

they all were playing with in a "fooling around sort of way by putting stick tape on students." (T-T.H.-31-25.) J.H. had tape put on him by several of his classmates, which consisted of balled up pieces of the tape. Parezo admitted that she put a piece of balled up tape on J.H.'s shoulders, along with some of the other students. They were all "fooling around."

Hamilton asked her if she had put any tape anywhere else and Parezo said "no." She denied putting it on J.H.'s mouth and only indicated that she had been playing with the tape in a balled up matter. Hamilton asked her again if she put it on J.H. at which time she said "no" once again but this time she indicated that she made a motion in front of his mouth with a flat piece of tape which was approximately 5 inches long. Once again, she said that they were all fooling around. She never indicated that she ever ever removed any tape from the mouth of J.H.. The conversation ended on that note.

After that session, Hamilton then called the mother of J.H. that same afternoon, at which time the mother told her that J.H. never said anything to her about any incident. The mother called back ten minutes later and indicated that she talked her son, who admitted to her that he did get involved in an incident that prior Friday, which involved a fellow male student, [J.], having put a piece of tape on him, followed by Parezo putting tape on his mouth and shoulder. The other students were laughing at that. Mrs. H. related to her about a prior incident she had had with Parezo about a month before regarding J.H.'s progress report in which she had gotten a form sent home from Parezo with "blatant disrespect" indicated. Hamilton asked to speak to J.H. the next day.

She met with J.H. alone on June 15, 2010 at approximately 9:30 a.m. (Immediately prior to that meeting, at 9:20 a.m. Mrs. H. had called to indicate that J.H. was nervous about seeing her.) J.H. was initially very quiet when she spoke to him. She asked him to describe what has happened at which time he indicated that he was the only one that Parezo put tape on. She put tape on his shoulder and his mouth. The tape was clear tape. The tape on his mouth was there for a couple of seconds, at

which point she took it off. At that point, J.H. noticed his teacher Kathleen Bixby come in and look upset. Other students were laughing at him at the time.

As a result of that discussion with J.H., Hamilton determined to conduct her initial investigation by speaking with some of the other students. She spoke to fellow student C.C. a short time after her discussion with J.H. The student C.C. told her that some of the students had put tape on the shoulders of J.H.. She then saw it on his mouth. Although J.H. was initially laughing when the tape activity began, he was not laughing when the tape was on his mouth. Then C.C. confirmed that she saw Parezo take the tape off the mouth of J.H., but she did not see who had put it there. She did notice, however, a red outline around the lips of J.H. when they were leaving the gym.

Hamilton also spoke to other students. A female student [A.] told her that after the students put tape on the shoulders of J.H., she saw Parezo put the tape on his mouth, at which time the other students who were involved with the taping were laughing. A male student [J.] confirmed that there was tape on the shoulders and mouth of J.H. but he did not know how it got on the mouth. He then reported that, as they were leaving the gym, J.H. asked him "Did you see the big red rectangle by my mouth?" Another female student [A.A.] told her that she saw Parezo putting tape on J.H.. He remained standing there laughing. Other students were calling him "tape boy." Another male student [J.J.] mentioned that he saw Parezo put tape on J.H.'s mouth but that J.H. removed it himself. He saw a rectangle on his mouth when it was removed. He told his mother about the incident later that day after school. (P-1 at pages 2 and 3). Hamilton did not interview any other students since she felt that she had enough information in order to make a determination. Further, she concluded there were no inconsistencies from those who had seen Parezo put the tape on J.H.'s mouth. She had a follow-up meeting with Parezo, DiCicco and Kim Lambusta, (the local education association representative), and Davis, at which time she advised them regarding the results of those interviews. DiCicco advised Parezo not to respond. Hamilton then told them that Mr. and Mrs. H. were very upset, so she suggested that a meeting be set up in order to address the situation "face-to-face."

However, when she contacted the mother the next day, June 16, 2010, Mrs. H. said that she saw no reason for the parties to meet. She did not want her son to be in Parezo's class and did not feel that he should be the one who should be removed. She also did not need to hear any apology from Parezo at any such meeting since she stated "my son had tape put on his mouth." (P-1 at 3). She later held an informal meeting with DiCicco and Mary Novotny, the UniServe field representative, regarding what steps would take place next. The next day, June 17, 2010, Hamilton was contacted by Susan Tatlow, an LEA representative, who indicated that there were two other people in a gym who should be interviewed, eighth grade student Z.W., and Mrs. Maryanne Capasso, a classroom assistant. She interviewed Z.W. on Friday, June 18, 2010, at which time Z.W. told her that she saw Parezo and some other students put tape on the shoulders of a student and that Parezo then put a ball of tape on the student's cheek. At that time, Z.W. did not indicate where everyone was standing. She only knew that it was "a kid" but she did not know his name. She thought they were all playing around until the cheek taping. Right before the cheek taping, she saw Bixby enter the area, observe what was going on, and then stare at Parezo before escorting her class out of the gym. Hamilton had Z.W. write up her statement at that time. (P-6). Z.W. never told her that any other students had tape placed upon them.

She also interviewed Bixby on June 18, 2010 at which time she asked her to supply details regarding what had happened. She did not have much further to add to her prior statement about having witnessed Parezo removing the tape from the mouth of J.H. when she entered the gym to retrieve her class. Her interview with Mrs.Capasso took place on June 23, 2010. Capasso is an aide for the autistic class which shared the gymnasium with the Bixby second grade class on June 10, 2010. She was accompanied by Tatlow. When she entered the gym with her class, Capasso saw Z.W. in the gym asking Parezo for permission forms and heard Parezo ask several students to help her take down the shapes. She left the gym at that point. On the same day, Hamilton called and advised Mrs. H. that, pursuant to School Policy 3281, (Inappropriate Staff Conduct-P-23) a full investigation had been initiated and would be performed by Principal Carmen Davis. She provided a copy of the policy to the father, Mr. H., later that evening at the spring concert. On August 13, 2010, the parents of J.H.

requested a meeting with her which was held at 11:30 on that day. At that time they indicated that they were concerned that their son had expressed fears to return to school and was afraid that Parezo would pull J.H. aside out of a line and say something to him about what had happened. Mrs. H. was adamant that Parezo should not be in contact with her son or any children. Hamilton determined to assign Vargas specifically to J.'s class as the teacher in charge as a result. The parents also agreed to a meeting with Parezo present as long as an apology was given to J.H. Thereafter, on August 17, 2010, Mrs. H. gave Hamilton a letter to be presented to the school board in which she expressed those same fears. In relevant part, she stated "Mrs. Parezo's abusive and humiliating approach in discipline is unconscionable." (P-13).

The meeting was held on August 18, 2010. Present were Mrs. H., J.H., Parezo and Tatlow. Parezo explained to J.H. that she wanted him to have a good year and she never specifically referred to anything she had done. Yet, when she started to say it was "just in fun" Mrs. H. and Hamilton both stopped her. At the end of the meeting, Mrs. H. only wanted Parezo to utter the two "magic words", at which point Hamilton stated in her report that Parezo "apologized saying she was sorry." (P-1 at 6). She presented the findings of her investigation to the Board of Education on August 24, 2010, relative to her violation of Policy 3281, at which time Parezo was suspended with pay pending further action by the board. Her findings were coupled with the formal findings by Davis (P-2) and were both the subject of her presentation to the board of education on that date. She noted that she had commissioned Davis to initiate the formal investigation on June 15, 2010. She submitted the tenure charges on September 30, 2010, consisting of the two above-cited charges of unbecoming conduct.(P-30).

On cross examination, she was asked her opinion regarding the wrongdoing by Parezo. She stated that even the act of applying tape to the shoulder of J.H. was inappropriate. And, even though she never specifically asked J.H. if he had been laughing during the event, she felt that the important issue was Parezo's violation of J.H.'s sensitivity, which was wrong. Parezo was the professional. Yet, the child was singled out by her. In the process, she violated his health, welfare and safety. Her

concern about the embarrassment to J.H. was based upon him telling her that the other students were laughing at him. She felt that it was inappropriate for Parezo to put tape on him at all but, in addition thereto, in front of his peers. She also noted that in her first contact with Bixby, she told Hamilton that J.H. appeared upset at the time. She did not interview all the students in the class because she had enough information from the selected students to warrant the investigation going forward, even though Capasso later advised her on June 23 that another male student [J.] was also present. Her answer was that her preliminary investigation had already been completed. And, of the students' statements given to her, only one was inconsistent with the rest, to wit, that he had claimed that J.H. took the tape off his mouth himself. She also believed the statement by Z.W., who had stated that she saw Parezo place a ball of tape on the cheek of J.H. She did not find it to be in conflict with the other statements. By contrast, she was concerned that Parezo had denied putting any tape on any place other than the shoulder of J.H. In fact, at no time did Parezo tell her that she put a piece of tape in front of his face and then on to his cheek. At that same time, she noted that, in a statement which Parezo later submitted to her, dated June 24, 2010, (R-2) Parezo claimed that she started sticking tape both on her arms and on another student's shoulder which, according to Hamilton, she had never said to her previously. Further, Parezo claimed that, in a "joking way", she pretended to stick a tape ball on to the lips of J.H. but never actually touched his lips. In that same statement, however, she made absolutely no reference to having put either tape or a tape ball on or near the cheek of J.H.

Karen Robinson

Karen Robinson has been employed by Lakehurst for thirteen years as a paraprofessional, in which capacity she assists teachers and students as well as participating in the luncheon duty. During the 2009-2010 school year she was one of three parprofessionals in the autistic program, and she was assigned to one of four children. In that capacity she worked along with all teachers, including the "specials" except for health. During that year they participated in physical education on Thursdays and Fridays with Parezo and other classes. Friday was "inclusive" gym with grades

kindergarten through third grade. She was assigned to be inclusive with Bixby's second grade class.

On June 11, 2010, her inclusive class was playing kickball outside. Also present were Capasso and Parezo. It was very hot outside. She knows J.H. and observed that he was involved in the kickball activity. He was not disciplined by anyone that day. After kick ball they all walked into the gym to line up for departure. As they entered, Parezo asked some students to take down the shapes, at which time they then balled up the tape and then she left. During the activity that she briefly observed, all of the students were laughing. She then left with her students on her arm and before the departure of Capasso and her student, Bixby and her class, and some substitute with another artistic child. She saw no one put tape on anyone before she left and nor she ever see Bixby upon her departure. She never saw Parezo embarrass, single out or discipline J.H. that day or anytime that year.

Maryanne Capasso

Maryanne Capasso has been employed by Lakehurst as a paraprofessional for 9 years. On June 11, 2010, she was part of a team for four autistic children in order to assist in their socialization. Their physical education was on Wednesdays and Fridays (T.-M.C.-245-12), (it being noted that this is in contrast to the testimony by Robinson about that schedule, who stated they met on Thursdays and Fridays (T.-K.R.-215-2) as indicated in her testimony hereinabove). Friday was the inclusive class with Bixby. It was a "beautiful day" so they participated in kick ball outside the gym. No one got disciplined that day. Upon re-entering at the end of that activity, she heard Parezo ask Z.W. what she was doing there, to which the student replied that she had been sent down there by Principal Davis. Parezo then called out to J.H., C.C., J. and A. to take down the shapes. Z.W. entered the gym and was directed to sit by Parezo's office until Parezo was done with the second graders. Capasso then left with two of the autistic children. She saw Bixby down the hall when she left the gym who asked if she was late

to get her class. Her statement, which was given to Hamilton after a meeting with her on June 23, 2010, was typed up by SusanTatlow. (R-3).

Kevin Joseph Carroll

Kevin Joseph Carroll was previously the superintendent of the Lakehurst school district between 2005 and 2009. Prior thereto he was its principal between 2003-2005. In his principalship capacity, he was the direct supervisor over Parezo for both years and had the opportunity to observe her. She easily made learning available to all students. She assumed various additional responsibilities, including the area of student activities as well as, at his request, being chair of the No Child Left Behind Program and the breakfast program. She was also a certified substance abuse counselor and served in the absence of any guidance counselor at the school. He wrote a professional recommendation on her behalf in February 2011. (R-25).

Bryan Vargas

Bryan Vargas is employed by Lakehurst in the areas of health, physical education and basic skills. He also runs the soccer program between September and October of each year. He is now tenured as of the completion of school in June, 2011. In 2009-2010, there were three second grade classes so there were times when not all would meet at the same time. The assignments were split up depending upon the class schedules. He shared teaming responsibilities with Parezo. During that year, if there were two full classes, both would teach, but if there was only one full class, only one would teach. So there were times during the year when they separately taught the health and physical education components. On Fridays, they had only Bixby's class and the autistic class.

He knows J.H., whom he taught last year and this year. During the 2009-10 school year there would be times when J.H. and others would have to be spoken to because of their disruptiveness, which most occurred in the case of J.H. during the health class. He would admonish J.H. for talking, who would "understand for the

moment" but then resort to his prior actions. He knows about progress reports, which are sent out in the middle of each marking period pursuant to a schedule posted at the beginning of the year. In order to issue progress reports, they use the Internet based system known as "Power Teacher." The remarks are "stored" in the students "folder", which he thought was a file on line. The teacher then either e-mails or verbally tells Mrs. Cecilia Ward in the main (or front) office that all progress reports are in. There is no requirement to send out progress reports, and they are sometimes utilized to note an exceptional or commendable comment, although mostly negative comments are generated. He does not keep any copies of his progress reports and knows of no requirement to do so. By entering a new comment in any marking period, they must erase the old ones.

At this point in the hearing, Vargas was shown Exhibit R-31, this being an example of a progress report which he has never seen before. He explained that he never sees progress reports that are sent out. By contrast he has seen report cards before, where one can also make teacher comments . But unlike the progress reports, one does not have to go back and erase the previous comments in the report card. He acknowledged that there was no way that any parent could even know which marking period was the subject of the comments from the teachers because of the way the program has been set up.

He noted that in the 2009-10 school year, he sent a progress report out regarding J.H. for "excessive talking" in his health class, which he denoted under the, standardized drop down menu on Power Teacher as being "poor self-control." He thought it was for the third marking period. He believed that Bixby wanted to know whom the mother could speak to about that comment. He met with the mother over the telephone and he felt that the session ended positively after a ten minute conversation. She accepted the fact that it was happening. They never had any face to face meeting. He was asked about the fact that Mrs. H. had sent a letter to Bixby in which she complained about Parezo being a "little mean to him in gym". (P-14.) He stated that he had never seen that letter before. He was also shown a series of emails from Bixby to Parezo in March, 2010 in which it was ultimately clarified that Vargas was the author of

those comments and not Parezo. (R-9). In his telephone discussion with Mrs. H., he did not recall any mention of Parezo or in bringing up anything about gym class at that time.

On cross-examination, he was asked about what procedures are followed during the luncheon period. He noted that he was not a lunchroom monitor last year since it was a stipended position and voluntary. (This year, by contrast, it is neither voluntary or stipended.) He was ,however, generally aware of the procedures involved during the luncheon period, in which recess follows the luncheon portion of that scheduled time for the students. Last year, the students could not access the gym during the recess because the gym was not available due to scheduling commitments. Instead, they were sent to their classrooms during recess. If recess involving gym at any time, however, sneakers would be required. Otherwise, a child could read a book or do some other activity. If the child had no sneakers he indicated he would not stop the child from completing one's lunch in order to get sneakers before engaging in recess activities. He acknowledged that he has not always seen "eye to eye" with Parezo, such as what activity to do each week with the children. But he has had no real disagreements with her. At the same time, although he was "sure" that he would periodically discuss the conduct of some students with Parezo, including J.H., he did not recall ever telling her that he had to do a progress report regarding J.H. talking in class. When asked further about denying a child the ability to complete the luncheon meal, he indicated that, as a health teacher, he would not feel it was appropriate to stop a child from eating. And he also acknowledged that a piece of tape stuck on a wall is not sanitary.

Barbara DiCicco

Barbara DiCicco has been employed for 38 years at Lakehurst, having served as a second grade teacher, a basic skills teacher, a third grade teacher, and most recently and once again a seventh and eighth grade language arts teacher, having previously taught that grade level for sixteen years. She has served as the president of the Ocean County Council of Education Associations for ten years.

On June 14, 2010, Parezo asked her to go to a meeting after school at the office of Superintendent Hamilton. Parezo told her that she thought that she had been late for "door duty" that morning. Upon meeting with Hamilton, however, they were told that Hamilton wanted to know about an incident that she had heard about Parezo having put tape on a child's mouth, which incident had occurred on Friday, June 11, 2010. Hamilton did not indicate how she found out the information other than having heard about it from "someone." Hamilton never said that it involved Parezo removing tape from a child's face.

Parezo proceeded to explain that the incident related to the taking down shapes off the wall and removal of the tape from the back of the shapes. The children were making tape balls or "tape flowers", as they call them. She said it was a fun atmosphere and that all the children were laughing. She then said that the children were also sticking tape (i.e., the flowers or tape balls) on her arm and that she jokingly went to a child, J.H., and pretended to put a tape on him and then "she demonstrated this, like almost like a claw, and approached the child [J.H.] and said "Oops" and stuck the tape ball instead on the child's shoulder. Someone then said "Oh, look you have a flower on your shoulder." (T-B.D.-134-22). At that point, Parezo reiterated that it was a playful, joking atmosphere. DiCicco then asked if a nurse, guidance counsellor or social worker had been involved, to which Hamilton said "no." DiCicco was concerned that a red mark would have required the need for a nurse. The meeting ended with Hamilton indicating she was going to look further into it. But Parezo agreed that it was not a good idea to have done what she did, in response to that question raised by Hamilton at that time. DiCicco typed up a memo of those handwritten notes of that meeting in her capacity as a member of the local education association and not in her capacity as president of the county council. (P.-32) Yet, she reduced some of her comments to a letter she sent to Mary Novotny, N.J.E.A. UniServ, on June 14, 2010, at which time she added that Parezo had attempted to put it a tape on a child's lips but never made contact. It was a playful atmosphere. (R-34).

On cross-examination, she admitted that the letter to Novotny did not contain all of the information she had set forth in her own memo, particularly with reference to a child observing that the tape ball looked like a flower growing on one's shoulder or that the tape at least went to the shoulder of J.H.. She indicated that she was merely attempting to put the N.J.E.A. on potential notice regarding the fact that something had gone on in their school and that it was her understanding that the N.J.E.A. needs documentation from "day number one." She then claimed that the letter to Novotny was only a general overview of that meeting. She admitted that it is not appropriate for a teacher to put one's hands on a child, except for emergency purposes.

Susan Parezo

Susan Parezo has been employed by Lakehurst for 21 years as a teacher of health and physical education in grades K. through 8. She has a bachelor of science degree in health science from Brooklyn College (1975) and teaching certificates as a teacher of health and physical education in grades K. through 12 having obtained them respectively in 1975 in New York and 1984 in New Jersey. In approximately 1993 she became a New Jersey certified substance awareness coordinator and a basic skills teacher in 2010. (R-1). She retains approximately seventeen credits toward her master's degree having obtained fourteen of them from Jersey City State College and three of them from Monmouth University. Prior to her present employment, she was employed by St. Dominick's School, Brick, New Jersey, in 1989. In her present job she teaches physical education to all students in the school from grades K. through 8 and also teaches one half of the year in health education in grades K. through 5, in which latter capacity she teaches them in the student's classrooms. During the 2009-10 school year, she shared those responsibilities with fellow teacher Bryan Vargas. She also became a lunch duty monitor starting in 1992, and has coached various girls and boys volleyball and soccer programs there since approximately 1992. She has also been the intramural coordinator, which involves preschool activities programs for the grades 5 through 8. These are all posted positions. The lunch duty has become a split, assignment with monitoring the eating component followed by a twenty minute recess, which is held outside if the weather permits. She also served as a student activities

coordinator for approximately three years and prior thereto was a student activities adviser. (R-12.) She was not a student activities coordinator in 2009-2010, but she served as a "family fun night" presenter (a paid position) in 2010, which consisted of three nights of activity at the school. (R-27.) She also implemented an archery program starting in 2006 (R-36) and also implemented various interscholastic athletic teams such as soccer, basketball, and volleyball starting in approximately 1992. She also voluntarily started an archery program, implemented a physical education idea exchange, and trips to adventure activities at Rowan University. She also served as a Title IV Coordinator pursuant to a Drug Free Schools grant in approximately 2002, which lasted for a couple of years. She also implemented a USTA tennis program approximately fifteen years ago which is still incorporated into the school curriculum.

She was initially asked about progress reports. She indicated that she would use this process to encourage the students to bring in their sneakers or to wear appropriate clothing to gym. Or, she and her colleague (Vargas) would send pre-printed blank notes or have child planners sent to the parents to remind them as to what their child should bring for such activities. Mostly, this method was used for the younger children in the pre-K. through ,perhaps, third grades. The planner was also used to address some basic conduct problems and notes were sent home via the home room teacher. Last year they began to employ the use of Power School with other systems known as Grade Book and Power Teacher in order to document behavior problems. During 2009-10, she and Bryan Vargas "team taught" two or three classes assigned during any given physical education marking period. During health, they taught gym and health, respectively. A "cum" folder follows the child's career at school and is kept in the main office, although the progress reports are not put in those folders.

Before the current case, she never saw J.H.'s progress report, although she did recall a discussion with Vargas sometime in March, 2010 after the progress reports were out. At that time, Mrs. H. had contacted the school and wanted to know if Parezo had sent out a progress report for J.H. relative to gym class. Vargas only told her about having written up the progress report after the fact. She understood that he then called Mrs. H. after Bixby had contacted him about it. She indicated that she had had an

exchange with Bixby herself prior thereto in order to clarify who was responsible for that note. (R-9.) She had no interaction with the parents at that time and she never sent home any progress notes regarding J.H. that entire year. And, although there are parent/teacher conferences twice a year, she recalled no conversation with either parent that school year until the results of an incident in June which propelled a meeting in August, 2010. In fact, she only saw a note from Mrs. H., dated June 25, 2010, during the course of this litigation (P-3.) In which Mrs. H. complained about her son being cited with "blatant disrespect" by Parezo during a class. But there had been no explanation given to support it. Mrs. H. also complained that she received another progress report in the mail from Parezo in June, 2010 who claimed that J.H. was "very talkative." She denies that she had any such conversation with Mrs. H. in approximately April, 2010 or any other time about J.H. excessively talking in class. Parezo claimed there was also an issue regarding lunchroom detention instead of recess for J.H. but nothing came of it.

She then described what happened on June 11, 2010. Since Vargas taught basic skills on Friday, they did not team teach then. She solely had the Bixby class that day. She thought there were twelve students there along with the students from the special education autism class, which was mainstreamed with Bixby's class. It was her belief that on that day, one of Bixby's students, I.B., was absent, even though the attendance sheet for that day indicates that she was not absent. (R-8.) Her response was that some students go home early and are marked in for full attendance anyway. She recalled no discipline incidents and there were no negative behaviors during the class between students. They played outside that day with "line-up kick ball."

Upon reentry into the gymnasium the paraprofessionals took their autistic children hand in hand. Upon her entry through the playground doors, (R-37 – her diagram) she saw Z.W., so she called out to her and asked her what she wanted. Z.W. told her that she needed to get a permission slip for a safety patrol field trip and had been directed there by Principal Davis. Although they approached each other, Parezo told her that she had to complete her class before she could get the permission slip. She did not specifically recall where Z.W. went because she became refocused on her

class. She had some of the students put the equipment in the storage room, which consisted of four bases and the kick ball. She asked the remaining students to help her out and remove the shapes and colors off the walls. She remembers that the female students A. and C.C. and the male students J. and J.H. were the ones who did the activity. She called them out since they had not been carrying any equipment. Those four students then grabbed the shapes at which time the paraprofessionals started to walk out with their autistic students. They exchanged parting pleasantries.

As she stood pretty much in the center of the gym, the four students came to her and they all started to remove the laminated pieces of construction paper, which consisted of triangles, squares and circles as well as different colors, which she calls "shapes". The shapes had been secured with one sided tape which was looped by her previously so that they would remain secure on the walls of the gym. It was clear tape but wider than standard scotch tape. She did not use straight or flat tape across each shape to secure them, however. She had looped them instead. The shapes were used in a game which was primarily meant for the pre-K through second grade classes.

She proceeded to stick the tape on her right arm with her left hand while she held the shapes. Then, a couple of students began to stick tape on her arm as well as on their own arms, although she didn't recall who was doing that. But those students "crunched" up the tape. Then, the male student, J., put a piece of balled up tape on J.H.'s left shoulder. Then, she thinks, that female student A., who was standing next to her, also did it to J.H., who was standing in front of Parezo. She then also joined in and placed a piece of the sticky ball of tape on J.H.'s left shoulder. The other students were already back around them by that point. She then "jokingly" went by the side of J.H.'s face and in front of his mouth and said "Oops" and she proceeded to put a piece of tape, not on his mouth but on his left shoulder. J.H. was laughing as was everyone else. He was not in distress. Then student A. said: "[J], It looks like you have a flower growing out of your shoulder." And they all laughed about it.

Parezo denied using a straight piece of tape in front of J.H.'s lips. She only "pretended" to put it on his cheek. As a result, she disputed the version given by Z.W.

She indicated that she had no malicious intent. She contended the J.H. put tape on his shoulder too. Then female student V.C. tried to put the tape, like her, to J.H.'s lips or face. But she stopped her and V.C. complied. The mood was playful but not chaotic. Bixby had arrived by then at the hallway door. She saw Bixby look into the gym and then walk out of her vision. She then saw her again almost immediately in the same spot which was at about the time that Parezo took the ball of tape off of J.H.'s shoulder. She could not recall any expression on the face of Bixby at that point. She never heard the term "tape boy" used or any indication of any child in distress or any complaints of a mark on anyone's face. The children then all lined up on the "big blue line", although she did not recall Bixby calling out for her students, either then or at any time during the year. In any case, Bixby's class did line up properly. During the time that she was removing the tape, she indicated she never told J.H. to stand still. Z.W. was still in the gym and they completed their conversation. The school day ended without anything further.

She saw J.H. in her class that next Monday and also saw him at recess. She recalled nothing more specific about him on June 14, 2010, except that later in the day she was approached by Hamilton told her to report to her office to speak to her and advised her to bring representation too. Parezo thought that she had been late for her breakfast duty at school and was in trouble because of that. Although she attempted to get a representative from the Lakehurst Education Association, she was only able to find Barbara DiCicco, who was still in her classroom. Parezo knew that DiCicco was very active in the local union and was also president of the Ocean County Education Council.

They went to Hamilton's office where Dr. Barneman was also in attendance. Hamilton asked her if she recalled any incident from the previous Friday which possibly involved the second grade physical education class since a staff member had reported about her having put tape on a student's mouth. Parezo denied it and then explained about putting tape on the shoulder of J.H. and jokingly putting it on his shoulder after passing it across his lip area. She demonstrated that act to Hamilton but she denies that she then demonstrated the act by putting both of her hands up and then as if

affixing a straight tape to his face. Hamilton explained that she would have to investigate the matter further and contact the child's parents. She also directed Parezo not contact the parents, which was not consistent with prior practice where the teachers were encouraged to be the first contact person with parents. She nonetheless abided by the instructions from Hamilton. In addition, Hamilton did not require any written statements from her at that meeting. She admits that she agreed with Hamilton that her playing around with tape wasn't such a good idea.

A second meeting was held on June 15, 2010, with Hamilton, Davis, DiCicco and Kim Lambusta (president of the local education association) in attendance. This meeting was held at Davis' office although Hamilton conducted the meeting once again. Hamilton advised them that she had met with the various students from the Bixby class and some had confirmed something had happened with the tape by Parezo. She said that it was unspecific, while other students recalled nothing. There was no verification of Parezo having placed tape on J.H.'s mouth. Parezo assumed from that statement that Hamilton meant that Parezo and the students had been fooling around. Hamilton confirmed that one of the students had mentioned the "flower on the shoulder" comment. Hamilton also then said that her part of the investigation was complete and that Davis would carry on her own investigation next. Hamilton never said that she had concluded that Parezo had put tape on the face or shoulders of J.H.

She engaged in two further meetings with Hamilton. On June 22, 2010, she met with Hamilton who told her that J.H.'s parents did not want her to teach J.H.'s class. As a result, that class was reassigned to Vargas. Parezo and Susan Tatlow (LEA representataive) were given the opportunity to review her personnel file at that time although they could not get a copy since it was too voluminous. Parezo then noted that she had also been told on June 16, 2010, that she would not be able to attend the school bowling trip for the safety patrol which she had arranged but Parezo thought that Hamilton refused to let her go because she was still investigating the matter. (But it is observed by this tribunal that Parezo had just testified that Hamilton had advised her on June 15, 2010, that her own investigation had been completed, which was one day before Parezo learned of her inability to attend that bowling trip.)

Another meeting was held with Hamilton on June 24, 2010 with Tatlow and DiCicco also in attendance. It is noted that the notes taken from that meeting (R-4 - and presumably written by DeCicco (?)) indicated it was held on September 24, 2010. However, according to Parezo, the date should have been June 24, 2010. She received a copy of her personnel file and the Board of Education policies at that time. Hamilton also suggested that she provide a written statement, which she did provide on the same day. (R-2 at page 3).

She met with Davis on June 28, 2010, which was also attended by Tatlow and DiCicco. Davis wanted her to give her statement that time since she was doing her part of the investigation so she recited what she had previously told Hamilton. Parezo thought that Bixby had jumped to a conclusion about the incident without having asked any questions from her. Davis asked if it was a problem class, to which she replied that she never had a problem with that class for the entire year. They were a "nice class." (T-S.P.-164-15). By contrast, she did recall an incident she had with a first grade student in March, 2010, at which time she had written to Davis about that student having lied about the status of his lunch and lunch money, even though he had already eaten his lunch. She also knew that he had a problem with stealing. She gave him a recess detention, which was supported by Davis at the time. (R-10.)

And, in an unrelated incident, on April 16, 2010, she observed a kindergarten student, M., during lunch who had sandals on, which would have been a problem with playing in recess immediately thereafter. She asked M. if she was done with her lunch and the child said "yes." So she directed her to Mrs. Hess, the school nurse, to see if she had some sneakers available in her size. But she had none available so instead of sending her back to her classroom during the luncheon recess, Hess directed M. to Davis' office, which ultimately upset M. and her parents. Parezo denied that the child had not completed her lunch prior to her sending the child to the nurse. Parezo exchanged a series of emails with Davis and thanked her for her support with the parents at a meeting which followed that incident. Davis responded that she had handled herself "very professionally." (R-11.)

Parezo then stated that the first time she met Mrs. H. regarding this incident was in August, 2010 and not before. Hamilton had told her that J.H. was somewhat apprehensive about returning to school in September. Hamilton set up the meeting and held it on August 18, 2010 in her office, which was also attended by Tatlow. Hamilton started the meeting and talked to J.H. about some sleep over. When Parezo tried to explain about the class, Mrs. H. stopped her immediately and indicated that she did not want to hear about it. She only wanted an apology from her and nothing more. So Parezo told J.H. that she was sorry that "it has gotten to this point where we're sitting here..." (T-S.P.-198-10). She then stated that she felt badly about the fact that he was a little bit scared about coming back to school in September so she wished him a "fabulous third grade year" (T-S.P.-198 14) and she looked forward to seeing him in September in third grade. Mrs. H. said nothing and Hamilton concluded the meeting, which had lasted a mere five minutes. Hamilton was also given a Manila envelope by Mrs. H. at that time, who wanted it read at the Board of Education meeting the next week. (P-13.) Hamilton said that the family was still very upset with her. When Parezo finally saw that letter, it upset her due to the mischaracterizations in it. For example, she had no idea what "abusive" situations she was accused of.

Notwithstanding the foregoing, she received her "welcome back" letter from the school thereafter and she anticipated returning to school on September 1, 2010, in order to participate in one of two in-service days. However, on August 31, 2010, at 3:40 PM, Hamilton called her and advised her she would be suspended with pay, this occurring after Hamilton told her to come in early the next day. She also told her that the Board of Education had voted on its actions relative to her seven days earlier on August 24, 2010, but no one told her anything about that action until that phone call. She wrote a confirming e-mail to Hamilton about not going to school the next day. (R-19.) Hamilton sent her a notice of the anticipated next Board meeting to discuss proposed Board action regarding her matter, which was set for September 21, 2010. (R-20.)

She was also asked on direct examination regarding any prior problems she may have had with Bixby to which she replied that, during the 2009-10 school year, she and Bixby had had an early conflict regarding the times of their respective lunch duty as between the first and second grades. Parezo wanted to be the first grade monitor as did Bixby who said she did not want to be with the second graders all day long. Parezo did not logistically want to be late for her 1:00 PM class, which would have occurred by her taking on the second grade lunch period. After discussing all this, however, Bixby won out with Davis and got the first grade assignment. This caused Parezo to have only five minutes to get to her 1:00 PM gym class. She claimed that she did not have a problem with that determination. Davis was "the boss" so she did what she was told to do.

Another incident arose in March, 2010 regarding J.P. in the lunch room setting when she was forced to give luncheon detention to that first grader even though Bixby had already received the first grade luncheon assignment (and, it can be inferred therefrom, that Parezo resented having to be responsible for the discipline of that child instead of Bixby.) The weather was inclement on that particular day, which meant that all of the six regular education classes plus the autistic class were in the lunchroom at the same time, all of this happening while she was forced to discipline the first grader. On top of all of that, Bixby, on the other hand, walked out of the lunchroom two times during that period and left her alone with the seven classes plus the discipline problem. She acknowledged that she never discussed the matter with Bixby but claimed that after the luncheon recess scheduling problem at the beginning of the school year, they really did not have a "really cordial type of relationship." (T-S.P.-220-6). She did however, complain to Davis right after the incident about being left alone with seven classes, which was an unruly setting, even though Bixby left twice, presumably to go to the bathroom on each occasion.

After she complained to Davis, Parezo was confronted by Bixby approximately a week later in the lunchroom near the teachers' refrigerator just as Parezo was awaiting the arrival of kindergarteners to come in for lunch. At that time, Bixby said that she was very upset that Parezo had gone to complain to Davis and further said "How dare I do

that and she has perfect control the lunchroom..." (T-S.P.-223-6.) Those comments were made in the presence of a cafeteria staff member. Parezo contended that she did not respond because she did not want to make a scene in front of others. When further asked about this, Parezo stated that it was not right that Bixby would leave the lunchroom every single time to go to the bathroom since it was only a 40 minute luncheon period. Parezo had no similar problems with any other teachers. The only other conversation she had with Bixby involved Mrs. H. having questioned Bixby about whether Parezo had issued a progress report regarding J.H., this conversation occurring as they passed in the hallway sometime around March 16, 2010. (R-10.) Parezo's response was that she did not recall anything off hand but that she would further look into it.

She had not been friendly outside of work with Bixby at any time even previous to the 2009-10 school year. Yet, she acknowledged that in 2002, Bixby hired her daughter to teach tennis for one season at the Point Beach recreation program, which Bixby ran.

Parezo pointed to various commendables she has received over time, including a letter from then superintendent Karl Calderone to her in 1997 in which he thanked her for her efforts regarding a sports banquet (R-23), a professional recommendation which she got from Kevin Carroll, previously of Lakehurst, dated February, 2011 (R-25), a letter from a parent and substitute school nurse on her behalf, dated February 28, 2011 (R-26), and various performance reviews which she received between 1989 and 2009 (R-30.) She also received good feedback regarding her girls' and boys'soccer programs from Theresa Hamilton in 2010 (R-13 and 14), a similar acknowledgement by Hamilton of her willingness to be involved in school activities in August, 2010, even though she did not get appointed to the job as the boys soccer coach for the 2010-11 school year (R-16), and further commendables from Hamilton in late June, 2010, for her role on behalf of the intramural sports program. (R-17.) She was also selected by Hamilton as a Family Fun Night facilitator in March, 2010 (R-18), and received a positive, satisfactory sign off by Davis on January 25, 2010 (R-29) and June 25, 2010 (R-27), regarding her most recent evaluations. She also pointed to her professional

development log for 2009-2010, which indicated that she had undertaken significant training during those periods of time. (R-28.)

On cross-examination, she acknowledged that teaching a first or second grader is more "fun-based" than teaching older students due to their general lack of maturity. Accordingly, there are less sports skills to be developed with younger children. They are also more impressionable and the teacher is more of a role model accordingly. She admitted that J.H. was always willing to participate and help out. He was also athletic. However, she then stated that J.H. was a "typical second grader" and once or twice a year she would have to tell him about excessive talking, like most, but not all of the students. But she would not agree that he is an excessive talker or having poor self-control, as indicated by the art teacher Conrad Cote who had noted "excessive talking" in the 2009-10 school year report card (P-28) or by Vargas who noted "poor self-control" in a progress report issued relative to J.H.. (R-31.)

Upon further cross examination, she maintained that there were no flat pieces of tape in the gym on June 11, 2010, despite the fact that both J.H. and C. C. testified that they saw a flat tape. The statements reported to Hamilton by the students A. and J. about Parezo putting the tape on the mouth of J.H. were also incorrect. (P-1 at pages 2 and 3). She also contended that when Bixby saw the flat tape, she was also incorrect. She admitted that when one of the male students, J., put a piece of tape on the shoulder of J.H., she did not tell him to stop. Nor did she advise the students that they should all put the tape on themselves as a fun activity. Instead, she thought they were all having fun but she immediately only stuck tape onto J.H.. At that point the other students, A., and C.C., as well as J.H. himself put tape only on him. Upon reflection of that incident, she acknowledged that it was not appropriate to put any tape on any student. Children should not be touched.

Although she continued to maintain that she only put a tape in front of J.H.'s lips, said "Oops" and then stuck it to the shoulder of J.H., she conceded that in her June 24, 2010 typed statement which was given to Hamilton (P-8), she failed to make any mention about putting any tape by his cheek or by the side of his face or about having

said the word "Oops." At most, she admitted that in her statement she only indicated that she pretended to stick the tape onto the lips of J.H.. Nor did she indicate in that statement that the other students put tape on themselves. She offered no explanation in her testimony to explain those omissions.

In addition, in her affidavit, dated October 8, 2010, (P-11) Parezo denied that she ever put anything on his cheek either. Yet, in the handwritten statement supplied by Z. W., dated June 21, 2010, (R-6), Z.W. had stated that Parezo had put "a ball of tape on the side of the kids (sic) face." Parezo contends that Z.W. was wrong even though she was only 10 to 15 feet away from them. And, C.C. and A. were also wrong even though they were right next to her.

She also ultimately conceded (at the final day hearing on April 20, 2011) that, although she only affixed a circular set of tapes to the back of the shapes, the tapes did become flat when they were removed from the shapes, although they all then "balled them up" by themselves by squeezing them into balls. She claims that she put the tape on J.H. just to be "silly." She admits this was not part of any lesson plan. She also then admitted that she put three or four pieces of tape on the shoulder of J.H. but she once again denied touching the mouth of J.H.. Although she brushed by his cheek as she placed it on his shoulder. Once again, she disagreed with the claim by Z.W. that it was stuck to his cheek by stating "it didn't happen" even though Z.W. had provided two separate handwritten statements regarding the placement of the tape on the cheek. (P-6 and P-11). Her contention was that she only held next to the cheek.

Similarly, Parezo said that C.C. had been correct when she said that Parezo put the tape on the shoulder of J.H. but was incorrect when she stated that Parezo had also put it on his face. She believed that C.C. changed her story from what she had told Hamilton versus what she testified to even though C.C. had confirmed at the due process hearing that which she had previously told Hamilton, which was that Parezo took the tape off J.H.'s mouth. (P-1.) In addition, she contended that the female student A. and a male student J.B. were also wrong in their statements about that event. She denied doing anything wrong at all.

She acknowledged that the performance review which was completed by Davis regarding her on June 25, 2010 (R-27) was completed before Davis conducted the investigation in this current matter. However, Davis did sit in on the June 15 meeting regarding this matter. She conceded that she received only a "satisfactory" rating on the section entitled "enforces school rules/discipline", which was the only "satisfactory" which she had ever received in 21 years. Parezo stated that she did not challenge that rating specifically since Davis instead had moved on into a discussion about the need to wear sandals at recess versus the use of the sandals at gym class.

When asked about the meeting with the mother of J.H. in August, 2010, Parezo said she was precluded from explaining what had happened in class that day by the mother. However, she never apologized to J.H. relative to having allowed other students to put tape on his shoulders, or that she had put it on his mouth, or that she "pretended" to put the tape on his mouth. At most, she only stated that she was sorry that it had gone that far, i.e., "to this point" and "everything had gotten so confusing." By that she meant that things had gotten taken out of context. She contended that she had been called into the meeting to allay J.H.'s fears about returning to school in September. Then, after she was able to make her brief remarks, J.H. shook his head and gave her a smile. That was it.

Finally, she claimed that the notes that were taken by DiCicco regarding the June 14, 2010 initial meeting (P-32) did not reflect all that she had said at that meeting. She then once again stated that J.H. had not been embarrassed at all during the fun activity. She saw that he was laughing but then admitted that she could not know what he was thinking.

ANALYSIS

Respondent, Susan Parezo is a tenured teacher at the Lakehurst School in the Lakehurst Borough School District. (See Petitioner's Statement of Tenure Charges and Statement of Evidence Under Oath at P-30.) Respondent has worked in the Lakehurst public school system for 21 years and currently serves in the capacity of teacher of health and physical education for students in grades kindergarten through 8. Respondent is accused by petitioner, the Lakehurst Board, of violating her professional responsibilities as a tenured teacher by (1) placing a piece of clear tape on the mouth and shoulder of J.H., a second grade student, during school hours, on June 11, 2010, as well as causing or allowing to be caused at least one or more students to also place tape on the person J.H., all of which thereby caused the student J.H. to be humiliated and embarrassed and (2) knowingly, intentionally and willfully making a false statement to Theresa Hamilton, interim superintendent of the Lakehurst school district, when questioned about the incident involving the student J.H.. Further, when questioned about the incident by Carmen Davis, principal of the Lakehurst School on a separate occasion and as part of her official investigation, she did knowingly, intentionally and willfully make a false statement to Davis by denying the placement of tape on the mouth of J.H.. Both of these charges are noted as being conduct unbecoming. In the process, Petitioner alleges that respondent Parezo ignored and violated the Lakehurst Board of Education policy # 3281, which is entitled" Inappropriate staff conduct." (P-23.)

That policy states, in relevant part:

> "The Board of Education recognizes its responsibility to protect the health, safety and welfare of all pupils within this school district. Furthermore, the Board recognizes there exists a professional responsibility for all school staff to protect a pupil's health, safety and welfare. The Board strongly believes that school staff members have the public's

trust and confidence to protect the well being of all pupils attending the school district.

In support of this Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.

The Board recognizes and appreciates the staff-pupil professional relationship that exists in the school district's educational environment. This Policy has been developed and adopted by this Board to provide guidance and direction to avoid actual and/or the appearance of inappropriate staff conduct and conduct unbecoming a school staff member toward pupils.

School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language or expression in the presence of pupils. School staff shall not engage in inappropriate conduct toward or with pupils...

A school's staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff

> member may also include conduct not specifically listed in this policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member..."

The New Jersey Legislature established tenure for public school teachers. The legislative design of the statutory tenure provisions is "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. Borough of Prospect Park Bd. of Education, 5 N.J. Super. 215, 218 (App. Div. 1949). Tenure protects competent and qualified teachers during good behavior and guards them against "dismissal for 'unfounded, flimsy or political reasons.'" Spiewak v. Rutherford Bd. of Education, 90 N.J. 63, 73 (1982) (citation omitted). "No person shall be dismissed or reduced in compensation, if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, . . . except for inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10(a).

The Board bears the burden of establishing the truth of the charges by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). This tribunal has the duty "to 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. Delaware, Lackawanna & Western Railroad Co., 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 Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). In other words, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958). See Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959). Precisely what is needed to satisfy this burden necessarily must be judged on a case by case basis.

Conduct unbecoming a public employee has been described as an "elastic" phrase that includes "any conduct which adversely affects the morale or efficiency" of the public entity or "which has a tendency to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. City of Atlantic City, 152 N.J. 532 (1998). Behavior rising to the level of unbecoming conduct need not be predicated upon a violation of any particular rule or regulation and may be based simply upon a violation of the implicit standard of good behavior. City of Asbury Park v. Dep't. of Civil Service, 17 N.J. 419, 429 (1955); In re Tuch, 159 N.J. Super. 219, 224 (App. Div. 1978). In the context of a tenured teacher, the contours for dismissal set forth in N.J.S.A. 18A:6-10 have been found to provide a sufficient standard which, while "general in terms," when "measured by common understanding . . . fairly and adequately conveys its meaning to all concerned." Laba v. Newark Bd. of Education, 23 N.J. 364, 384 (1956). Succinctly stated, "the touchstone is fitness to discharge the duties and functions of one's office or position." In re Grossman, 127 N.J. Super. 13, 29 (App. Div.), certif. den. 65 N.J. 292 (1974). In an educational setting, unbecoming conduct has been held to be demonstrated by a series of incidents indicating a pattern of behavior, or by a single incident if sufficiently flagrant. See Redcay v. State Bd. of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd o.b. 131 N.J.L. 326 (E.&A. 1944). In that matter, a school principal was found guilty of the charges of inefficiency, incapacity, insubordination, lack of cooperation, unfitness and conduct generally unbecoming a principal. 128 N.J.L. 281, 282 (Sup. Ct. 1942).[i] The court held,

> Unfitness for a task is best shown by numerous incidents. Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way.
>
> [130 N.J.L. at 371.]

[i] This citation concerns the original case, in which the court remanded back to the board. The board's decision in the remanded matter was subsequently appealed and that opinion is the one published at 130 N.J.L. 369 (Sup. Ct. 1943), aff'd o.b. 131 N.J.L. 326 (E.&A. 1944).

The type of conduct that the Commissioner of Education has determined constitutes "conduct unbecoming" varies significantly, from verbal/physical altercations and threats of both students and colleagues to failing to comply with school policies. The following are a few recent examples of cases involving conduct which demonstrates the range of such misconduct which can allow for the removal from office, some of which is similar to the conduct in the present case. In these cases, the ALJ's found the conduct of the tenured teachers to constitute insubordination and conduct unbecoming.

