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OAL DKT. NO. EDU 13998-08
AGENCY DKT. NO. 353-12/08

EMILY DIAZ,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON APPLICATION FOR EMERGENT RELIEF

The record of this matter, including the audio recording of proceedings, and the recommended Order of the Office of Administrative Law (OAL) have been reviewed.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ), substantially for the reasons expressed in her written order, that petitioner has not satisfied the requisite standards for the granting of emergent relief pursuant to *Crowe v. DeGioia, 90 N.J.* 126 (1982) and *N.J.A.C.* 6A:3-1.6; in particular, the Commissioner concurs that petitioner cannot be found to have demonstrated irreparable harm in the absence of any support in the record for her claim that financial hardship would preclude her from maintaining health insurance coverage upon termination on March 4, 2009 of her Family Medical Leave Act benefits. To the extent, however, that the ALJ may have considered petitioner's appeal resolved through denial of her application for emergent relief,[1] the Commissioner here stresses that

[1] Although there is no indication in the record that petitioner considered her appeal fully heard at the conclusion of emergent proceedings, the ALJ stated (Order at 8) that "no issues remain and no further relief [is] being sought" and apparently scheduled no further proceedings. No discussions of hearing dates or subsequent procedural matters are heard on the audio recording or reflected in the written record, and the OAL returned the case file to the Commissioner for review of the ALJ's Order as an Initial Decision.

petitioner is entitled to a hearing on the merits of her challenge to the actions of the Board of Education and the accuracy of the medical assessment proffered as the basis for them, notwithstanding her failure at this juncture to demonstrate entitlement to immediate relief pending the outcome of her appeal. Moreover, due to the nature of this matter, it is imperative that such hearing be expeditiously conducted.[2]

Accordingly, with the clarification noted above, the Order of the ALJ – DENYING petitioner's application for emergent relief – is adopted for the reasons set forth therein, and this matter shall forthwith be *returned to the OAL for a prompt hearing on the merits*.

IT IS SO ORDERED.[3]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/05/09

Date of Mailing: 1/05/09

[2] In this regard, the Commissioner stresses that nothing herein precludes resolution of this matter through re-examination of petitioner by Dr. Gallina or a third physician of the parties' choice, nor is petitioner precluded from any subsequent application for emergent relief as circumstances may warrant.

[3] 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
EMERGENT RELIEF
OAL DKT. NO. EDU 13998-08
AGENCY DKT. NO. 353-12/08

EMILY DIAZ,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH,
Respondent.

Alfred A. Maurice, Esq., for petitioner (Springstead & Maurice, attorneys)

Mark Zitomer, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, LLC, attorneys)

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

This matter having been opened on the filing of a petition for emergent relief, submitted by petitioner, Emily Diaz, Alfred A. Maurice, Esq. appearing, and respondent, Board of Education of the Township of Mahwah, Bergen County having been represented by Schwartz, Simon, Edelstein, Celso & Kessler, LLC, attorneys), Mark Zitomer, Esq. appearing, and the undersigned having considered the moving papers, Certification and exhibits submitted by the petitioner, and opposition papers, Certification 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 Spanish teacher in the employ of the Mahwah School District. Prior to the start of the 2008-2009 school year, petitioner requested a transfer from the District's high school to the middle school because she did not get along with her supervisor. The District advised her that she was not eligible for a transfer without a medical necessity reason, and requested petitioner be examined by the District's general physician, Dr. Everett Schlam. Due to concerns over petitioner's mental fitness to return to the classroom and teach children, Dr. Schlam referred petitioner for a psychiatric evaluation, and she was placed her on paid administrative leave effective June 30, 2008 pending receipt of a psychiatrist's report attesting to her fitness to teach.

Petitioner set up an appointment for such an evaluation with one of the psychiatrists suggested by the District for the first day of school, September 3, 2008. However, she cancelled the appointment. Petitioner then chose Dr. David Gallina, MD, as the doctor to whom she would go for the psychiatric evaluation at the District's expense. Dr. Gallina examined petitioner on September 24, 2008 and issued a report on September 27, 2008, which stated, in relevant part, that petitioner suffered from an "occupational problem" and an "adjustment disorder with mixed emotions." Dr. Gallina also found that petitioner suffered from "current stressors," including health concerns and concluded that it was his opinion, "with reasonable medical certainty, that [petitioner] is unfit to assume her job related duties as a teacher."