In I/M/O The Tenure Hearing of Carl A. Hill, EDU 5979-06, initial decision, (April 2, 2007), adopted, Comm'r. (May 15, 2007), adopted State Bd. (Oct. 17, 2007), <http://lawlibrary.rutgers.edu/oal/search.shtml>, the ALJ found a teacher guilty of both insubordination and unbecoming conduct for refusing to accept letters from supervisors, failing to timely submit roll and grade books, using inappropriate language toward a student, and using disrespectful language and vulgar gestures towards colleagues on multiple occasions.

In I/M/O The Tenure Hearing of Paul Ash, EDU 2799-03, EDU 2658-04 and EDU 2861-06 (consolidated), initial decision, (May 30, 2008), <http://lawlibrary.rutgers.edu/oal/search.shtml>, adopted Comm'r. (July 18, 2008) <http://www.state.nj.us/education/legal/index.html>. In that case, the ALJ found a teacher guilty of insubordination and unbecoming conduct for, among other things, failing to adhere to the district's attendance and leave policies, failing to comply with verbal warnings from supervisors, and failing to turn in required lesson plans.

In I/M/O the Tenure Hearing of Christopher Molokwu, EDU 9650-04, initial decision, (Oct. 26, 2005), adopted Comm'r., (Dec. 12, 2005) <http://lawlibrary.rutgers.edu/oal/search.shtml>, the Commissioner found that a teacher was guilty of conduct unbecoming for, among other things, failing to report to a period assignment, obtaining medical leave under false pretenses, pushing a female student, lying to his supervisor about attending a mandatory training program, threatening comments to the building principal, and telling a ninth grade female student that she

was "acting like a street girl." The Commissioner found that, together, these instances of conduct, "constitute[d] an ongoing pattern of conduct unbecoming a teacher and/or other just cause for dismissal."

In I/M/O the Tenure Hearing of April Renee Bradley, 1990 S.L.D. 790, adopted Comm'r. 1990 S.L.D. 818, adopted State Bd. of Education 1991 S.L.D. 2521, a teacher was found to have demonstrated conduct unbecoming and insubordination for "defying Board administrative directives," failing to comply with call-in/sign-in policies, and refusing to speak with a supervisor who approached her about a previous incident that had occurred.

Some cases have demonstrated that Inappropriate touching may result in certificate revocation.

In a case previously before this tribunal, a teacher's certificates were revoked following an incident where he had instructed and directed some students in the spirit of fun to tape a fellow student up and he then instructed two other students to drag him down a short hall while another student videotaped it. Dep't. of Educ. v. Stocker, EDE 4669-02, Initial Decision, (Feb. 10, 2004), adopted, State Bd. of Exam'rs, (April 1, 2004), <http://lawlibrary.rutgers.edu/oal/search.html>, affirmed, State Bd. of Educ. (Sept. 1, 2004) <http://www.state.nj.us/education/legal/sboe/2004/>. Some factors that this tribunal considered in making the determination were that the teacher did not act out of malice, he only helped the students because it was their intent to make a funny video for an after-school project, the student who was taped participated initially voluntarily, no one was presumptively hurt, and it was supposed to be spontaneous and fun. Although initially engaging in the activity and the frivolity that attended it, the student who was the subject of that activity nonetheless changed his tune as the activity progressed. Despite these mitigating circumstances, the teacher admitted he should have used better judgment. This ALJ, the State Board of Examiners and the State

Board of Education found that even though this was a single incident, it was sufficiently flagrant to revoke the teacher's certificates.[ii]

Another case involving certificate revocation was I/M/O the Certificate of Chavez, EDE 11443-03, Initial Decision, (Nov. 28, 2005), adopted, State Bd. of Exam'rs, (May 15, 2006), modified as to penalty,[iii] State Bd. of Educ. (Apr. 4, 2007) <http://lawlibrary.rutgers.edu/oal/search.html>. The unbecoming conduct consisted of two inappropriate comments of a sexual nature and inappropriate horseplay with a female student in front of the entire class. The horseplay incident, most relevant here, had to do with the teacher and the student trying to put ice down each other's shirts. Although the ALJ found that the touching was not sexual in nature, it could have appeared that way to the students who observed it. He determined that this constituted conduct unbecoming because he "compromised his own dignity as a teacher and reduced himself to a teenager's mentality all while being responsible for a class of impressionable students." Chavez, supra, EDE 11443-03.

Some inappropriate touching may warrant dismissal. If a teacher inappropriately touches a student through either corporal punishment or some other unacceptable form of touching, dismissal may be warranted. Fulcomer, supra, 93 N.J. Super. at 428 (teacher was dismissed for unbecoming conduct because he grabbed a student twice to try to get him to resume his seat); I/M/O the Tenure Hearing of Powell, EDU 1425-06, Initial Decision, (Feb. 2, 2009), adopted, Comm'r. (Mar. 18, 2009) <http://lawlibrary.rutgers.edu/oal/search.html> (a special education teacher was dismissed because he inappropriately touched students on several occasions asking them to rub or push his shoulder or back); I/M/O the Tenure Hearing of Cooper, EDU 6550-00, Initial Decision, (Feb. 2, 2000) adopted, Acting Comm'r. (Mar. 22, 2001) <http://lawlibrary.rutgers.edu/oal/search.html> (A teacher was removed from her tenured position after she told two disruptive students that if they intended to go on the class trip, they would have to kiss her butt. She did not mean this in the literal sense

[ii] A finding of whether the teacher committed unbecoming conduct was never made at a prior hearing because the teacher resigned before the school board of education could certify tenure charges against him. He moved on to another school district, at which time the licensing issue arose.
[iii] The State Board of Education modified the penalty determining that the teacher's certification should be suspended for two years instead of revoking the teacher's license.

and intended the incident as a joke yet presented her buttocks to the students, and they both kissed her buttocks in front of the entire special education class. Even though the teacher intended the incident as a joke, one of the students was embarrassed and shameful following the incident.); I/M/O Tenure Hearing of Tiefenbacher, 1982 S.L.D. 142, aff'd with modification, Comm'r. (teacher was dismissed for pulling a student from his chair, pushing him so that he hit a cabinet, grabbing him by the neck and throwing him to the back of the room where he hit a table).

Inappropriate touching has been found to warrant a penalty other than dismissal at times. In the following three cases, the tenure charges were dismissed because the unnecessary or inappropriate physical contact was not egregious enough to warrant dismissal. In an attempt to defend herself, the teacher in I/M/O the Tenure Hearing of Starling engaged in a physical fight with a sixth grade student. EDU 11679-96, Initial Decision, (Feb. 3, 1998), modified as to penalty,[iv] Comm'r. (June 15, 1998) <http://lawlibrary.rutgers.edu/oal/search.html>. Even though the ALJ found that the teacher exceeded the force required to defend herself and determined the conduct was unbecoming, it was not sufficiently flagrant to warrant dismissal. Mitigating factors the ALJ considered were that the teacher did not intend to inflict bodily harm, there was provocation by the student (the student struck the teacher first), it was an isolated incident, there were no injuries, and there was no prior or subsequent conduct. In I/M/O the Tenure Hearing of Kulp, 96 N.J.A.R.2d (EDU) 636, a special education teacher unintentionally struck an aggressive student after she observed him approaching a frail and undefended student who she thought would be harmed without her intervention. Corporal punishment may be used under certain circumstances such as when a student is found to be threatening physical injury to others. Despite this exception, the ALJ and Commissioner did not find evidence of corporal punishment here because the teacher's actions were not intended to punish the aggressive student but to protect the frail student and neither student was harmed. Kulp, 96 N.J.A.R.2d (EDU) at 640. The tenure charges were dismissed.

[iv] The Commissioner cannot require the teacher to take a course in crisis management/classroom control as the ALJ recommended but urged the Board to consider the teacher's involvement in such a program.

In some circumstances, a teacher will be penalized for unbecoming conduct by a salary withholding for the period of suspension, forfeiture of salary for the approaching school year(s), or forfeiture of adjustment increments. The teacher in Morris v. State Operated Sch. Dist. of Newark engaged in unbecoming conduct that resulted in a withholding of his salary increment. EDU 9472-05, Initial Decision, (Oct. 17, 2006) <http://lawlibrary.rutgers.edu/oal/search.html>, adopted, Comm'r. (Dec. 1, 2006) <http://www.nj.gov/education/legal/commissioner/2006/>[v] affirmed, State Board of Educ. (Oct.17, 2007) <http://lawlibrary.rutgers.edu/oal/search.html>. The ALJ determined that the teacher committed an act of corporal punishment when he struck a student on the wrist with a ruler. The ALJ found the testimony of the student who was hit by the teacher and another student witness credible; it was also consistent with observations by several staff members who observed the welt shortly after the incident. Another case, involved an isolated incident of a teacher kicking a student who refused to listen to her instructions. I/M/O the Tenure Hearing of Miller, EDU 5812-01, Initial Decision, (December 27, 2001), modified, (April 8, 2002) <http://lawlibrary.rutgers.edu/oal/search.html>. The teacher was penalized with a one-year salary increment withholding. Ibid. Lastly, **in** I/M/O the Tenure Hearing of Boyd, a teacher forced open a classroom door that two students were blocking to prevent another student from leaving, which caused her to impel a student, striking him in his shoulder area. EDU 6394-91, Initial Decision (May 21, 1992), adopted, (July 10, 1992), 1992 N.J. AGEN LEXIS 5255.[vi] The ALJ recommended forfeiture of the next year's salary and adjustment increments and 120 days' pay withheld, rather than the harsher penalty of dismissal, after considering mitigating factors such as the unbecoming conduct being a single incident, the teacher's actions were rash but not premeditated or cruel, there was no lasting effect on the school or students involved, the teacher had twenty-five years of unblemished service, and the teacher already suffered professional and personal embarrassment. Ibid.

As indicated hereinabove pursuant to this analysis, in tenure matters, as in all other matters which are the subject of due process, the moving party, which in this case

[v] For unknown reasons, the Commissioner's decision is only available on the DOE's website.

is the Board, bears the burden of proving the charges upon which it relies by a preponderance of the competent, relevant, and credible evidence. Atkinson v. Parsekian, 37 N.J. 143 (1962). After having examined and considered all of the evidence and testimony presented, as well as after having considered all the arguments advanced, I **FIND** that the overwhelming evidence supports the ongoing concerns raised by the district as to both of the charges preferred against Parezo.

Her arguments and proofs about her longstanding good service do not give her leave to be excused for her misconduct in this matter either as it applied to the incident or subsequently in her denial of the occurrence of the events. Based upon all of the relevant proofs, I **FIND** that she inappropriately singled out one student, J.H., and made him the butt of her "fun" time in the presence of all of his classroom peers plus the eighth grader Z.W.. She then placed tape on his shoulders and fostered and encouraged the opportunity for his fellow students to do the same on him. She then placed a piece of flat tape over his mouth as well as at or immediately near his cheek. And then, at or about the time of the arrival of Kathleen Bixby, the second grade teacher, she removed the tape from the mouth of J.H., all of this being witnessed by the students and Bixby. The tape briefly left a red rectangular mark on the child's face. Her role in this process as the adult leader was deplorable, whether she felt it was a fun activity or not. The child even received some taunts from his classmates, such as "tape boy." Despite what Parezo contends, the child J.H. expressed clearly that he was humiliated by the experience and then, as he described it at the hearing, he then felt anger at his teacher for having done what she did. This is hardly a reason to instill confidence in children or their families in the community by the adult educational leadership. In fact, the child was so upset that he feared going back to school. The impact on the child was significant and distinguishes it from other cases in which innocent play got out of hand. This definitely indicates that damage had been done to the child, whether or not Parezo personally felt it was neither punitive, bullying or malicious. Also, his parents were appropriately and understandably upset with the misconduct by Parezo. Curiously, for all of that, Parezo never even truly apologized to the child for which she had done. Her "apology", such as it was, was lame and feeble

[vi] These decisions are not available on Rutgers' website.

at best. All she had to really say at that time was what Mrs. H. had requested, which was the two magic words: "I'm sorry." Instead, she gave a response which indicated that she was only sorry for the matter having gone to that point. That hardly sounds like an apology for misconduct, especially where she violated the child so deliberately in front of his peers. The activity may have been fun for Parezo and the other students, but it definitely did not impact similarly for J.H., who was the victim. As a result, she violated the interests of J.H., as set forth in the first charge in this matter. In the process, I find very little merit to her contention that she was summarily cut off by the parent before she could really explain herself. The parent's reactions demonstrate how upset the entire family was by the incident. And yet, for all that, she never really apologized.

And then, to further compound her inappropriate conduct, Parezo was not truthful with either Superintendent Hamilton or Principal Davis when they conducted their respective investigations with her, which has been set forth specifically in Charge # two herein. Her denials about the happenings and occurrence of the event have not been supported by the credible evidence. In fact, in the statement which Parezo presented to Hamilton, dated June 24, 2010, (P-8) she made absolutely no reference to having put a ball of tape on the cheek of J.H., despite the observations by student Z.W., who testified as Parezo's own witness in this matter. Nor had she mentioned that she had said the word "Oops" at the time. One would have thought that had she actually only brushed by the side of the face of J.H. and not even, as Z.W. indicated she placed it on his cheek, she would have made reference to a cheek brushing incident or her accidental and faked act of saying"Oops" in that report to Hamilton and, absent any viable explanation to the contrary, I **FIND** that Parezo's account of the events is not credible and is not worthy of belief. Here was her first best opportunity to correctly and fully explain herself and she neglected to indicate relevant factors which could have addressed the problem. Those extra factors did not come out until later on. That suggests at a minimum, that those added-on statements were contrived at best. And she never offered any explanation for those ommissions. Her stake in the outcome of these proceedings is obvious.

By contrast, and after having considered and closely scrutinized the oral statements made at hearing by J.H., C.C., and Z.W., and the testimony of Bixby, as well as having considered under the residuum rule the largely corroborating statements made by the fellow students A., J., A., and J. to Hamilton and Davis in their respective investigations (P-1 and P-2), the much greater weight of the evidence supports the conclusion that Parezo specifically, intentionally and unequivocally affixed tape to the mouth of J.H. and then removed it as Bixby entered the area. The activity was observed by the students, who were clearly in the best position to observe what had happened. As part of the analysis, I carefully considered the answers provided at hearing by J.H and C.C., neither one of whom had any vested interest in the outcome other than to tell me the truth. Their answers were refreshing and straightforward. I detected absolutely no hesitation on the part of either one of them regarding what they had observed and/or experienced. Similarly, although to a slightly lesser degree I afforded credibility and appropriate weight to the statements of Z.W. as well, even though her vantage point was not nearly as good as the two second graders who were immediately in front of Parezo. Curiously, however, Parezo discounted the testimony and two handwritten notes even of her own witness, Z.W., who professed that she had seen Parezo place a balled up piece of tape of the cheek of J.H.. At a minimum and whether or not the tape was actually eventually affixed by Parezo also to that cheek, Z.W's observations demonstrate that Parezo was intimately engaged in some close-quarter activity with J.H., and his facial area to his detriment. Parezo's denial of that event has not been supported or corroborated in any form whatsoever. And her statements to Hamilton and Davis were clearly inaccurate, incorrect, and not truthful. That steadfast denial in the face of the overwhelming evidence to the contrary is equally disturbing and most significant since it demonstrates a lack of honesty and truthfulness which cannot be tolerated.

In addition, I **FIND** little merit in her contention that Bixby had a bias or motive against her. Rather, the reverse appears to be the case in as much as it strongly appears that Parezo resented the fact that Bixby had won out in getting the first grade assignment for lunch duty monitoring, while Parezo got the second graders, which made it logistically inconvenient for her to get to her next class period. Then, Parezo

resented having to deal with a first grader's problem because she saw Bixby taking two bathroom breaks during the luncheon periods. Her complaints to Davis thereafter corroborate that fact. If Bixby had any problem with or resentment for Parezo over time, why did she nonetheless hire Parezo's daughter to teach tennis one or more summers? As a further example of Bixby's lack of bias, she testified that she was so affronted by what she had seen in the gymnasium on June 11, 2010, she initially immediately walked away from it in order to extricate herself from what could have been seen as a problem. The reasonable conclusion is that in all probability she did not want to get her fellow teacher in trouble and also wanted to diffuse the embarrassment for J.H. However, after anguishing over it the entire weekend, she nonetheless realized that it was her professional obligation to have it reported to the proper authorities. At the same time, although Bixby was conflicted, it appears that she should have taken more affirmative steps on that Friday to address the needs of J.H., particularly by taking him to the school nurse immediately, her professional obligations to the rest of her students notwithstanding.

Further, none of the witnesses who appeared on behalf of Parezo provided any meaningful or relevant testimony which could shed any different light regarding what had happened between Parezo and J.H. on June 11, 2010. The two paraprofessionals Robinson and Capasso were not even witness to the events with J.H. since they were charged with responsibility over their respective autistic children and left with them at the time. Furthermore, they couldn't even agree on what days of the week they shared gym classes with Parezo. And, as to DiCicco, even Parezo maintained that the various notes by DiCicco were not completely accurate, thereby further diminishing their significance and usefulness at hearing. Nor could they detract from the thorough investigations conducted by Hamilton and Davis, whom I found to be highly credible and worthy of belief. In both cases, Parezo was not truthful or forthcoming with them. Her claim that she first believed that she was in trouble with Hamilton only because of some morning duty lateness issue is a weak response in light of the startled reaction by Bixby the previous Friday afternoon and also in light of the suggestion by Hamilton to her that she bring her union representative to that meeting. It seems hardly likely that a

union representative would have been required to sit in on such a minor infraction as lateness for breakfast duty.

At the same time, I **FIND** that Parezo has satisfactorily explained the authorship of the progress note regarding J.H. as having been vested in Vargas, and not her, although it is understandable how the parent could have previously believed that Parezo may have been responsible for the note since they both team-taught her son and there is some basic indication that Mrs. H. was somehow aware of Parezo's negative confrontations with two other students earlier in the year to which Parezo herself even testified and also heard prior complaints by her son about Parezo. Apparently, the Lakehurst community is not so large so as to avoid such knowledge. This also raises concerns about the long-term impact upon the community if she is retained since it is quite logical that other parents may be constrained to have their children taught by her in the future. By her own actions in this matter, Susan Parezo has emasculated her leadership, her trust and her confidence within the school community.

In that same regard, I feel compelled to observe that the current use of progress reports and the Power Teacher system should be revisited by the district. Its usefulness in this matter was very limited since it was difficult to assess the time frame within which negative actions by a child could have been effectively pinned down, other than by the independent recollection of the parties. Unlike the apparent running record of report cards, which lists ongoing comments from one marking period to another during the class year and which can be retained in the student's cum folder as a permanent record, any progress report notes from preceding marking periods must be deleted or erased before new entries can be made. And they are neither kept by the teachers nor stored by the district for future purposes. It is understandable that a parent could be confused about the status of one's child if there is no base line in the progress report from which to reference a potential problem during any part of the year. Thus, if the intent of the progress report is to alert a parent to those problems, the current practice falls very short of the mark. And, additionally, at least in the case before me, there was an obvious confusion by Mrs. H. regarding which team-teacher

wrote the negative remarks about J.H. in March 2010. That type of ambiguity must be addressed in the future to help the school community and families timely and accurately assess any potential student concerns.

As indicated hereinabove, the incident itself was most disturbing and serious. Parezo failed to properly consider the consequences of her actions and the impact upon J.H., as well as the other students present. Her claim that everything was done in innocence and fun fails to justify the despicable and unsettling nature of her actions under the circumstances. The child J.H. was subjected to ridicule and embarrassment. One also wonders the long-term impact upon the other children who witnessed the actions by her. In addition, by placing the tape on J.H.'s mouth, and most likely also his cheek, she exposed him to a potential health hazard by having an unsanitary piece of tape placed there. In all those respects, she violated the district's policy #3281. And I so **FIND.** In the process, it is noteworthy that her 21 years of teaching worked totally against her this matter. There was absolutely no excuse for that conduct. Perhaps a less experienced teacher could be given some margin of leniency based upon the rationale or justification of immaturity. This was not the case here, however. Given the evolving nature of awareness and sensitivity in our society to such violations of individual rights and the increasingly focused efforts in school districts to address such improprieties against children generally, this experienced teacher should have known much better under the circumstances. And her failure to either own up to that responsibility or appropriately apologize to the victim and his family adds to the disturbing nature of her actions when the matter was discovered and reported by Bixby and demonstrated her failure to maintain a proper role as a leader in the school setting.

In the matter of In re Tenure Hearing of Rosa Sardury, App. Div Dkt. No. a-5913-0323 (December 13, 2005), the Court held that even though the teacher had had numerous years of service, her insubordinate behavior and unbecoming conduct actions had so severely compromised her role as to justify her employment relationship with the board to be severed. This is precisely the problem with the actions by Parezo. Under the circumstances of this matter, her irresponsible actions and singling out of J.H. as she did and the reactions of the child and his parents to that inappropriate

conduct warrant significant discipline. The withholding of any increments or any protracted suspension do not appear to adequately serve the best interest of the community in light of what she had done or salvage the damage which she has caused. One also questions how she will be able to effectively teach in this district any longer in light of the incident and its impact upon the child and his family. It is also reasonable to assume that she will otherwise be watched and scrutinized at every turn by the community and the district leadership, thereby challenging, if not crippling, her ability to teach there. In addition, her steadfast denial of her responsibility over the misconduct in the face of such overwhelming evidence to the contrary demonstrates that she is no longer trustworthy, thereby also warranting removal. She has divested herself of her tenure protections by the sum total of her actions accordingly.

In the last analysis, a thorough review of this incident involving Parezo in the Lakehurst district illustrates a classic example of a board attempting to come to grips with unsettling and inappropriate behavior by a member of its staff against one of its students and its impact in the community which it serves. In the process, I am satisfied and **FIND** that Lakehurst employed appropriate procedures in order to intercept the problem as soon as possible, as evidenced by the significant number of meetings conducted and contacts made by Hamilton and Davis in a relatively short period of time. All of this occurred despite the unequivocal and unwavering denial by Parezo of having engaged in any wrongdoing. Her untruthfulness is intolerable and her failure to recognize her responsibility under the circumstances is inexcusable. How could one ever trust her again under the circumstances? Her job was to be a positive role model and to instill in the public and in the community a level of trust and confidence as well as to protect the well being of her pupils, which she failed to miserably do under the circumstances. As stated hereinabove, unbecoming conduct constitutes grounds for dismissal of a tenured teacher. Thus, while I am acutely aware of the entitlements which attach to tenure status under our present law and I diligently sought to scrutinize the evidence in light of the impact it will have upon her future, Parezo has nonetheless offered no viable explanation whatsoever to justify her unbecoming conduct on either June 11, 2010 or her own untruthfulness thereafter during the course of the investigation in this matter. And I so **FIND.**

CONCLUSION AND ORDER

Based upon all of the foregoing, I have thoroughly considered all of the extensive proofs offered in this matter. Although there are no explicit bright-line rules as to what may be considered "conduct unbecoming" in cases involving teachers facing tenure charges, the determination must be made on a case by case basis. As a result, in the present case, the petitioner Board has presented consistent and corroborated evidence in the form of extensive testimony, investigative reports and district policy regarding the proper role which must be conducted by a teacher. As a result I **FIND** and **CONCLUDE** that all of the allegations against respondent, Susan Parezo, as to the each of the two charges cited against her in the Statement of Tenure Charges and Statement of Evidence Under Oath by Theresa Hamilton, dated September 30, 2010, are sufficient to constitute conduct unbecoming and that she is **GUILTY** of both of the charges contained therein relative to same. I make all of these findings and form all of these conclusions by a preponderance of the credible evidence.

It is **ORDERED** that respondent Susan Parezo be **DISMISSED** and **REMOVED** from her tenured employment with the Lakehurst Board 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.

August 8, 2011

DATE

JOHN R. FUTEY ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/mamf

EXHIBITS

For petitioner:

P-1 Investigation report by Theresa Hamilton

P-2 Investigation report by Carmen Davis

P-3 through 5 Not in evidence

P-6 Handwritten note by Z.W., dated June 18, 2010

P-7 Not in evidence

P-8 Typewritten note by Susan Parezo, dated to 24, 2010

P-9 Affidavit of Theresa Hamilton, dated September 30, 2010

P-10 Affidavit of Carmen Davis, dated September 29, 2010

P-11 Affidavit of Susan Parezo, dated October 5, 2010

P-12 Resolution and Minutes of the Lakehurst Board of Education, dated October 26, 2010

P-13 through 22 Not in evidence

P-23 Lakehurst Board of Education policy #3281

P-24 through 26 Not in evidence

P-27 Progress report for J.H.

P-28 Report card for J.H. for the 2009-10 school year

P-29 Not in evidence

P-30 Tenure charges in the matter of Susan Parezo, dated September 30, 2010

P-31 Sketch of gym by Kathleen Bixby

P-32 Typed up notes by Barbara DiCicco, dated June 14, 2010

For Respondent:

R-1 Professional certification documents for Susan Parezo

R-2 Statement by Susan Parezo, dated June 24, 2010

R-3 Notes from June 23, 2010 meeting

R-4 Notes from June 24, 2010 meeting

R-5 Notes from June 28, 2010 meeting

R-6 Note by Z.W., dated June 21, 2010 and "received" dated June 22, 2010

R-7 Report card for J. H. for 2009-2010 school year

R-8 Bixby class attendance roster

R-9 Emails between Susan Parezo and Kathleen Bixby re. J.H.

R-10 Emails between Susan Parezo and Carmen Davis, March 2010, re. J.P.

R-11 Emails between Susan Parezo and Carmen Davis, dated April, 2010

R-12 Letter from K. Carroll to Susan Parezo, dated June 23, 2008

R-13 Emails between Susan Parezo and Theresa Hamilton r.e Soccer 2010

R-14 Emails between Susan Parezo and Theresa Hamilton re. boys soccer coach 2010 position

R-15 Soccer 2010 documents

R-16 Letter from Theresa Hamilton to Susan Parezo, dated August 24, 2010

R-17 Emails between Susan Parezo and Theresa Hamilton re. Intramurals 2010

R-18 Emails between Susan Parezo and Theresa Hamilton re. Family Fun Night presenter

R-19 Emails between Susan Parezo and Theresa Hamilton re. Lakehurst Elementary School Board Of Education decision

R-20 Letter from Theresa Hamilton to Susan Parezo, dated September 13, 2010

R-21 Lakehurst Board of Education decision re. Susan Parezo

R-22 Letter from Barry Parliman to Susan Parezo, dated October 27, 2010

R-23 Letter from K. Calderone to Susan Parezo, dated April 24, 1997

R-24 Letter from K. Calderone to Whom It May Concern, dated February 15, 2011

R-25 Letter from K. Carroll– professional recommendation for Susan Parezo, dated February, 2011

R-26 Letter from [parent] to Susan Parezo, dated February, 2011

R-27 Annual evaluation form regarding Susan Parezo, dated June 25, 2010

R-28 Lakehurst Professional Development Log for Susan Parezo

R-29 Performance review of Susan Parezo, dated January 25, 2010

R-30 Annual evaluation forms and performance reviews for Susan Parezo-various years between 1989-2009

R-31 Progress report for J.H.

R-32 Diagram of gym by Karen Robinson

R-33 Diagram of gym by Maryanne Capasso

R-34 Note from Barbara DiCicco to Mary Novotny, dated June 14, 2010

R-35 Barbara DiCicco-private notes-June 15, 2010

R-36 Activities participation list for Susan Parezo

R-37 Diagram of gym by Susan Parezo

WITNESSES

For Petitioner:

Theresa Hamilton
Carmen Davis
J. H.
C.C.
Kathleen Bixby

For Respondent:

Susan Parezo
Karen Robinson
Kevin Carroll
Maryanne Capasso
Z.W.
Bryan Vargas
Barbara DiCicco

#427-11

IN THE MATTER OF THE TENURE HEARING OF GIUSEPPE AMODEI, NEW JERSEY STATE JUVENILE JUSTICE COMMISSION.	:	COMMISSIONER OF EDUCATION
	:	DECISION
	:	

SYNOPSIS

The petitioner certified tenure charges of chronic and excessive absenteeism constituting unbecoming conduct and other just cause against respondent – a teacher of culinary arts at the Juvenile Justice Commission's (JJC) New Jersey Training School – for, *inter alia*, allegedly failing to return from an approved leave of absence without authorization, refusing to comply with requests to return to work or voluntarily resign from his position, and for chronic and excessive absences that constitute abandonment of his position. Respondent contends that his absences were due to a work-related injury, and that petitioner failed to warn him of its displeasure with his absences. Petitioner sought removal of respondent from his tenured position, and filed a motion for summary decision.

The ALJ found, *inter alia*, that: the undisputed facts in this matter are sufficient to support the dismissal of the charge of abandonment of position; on the charge of excessive absenteeism, the petitioner appropriately considered the circumstances of respondent's absences and not just their sheer number; the fact that JJC knew respondent's absences were the result of knee replacement surgery and the recovery thereafter, and continued to consider them excessive does not make its consideration of his absences unreasonable; respondent's absences for nearly nine months of authorized and one month of unauthorized leave negatively impacted the continuity of JJC's culinary program; JJC provided sufficient warnings to respondent and appropriately relied upon them when certifying the tenure charges of excessive absenteeism; JJC asserts that respondent's attendance record prior to the most recent leave of absence contributed to its decision to file the instant tenure charges; however, respondent's attendance record prior to his leave in 2009-2010 is in dispute and it can therefore not be determined from the evidence submitted whether respondent engaged in a pattern of absenteeism prior to October 2009 as JJC alleges; further material facts are needed to resolve the issue of whether dismissal is warranted; accordingly, although petitioner has established that respondent's absences were excessive, it has not established that the excessive absences justify his dismissal. Accordingly, the ALJ granted petitioner's motion for summary decision on the issue of respondent's excessive absences, but denied petitioner's motion for summary decision on the issue of dismissing respondent based on his excessive absenteeism. The ALJ further granted respondent's motion seeking a determination that he had not abandoned his position and denied petitioner's request for summary decision on this issue.

Upon independent review of the record, the Commissioner concurred with the ALJ that petitioner had not proven that respondent abandoned his position. The Commissioner agreed that a school district may, under certain circumstances, terminate the employment of a staff member whose absences have been prodigious – even where those absences have been caused by work-related injuries – but found that the factual record must support such a termination by harmonizing with the legal principals in *In the Matter of the Tenure Hearing of Lena White, State-Operated School District of the City of Jersey City, Hudson County*, 92 *N.J.A.R.* 2d (EDU) 157 and similar cases. Accordingly, the Commissioner: denied petitioner's motion for summary decision, granted respondent's motion for a ruling that he did not abandon his position; and ordered that the record of this matter be developed to allow a full application of the legal analysis in *Lena White, supra* – confined, however, to the time period specified in the within tenure charges.

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 13, 2011

OAL DKT. NO. EDU 11834-10
AGENCY DKT. NO. 575-9/10

IN THE MATTER OF THE TENURE HEARING OF GIUSEPPE AMODEI, NEW JERSEY STATE JUVENILE JUSTICE COMMISSION.	:	COMMISSIONER OF EDUCATION
	:	DECISION

In this matter, petitioner alleges that the absences of the respondent – a culinary arts teacher – have been excessive to a degree warranting dismissal. Respondent counters that because his absences were due to a work-related injury, and because petitioner did not disclose its displeasure with his absences, the tenure charges for excessive absenteeism and abandonment of position must fail. Before the Commissioner is a recommendation for disposition of some – but not all – of the issues raised by the parties. Upon review of the record, partial Initial Decision of the Office of Administrative Law (OAL), and parties' exceptions, the Commissioner determines as follows.

First, the ALJ's conclusion that respondent did not abandon his position at the New Jersey Training School (NJTS) is adopted for the reasons set forth in the Initial Decision. Petitioner's reliance, in its exceptions, upon *N.J.A.C.* 4A:2-6.2(b) – a civil service regulation which provides that absences of five or more days without employer approval constitute abandonment of position – is misplaced. At the outset, the Commissioner notes that the regulation itself requires that leave requests must not be unreasonably denied, and petitioner's bald assertion – on page eleven of its exceptions – that its denial was reasonable is not sufficient to support a finding in its favor on that point.

To the contrary, the record suggests that long before July 2010, petitioner was made aware – by two doctors selected by petitioner – that respondent needed a knee replacement. (*See, e.g.*, Email from Manzer in State Department of Treasury to Velez in petitioner's Human Resources Department, marked "JJC Amodei 266" in Exhibit A to certification of Lisa F. Bell; report of W. Thomas Gutowski, M.D., dated December 17, 2009, attached as Exhibit 5 to respondent's May 20, 2011 brief.) Respondent maintained that one of the doctors advised him that failure to correct his knee would undo the multiple repairs that he had undergone to mend the ankle that had been injured on the job in November 2004. The record also suggests that respondent disclosed to petitioner that without a knee replacement he would not be able to stand for the extended periods required by his culinary classes. Nonetheless, petitioner decided to end the series of leave approvals that it had given respondent on a date – July 7, 2010 – that it knew fell between respondent's knee surgery and his in-patient rehabilitation. This decision was made notwithstanding the provisions in *N.J.A.C.* 4A:6-1.10(a) which allow agencies to extend unpaid leave beyond the period of one year – with the approval of the Department of Personnel. In view of the foregoing, a question of fact is raised as to the reasonableness of petitioner's denial of respondent's request for leave for his knee replacement.

Further, the facts suggest that respondent's decision to undergo a knee replacement was driven, at least in part, by his desire to restore his ability to physically handle his teaching position. It would thus be counterintuitive to conclude that his actions signified an intent to abandon that position.

The determination that respondent did not abandon his position, however, does not dispose of the ultimate issue in this case. Frequent or prolonged absences can, regardless of the reason, warrant dismissal from a position. *See, e.g. State-Operated School District of*

Jersey City, Hudson County v. Vincent Pellecchio, 92 *N.J.A.R.* 2d (EDU) 267, 270.[1] The ALJ found that respondent's absences were excessive, but that the record thus far is insufficient to resolve the question of whether dismissal is warranted. The Commissioner concurs with the latter finding.

The appropriate legal analysis can be found in such cases as *In the Matter of the Tenure Hearing of Lena White, State-Operated School District of the City of Jersey City, Hudson County,* 92 *N.J.A.R.* 2d (EDU) 157; and *Kelsey v. Board of Education of the City of Trenton, Mercer County,* Commissioner Decision No. 127-89, May 11, 1989. In those cases, three factors were examined in determining the appropriateness of dismissal for absenteeism: 1) the particular circumstances of the absences and not merely the number of absences; 2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred; and 3) whether some warning had been given to the employee that his or her supervisors were dissatisfied with the pattern of absences. *Lena White*, *supra,* at 161.

As to these factors, only those allegations contained in the tenure charges which were certified to the Commissioner herein may be considered. Those charges reference only absences between July 7, 2010 and the date of the tenure charges. Earlier absences could have been included in the charges; they were not, however, and therefore they may not be used to establish the within charges.[2] The case upon which the ALJ relies for his view that the earlier

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[1] Accordingly, it is well settled that absences due to work-related injuries will not be excluded from consideration in determining whether absenteeism is excessive and warrants dismissal. *In the Matter of the Tenure Hearing of Phyllis Stanley, Board of Education of the Freehold Regional High School District, Monmouth County,* 95 *N.J.A.R.*2d (EDU) 495, 498; *In the Matter of the Tenure Hearing of Sonia Velez, School District of the Hudson County Schools of Technology,* Commissioner Decision No. 162-06 (April 27, 2006); *Malone v. Aramark Services, Inc.*, 334 *N.J. Super.* 669, 676-77 (2000). Thus, respondent cannot argue that the leave related to his ankle surgeries must be disregarded when evaluating his attendance.

[2] The Commissioner further notes that tenure charges may not be amended by motion. If a board wishes to make additional charges, it must comply with the requirements of the entire process and then seek to consolidate the subsequent case with the first if it is still pending.

absences may be considered, *i.e., Trautwein v. Board of Education of the Borough of Bound Brook, Somerset County,* 1980 *S.L.D.* 1539 (App. Div. 1980), *certif. den.* 84 *N.J.* 469 (1980), is an increment withholding case and consequently does not provide any guidance on this issue.

Accordingly, petitioner's motion for summary decision – requesting that the Commissioner find that respondent abandoned his position and may be dismissed from employment – is denied. Respondent's related motion seeking a finding that he did not abandon his position is granted. The Commissioner further orders that the record be developed to allow a full application of the legal analysis in *Lena White, supra,* to the time period specified in the tenure charges. Pending such an analysis, the OAL's finding that petitioner has established that respondent's absences were chronic and excessive is premature. Finally, the Commissioner adopts the OAL's order placing certain documents under seal.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/13/11

Date of Mailing: 10/14/11

[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

ORDER GRANTING PARTIAL SUMMARY DECISION
OAL DKT. NO. EDU 11834-10
AGENCY DKT. NO. 575-9/10

IN THE MATTER OF THE TENURE HEARING OF GIUSEPPE AMODEI, NEW JERSEY STATE JUVENILE JUSTICE COMMISSION,

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Michael J. Engallena, Deputy Attorney General, for petitioner (Paula T. Dow, Attorney General of New Jersey, attorney)

Jason L. Jones, Esq., for respondent (Weissman and Mintz, LLC, attorneys)

BEFORE **DENNIS P. BLAKE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In a letter dated August 31, 2010, Tremaine Harrison ("Harrison"), Assistant Director of the Office of Education within the Juvenile Justice Commission ("the JJC" or "petitioner") notified Giuseppe Amodei ("respondent"), a teacher of Culinary Arts at the JJC's New Jersey Training School ("NJTS"), that the JJC intended to file tenure charges against him and to seek his dismissal as Teacher 2 in accordance with N.J.S.A. 18A:6-10 & 60-2 and N.J.A.C. 6A:3-5.4. Respondent was suspended immediately.[1] Attached

[1] Until January 24, 2011, respondent was suspended without pay. In a letter dated January 28, 2011, Lisa Bell, JJC's Human Resources Manager, notified respondent that his 120 day suspension without pay

to the notice were a Statement of Charges, a Statement of Evidence, and an Appendix of Exhibits.

Respondent was charged with chronic and excessive absenteeism, conduct unbecoming, and other just cause under N.J.S.A. 18A:6-10 & 60-2. The Statement of Charges identified three separate charges. Charge One alleged that he engaged in chronic and excessive absenteeism, conduct unbecoming, and other just cause on the basis that:

> 1. He has failed to return from an approved leave of absence from his position without authorization since July 6, 2010[,]
> 2. He exhausted his Family Medical Leave entitlement and he was advised that management would not approve a leave of absence beyond July 6, 2010; and
> 3. He refused to comply with directives to return to work or resign from his position.

Charge Two alleged that "[h]e has refused to comply with the requests to return to work or voluntarily resign from his position which has had an adverse impact upon the students of [NJTS] under his jurisdiction." Charge Three stated that "[h]is absences during this unauthorized period from July 6, 2010 [sic] to present are chronic and excessive and constitute abandonment of his position." Five exhibits accompanied the Statement of Charges. They consisted of letters to respondent dated June 17, 2010; June 18, 2010; August 9, 2010; and August 20, 2010. These exhibits will be discussed in the factual discussion below.

The charges were filed against respondent on September 2, 2010. Respondent did not respond to the charges within the fifteen-day time period provided by N.J.A.C. 6A:3-5.4(b). On September 27, 2010, the JJC's Director of the Office of Education, LaCoyya Weathington, determined that there was probable cause to credit the charges filed against respondent and that the evidence was sufficient to warrant his dismissal from services. This determination was served on respondent that same day. The certified charges were filed with the Commissioner of the Department of Education on

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had expired on January 24, 2011, and that he had been placed on suspension status with pay effective January 25, 2011. (Engallena Decl. Ex. E.)

September 28, 2010. On November 1, 2010, the Bureau of Controversies and Disputes within the Department of Education received respondent's letter directed to Commissioner Hendricks contesting the charges. The matter was then transmitted to the Office of Administrative Law ("OAL") where it was received on November 3, 2010.

On December 14, 2010, a pre-hearing conference was held. On January 20, 2011, the JJC served on respondent discovery requests in the form of interrogatories, a request for production of documents, and a request for admissions. (Engallena Decl. Ex. D.) In a letter dated February 22, 2011, respondent's attorney requested an extension of time until March 21, 2011, to respond to the JJC's discovery requests. (Engallena Decl. Ex. F.) Respondent did not meet that deadline. (Engallena Decl. ¶ 10; Jones Cert. ¶ 7.)

On April 25, 2011, the JJC filed a motion for summary decision and to file certain records under seal. The JJC asserted in its motion for summary decision that the undisputed facts support that it properly determined that respondent's absences were excessive, that respondent had abandoned his position, and that dismissal was warranted. In its motion to file certain records under seal, the JJC requested that respondent's personnel and medical documentation it was submitting into evidence be kept under seal to protect respondent's privacy interests. After an extension to respond was granted, respondent's response brief was received on May 20, 2011. Respondent disputes the number of days petitioner asserts he was absent, that petitioner considered the circumstances of his absences, that petitioner warned him that it was dissatisfied with his absences, and that his absences negatively impacted the continuity of culinary arts instruction at NJTS. Respondent also asserts that the undisputed facts support that he did not abandon his position and also that issues of material fact exist in determining whether respondent had just cause for removing him from his position. Respondent's brief addresses only the motion for summary decision. Hence, the motion to file certain records under seal is uncontested. In its reply letter, received on June 3, 2011, the JJC reiterated its original arguments regarding the motion for summary decision.

At the time of JJC's motions, respondent had not answered the JJC's discovery requests. (Engallena Decl. ¶ 10.) The JJC requested that its request for admissions be

deemed admitted by respondent. (Pet'r's Mot. for Summ. D. 3 n. 1.) However, respondent included, as part of his response, his answers to the JJC's request for admissions. No other responses to the discovery requested were submitted. Respondent's attorney certified that he "inadvertently overlooked" the JJC's request for admissions and that respondent "does not admit to the veracity of any statements contained in said [request] except as indicated in [respondent's] attached [response]." (Jones Cert. ¶ 7.) Furthermore, he indicated that the "other requests for discovery will be completed and served upon [petitioner] by the filing deadline contained in the [OAL's] Procedural Rules." (Jones Cert. ¶ 7.) In its reply letter, the JJC asks that the requests for admissions be deemed admitted because respondent's response was served out of time.

FACTUAL DISCUSSION

The NJTS is a secure facility, operated by the JJC. (Harrison Decl. ¶ 4.) It provides "care, treatment and custody for juveniles committed by the courts to the JJC's custody" and "career and technical education opportunities and training for the juveniles housed there." (Id. at ¶ 7.) "Juveniles committed to the JJC who are assigned to [NJTS] live on site." (Id. at ¶ 5.) NJTS programs allow them to "develop technical skills they can used [sic] to obtain jobs and careers once they re-enter society; develop and utilize communication and interpersonal skills; develop critical thinking and problem solving skills; interact with others in positive, non-confrontational methods of interaction; build self-confidence, self-esteem, and character; all of which helps prepare them to become positive, beneficial members of their communities once released from [NJTS]." (Id. at ¶ 8.) A fiscal school year at NJTS "consists of a minimum of 220 days in which all JJC teachers employed there are expected to be present and working." (Id. at ¶ 12.) Juveniles at NJTS have a twelve-month school year. (Id. at ¶ 13.)

The Culinary Arts/Commercial Baking Program ("the culinary program") is "[o]ne of the career and technical programs offered . . . at [NJTS]." (Id. at ¶ 9.) Teaching culinary arts requires a special teaching certification. (Id. at ¶ 22.) From 2004 until 2009, the culinary program consisted of an introductory and intermediate phase. (Id. at ¶ 18.) "The introductory phase provided . . . basic training" and "[i]t was primarily book-

oriented, with only limited exposure to hands-on training." (Id. at ¶ 31.) "The intermediate phase provided opportunities for prep work in a small kitchen setting." (Id. at ¶ 32.) In June 2010, the JJC planned to expand the culinary program by adding an advanced phase where students "would function to a large extent as independent chefs, with responsibility for baking, overseeing inventory, and operating the Campus Shop[, a short-order restaurant,] for students and staff, including selling the baked goods they produced." (Id. at ¶ 33.) The advanced phase would give the students "primary exposure to the kitchen and the majority of the hands-on experience" out of all three phases. (Id. at ¶ 34.) The expansion of the culinary program was expected "to make the . . . program comparable to those offered by culinary school and local union shops, and to allow students to accumulate qualifying apprenticeship hours to apply for membership in local union shops or culinary schools." (Id. at ¶ 36.)

Respondent was hired on May 3, 2004, to serve as a Teacher II for the culinary program. (Harrison Decl. ¶ 10; Bell Decl. ¶ 16, Ex. K.) Harrison states that the position was full-time, "requiring a minimum of 35 hours of work per week, 12 months per year," (Harrison Decl. ¶ 11.); however, the JJC's personnel request action indicates that respondent was requested to work part-time for a total of six hours per week, 12 months per year, (Bell Decl. Ex. K.). It is unclear when he became a full-time, 35 hour-per-week employee, but his status had changed to such as early as January 2005 as demonstrated by a sick leave injury request form for January 3, 2005, to January 21, 2005. (Bell Decl. Ex. A (JJC Amodei 42).) From 2004 until 2009, respondent's responsibilities included teaching the intermediate phase of the culinary program. (Harrison Decl. ¶ 19.) Respondent achieved tenure during that time. Beginning in June 2010, respondent's responsibilities changed to providing instruction and supervision to facilitate the advanced phase of the culinary program. (Harrison Decl. ¶ 33.)