After receiving Dr. Gallina's report, Dr. Montesano, the District's superintendent wrote to petitioner, noting Dr. Gallina's findings that she was not "medically able" to perform the duties of a teacher. He further stated that petitioner would need to provide the Board of Education with "written clearance from Dr. Gallina stating that [she] is able to return to work." Dr. Charles Montesano further noted that because petitioner's leave was due to medical reasons, the Board would begin to charge petitioner's absence as sick time and deduct her sick days accordingly.

Petitioner then sought the opinion of a second psychiatrist of her choosing and was examined by Dr. Diana L. Riccioli, M.D. On November 20, 2008, Dr. Riccioli issued a four-page report in which she also diagnosed petitioner with "adjustment disorder" and occupational problems, but concluded petitioner was "able to return to work as a teacher without psychological restrictions."

Prior to the issuance of Dr. Riccioli's report, the District informed petitioner on November 17, 2008, that her sick and personal days would be exhausted on November 24, 2008, and that, due to her illness, she was entitled to 12 additional weeks of unpaid, job protected leave under the Federal Family Medical Leave Act (FMLA). The District also informed petitioner that her health benefits would be maintained during the period of FMLA leave. On November 24, 2008, petitioner wrote to the District, stating she was "available, willing, and able to return to work immediately," but had "no choice but to request the Family Medical Leave Act in order to retain my medical benefits." Pursuant to her request, petitioner was placed on unpaid Family Leave with benefits beginning on November 26, 2008, which will run through March 4, 2009.

After the Board failed to respond to petitioner's request for reinstatement, petitioner on December 2, 2008, filed the instant motion with the Department of Education for emergent relief returning her immediately to the payroll together with all medical benefits retroactive to October 13, 2008 or the actual date she was removed from paid administrative leave until the Commissioner renders a final decision on the underlying appeal.

Petitioner asserts as a tenured teaching staff member she has a right to be immediately returned to work. She avers no tenure or charges of inefficiency have been filed against her and contends the sole basis for the Board's action concerning her mental competence to return to work is Dr. Gallina's report which she disputes. She argues this initial psychiatrist's report found that she had a normal mental state but nevertheless found she should not return to work, and further argues that the psychiatrist she retained thereafter found irregularities with respect to the administration

of tests upon which the initial psychiatrist based his opinion, and found fault with his findings and conclusion. She avers her psychiatrist found her competent and immediately able to return to work and argues a denial of her application will permit her and other tenured employees of the District to be suspended without pay and denied the protections of the tenure law.

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.

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 she is suffering financial harm and potentially irreversible loss if her health benefits are not restored. She was diagnosed with breast cancer in 2001 and since that time she has had to have approximately twenty procedures related to her cancer including a double mastectomy in 2006. She is still under medical post operative care for cancer and the onset of fibromyalgia and argues with the loss of her salary she will not be able to afford Cobra coverage when her medical benefits run out and needs her regular income to survive. She contends without her full pay and benefits she will continue to suffer irreparable harm if she cannot support herself and her family and maintain their health coverage.

"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 certification beyond general statements, without providing any specific evidence of immediate financial duress. Moreover, pursuant to petitioner's Family Leave her medical benefits will run through March 9, 2009. 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.

As for the second and third requirements for granting emergent relief, petitioner argues there is a clear legal right underlying her claim and she has a likelihood of prevailing on the merits of the underlying claim. In support of her application, she cites Slater v. Board of Educ., 237 N.J. Super. 424 (App. Div. 1989) where the court noted:

> A tenured local school employee may be suspended pending disposition of an indictment or of tenure charges that may lead to dismissal. See Romanowski v. Bd. of Ed. of Jersey City, 89 N.J.Super. 38 (App.Div.1965). If a tenure charge is preferred and filed with the school board, the board reviews it and the accompanying statement of supporting evidence, and any written statement submitted by the employee. The board then determines if there is probable cause for the charge. If there is, the board's certification to that effect is forwarded to the Commissioner of Education. N.J.S.A. 18A:6-11.
>
> After certification of the charge, the board may suspend the employee with or without pay. If it is without pay, salary must resume after 120 days if the Commissioner has not made a

> "determination of the charge." N.J.S.A. 18A:6-14. A local school board employee may also be suspended if he is indicted, and N.J.S.A. 18A:6-8.3 provides that the suspension may be without pay.
>
> [Id. at 426.]

And the court concluded:

> Thus, a tenured employee may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education. In all other circumstances a suspension must be with pay.
>
> [Ibid.]

In relying on these tenure provisions petitioner fails to recognize the authority of boards of education to determine that employees are "ineligible for further service." Pursuant to N.J.S.A. 18A:16-2(a):

> Every board of education may require its employees and shall require any candidate for employment who has received a conditional offer of employment to undergo a physical examination. The board may require individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.
>
> [Ibid.]

And pursuant to N.J.S.A. 18A:16-4:

> If the result of any such examination indicates mental abnormality or communicable disease, the employee shall be ineligible for further service until proof of recovery, satisfactory to the board, is furnished, but if the employee is under contract or has tenure, he may be granted sick leave with compensation as provided by law and shall, upon satisfactory recovery, be permitted to complete the term of

> his contract, if he is under contract, or be reemployed with the same tenure as he possessed at the time his services were discontinued, if he has tenure, unless his absence shall exceed a period of two years.
>
> [Ibid.]

Thus, it appears where a board of education determines an employee is ineligible for further service as the result of a psychiatric examination indicating a mental abnormality, the board is allowed discretion to grant sick leave with compensation, but the employee is not entitled to be paid during his period of ineligibility. See Chambers v. Pleasantville Bd. of Educ., EDU 8498-97, initial decision, (May 1, 1998), adopted, Comm'r (June 18, 1998) http://lawlibrary.rutgers.edu/oal/search.html.

Consequently, petitioner's claim in this matter is not as she has cast it, i.e. whether she was improperly suspended without pay in violation of her tenure rights; but rather, whether the Board's failure to reemploy her with the same tenure she possessed at the time her services were discontinued was improper after she provided the Board with the second psychiatrist's report. The initial psychiatric report, prepared by a psychiatrist of petitioner's choosing found petitioner unfit to resume her duties. I **FIND** the legal right underlying petitioner's claim is not settled; and further I **FIND** petitioner does not have a likelihood of prevailing 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, "[w]here a public employee is 'ineligible for further service,' [pursuant to N.J.S.A. 18A:16-4] ... it would appear to be ultra vires to use public funds to pay him." Chambers, supra, initial decision. Therefore, I do not find that the equities favor on balance the grant of emergent relief.

IT IS therefore on this 18th day of December, 2008,

ORDERED that petitioner's application for emergency relief is **DENIED**.

No issues remain and no further relief was being sought.

IT IS FURTHER ORDERED that a copy of the within **ORDER** be served upon all counsel within 7 days of receipt.

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.

December 18, 2008
DATE

LESLIE Z. CELENTANO, ALJ

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DIANE DAVIDSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – who served as a non-tenured transportation supervisor in respondent's district during the 2006-2007 school year – contests the Board's decision to non-renew her annual contract for the 2007-2008 school year, claiming that such decision was the direct result of unethical interference by a Board member and contrary to the recommendation of district administrators. The Board filed a motion for summary decision, asserting its right to non-renew the petitioner, who had not attained tenure in the district. The ALJ determined to proceed with the hearing. Following completion of petitioner's evidence, the Board moved for judgment.

The ALJ found, *inter alia*, that: the legal standard applicable for a motion for judgment at the end of a petitioner's case had been met; the law provides the Board with broad discretion to determine whether to renew the contract of a non-tenured employee; and the burden to prove arbitrariness rests on the employee. The ALJ concluded, based on the evidence, that the Board did not act arbitrarily in non-renewing petitioner's contract, granted the Board's motion for judgment, and dismissed the appeal.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ that respondent Board properly exercised its right to non-renew petitioner's employment 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.