When respondent was hired, he was provided with the JJC's policies regarding leaves of absence ("LOA"), sick leave ("SL"), and sick leave injury ("SLI"), and told where to find them and that he was required to comply with them. (Bell Decl. ¶¶ 17 & 18, Ex. L; Resp't's Admis. ¶ 2.) He was also given a "Department of Law & Public Safety (LPS) Handbook and a Notice to All Employees of LPS Work-Related Standards of Conduct." (Bell Decl. ¶ 19, Ex. L; Resp't's Admis. ¶ 2.) He "signed an

acknowledgement agreeing to review all JJC and LPS policies." (Bell Decl. ¶ 20, Ex. L.) The JJC regularly distributed these policies throughout his employment. (Bell Decl. ¶ 21.) "Prior to October 2009, [respondent] read the JJC's Human Resources Policies regarding [LOA], [SL], and [SLI]." (Resp't's Admis. ¶ 7.) Between October 2009 and September 2010, Sick Leave, Policy 07H-11.7 ("SL Policy"), Work Related Injury/Illness and Requesting Sick Leave Injury (SLI) PR-4, PR-6, Policy 09H-14.1 ("SLI Policy"), and Leaves of Absence PR-2, Policy 08H-11.1 ("LOA Policy"), were in effect. (Bell Decl. ¶ 22.)

The SL Policy promotes "regular attendance" and allows SL to be used for personal illness, work-related injury, or medical appointments. (Bell Decl. Ex. H at 1 & 2.) It provides instructions on how to request SL and explains that when SL is exhausted, "employees may request their supervisor's approval to use vacation or administrative leave if an illness should occur." (Id. at 2-3.) It further provides that employees may be subject to discipline for, among other things, abuse of sick leave or chronic absenteeism. (Id. at 4.)

The SLI Policy allows employees to, in accordance with contractual agreements and N.J.A.C. 4A:6-1.6, request SLI benefits if they are disabled due to a work-related injury or illness. (Bell Decl. Ex. I at 1.) It provides instructions for requesting SLI and explains that "SLI benefits are limited to a period beginning on the initial date of injury and ending one year from that date." (Id. at 1 & 2.) When SLI is exhausted or denied, an employee should contact HR "to discuss eligibility for Temporary Disability Insurance or Temporary Workers' Compensation benefits." (Id. I at 2.)

The LOA Policy provides step-by-step instructions for employees requesting a "leave of absence of five or more consecutive working days or when requesting intermittent family leave." (Bell Decl. Ex. J at 1.) Part of those instructions provides that "[e]mployees must not allow a medical leave to expire. An additional [Application for Leave of Absence] PR-2 must be completed to extend the leave when the employee is unable to return to work. . . . If a leave expires without an approved extension, the repercussions may be severe." (Id. at 3.) "Permanent employees may receive approval for medical leave of absence for a maximum of six months. Employees requesting

leave beyond six months may be subject to an independent medical evaluation as requested by management or as determined by the Human Resources Manager. Employees who have exhausted FMLA and/or FLA entitlements may be disapproved for further leave." (Id. at 4.) In bold face type, the policy states: "Employees entering into an unauthorized leave of absence jeopardize their employment benefits and are subject to termination." (Id. at 4.)

Respondent's use of SLI appears to have begun after November 16, 2004, when he was injured in a work-related accident whereby he reportedly sprained his ankles. (Bell Decl. Ex. A (JJC Amodei 37).) Thereafter, he had a series of surgeries related to the accident. On February 11, 2005, Dr. David Hertzog performed surgery to repair a hernia, for which respondent was cleared to return to work four-to-six weeks afterwards. (Resp't Br. Ex. 1; Bell Decl. Ex. A (JJC Amodei 40).) On February 24, 2006, Dr. Pagliaro performed ankle surgery on respondent. (Resp't Br. Ex. 2.) On May 24, 2006, Dr. Pagliaro performed arthroscopic knee surgery. (Resp't Br. Ex. 3.) It is unclear from the evidence provided exactly how many days respondent was absent from his position during this time; however, an SLI worksheet indicates that he missed 2.5 hours during the remainder of 2004, was absent from January 3 until April 28, 2005, as supported by (Bell Decl. Ex. A (JJC Amodei 41, 38, 33, & 30.), and returned to work on April 29, 2005. (Bell Decl. Ex. A (JJC Amodei 26 & 28.) Any time missed as a result of the 2006 surgeries has not been verified. In dispute is the number of days respondent missed between May 3, 2004, and October 23, 2009. Respondent denies missing the 600 school days that JJC asserts he missed between May 3, 2007 and July 7, 2009. (Resp't's Admis. ¶ 22.)

From May 2004 until August 2008, respondent received evaluations. (Resp't Br. Ex. 15.) In his first rating cycle of 9-1-03 to 8-31-04, he had an overall commendable rating. (Ibid.) Nothing was written about absences. (Ibid.) The rating cycle paperwork for rating cycles 9-1-04 to 8-31-05 and 9-1-05 to 8-31-06 provided in respondent's exhibits are packets presented to respondent without any notations. (Ibid.) The rating cycle paperwork for 9-1-06 to 8-31-07 indicates that respondent passed all of his job expectations and, therefore, had received a satisfactory rating. (Ibid.) Comments made by the ratee did not include anything with regard to respondent's absences. (Ibid.) For

his rating cycle 9-1-07 to 8-31-08, the ratee also made no comments about his absenteeism and gave him a satisfactory rating. (Ibid.) Respondent certifies that he "was never advised by the JJC or its representatives that the absences I took to treat and recover from the injuries I sustained as a result of the November 16, 2004, incident at the NJTS, would subject me to disciplinary action." (Amodei Cert. ¶ 25.)

It is undisputed that respondent last appeared for work on October 23, 2009. Respondent states that "[f]rom October 2009 to July 2010, [he] was not aware that being absent due to work-related injury that was covered under an approved leave of absence could be grounds for termination." (Resp't's Admis. ¶ 8.) It is undisputed that respondent's absence from work since July 7, 2010, has been unauthorized. (Resp't's Admis. ¶ 18.) Respondent states that he "was aware that an unauthorized leave of absence could subject [him] to a resignation." (Resp't's Admis. ¶ 9.)

Harrison states that from 2009 until June 2010, only one other teacher, Judy Mulligan, taught in the culinary program as the teacher of the introductory phase. (Harrison Decl. ¶¶ 20 & 23.) She was frequently absent for prolonged periods of time during this time, and the JJC had a difficult time finding substitute teachers because of the needed certification. (Id. at ¶¶ 21 & 24.) Furthermore, the JJC could not reassign teachers from other JJC facilities and, due to budgetary constraints, could not hire another teacher between October 2009 and June 2010. (Id. at ¶¶ 23 & 26.) Consequently, between those dates, only the introductory phase of the program was operational. (Id. at ¶ 27.) JJC did assign a third teacher, Rodney Karp, to the program in June 2010 with the intention that he would contribute to the program's expansion, likely as its intermediate phase teacher. (Id. at ¶ 29 & 30 (the statement in ¶ 30 is not complete).) Ms. Mulligan continued to be absent for periods from June 2010 through August 2010, and respondent remained absent continuously during that entire time. (Id. at ¶ 37.) Harrison states in his declaration that respondent's "continued absences are a significant cause of why [NJTS] has frequently been unable to assign students to any intermediate or advanced phase classes . . . and why the advanced phase . . . was ultimately eliminated." (Id. at ¶ 38.) Moreover, he states that "the effect of [respondent's] absences on [the program] has resulted in the lack of any programmatic continuity; an inability to consistently plan for the program; an inability to prepare

students for either transition to a residential program or effective pre-release training; and an inability to coordinate activities that would take students from a beginner's phase through the intermediate and advanced phases of the program." (Id. at ¶ 40.) At the time of his declaration, the program was only offering introductory courses, which is a significant disadvantage to the student when they attempt "to gain acceptance into culinary schools or culinary unions." (Id. at ¶ 41.)

Respondent's LOA began when he reopened a workers' compensation claim related to the 2004 injury in September 2009 for further treatment. (Statement of Charges Ex. 2). According to an email from Kim Szanger ("Szanger"), the Supervisor of Education at NJTS, to Dolly Velez ("Velez") of JJC's Human Resources ("HR"), on October 26, 2009, respondent contacted Szanger informing her that he had "forwarded medical documentation to Dolly Velez for a medical condition requiring him to be on light duty for the next 2-weeks. He also explained that the light duty restrictions would most likely have him out of work for 2 weeks." (Bell Decl. Ex. A (JJC Amodei 282).) He further "asked if he should still come to work [on October 27, 2009]." (Ibid.) Szanger then contacted Velez with this information, and Velez "contacted Horizon Casualty Insurance (Workers' Compensation Insurance) for clarification." (Ibid.) Velez received a response that respondent could "not be on 'light duty.' He must be completely cleared of all medical restrictions prior to returning to work.'" (Ibid.) At that time, respondent "was not eligible for Sick Leave Injury time . . . because . . . SLI time cannot be utilized more than one-year [sic] from the date of injury, under N.J.A.C. 4A:6-1.6(b)(3)." (Bell Decl. ¶ 25.)

In a letter dated October 27, 2009, Lisa Bell ("Bell"), the JJC's HR manager, provided respondent with instructions that he should follow to protect his benefits and pay status while being treated by a State-authorized physician due to a work-related injury. (Bell Decl. Ex. A (JJC Amodei 277).) In relevant part, the letter notified respondent that his responsibilities while on temporary workers' compensation included providing HR with an ongoing schedule of medical and physical therapy appointments, contacting HR immediately following each medical appointment to advise of work status and providing them within twenty-four hours the medical documentation indicating work status and date of next appointment, advising a supervisor of work status as it extends

or changes, and immediately notifying HR when a physician clears the employee for return to work. (Ibid.)

In a letter dated October 28, 2009, Bell submitted information to Manzer Hussain ("Hussain"), a claims investigator with the State's Division of Risk Management ("Risk Management"), for a determination of respondent's eligibility for temporary workers' compensation benefits. (Bell Decl. Ex. A (JJC Amodei 283).) In another letter dated October 28, 2009, Bell notified respondent that his LOA from October 26, 2009, until November 16, 2009, was approved by the Civil Service Commission as leave without pay and would be recorded as workers' compensation. (Bell Decl. Ex. A (JJC Amodei 276).) On November 2, 2009, Hussain notified Bell that respondent's workers' compensation claim was accepted as a result of the injury occurring on November 16, 2004, and that it was providing workers' compensation disability payments to respondent for the period of October 26, 2009, through November 6, 2009. (Bell Decl. Ex. A (JJC Amodei 291).) Consequently, on October 26, 2009, respondent began using HR-approved LOA time that was covered under workers' compensation because the time was based on the work-related injury, as determined by Risk Management. (Bell Decl. Ex. A (JJC Amodei 276).)

Whether respondent's leave time between November 6 and 16, 2009, was considered workers' compensation time is unclear from the exhibits provided. It is further unclear whether HR approved respondent's leave time between November 17 and December 17, 2009, because no such document has been submitted to support this. Nevertheless, that these LOAs were covered under workers' compensation and approved appears to be undisputed.

It is clear that from December 18, 2009 until June 15, 2010, HR continued to approve LOA for respondent. (Bell Decl. Ex. A (JJC Amodei 258, 251, 247, 241, 237, 231, 214 & 225).) It is also clear that each time he was approved he was notified that he should not allow his "leave to expire without requesting an extension and providing medical documentation" and that pursuant to N.J.A.C. 4A:2-6.2(c), "An employee who has not returned to duty for five or more consecutive business days following an approved leave of absence shall be considered to have abandoned his or her position

and shall be recorded as resignation not in good standing." (Ibid.) Nevertheless, none of these notices touched on the subject of dissatisfaction with his absences.

At some point before December 17, 2009, Dr. Pagliaro, a State-appointed physician, recommended that respondent undergo a total knee replacement to prevent undoing the surgeries performed on his left ankle, tendon, and foot. (Amodei Cert. ¶ 8.) On December 17, 2009, respondent was sent to Dr. Thomas Gutowski for a second medical opinion regarding that surgery. (Bell Decl. Ex. A (JJC Amodei 266); Resp't Br. Ex. 5.) In a letter dated December 17, 2009, Dr. Gutowski provided a medical opinion to Tennese Taitt of Horizon Casualty Services regarding respondent's left knee. (Bell Decl. Ex. A (JJC Amodei 263-265).) He stated that respondent required a full knee replacement but that the conditions in the knee which called for the replacement were not related to the injury occurring on November 16, 2004, but instead to preexisting degenerative arthritis which had been noted by his previous treating physicians and by Dr. Pagliaro. (Ibid.)

On December 22, 2009, Velez contacted Hussain regarding respondent's continuous inquiries concerning his visit to Dr. Gutowski and his concern that he had not been given any paperwork to send to HR. (Bell Decl. Ex. A (JJC Amodei 266).) Hussain told Velez to advise respondent "not to worry about lapse in [workers' compensation] coverage." (Ibid.) It is not clear from the evidence what respondent was told and whether he was given any documentation to send to HR. However, HR did approve his LOA from December 18, 2009 to January 8, 2010; from January 9 to 29, 2010, and from January 30 to February 5, 2010. (Bell Decl. Ex. A (JJC Amodei 258, 251, & 247).) Each approval notified respondent that if he allowed his leave time "to expire without requesting an extension and providing medical documentation" and did not return to duty for five or more consecutive days he would be considered to have abandoned his position pursuant to N.J.A.C. 4A:2-6.2(c), but they did not mention anything about dissatisfaction with his absences. (Ibid.)

On February 5, 2010, respondent underwent tarsal tunnel surgery by Dr. Pagliaro on his left ankle. (Resp't Br. Ex. 6.) HR approved his leave from February 6, 2010, until March 23, 2010. (Bell Decl. Ex. A (JJC Amodei 241).) On March 2, 2010, Dr. Pagliaro

updated respondent's status regarding his tarsal tunnel release to his left foot. (Resp't Br. Ex. 4.) He was doing extremely well, but was unable to work until further notice. (Ibid.) Dr. Pagliaro noted that Dr. Gutowski had given a second opinion regarding respondent's knee and had concurred with his need for a total knee replacement, but that Dr. Pagliaro had not received his record and reports yet. (Ibid.)

It is unclear when respondent was notified that his total knee replacement would not be covered under workers' compensation. The submitted documents demonstrate that Hussain stated in an email on June 25, 2010, and in a letter dated August 25, 2010, that a letter was sent to respondent's attorney on March 8, 2010. (Statement of Charges Ex. 2; Bell Decl. Ex. A (JJC Amodei 213).) Respondent disputes that either he or his attorney received this notification. (Resp't's Admis. ¶¶ 10 & 11.) Furthermore, no such notice has been produced. Respondent asserts that he was told in June 2010 by Risk Management that his knee replacement surgery would not be covered by workers' compensation. (Amodei Cert. ¶ 11.) This is consistent with Hussain's email of June 15, 2010, wherein Hussain states that respondent had just called and Hussain advised him that he would not be extending his workers' compensation beyond June 15, 2010. (Bell Decl. Ex. A (JJC Amodei 215).)

Nonetheless, respondent's LOA was approved by HR for the dates of March 24 to 30, 2010; March 31 to April 20, 2010; April 20 to May 18, 2010; and May 19 to June 15, 2010. (Bell Decl. Ex. A (JJC Amodei 237, 231, 225, & 214).) He was also notified through such approval that if he allowed his leave time "to expire without requesting an extension and providing medical documentation" and did not return to duty for five or more consecutive days he would be considered to have abandoned his position pursuant to N.J.A.C. 4A:2-6.2(c). (Ibid.)

Respondent filed a temporary disability insurance claim on June 16, 2010, for his knee surgery. (Amodei Cert. ¶ 13; Resp't Br. Ex. 8.) A form signed by a JJC personnel assistant on June 17, 2010, attached to respondent's paperwork, indicated that respondent was separated from work due to personal illness, that the disability was not in connection with his occupation, and that JJC expected to pay respondent for the period of June 16, 2010, until June 18, 2010, with regular vacation pay. (Resp't Br. Ex.

8.) On the claim forms, he indicated that his injury was not caused by his job. (Ibid.) Also attached to the paperwork was a Medical Certificate signed by a doctor (name illegible) on May 26, 2010, certifying that respondent had been under his care for this period of disability from June 16, 2010, to the present, had last been treated on May 26, 2010, by him, had been unable to perform his regular work duty due to this disability starting on June 16, 2010, and was expected to recover on the estimated date of September 9, 2010. (Ibid.)

Respondent states that in June 2010, when he requested that HR authorize his request to take LOA until September 2010 while he was rehabilitating from his knee surgery, he was subsequently told that his request was approved and to submit the requisite paperwork to the State. (Resp't's Admis. ¶ 9.) No such documentation has been submitted, however, to indicate that such leave time was approved; however, he had written to Bell later that he was told this as well. (Resp't Br. Ex. 7.)

Bell does state that respondent requested additional leave on June 15, 2010. (Bell Decl. ¶ 17.) However, Bell's response letter differs from what respondent claims to have been told. In a letter dated June 17, 2010, Bell notified respondent that his request for an extension of LOA had been approved by the Civil Service Commissioner. (Statement of Charges Ex. 1; Bell Decl. Ex. G (JJC Amodei 317); Resp't Br. Ex. 9; Resp't's Admis. ¶ 13.) She stated that his leave with pay from June 16 through June 18, 2010, and his leave without pay from June 19 through July 6, would be recorded as personal illness. (Ibid.) She also notified him that as of July 8, 2010, his "Federal Family Leave entitlements were exhausted and management has advised no further leave beyond July 6, 2010 [sic] will be authorized. You will be expected to return to work on July 7, 2010. If you are not medically released by that time and are unable to return to work on that date, you may resign from your position in good standing by completing the enclosed Separation Form (PR-3) and returning [sic] to Human Resources no later than June 25, 2010." (Ibid.) Respondent states that he received this letter on June 24, 2010. (Amodei Cert. ¶ 14.)

In a letter dated June 22, 2010, Bell notified respondent that his treating physician for the work-related injury had released him "to return to work, full duty,

effective June 15, 2010," and that temporary workers' compensation benefits would be discontinued as of that date. (Bell Decl. Ex. A (JJC Amodei 212).)

In response to Bell's letter dated June 17, 2010, respondent states that he left a voicemail and sent an email to Bell. (Amodei Cert. ¶ 15.) In the email dated June 24, 2010, respondent explained why he needed the knee surgery; that he could not walk or stand without it; that the surgery was scheduled for July 1, 2010; that he would be hospitalized until July 7, 2010; that the surgeon ordered two weeks of in-patient therapy; and that he would not be able to return to full duty status on July 7, 2010. (Resp't Br. Ex. 7.) He stated that when Risk Management denied the knee surgery, he contacted HR for permission to proceed on "Temporary State Disability and was told that it was approved." (Ibid.) He further noted, "I am well aware of my prior attendance issues but they are being contested as work related injury absences concerning the Tarsal Tunnel surgery that just occurred." (Ibid.) He requested "some leniency" because he was in "dire straights [sic] and just need a little time to get better, but with no monies or health care benefits, I will not be able to survive in my current condition." (Ibid.) Respondent asserts that Bell never responded to his call or this email. (Amodei Cert. ¶ 16.)

On June 25, 2010, HR staff member Marie Kraus ("Kraus") forwarded respondent's email to Hussain and asked for clarification of whether the knee surgery would entitle him to further temporary workers' compensation. (Statement of Charges Ex. 2.) She expressed that respondent "has exhausted his leave entitlements with the State and we are going to terminate his employment. However I do not want to enter into this if there is any room for Risk to reconsider the knee surgery." (Ibid.) Hussain replied that when Dr. Pagliaro recommended the total knee replacement, Risk Management sent him to Dr. Gutowski for a second opinion, and, based on his report and clarification from Dr. Pagliaro, Risk Management denied the replacement, and "a letter to this effect was sent to [respondent's] attorney on 03/08/10 explaining the State's position regarding the surgery." (Ibid.) Furthermore he stated that "[a]ny treatment that [respondent] receives for his knee will not entitle to WC." (Ibid.)

On June 28, 2010, Kraus informed respondent through email that Risk Management had confirmed that his knee surgery would not be covered by workers'

compensation benefits, he had exhausted his federal leave entitlements, JJC management would not approve further leave, and that he was to return to work on July 7, 2010, or resign in good standing by June 25, 2010. (Statement of Charges Ex. 2; Resp't's Admis. ¶ 15.) Although respondent admits that he was ordered to return to work, the letter does not indicate that any "ordering" occurred.

Respondent denies that he exhausted all medical leave time premised on the assertion that N.J.A.C. 4A:6-1.10(a) and Article 24(A) of the contract between the State and the Communication Workers of America provide eligibility for LOA without pay while rehabilitating from his total knee replacement. (Resp't's Admis. ¶ 16.) However, respondent admits that he had exhausted all authorized LOA time permitted by the JJC. (Resp't's Admis. ¶ 17.)

On July 1, 2010, respondent underwent a total knee replacement on his left knee by Dr. J. Schnell. (Resp't Br. Ex. 11.) Respondent asserts that his need for the total knee replacement was caused by the injury he sustained on November 16, 2004, although the surgery was covered by his health insurance. (Amodei Cert. ¶¶ 18 & 20.) Respondent was released from the hospital after his knee surgery on July 7, 2010. (Bell Decl. Ex. L; Resp't Br. Ex. 12.) Afterwards he entered in-patient therapy. (Amodei Cert. ¶ 5.)

In a letter dated August 9, 2010, Bell advised respondent that his absence since July 7, 2010, had been unauthorized and he could resign by August 16, 2010, in good standing. (Resp't's Admis. ¶ 20.) The letter stated that his LOA had "expired effective July 6, 2010, resulting in [his] unauthorized absence. In order to protect your employment history, a Separation Form (PR-3) is enclosed for your completion and return to my attention no later than August 16, 2010. If you do not respond, there will be no recourse but to pursue your resignation not in good standing." (Statement of Charges Ex. 3.)

Respondent asserts that Harrison came to his home on August 20, 2010, and "attempted to force him to resign." (Amodei Cert. ¶ 21.) Harrison informed him that he

"could resign in good standing and seek reemployment in the future, but that this was the JJC's final attempt to contact [him]." (Resp't's Admis. ¶ 21.)

In a letter dated August 20, 2010, Bell notified respondent again that he had been absent without authorization since July 7, 2010, and that he was not eligible for health benefits through the State Health Benefits Program as his current coverage has been terminated effective August 14, 2010. (Statement of Charges Ex. 4.)

On August 24, 2010, Harrison sent an inter-office memorandum to Bell describing his communication with respondent. (Statement of Charges Ex. 5.) He explained that he had called respondent on August 20, 2010, to get his follow-up on the status of his employment with the JJC and reminded him that the JJC had notified him multiple times that he was on unauthorized leave. (Ibid.) He explained to respondent that this was the JJC's last attempt to contact him. (Ibid.) He again expressed to him that he should resign in good standing. (Ibid.) He expressed that "his lack of communication leaves us with no recourse but to pursue his resignation not in good standing." (Ibid.) He further stated that he told respondent that if his health status should change and he did resign in good standing he could certainly reapply for employment with the JJC in the future. (Ibid.) He reiterated that respondent's response was that his injury was work-related, that his legal counsel told him not to respond to any correspondence from the JJC, and that he would not resign. (Ibid.)

A September 1, 2010, report by Dr. Schnell indicates that he recommended that respondent continue therapy for his knee, and referred him back to sedentary work for September 1, 2010. (Resp't Br. Ex. 11 & 13.) Respondent certifies he was able to return to work on September 1, 2010. (Amodei Cert. ¶ 23.)

LEGAL ANALYSIS

The JJC now moves for summary decision requesting that the charges against respondent be upheld for it properly determined that respondent's absences were excessive, respondent abandoned his position, and dismissal is warranted. 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 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. I am 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 539-40. 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). Consequently, it must be determined whether any issues of material fact exist before it can be determined whether the charges can be upheld and respondent dismissed.

I. Whether Respondent Abandoned His Position and Should Be Determined to Have Resigned Not in Good Standing.

Charges Two and Three in the Statement of Charges filed against respondent certify that respondent failed to return to work or comply with requests to resign in good standing and that he had abandoned his position. In its brief, the JJC analyzes both of these charges in the context of whether respondent abandoned his position pursuant to N.J.A.C. 4A:2-6.2(b) and (c). N.J.A.C. 4A:2-6.2(b) and (c) provide that:

> (b) Any employee who is absent from duty for five or more consecutive business days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. Approval of the absence shall not be unreasonably denied.

> (c) An employee who has not returned to duty for five or more consecutive business days following an approved leave of absence shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. A request for extension of leave shall not be unreasonably denied.

Therefore, although the JJC filed tenure charges requesting respondent's dismissal, its charges would be read to include that if respondent has abandoned his position he should be considered to have resigned not in good standing.

In cases wherein an individual has been denied leave time and subsequently charged with abandonment, two issues are often analyzed. First, ALJs have analyzed whether the denial of requested leave time was reasonable. Sykes v. NJ Judiciary, CSV 4461-04, initial decision, (July 12, 2005), adopted, Merit System Bd. (September 7, 2005) <http://lawlibrary.rutgers.edu/oal/search.html>. Second, ALJs have analyzed whether the employee intended to abandon his position. In re Smith, CSV 241-09, initial decision, (June 26, 2009), adopted, Civil Serv. Comm'n (October 21, 2009) <http://lawlibrary.rutgers.edu/oal/search.html>; In re Richardson, EDU 5560-97, initial decision, (June 1, 1998), aff'd, Comm'r. (July 15, 1999), adopted, St. Bd. (January 8, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>; Smith v. Dep't of Personnel, CSV 2568-01, initial decision, (July 15, 2002), adopted, Merit System Bd. (September 25, 2002) <http://lawlibrary.rutgers.edu/oal/search.html>.

In determining whether leave was reasonably denied, the starting point is recognizing that "it is within the discretion of [the employer] to determine whether to grant or deny a leave of absence without pay or an extension of such leave;" however, it cannot be unreasonably denied. Sykes, supra. While "[a] chronic medical condition does not require that an employee be continued in a position by extended leaves of absences until the employee is able to return to work . . . [t]he only requirement is that such requests not be unreasonably denied." Ibid. (citing Mercado v. Dep't of Human Servs., 94 N.J.A.R.2d (CSV) 557, 560). Consequently, the employer should provide a valid reason for its denial.

Determinations of whether an employee intended to abandon his position have included looking at how responsive he was to the employer's requests to return to work or notify it of his status, and whether the employee was medically able to return to work or respond. In re Stanley, 95 N.J.A.R.2d (EDU) 497. In Stanley, supra, a school board argued that Stanley abandoned her position on the basis that she failed to return to work after her request for leave was denied. It was determined that she did not abandon her position because she "responded to each and every communication from the Board" and was medically unable to return to work. Ibid. However, it is clear that, while a failure to respond to an employer's request to return to work or update one's status can "legitimately be taken as intent to abandon [one's] position," Troiano v. Dep't of Health, CSV 8266-00, initial decision, (December 14, 2001), adopted, Merit System Bd. (January 29, 2002) <http://lawlibrary.rutgers.edu/oal/search.html>, failure to respond alone would not demonstrate the needed intent to abandon, particularly when the employer knows the employee is experiencing a hardship, In re Givens, CSV 4385-10, initial decision, (December 20, 2010), <http://lawlibrary.rutgers.edu/oal/search.html>, adopted, Civil Serv. Comm'n (February 2, 2011). It is further clear that even when an employee's leave request is reasonably denied and he continues to fail to respond or report to work, if his illness prevents him from doing so, he may not have intended to abandon his position. Sykes, supra. Consequently, the totality of the circumstances surrounding such facts should be weighed before determining whether one intended to abandon his position. See Westfield Bd. of Educ. v. McLear Poffenberger, EDU 7612-97, initial decision, (January 20, 1998), <http://lawlibrary.rutgers.edu/oal/search.html>, adopted, Comm'r. (March 6, 1998) (finding abandonment for failing to return to work, failing to contact District concerning status, and failing to respond to District's efforts to contact her, after employee had been cleared to return to work).

In the instant matter, it is undisputed that respondent was absent from work for more than five consecutive business days without approval. This would constitute abandonment if the facts demonstrate that the JJC reasonably denied him further leave and that he intended to abandon his position.

Significantly, here, respondent did not formally request additional leave time past July 6, 2010; rather, HR notified him that its approval of leave time until July 6, 2010, would be its last. Respondent's response was essentially an informal request that it grant further leave, and the JJC essentially denied this request. This denial followed a period of time where respondent had not reported to work for almost eight months due to a work-related injury that had occurred about five years prior. During that time HR had approved about eight requests for leave time. In its letter notifying respondent that it would deny additional leave time requested, the JJC does not provide a reason for its denial. It is suggested by the letter that the basis was respondent's exhaustion of his leave entitlements and that he was cleared to work on June 15, 2010, by his physician. However, no clear basis is provided. Furthermore, nothing in the exhibits or declarations submitted demonstrates who made this decision and why. Although a reasonable explanation for the denial can be inferred from Harrison's declarations that respondent's absences had a significant negative impact on the culinary program and any further absences would continue to do so, it would be premature to determine that the denial was reasonable without a direct explanation as to why the denial was made. Consequently, a material issue of fact exists concerning whether the JJC reasonably denied respondent's leave.

However, the existence of this issue of fact need not be resolved because the undisputed facts support that respondent did not intend to abandon his position. He essentially requested leave time in June 2010 and explained to HR that he would be undergoing a total knee replacement on July 1, leaving the hospital on July 5, and participating in in-patient therapy for two weeks thereafter. Consequently, his lack of responses for the month of July can be understood. His lack of responsiveness during August 2010 raises questions as to whether he intended to abandon his position; yet, those questions do not amount to a showing of the intent needed to demonstrate one has abandoned his position. Rather, they are answered by Harrison's statement provided in the exhibits attached to the Statement of Charges that respondent had told him that his legal counsel advised him not to respond to any correspondence from the JJC. (Statement of Charges Ex. 5.) While this statement is hearsay and on this motion lacks assurances of reliability, discovery of its truth would not significantly affect the determination that respondent did not abandon his position particularly because it is

undisputed that respondent's medical condition prevented him from returning to work when he was initially asked to return. This coupled with a lack of responsiveness is typically not enough to demonstrate abandonment as shown by the case law cited above. Thus, the undisputed facts in this matter are sufficient to support the dismissal of the charge of abandonment brought against respondent and also to refute the charge that respondent has not resigned from his position not in good standing.

II. Whether Respondent's Absences Were Excessive and, If So, Whether They Warrant Dismissal.

Charge One in the Statement of Charges alleges that respondent engaged in excessive absenteeism. The Motion for Summary Decision focuses most on this charge and the facts related to it for its basis in arguing that respondent should be dismissed. Consequently, the determination of whether respondent should be dismissed would not be resolved by a finding that respondent did not abandon his position. Respondent may still be dismissed if his absences are determined to be excessive and the circumstances surrounding them warrant dismissal.

A. Whether Respondent's Absences Were Excessive.

Tenured status protects persons in the public school system from being dismissed for reasons other than "inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10. "[I]t is well settled law that a teacher's chronic and excessive absenteeism may constitute both 'unbecoming conduct' and 'incapacity' such as to amount to 'just cause' which warrants the termination or suspension of a teacher under N.J.S.A. 18A:6[-]10." State-Operated Sch. Dist. of Newark v. Gillespie, EDU 399-03, Order, (April 27, 2007) <http://lawlibrary.rutgers.edu/oal/search.html> (citing In re Kacprowicz, 93 N.J.A.R.2d (EDU) 147, 151). "The point at which the absenteeism is judged to be excessive falls within the reasonable judgment and discretion of the [employer]." Kacprowicz, supra, 93 N.J.A.R.2d at 151 (citing Trautwein v. Bound Brook Bd. of Educ., 1980 S.L.D. 1539, 1542, (App. Div. Apr. 8, 1980), certif. denied, 84 N.J. 469 (1980); State-Operated Sch. Dist. of Jersey City v. Pellechio, 92 N.J.A.R.2d (EDU) 267, 270). That judgment and discretion, however, must consist of a consideration of "1) the particular circumstances of the absences and not merely the number of

absences; 2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred; and 3) that there [was] some warning given to the employee that his or her supervisors were dissatisfied with the pattern of absences." Kacprowicz, supra, 93 N.J.A.R.2d at 152 (quoting In re White, 92 N.J.A.R.2d (EDU) 157, 161, aff'd, Comm'r, 92 N.J.A.R.2d (EDU) 162, dismissed, St. Bd., 92 N.J.A.R.2d (EDU) 163). The Commissioner is not to substitute his judgment for that of the employer but to determine whether a reasonable basis existed for the decision. Trautwein, supra, 1980 S.L.D. at 1541 (citing Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288 (App. Div. 1960)). Consequently, a petitioner seeking to dismiss a tenured teacher must demonstrate that these considerations were appropriately addressed. Kacprowicz, supra, 93 N.J.A.R.2d at 152 (quoting White, supra, 92 N.J.A.R.2d at 161). Of course, the review before the Commissioner is de novo and he is to make an independent decision on the facts. Trautwein, supra, 1980 S.L.D. at 1542 (citing In re Masiello, 25 N.J. 590, 606 (1958)).

1. Whether the JJC Appropriately Considered the Particular Circumstances of the Absences and Not Merely Their Number.

So long as a school considered the circumstances of a teacher's absences and not just their sheer number, the first prong is met even if the absences were caused by illness or work-related injuries. Excessive absenteeism has been properly determined even when the absences were approved or excused, or "caused by legitimate reasons or personal illness." Kacprowicz, supra, 93 N.J.A.R.2d at 151 (citing Pellechio, supra, 92 N.J.A.R.2d at 269-70; White, supra, 92 N.J.A.R.2d at 161; In re Booth, 1985 S.L.D. 722, 744, 760-61; In re DeKrafft, 1981 S.L.D. 1308, aff'd, St. Bd., 1982 S.L.D. 1470, aff'd, No. A-4641-81T2 (App. Div. May 4, 1983); In re Reilly, 1977 S.L.D. 403, 413-15). "Action [has] also [been] taken against a teacher for excessive absenteeism . . . [when] her absences were the result of work-related injuries." Gillespie, supra, (citing Irvington Twp. Bd. of Educ. v. Pearson, 97 N.J.A.R.2d (EDU) 329); see also Faccone v. Jersey City Bd. of Educ., EDU 220-90, initial decision, (April 20, 1993), adopted, Comm'r (June 3, 1993), aff'd, St. Bd. (July 6, 1994) (increment withholding appropriate on basis of excessive absenteeism even though absences caused by work-related injury).[2] The Commissioner has held that it is of no consequence in a matter concerning excessive

[2] This case is available on Lexis at 1993 N.J. AGEN LEXIS 964.

absenteeism that the absence may be related to a claim of work-related illness or injury. In re Velez, EDU 3255-05, final decision, Comm'r (April 27, 2006 <http://lawlibrary.rutgers.edu/oal/search.html>. However, if the teacher raises an inference of doubt as to the legitimacy of the school's considerations, summary decision as to whether the school has met this prong is premature. Gillespie, supra (summary decision unripe because unclear whether school impeded teacher's attempt to return to work or told teacher to fill out improper paperwork for requesting leave).

In the instant matter, the JJC appropriately considered the circumstances of respondent's absences and not just their sheer number. The charges asserted that he had "failed to return from an approved leave of absence," that he had "been absent from his position without authorization since July 6, 2010," that he "exhausted his Family Leave entitlement," that "he was advised that management would not approve a leave of absence beyond July 6, 2010," and that "[h]e refused to comply with directives to return to work or resign from his position." As these assertions suggest, the JJC was considering first the undisputed fact that respondent's absences between July 6 and August 31, 2010, had been unauthorized. They demonstrate that the JJC was further considering the undisputed facts that respondent was advised that his absences would not be approved beyond July 6, 2010, and that he failed to return to work or resign from his position. As mentioned above, that the JJC knew that his absences were the result of knee replacement surgery and his recovery period thereafter and continued to consider them excessive does not make its consideration of his absences unreasonable. Respondent's arguments that his knee replacement surgery was a result of his work-related injury or that he did not exhaust the leave he was entitled to under the CWA contract, while agreeing that he exhausted the leave he was entitled to by the JJC, do not raise issues of fact, for even absences caused by work-related injuries or approved as leave can be considered excessive. Furthermore, respondent does not raise any inferences of doubt that the circumstances considered by the JJC were illegitimate. As such, it is evident from the Statement of Charges, as well as the supporting documentation attached to it, that the JJC considered the circumstances of respondent's absences and not just their sheer number.

2. Whether the JJC Appropriately Considered that the Absences Negatively Impacted the Continuity of the Culinary Program.

Though "a school district has a responsibility to teachers who are plagued with illness and have medical problems . . . the overarching responsibility of the Commissioner . . . is to the children." In re Green, 1991 S.L.D. 1103, 1119 (citations omitted). When a teacher's absences disrupt "the required continuity of instruction necessary to provide for a pupil's maximum educational progress," a school's "responsibility to . . . a teacher who is plagued with illness and medical problems is far outweighed by [his] excessive number of absences." Kacprowicz, supra, 93 N.J.A.R.2d at 152. Consequently, a finding that the students have been negatively impacted by a teacher's absences weighs strongly in favor of a finding that a teacher absences were excessive.

The second prong of the excessive absenteeism test has been considered the "touchstone" of cases wherein absences have occurred for legitimate reasons. Ibid. Regardless of the reasons for the absences, however, this prong is essential in determining whether absences were excessive because

> Frequent absences of teachers from regular classroom learning experiences disrupt the continuity of the instruction process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. Indeed, many pupils in these circumstances are able to achieve only mediocre success in their academic program. The entire process of education requires a regular continuity of instruction with a teacher directing the classroom activities and learning experiences in order to reach the goal of maximum educational benefit for each individual pupil. The regular contact of the pupils with their assigned teacher is vital to this process.
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> [Reilly, supra, 1977 S.L.D at 414.]

While the weight of the impact on students may rest on the instruction needed, see Pellechio, supra, 92 N.J.A.R.2d at 270 (basics skills teacher's attendance especially

significant because students need services more than the average child), "[c]ommon sense dictates that a teacher's continued absences must, at some point have a negative impact upon her pupils even if a board of education is unable to prove the relationship between a teacher's attendance and pupil progress." Green, supra, 1991 S.L.D. at 1119 (quoting Meli v. Burlington County Vocational-Technical Sch. Bd. of Educ., 1984 S.L.D. 906, aff'd, St. Bd. 921); see also Kacprowicz, supra, 93 N.J.A.R.2d at 152 (common sense dictates that 262 days missed over the period of eight school years, even if for legitimate reasons had a negative impact on instruction). Therefore, a prolonged history of absenteeism and tardiness is sufficient to find that continuity of student instruction was adversely impacted. Id. at 1120. Consequently, "it is not necessary for a district to prove a direct correlation between student achievement and teacher attendance in order to validate concerns . . . about the effect of a teacher's absence on the educational program of the district." Kacprowicz, supra, 93 N.J.A.R.2d at 153. "[A]t some point the sheer magnitude of the absences can support a [conclusion] that continuity of instruction has been negatively impacted, regardless of the particular circumstances of the case." Camden Bd. of Educ. v. Rucker, 94 N.J.A.R. (EDU) 190, 190. Notably, when absences are so numerous, it is appropriate to apply the principle of res ipsa loquitur, finding it "unnecessary to provide testimony of an administrator that the absences have adversely impacted the students." Rucker, supra, 94 N.J.A.R. at 193 (applying principle when teacher had been absent 263 school days out of 655 school days—62 the first year, 77 the second, 92.5 the third, and 115 in only a portion of the fourth).

In the instant matter, the Statement of Charges demonstrates that the JJC considered the negative impact that respondent's absences had on the students in the culinary program. Charge Two specifically states, "He has refused to comply with requests to return to work or voluntarily resign from his position which has had an adverse impact upon the students . . . ." Consequently, the undisputed evidence supports that the JJC made this consideration, and, as discussed below, that this consideration was appropriate.

Respondent takes issue with the JJC's failure to produce proofs supporting Harrison's declarations that the culinary program was negatively impacted by the

respondent's absences. In his declaration, Harrison avers that it was difficult to find a person to replace respondent particularly in that the other culinary teacher was absent and also states that the plan to expand the program for advanced students was ultimately discontinued because of respondent's absences. Respondent's issue with Harrison's declaration, though noted, is meritless. Here, common sense dictates that respondent's absences negatively impacted the continuity of the culinary program: respondent was absent from his classroom for nearly nine months of authorized leave and one month of unauthorized leave by the time the charges were filed; any students starting the program with respondent in September 2009 no longer had him as an instructor for the remainder of the year. Furthermore, because these absences were so numerous, application of the principle of res ipsa loquitur is appropriate, and, as such, the declarations made by Harrison are simply unnecessary to find that the absences negatively impacted the continuity of the culinary program.

Nevertheless, Harrison's declarations are quite helpful in establishing why respondent's absences made it difficult for the JJC to mitigate their impact. Respondent's teaching position was distinctive not only in that one needs a special certificate to provide culinary arts instruction but also in that the JJC students are in a unique position of reliance on their teachers to provide them with skills that will help them re-enter society. Respondent's position is not one that can be or should be simply filled on any given day or week by a person holding the appropriate certificate. His relationship to the students and importance in the program, as described by Harrison and uncontested by respondent, enhances the weight of the impact his absences had on the continuity of instruction. Declarations such as Harrison's, wherein he avers that "the use of substitute teachers has been ineffective for culinary courses, as the result is a lack of continuity and the opportunity for hands-on learning is significantly reduced," (Harrison Decl. ¶ 25.), help further support what common sense dictates. See Elizabeth Bd. of Educ. v. Segall, EDU 1077-00, initial decision, (February 25, 2000), adopted, Comm'r. (April 17, 2000) <http://lawlibrary.rutgers.edu/oal/search.html> (affidavit of school principal that school is understaffed and continuity destroyed supports satisfaction of second prong in favor of excessive absenteeism).

3. Whether the JJC Appropriately Considered that Respondent Had Been Given Some Warning that It Was Dissatisfied with His Pattern of Absences.

Case law illustrates that several forms of warnings may be deemed sufficient under this prong. For example, frequent contact by a school principal regarding absences constitutes sufficient warning that the number of absences is not satisfactory. Segall, supra. Evaluations indicating a need for improvement in attendance, advising a person that his record of absences could not continue, and increment withholding for absences, have amounted to sufficient warning. Kacprowicz, supra, 93 N.J.A.R.2d at 152. Moreover, an increment withholding has been deemed such an obvious warning of the seriousness of the absenteeism for which the increment is withheld that it alone is sufficient. White, supra, 92 N.J.A.R.2d at 162. More pertinently, however, is the sufficiency of warnings in letters sent by a school to a teacher seven months prior to and one month after tenure charges were filed notifying her that she was considered absent without leave and requesting that she notify the district in writing of her intentions regarding her employment status and that failure to do so would result in disciplinary action. Gillespie, supra. The Commissioner has also agreed that when a person's absences are for medically legitimate reasons, the sufficiency of a warning need not be based on whether school employees specifically notified a teacher that his absences were unacceptable:

> Although the Commissioner has said on numerous occasions that a tenured employee should have some warning that his or her supervisors are dissatisfied with the attendance record, . . . an increment withholding or a formal warning is unnecessary as a prerequisite sanction because [when] absences were medically legitimate . . . a sanction or warning could not be expected to produce improvement in attendance. The law should not require frivolous acts.
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> [Rucker, supra, 94 N.J.A.R.2d at 193.]

The undisputed facts of the instant matter demonstrate that the JJC considered the warnings that respondent had received before filing tenure charges against him. It is evident from the Statement of Charges and the exhibits attached that the JJC considered the letters that had been sent to respondent regarding his unauthorized leave and relied upon them in determining that tenure charges were warranted. The

question is, however, whether these warnings were sufficient and whether the JJC appropriately relied upon them.

The letters indicating any dissatisfaction with respondent's absences began in June 2010, about two months before the tenure charges were filed. In late June 2010, Bell notified respondent that "management" had advised that no further leave beyond July 6, 2010, would be authorized. She further provided that if his medical status prevented him from returning to work on July 7, 2010, he could resign in good standing. Respondent responded to this warning, requesting that some leniency be provided because of his need for the knee replacement surgery. Respondent received a second warning in response to his email on June 28, 2010, when Kraus reiterated what Bell had told him in the previous letter. The evidence does not indicate that respondent contacted the school again after this. He was again notified on August 9, 2010, that his absence had been unauthorized and that he could resign by August 16, 2010, but this time he was warned that if he did not respond the JJC would pursue his resignation not in good standing. The evidence indicates that he was also unresponsive to this warning. His final warnings prior to the filing of the charges were provided in person by Harrison and in letter by Bell on August 20, 2010, when he was again told that he could resign in good standing but told that this would be the JJC's final attempt to contact him. It appears from the evidence that respondent told Harrison that he had been unresponsive on advice of counsel but also that he would not resign.

The letters provided to respondent should be considered sufficient and reasonably relied upon by the JJC when it certified tenure charges against him for excessive absenteeism. First, letters similar to those provided to respondent have been deemed sufficient warnings upon which a school could rely on to bring tenure charges. Second, the Commissioner has indicated that warnings would not have been necessary in this case because they would have been frivolous, as respondent would not have been able to return to work even if he chose to opt out of his knee surgery because he would not have been able to walk and the evidence infers that, due to respondent's unique teaching position, he could not return to work with restrictions. Third, although respondent replied to the earliest warning, his unresponsiveness to all other warnings reasonably indicated to the JJC that it would need to move forward with tenure charges.

Finally, although it is not apparent that the JJC relied upon this when bringing the tenure charges, the JJC has established that respondent was aware, prior to the letters sent to him, that the leave policies he was required to abide by indicated that employees who took leave time beyond that which was authorized would be subject to termination and that when an employee is unable to return to work after leave time has expired the repercussions may be severe. Therefore, while it is undisputed that HR consistently approved respondent's leaves of absences from October 2009 until June 2010 without indicating to him that they were problematic, and while the evidence submitted does not indicate that anyone other than HR notified respondent that the school was dissatisfied with his absences, the JJC provided sufficient warnings to respondent and appropriately relied upon them when certifying tenure charges for excessive absenteeism against him.

It should be noted, however, that respondent asserts that he was told his request for LOA from July until September 2010 would be approved. Had the evidence demonstrating that he was formally notified that it was not approved not been submitted, this might create a dispute of material fact. However, regardless of what respondent may have been told, he was warned not long after he would have been told of the approval that no further leave would be approved. Hence, any doubt raised by respondent's assertion does not change that respondent did, in fact, receive warnings that his absences were unauthorized and would subject him to termination and that the JJC considered these warnings when certifying the charges against him.