January 5, 2009

OAL DKT. NO. EDU 8236-07
AGENCY DKT. NO. 218-8/07

DIANE DAVIDSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner, a non-tenured transportation supervisor, challenged the respondent board of education's decision – rendered against the recommendation of district administrators – not to renew her employment.[1] The record, including the exhibits entered into evidence during the hearing in the Office of Administrative Law (OAL),[2] and the Initial Decision have been reviewed.

For the reasons articulated by the Administrative law Judge (ALJ), including his credibility determinations, the Commissioner finds that petitioner failed to meet her burden under *Dore v. Bedminster Twp. Board of Education,* 185 *N.J. Super.* 447, 453-54 (App. Div. 1982) and the other cases cited by the ALJ to show that respondent's decision was arbitrary or capricious. Accordingly, a decision against petitioner at the close of her case was warranted. *See, N.J.A.C.* 1:1-1.3; *R.* 4:40-1; *Dolson v. Anastasia,* 55 *N.J.* 2, 5-6 (1969).

The petition is accordingly dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 1/05/09
Date of Mailing: 1/06/09

[1] There is no indication in the record or Initial Decision that the petitioner alleged untimeliness of the provision to her of notice of respondent's decision.

[2] No hearing transcripts were provided to the Commissioner.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08236-07S
AGENCY DKT. NO. 218-8/07

DIANE DAVIDSON,

Petitioner,

v.

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

Respondent.

Robert M. Schwartz, Esq., for petitioner

Rocky L. Peterson, Esq., for respondent (Hill Wallack, LLP, attorneys)

Record Closed: November 13, 2008 Decided: November 21, 2008

BEFORE **JEFF S. MASIN**:

Diane Davidson was employed as a twelve-month employee by the Trenton Board of Education (Board), serving as Transportation Supervisor during the 2006-2007 school year. She was at that time an untenured employee, serving as an at-will employee. In May 2007, the Board decided that it would not renew her contract for the 2007-2008 school year. It notified her of this decision, held a meeting at which she was able to argue against the decision, and then reaffirmed its decision by letter to Ms. Davidson dated June 15, 2007. She appealed to the Commissioner of Education, seeking to overturn the Board's refusal to renew her contract. The Commissioner transferred the contested case to the Office of Administrative Law on October 3, 2007, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A prehearing

conference was conducted on December 14, 2007. A hearing was scheduled for May 1, 2008. However, just prior to the scheduled hearing date, Thomas W. Sumners, Esq., counsel for the Board, was appointed to the New Jersey Superior Court and was unable to appear at the hearing, which was adjourned to allow the Board to obtain new counsel. A hearing was held on November 13, 2008. Following the completion of the petitioner's presentation of evidence, Board counsel moved for judgment.[1] Based upon the evidence and the legal standard applicable for such motion, which mirrors the standard applied for motions for summary decision, I determined that as the law provides the Board with nearly unfettered discretion to determine whether to renew the contract of a non-tenured employee, and the burden to prove arbitrariness rests on the employee, no reasonable finder of fact could determine that the Board had acted in an arbitrary and capricious manner in determining not to renew the contract and therefore the motion was meritorious.

EVIDENCE

The June 15, 2007, letter from the board to Ms. Davidson recited two reasons for the Board's decision not to renew her contract. These were "1. Poor interpersonal skills in dealing with parental complaints" and "2. Too many failed or late pickups/drop-offs." Ms. Davidson testified that she started with the Trenton Board in October 2006, entering into a transportation situation that was later described in her Performance Evaluation by her supervisor, Everett O. Collins, as existing in a "confusing time." Davidson had previously served as a transportation and food service coordinator or supervisor with the Clifton and Hillside Boards of Education. She holds a transportation certification from Rutgers University and as Associate's Degree.