B. Whether Dismissal is Warranted.

Dismissal on the basis of excessive absenteeism may be warranted for several reasons. It may be warranted when the facts demonstrate that a future pattern of absences can be reasonably anticipated because the medical problems or the circumstances underlying the absences are expected to continue. Kacprowicz, supra, 93 N.J.A.R.2d at 153; Toms River Reg'l Sch. Dist. Bd. of Educ. v. Marsden, 1985 S.L.D. 1572, 1591. A teacher's poor attendance record prior to a lengthy LOA coupled with current serious injuries has supported that his absences would reasonably continue. Kacprowicz, supra, 93 N.J.A.R.2d at 152. Dismissal may also be warranted when facts support that a teacher has shown an unwillingness to improve absences despite

repeated warnings or disciplinary action. In re Meade-Stephens, 92 N.J.A.R.2d (EDU) 550, 554, appeal dismissed, St. Bd., 93 N.J.A.R.2d (EDU) 134, aff'd, No. A-3076-92 (App. Div. Jan. 10, 1994), certif. denied, 137 N.J. 167, cert. denied, 513 U.S. 991, 115 S. Ct. 491, 130 L. Ed. 2d 403 (1994); Pellechio, supra, 92 N.J.A.R.2d at 270 & 71; Green, supra, 1991 S.L.D. at 1121; Marsden, supra, 1985 S.L.D. at 1595. Nonetheless, an excessive amount of absences alone has warranted removal in cases, for instance, where a respondent's illness was in remission, but a degree and repetitiveness of absenteeism, amounting to 403 school days during a ten-year period, along with disobedience, warranted removal. In re Pellagatti, 93 N.J.A.R.2d (EDU) 121, 124.

When determining whether dismissal is warranted, it is irrelevant that a teacher's performance was good, Kacprowicz, supra, 93 N.J.A.R.2d at153; Pellechio, supra, 92 N.J.A.R.2d at 270, or that the teacher used sick leave time legitimately, Marsden, supra, 1985 S.L.D. at 1595. Nevertheless, "[a]lthough excessive absenteeism may be found to warrant dismissal of a tenured staff member when the absences in question were for legitimate medical or health reasons," it should not be ignored that a teacher's absences were the result of work-related injuries and the treatment thereof, particularly if the record supports that the employee is capable of performing the job and has returned to work or is gradually returning to work. Vereen, supra. Moreover, if a teacher can show he had a willingness to improve attendance or that his record reflects that the necessary improvement will come, he may be able to avoid dismiss al. Pellechio, supra, 92 N.J.A.R.2d at 270. It is the teacher's burden, however, to prove that his absenteeism record improved. Trautwein, supra, 1980 S.L.D. at 1542.

Respondent asserts that the JJC's facts regarding his attendance record prior to 2009 are outside of the scope of the tenure charges because he was charged only with being chronically and excessively absent from July 6, 2010 to the present. However, the Commissioner may take into account a teacher's absences during the school years prior to the ones in issue when determining whether disciplinary action based on excessive absenteeism is warranted. Trautwein, supra, 1980 S.L.D. at 1542. The case law cited above further supports this.

However, at this point, respondent's attendance record prior to his LOA for work-related injuries is in dispute. Therefore, it cannot be gleaned from the evidence submitted whether respondent engaged in a pattern of absenteeism prior to October 2009, as the JJC alleges. Because a majority of respondent's absences were for work-related injuries, consideration must be given to further evidence regarding his prior absenteeism record, whether anyone from the JJC repeatedly warned respondent about his absences, and respondent's willingness to improve his absenteeism record. Also relevant, because of respondent's position as a teacher for the JJC, is whether or not he would have been able to return to work and the effect on that determination of any required medical clearance. If there was such a requirement, the JJC's initial request that he return to work would have been impossible to fulfill. This fact, however, may also shed light on whether respondent would have been able to return to work on September 1, 2010, as he claims, or at any time thereafter, a factor that should be considered in a determination for dismissal. As further material facts are needed to resolve the issue of whether dismissal is warranted, I cannot grant the JJC's motion seeking summary decision that respondent be dismissed. However, partial summary decision that respondent's absences were excessive is appropriate at this time.

III. Whether to Grant the JJC's Request to Seal Certain Documents.

The JJC has also filed a motion for an order to seal certain records it has submitted as exhibits on the basis that they contain respondent's personnel and medical information, particularly those records attached as exhibits A through G, K, and L to Bell's declaration. Initially, it should be underscored that exhibits C, D, E, and G contain the Statement of Charges and accompanying exhibits, all which were transmitted to OAL by the Department of Education and made part of the transmittal packet.[3] As tenure charge documents are "public documents," Williams v. Bd. of Educ. of Atlantic City Public Schools, 329 N.J. Super. 308, 318 (App. Div.), certif. denied, 165 N.J. 488 (2000), these exhibits have already been produced, not under seal, before the public and need not be protected. As for the remaining documents, since they contain medical and personnel information and respondent has not opposed the motion to seal, I have discretion to protect them pursuant to N.J.A.C. 1:1-14.1(b).

[3] Furthermore, those same documents were submitted not under seal in respondent's exhibit 14.

The Uniform Administrative Procedure Rule ("UAPR") governing protecting records under seal provides that

> In considering whether to . . . seal a record, the judge shall consider the requirements of due process of law, other constitutional and statutory standards and matters of public policy. The judge shall consider the need to protect against unwarranted disclosure of sensitive financial information or trade secrets, to protect parties or witnesses from undue embarrassment or deprivations of privacy, or to promote or protect other equally important rights or interests.
>
> [N.J.A.C. 1:1-14.1(b).]

There exists a recognized "right to privacy in one's medical information." Doe v. Delie, 257 F.3d 309, 315 (3d Cir. 2001) (citing United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980)). A person's personnel files are also protected from public disclosure pursuant to R. 1:38-5(e), a rule that is applicable because no UAPR speaks to the issue. N.J.A.C. 1:1-1.3(a). Nevertheless, "it is almost always the case that once privileged material is disclosed, the privilege of non-disclosure is waived as to that matter." Biunno, Current N.J. Rules of Evidence, cmt. on N.J.R.E. 530 (2011).

The documents contained in Bell's exhibits A, B, K, and L, consist of medical and personnel files that respondent has a privacy interest in protecting from public disclosure. In that both parties agree they should be sealed and in that a privacy interest exists in their non-disclosure, the JJC's request to seal them should be granted. However, respondent has produced as his own exhibits not under seal certain documents identical to those also in the exhibits sought to be protected. A comparison of these submissions reveals that Bell's exhibit L is identical to respondent's exhibit 12, and respondent's exhibit 5 is identical to JJC Amodei 263 in Bell's exhibit A. In the interest of convenience and also, judicial economy, all of Bell's exhibit A will be sealed, although respondent's exhibit 5, which was willingly produced for public disclosure, will not be. Bell's exhibit L, however, will be protected. Thus I will require that Bell's exhibits A, B, and K, remain under seal, while C through G and L do not need such protection.

CONCLUSIONS OF LAW

Based on the foregoing, I **CONCLUDE** that, although petitioner has established that respondent's absences were excessive, it has not established, for purposes of Summary Decision that the excessive absences justify his dismissal. I further **CONCLUDE** that, on the issue of respondent's abandonment of his position, Summary Decision is appropriate in favor of respondent. While the undisputed facts support, in favor of respondent, that he did not abandon his position, and, in favor of the JJC, that respondent's absences were excessive, issues of material fact exist must be resolved before determining whether respondent's absences warrant dismissal.

As for the remaining issues, I will accept respondent's answers to petitioner's request for admissions. Although respondent answered them well after the March 21, 2011, extended deadline and well beyond the fifteen-day time frame required under N.J.A.C. 1:1-10.4(c), respondent should not suffer as a result of his attorney's oversight. However, considering that respondent's attorney's failure to submit the requested discovery could not have been as "inadvertent" as he suggests in light of his February request that he be granted an extension to answer them, I will order respondent to answer the remainder of the discovery requests strictly within 15 days of the date of this Order or face a dismissal of the matter in favor of the JJC for failure to respond to discovery.

All of the documents in Exhibit A attached to Bell's Declaration will be sealed, although respondent's exhibit 5, which was willingly produced for public disclosure, will not be. Bell's exhibit L, however, will be protected. Thus I will require that Bell's exhibits A, B, and K, remain under seal, while C through G and L do not need such protection.

ORDER

I hereby **ORDER** that petitioner's motion for Summary Decision seeking an order that respondent's absences were excessive is **GRANTED.** I further **ORDER** that petitioner's motion for Summary Decision seeking an order granting its request to

dismiss respondent based on this excessive absenteeism is **DENIED.** I further **ORDER** that petitioner's motion for Summary Decision seeking an order that respondent had abandoned his position is **DENIED** and that respondent's motion seeking an order that he had not abandoned his position is **GRANTED.**

I further **ORDER** that respondent's answers to admissions should be accepted, and that respondent will comply with all outstanding discovery requests within fifteen days of the date of this Order. Finally, I **ORDER** that the JJC's exhibits A, B, and K should be sealed.

This order granting and/or denying partial summary decision is being submitted under N.J.A.C. 1:1-12.5(e) for immediate review. This recommended order may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make the final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days and unless such time limit is otherwise extended, this recommended order shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this order 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**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 15, 2011
DATE

DENNIS P. BLAKE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

mamf

#429-11L

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 14, 2011

Melvin C. Randall, Esq.
Love & Randall
57 Washington Street
East Orange, New Jersey 07017

Robert Schwartz, Esq.
Monroe Centre at Forsgate
12 Centre Drive
Monroe Township, New Jersey 08831

David Nash, Esq.
New Jersey Principals and Supervisors Association
12 Centre Drive
Monroe Township, New Jersey 08831

Re: *Elbert Smith v. Board of Education of the City of Orange, Essex County. OAL Dkt. No. EDU 11566-09, Agency Dkt. No. 194-8/09 (Consolidated Cases)*

Dear Counsel,

I have reviewed Intervenor Candace Wallace's submission in connection with her motion for leave to file reply exceptions out of time in the above-captioned matter. Within five days after receipt of this letter, Ms. Wallace shall file her reply exceptions.

Accordingly, Ms. Wallace's motion to file exceptions out of time is hereby granted.

Sincerely,

Andrew Smarick
Acting Commissioner

c: County Superintendent
State Law Library ✓

AS/MKD/JKH

VIA FACSIMILIE AND REGULAR DELIVERY

431-11

A.B., on behalf of minor child, B.N.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
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 August 31, 2011, but petitioner failed to appear despite having received appropriate notice and provided no explanation for her nonappearance. No counterclaim was filed by the respondent Board.

The ALJ issued an Initial Decision which concluded that the petitioner has abandoned the matter, and returned the record of the matter to the Commissioner.

There being no explanation filed for petitioner's nonappearance, 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.

October 14, 2011

431-11

OAL DKT. NO. EDU 06921-11
AGENCY DKT. NO. 121-5/11

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

The record of this matter – transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and including an advisement of petitioner's failure to appear at the scheduled August 31, 2011 OAL hearing – has been reviewed. Petitioner filed no explanation for her failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10|14|11
Date of Mailing: 10|18|11

* 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 06921-11
AGENCY REF. NO. 121-5/11

A.B. ON BEHALF OF B.N.W.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,
Respondent.

No Appearance by A.B., pro se

Melvin Randall, Esq., for respondent (Love and Randall, attorneys)

Record Closed: August 31, 2011 Decided: September 2, 2011

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals the determination of the respondent, Orange Board of Education ("the Board"), that she is not domiciled in its district. The Board seeks to remove petitioner's child, B.N.W., from its schools pursuant to N.J.S.A. 18A:38-1(b)(2).

Petitioner filed an appeal with the Department of Education ("the Department") on May 16, 2011. The Board filed an answer on June 15, 2011. The matter was transmitted to the Office of Administrative Law as a contested case on June 16, 2011. A hearing was scheduled for August 31, 2011, and counsel for the Board appeared. Petitioner failed to appear.

STATEMENT OF FACTS

I **FIND** as follows:

1. A formal notice of hearing was forwarded to petitioner by the Clerk of the OAL on June 27, 2011. The notice was sent to petitioner at the address indicated on her petition of appeal. The OAL received no return of the notice as undeliverable.

2. Additionally, via letter dated June 27, 2011, I advised both petitioner and counsel for the Board that the hearing would take place on August 31, 2011, at the OAL offices in Newark, New Jersey. My letter confirmed that an appearance at the hearing is mandatory and that if petitioner does not appear her petition may be dismissed. That letter was likewise sent to the address noted on the petition of appeal. The OAL received no return of the letter as undeliverable.

3. Petitioner did not appear and has not contacted my office to explain her non-appearance.

4. A review of the pleadings reflects that the Board has not filed a counterclaim in this matter; counsel for the Board likewise confirmed on the record that there is no pending counterclaim.

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. A.B. failed to appear and she failed to timely provide an explanation for 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 2, 2011
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: September 2, 2011

Date Mailed to Parties: SEP - 6 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

I.C.W., on behalf of minor child, J.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the Board's determination that her child, J.W., was not eligible for membership in the National Honor Society as the result of a disciplinary suspension during his ninth grade year. Petitioner initially filed a motion for emergent relief, which was denied. The case was heard on its merits in August 2011. During the pendency of the proceedings, it was learned that J.W. had turned 18 and thereby attained adult status and standing to pursue this matter in his own right. Accordingly – because J.W. did not participate in the appeal process in any way – the respondent Board moved to dismiss the matter since I.C.W. lacks standing to bring the action on behalf of her adult son.

The ALJ found, *inter alia,* that: despite being advised by counsel for the petitioner that he is the only person with standing to pursue this matter, J.W. did not elect to submit a Certification of Substitution or appear at the OAL hearing to place on the record his desire to have his mother proceed as his representative; the non-notarized letter purportedly from J.W. indicating that he authorized his parents to act on his behalf was not convincing evidence that it was J.W.'s idea or intention to assert his rights in this case and to demand induction into the National Honor Society. Accordingly, the ALJ granted the Board's motion to dismiss for lack of standing.

Upon comprehensive review and consideration, the Commissioner 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.

October 14, 2011

OAL DKT. NO. EDU 05838-11
AGENCY DKT. NO. 129-5/11

I.C.W., on behalf of minor child, J.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,	:	DECISION
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[1] and the Board of Education's reply thereto.[2]

In her exceptions, the petitioner argues that the Administrative Law Judge (ALJ) erroneously dismissed the petition in this matter based on lack of standing. Petitioner contends that the ALJ's dismissal was based upon nothing more than an assumption that J.W., who turned 18 in the middle of the case, had no interest in pursuing the matter. The petitioner also maintains that it is unreasonable to expect J.W. to proceed with this case on his own because he is profoundly deaf and language impaired. Petitioner further points out that although it was not notarized, J.W. signed a statement authorizing his parents to proceed on his behalf. Finally, the petitioner emphasizes that all of the testimony was completed prior to the ALJ's decision to dismiss the case, and as such, there would be no prejudice or undue expense to the Board if the Commissioner were to require that the matter be decided on the merits. Therefore, the petitioner

[1] The exceptions filed by counsel for the petitioner state that I.C.W. and G.W. (J.W.'s father) are both petitioners in this matter; however the only petitioner of record is I.C.W.

[2] The record included the transcript from the hearing conducted at the OAL on August 1, 2011 as well as the emergent relief hearing. The record did not include a transcript from the hearing on August 15, 2011, during which the parties argued the Board's motion to dismiss based on a lack of standing.

contends that J.W. is entitled to a determination as to whether the Board acted in an arbitrary, capricious or unreasonable manner when it denied his induction into the National Honor Society.

In reply, the Board urges the Commissioner to adopt the ALJ's determination that the petition should be dismissed based on a lack of standing. The Board maintains that it is undisputed that during the course of the appeal it was discovered that J.W. had turned 18, and when an individual reaches the age of 18 in New Jersey he must sue and be sued in his own name as an adult pursuant to *N.J.S.A.* 9:17b-1 and b-3. Additionally, the Board notes that J.W. has not participated in any of the proceedings involving the dispute in this matter, including the board meeting where his parents challenged the decision not to admit him into the National Honor Society; the emergent relief hearing; the first day of the hearing on the merits; or even the oral argument where the Board argued that the case should be dismissed based upon a lack of standing. The Board further stresses that after the ALJ advised the petitioner of the steps necessary for J.W. to continue with this matter, he also declined to exercise those options. Therefore, the Board argues that based upon the circumstances it was reasonable for the ALJ to conclude that J.W. had no interest in pursuing the appeal.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ's recommendation that this case be dismissed based on a lack of standing. The Commissioner is in accord with the ALJ's determination that once J.W. turned 18, petitioner I.C.W. no longer had standing to pursue this claim. The ALJ afforded the petitioner and J.W. the option of having J.W. file a Certificate of Substitution or appear before the ALJ and inform him that he would like his parents to proceed on his behalf. J.W. did not exercise either option, and as a result it was appropriate for the ALJ to conclude that J.W. did not intend to proceed with the appeal.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/14/11

Date of Mailing: 10/18/11

[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 05838-11
AGENCY DKT. NO. 129-5/11

I.C.W. ON BEHALF OF MINOR CHILD, J.W.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MOUNTAIN LAKES, MORRIS COUNTY,
Respondent.

Paul N. Barger, Esq., for petitioners (Kalac, Barger & Bacigalupo, attorneys)

Vito A. Gagliardi, Jr., Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: August 15, 2011 Decided: September 2, 2011

BEFORE **LELAND S. McGEE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 23, 2011, petitioner filed an application for emergent relief with the New Jersey Department of Education, Office of Controversies and Disputes. On the same day, this matter was transmitted to the Office of Administrative Law (OAL) for a hearing on the requested emergent relief. On May 31, 2011, the application for emergent relief

was heard at the OAL, 33 Washington Street, Newark, New Jersey, and the record closed.

On June 1, 2011, the undersigned issued an Order denying the motion for emergent relief; and on or about June 24, 2011, the Commissioner of Education issued a Decision on Application for Emergent Relief affirming said Order. The Commissioner returned the case to the undersigned for a determination on the merits.

On July 1, 2011, the undersigned issued a Prehearing Order scheduling this matter for an evidentiary hearing on July 13, 2011. At the request of both parties, this matter was adjourned to July 20, 2011.

On or about July 6, 2011, petitioner filed a Motion of Summary Decision and on or about July 12, 2011, respondent filed a Cross-Motion for Summary Decision. On or about July 18, 2011, petitioner filed a response to respondent's cross-motion and on July 22, 2011, the undersigned denied both the motion and cross-motion. Following several telephone-conference conversations, the parties agreed to a hearing schedule of August 1, 2011, and August 15, 2011.

A hearing was held on August 1, 2011. During the week of August 8, 2011, the parties learned that J.W. turned eighteen (18) during the course of this proceeding. At the hearing of August 15, 2011, respondent moved for dismissal of this matter for failure of standing to sue. The undersigned granted the motion to dismiss and the record closed.

STATEMENT OF FACTS

The pertinent facts of this case are not in dispute and I **FIND** the following to be the **FACTS** of this case.

J.W. is a resident of Kennelon, New Jersey, and a rising twelfth-grade out-of-district high school student in the Mountain Lakes School District. He has attended

school in this district pursuant to an Individualized Education Program (IEP) since he was four years old. J.W. wears a cochlear implant to assist with his hearing impairment.

On or about May 6, 2009, the end of J.W.'s ninth-grade year, two students reported an incident involving J.W. to Stephen W. Ryan, the assistant principal at Mountain Lakes High School. The investigation of this incident resulted in an out-of-school suspension.

In the spring of 2011, J.W. satisfied the initial academic-proficiency threshold for receiving an invitation to apply for membership in the National Honor Society. J.W.'s application was considered by a five-member Local Faculty Council (LFC), which was comprised of five teachers selected by the school prinicipal.

On or about April 11, 2011, the LFC met to consider applicants for induction into the NHS and determined not to select J.W. The council concluded that his "disciplinary record did not meet chapter selection standards" as a result of the five-day suspension.

Petitioners appealed the decision of the LFC to the principal of the high school who affirmed the decision. After becoming aware of the incident and appeal, the superintendent of the school district discussed the matter with petitioners and also affirmed the decision of the LFC.

Petitioners appealed the decision to the Mountain Lakes Board of Education (BOE). They attended the BOE meeting of May 16, 2011, to present their appeal in "closed session." Following the presentation made by J.W.'s mother, the BOE went into "open session" but took no action on the requested appeal.

On or about May 27, 2011, respondent held an induction ceremony for students selected for membership in the National Honor Society. A less-formal induction ceremony will be held in October 2011, for eligible students not inducted during the spring ceremony.

Petitioner filed a timely motion for emergent relief, contesting the decision of the LFC, and the failure of respondent to take any action to reverse that decision. The undersigned denied the motion, and retained jurisdiction of the merits of this case following the Commissioner's affirmation of the denial of emergent relief. A hearing on the merits was commenced on August 1, 2011, and continued on August 15, 2011.

DISCUSSION AND CONCLUSIONS OF LAW

New Jersey law "[e]xtend[s] to persons eighteen years of age and older the basic civil and contractual rights and obligations heretofore applicable only to persons twenty-one years of age or older, including the right to contract, sue, be sued and defend civil actions . . ." N.J.S.A. 9:17b-1. The law affirmatively states that "every person 18 or more years of age shall in all other matters and for all other purposes be deemed to be an adult and, notwithstanding any other provision of law to the contrary, shall have the same legal capacity to act and the same powers and obligations as a person 21 or more years of age." N.J.S.A. 9:17b-3. The parties in this matter stipulated that J.W. turned eighteen on June 26, 2011, thereby reaching the age of majority and attaining standing to pursue the within matter.

The undersigned is faced with a motion to dismiss for failure of standing to sue as a result of a child reaching adulthood under New Jersey law. In the absence of precidential legal authority, the undersigned relied upon the aforementioned statutory authority and the absence of any evidence that J.W. wished to have his parents procede with this matter on his behalf.

It is undisputed that J.W. did not participate in the administrative appeals that occurred at the local level. He did not attend or otherwise participate in the appeal to the school principal, the superintendent of schools, or the Board of Education. J.W. has not attended any of the hearings scheduled in this matter and was not a proposed witness. In fact, only one of the two-named petitioners has appeared in this matter—namely J.W.'s mother.

Counsel for petitioner represented that he advised petitioner of the law pertaining to her son attaining the age of majority and that J.W. is therefore the only person with "standing" to pursue this matter. Further, petitioner was advised that there were two options for proceeding in this case: either J.W. could submit a formal Certification of Substitution relieving petitioners of their status as parties and substituting himself in as the petitioner; or J.W. could appear before this court and place on the record his desire to have his parents proceed as his representative. He did not elect to exercise either of these options.

During the hearing held on August 15, 2011, a non-notarized letter was presented purportedly from J.W. indicating that he authorized his parents to act on his behalf. However, I am not convinced that it was J.W.'s idea or intention to assert his rights in this case, and to demand induction into the National Honor Society. It was his mother who made the formal appeal before the Board of Education and submitted her written remarks. I believe that it was his mother who filed the initial request for due process, which does not include any statement by J.W. that he is in any way interested in proceeding with this appeal. In addition, his mother stated that she refused to allow J.W. to participate in these proceedings. Finally, there is no evidence that J.W. authorized counsel for petitioners to continue as the attorney of record.

For the foregoing reasons, I **CONCLUDE** that the motion to dismiss by respondent must be granted for lack of standing to sue. Accordingly, it is **ORDERED** that this appeal be and 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 2, 2011
DATE

LELAND S. McGEE, ALJ

Date Received at Agency: September 2, 2011

Date Mailed to Parties: SEP - 6 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

APPENDIX

Witnesses

Petitioner

None

Respondent

Robert Downes

Paul Henry

Anne Mucci

Dr. John Kazmark

Exhibits

Petitioner

Respondent

R-1 Constitution of the National Honor Society

R-2 NHS/NJ Honor Society Website Criteria

R-3 Mountain Lakes NHS Chapter Selection Process Guidelines

R-4 Notification of eligibility

R-5 NHS Activity Sheet for J.W.

R-6 Rejection letter

R-7 Certification of Raquel S. Lord, Esq.

Joint

J-1 New Jersey Department of Education Report

433-11

OAL DKT. NO. EDU 3203-11
AGENCY DKT. NO. 26/2-11

CATHERINE DONAGHY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	DECISION
RESPONDENT.	:	

The record of this matter and Stipulation of Settlement transmitted by the Office of Administrative Law have been reviewed. Because the agency is a party to this matter, pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), the settlement agreement is deemed to be the final decision.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/14/11

Date of Mailing: 10|18|11

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625-0112

PAULA T. DOW
Attorney General

ROBERT M. HANNA
Director

August 24, 2011

Via Electronic Mail Only
Honorable William Todd Miller, A.L.J.
1601 Atlantic Avenue
Atlantic City, New Jersey 08401
E-Mail: Sharon.Danks@oal.state.nj.us

Re: Catherine M. Donaghy v. NJDOE, Criminal History Review Unit
OAL Docket No. EDU 03203-2011S
Agency Reference No. 26-2/11

Dear Judge Miller:

The undersigned represents Respondent, New Jersey Department of Education, Criminal History Review Unit. There is a telephone status conference set for August 29, 2011. Please be advised that the parties have settled this matter as to all issues. The terms of the settlement are set forth in a fully executed affidavit and consent order, which is attached.

Thank you for your attention to this matter.

Respectfully Submitted,

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY

By: _____
Bryant Lawrence Horsley, Jr.
Deputy Attorney General

With Enclosures
cc: Ned P. Rogovoy, Esquire (via regular mail and e-mail)

Ned P. Rogovoy, Esquire
782 S. Brewster Road, Unit A6
Vineland, NJ 08361
856-205-9701
Attorney for Petitioner

CATHERINE M. DONAGHY,	:	BEFORE THE
	:	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
	:	OAL Docket No. EDU 03203-2011S
v.	:	Agency Reference No. 26-2/11
	:	
NEW JERSEY DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	ADMINISTRATIVE ACTION
	:	
Respondent.	:	**CONSENT ORDER**

WHEREAS, Petitioner, Catherine M. Donaghy ("Donaghy") and Respondent, New Jersey Department of Education, Criminal History Review Unit, (the "Department") have mutually agreed to settle the above-captioned matter, with Paula T. Dow, Attorney General of New Jersey, by Bryant Lawrence Horsley, Jr., Deputy Attorney General, appearing on behalf of the Department, and Ned P. Rogovoy, Esquire, appearing on behalf of Donaghy; and

WHEREAS, this matter arose from Donaghy's appeal of the Department's determination letter finding that on January 6, 2010, a child was left unattended on the school bus to which Donaghy was assigned; and

WHEREAS, the settlement of this matter shall not constitute precedent in other pending or future litigation.

NOW, THEREFORE, the parties hereto agree to settle the abovecaptioned matter upon the following terms:

1. Donaghy acknowledges that she is the holder of a commercial driver's license, with a school bus endorsement.

2. As reflected in her Affidavit, the terms of which are incorporated herein by reference, Donaghy agrees to a six-month suspension of the school bus endorsement on her commercial driver's license, pursuant to N.J.S.A. 18A:39-29(a).

3. The aforesaid suspension of Donaghy's school bus endorsement shall be imposed retroactively for the six-month period from January 19, 2011 through August 19, 2011.

4. Donaghy agrees that the aforesaid suspension shall constitute a "first offense" for purposes of N.J.S.A. 18A:39-28, *et seq.*

5. Upon full execution of this Consent Order, the Department shall notify the New Jersey Motor Vehicle Commission ("MVC") of the aforesaid retroactive suspension, and same will be reflected on Donaghy's MVC records.

6. Upon full execution of this Consent Order, the Petition of Appeal in the matter of Catherine M. Donaghy v. New Jersey, Department of Education, Criminal History Review Unit, Agency Reference No. 26-2/11, OAL Docket No. EDU 03203-2011S, is hereby dismissed with prejudice.

7. Both parties have entered into this Consent Order for the purposes of settlement only.

8. The parties have read the terms of this Consent Order and acknowledge that they have had an opportunity to discuss it with legal counsel or a representative of their choosing. The parties further acknowledge that they are executing this Consent Order of their own volition with a full understanding of its terms and effects, and without any coercion. Both parties acknowledge that they have entered into this Consent Order with a full understanding of their rights.

9. By consenting to the aforesaid suspension of her school bus endorsement, Donaghy agrees to waive any and all hearings to which she may be entitled in this matter.

10. The parties agree that this Consent Order may be executed in one or more counterparts, each of which shall be deemed an original and part of one in the same Consent Order and that facsimiles of signatures shall have the same force and effect as original signatures.

11. The parties acknowledge that this Consent Order is subject to the approval of the Commissioner of Education.

Ned P. Rogovoy, Esquire
Attorney for Petitioner

Dated: 7/19/11

Bryant Lawrence Horsley, Jr.
Deputy Attorney General
Attorney for Respondent

Dated: 8/24/11

Ned P. Rogovoy, Esquire
782 S. Brewster Road, Unit A6
Vineland, NJ 08361
856-205-9701
Attorney for Petitioner

CATHERINE M. DONAGHY, Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT, Respondent.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL Docket No. EDU 03203-2011S Agency Reference No. 26-2/11 ADMINISTRATIVE ACTION **AFFIDAVIT OF CATHERINE M. DONAGHY**

I, CATHERINE M. DONAGHY, of full age, hereby certify as follows:

1. I am the holder of a New Jersey Commercial Driver's License with a school bus endorsement.

2. I did not utilize the school bus endorsement on my commercial driver's license for the six-month period from January 19, 2011 through July 19, 2011.

3. I agree to a six-month suspension of the school bus endorsement on my commercial driver's license, to be imposed retroactively for the six-month period from January 19, 2011 through July 19, 2011.

4. I understand that the suspension of my school bus endorsement will be reflected upon the records of the New Jersey Motor Vehicle Commission as a "first offense" for purposes of N.J.S.A. 18A:39-28, *et seq.*

5. In consenting to the suspension of my school bus endorsement, I agree to waive any and all hearings to which I may be entitled in this matter.

6. I acknowledge that in signing this agreement I have secured the advice of an attorney and I understand the terms of this agreement.

Catherine M Donaghy

CATHERINE M. DONAGHY

Sworn and Subscribed
before me this 14th day
of July, 2011

Notary

NOTARY PUBLIC
CRAIG A. NICHOLS
STATE OF WISCONSIN

OAL DKT. NO. EDU 12071-09
AGENCY DKT. NO. 267-9/09

MARJORIE HILL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE LEAP ACADEMY UNIVERSITY CHARTER SCHOOL, CAMDEN COUNTY,	:	DECISION
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 became effective prior to 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 effective date of the settlement. Assuming same, 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: 10|14|11
Date of Mailing: 10|18|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12071-09

AGENCY DKT. NO. 267-9/09

MARJORIE L. HILL,

Petitioner,

v.

LEAP ACADEMY UNIVERSITY CHARTER SCHOOL, CAMDEN COUNTY,

Respondent.

Jason E. Sokolowski, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Nicholas J. Repici, Esq., for respondent (Genova, Burns & Giantomasi, attorneys)

Record Closed: July 11, 2011 Decided: August 18, 2011

BEFORE **ELIA A. PELIOS**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 23, 2009, 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 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. It is noted that despite references in the agreement to confidentiality between the parties except where required by law, the parties have not requested nor does my approval of this agreement in any way constitute a conclusion that the record in this matter should or is to be sealed under the criteria enumerated by N.J.A.C. 1:1-14.1.

It is further noted that although the resolution of the Board of Trustees of the LEAP Academy Charter School approving the settlement was signed by Wanda Garcia, "Board Liaison," rather than the secretary of the Board, counsel has provided Ms. Garcia's certification (attached) wherein she states that as Board Liaison she is the individual responsible for preparing the agenda and resolutions for all Board meetings; that she is responsible for taking minutes of the meetings and recording all roll call votes in consideration of resolutions; and that the individual identified as "Board Secretary" on the Board's letterhead is in fact an appointed voting member of the Board and not an employee of the school's administrative offices.

Accordingly, I **CONCLUDE** that the resolution provided by Counsel memorializing the approval by the Board of the settlement agreement is a validly executed resolution of the Board and should be accepted as evincing the Boards approval of this settlement.

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.

8/19/2011
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: AUG 31 2011

Date Mailed to Parties: AUG 31 2011

/mev

EXHIBITS

Jointly submitted

J-1 Settlement Agreement

J-2 Certification of Wanda Garcia

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this 20th day of January, ~~2010~~ 2011 between the LEAP Academy University Board of Trustees (hereinafter, "the Board" or "the Employer") and Marjorie L. Hill (hereinafter referred to as "Hill" or "the Employee") (hereinafter collectively referred to as "the parties").

WHEREAS, Hill was employed by the Board as an interim school Librarian/Media Specialist from October 3, 2005 to the time of her voluntary resignation on December 31, 2007; and

WHEREAS, upon Hill's resignation she was afforded a temporary continuation of health benefits by the Board in accordance with the Consolidated Omnibus Budget Reconciliation Act ("COBRA"); and

WHEREAS, Hill's eligibility for continuation in the Board's health benefits plan under COBRA expired on July 1, 2009 and she was removed from the Board's plan at that time; and

WHEREAS, Hill requested that the Board allow her to continue to participate in the Board's plan, at Hill's own expense, up until November 12, 2012, at which time Hill will turn 65 years of age and become eligible for participation in Medicare Parts A and B, as well as participation in the New Jersey State Health Benefits Program (SHBP); and

WHEREAS, the Board denied Hill's request for continued participation in its health benefits program; and

WHEREAS, on or about September 29, 2009, Hill filed a Petition of Appeal ("Petition") of the Board's decision to deny her continued participation in its health benefits program with the Commissioner of Education asserting that she is entitled to continued participation under N.J.S.A. 18A:16-18; and

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WHEREAS, Hill's Petition is currently pending before the Commissioner of Education and the Office of Administrative Law and docketed as OAL Docket No. EDUOA 12071-2009S; Agency Ref. No. 267-9/09; and

WHEREAS, the parties desire to amicably resolve this matter without the need for further administrative proceedings; and

NOW, THEREFORE, in consideration for the promises and conditions set forth herein, the Board and Hill agree as follows:

1. **TERMS**

a. Nothing contained in this Agreement is or shall in any event be construed as or deemed to be an admission or concession of the merit, validity, or non-validity of the claims asserted in the Petition or any other claim asserted against the Board. The Parties have entered into this Agreement for the sole purpose of resolving the aforementioned disputed and potential claims without the burden, expense, delay and uncertainties of further litigation. This Agreement shall not be precedential in any manner against the Board should the same or similar claims be asserted against the Board in the future by any of its other employee or former employees of the Employer.

b. Upon the effective date of this Agreement, Hill shall be permitted to reenroll in the Board's health benefits program and continue her participation in the program until November 12, 2012, the date she reaches the age of 65 and becomes eligible for Medicare Parts A and B and participation in the SHBP. Hill is responsible for assuming all costs associated with her reenrollment and continued participation in the Board's health benefits program, in accordance with N.J.S.A. 18A:16-19. In order to cover the full cost of the health benefits premium and additional administrative costs incurred, Hill agrees that her insurance rate shall be

equivalent to the COBRA rate in effect for the Employer. Hill is responsible for taking whatever steps necessary to enroll in Medicare Parts A and B and the SHBP upon reaching the age of eligibility. The Board's makes no representations regarding Hill's eligibility for Medicare Parts A and B and participation in the SHBP upon her reaching the age of 65 and this agreement shall not be affected if Hill is denied coverage in by Medicare or the SHBP. Hill's participation in the Board's health benefits program shall affirmatively terminate on November 12, 2012, regardless of whether Hill has obtained other coverage.

c. Hill shall be responsible for submitting payments to the Employer, or the Employer's designee, in a manner determined by the Employer, and at rate equivalent to the COBRA rate in effect for the Employer, to cover the entire cost of her coverage under the Board's health benefits program together with any administrative costs incurred by the Employer. Hill will not receive invoices from the Employer but shall be responsible for submitting all payments in a timely manner as set forth by the Employer. Failure to submit timely payment shall result in Hill's termination coverage under the Board's health benefits program.

d. Immediately upon the effective date of this Agreement, Hill shall withdraw her Petition pending before the Commissioner of Education and the Office of Administrative Law which is docketed as OAL Docket No. EDUOA 12071-2009S; Agency Ref. No. 267-9/09.

2. **COMPLETE RELEASE**

a. Hill, for herself and her heirs, executors, representatives, assigns, and all others claiming by or through any of them, hereby waives, remises, releases and forever discharges any and all claims, disputes, grievances, demands, actions, causes of action, and/or

claims for damages, losses, expenses, fees, or other relief of any kind or nature whatsoever, either in law or in equity, whether direct or indirect, whether asserted or unasserted, and whether known or unknown, which Hill, and/or her heirs, assigns, representatives, executors and any others claiming by or through her, have, may have had, or may hereinafter have against Board, its predecessors, successors, and affiliates and/or any of their respective past or present Board members or representatives or agents (collectively hereinafter the "Board Releasees"), which arise out of, result from or relate in any manner to Hill's employment with the Board, her termination thereof, the execution of this Agreement, occurring prior to the execution of this Agreement, or by reason of any other matter whatsoever occurring prior to the execution of this Agreement, whether or not relating to employment, excepting therefrom any action for the enforcement of the terms of this Agreement. Hill specifically waives, releases and forever discharges any and all claims arising from or relating to her employment with the Board based on any act, event or omission occurring before she executes this Agreement including, but not limited to, any claims which could be asserted now or in the future, under: common law, including, but not limited to, breach of express or implied duties, wrongful termination, defamation, or violation of public policy; any policies, practices, or procedures of the Board; any federal or state statutes or regulations including, but not limited to, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., the Civil Rights Act of 1866 and 1871, the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq., the Americans With Disabilities Act, 42 U.S.C. §12101 et seq., the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001 et seq., Equal Pay Act, 29 U.S.C. §206 et seq., Worker-Adjustment Retraining Notification Act, 29 U.S.C. §2101, et seq., National Labor Relations Act, 29 U.S.C. §151 et seq., Older Worker's Benefit Protection Act, 29 U.S.C. §621 et seq., New Jersey Family Leave Act,

N.J.S.A. 34:11B-1 et seq., the Family and Medical Leave Act, §2601 et seq., the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq.; the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to -8; any contract of employment, expressed or implied; any provision of the United States or New Jersey Constitutions; any provision of any other law, common or statutory, of the United States, the State of New Jersey or any other state.

b. Hill agrees never to commence against the Board, or any other of the Board Releasees, any action based upon any claims which are the subject of this Agreement; provided, however, that nothing in this Agreement prevents her from filing, cooperating with, or participating in any proceeding before the Equal Employment Opportunity Commission or a state or local fair employment practices agency, except that she acknowledges and understands that she may not be able to recover any monetary benefits in connection with any such claim, charge or proceeding.

c. Hill represents that there are no pending lawsuits, charges, or administrative proceedings, or other claims of any nature whatsoever by her against Board, pending in any state or federal court, or before any agency or other administrative body.

3. **CONFIDENTIALITY**

Except in proceedings to enforce this Agreement, this Agreement and all of its terms shall be deemed confidential and shall not be disclosed to anyone by Hill, except as required by law; provided however, that Hill may inform only Hill's attorneys, immediate family, accountants, union representatives, financial and health consultants on the condition that they are informed of this confidentiality agreement prior to the disclosure of information protected by it and agree to abide by its terms. In no instance shall Hill, directly or indirectly, attempt to bring this Agreement or its terms, to the attention of any person, unless ordered to do so by the Court.

4. **CONSULTATION WITH ATTORNEY**

Hill has consulted with her attorney with respect to this Agreement and reviewed with her attorney all the terms and conditions of this Agreement prior to executing this Agreement. Hill agrees that she has received competent legal counsel and representation from her attorney.

5. **COMPLETE AGREEMENT**

This Agreement contains the entire agreement between Hill and the Board with respect to the subject matter and supersedes all prior agreements or understandings dealing with the same subject matter. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey.

6. **MODIFICATION**

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

7. **SEVERABILITY**

Should any provision of this Agreement be declared or determined by the Commissioner of Education or any court or administrative agency of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms or provisions shall not be affected thereby and said illegal, unenforceable or invalid part, term or provision shall be deemed to be part of this Agreement.

8. **HILL ATTESTS**

Hill represents and warrants that she has carefully read each and every provision of this Agreement and that she fully understands all of the terms and conditions contained in each provision of this Agreement. Hill represents and warrants that she enters into this Agreement

voluntarily, of his own free will, without any pressure or coercion from any person or entity including but not limited to the Board.

9. **REVIEW AND REVOCATION**

Hill understands and agrees that: (i) she shall have up to twenty-one (21) days from December 9, 2010, the date that she received this Agreement, to consider and sign it, and that she may take the entire 21-day period to do so; (ii) any changes to this Agreement, whether material or immaterial, will not restart the running of the 21-day period; (iii) if she does sign this Agreement, she may revoke it within seven (7) days after signing it by submitting a written notice to the Board, addressed to the attention of Nicholas J. Repici, Esquire, Genova, Burns & Giantomasi, 2 Riverside Drive, Suite 502, Camden, New Jersey 08103, in such a manner that it is actually received within the 7-day period; and (iv) this Agreement will not become effective or enforceable until the end of this 7-day revocation period.

IN WITNESS WHEREOF, and intending to be legally bound hereby, I, Marjorie L. Hill, executed the foregoing Agreement this 10 day of December, 2010.

Marjorie L. Hill
MARJORIE L. HILL

LEAP ACADEMY UNIVERSITY
BOARD OF TRUSTEES

LEAP ACADEMY UNIVERSITY CHARTER SCHOOL, INC.

Leadership, Education, and Partnership

549 Cooper Street, Camden, NJ 08102 / Telephone: 856-614-5600 / Fax: 856-614-5601

www.leapacademycharter.org

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Maria Miranda
Hector Nieves

Chief Learning Officer

Deanna Burney, Ed.D.

Board Liaison

Wanda I. Garcia

Resolution Approving of Settlement Agreement with Marjorie Hill

Resolved that the Board of Trustees approves the Settlement Agreement negotiated with Marjorie Hill by Board Counsel as presented.

Approval by Roll Call

Dr. Gloria Bonilla-Santiago	YES
Manny Delgado	YES
Robert Everinghman	YES
Dr. Luis Garcia	YES
Dr. Eduardo Gomez	YES
Dr. Mira Lalovic-Hand	YES
Maria Miranda	YES
Hector Nieves	YES
Brenda Ortiz	YES
Dr. Benedetto Piccoli	YES
Dr. Wendell Pritchett	YES
Mary Sheil	YES
Adam Szpreingel	YES
Joseph P. Tredinnick	YES
Dr. Raymond Yannuzzi	YES

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I, Wanda Garcia, Board Liaison certify that the foregoing is a true copy of a Resolution as it appears in the records of the Corporation and as was duly and legally adopted by the Board of Trustees at is meeting of January 20, 2011 pursuant to and in accordance with the Certificate of Incorporation and By-Laws thereof; that it has not been modified, amended or rescinded and is in full force and effect as of the date hereof.

Dated: January 20, 2011

Wanda Garcia

#435-11LM

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 14, 2011

John E. Collins, Esq.
Parker McCay
1009 Lenox Drive
Building Four East
Suite 102A
Lawrenceville, N.J. 08648-2321

Arnold M. Mellk, Esq.
Wills, O'Neill & Mellk
10 Nassau Street
P.O. Box 614
Princeton, N.J. 08542

Re: *In the Matter of the Tenure Hearing of Edith Craft, School District of the Township of Franklin, Somerset County. Agency Dkt. No. 24-2/11.*

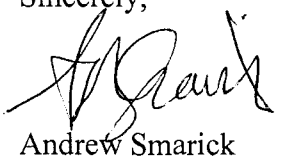
Dear Counsel,

I have reviewed the materials filed in connection with the Franklin Township School District's Motion for Reconsideration of the Acting Commissioner's September 1, 2011 decision finding respondent guilty of unbecoming conduct and imposing a suspension without pay plus the loss of her salary increment for the 2011-2012 school year. The District is seeking to have the penalty in this case reconsidered because on March 16, 2011 the District and the Franklin Township Education Association entered into a Memorandum of Agreement in which it was agreed that all salaries for the 2011-2012 school year would be frozen at the 2010-2011 rate. The District now argues that because of that agreement the respondent will not be penalized with the loss of an increment since her salary was already frozen at the 2010-2011 level.

Upon review of the parties' submissions, I find that on September 23, 2011 the respondent filed a Notice of Appeal with the Appellate Division. Pursuant to *R.* 2:9-1 once a Notice of Appeal is filed, the Appellate Division automatically acquires supervision and control

over the matter. Accordingly, the Commissioner does not have jurisdiction to decide the Board's Motion for Reconsideration; therefore no further action will be taken on this matter.*

Sincerely,



Andrew Smarick
Acting Commissioner

c: County Superintendent
State Law Library

AS/MKD/JKH

Via Regular Mail

Date of Mailing: 10/17/11

* 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).

#436-11

ENRICA B. GILLIKIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF GARFIELD, BERGEN COUNTY, RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured teacher holding a standard instructional certificate with endorsements as an Elementary School Teacher and a Teacher of Italian – appealed the determination of the respondent Board to non-renew her contract for the 2010-2011 school year, alleging violation of her tenure and seniority rights. Petitioner was continuously employed by the Board as a Teacher of Italian from September 2002 through June 2010. She contends that her tenure extends to her Elementary School Teacher endorsement, and that she was illegally terminated because no resolution was adopted by the Board to abolish her position or to dismiss her from its employ. The Board argues that petitioner is not entitled to an elementary education position in the school district after the abolishment of the elementary World Language Program.