Davidson received a Performance Evaluation Form dated April 30, 2007. Her performance in various "Management" categories varied from Outstanding to Satisfactory, with one category, "Establishes and maintains favorable relationships with parents, local community and business groups" rated at S-, which Collins testified

[1] The Board had filed a motion for summary decision within days of the hearing originally scheduled for May 2008. At the time I had advised counsel that due to the imminent hearing date I would not consider the motion and would instead simply decide the case following the hearing. As noted, it became necessary to adjourn that hearing date. The Board's new counsel renewed the motion shortly before the rescheduled date, but at hearing I again determined to proceed with the hearing so as not to have to once again delay it to allow a response by counsel for Ms. Davidson. Following the completion of her evidence, the Board moved for judgment.

meant "Satisfactory minus." Davidson testified that she did not receive any indication from Collins that he was dissatisfied with her performance, and Collins, testifying, confirmed that he recommended renewal of her contract, as did the Superintendent of Schools. However, the Board did not follow these recommendations.

Davidson related that on March 2007, she had received an e-mail from a Lucy Guzman regarding transportation issues related to a student, L.R. According to Davidson, the district had an incorrect address for this student, which resulted in some problems with him being picked up and transported to school. Guzman's e-mail sent at 12:47 p.m. on March 16, discussed how L.R. had waited for pickup and then had to be taxied to school. It asked a question about how L. was to know which bus to board. It also related that the local Spanish newspaper had called Guzman to determine if it could report that these problems had been resolved.

Lucy Guzman was in fact Dr. Lucy Guzman, a member of the Trenton Board of Education. Davidson averred that she did not know this at the time she received the March e-mail. She responded to the e-mail, advising that that she had "tracked the route that L. was assigned." She told Guzman that the bus had arrived at the address on South Holden at 7:45 am. The driver blew the horn and waited three minutes and then proceeded on the route. She concluded, "[i]t was called in as a no show." Guzman responded on March 19, a Monday. She opened her e-mail "I would have appreciated a more timely reply to my Friday email with instructions concerning L.R." She went into some detail about her experience that morning waiting with L. at the bus stop and then driving the child to school. She details her discussion with officials at the school and then writes, "[n]ow i get your email that we were supposed to wait at 345 S Olden Ave . . . . Why didn't you send me this information on Friday or even on Monday morning?" She goes on to note the "inefficiency and miscommunication" that could have been avoided by an earlier reply from Davidson. She concludes, "[t]his morning I sacrificed my precious time and canceled my attendance at a seminar at Piscataway to clear-up this ongoing situation situation (sic) with student L. What went wrong? We object to the 'no show' status you attributed to us." Davidson testified that when she received these emails she discussed the issue with Mr. Collins, who told her that Guzman was a Board member. The pickup situation was quickly resolved. However, in

Guzman's last email, dated March 21, 2007, she wrote that while L. had been picked-up that morning, "[t]here is enough incompetence and inefficiency in transportation services to go around. I am positive the Delaware Valley bus company is a prime culprit. This awful experience raises some concerns that I will take up with Mr. Lofton."

Ms. Davidson first found out that her renewal might be in trouble one night after the Board meeting in May when she received a call from Collins and Nancy Swirsky, the Board Secretary. They advised that she might be in trouble because of some Board members, but did not advise who these were.

The petitioner denied that Mr. Collins had ever discussed with her any concern about there being, in the words of the non-renewal letter, "too many failed or late pickups/drop-offs." She also never discussed this with Guzman, with whom she spoke only one time on the telephone during the time that arrangements were being made for L.R. to be picked up. She had called to get some facts, as qualification for bus transportation depended upon whether the student lived in a location that was authorized for bus transportation or had an Individualized Education Plan (IEP) that required pickup. When she spoke to Guzman, Davidson was not aware of her membership on the Board and thought that she might be a parent.

Davidson is now employed with the Middle Township Board of Education as a transportation supervisor. She started with Middle Township on October 15, 2007.

On cross-examination, Davidson acknowledged that at some time after she began in the district, there were articles published in the local newspaper regarding problems with the transportation system. She read one article about a student who had to be taken to school in a taxi. She spoke to Mr. Collins about this in order to get children onto busses rather than in taxis. This was a problem that pre-existed her arrival in the district. She was aware of discussions in the community about bus issues. A lot of students had previously not been on bus routes, although they should have been.