The ALJ found, *inter alia,* that: there is no genuine issue of material fact challenged in this matter, and the case is ripe for summary decision; *N.J.S.A.* 18A:28-1 to -18 authorizes the tenure of educational personnel; petitioner had attained tenure under both her Elementary School Endorsement and her Teacher of Italian endorsement; petitioner does not dispute that her seniority – pursuant to *N.J.S.A.* 18A:29-9 *et seq.* and *N.J.A.C.* 6A:32-5.1 – is limited to the subject area and grade levels she actually taught, nor does she dispute that she does not have sufficient seniority to claim a position as Teacher of Italian from tenured teachers currently employed as such in the district's secondary grades; at the same time, the Board does not dispute that it has retained non-tenured elementary school teachers following petitioner's nonrenewal; *N.J.S.A.* 18A:27-4.1 sets forth the procedure by which a certificated employee may be removed, namely upon the recommendation of the chief school administrator and by a recorded roll-call majority vote of the full membership of the Board, which appears not to have happened in this case; however, even if petitioner's position was legally terminated pursuant to a reduction in force, petitioner should have been retained as an elementary school teacher based upon the tenure law. Accordingly, the ALJ granted summary decision in favor of petitioner, and ordered that respondent shall reinstate petitioner as a full-time employee; compensate her for monetary damages, including loss of salary and medical, dental and prescription insurance coverage; and restore her seniority rights and pension credit.

Upon comprehensive review, the Commissioner concurred with the ALJ's conclusion that summary decision is appropriately granted to petitioner, and adopted the Initial Decision as the final decision in this matter. The Commissioner ordered respondent to immediately reinstate petitioner to a full-time teaching position, reimburse her within 60 days for lost salary and payments made for medical, dental, and prescription insurance coverage, provide her with seniority credit, and make the requisite contributions to the pension fund and Social Security for the entire period of petitioner's illegal termination.

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 17, 2011

OAL DKT. NO. EDU 9242-10
AGENCY DKT. NO. 149-7/10

ENRICA B. GILLIKIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE	:	DECISION
CITY OF GARFIELD, BERGEN 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 his considered review, the Commissioner concurs with the Administrative Law Judge (ALJ) that summary decision is appropriately granted to petitioner. For the reasons cogently presented in the ALJ's decision, it is without question that petitioner's tenure rights – pursuant to *N.J.S.A.* 18A:28-5, *et seq.* – were violated, as a matter of law, when the Board abolished her teaching position and continued to employ non-tenured individuals as elementary teachers for the 2010-11 school year.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. Respondent is hereby directed to immediately reinstate petitioner to a full-time teaching position within the scope of her endorsements; reimburse her within sixty days of the date of this decision for lost salary and payments she made for medical, dental and prescription insurance coverage; provide her with seniority credit; and make the requisite

contributions to the pension fund and Social Security for the entire period of her illegal termination.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/17/11

Date of Mailing: 10/18/11

* 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 09242-10
AGENCY DKT. NO. 149-7/10

ERICA B. GILLIKIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,
Respondent.

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

Amy E. Lefkowitz, Esq., for respondent (Law Offices of Curt J. Geisler, attorneys)

Record Closed: June 16, 2011 Decided: September 1, 2011

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

STATEMENT OF THE CASE

Petitioner Enrica Gillikin (Gillikin), a teacher, appeals the determination of respondent, Board of Education of the City of Garfield, Bergen County (Board), that her

contract would not be renewed for the 2010–2011 school year, alleging violation of her tenure and seniority rights.

PROCEDURAL HISTORY

On July 13, 2010, Gillikin filed a Petition of Appeal with the Commissioner of Education. On August 13, 2010, the Board filed a Verified Answer. On August 16, 2010, the Bureau of Controversies and Disputes (Bureau) of the Department of Education (Department) transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on August 31, 2010. The parties filed a Joint Stipulation of Facts and Documents and cross-motions for summary decision. Oral argument was heard on June 16, 2011, on which date the record closed.

STIPULATIONS OF FACT

Gillikin has held a standard instructional certificate in New Jersey with an "Elementary School Teacher" endorsement since May 2001, and a "Teacher of Italian" endorsement since September 2002. (J-1; J-2.)

Gillikin was continuously employed by the Board as a Teacher of Italian from September 18, 2002, through June 30, 2010, as follows:

a) 09/18/2002–2003, full-time Teacher of Italian, grades 1–5;
b) 2003–2004, full-time Teacher of Italian, grades 2–6;
c) 2004–2005, full-time Teacher of Italian, grades 2–6;
d) 2005–2006, full-time Teacher of Italian, grades 2–6;
e) 2006–2007, full-time Teacher of Italian, grades 2–6;
f) 2007–2008, full-time Teacher of Italian, grades 1–5;
g) 2008–2009, full-time Teacher of Italian, grades 1–5;
h) 2009–2010, full-time Teacher of Italian, grades 1–5.

By virtue of her term of service with the Board, petitioner achieved tenure in the Garfield School District (District) pursuant to N.J.S.A. 18A:28-5.

On May 12, 2010, the Board met in a special public session. During the special public session, the Board considered multiple resolutions, including Resolution #05-418-10, to abolish three positions of full-time Teacher of Italian for economic reasons, effective July 1, 2010, and Resolution #05-440-10, to dismiss Gillikin, as a result of the abolishment of the position of Teacher of Italian, and to place her on a preferred eligible recall list. (J-3.) By a recorded roll-call vote of 8-0 (with one member absent), the Board voted not to adopt the consent agenda of personnel actions. (J-3.)

By letter dated May 14, 2010, from the superintendent of schools, Gillikin was advised that the full-time positions of "Italian Teacher Elementary" would be abolished for economic reasons, effective July 1, 2010, and that she was dismissed from the position of "Teacher of Italian" and placed on the preferred eligible recall list for the category of "Italian Teacher Elementary," effective July 1, 2010. (J-4.)

Petitioner was not employed by the Board for the 2010–2011 school year. The Board did not adopt a resolution to abolish a Teacher of Italian or to terminate Gillikin's employment, and the Board continues to employ full-time nontenured teachers in positions requiring an endorsement as a Teacher of Elementary School for the 2010–2011 school year, in grades K–5. The Board did not employ petitioner in place of one of the full-time nontenured elementary school teachers.

The Board has not employed anyone to teach Italian in its elementary grades for 2010–2011. Petitioner is less senior as a Teacher of Italian than any Teacher of Italian employed in the District's secondary grades.

For the 2009–2010 school year, Gillikin's wages were $51,384. (J-5.) If Gillikin had been employed by the Board for the 2010–2011 school year her gross salary would have been $54,706. She has been maintaining her family's health insurance coverage since September 1, 2010, by payment of $1,174.70 per month for medical insurance and by payment of $1,908.64 every four months for dental and prescription coverage pursuant to her rights under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). (J-5; J-6.)

LEGAL ANALYSIS AND CONCLUSION

Gillikin argues that her tenure in Garfield extends to her Elementary School Teacher endorsement, and that Gillikin was illegally terminated because no resolution was adopted by the Board to abolish her position or to dismiss her from its employ. Conversely, the Board argues that Gillikin was not entitled to an elementary education position in the District after the abolishment of the elementary World Language Program.

Tenure and Seniority

Tenure of educational personnel is authorized by the Tenure Act, N.J.S.A. 18A:28-1 to -18. An employee of a board of education is entitled to tenure if the employee (1) works in a position for which a teaching certificate is required; (2) holds the appropriate certificate; and (3) has served the requisite period of time. Spiewak v. Bd. of Educ., 90 N.J. 63, 74 (1982); N.J.S.A. 18A:28-5. Teaching staff members 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 and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of Title 18A. N.J.S.A. 18A:28-5; Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962).

Pursuant to N.J.S.A. 18A:26-2, any person employed as a teaching staff member by a district board of education shall hold a valid and appropriate certificate. N.J.A.C. 6A:9-5.1(a). The Board of Examiners issues three categories of educational certificates: Instructional, Administrative and Educational Services. N.J.A.C. 6A:9-5.2. Additionally, the State Board has designated "special endorsements" under each type of certificate, which identify the educational subjects or assignments that share common traits. Nelson v. Old Bridge Bd. of Educ., 148 N.J. 358, 363 (1997). "Endorsement" means the specific subject area in which a certificate holder is authorized to serve. N.J.A.C. 6A:9-2.1.

In Dennery v. Passaic County Regional High School District #1 Board of Education, 131 N.J. 626, 634 (1993), the Supreme Court opined that a tenured staff member may not be subject to a reduction in force if a nontenured person has been retained in a position within the scope of the tenured staff member's certificate:

> To acquire a particular certificate and endorsement, an educator is also required to fulfill certain academic requirements. N.J.A.C. 6:11-5.1 to 5.2. Those most often include the completion of coursework or the acquisition of a relevant higher degree. On the satisfactory completion of all requirements, the Division of Teacher Preparation and Certification will certify the educator. N.J.A.C. 6:11-3.19.
>
> 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. Ellicott v. Board of Educ., 251 N.J. Super. 342, 349, 598 A.2d 237 (App. Div. 1991). Tenure under any one endorsement entitles an educator to tenure under all endorsements obtained under his or her certificate. Id. at 350, 598 A.2d 237; Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239, 534 A.2d 93 (App. Div. 1987) (holding that tenured teacher with instructional certificate and endorsement in art also entitled to tenured post requiring secondary art endorsement), certif. denied, 110 N.J. 512, 541 A.2d 1371 (1988); Capodilupo v. West Orange Township Bd. of Ed., 218 N.J. Super. 510, 528 A.2d 73 (App. Div.) (holding that teacher with both elementary and secondary physical education endorsements was tenured under both endorsements), certif. denied, 109 N.J. 514, 537 A.2d 1300 (1987); Grosso v. Board of Educ., 1990 S.L.D. 1750.

The Board argues that Capodilupo v. West Orange Township Board of Education, 218 N.J. Super. 510 (App. Div.), certif. denied, 109 N.J. 514 (1987), is distinguishable because Capodilupo had certificates in elementary physical education and secondary physical education, and though he had not taught elementary education, he taught secondary physical education, while Gillikin has taught only Italian and would be teaching all elementary education subjects without any prior training, knowledge or experience in teaching reading, writing, spelling, science, math, or other subjects within the elementary education curriculum. Citing dicta in Capodilupo, the Board argues that allowing petitioner to take the position of a nontenured elementary school teacher would

violate public policy, proposed tenure reforms, and the requirements to provide a thorough and efficient education, and that it would be detrimental to the needs of the District's students. The Board argues that it was educationally appropriate to retain the nontenured teacher over Gillikin. However, this same argument was addressed by the Appellate Division in Ellicott v. Frankford Township Board of Education, 251 N.J. Super. 342, 351 (App. Div. 1991):

> Lastly, the Local Board argues even if petitioner had tenure entitlement to the LDTC position, it had "sound educationally-based reasons" for its decision to employ a nontenured person rather than petitioner. In Capodilupo, we observed in dictum that:
>
> > We recognize that, in upholding the [Local] Board's decision to retain [a nontenured teacher], the State Board also made a finding that the Board's obligation to consider tenure in a RIF could be balanced by "sound educationally based reasons for its decision to retain a non-tenured teacher."
>
> 218 N.J. Super. at 515–16, 528 A.2d 73. However, we found it "both unnecessary and inappropriate" to address the merits of this portion of the State Board's opinion because the Local Board had advanced "no educationally based reasons" to retain the nontenured teacher, beyond his experience, as an elementary teacher. Id. at 516, 528 A.2d 73.
>
> We now question whether, at least in the context before us, there can be any "sound educationally based reasons" for retaining a nontenured over a tenured teaching staff member in the event of a RIF, once the statutory right to tenure is fixed. Indeed, in Bednar, the State Board had concluded that tenure did not permit a teacher to claim an assignment in a job category against a nontenured teacher who had seniority in that category. 221 N.J. Super. at 242, 534 A.2d 93. We held that while the State Board's approach may or may not represent "sound educational policy," it erodes tenure rights "which appear plain on the face of the statute, which we are bound to recognize and which can be removed only by the Legislature." Id. at 243, 534 A.2d 93.

Additionally, in Bednar, the court opined that seniority does not purport to create employment rights for nontenured employees, and that Chapter 28 surely does not contemplate use of the concept of seniority to justify retaining a nontenured teacher in a position within the certificate of a dismissed tenured teacher. Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239, 242 (App. Div. 1987) (citing Capodilupo). The court continued that N.J.S.A. 18A:28-10 declares only the rights inter sese of tenured teachers in a RIF, among whom seniority is determinative, but the statute does not authorize regulatory dilution of tenure rights by affording a nontenured teacher "seniority." Id. at 243.

Additionally, in Grosso v. Board of Education, 1990 S.L.D. 1750 (State Board of Education), appeal dismissed, Nos. A-4359-89T5 and A-4360-89T5 (App. Div. 1990), the Commissioner of Education agreed that the petitioner had achieved tenure as a "teacher" by virtue of his service teaching business education for the requisite period of time under N.J.S.A. 10A:28-6, and that the scope of his tenure protection extended to all of the endorsements on his instructional certification. The Commissioner concluded that since the petitioner was authorized and qualified to serve as an elementary teacher by virtue of his elementary education certification, under N.J.A.C. 6:11-6.2(a)(6), he had entitlement as a result of his tenure status to employment as an elementary teacher as against nontenured individuals, regardless of whether he had previously served under that endorsement.

Gillikin was employed as a Teacher of Italian in the District for the equivalent of more than three academic years within a period of four consecutive academic years, and the parties stipulated that Gillikin acquired tenure pursuant to N.J.S.A. 18A:28-5. Petitioner has attained tenure both under her Elementary School Teacher endorsement and her Teacher of Italian endorsement. The standards for determining seniority are set forth in N.J.A.C. 6A:32-5.1. Seniority, pursuant to N.J.S.A. 18A:29-9 et seq., is 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. N.J.A.C. 6A:32-5.1. One such category is "elementary," which provides, in pertinent part, that any person employed at the elementary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire

seniority only in the elementary category and only for the period of actual service under such educational services certificate or special subject field endorsement. N.J.A.C. 6A:32-5.1(*l*)(18)(ii). In the present matter, petitioner does not dispute that her "seniority" is limited to the subject area and grade levels she actually taught, nor does she dispute that she does not have sufficient seniority to claim a position as Teacher of Italian from the tenured teachers currently employed as such in the secondary grades in the District. However, the District does not dispute that it has retained nontenured elementary school teachers. Thus, based upon applicable case law, I **CONCLUDE** that Gillikin's tenure rights extend to her endorsement as Elementary School Teacher and required her full-time employment in place of a nontenured elementary teacher for the 2010–2011 school year.

Termination

Nothing in Title 18A 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. N.J.S.A. 18A:28-9. A local board of education has the authority to reduce its teaching force as long as that reduction is for reasons of economy. Impey v. Shrewsbury Bd. of Educ., 142 N.J. 388, 398–99 (1995); Klinger v. Cranbury Bd. of Educ., 190 N.J. Super. 354, 357 (App. Div. 1982), certif. denied, 93 N.J. 277 (1983); Maywood Bd. of Educ. v. Maywood Educ. Ass'n, 168 N.J. Super. 45, 55 (App. Div.), certif. denied, 81 N.J. 292 (1979). Dismissals resulting from any such reduction 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.

N.J.S.A. 18A:27-4.1 sets forth the procedure for certain personnel actions 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.
>
> 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 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 nontenured officer or employee who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed. Prior to notifying the officer or employee of the nonrenewal, the chief school administrator 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 pursuant to section 2 of P.L.1975, c.132 (C.18A:27-3.2) 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 chief school administrator shall notify the officer or employee of the nonrenewal pursuant, where applicable, to the provisions of section 1 of P.L.1971, c.436 (C.18A:27-10).
>
> c. The provisions of this section shall not apply to the appointment, transfer, removal, renewal or nonrenewal of a person who is a treasurer of school moneys, election officer, board auditor, board attorney or board secretary, except a board secretary who performs business administration functions.

Gillikin was a tenured employee. Accordingly, removal of a certificated employee may only be made upon the recommendation of the chief school administrator and by a recorded roll-call majority vote of the full membership of the Board. It is not disputed

that the roll-call majority vote of the full membership of the Board voted not to adopt the resolution abolishing the position of Teacher of Italian and dismissing Gillikin from her employment. Nevertheless, the Board argues that as a result of the recent financial crisis and lack of funding to New Jersey school districts, the World Language Program in the District's elementary school was abolished, and that the District had the authority to employ a reduction in force in order to comply with the 2010–2011 budget that was approved by the Bergen County executive superintendent. Although no certification or affidavit was submitted, the Board argues that during the April 2010 school election, the City of Garfield voted not to accept the proposed budget, but with limited State aid and tax revenue, reductions in force were necessary for reasons of economy, and that the executive county superintendent allowed the passing of the proposed budget, as was submitted to the Board prior to the election date, which budget included the elimination of the World Language Program. Thus, the Board argues that the World Language Program was terminated in accordance with the budget for the 2010–2011 school year that was struck by the executive county superintendent. Petitioner argues that the introduction of a letter dated March 29, 2010, from the county executive superintendent to the Board president is contrary to N.J.A.C. 1:1-12.4(a), as no affidavit or certification was submitted in connection with the letter. Petitioner further argues that the letter only refers to the Board's failure to approve a FY11 preliminary budget at its March 22, 2010, meeting, and that the Board's claim that the budget required elimination of the World Language Program has no basis in fact, as it was likewise unsupported by an affidavit or certification.

The Board's arguments that the budget was passed and thereby eliminated the World Language Program may have raised an issue of fact if supported by an affidavit or certification. However, even if petitioner's position was legally terminated pursuant to a reduction in force, it does not change that case law provides that Gillikin should have been retained as an elementary teacher based upon tenure law. As such, an issue of fact as to whether or not Gillikin's position was ever legally terminated pursuant to N.J.S.A. 18A:27-4.1(a) is not a material issue.

Summary Decision

Applications for summary decision after a matter has been transmitted to the Office of Administrative Law shall be filed with the Administrative Law Judge (ALJ) in accordance with applicable rules of the OAL. N.J.A.C. 6A:3-1.12(b). 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. 63 (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.

Initially, the parties cross-moved for summary decision. The District subsequently argued in its reply that the matter was not ripe for summary decision because the Board must be permitted to produce through testimony the reasoning and justification for Gillikin not having been assigned to an elementary education classroom. However, in order for Gillikin to have acquired the "Elementary School Teacher" endorsement, she would have been required to fulfill certain academic requirements, and would have been certified only upon satisfactory completion of all requirements. Further, the case law provides that tenure rights may not be diluted by affording a nontenured teacher "seniority," and further provides that arguments of "sound educational policy" erode tenure rights conferred by statute which can be removed only by the Legislature. Thus,

based upon the foregoing, there is no genuine issue as to any material fact challenged, and I **CONCLUDE** that this matter is appropriate for summary decision.

Based upon the totality of the facts and circumstances, I **CONCLUDE** that petitioner should be reinstated as a full-time employee; she should be compensated for monetary damages, including loss of salary and medical, dental and prescription insurance coverage; and her seniority rights and pension credit should be restored.

ORDER

It is hereby **ORDERED** that summary decision is **GRANTED** in favor of the petitioner, and that respondent shall reinstate petitioner as a full-time employee; reimburse petitioner within sixty days of the effective date of this decision for her lost salary and the payments she made for medical, dental and prescription insurance coverage; and restore petitioner's seniority rights and contributions to the pension fund and Social Security for the period in question.

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.

9/1/11
DATE

Kelly J. Kirk
KELLY J. KIRK, ALJ

Date Received at Agency: September 1, 2011 db

Date Mailed to Parties:

db

EXHIBITS

Joint

J-1 Joint Stipulation of Facts

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 21, 2011

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 October 20, 2011 Order of the Commissioner of Education finding that Tyrone and Raqia Crawley are subject to entry of a judgment on the docket of the court due to their failure to pay the tuition assessment ordered in the matter of *Board of Education of the Township of Burlington, Burlington County v. T.C. and R.C.* By copy of this letter, I am advising Tyrone and Rawia Crawley, as well as counsel for the Township of Burlington 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,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes
MKD/MH
Enclosure
c: Tyrone and Rawia Crawley, *Pro Se* (with copy of Order)
52 Bolton Lane
Willingboro, New Jersey 08046
David M. Serlin, Esq. (with copy of Order)
Jones Addo (with copy of Order) ✓

AGENCY DKT. NO. 126-5/11

BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	ORDER
V.	:	
T.C. AND R.C.,	:	
RESPONDENTS.	:	

On July 22, 2011, a final agency decision was rendered in this matter, wherein the Commissioner granted summary decision to the Board on its complaint seeking reimbursement from respondents T.C. and R.C. of the costs of tuition pertinent to the period of ineligible attendance of their child, Y.C., in its schools during the 2010-11 school year. Respondents had been directed to submit an answer to the Board's complaint and were informed that if no answer was submitted, each count of the complaint would be deemed admitted and the matter could then be decided on a summary basis. As no answer was subsequently submitted, the Commissioner granted summary decision in favor of the Board, and ordered respondents to remit to the Board tuition in the amount of $7,527.80 for the 140 days that Y.C. attended school in the District during the 1010-11 school year. The Board subsequently notified the Commissioner that the respondents had failed to comply with his 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. Respondents offered no reasons why the judgment against them 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, Tyrone and Raqia Crawley are now subject to entry of a judgment by the court in the amount of $7,527.80, which represents the payment ordered at the conclusion of the contested case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/20/11

Date of Mailing: 10/21/11

#442-11

OAL DKT. NO. EDU 9-10
AGENCY DKT. NO. 354-12/09

IN THE MATTER OF THE TENURE	:	
HEARING OF KERRI POTTER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP OF	:	DECISION
LITTLE EGG HARBOR, OCEAN COUNTY.	:	

The record of this matter, the parties' proposed Settlement 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, 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 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: 10/21/11
Date of Mailing: 10/21/11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9-10
AGENCY DKT. NO. 354-12/09

IN THE MATTER OF THE TENURE HEARING OF KERRI POTTER, SCHOOL DISTRICT OF THE TOWNSHIP LITTLE EGG HARBOR.

Joseph D. Coronato, Esq., for the petitioner, School District of the Township Little Egg Harbor (Coronato, Brady & Kunz, attorneys)

William F. Koy, Esq., for respondent Kerri Potter

Record Closed: September 9, 2011 Decided: September 12, 2011

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

STATEMENT OF THE CASE

Petitioner, Board of Education of the School District of the Township Little Egg Harbor ("District"), brings charges of incapacity, insubordination and unbecoming conduct against respondent, Kerri Potter, a tenured employee holding the position of intermediate schoolteacher. Petitioner alleges that respondent is guilty of incapacity, in that she was excessively absent during the 2007-2008 and 2008-2009 school years; insubordination, in that she failed to comply with the board directive to be re-evaluated

by Dr. Theodore Zalesky within the two week period required; and unbecoming conduct, in that she attended her duties under the influence of narcotic controlled dangerous substances in the presence of minor children in the district, thereby jeopardizing their safety and security. Petitioner has certified these charges under the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10-18.1. This matter was transmitted to the Office of Administrative Law on January 5, 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.

Prior to commencing a hearing, the parties engaged in discussions in an effort to resolve the matter amicably. The parties reached a settlement of the matter, and the settlement has been reviewed and approved by their respective clients.

On September 9, 2011, the parties submitted the fully executed Settlement Agreement accompanied by an original resolution of the Board of Education of the Township of Little Egg Harbor adopted on August 15, 2011, authorizing the execution of the Settlement Agreement. The Settlement Agreement is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I make the following **FINDINGS**:

1. N.J.A.C. 6A:3-5.6(a) provides that once tenure charges are certified to the Commissioner, such charges may be withdrawn or settled only with the Commissioner's approval, and that any proposed withdrawal or settlement, whether submitted to the Commissioner or to the ALJ, shall address the standards established in In re Cardonick, 1990 S.L.D. 842, 846 (State Board decision, April 6, 1983). N.J.A.C. 6A:3-5.6(a) further provides that any proposed withdrawal or settlement be accompanied by documentation as to the nature of the charges, explain the circumstances justifying settlement or withdrawal, be consented to by both the charged and charging parties, indicate that the charged party entered into the agreement with a full understanding of his or her rights, and contain a showing that the agreement is in the public interest. In addition, where the charged party is a teaching staff member, the documentation must

show 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. After a careful review of the Settlement Agreement, I **FIND** that it fully complies with the foregoing requirements. I specifically **FIND** that Kerri Potter has agreed to this settlement with a full understanding of her rights, and that Kerri Potter was advised of the Commissioner's duty to refer tenure determinations to the State Board of Examiners for possible revocation of any certificates held by her. I also **FIND** that it is in the public interest to conclude this matter in the manner agreed to by the parties for the following reasons: Kerri Potter had previously been involved in a serious car accident, which accident caused residual pain and injuries requiring the use of painkilling drugs. The painkilling drugs were not taken in the presence of the classroom children, and there is no indication that Potter's teaching was negatively impacted by the use of the pain killers. Potter made several attempts to return to teaching but was unable to do so. Potter agreed to drug testing, and there were no positive findings. There was no negative impact on the children in her class. It is anticipated that the hearing in this matter would be protracted and costly. If the tenure matter proceeds to hearing, both parties would incur costs of paying their attorneys for a likely lengthy hearing. 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 incidents which led to the filing of the tenure charges against an employee who has resigned her teaching position.

2. N.J.A.C. 6A:3-5.6(b) provides that where tenure charges have been certified to the Commissioner by a district board of education, any proposed settlement shall indicate, by signature of the board attorney or inclusion of a district board of education resolution authorizing settlement, that the district board of education has consented to the terms of the settlement. I **FIND** that the submitted Settlement Agreement is signed by the board attorney and is accompanied by resolution of the Board of Education of the Township of Little

Egg Harbor authorizing the board attorney to enter into the Settlement Agreement.

3. I **FIND** that the settlement is with the consent of all parties and that the parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

4. I **FIND** that the settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that the terms of the agreement are in the public interest, the agreement meets the requirements of N.J.A.C. 1:1-19.1, and 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 12, 2011
DATE

EDWARD J. DELANOY, JR., ALJ

Date Received at Agency: SEP 14 2011

Date Mailed to Parties: SEP 14 2011

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2011 SEP -6 P 3:14
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

CORONATO, BRADY & KUNZ, P.C.
12 MADISON AVENUE
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TOMS RIVER, NEW JERSEY 08754-4990 (732) 240-4600
Attorneys for Little Egg Harbor Board of Education

OFFICE OF ADMINISTRATIVE LAW
DOCKET NO. EDU 9-10

IN THE MATTER OF THE TENURE HEARING OF KERRI POTTER.

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (hereinafter referred to as the "Agreement") is made effective as of August 15, 2011, by and between the Petitioner Board of Education of Little Egg Harbor Township, Ocean County, New Jersey (hereinafter referred to as the "Board") and the Respondent, Kerri A. Potter (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 Township of Little Egg Harbor School District in Ocean County, New Jersey; and

WHEREAS, the Respondent was employed by the Board as a tenured teacher; and

WHEREAS, the Board filed certain charges against the Respondent alleging incapacity, insubordination and unbecoming conduct, said charges more specifically contained in a Statement of Charges filed by the Board on or about October 7, 2009

(attached hereto as Exhibit A); and

WHEREAS, the Respondent, by formal Answer (attached hereto as Exhibit B), denied the charges contained in the Statement of Charges and further denied that such charges contained in the Statement of Charges, if proven, would constitute unbecoming conduct sufficient to warrant Respondent's removal from her tenured position; 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 Edward J. Delanoy, Jr., A.L.J.; and

WHEREAS, the Respondent filed a Motion for Summary judgment requesting dismissal of the charges. On May 3, 2010, the Honorable Edward J. Delanoy, Jr., A.L.J., denied the Respondent's Motion.

WHEREAS, miscellaneous telephone/status conferences were held on 08/30/10, 10/21/10, 11/03/10, 11/15/10, 12/01/10 01/05/11, 01/07/11, 01/13/11, 01/18/11, 01/25/11, 02/02/11.

WHEREAS, a settlement conference was held in this matter on December 7, 2010.

WHEREAS, the parties wish to settle all controversies among and between them, including the charges contained in the Statement of 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 of the Respondent;

WHEREAS, the parties acknowledge that the merits of the controversy are in dispute and that neither the Board nor the Respondent admits any liability to either, but both have reasons to desire a resolution of the matter, and have freely and impartially agreed to resolve same; and

WHEREAS, the Board believes that, based on the Respondent's medical condition, the Board may have insufficient proofs to sustain the charge as set forth.

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, the parties agree as follows:

1. **DIMISSAL OF ACTION.**

(a) The Respondent will submit a letter of resignation by January, 2011, effective as of September 1, 2011.

(b) The Respondent's medical coverage will cease on October 1, 2011.

(c) The Respondent's salary shall cease on June 30, 2011.

(d) The Respondent shall be entitled to an additional payment of $15,500, which will be paid on July 15th, 2011 and August 15th, 2011 ($7,750 for each month). A 1099 form will be issued for this payment.

(e) The Petitioner shall execute a letter of reference for the Respondent and the contents of the letter shall be mutually agreed upon between the parties.

(f) The Board discussed the proposed settlement at its December 20th meeting, at which time the Board approved the settlement. The Board shall authorize in a resolution that the Board President shall execute the Consent Order of Settlement and the Board Secretary shall attest to same.

(g) The Respondent shall execute a release in favor of the Board for all legal issues arising out her employment by the Board.

(h) The parties and their counsel, shall execute a Stipulation of Dismissal in the civil law suit filed in Ocean County, entitled *Potter v. Little Egg Harbor Board of Education*, bearing Docket No. OCN L-722-10 and release the Little Egg Harbor Board of Education for all issues arising out of an Office of Administrative Law action bearing Docket No. EDU 9-10.

(i) Upon the approval of the Commissioner of Education of this Agreement, the Board will withdraw and dismiss the Statement of Charges and the Respondent's resignation will be effective September 1, 2011, and the Board's letter of reference will become operative.

2. **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 or 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 Agreement including, but not limited to, any events related to, arising from or in connection with Respondent's employment with the Board or the Statement of 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 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 charges or complaint in her own behalf, to participate as a complainant, a plaintiff or a charging party in any charges or complaint, or to collect damages as a result of any charges 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

Agreement, before any federal, state or local court or administrative agency against the Board except as such waiver is prohibited by law.

4. **ATTORNEYS' FEES.** The parties agree 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 Agreement.

5. **NO ADMISSION OF LIABILITY.** It is expressly understood that neither the execution of this 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 lack thereof.

6. **ENTIRE AGREEMENT.** This Agreement contains the sole and entire Agreement between the parties hereto. Each party represents and acknowledges that, prior to executing this 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 Agreement made by any other party hereto, or their counsel or representatives, with regard to the subject matter of this 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 ratifying this agreement and authorizing the Board's signatory to sign this Agreement on its behalf.

8. **COMMISSIONER'S APPROVAL.** It is expressly understood that this Settlement Agreement, and the settlement pursuant to the terms above must first be approved by the Commissioner of Education and must meet the following standard as enumerated in *N.J.A.C.* 6A:3-5.6(a):

(a) Accompaniment by documentation as to the nature of the charges (see Exhibits A and B).

(b) Explication of the circumstances justifying settlement or withdrawal: The parties acknowledge the seriousness of the charges. The Board represents and asserts that a withdrawal of the Statement of Charges is appropriate. The Board acknowledges that the Respondent was involved in a serious automobile accident which caused pain and, thereafter, residual pain. The Respondent made several attempts to return to teaching but was unable to do so. Despite the numerous absences, the Board had employed substitute teachers. Respondent did consume pain medication and did agree to drug testing, and with no positive findings and there has been no negative impact on the students. There are no proofs that pain medication was taken in front of children. The Respondent has agreed to submit her resignation to the Board. The Board believes that it is in the public interest not to proceed in this matter and the proofs are insufficient as they relate to Respondent's medical condition as to not warrant the charges as set forth.

(c) Consent of both the charged and charging parties is evidenced by this Agreement.

(d) Indication that the Respondent entered into this Agreement with a full understanding of her rights is evidence by this Agreement.

(e) A showing that the Agreement is in the public interest as evidence by this Agreement, the separation of the parties, the cost associated thereto by the public which is significantly less than the cost associated with prosecuting the Statement of Charges.

(f) The proof are such, in light of the Respondent's medical condition, that it is in the best interest of the parties to resolve same.

9. **NON DISCLOSURE.** Except as may be otherwise required by the Board pursuant to the *Open Public Records Act* and/or *Open Public Meeting Act,* as 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 copy of this Settlement Agreement.

IN WITNESS WHEREOF, the parties have set their hands and seals as of the day and year first written.

CORONATO, BRADY & KUNZ, P.C.

Joseph D. Coronato, Esq.
Attorney for Petitioner

Dated: 8/16/11

LAW OFFICES OF WILLIAM F. KOY,

William F. Koy, Esq.
Attorney for Respondent

Dated: 8/26/11

Kerri A. Potter, Respondent

Dated: 8/26/11

EXHIBIT A

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2011 SEP -9 P 1:21
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

AGENCY DKT. NO.
OAL DKT. NO.

IN THE MATTER OF THE TENURE HEARING OF KERRI A. POTTER, BOARD OF EDUCATION OF THE TOWNSHIP OF LITTLE EGG HARBOR, OCEAN COUNTY.	:	COMMISSIONER OF EDUCATION CHARGES

TO: LITTLE EGG HARBOR BOARD OF EDUCATION
307 FROG POND ROAD
LITTLE EGG HARBOR, NJ 08087

In accordance with NJSA 18A:6-11 and NJSA 18A:6-14, you are requested to consider the following charges brought against a tenured staff member, Kerri A. Potter for the following reasons:

I. IN CAPACITY, in that she was excessively absent during the 2007-2008 and 2008-2009 school years.

II. INSUBORDINATION, in that she failed to comply with a board directive to be re-evaluated by Dr. Theodore Zaleski within the two-week period required.

III. UNBECOMING CONDUCT, in that she attended her duties under the influence of narcotic controlled dangerous substances in the presence of minor children in the district, jeopardizing their safety and security.

In support of the foregoing charges, attached is the certification of Paul J. Carr, Esq., Attorney for the Little Egg Harbor School District.

Respectfully submitted,

Paul J. Carr, Esq.
Board Attorney

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

AGENCY DKT. NO.
OAL DKT. NO.

IN THE MATTER OF THE TENURE HEARING	:	
OF KERRI A. POTTER, BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF LITTLE EGG HARBOR,	:	CERTIFICATION
OCEAN COUNTY.	:	
	:	

TO: LITTLE EGG HARBOR BOARD OF EDUCATION
307 FROG POND ROAD
LITTLE EGG HARBOR, NJ 08087

I, Paul J. Carr, Esq., Attorney for the Little Egg Harbor Board of Education hereby certify as follows:

1. I am an Attorney at Law in the State of New Jersey representing the Little Egg Harbor Board of Education and I am fully familiar with the facts herein.

2. Kerri A. Potter is a staff member employed by the Little Egg Harbor Board of Education holding tenure and is so during all the times mentioned herein.

3. Kerry A. Potter was assigned to teach the 5th grade in a class support program at the Little Egg Harbor Intermediate School with Lori Zettlemoyer, a staff member employed by the Little Egg Harbor Board of Education in the 2008-2009 school year.

4. On or about September, 2009 the parents of a classified student complained to Kerri A. Potter's case manager. The student's mother complained that he was coming home depressed daily and did not want to return to school. He complained that Ms. Potter yelled and screamed all day.

5. Subsequent to this occurrence, the case manager referred the student's mother to the district administration.

6. The student's mother decided to wait until Back-to-School Night to discuss the issues with Ms. Potter.

7. The student's mother attended Back-to-School Night and reported that Ms. Potter appeared, in her words, "spaced out." When the parent and her husband tried to speak to Ms. Potter, they reported that she was unable to follow the conversation, she shuffled through papers while they were speaking, and she did not appear to be coherent of anything they were saying.

8. After the meeting at Back-to-School Night, the student's mother scheduled an appointment with Building Principal Troy Henderson to discuss the problem. Her son was still depressed and still complaining about the yelling. She reported that Ms. Potter would yell at the students for not putting

papers where they were supposed to put them and then both the students and Ms. Zettlemoyer would go to the basket to look for the papers and they would be there.

9. Mrs. Hudak, another staff member reported to the administration that several other parents started complaining about Ms. Potter and the situation was becoming uncontrollable.

10. Subsequent to the parental complaints, Ms. Potter went on leave and Mrs. Cuisamano was assigned to take her place. The student's mother reported that once again, her son was a happy and enthusiastic student.

11. As a result of learning of the foregoing conduct by Kerri A. Potter, the Superintendant of Schools, Dr. Frank Kasyan, in consultation with the school board president and the school board attorney placed Ms. Potter on administrative leave with pay and required her to undergo an evaluation by a physician to be determined by the administration at the school board's expense.

12. On or about January 8, 2009 Dr. Theodore G. Zaleski, M.D., F.A.C.S. conducted an initial evaluation and concluded within a reasonable degree of medical certainty that Ms. Potter's condition will not spontaneously improve to an acceptable degree, and that given her continuing symptoms, she will require continued use of potent narcotic analgesics for pain control, as well as further diagnostic evaluation and treatment which would result in additional time away from her job. A copy of Dr. Zaleski's report dated January 8, 2009 is included herein.

13. Subsequent to Dr. Zaleski's opinion, an agreement was reached between Richard Friedman, Esq., Ms. Potter's then attorney, whom she subsequently released in favor of her current attorney, William F. Koy, Sr., and the administration, wherein she would be reevaluated in 120 days and would not be able to return to the district as a staff member until she underwent blood and urine screening in addition to a psychiatric evaluation.

14. On or about July 17, 2009, Dr. Zaleski performed a reevaluation of Ms. Potter and concluded within a reasonable degree of medical certainty that Ms. Potter's condition will not spontaneously improve to the extent that she can perform the duties required of a teacher. Furthermore, her condition is such that reasonable accommodations will not render her capable of performing those duties. Because of her continuing symptoms, she still requires continued use of potent narcotic analgesics for pain control. A copy of Dr. Zaleski's report dated July 17, 2009 is enclosed.

15. Ms. Potter attended her duties as a teacher of minor children while under the influence of narcotic controlled dangerous substances. This presented a clear and present danger to herself and to the students she was responsible for.

16. Ms. Potter failed to comply with the directive of the administration to perform a reevaluation within the 120 days of the initial evaluation and she further failed to undergo a psychiatric evaluation and blood and urine testing within the time required by the administration.

17. The foregoing conduct on the part of Ms. Potter constitutes insubordination.

18. During Ms. Potter's 2006-2007 school year, she missed 183 days of school. During Ms. Potter's 2007-2008 school year, she missed 164 days. During the 2008-2009 school year, Ms. Potter missed 120 days of school. A copy of Ms. Potter's attendance records is enclosed.

19. Paragraph 18 above constituted incapacity on the part of Ms. Potter.

20. The conduct on the part of Ms. Potter in attending her responsibilities while under the influence of narcotic controlled dangerous substances in the presence of minor children, jeopardizing their safety and security, constitutes unbecoming conduct.

It is respectfully requested that the Little Egg Harbor Board of Education consider this supporting certification in determining whether to certify charges for tenure dismissal of Kerry A. Potter.

Respectfully submitted,

_____

Paul J. Carr, Esq.
Board Attorney

Kasyan copy

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

AGENCY DKT. NO.
OAL DKT. NO.

IN THE MATTER OF THE TENURE HEARING	:	
OF KERRI A. POTTER, BOARD OF EDUCATION	:	COMMISSIONER OF EDUCATION
OF THE TOWNSHIP OF LITTLE EGG HARBOR,	:	SWORN STATEMTENT IN
OCEAN COUNTY.	:	SUPPORT OF CHARGES
	:	

TO: Commissioner of Education
State of New Jersey
100 River View Plaza
P.O. Box 500
Trenton, NJ 08625

Dr. Frank Kasyan, of full age, being duly sworn, deposes and says:

1. I am the chief school administrator of the Little Egg Harbor School District and I am fully familiar with the facts herein.

2. Kerri A. Potter is a staff member employed by the Little Egg Harbor Board of Education holding tenure and is so during all the times mentioned herein.

3. Kerry A. Potter was assigned to teach the 5th grade in a class support program at the Little Egg Harbor Intermediate School with Lori Zettlemoyer, a staff member employed by the Little Egg Harbor Board of Education in the 2008-2009 school year.

4. On or about September, 2009 the parents of a classified student complained to Kerri A. Potter's case manager. The student's mother complained that he was coming home depressed daily and did not want to return to school. He complained that Ms. Potter yelled and screamed all day.

5. Subsequent to this occurrence, the case manager referred the student's mother to the district administration.

6. The student's mother decided to wait until Back-to-School Night to discuss the issues with Ms. Potter.

7. The student's mother attended Back-to-School Night and reported that Ms. Potter appeared, in her words, "spaced out." When the parent and her husband tried to speak to Ms. Potter, they reported that she was unable to follow the conversation, she shuffled through papers while they were speaking, and she did not appear to be coherent of anything they were saying.

8. After the meeting at Back-to-School Night, the student's mother scheduled an appointment with Building Principal Troy Henderson to discuss the problem. Her son was still depressed and still complaining about the yelling. She reported that Ms. Potter would yell at the students for not putting papers where they were supposed to put them and then both the students and Ms. Zettlemoyer would go to the basket to look for the papers and they would be there.

9. Mrs. Hudak, another staff member reported to the administration that several other parents started complaining about Ms. Potter and the situation was becoming uncontrollable.

10. Subsequent to the parental complaints, Ms. Potter went on leave and Mrs. Cuisamano was assigned to take her place. The student's mother reported that once again, her son was a happy and enthusiastic student.

11. As a result of learning of the foregoing conduct by Kerri A. Potter, the Superintendant of Schools, Dr. Frank Kasyan, in consultation with the school board president and the school board attorney placed Ms. Potter on administrative leave with pay and required her to undergo an evaluation by a physician to be determined by the administration at the school board's expense.

12. On or about January 8, 2009 Dr. Theodore G. Zaleski, M.D., F.A.C.S. conducted an initial evaluation and concluded within a reasonable degree of medical certainty that Ms. Potter's condition will not spontaneously improve to an acceptable degree, and that given her continuing symptoms, she will require continued use of potent narcotic analgesics for pain control, as well as further diagnostic evaluation and treatment which would result in additional time away from her job. A copy of Dr. Zaleski's report dated January 8, 2009 is included herein.

13. Subsequent to Dr. Zaleski's opinion, an agreement was reached between Richard Friedman, Esq., Ms. Potter's then attorney, whom she subsequently released in favor of her current attorney, William F. Koy, Sr., and the administration, wherein she would be reevaluated in 120 days and would not be able to return to the district as a staff member until she underwent blood and urine screening in addition to a psychiatric evaluation.

14. On or about July 17, 2009, Dr. Zaleski performed a reevaluation of Ms. Potter and concluded within a reasonable degree of medical certainty that Ms. Potter's condition will not spontaneously improve to the extent that she can perform the duties required of a teacher. Furthermore, her condition is such that reasonable accommodations will not render her capable of performing those duties. Because of her continuing symptoms, she still requires continued use of potent narcotic analgesics for pain control. A copy of Dr. Zaleski's report dated July 17, 2009 is enclosed.

15. Ms. Potter attended her duties as a teacher of minor children while under the influence of narcotic controlled dangerous substances. This presented a clear and present danger to herself and to the students she was responsible for.

16. Ms. Potter failed to comply with the directive of the administration to perform a reevaluation within the 120 days of the initial evaluation and she further failed to undergo a psychiatric evaluation and blood and urine testing within the time required by the administration.

17. The foregoing conduct on the part of Ms. Potter constitutes insubordination.

18. During Ms. Potter's 2006-2007 school year, she missed 183 days of school. During Ms. Potter's 2007-2008 school year, she missed 164 days. During the 2008-2009 school year, Ms. Potter missed 120 days of school. A copy of Ms. Potter's attendance records is enclosed.

19. Paragraph 18 above constituted incapacity on the part of Ms. Potter.

20. The conduct on the part of Ms. Potter in attending her responsibilities while under the influence of narcotic controlled dangerous substances in the presence of minor children, jeopardizing their safety and security, constitutes unbecoming conduct.

SWORN TO AND SUBSCRIBED BEFORE ME
this _____ day of _____, 2009

_____
Paul J. Carr, Esq.
Attorney at Law, State of New Jersey

Dr. Frank Kasyan
Chief School Administrator

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Law firm of Paul J. Carr PC
Attorney for Defendant
2011 Mill Creek Road
Manahawkin, NJ 08050
(609) 597-8272
Fax: (609) 597-6317

KERRI POTTER, Plaintiff, —vs— LITTLE EGG HARBOR BOARD OF EDUCATION, Defendant.	COMMISSIONER OF EDUCATION STATE OF NEW JERSEY CERTIFICATION OF DETERMINATION

I, Lynn Coates, hereby certify as follows:

1. I am the School Business Administrator / Board Secretary for the Little Egg Harbor Board of Education.

2. On October 7, 2009, I received and filed with each member of the Board a copy of charges for the tenure dismissal of plaintiff in the within matter.

3. These charges were prepared by and filed by the School Solicitor, Paul J. Carr, Esq.

4. Pursuant to N.J.S.A. 18A: 6-11, these charges were considered by the Board and the Board determined, by majority vote of the full membership, that there is probable cause to credit the evidence in support of the charges and that the charges were sufficient to warrant a dismissal of plaintiff thereafter, the Board voted to certify these charges to the Commissioner of Education for the State of New Jersey.

5. On October 7, 2009, and again on October 19, 2009, after considering the reply to charges filed by Kerri Potter, the Board of Education of the Little Egg Harbor School District determined that the charges and the evidence in support of the charges are sufficient, if true in fact, to warrant tenure dismissal of staff member, Kerri Potter. At the same time and place, the Board of Education of the Little Egg Harbor

School district placed staff member Kerri Potter on suspension without pay consistent with N.J.S.A. 18A:6-11.

I certify the foregoing information is true and I am aware that if any of the information is false I am subject to punishment.