The witness did discuss her performance evaluation with Collins. She believed that the statements on page 2, under "Evaluator's Comments Related to Supervision Criteria," were meant to encourage her and all others to be very positive in their work. He did not mention diversity workshops to her. She did not take objection to his comment. She also noted that when she first signed the document, the rating for item 14 on page one, "Establishes and maintains favorable relationships with parents, local community and business groups" was not filled in. Collins later told her that he had simply missed it, as in fact she also missed it when she looked over the evaluation. She was not happy with the S-. While Collins never told her that he had met with Guzman and Carolyn Gibson about her evaluation, he did tell her that Guzman had been in his office and he may have said that she was "bullying" him, but she was not sure that he said this. The S- was added only a day or so after she first saw the evaluation. In fact, the document was signed by Davidson on April 30.

In more specific detail, the Performance Evaluation portion entitled "Evaluator's Comments Related to Supervision Criteria," states

> Diane brings to the district, a very stern, no nonsense approach toward supervision. I would like to see from her a more openness toward supervising and understanding a diverse staff. Trenton school district has a very diverse staff. All supervisors need be aware of the diversity and interact in an equitable manner. Ms. Davison has demonstrated the ability to positively interact with her staff, however I would encourage her to take advantage of diversity workshops. This positive approach would create a more positive working environment, empowering employees to be more creative in assisting in difficult situations involving parents & students.
>
> [Id.]

Davidson agreed with the goals stated as part of the professional improvement plan portion of the evaluation. She had been working steadily on Goal A, "Bring transportation in compliance with evacuations. Acquire more in district routes." She was not aware of any complaints as to how she addressed these goals.

Everett O. Collins, Executive Administrator of Building and Grounds since 1993, served as Ms. Davison's immediate supervisor. He holds a Bachelor's Degree in

Industrial Arts, a teaching certificate and a Facilities Supervisory certificate. He explained that prior to Davison's employment with the district, the position of coordinator of transportation had been filled by someone who had been out ill for three or four months. He did not think that that person had been out for as long as a year. There was no supervisor of transportation position such as Davidson held, but he believed that she and her predecessor in the coordinator title had similar roles. He prepared the Performance Evaluation and discussed it with Davidson. At the time they first talked about it, he had inadvertently failed to fill out the rating for item 14. After he spoke to Davidson, he spoke to Carolyn Gibson and Lucy Guzman. This occurred when Gibson called him and told him that she was looking over his evaluation of Davidson and asked if he could come to see her about it. When he arrived Guzman was there as he knew she would be. He had spoken to Guzman prior to April 30 about Davidson, sometime around the time of the events related in the March emails. She felt that the transportation department was not performing well and "alluded" to Davison not performing her job properly. He replied that while the transportation department was not perfect it functioned as well as it possibly could. Collins testified that many issues regarding transportation had existed before Davidson joined the district and he felt that she had addressed these and he told Guzman this. He related that he does sometimes receive calls from Board members regarding employees, although he would not classify this as "typical." When Guzman called him, he mentioned her call to his own supervisors, most likely to Swirsky and possibly Gibson. When he met with Gibson and Guzman, Guzman raised issue with the content of the evaluation. He was not sure how she knew of its content, but after it was signed by Davidson he would as a matter of course send it to Gibson. Guzman questioned the evaluation and stated that Davidson had not performed well. He defended her as having performed satisfactorily. He had never before had a Board member question his evaluation of a staff member. Gibson mentioned the blank space for the rating for item 14. He marked it with an S-, a rating he said was affected by what went on at this meeting. In his mind the rating was that she had performed satisfactorily, but perhaps a little less than wholly satisfactory. Part of his discussion with the two ladies "swayed" him to put the S-. He did recommend renewal of Davidson's contract. The comments he made regarding diversity training and such are typical of the improvement recommendations that he places in positive evaluations.

Mr. Collins acknowledged that his position with the district is not a tenured one and his contract is subject to annual renewal by the Board. Collins was queried about what impact, if any, his own need for renewal of his contract had upon his evaluation of and recommendation about Davidson. He was renewed and Guzman, who voted against renewal of Davison's contract, voted to renew his contract. He denied that his own status affected how he rated Davidson, saying that he could "honestly say no" as to any impact. Indeed, he recommended Davidson's renewal. He denied that he was told what rating to place next to item 14.

Collins did acknowledge that there were some concerns about Davidson's interpersonal skills as related to parental complaints. He would not say she had "poor" skills, but there were frequent calls about bus issues and there was some concern expressed about how she interacted and some parents expressed issue with what they felt were matters that were not addressed. In some cases he felt that parents were saying that her response to them was unsatisfactory, was not cordial or understanding. There were also some concerns about her interpersonal skills with other employees, such as a dispatcher who felt discriminated against because of his Hispanic background. Collins looked into this complaint, called a meeting with the dispatcher and Davidson and "felt that there were two sides to the story." He had some conversation with Davidson about these concerns, but he did not discuss them with the Board. He never indicated to the Board any concern about late pickups or drop offs, although he was aware of some community concerns regarding these matters because the issues would come up at board meetings. He was never consulted by any members of the Board (other than his talks with Guzman) about the issue of renewal of her contract. These issues were a factor in his recommendation for diversity training.

Collins told Davidson about his meeting with Guzman and Gibson and of Guzman's concerns. He told her that he felt that he had to mark her for item 14 as he did.

DISCUSSION

The Board moved for judgment at the close of petitioner's evidence. The Uniform Administrative Procedure Rules (UAPR), N.J.A.C. 1:1-1 et seq., do not specifically discuss this motion, but under the UAPR, in the absence of a rule judges are to look to the Rules of Court for guidance. N.J.A.C. 1:1-3a. Those Rules provide the standard to be applied in determining whether a petitioner's case can be dismissed at the conclusion of her presentation of evidence, without the need for the respondent to present its case. The test is the same as that applicable to a motion for summary judgment, or, as it is known in the UAPR, summary decision. N.J.A.C. 1:1-12.5. N.J.R. 4:40-1. Thus, the judge must determine whether, accepting as true all the evidence that supports the position of the party defending against the motion and giving the opponent of the motion all reasonable inferences that arise from the testimony, a reasonable trier of fact could still determine the case in favor of the opponent of the motion, taking into account the burden of proof applicable to the case. Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969).

Boards of Education enjoy virtually unfettered discretion regarding the decision as to whether to renew the employment contract of a non-tenured employee. As the Appellate Division noted in the seminal case of Dore v. Board of Education, 185 N.J. Super. 447 (App. Div. 1982), "[t]he decision of the Commissioner recognized a local board's right to base its decision not to re-employ on matters outside of a teacher's evaluations due to a board's virtually unlimited discretion in hiring or renewing nontenured teachers." In that same decision the Court recognized that the sources from which a Board may acquire information that it uses in the course of its determination as to whether or not to renew can be quite varied, and may even include a Board member's personal knowledge of the employee's performance. "The State Board's decision properly recognized the board's right to reach its conclusion about a nontenured teacher on a broad base of input received from a variety of people, including members of the public, parents of students and a board member's own knowledge of a teacher even if that knowledge is acquired through having a child in the teacher's class." Dore, supra, at 454. Thus, if a board follows proper procedure, provides the correct notices to the non-tenured staff member and permits the employee

to appear before the board before the final determination if the employee exercises her right to do so, the Board's ultimate conclusion not to renew is largely sacrosanct and will not be disturbed. N.J.S.A. 18A:27-10.[2] Donaldson v. Bd. of Educ., 65 N.J. 236 (1974); Stigliano v. St. Rose High School, 198 N.J. Super. 520 (App. Div. 1984). Nevertheless, if the preponderance of the credible evidence establishes that the board acted in an arbitrary, capricious and unreasonable manner, the board's decision can be set aside.

In the present matter, the Board acted in derogation of the recommendation of the Superintendent of Schools, who himself followed the recommendation of Ms. Davidson's immediate supervisor, Mr. Collins, that her contract be renewed. As the employer and the final decision maker, the Board is not bound to follow the Superintendent's recommendation. Here, the Board was called upon to consider renewal for an employee working in what no doubt was a difficult job, organizing the complex task of transporting many students in a complex urban district where, according to both her and her supervisor, the transportation situation prior to her arrival was "confusing" and apparently far from satisfactory. It appears that Davidson made things better, and Collins attested to what he felt was her generally satisfactory performance. But the test regarding the legality of the Board's decision not to renew is not whether the employee did a good job, but whether there existed any reasonable grounds for deciding that she should not be brought back. And unfortunately for Davidson, such reasons did exit. Her evaluation, while generally good, can be read to indicate that she needed some improvement in her interpersonal relationships with parents, and Collins' testimony supports that he was aware of some issues in this area, as well as with her interpersonal relationships with some staff. In a district populated by persons of many diverse backgrounds, sensitivity to any problems or deficiencies in dealing with such a mix of persons is understandable. And as the Dore case makes clear, there is no problem with a board member, or members, utilizing information they have gained either from the community or by themselves in deciding on whether to