Lynn Coates
SBA / Board Secretary

EXHIBIT B

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

THE LAW FIRM OF WILLIAM KOY L.L.P.
89 Headquarters Plaza
North Tower, Twelfth Floor
Morristown, New Jersey 07960
(973) 993-1755
Attorney for Kerri Potter

IN THE MATTER OF THE TENURE CHARGES AGAINST KERRI POTTER :

BEFORE THE COMMISSIONER OF EDUCATION

SWORN RESPONSE TO TENURE CHARGES

BY THE BOARD OF EDUCATION OF LITTLE EGG HARBOR, OCEAN COUNTY, NEW JERSEY

STATE OF NEW JERSEY

SS:

COUNTY OF OCEAN

I, Kerri Potter, Teaching Staff Member of the Little Egg Harbor Board of Education ("Board"), of full age and capacity, and having been duly sworn by the undersigned authority, depose and say that I hereby respond to the conveyed Tenure Charges.

Kerri Potter

Kerri Potter

Sworn to and subscribed before me
On this 2 day
Of November 2009

Kathleen M. Slepinski
Notary Public
State of New Jersey
My Commission Expires, Sept. 15, 2011

Facsimile Verification

I Certify that Kerri Potter is not available to sign this document. The above is filed with a facsimile of his original signature and I certify that the affiant acknowledged to me the genuineness of the signature and that the document or a copy with an original signature affixed will be filed if requested by the Court or a party.

WILLIAM F. KOY, ESQ.

Dated: November 2, 2009

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

DENIAL RESPONSE TO ALLEGED CHARGES

To the Members of the Little Egg Harbor Board of Education:

My position to these allegations is twofold: the first is a lack of compliance to the notice and procedural provisions by the Board as well as defending the allegations against me. First, there is a complete breach of the standards to be followed. ***I enclose two fax transmissions from my attorney, Mr. Koy to Board attorney, Mr. Carr*** for clarification of same.

Notwithstanding the above, and I do not waive my rights regarding these procedural deficiencies. I provide my position as to the allegations against me in effort to have these charges nullified and to grant my return to the classroom.

In addition to the commentary herein, I include exhibits which substantiate my position attached hereto.

As to the allegations that I was excessively absent during the 2007-08 and 2008-09 school years, I at no time, was notified by administration that my job was in jeopardy. In fact, it was quite the contrary. As identified in Mr. Carr's ***no. 11***, the Superintendent, Board President and Board Attorney placed me on administrative leave with pay. In no terms is this administrative leave disciplinary in nature.

Be advised that this had nothing to do with items ***no. 4 through 10***, as these circumstances have never been conveyed to me. It is only now that I see these allegations. As a result thereto, I disavow any and all allegations as to student/staff/parental concerns. If there was a problem/concern, I am sure that I would have been notified of such. More specifically, as to ***no. 4***, I do not have a case manager; only classified students do.

As to ***no. 7***, this obviously is not true. Administration repeatedly, year in and year out reminds us that back to school night is not a time for conferences or individual discussions about students. We barely know the students two weeks into the school year; however, I never have or would turn a parent away if they had any concerns to discuss with me. As far as not being coherent and shuffling through papers is ridiculous.

As to ***no. 8***, nothing was ever brought to my attention by Troy Henderson, Principal or anyone else.

Per ***no. 12***, I did go for testing by Dr. Zaleski, and his report stands on its own merit, to which I do not agree. The subsequent medical reports clearly do not confirm Dr. Zaleski's conclusion that I will be required to use "potent narcotic analgesics" for pain control. One such report is a blood test from my physician, Dr. Bruce Coplin; the second is a urinalysis report scripted by Dr. Zaleski himself. These reports, especially that prescribed by Dr. Zaleski, confirm that I should be back teaching. The reports came back "negative" and I am bewildered why there is such a continued vendetta against me. I repeat, the contrived parental concerns have never been conveyed

to me via words or writings. There is nothing of such in any communication to me or any of my observations/evaluations. For the Board to rely on these representations, with the evidence to be conveyed herein, would be a travesty.

As to ***no. 13***, there was never an agreement of such with my former attorney. There were only non-conclusory dialogue back and forth, but never an agreement. No agreement has ever been provided to me by an administrator or anyone representing the district. There was never a mention of a psychiatric evaluation, nor was there any agreement of any kind. Again, for the Board to rely on these representations, with the evidence to be conveyed herein, would be a travesty.

As to ***no. 14***, I did visit Dr. Zaleski again in July. The record shows that his conclusions in January and July are no longer current per the referenced testing results noted above. For the Board to disregard the current results, solely because they came out negative, would be most discriminatory. Again, it was Dr. Zaleski's scripted testing that I passed, as well as the one prescribed by Dr. Coplin.

Per ***no. 15***, I have never attended my teaching duties under the influence of narcotic controlled dangerous substances. This has never been represented to me until now. Again, no oral or written notice whatsoever. If I was a "clear and present danger to myself and to the students" I am sure that there would be a written record of such. For the Board to rely on these representations, with no evidence of same and the evidence I convey herein, would be a travesty.

Per ***no. 16***, I never failed to comply with any conveyed directive. The only time a psychological evaluation was ever mentioned, was on August 19, 2009, as Mr. Carr sent a letter stating, among other things that, "Based upon her conduct in returning to school and the observations made by parents and staff member, it will be necessary that she undergo a psychological evaluation as well. "Complaints by parents" are referenced in Mr. Carr's letter of August 24, 2009 and reiterates Plaintiff's "suspension" for 120 days. ***(See Exhibit G, to my Certification).***

Needless to say, my attorney immediately confronted Mr. Carr with this ***new condition*** with no prior notice ***(See Exhibit H, to my Certification).*** Mr. Koy asked for ***"... the names of the parents and staff member (who complained), the date of the complaint, and the text of the complaint. Also, why Ms. Potter was not notified in any way, shape or form. Also, why there is no writing as to these instances in the form of progressive discipline, observations or performance appraisal.***

It is noted that the Superintendent was questioned at the Board Meeting of October 7, 2009 as to why he did not notify me as to any alleged complaints. He simply stated, "It wasn't the time for that". Again, for the Board to rely on these representations, with the evidence to be conveyed herein, would be a travesty.

On September 5, 2009, Mr. Carr writes, that, ***"He (the Superintendent) has requested that a meeting take place among you (Mr. Koy), me, your client and Dr. Kasyan in the administration building to determine the next step in this saga."*** There was never a followup to this meeting request. Please remember that at the Board meeting, the Superintendent stated he never

saw this letter, nor did Mr. Carr remember sending this. I ask the Board to review ***Exhibit K, to my Certification)*** for validation of same.

Lastly, on September 10, 2009, Mr. Carr ordered me to take a school designated screening at the National Safety Compliance, script to be provided by the Board's physician, Dr. Zaleski. On that fax transmission to Mr. Koy, Mr. Carr writes, ***"Bill, Please have Kerri do this so we can receive Dr. Zaleski's clearance" (See Exhibit M , appended hereto).*** The direction to me could not be any clearer. For the Board to rely on these representations, with the evidence to be conveyed herein, would be a travesty.

Per ***no. 17***, it is obvious that I followed the direction of the Board and there was no insubordination.

Per ***no. 18***, days missed, I was told that I was on leaves of absence and never had my job in jeopardy. As long as I would receive medical clearance, which I did, I could return to my teaching position, as I should. For the Board to rely on these representations, with the evidence to be conveyed herein, would be a travesty.

Per ***no. 19***, nothing herein represents any incapacity on my part. I was never noticed of such allegations until I read them here. For the Board to rely on these representations, with the evidence to be conveyed herein, would be a travesty.

Per ***no. 20***, a blatantly false statement, there is no unbecoming conduct on my part.

Dated: November 2, 2009

EXHIBIT C

RESOLUTION OF THE
LITTLE EGG HARBOR BOARD OF EDUCATION
AUTHORIZING THE APPROVAL OF THE SETTLEMENT AGREEMENT IN THE MATTERS ENTITLED "POTTER VERSUS LITTLE EGG H ARBOR BOARD OF EDUCATION"

RECEIVED
SEP 8 1:23
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

August 15, 2011

WHEREAS, the Little Egg Harbor Board of Education is named as a defendant in two litigation matters entitled *Potter v. Little Egg Harbor Board of Education*, bearing Docket No. OCN L-722-10 and *Potter v. Little Egg Harbor Board of Education*, bearing Docket No. EDU 9-10.

WHEREAS, the Little Egg Harbor Board of Education has entered into negotiations with the plaintiff, Kerri Potter, and has determined that the best interests of the Board of Education will be served by settling both matters.

WHEREAS, the Little Egg Harbor Board of Education has agreed to settle both matters pursuant to the terms of the attached Settlement Agreement which shall be made a part of this Resolution and incorporated herein.

WHEREAS, the Little Egg Harbor Board of Education has agreed that the Board President and the Board Secretary shall execute the attached Settlement Agreement on behalf of the Board of Education.

NOW, THEREFORE, BE IT RESOLVED BY THE LITTLE EGG HARBOR BOARD OF EDUCATION as follows:

1. That the Little Egg Harbor Board of Education agrees to settle the matters entitled *Potter v. Little Egg Harbor Board of Education*, bearing Docket No. OCN L-722-10 and *Potter v. Little Egg Harbor Board of Education*, bearing Docket No. EDU 9-10.

2. That the Board President is hereby authorized to execute the attached Settlement Agreement between Kerri Potter and the Little Egg Harbor Board of Education and the Secretary to the Little Egg Harbor Board of Education shall attest to the Settlement Agreement between the Little Egg Harbor Board of Education and Kerri Potter.

3. That a copy of the attached Settlement Agreement shall be made part of this Resolution by reference and incorporated herein.

4. A certified copy of this resolution shall be provided to

Attest: Board Secretary

Board President

I, LYNN COATES, Secretary to the Little Egg Harbor Board of Education hereby certify that the above is a true copy of a resolution adopted by the Board of Education on the 15th day of August, 2011.

BOARD OF EDUCATION SECRETARY

RECEIVED
2011 SEP -2 P 1:21
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SEP 0 2 2011

August 18, 2011

To Whom It May Concern:

Please find this letter as my resignation to employment with the Little Egg Harbor School District. Resignation will be effective September 1, 2011, with health benefits continuing until October 1, 2011. Thank you for all of the positive experiences over the past 7 years. If you have any questions or concerns please feel free to contact me. Thanks you.

Sincerely,

ms. Kerri a. Potter

Ms. Kerri A. Potter

LITTLE EGG HARBOR TOWNSHIP SCHOOL DISTRICT

COPY

To Whom It May Concern:

Ms. Kerri Potter has been an employee who has served the Little Egg Harbor School District for approximately 7 years. Ms. Potter was a tenured teacher who instructed a fifth grade class. Her observations and evaluations and commendations are attached hereto.

In addition to Ms. Potter's regular teaching duties she also participated in the following activities: various after school programs including homework clubs and tutoring, summer school programs for regular and special education, Curriculum Council Committee, Language Arts Curriculum Council which included curriculum writing, home bound instruction, and Family Math Nights. She also attended professional development courses offered in the district as well as workshops out of district.

Ms. Potter resigned her position effective September 1, 2011, a copy of her resignation letter is attached.

Very truly yours,

Mr. Robert C Wood, Sr.
Vice President
Little Egg Harbor Board of Education

cc: Little Egg Harbor Board of Education
Personnel file
chron

SEP 09 P 1:53
OFFICE OF THE SECRETARY

443-11

OAL DKT. NO. EDU 10190-10
AGENCY DKT. NO. 360-8/10

MAUREEN LUKENDA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
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.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10|21|11

Date of Mailing: 10|21|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10190-10
AGENCY DKT. NO. 360-8/10

MAUREEN LUKENDA,
Petitioner,
v.
BOARD OF EDUCATION
OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Karen A. Murray Esq., for respondent (Elizabeth Public Schools)

Record Closed: September 6, 2011 Decided: September 6, 2011

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

This matter was transmitted to the Office of Administrative Law on September 20, 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 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 June 30, 2011.

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.

9/6/11
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 9-8-11

Mailed to Parties: SEP - 8 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

BUCCERI & PINCUS, ESQS.
300 Broadacres Drive, Suite 210
Bloomfield, NJ 07003-3153
(973) 771-0700
Counsel for Petitioner

MAUREEN LUKENDA,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
Petitioner,	:	ADMINISTRATIVE LAW
v.	:	AGENCY REF. NO. 360-8/10 OAL DKT. NO. EDU 10190-2010N
CITY OF ELIZABETH BOARD OF, EDUCATION, UNION COUNTY,	:	
Respondent.	:	**SETTLEMENT AGREEMENT AND RELEASE**

THIS SETTLEMENT AGREEMENT AND RELEASE (hereinafter "agreement") is made between MAUREEN LUKENDA ("Petitioner") and the ELIZABETH BOARD OF EDUCATION ("Respondent").

RECITALS

WHEREAS, Maureen Lukenda was employed by the Elizabeth Board of Education and asserted certain claims against the Respondent arising out of her employment in an action captioned Lukenda v. Elizabeth Board of Education, and bearing Agency Reference No. 360-8/10 and OAL Docket No. EDU 10190-2010N ("lawsuit"); and

WHEREAS, the parties have reached an agreement to fully and finally settle all of the Petitioner's claims, including those asserted and not asserted in the lawsuit against the

Respondent arising out of Petitioner's employment with Respondent.

NOW, IN CONSIDERATION of the promises to the Petitioner, provided for herein, and other good and valuable consideration, the receipt and sufficiency of which the parties acknowledge, the parties do hereby agree as follows:

1. The Respondent agrees to pay the Petitioner the sum of thirteen thousand dollars ($13,000.00). This sum is in exchange for a release of statutory tenure rights and all other claims Petitioner has or may have against the Respondent. This sum is in exchange for a release of statutory tenure rights. It does not represent salary as Petitioner has been paid fully for all time worked in the District. As a result, the Respondent will not make school customary payroll deductions and withholdings from said check. Instead, the Respondent will issue IRS Form(s) 1099 with Box to Petitioner checked. The Respondent makes no representation as to the tax consequences of said payment and shall assume no responsibility for any tax liability attributed to petitioner. Petitioner agrees to pay any and all taxes found to be owed from the payment made pursuant to this Agreement and to indemnify and hold the Respondent harmless from any claims, assessments, demands, penalties and interest owed, or found to be owed, as a result of any payment made to this Agreement.

2. The Respondent agrees to forward the payment referenced above to Petitioner within thirty (30) days after

formal approval of this Agreement by the Commissioner of Education.

3. Petitioner agrees to withdraw the Verified Petition with prejudice.

4. Petitioner agrees to waive any tenure rights she earned while employed with the Respondent.

5. The Petitioner hereby releases and forever discharges the Respondent, their present and former divisions, affiliates, agents, employees, directors, officers, representatives, predecessors, successors, and assigns, and all of their successors and assigns, from any and all causes of action, suits, claims, charges, or complaints, known or unknown, which the Petitioner has, may have or claims to have against the Respondent from everything that has occurred up to now, including all claims which were or could have been asserted in the lawsuit. Nothing in this release shall apply to limit Petitioner's right to apply for workers compensation and any rights under N.J.S.A. 18A:16-6 and 6.1, are not released by this agreement.

6. The Petitioner acknowledges that this release also includes, but is not limited to, claims under Federal, State and local laws, prohibiting employment discrimination, wrongful discharge, claims for breach of contract, claims arising under the common law, claims for personal injuries, claims arising under any compensation, bonus incentive and benefit plan, and any other claims arising in any way from Petitioner's employment with

the Respondent and any conduct by the Respondent through the date of this agreement.

7. This agreement does not constitute an admission by the Respondent of any wrongful action or violation of any Federal or State Statute, or common law rights, including those relating to the provisions of any law or statute concerning employment actions, or of any other possible or claimed violation of law or rights. The Respondent specifically denies any wrongful action or conduct.

8. The Petitioner promises she will not defame or disparage the Respondent or any of the Respondent's employees, servants and agents. Respondent promises that it will not defame or disparage the Petitioner.

9. The Petitioner represents that she has not assigned to any third party any claim the Petitioner has, may have or believes she may have against the Respondent.

10. This agreement shall be binding upon and inure to the benefit of the parties and any of their respective heirs, legal or personal representatives, employees, officers, directors, successors and assigns.

11. This agreement shall be construed in accordance with the laws of the State of New Jersey.

12. 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.

13. The parties acknowledge that they have carefully read and fully understand all of the terms of this agreement, including the general release contained herein, that the parties have had a reasonable amount of time to consider the terms of the agreement, and that they enter into this agreement voluntarily and with the advice of counsel.

14. Nothing in this agreement shall be construed as creating a past practice or precedent with regard to the rights of any employee, other than Petitioner.

Maureen Lukenda 7/18/2011

Maureen Lukenda

Dated

Dated

~~Witness:~~

Elizabeth Board of Education

Marie Munn

By: Marie Munn, President
Elizabeth Board of Education

C
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P
Y

10i

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Maureen Lukenda have discussed a resolution of Office of Administrative Law Docket No. EDU 10190-2010N; and

WHEREAS, in the interest of cost efficiency and in lieu of a hearing, the parties have agreed to settle this case; and

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, provided that it is fully signed by all parties.

TRUE COPY APPROVED AND ADOPTED AT
THE ELIZABETH BOARD OF EDUCATION MEETING
HELD ON **June 30, 2011**

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary

Elizabeth, New Jersey
June 30, 2011

10-186

OAL DKT. NO. EDU 9324-10
AGENCY DKT. NO. 170-7/10

JOANNE DOWD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE EAST WINDSOR SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, the parties' proposed 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 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: 10|21|11

Date of Mailing: 10|21|11

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9324-10
AGENCY DKT. NO. 170-7/10

JOANNE DOWD,
Petitioner,
v.
BOARD OF EDUCATION OF THE EAST WINDSOR SCHOL DISTRICT, BURLINGTON COUNTY,
Respondent.

Keith Waldman, Esq., for petitioner (Selikoff & Cohen, attorneys)

Casey R. Langel, Esq., for respondent (Lenox, Socey, Formidoni, Brown, Giordano, Cooley & Casey, attorneys)

Record Closed: August 30, 2011 Decided: September 6, 2011

BEFORE **SUSAN M. SCAROLA**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 27, 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. After a prehearing conference on December 7, 2011, the matter was scheduled for hearing on April 4, 2011. Prior to that date, the hearing was adjourned due to discovery issues. Several telephone conferences were held and

additional time was afforded to petitioner so that notices could be mailed to potential intervenors. Hearing was then scheduled for August 15, 2011. On August 9, 2011, the parties requested adjournment of the hearing, indicating that the matter had been tentatively settled subject to final agreement and execution of settlement documents.

On August 19, 2011, a Release of All Claims executed by petitioner was received and on August 30, 2011, certified minutes of the Board of Education adopting the settlement was received.

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

1. Petitioner has voluntarily agreed to the Release of All Claims as evidenced by her signature.

2. The Release of All Claims 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.

September 6, 2011
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: SEP - 8 2011

Date Mailed to Parties: SEP - 8 2011

mph

CLAIM #: EDU 09324-2010S

RELEASE OF ALL CLAIMS

That Joanne Dowd (hereafter the Releasor[s]), for the sole consideration of **Thirteen Thousand Five Hundred Dollars ($13,500.00)** to the undersigned paid, receipt whereof is hereby acknowledged received from **NEW JERSEY SCHOOL BOARDS ASSOCIATION INSURANCE GROUP AND EAST WINDSOR REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION** (hereafter the Releasees) and does for release, acquit and forever discharge the fore-mentioned Releasees and his, her, their, or its agents, servants, successors, heirs, executors, administrators, and all other persons, firms, corporations, associations or partnerships of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the undersigned now has/have or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries and property damage and the consequences thereof resulting or to result from the accident, casualty or event which is the basis of the claim. This Agreement and 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 the settlement giving rise to this Agreement and Release. Releasor is unaware of any factual basis for such claims.

This lump sum payment represents payment for surrender of any and all existing and potential tenure and recall rights and the Parties acknowledge and agree that the payment constitutes adequate consideration for this Agreement and General Release. The Parties further agree that this lump sum payment is not salary. As a result, the Board will not make customary payroll deductions and withholdings from this payment. Instead, the Board will issue an IRS form 1099 to Releasor and Releasor will be responsible for paying taxes due on the sum received.

The Parties agree that the Board makes no representations or warranties regarding any tax issues relating to the lump sum payment provided for above, and acknowledge that she has not relied upon any advice from the Board concerning the taxability of the amounts to be paid under this Agreement. In the event that taxes are assessed by any federal, state or local taxing authority against Releasor or the Board with respect to the lump sum payment described above or in the event that the Department of Labor and Workforce Development or the Department of Treasury contends that the payment constitutes salary, Releasor shall be responsible for the payment of all taxes, interest, penalties, fines, offsets and/or other charges as may be assessed in connection therewith, and Releasor specifically acknowledges her obligation to indemnify and hold harmless the Board for all sums under such circumstances

It is understood and agreed that this settlement is the compromise of a disputed claim, and that the payment made is not to be construed as an admission of liability on the part of the party or parties hereby released, and that said releases deny liability therefor and intend merely to avoid litigation and buy the parties peace.

The undersigned further declares and represents that any injuries sustained are or may be permanent and progressive and that recovery therefrom is uncertain and indefinite and in making this Release, it is understood and agreed that the undersigned rely(ies) wholly upon the

undersigned's judgment, belief and knowledge of the nature, extent and duration of any injuries and liability therefor and is made without reliance upon any statement or representation of the party or parties hereby released or their representatives or by any physician or surgeon by them employed.

The undersigned further declare(s) and represent(s) that there may be unknown or unanticipated injuries resulting from the above-stated accident, casualty or even and in making this release, it is understood and agreed that this Release is intended to include such injuries.

The undersigned further declare(s) and represent(s) that no promise, inducement or agreement not herein expressed has been made to the undersigned, and that this Release contains the agreement between the parties hereto, and that the terms of this Release are contractual and not a mere recital.

It is further understood that as a condition of this settlement, all claims and/or liens, past, current and/or future arising out of this settlement or asserted against the proceeds of this settlement are to be satisfied by Releasors, including but not limited to any Medicare or Medicaid claims and/or liens, Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or judgment claims and/or liens, including but not limited to claim based on subrogation or any other legal or equitable theory. Releasor(s) therefore agrees, upon prompt presentation of any such claims and/or liens, to defend Releasees against any such claims and/or liens, and to indemnify and hold Releasees harmless against any judgment entered against Releasees based on such claims and/or liens, including the payment of any fines, charges and attorneys fees incurred as a result of any such lien. Failure to satisfy any such lien shall be considered a breach of this Agreement and Releasor(s) agree to pay all costs, interest and attorneys fees relative to any such lien."

This Release expressly reserves all rights of the person or persons on whose behalf the payment is made and the rights of all persons in privity or connected with them and reserves to them their right to pursue their legal remedies, if any, including but not limited to, claims for contribution, property damage and personal injury against the undersigned or those in privity or connected with the undersigned.

THE UNDERSIGNED HAS READ THE FOREGOING RELEASE AND FULLY UNDERSTANDS IT.

Signed, Sealed and delivered this 17th Day of August, 2011.

Joanne Dowd
CLAIMANT

8/17/11
Date

Witness

8-17-11
Date

STATE OF NEW JERSEY

COUNTY OF Burlington

I certify that on the 17th day of August, 2011, Joanne Dowd personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as his or her act and deed.

Erika Bridget Zieger
Notary or Attorney

ERIKA BRIDGET ZIEGER
A Notary Public of New Jersey
My Commission Expires OCTOBER 19, 2015

EAST WINDSOR REGIONAL SCHOOL DISTRICT, HIGHTSTOWN, NJ
BOARD OF EDUCATION

CERTIFIED MINUTES of the REGULAR MEETING on JULY 18, 2011

RE: Joanne Dowd v. East Windsor Regional Schools Board of Education Claim # 10EO00240S

Whereas, the Board has consulted with the Mr. Casey Langel, attorney representing the District and appointed by NJ School Boards in regard to legal matter, JD. V EWRSD, and

Whereas, Mr. Langel has provided to the Board an updated analysis of the facts, liability and settlement demands of the plaintiff and given his advice on how to move forward in the settlement of this matter,

Therefore Be It Resolved that the Board of Education will approve the settlement terms as proposed by NJSBAIG attorney, Mr. Casey Langel and request that Mr. Langel negotiate on behalf of the Board the terms of settlement as discussed in executive session.

BOARD ACTION: Mr. Paul moved, seconded by Ms. Fallon to approve the settlement terms as proposed by NJ School Boards attorney, Mr. Casey Langel.

On a roll call vote of the Board, motion to approve was carried unanimously.

I, Kurt Stumbaugh, Secretary of the Board of Education of the East Windsor Regional School District, ***HEREBY CERTIFY*** *that this is a certified copy of the unapproved minutes of the regular Board meeting held on July 18, 2011.*

IN WITNESS WHEREOF*, I have hereunto set my hand and affixed the corporate seal of said Board of Education this 15th day of August, 2011.*

Kurt Stumbaugh, Board Secretary
East Windsor Regional School District

K.W., on behalf of minor child, J.B.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY	:	
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her son in May 2011. A hearing at the Office of Administrative Law (OAL) was scheduled for September 7, 2011, but petitioner failed to appear despite having received appropriate notice and provided no explanation for her nonappearance. No counterclaim was filed by the respondent Board.

There being no explanation filed for petitioner's nonappearance, the matter is no longer deemed to be a contested case before the Commissioner. Accordingly, 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.

October 21. 2011

OAL DKT. NO. EDU 07615-11N
AGENCY DKT. NO. 99-5/11

K.W., on behalf of minor child, J.B.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY	:	
RESPONDENT.	:	
	:	

The record of this matter – transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, and including an advisement of petitioner's failure to appear at the scheduled September 7, 2011 OAL hearing – has been reviewed. Petitioner filed no explanation for her failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10|21|11

Date of Mailing: 10|21|11

* 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).

RICHARD J. MASINI, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed an appeal challenging the discipline imposed upon him for allegedly instigating a "swirly" incident, carried out by other students on a fellow high school hockey player. Specifically, the petitioner sought expungement from his record of a one-day out-of-school suspension, immediate reinstatement to the school's hockey team, and permanent and immediate removal from his school record of all disciplinary actions relative to the "swirly" incident. Petitioner filed a motion for emergent relief, which was denied. The matter was scheduled for a hearing on the merits at the Office of Administrative Law (OAL) on September 23, 2011, but petitioner and his counsel failed to appear. Counsel for respondent Board appeared at the hearing and requested that a final order be entered dismissing the petition.

The ALJ found, *inter alia*, that: this matter had been pending in the OAL for more than six months and had been adjourned twice; petitioner received notice more than six weeks in advance of the scheduled hearing, yet failed to appear; counsel for petitioner provided a written explanation, namely that he did not want to appear because his request for an adjournment and his request to brief an issue – which may or may not have been raised at hearing – had been denied; this rationale for non-appearance does not rise to good cause to excuse the failure of either petitioner or counsel to appear; and the failure to appear in this case was intentional and deliberate. The ALJ concluded – pursuant to *N.J.A.C.* 1.1-14.4(c)2 – that, under the circumstances herein, there was no good cause for failure to appear. Accordingly, the Board's motion to dismiss the petition was granted.

Upon full review and consideration, the Commissioner agreed with the ALJ that this matter is appropriately dismissed. Accordingly, the recommended decision of the OAL was adopted for the reasons fully presented therein, 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 806-11
AGENCY DKT. NO. 19-1/11

RICHARD J. MASINI, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
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 agrees with the Administrative Law Judge that this matter is appropriately dismissed as a consequence of petitioner's and his counsel's failure to appear – without good cause – at the hearing scheduled for September 23, 2011.

Accordingly, the recommended decision of the OAL is adopted – for the reasons succinctly presented therein – and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10|21|11

Date of Mailing: 10|21|11

* 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 806-11
AGENCY DKT. NO. 19-1/11

RICHARD J. MASINI, JR.,
Petitioner,
v.
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,
Respondent.

Steven D. Farsiou, Esq., appearing for petitioner (Gebhardt & Kiefer, attorneys)[1]

Robert Francis Gold, Esq., and **Robin Sammer Behn**, Esq., appearing for respondent (Gold, Albanese, & Barletti, attorneys)

Record Closed: September 23, 2011 Decided: September 26, 2011

BEFORE **SUSAN M. SCAROLA**, ALJ:

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[1] Neither Mr. Farsiou nor petitioner, Richard J. Mancini, Jr., appeared at the hearing. Ms. Behn appeared for respondent.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On January 24, 2011, Richard J. Masini, Jr. (petitioner) filed a due process petition with the Department of Education, Bureau of Controversies and Disputes, seeking expungement from his record of a one-day out-of-school suspension; immediate reinstatement to the school's hockey team; and permanent and immediate removal from his school record of all disciplinary actions relative to a "swirly" incident.[2]

Petitioner also filed a request for emergent relief, seeking immediate return to the varsity hockey team pending resolution of the due process petition.

The Board of Education of the Hunterdon Central Regional High School, County of Hunterdon (respondent), opposed the request for emergent relief, contending that petitioner failed to satisfy the requirements for such relief. It also alleged that petitioner's due process rights were not violated and discipline was properly imposed by the school; that the petition should be dismissed and judgment entered in respondent's favor; and that counsel fees and costs should be awarded to it.

The petition and the request for emergent relief for reinstatement to the hockey team were transmitted to the Office of Administrative Law (OAL) on January 27, 2011, for determination as a contested case. The parties were advised that the emergent matter would be heard at the OAL on February 1, 2011.

At a telephone conference on January 31, 2011, petitioner advised that he had also filed a Verified Complaint and Order to Show Cause in the Superior Court, Law Division, Hunterdon County, under Docket No. L-49-11, which was scheduled to be heard on February 2, 2011, before the Honorable Peter A. Buchsbaum, J.S.C. Due to the matter pending in the Superior Court, the petition for emergent relief was rescheduled to the afternoon of February 4, 2011.[3]

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[2] The gravamen of the underlying discipline concerned an incident involving three hockey players who gave another teammate a "swirly" [sticking the head in the toilet bowl and flushing] for violating a "team pact" to not cut their hair for a certain number of games, in which it is alleged that the petitioner, although not a direct participant, incited the others to action.

[3] The adjournment in the OAL was due to the postponement of the Order to Show Cause in the Superior Court to the morning of February 4, 2011, and to accommodate counsel's trial calendar.

On the morning of February 4, 2011, the Order to Show Cause was heard in the Superior Court. That afternoon, the parties appeared at the OAL and provided a copy of the order entered by Judge Buchsbaum denying plaintiff's (petitioner's) request for temporary restraints and for immediate reinstatement to the hockey team. The other claims set forth in petitioner's Verified Complaint remain pending in the Superior Court.

At the OAL hearing, respondent argued that the matter should be dismissed because, although the Commissioner of Education has primary jurisdiction, it is not the sole jurisdiction, and having chosen to proceed in Superior Court, petitioner was barred from re-litigating the same issue in the OAL. Petitioner argued that Judge Buchsbaum stated that he did not have primary jurisdiction but that the Commissioner and the OAL did, although the Commissioner's and the OAL's jurisdiction was not sole and exclusive. Therefore, the issue was not precluded from being heard in this forum.[4] Counsel also argued the matter on the merits.

The request for emergent relief was denied in the OAL by order dated February 7, 2011, which was adopted by the Acting Commissioner of Education on March 14, 2011. According to the Acting Commissioner, "petitioner – having chosen to assert his right to be heard on this emergent matter in Superior Court and having proceeded to a decision in that court – is precluded from re-litigating the identical issue at the OAL." The Acting Commissioner ordered that "[t]his case shall proceed at the OAL for such further proceedings as may be required to bring it to conclusion." The matter was scheduled for hearing on July 7, and August 2, 2011.[5]

On July 27, 2011, respondent filed a motion to dismiss the OAL claim filed by petitioner on the basis that the matter is presently docketed in the Superior Court, and, having chosen that forum, the petitioner is precluded from further litigation in the OAL. Petitioner responded by letter filed July 29, 2011, that he is seeking relief not available in the Superior Court, namely, expungement of his record, and that those issues remain pending in the OAL for ultimate determination by the Commissioner of Education. This

[4] Due to the emergent nature of the proceedings, no transcript of the Superior Court proceedings was provided.
[5] The July hearing date was adjourned due to the unavailability of the Board's witnesses during the summer recess. The August hearing date was adjourned and the matter rescheduled to September 23, 2011, at the request of petitioner who wanted additional time to respond to the motion.

motion was denied on August 23, 2011, as "the Commissioner of education has primary jurisdiction over student records and because the issue had not yet been decided [in Superior Court]." The matter was scheduled for hearing on September 23, 2011.

On September 20, 2011, petitioner requested an adjournment of the hearing date for two reasons: one, that he had had difficulty in communicating with his client for the past few weeks; and two, the mother of one of his witnesses had been going through cancer treatment, and another witness was away at college. Respondent objected to the adjournment and indicated that he had ten witnesses scheduled to appear, one of whom, former Superintendent Brady, had arranged his calendar to appear as he was coming from out-of-state.

A conference call was held at approximately 4:00 p.m. on September 23, 2011. Petitioner repeated his request for an adjournment. He acknowledged that his client had received notice of the hearing in sufficient time to be able to appear and was in the local area so no long distance travel was necessary. He said his client had not returned his calls and that there may be family issues. Petitioner was advised that this was not an acceptable reason for an adjournment. He was also advised that he need not be concerned about the availability of his witnesses as it was likely that none of them would be reached on the scheduled hearing date due to the number of respondent's witnesses. Moreover, the second date of hearing could be scheduled to accommodate his witnesses' schedules.

Also discussed whether the relief petitioner was seeking – namely the expungement of his school record, which purportedly included the one-day suspension, and a suspension from the hockey team -- was within the remedies this forum could entertain pursuant to N.J.A.C. 6A:32-7.1 and N.J.A.C. 6A:32-7.7, which concern student records and the conditions under which they can be supplemented, corrected or expunged, as well as the procedural process to follow when a student record is challenged.

Counsel then acknowledged that he did not know what was contained in the relevant school record of petitioner as he did not have a copy of it, but that he had

previously been told that the record contained the disputed information. Counsel also requested an opportunity to brief the issue prior to the hearing and again stated he wanted to adjourn the matter. He was advised that not every issue needs to be briefed, and moreover, there would be adequate time to do that following the hearing if, indeed, it were an issue. Respondent was then ordered to provide a copy of the school record to petitioner by 11:00 a.m. on September 22, 2011, so counsel could review same and determine the nature of the material contained therein. He would then be able to ascertain whether to pursue his petition for relief. The request for an adjournment on the basis of additional briefs was denied and the hearing continued to be scheduled for September 23, 2011.

On September 22, 2011, petitioner faxed correspondence which was received on September 23, 2011.[6] In his letter, counsel stated:

> . . . Although I advised Your Honor of several issues which we believe warranted an adjournment of the hearing scheduled for September 23, 2011, you have denied our request. In addition, you advised that you were not sure if you had the authorization or jurisdiction to grant plaintiff's [petitioner's] request for relief, which is to have all disciplinary action stemming from the respective incident expunged. This is the first time we learned of this issue, and we do not agree with this position. . . . Due to this development, we requested permission to brief the issue, especially since defense counsel stated he intended to bring a motion at the hearing. Your Honor denied this request notwithstanding the fact that any such motion is dispositive.
>
> Based upon the above, **we will not be appearing for the hearing on September 23, 2011**. [Emphasis added.] If Your Honor is inclined to dismiss the case then we request a final order be entered.

Respondent replied with correspondence of the same date indicating that since counsel for the petitioner and the petitioner would not be appearing, he would not be producing his witnesses, and that he would request that a final order be entered dismissing the petition. Counsel from respondent's office appeared as scheduled on September 23, 2011, and renewed that application.

[6] Review of the correspondence was on September 23, 2011, as all administrative law judges were out of the office on September 22, 2011, for training.

LEGAL ANALYSIS AND CONCLUSION

The issue presented is whether this matter should be dismissed for petitioner's and his counsel's failure to appear at the hearing scheduled on September 23, 2011.

Pursuant to N.J.S.A. 18A:6-9, the Commissioner of Education "shall have jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws." The Commissioner's authority is plenary. Archway Programs, Inc. v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 424 (App. Div. 2002). Under N.J.A.C. 6A:32-7.8, "[a] student record is considered to be incomplete and not subject to the provisions of the Destruction of Public Records Law, N.J.S.A. 47:3-15 et seq., while the student is enrolled in the school district" and "[s]tudent records of currently enrolled students . . . may be disposed of after the information is no longer necessary to provide educational services to a student."

A parent or adult student may challenge the student record and seek to expunge inaccurate, irrelevant or otherwise improper information; or to insert additional data and comments as to the meaning and/or accuracy of the records; or to request a stay on disclosure pending final determination of the challenge. N.J.A.C. 6A:32-7.7(a) – (d). Petitioner has the right to challenge the contents of his student record, to seek modification of same, and to place a statement in his record commenting upon the information contained therein.

In adopting the OAL decision denying emergent relief, the Acting Commissioner ordered that "[t]his case shall proceed at the OAL for such further proceedings as may be required to bring it to conclusion." The issues of expungement and modification of the school record were pled in petitioner's due process petition, and therefore further proceedings were necessary in the OAL to resolve these remaining issues. This does not mean, as petitioner's counsel would suggest, that such relief is automatic. Rather, petitioner must comply with the administrative code provisions concerning a challenge to the contents of student records.

This matter has been pending in this forum for more than six months and has been adjourned twice. Notice was provided more than six weeks ago of the hearing scheduled on September 23, 2011. Counsel for petitioner acknowledged his client had notice. No reasonable excuse has been provided for petitioner's failure to appear. Petitioner's response to a denial of his request for an adjournment was to ignore this forum and not to appear at all. Pursuant to N.J.A.C. 1:1-3.3, "a case shall be returned to the transmitting agency by the Clerk . . . if, after appropriate notice, neither a party nor a representative of the party appears at a proceeding scheduled by the Clerk or a judge (see N.J.A.C. 1:1-14.4)."

Pursuant to N.J.A.C. 1:1-14.4, "if, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or 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 shall, unless proceeding pursuant to (d) below, direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c)."

In this matter, petitioner had more than appropriate and sufficient notice of the scheduled hearing date yet failed to appear. Moreover, counsel for petitioner provided a written explanation for his failure to appear, namely, he did not want to appear because his request for an adjournment had been denied, and his request to brief an issue (which may or may not have even been raised at hearing) was denied. This does not rise to good cause to excuse the failure of either petitioner or counsel to appear. In fact, the failure to appear here was intentional and deliberate.

Accordingly, pursuant to N.J.A.C. 1:1-14.4 (c)2, I **CONCLUDE** that, under the circumstances presented herein, there was no good cause for the failure to appear. Based upon petitioner's intentional failure to appear and pursue this matter, the motion to dismiss shall be granted.

ORDER

I hereby **ORDER** that the motion to dismiss the petition 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.

September 26, 2011
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

Date Received at Agency: 9/26/11

Date Mailed to Parties: 9/26/11

mph

OAL DKT. NO. EDU 12093-11
AGENCY DKT. NO. 298-10/11

T.H., o/b/o S.K., S.H., and S.H.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE CITY OF BURLINGTON AND BOARD OF EDUCATION OF THE CITY OF BEVERLY, BURLINGTON COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

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. The Commissioner finds, however, that – pursuant to *N.J.A.C.* 6A:17-2.6(c)(1) and 6A:17-2.8(d) – where there is a dispute regarding homelessness, the homeless child shall be enrolled immediately in the school in which enrollment is sought until the disputed matter is resolved.

Accordingly, the Commissioner – subject to the rules cited herein – modifies the recommended Order of the OAL denying petitioner's application for emergent relief and orders the immediate enrollment of petitioner's children in the City of Burlington School District, pending a

resolution on the merits herein. 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.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10|21|11

Date of Mailing: 10|24|11

* 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 12093-11
AGENCY DKT. NO. 298-10/11

TRENNANCE HARRIS,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF BURLINGTON and BOARD OF EDUCATION OF THE CITY OF BEVERLY, BURLINGTON COUNTY,

Respondent.

Trennance Harris, petitioner, pro se

Sharon D. Larmore, Esq., for respondent Board of Education of Burlington (Parker McCay, attorneys)

No appearance by or on behalf of Beverly Board of Education

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Trennance Harris (petitioner) appeals Burlington City Board of Education's (respondent's) determination that she does not reside within the Burlington City district, and that as such her children should not be enrolled in the Burlington City schools.

PROCEDURAL HISTORY

On or about October 6, 2011, petitioners' petition of appeal was filed with the Office of Controversies and Disputes of the New Jersey Department of Education, along with a request for emergency relief seeking an order compelling respondent to enroll petitioner's three children. On October 7, 2011, the emergent matter was filed with the Office of Administrative Law for oral argument, which was held on October 13, 2011.

FACTUAL DISCUSSION

Petitioner enrolled her three children, S.K., S.H., and S.H., all school aged, in the Burlington City Public Schools for the 2009-2010 and 2010-2011 school years. After conducting an independent investigation, respondent determined that the family did not reside in Burlington city and that the children were ineligible to attend Burlington City Schools. Petitioner appealed this decision and the district filed counterclaim seeking repayment of tuition.

On July 21, 2011, a hearing was scheduled in that matter at the Office of Administrative Law under OAL docket Number EDU 13213-10. At the hearing, petitioner provided testimony in which she acknowledged and admitted that at all relevant times she and her children resided in Beverly City and as such her children were never eligible to attend Burlington City Schools during the 2009-2010 and 2010-2011 school years. The Administrative Law Judge ordered the petitioner's appeal dismissed and the petitioner liable for $131,922 in tuition for the years in question (respondent's papers, Exhibit C).

That same day, the parties then entered into a signed settlement agreement whereby petitioner acknowledged and admitted the same facts regarding her residency and her children's eligibility. Petitioner agreed to immediately enroll her children in the Beverly City School District, and respondent agreed to not pursue repayment of the tuition so long as petitioner did not seek to reenroll her children in Burlington City Schools (respondent's papers, Exhibit D). The Administrative Law Judge then issued an initial decision approving the settlement agreement (respondent's papers, Exhibit E).

In September, 2011, petitioner again attempted to enroll her children in the Burlington City Schools. She Indicated that she and the children were homeless and in transition. The children were enrolled and the district performed another investigation. Respondent obtained a City of Beverly Landlord Registration (R-1) which lists petitioner and her children as occupants of 619 C___ Street Apartment _ in Beverly, NJ. On September 23, 2011 respondent requested that petitioner withdraw her children from the Burlington City Schools. (Certification of Craig H. Wilkie, School Business Administrator).

On September 29, 2011, Peggy Nicolosi, the Burlington County School Administrator, issued a determination that petitioner and her children are residents of Beverly City; that the children should be immediately enrolled in Beverly City Schools; and that Beverly City is responsible for the children's education (respondent's papers, Exhibit F). Petitioner appealed this decision by filing the underlying petition in the current matter and the emergent relief request currently at issue, seeking placement of her children in Burlington City schools pending the outcome of the due process proceeding.

The preceding statements are not in dispute and are hereby **FOUND** as **FACT**.

At the oral argument for the emergent relief application, petitioner testified that she is currently residing with her children in Burlington city, at the residence of her great grandmother and great aunt. She stated that this is a temporary situation while she

tries to find permanent residence. She alternately stated that she vacated the premises in Beverly City around August 15, 2011 or in July, 2011. She was not evicted but her lease was expiring. Her landlord had indicated his intent to sell the property. Petitioner did not feel comfortable remaining in the apartment while realtors came through so she quit the premises and moved in with her relatives in Burlington. Petitioner argued that since she lived in Burlington it was respondent's responsibility to provide her children's education.

R.H., petitioner's mother, testified that petitioner's children would suffer irreparable harm if enrolled in Beverly during the pendency of the proceedings in that one of the children is in high school and would have to travel to Palmyra (Beverly students attend high school in Palmyra.) Citing the length of the commute as inflicting irreparable harm, R.H. testified that the Commute from Burlington to Palmyra would take thirty minutes while the commute from Beverly to Palmyra is a twenty minute commute.

Craig Wilkie, School Business Administrator/Board Secretary for the respondent, testified as to the chronology outlined in his certification. He indicated that petitioner was provided with the appropriate paperwork for a family in transition and her children enrolled pending a due diligence investigation. With reference to the Landlord Certification (R-1), Wilkie noted that Michael Thompson of the Beverly Housing Department noted on the form that an inspection was conducted on September 21, 2011 wherein petitioner's occupancy of the premises was verified.

CONCLUSIONS OF LAW

The standards which must be met by the moving party in an application for emergent relief in a matter concerning a special needs child are embodied in N.J.A.C. 1:1-12.6 and Crowe v. DeGoia, 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.

Petitioner argues there will be irreparable harm if the requested relief is not granted due to the length of the commute to school for one of the children to Palmyra. By petitioner's witness's testimony, this would be a commute ten minutes longer in duration than that of a student residing in Beverly and attending High School in Palmyra. While this could conceivably present some inconvenience, a thirty minute commute hardly constitutes irreparable harm. In any event, whether at Beverly or at Burlington, which respondent notes are contiguous communities, educational services would be available and provided to the children during the pendency of these proceedings. As such, I **CONCLUDE** that petitioner has failed to demonstrate that irreparable harm will be suffered if emergent relief is not granted.

As respondent notes petitioner has not provided a piece of documentary evidence that she has vacated Beverly City and is in fact living in Burlington. She has only offered her own testimony to that fact. Given that she signed an agreement in July, 2011 wherein she admitted that she enrolled her children in Burlington City while residing in Beverly City, her credibility can certainly be called into question as to this issue. As such, petitioner's testimony on this matter is not by itself sufficient to overcome the documentary evidence provided by respondent verifying her residence in Beverly pursuant to an inspection of the premises on September 21, 2011.

Accordingly, I **CONCLUDE** that petitioner has not demonstrated a likelihood of success on the merits of the underlying claim. A full plenary hearing is likely necessary to ascertain the underlying facts before the full merits of their claim can be determined.

The petitioners' request for emergency relief is **DENIED**.

DECISION AND ORDER

For the foregoing reasons, I **CONCLUDE** that petitioners are not entitled to the requested emergent relief and that the Petitioners' request for emergency relief is **DENIED**.