[2] 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. The sole basis for overturning the decision is that it is arbitrary and capricious.

renew. The issue is not whether I or the Commissioner would have voted to renew Davidson's contract, or whether we think that she should have been given more time to continue her work while hopefully improving her skills. That may well have been a reasonable, even a better approach. But, it was clearly not irrational for the Board to decide that it would prefer to try someone else in the position, or at least to not continue Davidson, and given the wide discretion that the Board enjoys in this managerial determination vis a vis an at-will employee, denying renewal to an employee whose own supervisor had at least arguably suggested that she needed to improve in an area that the Board deemed important for someone holding her job was also arguably reasonable. Given that the Board enjoys such wide latitude in this managerial determination vis a vis an at-will employee, judgment at the conclusion of the petitioner's case is appropriately granted.

I have of course considered the role played by Dr. Guzman in all this. There is no problem whatsoever with a member of the Board assisting a family in arranging for otherwise legitimate transportation services for their child. This is a form of constituent service that cannot reasonably be condemned. That the exchange between Guzman and Davidson suggests that Guzman was unhappy with what happened and may have in part blamed Davidson is probably a correct assessment of the emails. That Guzman would take her concerns and complaints to the district management is not surprising or inappropriate. What is strange is that she took part in a meeting with Collins where Gibson, and arguably Guzman, questioned his evaluation of Davidson. But what must be focused upon is what the content of the evaluation was even before that meeting. Collins had already written his comments about interactions and diversity training. While counsel for Davidson tried to establish that Collins was bullied, was cowed, was threatened by Guzman and by his knowledge that his own renewal was before the Board on which Guzman sat, in fact he recommended Davidson's renewal and never changed that recommendation. His rating of S- may well have been influenced by Guzman's complaint, but even if the rating were simply an S, which would clearly be an appropriate rating given the comments in the already prepared paragraph, the Board could have rationally decided that Davidson should not receive another year with the district. I found Collins to be a fair and credible witness, who acknowledged that he took Guzman's information and complaint into account, but who denied, I think

honestly, that he was bullied into a position that it may be inferred Guzman would have favored, that is, making a recommendation to the Superintendent that the contract not be renewed. Instead, he continued to recommend renewal. But even without considering anything about Collins' credibility at this juncture of the case, I am convinced that the evidence, assessed in compliance with the Dolson test, still supports dismissal of Davidson's case. The burden placed upon the petitioner to prove that the Board's decision should be overturned is very great indeed. Given the evidence, the applicable legal standard and burden of proof, I **CONCLUDE** that no reasonable finder of fact could determine that the Board acted in an arbitrary and capricious manner. Therefore, the motion for judgment is **GRANTED** and the appeal 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.

November 21, 2008
DATE

JEFF S. MASIN, ALJ
November 21, 2008

Date Received at Agency:

Mailed to Parties:

NOV 25 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

JOINT EXHIBITS:

J-1	Not in evidence
J-2	Not in evidence
J-3	Performance Evaluation Form, Central Office Administrator dated 4/30/07
J-4	Not in evidence
J-5	Letter dated 6/15/07 from Carolyn Gibson to Diane Davidson

FOR THE PETITIONER:

P-1	E-mails dated 3/19/07, 3/16/07 and 3/21/07

FOR THE RESPONDENT:

None.

3-09

STEPHEN NEELEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner is an Earth Science teacher hired by the Board following a 25 year career that included nearly four years of active military service and six years in which he operated his own company, training people to work on hazardous waste sites. He contends that respondent failed to consider his prior military service upon hiring, thereby improperly placing him on the salary guide. The respondent Board took the position that petitioner was awarded military