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 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 13, 2011

DATE

ELIA PELIOS, ALJ

/eap, mamf

#450-11E

OAL DKT. NO. EDU 11330-11
AGENCY DKT. NO. 275-9/11

REMOND PALMER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY REVIEW UNIT,	:	APPLICATION FOR EMERGENT RELIEF
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.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/21/11
Date of Mailing: 10/24/11

* 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 11330-11
AGENCY DKT. NO. 275-9/11

REMOND PALMER,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,
Respondent.

Ronald J. Ricci, Esq, for petitioner (Ricci and Fava, LLC, attorneys)

Daniel F. Dryzga, Jr., DAG., for respondent (Paula T. Dow, Attorney General of New Jersey, attorney)

BEFORE **JOHN R. FUTEY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner, Remond Palmer (hereinafter "petitioner") seeks emergent relief in which he challenges the August 22, 2011, finding of respondent, the New Jersey Department of Education, Criminal History Review Unit (hereinafter "respondent" or the "Department"), in which it determined that petitioner was

disqualified from serving on the Asbury Park Board of Education (hereinafter the "Board") because of a prior criminal conviction in South Carolina from which he received a pardon.

On September 19, 2011, the Office of Controversies and Disputes within the Department of Education ("Department") received a verified petition from the petitioner challenging the finding of the respondent and alleging that it failed to properly consider the South Carolina pardon granted to the petitioner. The Department also received a motion for emergent relief with accompanying brief from the petitioner for an order enjoining respondent's decision of August 22, 2011, wherein respondent disqualified the petitioner from further service on the Asbury Park School Board. The matter was transmitted without an answer to the Office of Administrative Law (hereinafter "OAL") on September 23, 2011. A response from the Department was received on September 27, 2011. The matter was argued at an emergent relief hearing on September 29, 2011. The hearing record closed for purposes of emergent relief at that time and this order is issued pursuant thereto.

FACTS

Based upon the information supplied by the parties and argument received at the emergent relief hearing, the following constitute the relevant facts adduced in this matter. Petitioner was convicted of possession of cocaine in the State of South Carolina on November 27, 1989. He was 21 years old at the time. He received a suspended sentence with a two (2) year probation and $2,000 fine. On January 11, 2002, petitioner received a pardon regarding the conviction from the South Carolina Board of Probation, Parole, and Pardon Services. Petitioner has served as a member of the Asbury Park Board of Education since being elected in April 2010.

On May 26, 2011, New Jersey Governor Chris Christie signed into law a requirement that all current (emphasis added) and future members of boards of education must undergo criminal history background investigations to determine if they have been convicted of certain criminal acts that would disqualify them from serving as a member of a school board. (emphasis added.) N.J.S.A. 18A:12-1.2. Pursuant to this statute, the respondent conducted an investigation of petitioner. On August 22, 2011,

the respondent notified petitioner that he was permanently disqualified from serving on a school board because of the criminal conviction from South Carolina, and notwithstanding his procurement of a pardon there.

Petitioner seeks emergent relief to stay his removal from the school board pending his appeal on the basis that his pardon serves to preclude any legal liability as a result of the conviction.

Separate from the case at hand, the petitioner also has had another appeal pending involving his disqualification for employment as a substitute teacher, under N.J.S.A. 18A:6-7.1, after a criminal background check by the respondent identified the same conviction at issue. In that case, the petitioner similarly argued that the pardon precludes any liability for the conviction. ALJ John Schuster upheld the respondent's action in disqualifying the petitioner as a substitute teacher. Palmer v. New Jersey Department of Education, Criminal History Review Unit, EDU 4145-09, Initial Decision, (November 30, 2009), <http://lawlibrary.rutgers.edu/oal/html/initial/edu4145-09_1.html>, adopted, Comm'r. (January 12, 2010), <http://lawlibrary.rutgers.edu/oal/search.html>.

On April 28, 2011, while pending appeal of that matter to the New Jersey Appellate Division, the Department of Education ordered a remand of EDU 4145-09 for the purpose of re-examining its interpretation of N.J.S.A. 18A:6-7.1 as it relates to the pardon in question. On September 22, 2011, the Department, after further review, reaffirmed its January 12, 2010, decision that the pardon from South Carolina did not eliminate the record of conviction and petitioner was disqualified from working as a substitute teacher under N.J.S.A. 18A:6-7.1. Palmer v. New Jersey Department of Education, Criminal History Review Unit, EDU 4145-09, revised, Comm'r. (September 22, 2011), <http://www.nj.gov/education/legal/commissioner/2011/sep/395-11R.pdf>. Since that record of conviction was not expunged, it triggered N.J.S.A. 18A:6-7.1 and barred petitioner from employment in New Jersey schools. Ibid.

DISCUSSION AND ANALYSIS

In order to obtain emergency relief the requesting party must show that without relief there will be irreparable harm, that the legal right underlying the claim is settled, that the material facts are uncontroverted and there is a reasonable probability of ultimate success on the merits. The relative hardship to the parties in granting or denying relief must also be considered.

N.J.A.C. 6A:3-1.6 provides the standard for granting emergent relief for controversies subject to the Commissioner of Education's jurisdiction:

> (b) 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.

Petitioner must meet all four criteria to prevail on this motion. See Crowe v. DeGioia, 90 N.J. 126 (1982); DEC Electric, Inc. v. Bd. of Educ. of the S. Gloucester County Reg'l High Sch. Dist. and USA Elec. Contractors, Inc., 96 N.J.A.R. 2d (EDU) 789, 790 (citing DEC Electric, Inc. v. S. Gloucester County Reg'l High Sch. Dist. Bd. of Educ. and USA Elec. Contractors, Inc., EDU 10833-95, Order Denying Emergent Relief (Dec. 6, 1995) adopted, Comm'r (Dec. 26, 1995) (denied unsuccessful bidder's request for emergent relief because it was unable to establish that it would suffer immediate and irreparable harm, although it was able to establish a reasonable likelihood of success on the merits and that the parties opposing the motion would not suffer undue harm). The moving party bears the burden of proving each of the elements for

emergent relief "clearly and convincingly". Waste Mgmt of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Based upon the foregoing and after having considered all of the arguments advanced as set forth more fully below, the petitioner's motion for emergent relief must be **DENIED** because he fails to satisfy the elements required under N.J.A.C. 6A:3-1.6. Specifically, he has not shown irreparable harm, nor that the law concerning pardoned convictions is well settled in his favor, nor a likelihood of prevailing on the merits of his claim, nor that, on balance, he will suffer greater harm than will respondent if his relief is not granted. Those elements are considered henceforth.

A. There must be irreparable harm to the petitioner for emergent relief to be warranted.

One of the principles for injunctive relief is that relief should only be ordered to prevent irreparable harm to the petitioner. Crowe v. DeGioia, supra, 90 N.J. at 132-332. Further, harm is irreparable when it cannot be addressed with monetary damages. Ibid. This standard contemplates that the harm also be both substantial and immediate. Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). Furthermore, courts have held that speculation cannot prove irreparable harm. Peregoy v. Peregoy, 358 N.J. Super. 179, 183 (App. Div. 2003). In discussing an allegation of irreparable harm made by the defendant in his application for emergent relief, the court said that "concerns that 'may' lead to irreparable harm are not enough." Id. at 203. Speculation and opinions about possible harm, absent direct evidence, were not sufficient to show irreparable harm. Id. at 203-4.

In the present case, the facts set forth in the petitioner's motion do not identify any specific or irreparable harm that he will incur if emergency relief is denied. The petitioner stated in his motion that the Monmouth County Superintendant was, at the time of the filing of that motion, already receiving resumes and planning to interview for petitioner's replacement. Subsequently, at the hearing on this motion, petitioner informed this tribunal that the Superintendant has already and actually selected a replacement and attempted to install the replacement at a Board meeting on September 28, 2011, which was one day before the oral argument on this motion.

However, there has been no evidence presented to demonstrate how this action will actually harm the petitioner, much less in any substantial or immediate way. Recognizing that school board members serve in a volunteer capacity, the petitioner will not suffer any adverse employment loss from this decision. Further, should there be any incidental income loss, that is exactly the type that can be redressed by monetary damages. Therefore, while the petitioner may be inconvenienced, he has failed to establish irreparable harm and does not meet the first prong for emergent relief required under N.J.A.C. 6A:3-1.6. And I so **FIND.**

B. The legal right underlying the petitioner's claim must be settled for emergent relief to be warranted.

The second principle for emergent relief is that temporary relief should only be issued when the legal right essential to the petitioner's claim is settled. Crowe v. De Gioia, supra, 90 N.J. at 133. In that regard, New Jersey case law clearly demonstrates that a pardon is treated differently from expungement. Therefore, and based upon the following, the petitioner has failed to show clear legal evidence supporting his claim that a pardon should equal an expungement and prevent application of N.J.S.A. 18A:12-1.2. Expungement is a legislatively authorized remedy, expressly limited to certain prescribed criminal, quasi-criminal, juvenile and other enumerated offenses. N.J.S.A. 2C:52-2 to -6. For many purposes, once an offense has been expunged, it is deemed not to have occurred. N.J.S.A. 2C:52-27. Thus, unlike a pardon, the expungement will erase the record of a conviction.

In any case, in both South Carolina and New Jersey, a pardon does not equal an expungement. Opinion of South Carolina Attorney General, 1996 S.C. AG LEXIS 75 ("This Office has frequently recognized ... that a conviction is not expunged by virtue of a pardon."); Storcella v. State, Dept. of Treasury, Div. of State Lottery, 296 N.J. Super. 238, 243 (App.Div. 1997) ("A pardon relieves the guilty person from the burden of the crimes forgiven so that the legal disabilities attendant upon the convictions are removed. A pardoned person is restored to all rights of citizenship, and may vote, and may serve on a jury, but not all consequences of the conviction are erased by the pardon.") (internal citations omitted).

As a general rule, an "expungement" is the process of legally destroying, obliterating or striking out records or data in files, computers and other depositories relating to criminal charges. (http://definitions.uslegal.com/e/expungement/). Its availability and requirements are determined by the states, thus the effect of an expungement is not functionally equivalent from state to state. South Carolina's legislature has restricted and determined the availability of an expungement to the following specific circumstances:

1. Simple Possession of Marijuana: Any person who has been sentenced to a "Conditional Discharge" for their first offense of simple possession of marijuana, may, upon completion of the sentencing requirements, apply to the court for an order to expunge from all official records all information relating to his arrest, indictment, trial, finding of guilty, and dismissal and discharge pursuant to this section. S.C. Code Ann. § 44-53-450(a). No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose. Ibid.

2. Successful Completion of Pre-Trial Intervention: Pre-trial Intervention is a diversion program for first-time non-violent criminal offenders. Participants are required to perform, among other things, community restitution and make monetary restitution to their victims. Upon successful completion, the offender may apply to the court for "an order to destroy all official records relating to his arrest and no evidence of the records pertaining to the charge may be retained by any municipal, county, or state entity". S.C. Code Ann. § 17-22-150(a). The effect of the order is "to restore the person, in the contemplation of the law, to the status he occupied before the arrest. Ibid. "No person as to whom the order has been entered may be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge the arrest in response to any inquiry made of him for any purpose." Ibid.

3. Magistrate Court Offenses: Records of first offense convictions in magistrate or municipal court may be expunged if no other conviction for 3 or 5 years. S.C. Code Ann. §§ 22-5-910, 34-11-90.

4. Fraudulent Checks: After a first offense conviction of fraudulent intent in drawing check, draft or other written order, the defendant may, after one year from the date of the conviction, apply, or cause someone acting on his behalf to apply, to the court for an order expunging the records of the arrest and conviction. S.C. Code Ann. § 34-11-90(e).

5. Dismissal or Non Conviction of Offense: If charges dismissed or person found not guilty, all records must be destroyed and "no evidence of such record pertaining to such charge shall be retained by any municipal, county or State law enforcement agency". S.C. Code Ann. § 17-1-40.

6. Failure to Stop: Records of first misdemeanor offense for failure to stop for a blue light may be expunged if no other conviction for 3 years. S.C. Code Ann. § 56-5-750.

As a general rule, a "pardon" is the process to forgive an individual of the legal consequences of a crime. (http://definitions.uslegal.com/p/pardon/). In South Carolina, the governor has authority to grant reprieves and commute death sentences, but all other clemency authority (i.e. "pardon") is vested by statute in the Probation, Parole, and Pardon Board. S.C. Const. Art. IV, § 14; S.C. Code Ann. § 24-21-920. (Transferred by constitutional amendment from Governor in 1949.)

"'Pardon' means that an individual is fully pardoned from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty or whatever else the law has provided." S.C. Code Ann. § 24-21-940. A pardon shall fully restore all civil rights lost as a result of a conviction, including but not limited to the right to:

(1) register to vote;
(2) vote;
(3) serve on a jury;

(4) hold public office, except as provided [by law];
(5) testify without having the fact of his conviction introduced for impeachment purposes to the extent provided by Rule 609(c) of the South Carolina Rules of Evidence;
(6) not have his testimony excluded in a legal proceeding if convicted of perjury; and
(7) be licensed for any occupation requiring a license.

[S.C. Code Ann. § 24-21-990.]

In South Carolina, it is settled law that a pardon does not expunge a criminal record. State v. Baucom, 334 S.C. 371, 378 (S.C. Ct. App. 1999)

> "Since the very essence of a pardon is forgiveness or remission of penalty, assessed on the basis of the conviction of the offender, a pardon implies guilt. ... It does not obliterate the fact of the commission of the crime and the conviction thereof, nor does it 'wash out the moral stain'. Thus, a pardon involves forgiveness and not forgetfulness. The 'ambit of the pardons statute must be confined to a restoration of civil rights; it cannot have the effect of eliminating consideration of a prior conviction in a subsequent judicial proceeding'."
>
> [Ibid. (internal citations omitted).]

See also the opinion of South Carolina Attorney General: ("This Office has frequently recognized this general doctrine in determining that a conviction is not expunged by virtue of a pardon." 1996 S.C. AG LEXIS 75.)

Like South Carolina, a pardon in New Jersey does not equal an expungement. Storcella v. State, Dept. of Treasury, Div. of State Lottery, 296 N.J. Super. 238, 243 (App.Div. 1997) ("A pardon is a matter of executive grace. A pardon relieves the guilty person from the burden of the crimes forgiven so that the legal disabilities attendant upon the convictions are removed. A pardoned person is restored to all rights of citizenship, and may vote, and may serve on a jury, but not all consequences of the conviction are erased by the pardon.") (internal citations omitted). New Jersey has also clearly delineated laws, relevant to this matter, which prohibit individuals who possess certain types of convictions from either working in or serving on a school board in a

school environment. This is not at all dissimilar to the above-cited South Carolina law, which allows one, even under a pardon, to hold public office, except as otherwise provided by law.

At the same time it is important to note that, unlike South Carolina, New Jersey does not operate a Board of Pardons. Instead the power to pardon is vested solely in the Governor, except in cases of treason and impeachment. N.J. Const. Art 5, § 2, cl.1[1]. The Constitution allows for the creation of a commission to assist and advise the governor on pardons, but no such single-purpose panel exists as it does in South Carolina. The Governor may also act to restore civil and all other rights, except the right to hold office. N.J.S.A. 2A:167-5.

As noted here in above, under N.J.S.A. 18A:12-1.2, the presence of a conviction for an enumerated offense identified during a criminal history record check disqualifies one from holding the office of member of a school board. N.J.S.A. 18A:12-1.2. That law is clear. Among the enumerated offenses is any "offense involving the manufacture, transportation, sale, possession, distribution or habitual use of a 'controlled dangerous substance'". N.J.S.A. 18A:12-1. Cocaine is a controlled dangerous substance. N.J.S.A. 24:21-6. As agreed to herein, Petitioner was convicted of possession of cocaine. Since this conviction has not been expunged, it remains on his record and the plain language of the statute warrants petitioner's disqualification. And I so **FIND.** At a minimum, the petitioner has also not shown well settled law that the pardon by South Carolina should equate to an expungement and prevent the Department from enforcing N.J.S.A. 18A:12-1.2.

It is further noted that South Carolina treats the pardon process as an integral part of their criminal justice process by issuing a substantial number of pardons each year and granting a high percentage of the applications filed. http://www.pardonlaw.com/materials/HireArticlesI-IV.5.10.pdf. It was represented at hearing that it confers pardons in approximately 60% of its reviewed matters. However,

[1] Under the 1844 Constitution, a court of pardons consisting of the Governor, the Chancellor, and six judges of the court of appeals, had authority to issue pardons. *See In re Court of Pardons*, 129 A. 624 (N.J. Pardons 1925). The power was placed with the Governor alone in the 1947 Constitution.

the pardon does not remove the fact or the record of a conviction, but merely restores to the defendant his civil rights. S.C. Code Ann. § 24-21-990. At the same time, the pardon does not seal, erase, or expunge the conviction from an individual's criminal record. When applying for a job or license, an individual may indicate on the application that he was pardoned of a particular crime, but he cannot deny that he was convicted of the crime because the conviction will still appear on a criminal history background check. South Carolina has no standard prohibiting employment discrimination by public or private employers based on a conviction record.

On the other hand, and despite the urgings and representations of petitioner's counsel at the emergent relief hearing in which he stated that it does not have an expungement law, South Carolina legislature has determined that expungement is nonetheless actually available in certain enumerated situations. S.C. Code Ann. § 34-11-90(e) (first offense misdemeanor fraudulent check); S.C. Code Ann. § 44-53-450(b) (conditional discharge for simple possession of marijuana or hashish); S.C. Code Ann. § 22-5-910 (first offense conviction in magistrates court); S.C. Code Ann. § 22-5-920 (youthful offender act); S.C. Code Ann. § 56-5-750(f) (first offense failure to stop when signaled by law enforcement vehicle); S.C. Code Ann. § 17-22-150(a) & 530(a) (pretrial intervention); S.C. Code Ann. § 17-1-40 (dismissal or non conviction of offense). By defining and limiting expungement to such narrow situations, the South Carolina legislature has clearly shown that it does not want criminal convictions to be broadly erased. It is noted that possession of cocaine is not one of them, which prohibition is consistent with New Jersey. At the same time, it can be reasonably inferred there from that South Carolina has made a deliberate and conscientious evaluation of expungement and has applied it to reflect its unique preferences and legislative mandates within that state. While demonstrating a desire to restore civil rights through the pardon process, that legislature has presumptively also protected the ability of public and private entities to discover and act upon an individual's criminal history by limiting the availability of expungement. Accordingly, in order to provide due respect and credit to those laws of South Carolina, this tribunal shall not contradict the intent of its legislature by equating a pardon with an expungement. To do so would impart upon the petitioner a benefit in New Jersey that he could not receive in South Carolina and

for which the South Carolina legislature has clearly indicated it does not want to confer. Equally importantly, however, and in any case, South Carolina law is nonetheless in accord with New Jersey law which states that a pardon does not remove a record of a conviction. Storcella v. State, Dept. of Treasury, Div. of State Lottery, 296 N.J. Super. 238, 243 (App.Div. 1997).

C. Petitioner must have a likelihood of prevailing on the merits of the underlying claim for emergent relief to be warranted.

The third principle for emergent relief requires that all material facts are uncontroverted and that for a party to get relief he "must make a preliminary showing of a reasonable probability of ultimate success on the merits." Crowe v. De Gioia, supra, 90 N.J. at 133. The most difficult requirement for the moving party to establish or in order to show entitlement to emergency relief is this third factor. In order to prevail on one's application for emergency relief, the party requesting the relief must make a preliminary showing of a reasonable probability of ultimate success on the merits. If the point of emergency relief is to maintain the parties in substantially the same condition at the final decision as when this matter began, it must be established by the moving party that it will probably win on the merits. It is with respect to this that petitioner has great difficulty. Petitioner must show that respondent's actions in this matter are arbitrary and capricious and unreasonable. This he has failed to do for the reasons stated herein.

The facts are uncontroverted and both parties acknowledge that petitioner was previously a duly elected member of the Asbury Park Board of Education and that he has a criminal conviction from South Carolina for which he has received the subject pardon. However, in light of the Department's reaffirmation on September 22, 2011 of Judge Schuster's initial decision that the criminal conviction disqualifies the petitioner under N.J.S.A. 18A:6-7.1 from working in any school in New Jersey (and that the instant board of education law mirrors that law) Palmer cannot show the reasonable probability that he will have success in this case since the legislative intent in protecting children in both settings is identical.

The respondent determined that petitioner was disqualified from serving on the school board under N.J.S.A. 18A:12-1.2. Once again, this statute is virtually a mirror image of N.J.S.A. 18A:6-7.1, which applies to school employees and volunteers while N.J.S.A. 18A:12-1.2 applies to school board members. Both statutes list possession of a 'controlled dangerous substance' as a disqualifying conviction. Thus, based upon the denial of petitioner's substitute teacher license, and without contrary appellate guidance, petitioner cannot make a preliminary showing of a reasonable probability of ultimate success on the merits in this case.

D. Emergent relief is only warranted when the equities and interests of the parties are balanced and the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The last test to be considered in determining whether to issue emergency relief is the "relative hardship to the parties in granting or denying relief." Crowe v. De Gioia, supra, 90 N.J. at 134. Here, when one balances the equities, I **FIND** that the respondent's need to limit the contact and influence that individuals with criminal convictions have with school-aged children outweighs the petitioner's desire to continue to serve on the Asbury Park School Board. By contrast, any harm to the petitioner is compensable with monetary damages subject to a showing by him of such actual damages, if any at all. Further, the petitioner's argument that the will of the electorate will be frustrated ignores the fact that the electorate will continue to be served by the elected school board. The electorate can address any dissatisfaction with future school board actions in the next election and further provided that the candidates comply with all appropriate state law regarding their legal ability and qualification in that regard. In the mean time, the respondent's interest in protecting the public and school children in Asbury Park outweighs any interest that petitioner has in serving on the board. Further, any argument about lack of equal protection must also fail since New Jersey and South Carolina have made deliberate and specific determinations regarding the impact of the pardon process and the expungement process in their respective jurisdictions. The fact that one state treats the "forgiving" (ie. pardon) process and expungement options differently does not create an unequal treatment under the law. New Jersey cannot dictate South Carolina law, and, importantly, neither can South Carolina do it in reverse.

And, in any case, they both exclude possession of cocaine from their individual expungement processes.

CONCLUSION AND ORDER

Based upon the foregoing and after having considered all the arguments advanced as well as the proofs offered by both sides, I therefore **FIND** and **CONCLUDE** that the right underlying petitioner's claim is clearly settled against the petitioner's position, thereby foreclosing any need for any more deliberative administrative proceeding at this level. He has not shown irreparable harm, nor that the law concerning pardoned convictions is well settled in his favor, nor that there is a likelihood of prevailing on the merits of his claim, nor that on balance he will suffer greater harm than shall the respondent. I also **FIND** and **CONCLUDE** that petitioner has failed to establish the right to relief and has failed to show that the action of respondent is arbitrary, capricious and unreasonable, this having occurred after having given petitioner all due deference and a full and a complete opportunity to present such arguments at the emergent relief hearing.

In view of the fact that petitioner has failed to establish the requirements for emergency relief, I **CONCLUDE** that petitioner's request must be **DENIED**.

I have made all these above findings and have formed all of these conclusions by a preponderance of the credible evidence.

Based upon the foregoing, it is hereby **ORDERED** that petitioner's request for emergency relief is **DENIED.** Any action by respondent against him in this matter shall not be stayed. It is so **ORDERED.**

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISIONER 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 (45) days following the entry of this order. If the **COMMISIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) 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.

September 30, 2011
DATE

JOHN R. FUTEY, ALJ

#451-11

IN THE MATTER OF THE TENURE HEARING OF DONALD DUDLEY, SCHOOL DISTRICT OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning school district certified four tenure charges against respondent – a tenured custodian – alleging neglect, misbehavior and other offense including insubordination and chronic absenteeism. These charges stem from the Board's contentions that respondent: frequently left early or missed work without properly reporting his absence; was on two occasions found to be asleep on the job; and was frequently absent from his position. The Board sought to terminate petitioner's tenured employment. Petitioner acknowledged absences that he contended were legitimate, but denied all of the Board's allegations and asserted that no disciplinary action was warranted.

The ALJ found, *inter alia*, that: for a Board to remove a tenured custodian, a showing must be made of the harm the employee's poor performance has had on the provision of a thorough and efficient education in adequately equipped, sanitary and secure facilities; additionally, the Board must show that the tenured custodian was adequately warned and failed to correct the unacceptable attendance and/or behaviors; in the instant case, the Board has produced sufficient evidence to support all four of the tenure charges; specifically, respondent repeatedly failed to follow procedures related to requesting and reporting time off, was twice caught sleeping on the job, and was chronically absent, and this conduct amounted to an ongoing pattern of misbehavior and neglect; however, the Board failed to provide timely warning to respondent that he needed to improve his attendance patterns; and respondent's unacceptable performance was not generally a significant problem for the overall safety and security of the school. Accordingly, the ALJ concluded that the appropriate penalty in this matter is not termination, but rather a suspension of six months and the withholding of any salary increment to which respondent would otherwise be entitled.

Upon careful review and consideration, the Commissioner concurred with the ALJ's finding that the tenure charges are supported by the record, but disagreed regarding the penalty to be imposed. The Commissioner concluded that: respondent had reason to be aware of the district's required rules and procedures, and the expectations of his supervisors, but persisted in rejecting them; there is no statutory mandate in tenure matters to impose progressive discipline; and the record is sufficient to support respondent's dismissal from employment. Accordingly, the tenure charges were affirmed, and the respondent was dismissed from his employment as of the date of this 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.

October 21, 2011

OAL DKT. NO. EDU 1839-11
AGENCY DKT. NO. 30-2/11

IN THE MATTER OF THE TENURE HEARING OF DONALD DUDLEY, SCHOOL DISTRICT OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

Four separate charges against respondent Donald Dudley, a tenured custodian in petitioner's district, are at issue in the instant tenure matter: 1) failure to follow attendance and reporting procedures, 2) sleeping on the job, 3) chronic absenteeism, and 4) persistent pattern of neglect, misbehavior and other offenses. Upon careful review of the record, Initial Decision of the Office of Administrative Law (OAL), and the parties' exceptions – which contain arguments similar to those contained in the post-hearing briefs – the Commissioner concludes that the record supports the charges.

As to CHARGE I, concerning attendance and reporting procedures, the Commissioner agrees with the Administrative Law Judge (ALJ) that the record supported the following facts: 1) respondent left work early on October 27, 2007 without reporting same to the appropriate supervisor; 2) respondent took June 21, 2010 off without reporting the absence to the appropriate supervisor or AESOP (the automated system that enters absences into the district's payroll records and calls substitute custodians to replace the absentees); 3) respondent left early on August 13, 2010 without contacting the appropriate supervisor or AESOP; 4) respondent took August 19, 2010 off without reporting the absence to the appropriate supervisor or AESOP; 5) respondent left early on August 24, 2010 without reporting to the appropriate supervisor or AESOP; 6) respondent took August 27, 2010 off without reporting to AESOP; 7) respondent left

early on September 9, 2010 without notifying the supervisor or AESOP; and 8) respondent applied for and took vacation without having received approval for the week before the opening of the 2010-2011 school year – a period of time where vacation is prohibited under the terms of the applicable collective bargaining agreement.

In addition to the foregoing, the Commissioner finds that respondent signed in but could not be found in petitioner's high school on two occasions during the week that included March 12, 2004. A business record, P-2, was presented memorializing the incidents. The business record was signed by the high school building principal, whose signature was identified by respondent's custodial supervisor, Donald Frangipane, who was familiar with same. (T20)[1] Under New Jersey's rules of evidence, *bona fide* business records may be regarded as exceptions to the hearsay rule. *N.J.R.E.* 803 (c) (6). Further, under the rules of evidence, a writing/signature may be authenticated by one who is not the signator, but is familiar with the signature. *See, N.J.R.E.* 903.

In summary, and particularly in light of the fact that the rate of respondent's reporting infractions increased in August and September of 2010, the Commissioner upholds CHARGE I.

As to CHARGE II, the charge that respondent slept on the job on two separate occasions (November 2, 2007 and January 27, 2010), the Commissioner agrees with the ALJ that the underlying facts are virtually undisputed. The charge is upheld.

As to CHARGE III concerning absenteeism, a review of the record reveals that the dates of absences identified in the charge are largely accurate. What remains to be evaluated is whether said absenteeism warrants discipline.

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[1] T shall designate the hearing transcript dated May 11, 2011; 2T shall designate the hearing transcript dated June 8, 2011 and 3T shall designate the hearing transcript dated June 23, 2011.

As the ALJ noted, excessive absenteeism may constitute sufficient independent grounds for the removal or suspension of a tenured employee. *Passaic Bd. of Ed. v. Viani*, 92 *N.J.A.R.*2d (EDU) 76. In fact, chronic or excessive absenteeism may warrant removal even when the sick leave is taken for legitimate medical or health reasons. *State-Operated School District of Jersey City v. Pellechio*, 92 *N.J.A.R.*2d (EDU) 269; *In the Matter of the Tenure Hearing of Marsden*, OAL Docket Number EDU 1188-84; *Kelsey v. Board of Education of the City of Trenton, Mercer County*, 1989 *SLD* 1622. Excessive absenteeism may also be found to constitute incapacity, unbecoming conduct, and other just cause for removal. *Ibid.*

A custodian is not held to the same attendance requirements as a teacher. *Passaic Bd. of Ed. v. Viani, supra*, 92 *N.J.A.R.*2d 76. Nevertheless, a school custodian holds a position of trust and responsibility requiring high standards of dependability. *In the Matter of the Tenure Hearing of Joseph McDougall*, 1974 *S.L.D.* 170. Regular attendance is essential because repeated absences may make it difficult to keep the building clean and possibly jeopardize the health and safety of the students and staff members of the school. *State-Operated School District of Paterson v. Watson*, 93 *N.J.A.R.*2d (EDU) 362.

The point at which absenteeism is so chronic as to warrant dismissal falls within the prerogative and discretionary authority of the local board of education, subject to review pursuant to the Commissioner's general authority to hear and determine controversies and disputes arising under the school laws. *In the Matter of the Tenure Hearing of Sheets*, 1980 *S.L.D.* 1536, *rev'g* 1979 *S.L.D.* 790. The nature of any warnings given to an employee and any corrective action taken by the board, as well as the reasons for the absences, are relevant to the question of whether discipline should be imposed. *Passaic Bd. of Ed. v. Viani, supra*, 92 *N.J.A.R.*2d 76. There must also be a showing of the harm the custodial employee's absences have

had on the provision of a thorough and efficient education. *Ibid.* And, as the ALJ noted, the coupling of absenteeism with other significant problems has served as a basis for dismissal. *See, e.g., In the Matter of the Tenure Hearing of Fabio Jiminez, Woodbridge Township School District, Middlesex County,* Commissioner Decision No. 123-10 (March 8, 2010).

Application of the foregoing principles to respondent's record of absences reveals factors that mitigate both for and against discipline. On the one hand, many of the absences appeared to be for medical reasons, including an August 2010 work-related injury. (R-14) On the other hand, head custodian William Jenkins and custodian Gregory Bacon testified that Dudley's many absences – especially when no substitute materialized – had a significant negative impact on the rest of the staff and the cleanliness of the building. (3T156-57; 3T183; 3T186-87) The ALJ noted that there were a limited number of exhibits memorializing advice or warnings to respondent about his general absenteeism. However, the record does include evaluations from 2006 and 2008 which memorialized dissatisfaction with respondent's attendance, as well as many instructional memoranda and written and verbal warnings issued to respondent about absences in the second half of his shift. Those notices and warnings did not appear to ultimately curb respondent's absenteeism – which included half days as well as full days.

Upon consideration of the foregoing, the Commissioner finds that the level and nature of respondent's absenteeism – referenced in CHARGE III – combined with his other performance deficiencies, warrants discipline.

Finally, as to CHARGE IV, the Commissioner concurs with the ALJ that the incidents referenced in the first three charges can be deemed to cumulatively constitute a pattern of neglect, misbehavior and other offenses, providing that the record shows that respondent was

aware of, or should have known about the attendance and reporting procedures that he was violating, and was on notice about petitioner's dissatisfaction with such issues as respondent's absenteeism and sleeping on the job The Commissioner concludes that respondent did indeed have notice of those procedures, rules and issues.

In the record, for example, is a written evaluation from March 2006 in which respondent received below average grades for reliability/dependability due to his excessive absences. (P-3; R-10) Building Principal Smith wrote: "Mr. Dudley's excessive absences have put quite a burden on those he works with. Substitutes are not readily available, which has often resulted in day custodians cleaning his area the next morning." Respondent signed this evaluation.

A disciplinary notice from Facilities Supervisor Frangipane – dated October 27, 2007 – warned respondent that another early departure without notifying his supervisor could subject him to dismissal. (P-5) The notice further stated that respondent had been verbally warned about the same problem in September 2007.

After an incident on November 2, 2007 where respondent was found sleeping on the job, respondent was issued a written warning signed by Building Principal Mark Alfone, Evening Custodial Supervisor Dawn Corbin, Custodial Supervisor Frangipane and respondent, that another sleeping incident could result in dismissal. (P-14)

In April 2008, respondent's evaluation by Frangipane noted attendance deficiencies. Respondent signed this evaluation. (P-47; T76-78) And on April 3, 2008, Frangipane issued a memorandum to all custodians – including respondent – reminding them of

the requirement to call the appropriate supervisor[2] before leaving work early. The memo also instructs that lunches must be taken mid-shift. (P-15; R-4, at 6)

In March of 2009 all employees, including respondent, were given instructions and training on using the AESOP attendance reporting system. (P-51; P-52; T194-95; T227)

On October 27, 2009, then evening custodial supervisor Edward Russell distributed a memorandum to all custodians, including respondent, concerning attendance and reporting. It directed, *inter alia,* that all absences be reported on AESOP, and that leaving early would not be permitted without prior authorization from a custodian's building administrator (principal), custodial supervisor or the facilities engineer (Frangipane). (P-16; R-4 at 7)

After respondent failed to report an August 27, 2010 absence on AESOP, and failed to contact a supervisor before leaving work early on September 9, 2010, Frangipane sent respondent a letter dated September 14, 2010 directing him to attend a meeting – with union representation – to discuss, *inter alia,* those incidents. (P-43) The letter warned that the meeting could impact respondent's continued employment in petitioner's district.

On September 21, 2010, Frangipane distributed yet another memorandum to all custodians, including respondent, reminding them about the previously distributed procedures for reporting absences, leaving before the end of the shift, and the prohibition against saving lunch or breaks until the end of the shift. (R-4 at 3-4; T187-189; P-15)

Finally, Frangipane testified that on several occasions he personally counseled respondent about his performance issues – such as sleeping on the job – his attendance, and his noncompliance with reporting procedures. For example, Frangipane testified that he advised Dudley verbally (as well as via memo P-5) that he needed to notify a supervisor whenever he

[2] According to Frangipane , head custodians – such as William Jenkins – were not supervisors and had no authority to approve early departures from work. Nor did a head custodian ever try to give such approvals. (T210-11)

needed to leave early. (1T37) Frangipane also recalled that Dudley had been specifically told on August 24, 2010 by head custodian Jenkins that it was Dudley's responsibility to call his supervisor about leaving early. (At that time there was no evening custodial supervisor, so a call to Frangipane was required.) (T162-63) And Frangipane verbally reminded Dudley that sleeping in the building was prohibited, referred to the fact that he had done it before, and warned that it could lead to termination. (T70; T204) The Commissioner notes, moreover, that it should be self-evident to any employee that sleeping on the job is unacceptable.

As regards proper reporting through the AESOP system, Frangipane testified that Dudley had blamed some of his unreported absences on an alleged failure of the system to register the correct day. However, after checking the AESOP printouts, Frangipane determined that there had been no problem attributable to AESOP. (T214-15) He verbally reprimanded Dudley. (T215)

In light of the foregoing, the Commissioner concludes that respondent had reason to be aware of the required rules and procedures, and the expectations of his supervisors, but persisted in rejecting them. Thus, CHARGE IV is supported by the record.

The Commissioner is mindful of the ALJ's concern that respondent did not receive many written warnings about his shortcomings – which concern led to the recommendation that respondent receive a six-month suspension as opposed to separation from service. In that vein, the Commissioner finds it somewhat surprising that respondent's March 2010 evaluation included no reference to the January 27, 2010 incident where respondent slept on the job. But it is noteworthy that the March 2010 evaluation was not completed by

Frangipane, the individual who had been most responsible for supervising and disciplining respondent.[3]

The March 2010 evaluation notwithstanding, the Commissioner finds that the record is sufficient to support respondent's dismissal from employment. More specifically, the Commissioner finds that over the course of respondent's six or seven years of permanent employment – despite some periods without documented infractions – the same problems concerning attendance and reporting were manifested by respondent. In August and September of 2010 the problems accelerated. The Commissioner is not persuaded that further warnings would have cured respondent of his pattern of ignoring district procedures.

Nor is there, in tenure matters, any statutory mandate to impose progressive discipline. *See, e.g., In the Matter of the Tenure Hearing of Marcelino Basulto, School District of the Town of West New York, Hudson County*, Dkt. No. A-1493-09 (App. Div. July 23, 2010). Had petitioner, for example, chosen to seek respondent's removal after the second sleeping incident, no progressive discipline would have been required.

Accordingly, the tenure charges are affirmed and respondent is terminated from his employment in petitioner's district.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/21/11
Date of Mailing: 10/24/11

[3] The individual who signed the March 2010 evaluation was Edward Russell, an evening supervisor who was no longer employed by petitioner as of June 2010. (T163)

[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 01839-11
AGENCY DKT. NO. 30-2/11

IN THE MATTER OF THE TENURE HEARING OF DONALD DUDLEY, SCHOOL DISTRICT OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY.

Nicholas Celso III, Esq., for petitioner School District of the Township of Neptune, Monmouth County (Schwartz, Simon, Edelstein & Celso, attorneys)

Stephen B. Hunter, Esq., for respondent Donald Dudley (Detzky & Hunter, attorneys)

Record Closed: August 9, 2011 Decided: September 6, 2011

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Donald Dudley (or respondent) is employed by the Board of Education of the Township of Neptune (or Board) in the position of tenured custodian. On February 1, 2011, the Board, pursuant to N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1, certified charges of neglect, misbehavior, and other offenses, including insubordination and chronic

absenteeism, constituting cause for dismissal and reduction in salary. Although Dudley acknowledges absences that he contends were legitimate, he denies all of the Board's allegations and contends that no disciplinary action was warranted, much less loss of tenure.

The Board's action encompasses four separate charges. The first, failure to report and follow procedures, alleges that on nine occasions Dudley either left early or missed work without properly reporting his absence. The second charge involves two instances of sleeping on the job. The third, chronic absenteeism, alleges that Dudley was absent from his position on sixty-two days in one three-month period, and fifty-three days in another eight-month period. The fourth charge, an ongoing pattern of neglect, misbehavior, and other offenses, alleges that the three charges, taken altogether, constitute a pattern of conduct that warrants dismissal. The matter was heard on May 11, 2011, June 8, 2011, and June 23, 2011. The record closed on August 9, 2011, with the submission of briefs.

FACTUAL DISCUSSION

The first charge centers on failure to follow procedures and directives, and therefore the Board offered extensive evidence concerning proper procedure for the reporting of absences.

Donald Frangipane, facility engineer for the district, is the administrator responsible for the custodial staff, among other things. He testified that since at least 2006 the district has required custodians to seek prior approval from either the custodial supervisor or Frangipane for absences. A written notice to Dudley after an incident that occurred on October 27, 2007, stated, "In the past, I have met with you and warned you that the building must not be left unattended. You were instructed to notify an administrator if you had to leave the premises." (P-5.) In that period the person Dudley should have contacted, according to Frangipane, was the custodial supervisor for the night shift, Dawn Corbin. The district offered P-15, a memo dated April 3, 2008, from Frangipane to All Custodians, which stated, "Please remember in the event you must leave your school for any reason other than your regularly scheduled lunch you must

contact a supervisor and must leave a voice message if you do not reach someone." The memo gives a phone number for reaching Frangipane after hours for supervisor assistance, implies that his approval is needed, and makes that explicit for substitute custodians. However, for the full-time custodians, it does not state explicitly who the other supervisors are. It also states that if a problem in the building does not necessarily require a supervisor, the custodians should call the head custodian for the building, Frangipane, or another employee, named Dennis Chenolli. The sign-in sheets do not go to payroll. (Tr. 2, June 8, 2011, at 74, 77.)

The second absence reporting procedure involves the system known as Aesop. Frangipane stated that sometime in 2007 the district implemented Aesop, an automated phone system for absences, which allows a person to either call in digitally entering that person's school identification number, or go online and enter the absence. There was general agreement among witnesses that Aesop will not accept contacts for a particular date after a period approximating twenty-four hours. Once that time period has passed, an employee is to contact the Human Resources office, and report the absence. It is then up to Human Resources to make the Aesop entry. Employees may call several days after an absence and advise Human Resources, which will then go in and correct the person's Aesop account. (Tr. 2 at 78.) David Mooij, school superintendent, explained that it is the Aesop record that connects to the payroll system and provides the fundamental accounting for sick, vacation, workers compensation, and other kinds of leave.

For custodians, upon an employee reporting an absence, the Aesop system would then automatically begin dialing a list of substitute custodians, until it found one to accept the assignment. A memo to all custodians dated October 27, 2009, states:

> If for any reason you are going to be absent you are required to follow the normal reporting procedures using the ASEOP [sic] system.
>
> . . . . .
>
> You are not permitted to leave prior to your normal completion time unless you have prior authorization from a

> Building Administrator, the Custodial Supervisor or the Facilities Engineer.
> [P-16.]

A related rule, Frangipane stated, was a prohibition on consolidating the two fifteen-minute breaks with the one-hour lunch break to allow one to leave early.

The third procedure requires custodians to sign into and out from work. For many years, this meant signing the paper rosters maintained at the main office in the facility (see P-24 at 16). Frangipane stated that the paper system did not require custodians to report leaving the premises during lunch hour, which was acceptable. Beginning on September 1, 2010, all school district employees were required to use a new card-swipe system. With the implementation of that system also came the requirement to swipe in and out when leaving the premises at lunchtime.

District superintendent David Mooij, who has spent thirty-eight years in the Neptune School District, many of them involving responsibility for facilities, acknowledged that there is a difference between the union contract and the school district policy regarding sign out. Where the union contract requires signing in, it has no such requirement regarding signing out. Nonetheless, Mooij said, there have been many, many memos to employees explaining why Board policy calls for signing out, which is important to safety for everyone, and to ensuring proper coverage of the building for cleaning purposes. When the swipe-in, swipe-out system was implemented in July 2010, the district asked employees to voluntarily cooperate so that problems could be identified before the system became mandatory on September 1, 2010. Mooij also testified extensively to the interplay between the sign-in sheets and Aesop with regard to other custodial employees on the relevant dates, and based on that testimony, I am persuaded that both systems were generally in use, that the manual sign-in system was reliable, that the sign-out system was less reliable, and that the interplay between Aesop and the sign-ins could be utilized reliably to determine when employees started work. As sign-out was not required, the onus was entirely on the employee to self-report absences.

Charge One

The Board alleges that on numerous occasions Dudley either left early or failed to come to work without reporting his absence in the manner required. The Board also alleges that he took a vacation during a period specifically prohibited per the union contract. The incidents are addressed separately below.

1. October 8, 2002. The evidence concerning October 8, 2002, an alleged failure to appear during the time he worked as a substitute custodian, consists of a photocopy of a post-it note affixed to a copy of his resume. While the Board argues this is an official part of his record, since no one could testify as to who created the note, when it was put there, or how the determination was made that the incident had occurred, the note is hearsay. As there is no competent evidence in support of the charge, I **FIND** that the failure to report on that date has not been proven.

2. March 12, 2004. Respondent was the subject of a "Substitute Check List" report dated March 12, 2004. (P-2.) The document states, "Signed in at the High School. Could not be found all day. Second time this week. I do not want him back in this building." The signature is illegible, and the transcript identifies the signer as "Mr. Debber (phonetic)." (Tr. 1, May 11, 2011, at 20.) Donald Frangipane, facility engineer for the district, identified the signer as "our building principal at the time." (Ibid.) Frangipane also stated that the check list form serves as a notice to the central office that a scheduled employee did not show up for work and did not report the absence. (Id. at 19.) Dudley, who was not yet permanent in March 2004, testified that he had no recall of failing to report during the time he was a substitute. Although the document is arguably a business record, and therefore evidence that the incident occurred, the signature is illegible, the signer was not called, there was no evidence that it was brought to Dudley's attention at the time, and it is so stale that Dudley has virtually no ability to defend against the charge, making it unfair to utilize in this proceeding.

3. October 27, 2007. Frangipane testified that he supervises the Board's facilities and its custodial staff. In that role, on October 27, 2007, at 4 a.m., he personally visited the middle school to which respondent was assigned for the purpose of locating him. Frangipane decided to visit the school because both he and the school principal had noted times when Dudley was not present, but Dudley always offered an excuse, such as lunch hour. On this date, Frangipane said, he walked the entire building without seeing a custodian. He rang the fire alarm for about ten minutes to see if he could raise anyone. At the time he entered, the rear door was unlocked, the lights were on, and the burglar alarm was off. Frangipane remained until 6:30 a.m., the end of the shift, without seeing anyone. David Mooij, superintendent, testified that during a meeting held on December 6, 2010, Dudley admitted he had left early. Dudley testified that he had to leave early on that date, tried unsuccessfully to reach his immediate supervisor, and could not turn the alarm on because he did not have the security codes for it. Dudley received a written notice of discipline, which stated, "You are now being placed on notice that if you leave work prior to the end of your shift without properly notifying an administrator with reasons, or leave the premises unattended during your shift, you may be immediately dismissed." (P-5.) Based upon the essentially uncontroverted testimony, I **FIND** as **FACT** that respondent left work at least two hours early without reporting it on October 27, 2007. With regard to the alarm, William Jenkins, head custodian at the middle school, testified that the last custodian in the building is supposed to set the alarm before leaving. (Tr. 3, June 23, 2011, at 162.) Jenkins said that the system does not require a code to turn the alarm on; it is only necessary to follow the instructions on the pad, which tells one what to do. (Ibid.) There is a code required to turn the alarm off, but not to turn it on. (Ibid.) Based on Jenkins' credible testimony, I **FIND** that Dudley had the ability to set the alarm but failed to do so.

In relation to the October 27, 2010, incident, Mark Alfone, school principal, sent Dudley a memo directing him to attend a meeting in his office on Thursday, November 1, 2007, along with his union representative. Frangipane testified that when Dudley failed to appear, they scheduled a second meeting, at which he also failed to appear. According to Frangipane, Dudley ran into unexpected

transportation problems the first time, and the second time went to the wrong room, waited fifteen minutes, and then left. A memo from David A. Mooij, superintendent of schools, dated December 6, 2007, confirmed that Dudley did appear at a meeting with the superintendent and his union representative. (P-13.) While his non-appearance at the first two meetings was unwise, and wasted the time of those waiting for him, I **FIND** that his excuses for failing to appear were legitimate, if ill-advised, and therefore do not constitute a separate failure to follow procedures.

4. June 21, 2010. The evidence consists of two documents, the first being a school sign-in sheet dated June 21, 2010, indicating that respondent was scheduled to work from 10 p.m. to 6:30 a.m. and did not sign in. (P-21.) The second is what Frangipane stated was the official district printout of leave taken on that date, generated from Aesop. (P-22.) Although the names of twelve custodians appear in relation to absences, Dudley is not listed as having been absent. Dudley testified that he has no recollection of having taken the day off, but if he did so, he would have contacted Will Jenkins, as the head custodian, to advise him of his absence. Although Jenkins recalled not being contacted by Dudley concerning absences, he could not state with any certainty that Dudley failed to contact him on June 21. I find it difficult to believe that Dudley worked without signing in, and the documents are official records that fall within an exception for hearsay. Based on the records, I **FIND** as **FACT** that Dudley was absent and failed to report it properly. Since the time and leave reporting system automatically contacts substitute custodians, I further **FIND** that the unreported absence deprived the Board of the opportunity to employ a substitute on that date.

5. August 13, 2010. In relation to the various early-leaving dates in August, Dudley testified that he was injured on the job on August 9, 2010, and, as a result was on light duty, restricted to tasks with no bending, lifting, or pulling. The record includes an Accident Investigation Report dated August 16, 2010, reporting that on August 9, 2010, Dudley had suffered back pain as a result of moving furniture and stripping floors. (R-14.) A Patient Visit Summary from

Meridian Occupational Health dated August 17, 2010, diagnosed a lumbosacral sprain and imposed the light-duty regimen. (R-16.) Other documentation establishes that treatment for the sprain continued through January 6, 2011. Three documents related to Friday, August 13, 2010, were offered. The first is a sign-in sheet for August 13, 2010, reflecting that respondent signed in at 3 p.m. and signed out at 7 p.m. with a notation of "half-day." (P-25.) The second, an Aesop printout for August 13, 2010, shows thirteen custodians absent for various reasons, but does not include a reflection that Dudley missed any time. (P-26.) The third, P-20, is a compilation of absences entitled, "Multi Year Absence Report Listing" for the period July 1, 2010, to March 31, 2011. It shows four absences in August 2010, but none on August 13. Frangipane testified that he visited the middle school on that date, and could not find Dudley. He spoke with others in the building, and none had seen him. Dudley testified that he did leave work early because he visited the physician for an epidural shot related to the August 9 back injury. (Tr. 2 at 169.) I credit Dudley's testimony that he told Jenkins he was leaving. However, he did not contact Frangipane to notify him, and the documents establish that he also failed to report the absence to Aesop, and I so **FIND**.

6. August 19, 2010. Frangipane testified that on Thursday, August 19, 2010, he left work, went home for dinner, and then visited the middle school. He could not locate Dudley, which was consistent with the fact that the school sign-in sheet for that date did not show any sign-in by him. (P-32.) The Multi Year Absence Report Listing shows no absence on that date. (P-20.) At this point, Frangipane said, he was becoming very concerned because this was the third time he had visited without finding respondent. Dudley testified that he has no independent recollection of where he was on August 19, 2010, but that he had a practice of calling in and reporting, and would have contacted both Aesop and his immediate supervisor, William Jenkins. I am not persuaded that Dudley called Aesop or any superior. Rather, based on Frangipane's testimony and the documents, I **FIND** that Dudley did not report for work, did not advise any superior that he would not be coming in, and further failed to report his absence

to Aesop. Additionally, as he did not report his absence, the District was deprived of the opportunity to employ a substitute custodian on that date.

Dudley's normal assignment was the two gymnasiums, the boys' and girls' locker rooms, two bathrooms, and all of the hallways in the three-floor building. (Tr. 2 at 148; Tr. 3 at 159.) In his absence, these had to be covered by either the other two custodians assigned to the building or a substitute. (Tr. 3 at 159.) William Jenkins characterized Dudley's unreported absences as having "a big . . . impact" because it would leave Jenkins and a substitute to cover Dudley's work as well as their own. (Tr. 3 at 156.) "[A]fter doing 26 classrooms and six bathrooms you're kind of tired, and you get wore out . . . [and] when we do his run we didn't do everything Mr. Dudley would do, but we'd do it where it looks presentable, but it's not everything we could do on that run." (Tr. 3 at 156–57.) Jenkins also talked about the periods when no substitute was located. (See, e.g., P-20, showing no substitute on numerous dates in July and August 2010.) He explained that sometimes no substitute is available because there are openings in other buildings as well. But even if substitutes were located, in Jenkins' opinion, their work was not of the same quality as Dudley's. (Tr. 3 at 183.)

7. August 24, 2010. On that date, the sign-in sheet shows Dudley working from 3 p.m. to 7 p.m., and then bears the notation "sick." (P-34.) Dudley stated that the notation is not his handwriting, but appears to be that of his supervisor, William Jenkins. He did recall telling Jenkins that he was ill and needed to leave. Jenkins testified that he was aware of the district policy requiring a custodian who needed to leave work early to do two things—tell the head custodian, and also call the supervisor, whose number was posted in the office. (Tr. 3 at 146, 148.) While Dudley followed the first part of the procedure, there was no evidence that he followed the second part, and therefore I **FIND** that he did not contact Frangipane on that date. Although the Multi Year Absence Report Listing shows that Dudley was out sick on August 25 and August 26, it has no indication that he was absent for a half day on August 24. (P-20.) Therefore, I **FIND** that he also failed to report his absence to Aesop.

8. August 27, 2010. Similarly, on August 27, Dudley recalled calling into Jenkins, and testified that the "out sick" on the sign-in sheet appeared to be Jenkins' handwriting. (P-35.) Based on the absence of an Aesop record for that date, I **FIND** that Dudley did notify the head custodian but failed to call into the system that tracks leave and assigns temporary custodians. This failure to provide notice prevented the district from using the automated calling system to contact a substitute.

9. September 9, 2010. Frangipane stated that Dudley left four hours early on Thursday, September 9, 2010, without notifying a supervisor that he was leaving. Frangipane stated that he personally visited the building and could not locate Dudley, and there is a video showing Dudley leaving. (See also P-45.) The printout from the alarm-monitoring system indicates that Dudley swiped his card at 7:59 p.m. (P-8), which would be mid-shift, or about the time he would be expected to leave for lunch. (Tr. 1 at 82.) The report gives no indication that he swiped in, either initially or upon return from lunch. The Aesop daily report for September 9, 2010, records other custodial absences, but not Dudley's. (P-42.) Dudley testified that he spoke to Jenkins about not returning that day because of illness. (Tr. 2 at 176.) While he may have spoken to Jenkins, based on Frangipane's testimony and the video, I **FIND** that Dudley left early and did swipe out, but did not report his absence to the time-leave reporting system and did not advise Frangipane of his need to leave early.

10. Vacation during a prohibited period. A substantial component of the "failure to follow procedures" charge is the failure to follow appropriate procedures in taking a vacation the week before school. Some facts related to this charge are undisputed. The union contract for the period July 1, 2009, through June 30, 2012, states in Article VII—Work Hours, Holidays and Vacation in Paragraph E, Custodians, subparagraph (e), that "Vacation requests shall not be granted during the first week after the close of school in June, or during the last two weeks prior to the reopening of school in September." (P-24.) Dudley submitted a vacation request for August 30, 2010, through September 3, 2010,

(P-23) which was the week immediately before school opened. (Tr. 1 at 65.) The union contract states, "A vacation application must be approved or rejected by Administration within ten work days of submission." (P-24.) It does not state what happens if the approval or rejection is not given, and does not state whether it requires a verbal or written denial.

Dudley testified that he turned the request into Mark Alfone, principal of the middle school, on August 11. Frangipane explained that the usual practice is for a school principal, who has authority to approve, to respond to the request. However, where, as in this instance, the principal believes there is a problem, the request is forwarded to Human Resources, which then sends it to Frangipane. Having received the request on August 16, Frangipane began trying to visit Dudley to talk with him about the request. When he kept not finding him, he began reviewing additional documentation, which is how he discovered the multiple August sign-in irregularities. Finally, on August 30, the effective date of the vacation request, he called Dudley's home at 10:58 a.m., well before the beginning of his late-day shift. He received no answer, as Dudley already had left home on vacation. Outside of that phone contact, Frangipane did not otherwise call Dudley. He also did not utilize email, regular mail, a notice posted at Dudley's work station, or a notice in Dudley's mail slot in the middle school, and did not ask head custodian Will Jenkins, who worked the same shift as Dudley, to advise Dudley that his request was not approved. Frangipane testified that he considered a written response to be outside of the contract requirements, and said it has never been his practice to call custodians at home in relation to their vacation requests. In his view, the vacation became an unauthorized absence on August 30, 2010. The Board contends that Frangipane's call on August 30, following the August 16 receipt of the request meant that the administration responded within nine days. Respondent contends that the August 30 call came on day nineteen, putting the response outside the contract.

David Mooij, superintendent of schools, testified that the district and the union split the cost of printing a copy of the union contract for every individual. (Tr. 2 at 40.) The Board sends out one copy per person per building. (Tr. 2 at

40.) Dudley testified that he was not aware of the black-out period. (Tr. 2 at 165.) He also testified that in all the years he has worked for the district, he never looked at the collective bargaining agreement. (Tr. 3 at 85, 86.) Jenkins, the head custodian, testified that he was aware of the black-out period. (Tr. 3 at 157.) Gregory Bacon, who has been a custodian with the district for twenty-seven years, also testified that vacation has been prohibited during the two weeks before school as long as he can recall. (Tr. 3 at 189.)

Based upon the actual vacation request and Dudley's statement, I **FIND** that he turned in the vacation request on August 11, which means that Frangipane's denial did not come until day nineteen, which is outside the time required by the union agreement. Given the language of the agreement, I do not find credible Dudley's assertion that he did not worry about it because he never received responses to his requests. (Tr. 3 at 66.) While he may well not have bothered to look at the union agreement, his failure to inform himself does not relieve him of his responsibility to understand the terms and conditions of employment. The testimony by Jenkins and Bacon establishes that the two-week prohibition was longstanding and well known. Therefore, I **FIND** as **FACT** that respondent failed to comply with the policy.

Charge Two

The record includes a written warning to Dudley for having been discovered asleep in the faculty lounge during his shift on November 2, 2007. (P-14.) Dudley said he had taken some medicine before taking his normal break in the faculty lounge. He does not believe he dozed any appreciable amount of time before Supervisor Dawn Corbin entered the lounge. They then discussed work matters for a considerable period of time. (Tr. 2 at 176-177.)

In relation to the second incident, Donald M. Frangipane testified that he personally found Dudley asleep on January 27, 2010, in the teacher's lounge, and that a video camera outside the lounge recorded Dudley's entrance into the lounge around 3 a.m., and Frangipane's entry at 5:20 a.m., about an hour before the shift ended at 6:30

a.m. As there is no real dispute that Dudley was sleeping for a period of time on both occasions, the two sleeping incidents are **FOUND** as **FACT**.

Charge Three

The third, chronic absenteeism, alleges that Dudley was absent from his position fifty-three days in an eight-month period, and sixty-two days in one three-month period. The first lengthy leave, between July 1, 2007, and March 31, 2008, was occasioned by major surgery to Dudley's shoulder. The record includes Board approval of sick leave termination dates of January 30, 2007, and December 19, 2007, for Dudley (R-33; R-36), as well of medical evidence regarding inability to work from June 15, 2007, through July 23, 2007, when return was possible excluding heavy lifting and overhead reaching. (R-34; R-35.) The sixty-two days were taken between June 10, 2009, and September 30, 2009. Dudley does not contest the fact that he was out, but emphasizes that the reason was major back surgery. He submitted medical evidence to show that he properly requested leave, and was treated with a lumbar fusion on June 12, 2009. (R-37 to R-40.) Except for four days, the Multi Year Absence Reporting Listing indicates that the Board was able to locate substitutes. (P-18; P-19.) As there is no dispute as to the absences or the reasons for them, they are found as **FACT**.

Charge Four

The fourth charge essentially collapses all of the incidents in question into a charge of an ongoing pattern of neglect, misbehavior, and other offenses, including repeated and deliberate abandonment of assigned duties, disregard of procedures, sleeping on the job, chronic absenteeism and general failure to follow instructions.

Dudley became employed full-time by the Neptune School District in September 2003. (Tr. 2 at 145.) He acquired tenure on October 22, 2007. (Tr. 2 at 146.) Five days after acquiring tenure, he left work early, leaving the building completely unattended and without the protection of an active alarm system. About a week after that, he was found sleeping on the job. In about this same time period, he had

undergone major surgery to his shoulder, such that he missed fifty-three days due to illness between July 1, 2007, and March 31, 2008.

Dudley has experienced two other significant health problems. He was out sixty-two days, for back surgery, between June 10, 2009, and September 30, 2009. Then, about a year later, on August 9, 2010, he suffered back pain as a result of moving furniture and stripping floors. He was diagnosed with a lumbosacral sprain and was required to follow a light-duty regimen. Documentation establishes that treatment for the sprain continued through January 6, 2011.

Dudley has not managed an event-free year since acquiring tenure, although to be fair, 2008 was only marred by the lingering absences related to the shoulder surgery. In January 2010, he was caught sleeping on the job, and that summer marked a significant deterioration in compliance with procedures. For whatever reason, he began to disregard them routinely. While everyone, including the school superintendent, acknowledges that the sign-out rule was shaky at best, and therefore Dudley's failures to sign-out are not actionable, the record establishes that a call (or a computer entry) into Aesop, the District's time and leave reporting system, was required. Dudley's background included prior employment in computers, so it is clear he had the technical ability to use the computer. Further, it was also permissible to call Human Resources and have personnel adjust the record. Since Aesop is the system by which the usage of the time off entitlements is recorded, routine failure to contact Aesop amounts to granting oneself additional time off with pay. Additionally, since Aesop includes a feature that automatically seeks a substitute custodian, the repeated failure to provide notice routinely deprived the district of the opportunity to secure a replacement for the shift.

With regard to the vacation during the black-out period, I do not believe Dudley knowingly set out to violate the black-out policy; rather, I am convinced that by that point, Dudley had lost all awareness of the district's actual leave policies. But the district had a contractual obligation to reply within ten days, which it did not meet. Whether an immediate negative response would have prevented the absence is a matter of speculation, but it at least would have provided timely notice that there was a

problem. By the time respondent returned, he was on notice through the phone call made by Frangipane that the District had actually denied the vacation, based on violating a policy. Apparently this knowledge did not result in any additional care with regard to following procedures, since on September 9, 2010, he left mid-shift and failed again to report his absence to Aesop. Therefore I **FIND** as **FACT** that there was an ongoing pattern of failure to comply with procedure. I also **FIND** that the absences related to the three injuries, plus the vacation during the period that school was being prepared to reopen, plus the unreported absences amount to chronic absenteeism. Further, leaving the school unattended and unlocked with no alarm, sleeping on the job, awarding himself extra sick time by failing to report what he took, and depriving the Board of the opportunity to call substitutes, taken together, amount to a pattern of neglect of duty and misconduct.

LEGAL ANALYSIS

A tenured employee may only be dismissed if the District shows "inefficiency, incapacity, unbecoming conduct, or other just cause[.]" N.J.S.A. 18A:6-10. Tenured janitorial employees may not be "dismissed or suspended or reduced in compensation . . . except for neglect, misbehavior or other offense[.]" N.J.S.A. 18A:17-3. The Board has the burden of proof in relation to the charges it has brought. In re Polk, 90 N.J. 550 (1982).

In the instant matter, the Board has produced sufficient evidence to support all four of the charges. The Board has established: (1) that respondent repeatedly failed to follow procedures related to requesting and reporting time off; (2) that he twice was caught sleeping on the job; (3) that he was chronically absent; and (4) that his conduct amounted to an ongoing pattern of misbehavior and neglect. The remaining issue is the appropriate discipline.

The Board urges dismissal is the appropriate remedy, as it is well-established that excessive absenteeism in and of itself may constitute sufficient grounds for the removal or suspension of a tenured employee. Passaic Bd. of Educ. v. Viani, 92 N.J.A.R.2d (EDU) 76; Jiminez v. N.J. State-Operated Sch. Dist. of Paterson, 96

N.J.A.R.2d (EDU) 600. Additionally, the Commissioner on numerous occasions has removed custodians where absenteeism was coupled with some other significant problem. See In re Jiminez, EDU 09298-09, Initial Decision (March 8, 2010), adopted, Comm'r (April 22, 2010) <http://lawlibrary.rutgers.edu/oal/search.html>, where a custodian was not only frequently absent but had behaved toward other employees in ways that were disrespectful, offensive, and intimidating.

However, in seeking to remove a tenured custodian for absenteeism, the Board must demonstrate "the extent of harm such performance of a custodial employee has on the provision of a thorough and efficient education in adequately equipped, sanitary and secure physical facilities . . . ." Passaic Bd. of Educ., supra, 92 N.J.A.R.2d (EDU) 76. Moreover, the cases affirming removal virtually always include some showing that the custodian had been adequately warned, and failed to correct the unacceptable attendance. For example, in In re Tenure Hearing of Riddick, 93 N.J.A.R.2d (EDU) 345, 346, 347, then Chief Administrative Law Judge Jaynee LaVecchia wrote that she was "left with the impression that Riddick used any excuse to explain his lack of dedication to attend his work." There was also evidence that "[d]uring each of the two times he was put on notice that his attendance would be focused upon during a certain time period . . . his attendance . . . was virtually flawless," but invariably returned to unacceptable levels. In In re Tenure Hearing of Isaac, 97 N.J.A.R.2d (EDU) 27, a custodian had been notified repeatedly that his attendance and performance were unacceptable over a period of at least three years. His increment was withheld twice, and he had been suspended, but his performance continued to deteriorate. In In re Tenure Hearing of Basulto, No. A-1493-09 (App. Div. July 23, 2010) <http://lawlibrary.rutgers.edu/search.shtml>, a custodian was warned in January 2006 about leaving early and advised that further infractions would result in termination. In January 2008 he received a second written warning for failure to maintain rooms properly over a three-day period. See also In re Tenure Hearing of Marsden, OAL Dkt. No. EDU 1188-84, Initial Decision (August 26, 1985), adopted, Comm'r (October 10, 1985). Consequently, the nature of any warnings given to an employee and any corrective action taken by the board, as well as the reasons for the absences, are relevant to the questions of whether discipline should be imposed. Passaic Bd. of Educ., supra, 92 N.J.A.R.2d 76.

Here, Dudley received two written reprimands. The first was in relation to leaving the building without any security measures on October 27, 2007, and the second for sleeping on the job on November 2, 2007. Dudley did not receive a written reprimand for the sleeping incident of January 2010. (Tr. 1 at 152). With regard to his overall performance, an evaluation from March 2006 stated that respondent's "excessive absences have put quite a burden on those he works with. Substitutes are not readily available which has often resulted in day custodians cleaning his area the next morning." (R-10.) The evaluation for April 2008 stated, "Overall[,] Mr. Dudley is not meeting our expectations as a custodian." (R-11.) It noted the October 27 and November 2 incidents, and stated that, "Mr. Dudley must improve the cleanliness of his run and his attitude towards work in the coming year. Failure to do so can affect future employment." Nonetheless, it recommended advancement on the salary scale. (Ibid.) The March 31, 2009, evaluation noted improvement in both cleanliness and overall attitude. (R-12). The March 15, 2010, evaluation made no reference to the January sleeping incident and praised respondent for "improvement in the cleanliness of his run" and for great improvement in his conduct "as well as his attitude towards work" and his co-workers. (R-13.) While Dudley did receive warnings, they were old, and the positive 2010 evaluation encompassed a period when he was out sick for sixty-two days and was caught sleeping on the job. Praise for improvement in such circumstances cannot be said to have warned him that he needed to alter his attendance patterns.

Respondent relies upon the absence of progressive discipline for the proposition that discipline should be limited to a minor disciplinary penalty. Respondent points to the presence of a Board policy for support staff, which states, in pertinent part:

> Discipline will include as appropriate, verbal and written warnings, transfer, suspension, freezing wages and dismissal; discipline will provide, wherever possible, for progressive penalties for repeated violations.
>
> [P-65.]

As a general proposition, there is no statutory support for progressive discipline in the tenure arena. (Basulto, supra, No. A-1493-09 (App. Div. July 23, 2010)

<http://lawlibrary.rutgers.edu/search.shtml>) But the Board has formulated a policy, which indicates that it will apply progressive penalties as appropriate.

Although respondent's failures were very serious, the lack of recent warning in the face of some significant occurrences, indicates that a penalty short of dismissal is warranted. Additionally, although the October 27, 2007, incident jeopardized the security of the school, the other incidents were shown to be burdensome for the other custodians but not a significant problem for the overall safety and security of the school. Taking a vacation right before school started did violate the union contract—and was symptomatic of a disconnection from the needs of the school in general—but the negative response was also in violation of the contract, as it was not timely. Weighing all the factors, I **CONCLUDE** that termination is not appropriate. However, I **CONCLUDE** that a significant penalty is warranted for the purpose of making clear that attendance is a primary duty, as is compliance with all of the Board's policies and procedures.

ORDER

The Board's action is **OVERRULED**, and I hereby **ORDER** a suspension of six months (excluding the time served to date), plus the withholding of any increment that might otherwise be due.

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 6, 2011
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: September 6, 2011

Date Mailed to Parties: September 6, 2011

/caa

LIST OF WITNESSES

For Petitioner:

Donald M. Frangipane
David Mooij
Gregory Bacon
William Jenkins

For Respondent:
Donald Dudley

LIST OF EXHIBITS

For Petitioner—School District of the Township of Neptune:

P-1 Handwritten Note dated October 8, 2002
P-2 Substitute Check List dated March 12, 2004
P-3 Personnel Evaluation Form—March 2006 dated March 29, 2006
P-4 Memo from Frangipane to Head Custodians dated August 6, 2007
P-5 Disciplinary Written Notice, dated October 27, 2007
P-6 Multiyear Absence Report—2007-2008
P-7 Email from Mooij to Alfone dated October 29, 2007
P-8 Alarm Monitoring Report—243 from September 9, 2010 through October 27, 2010
P-9 Memo from Alfone to Dudley dated October 30, 2007
P-10 Memo from Alfone and Frangipane to Dudley dated November 19, 2007
P-11 Letter to Dudley from Frangipane dated November 19, 2007
P-12 Letter to Dudley from Mooij dated November 28, 2007
P-13 Letter to Alfone from Mooij dated December 6, 2007
P-14 Written Warning to Dudley dated November 2, 2007
P-15 Memo to All Custodians from Frangipane dated April 3, 2008

P-16 Memo to All Head Custodians and All Custodians from Edward G. Russell dated October 27, 2009

P-17 Memo to Mooij from Frangipane dated October 21, 2010

P-18 Multiyear Absence Report—2008-2009

P-19 Multiyear Absence Report—2009-2010

P-20 Multiyear Absence Report—2010-2011

P-21 Custodial Sign-In Sheet dated June 21, 2010

P-22 Daily Report dated June 21, 2010

P-23 Dudley Vacation Request dated August 11, 2010

P-24 Agreement between NTBOE and NTEA for the period July 1, 2009, through June 30, 2012

P-25 Custodial Sign-In Sheet dated August 13, 2010

P-26 Daily Report dated August 13, 2010

P-27 Custodial Sign-In Sheet dated August 9, 2010

P-28 Custodial Sign-In Sheet dated August 11, 2010

P-29 Custodial Sign-In Sheet dated August 12, 2010

P-30 Custodial Sign-In Sheet dated August 17, 2010

P-31 Custodial Sign-In Sheet dated August 18, 2010

P-32 Custodial Sign-In Sheet dated August 19, 2010

P-33 Custodial Sign-In Sheet dated August 23, 2010

P-34 Custodial Sign-In Sheet dated August 24, 2010

P-35 Custodial Sign-In Sheet dated August 27, 2010

P-36 Custodial Sign-In Sheet dated August 30, 2010

P-37 September 2010 Calendar

P-38 Daily Report dated August 31, 2010

P-39 Daily Report dated September 1, 2010

P-40 Daily Report dated September 2, 2010

P-41 Daily Report dated September 3, 2010

P-42 Daily Report dated September 9, 2010

P-43 Letter to Dudley from Frangipane dated September 14, 2010

P-44 Memo from Frangipane to Mooij dated September 22, 2010

P-45 Email from Mooij to Frangipane dated December 16, 2010

P-46 Not offered

P-47 Performance Evaluation Form for Dudley dated May 28, 2008

P-48 Absence Report Detail—2006–2008

P-49 Multiyear Absence—2007–2008

P-50 August 2010 Calendar

P-51 AESOP Quick Start Guides for Employees, March 2009

P-52 AESOP Phone System Instructions for Employees

P-53 Sprint Invoice dated September 30, 2010

P-54 Aesop Report dated August 9, 2010

P-55 Aesop Report dated August 11, 2010

P-56 Aesop Report dated August 12, 2010

P-57 Aesop Report dated August 17, 2010

P-58 Aesop Report dated August 18, 2010

P-59 Aesop Report dated August 19, 2010

P-60 Aesop Report dated August 24, 2010

P-61 Aesop report dated August 27, 2010

P-62 Aesop report dated August 30, 2010

P-63 Aesop report dated August 23, 2010

P-64 Swipe Card Ledger dated August 2010

P-65 Neptune Township Board of Education Policy 4150—Discipline

P-66 Letter to Bertha Williams-Pullen from Donald Dudley dated October 13, 2010

P-67 Video of January 27, 2010 with Stipulation—identification only

For respondent—Donald Dudley:

R-1 Not offered

R-2 Letter from Donald Frangipane to Donald Dudley dated September 14, 2010

R-3 Letter from Superintendent of Schools David Mooij to Donald Dudley dated September 23, 2010

R-4 Letter from Bertha Williams-Pullen to Mark Lupinski dated October 14, 2010

R-5 Not offered

R-6 Not Offered

R-7 Not Offered

R-8 Not Offered

R-9 Non-Instructional Personnel Evaluation Form regarding Donald Dudley dated March 2005

R-10 Non-Instructional Personnel Evaluation Form regarding Donald Dudley dated March 2006

R-11 Non-Instructional Personnel Evaluation Form regarding Donald Dudley dated April 2008

R-12 Non-Instructional Personnel Evaluation Form regarding Donald Dudley dated March 2009

R-13 Non-Instructional Personnel Evaluation Form regarding Donald Dudley dated March 15, 2010

R-14 Accident Investigation Report dated August 16, 2010

R-15 Workers' Compensation First Report of Injury dated August 25, 2010

R-16 Patient Visit Summary dated August 17, 2010

R-17 Intake Information Form entered on August 16, 2010

R-18 Status Update Form dated August 17, 2010

R-19 Status Update Form dated September 13, 2010

R-20 Status Update Form dated September 15, 2010

R-21 Patient Visit Summary dated September 15, 2010

R-22 Status Update Form dated September 20, 2010

R-23 Status Update Form dated October 4, 2010

R-24 Status Update Form dated October 18, 2010

R-25 Status Update Form dated November 2, 2010

R-26 Status Update Form dated November 12, 2010

R-27 Status Update Form dated November 23, 2010

R-28 Status Update Form dated December 10, 2010

R-29 Status Update Form dated December 21, 2010

R-30 Status Update Form dated January 6, 2011

R-31 Letter to Donald Dudley from Leslie Haug dated March 11, 2011

R-32 Status Update Form dated February 28, 2011

R-33 Portion of Board Minutes relating to approval of sick leave terminal date for Donald Dudley dated January 30, 2007

R-34 Medical Certification dated June 15, 2007

R-35 Medical Certification dated July 19, 2007

R-36 Portion of Board Minutes relating to approval of sick leave terminal date for Donald Dudley dated December 19, 2007

R-37 Letter from Dr. Cary Glastein dated May 27, 2009

R-38 Certificate of Professional Care from Dr. Cary Glastein dated August 19, 2009

R-39 Medical Certification dated September 21, 2009

R-40 Portion of Board Minutes relating to approval of sick leave terminal date for Donald Dudley dated April 1, 2009

R-41 Status Update form dated August 23, 2010

R-42 Light Duty Medical Note dated August 12, 2010

R-43 Medical Certification from Jack Ebani dated August 26, 2010

R-44 Memorandum from Don Frangipane to All Custodians dated March 14, 2011

#452-11

BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
THE RAMSEY TEACHERS ASSOCIATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board sought to invalidate its April 2009 resolution establishing two consecutive two year salary schedules for the school years from 2007-2008 to 2010-2011, contending that the resolution violates the requirements of *N.J.S.A.* 18A:29-4.1, which limits the adoption of salary policies and schedules by boards of education to not more than three years from the effective date of said policies. Respondent teachers association asserted that the action of the Board was consistent with the law, and that the Board is obligated to pay unit members all salary increases promised in the salary schedules. 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 judgment; *N.J.S.A.* 18A:29-4.1 allows adoption of salary policies, including salary schedules, for terms of one, two or three years; such policies are binding upon the adopting board and future boards for one, two, or three years from the effective date of the policy; in 2009, the petitioning Board retroactively agreed upon salary adjustments for 2007-2008 and 2008-2009, as well as the two forthcoming years, 2009-2010 and 2010-2011; accordingly, the 2009 Board bound successor boards for only two years, and its actions were therefore fully compliant with *N.J.S.A.* 18A:29-4.1. The ALJ concluded that during the 2011-2012 school year, the Board must honor the salary guides adopted in 2009 and pay any increments earned under the 2010-2011 salary guide.

The Commissioner rejected the Initial Decision of the OAL, finding, *inter alia*, that the petitioning Board exceeded its authority under *N.J.S.A.* 18A:29-4.1 by binding itself and future boards for a total of four years, despite the fact that the salary schedules for the first two years were distributed in a lump-sum retroactive payment. In so determining, the Commissioner rejected the ALJ's conclusion that the salary policy was consistent with the statute because the Board only bound future boards for two years; such a conclusion creates an exception that would allow for retroactive payments as a means to circumvent the three year limit mandated in *N.J.S.A.* 18A:29-4.1. Accordingly, the fourth year of the petitioning Board's policy that provides a salary schedule for 2010-2011 is null and void.

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 21, 2011

OAL DKT. NO. EDU 03444-11
AGENCY DKT. NO. 48-2/11

BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
THE RAMSEY TEACHERS ASSOCIATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Board.[1]

The Board takes exception to the Administrative Law Judge's determination that the Board did not bind itself beyond the three year limit imposed by *N.J.S.A.* 18A:29-4.1. The Board argues that it is irrelevant that the Board adopted two separate collective bargaining agreements rather than one four year agreement because the Board still effectively bound itself to four years in violation of *N.J.S.A.* 18A:29-4.1. As a result the Board contends that the Initial Decision should be rejected, and that the fourth year of the salary policy should be null and void – precluding the Board from paying the salary increments to teachers based thereon for the 2011-2012 school year.

In support of its argument, the Board cites to an unpublished Appellate Division Opinion in *Bogota Educ. Ass'n. v. Bogota Bd. of Educ.*, Docket No. A-4708-97T2

[1] The respondent filed reply exceptions out of time without requesting an extension for filing, and as a result they were not considered.

(May 24, 1999).[2] The Board maintains that the facts in *Bogota, supra*, are analogous to the facts in this case and therefore the Commissioner should adopt the legal reasoning in *Bogota, supra.* In its exceptions the Board contends that in *Bogota, supra*, the Appellate Division addressed whether a collective bargaining agreement that provided for a lump-sum retroactive salary payment covering a two year period – and also prospectively established a pay scale for the following two years – was in violation of *N.J.S.A.* 18A:29-4.1. The Appellate Division held that such an agreement was inconsistent with *N.J.S.A.* 18A:29-4.1 because the time period affected by the memorandum was four calendar years despite the ratification date of the agreement.

The Board also contends that the ALJ erred by concluding that *N.J.S.A.* 18A:29-4.1's prohibition on salary guides longer than three years was prospective only. In its exceptions, the Board stresses that the statute does not limit its prohibition to the prospective adoption of teaching salaries, but rather it simply provides that the adopted salary schedules can only be binding upon the adopting board and upon all future boards for a period of one, two or three years. Finally, the Board argues that the intent or good faith of the Board in adopting its resolution is irrelevant to assessing whether the resolution is consistent with *N.J.S.A.* 18A:29-4.1.

Upon a comprehensive review of the record in this matter, the Commissioner finds that the salary policy adopted by the Board pursuant to the April 28, 2009 Resolution (April 2009 Resolution) is in violation of *N.J.S.A.* 18A:29-4.1. Under *N.J.S.A.* 18A:29-4.1, a board of education may adopt a one, two or three year salary policy that shall be binding upon the adopting board and upon future boards for a period of one, two or three years from the effective date of the policy. The plain meaning of *N.J.S.A.* 18A:29-4.1 expressly limits salary schedules to no more than three years; further, any contract that establishes a salary schedule

[2] The Board failed to include the required footnote stating that there are no known contrary unpublished opinions known to counsel pursuant to *R.* 1:36-3.

beyond the third year is not binding. *Board of Educ. of the Tp. of Neptune v. Neptune Tp. Teacher's Ass'n*, 144 *N.J.* 16, 26-29 (1996).

In this case, it is undisputed that the April 2009 Resolution established salary guides for 2007-2008, 2008-2009, 2009-2010, and 2010-2011. Additionally, the effective date of the salary policy was July 1, 2007, despite the fact that the resolution approving the salary guides was not passed until April 29, 2009. Therefore, when the Board adopted the April 2009 Resolution, it exceeded its authority by binding itself and future boards for a total of four years regardless of the fact that the salary schedules for the first two years were distributed in a lump-sum retroactive payment. [3] The ALJ's determination that the salary policy was consistent with the statute simply because the Board only bound future boards for two years provides an exception allowing for retroactive payments as a means to circumvent the three year limit that is not contained in the statute.

Accordingly, the Initial Decision is rejected; the fourth year of the policy that provides a salary schedule for 2010-2011 is null and void.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/21/11
Date of Mailing: 10/24/11

[3] Pursuant to *R.* 1:36-3, the Commissioner is not bound by the holding in *Bogata, supra.* However, the Commissioner notes that the facts in *Bogota, supra*, are similar to the circumstances in the case at bar, and the Commissioner is in accord with the Appellate Division's interpretation of *N.J.S.A.* 18A:29-4.1 in that case.

[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 03444-11
AGENCY DKT. NO. 48-2/11

BOARD OF EDUCATION OF THE BOROUGH OF RAMSEY, BERGEN COUNTY,

Petitioner,

v.

THE RAMSEY TEACHERS ASSOCIATION,

Respondent.

Robert Jacobs, Esq., for petitioner (Winne, Banta, Hertherington, Basralian, and Kahn, attorneys)

Alfred Maurice, Esq., for respondent (Springstead and Maurice, attorneys)

Record Closed: August 3, 2011 Decided: August 25, 2011

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

STATEMENT OF THE CASE

Petitioner, the Board of Education of the Borough of Ramsey (the Board), seeks to invalidate its April 28, 2009, resolution establishing salary schedules for the years 2007-2011, contending that the resolution violates the requirements of N.J.S.A. 29-4.1.

The Ramsey Teachers Association (the Association) urges that the action of the Board was consistent with law, and that the Board is obligated to pay unit members all salary increases promised in those salary schedules.

PROCEDURAL HISTORY

The Board filed a petition for a Declaratory Ruling before the Commissioner of Education (the Commissioner) on February 23, 2011. Via letter dated March 25, 2011, the Commissioner advised that he had determined to process the matter as a Petition of Appeal, pursuant to his discretionary authority under N.J.A.C. 6A:3-2.1(a). The contested case was transmitted to the Office of Administrative Law (OAL) on March 25, 2011. The parties filed a joint Stipulation of Facts on June 7, 2011, and cross-motions for Summary Decision on July 22, 2011. Simultaneous replies were filed on August 3, 2011, at which time the record closed.

FINDINGS OF FACT

The material facts are not in dispute, and I **FIND**:

The Association is the duly certified majority representative for all non-supervisory certificated employees of the Board. The Association and the Board were parties to a collective bargaining agreement that was to expire on June 30, 2007. In early 2007, the Board and the Association began to bargain over the terms of a successor collective bargaining agreement. The process did not go smoothly; impasse was declared, and an unsuccessful mediation conducted. In accordance with N.J.A.C. 19:12-4.2, Factfinder Thomas Hartigan was assigned by the Public Employment Relations Commission (PERC). He issued a Report and Recommendations on February 2, 2009. By that point, the professional staff of the Ramsey Public Schools had been "working without a contract" for close to two years. Hartigan recommended as follows:

> The Association has proposed and I would suggest that the parties consider the addition of a fourth year to the agreement. As noted earlier these negotiations have gone on now for two years, and the addition of [a] fourth year and some additional time away from the bargaining table may be in the interest of all concerned.
>
> [(Exhibit A to the Partial Stipulation of Fact.)]

After receiving the Factfinder's Report and Recommendations the parties successfully reached agreement on the terms of a successor agreement. A Memorandum of Agreement was executed by Association representatives and two members of the Board. An addendum to the Memorandum of Agreement included salary guides for the school years 2007-2008, 2008-2009, 2009-2010, and 2010-2011. (Exhibit C to Partial Stipulation of Fact.) On April 28, 2009, the Board adopted a resolution "to approve the Memorandum of Agreement . . . for the period July 1, 2007 through June 30, 2009, and for the period July 1, 2009 through June 30, 2011." (Exhibit D to Partial Stipulation of Fact.)

On July 1, 2009, the Board president executed two separate collective bargaining agreements, one extending from July 1, 2007, through June 30, 2009, and the second from July 1, 2009, through June 30, 2011. (Exhibits E and F to Partial Stipulation of Fact.) Each of these agreements contained a two-year-salary schedule. The latter of those agreements has again expired, and the parties are again negotiating for a successor collective bargaining agreement.

The Board submitted the certification of Assistant Superintendent for Business Robert Marcotulli, which outlined the financial constraints faced by the school district. It is uncontroverted, and I **FIND** that during the 2009-2010 school year, and following execution of the Memorandum of Agreement, the district was advised that it would lose State aid, and that it would be required to utilize budget surplus to fund district programs. The 2010-2011 school year saw further cuts in State aid—approximately $2.2 million dollars. The district was forced to cut staff and programming, increase class sizes, and postpone needed capital expenditures. Marcotulli noted that these financial setbacks will continue to impact the district during the 2011-2012 school year.

CONCLUSIONS OF LAW

The parties cross-move for summary decision. N.J.A.C. 1:1-12.5 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 "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.

It is clear from the submissions of the parties that they do not disagree as to the underlying facts; only as to how the relevant law affects the validity of the controverted salary schedules. Accordingly, I **CONCLUDE** that this matter is ripe for summary decision.[1]

The Board argues that the Memorandum of Agreement adopted on April 28, 2009, was ultra vires because it contained four salary schedules. It asserts that the 2010-2011 salary guide must be voided, and that as a result, salary increments may not be paid to staff members during the 2011-2012 year. N.J.S.A. 18A:29-4.1 provides as follows:

> A board of education of any district may adopt a one, two or three year salary policy, including salary schedules for all full-time teaching staff members which shall not be less than those required by law. Such policy and schedules shall be binding upon the adopting board and upon all future boards in the same district for a period of one, two or three years from the effective date of such policy but shall not prohibit the payment of salaries higher than those required by such policy or schedules nor the subsequent adoption of policies or schedules providing for higher salaries, increments or adjustments.

By permitting salary schedules to be adopted that will extend beyond the life of the adopting board, the legislature has determined to create an exception to the well-accepted rule that a board of education is a non-continuous body whose authority is limited to its own official life. The actions of a sitting school board can bind its successors only in those ways and to the extent expressly provided by statute. Skladzien v. Bd. of Educ., 12 N.J. Misc. 602, 604-605 (Sup. Ct. 1934), aff'd, 115 N.J.L. 203 (E. & A. 1935). Such statutes recognize that, at times, it is "politic" that local boards be enabled to act in the manner of a continuous body. Rall v. Bd. of Educ., 104 N.J. Super. 236, 244 (App. Div. 1969).

[1] The parties filed a document captioned "Partial Stipulation of Facts," but their submissions set forth no additional contested facts that might preclude summary disposition of the claims raised by the pleadings. The Board supplemented its submission with the Marcotulli certification, which contained additional but nonetheless uncontroverted facts.

Since salaries for school district employees are established through collective bargaining, the legislature wisely recognized that annual salary negotiations would be inefficient and not in the overall best interest of school districts and their students. Indeed, N.J.S.A. 18A:29-4.1 was amended in 1987 precisely because the Commissioner had construed its language to invalidate the third year of a salary schedule under earlier statutory language limiting salary guides to only two years. The Assembly Education Committee Statement read:

> On September 6, 1984, the Commissioner of Education held (Orlando v. Mercer County Vocational-Technical Schools) that the third year of a salary schedule, even if negotiated in good faith, was not binding and would have to be renegotiated since N.J.S.A. 18A:29-4.1 specifically provides for a two year salary schedule only. This bill gives a board the option of adopting or negotiating a three year salary schedule.
>
> [Assembly Education Committee Statement, Assembly No 2045 - L. 1987, c. 123.]

But the desire to minimize the need to continuously bargain collectively must be balanced with the need to base salary agreements on sound fiscal considerations; hence, the legislature likewise understood that salary agreements cannot be boundless. Indeed, a board sitting today has a limited ability to predict the economic indicators that must guide economically prudent decisions about teacher salaries.

It was this latter concern that was the focal point of the seminal judicial interpretation of N.J.S.A. 18:29-4.1. Neptune Bd. of Educ. v. Neptune Educ. Ass'n, 144 N.J. 16 (1996). The Neptune court strictly construed the statutory language, and determined that N.J.S.A. 18:29-4.1 prohibited a board of education from paying its staff members the increments contained in an expired three-year agreement.[2] The court held that per the plain language of the statute, no collective bargaining agreement's salary schedule could be binding on a board of education beyond three years, holding that "[b]y enacting N.J.S.A. 18A:29-4.1, the Legislature intended to allow schools to

[2] In so ruling, the Neptune court departed from the standard labor-relations notion that the parties must maintain the "status quo" pending negotiation of a successor agreement. The "status quo" was traditionally viewed as "dynamic," thus requiring payment of increments despite the expiration of a collective bargaining agreement.

properly manage their budgets in conformance with the New Jersey Constitution and current economic realities." Neptune, supra, 144 N.J. at 25.

The sitting Ramsey Board relies heavily on Neptune in support of its contention that the two separate two-year-salary guides adopted in 2009 run afoul of N.J.S.A. 18A:29-4.1. But I **CONCLUDE** that the Board is compelled to honor the bargain struck with its Association and that requiring that it do so in no way contravenes either Neptune or N.J.S.A. 18A:29-4.1. In 2009, the Board and the Association had been negotiating for a successor agreement for close to two years. The clear intent behind the Board's April 2009 resolution was to retroactively agree upon salary adjustments for the years that had already passed, 2007-2008 and 2008-2009, and to also purchase labor peace for two years moving forward. Accordingly, the 2009 Board bound successor boards for only two years. Its actions were fully compliant with N.J.S.A. 18A:29-4.1, which allows a sitting board to establish staff salaries prospectively for up to three years.

Unit members are again working under an expired contract, and I **CONCLUDE** that during the 2011-2012 school year the Board must pay any increments earned under the 2010-2011 guide. Doing so would not contravene N.J.S.A. 18A: 29-4.1, as 2011-2012 is the "third year" contemplated by the statute. If the parties are unable to agree to a successor agreement before June 2012, then and only then, would continued payment of increments under the 2010-2011 guide violate the requirements of N.J.S.A. 18A: 29-4.1.

The Marcotulli certification was offered to demonstrate that the district is struggling to function in difficult financial times, and I have no doubt that the concerns expressed in that certification are valid and sincere. But the relevant law does not permit me to grant the Board the relief it seeks merely because it is experiencing economic exigencies. The Neptune court pointed out that one of the purposes of allowing multi-year-salary schedules under N.J.S.A. 18A:29-4.1 was "to prevent local boards from using the budget process to avoid salary schedules they had already agreed to in collective-bargaining negotiations." Neptune, supra, 144 N.J. at 22. The

court stated that "[e]ssentially, in 1965, the Legislature, to protect teachers, granted a limited power to boards to bind further boards." Ibid. (emphasis supplied). Thus, the district's financial concerns, however real, do not permit it to rescind an arm's-length agreement made in good faith with its Association, particularly when that agreement falls squarely within the parameters of N.J.S.A. 18A:29-4.1.

Labor relations in the public sector falls under the specialized purview of PERC, the agency statutorily empowered to interpret and implement the New Jersey Public Employment Relations Act. N.J.S.A. 34:13A-1 et seq. But when the employment setting is a school, the Commissioner has a concomitant interest in labor harmony. School Board members, administrators, and teachers who work under settled contracts are better able to focus on their essential mission; the educational success of district children. Simply put, labor strife is bad for kids. The 2009 Ramsey Board apparently knew this, and acted within the boundaries of the law to settle the terms and conditions of employment for district professional staff for the longest term possible. This record presents me with no cause to disturb the contract it entered into, in good faith, with its professional staff.

ORDER

Based on the foregoing, I **ORDER** 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.

August 25, 2011
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: August 25, 2011

Date Mailed to Parties: AUG 26 2011

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE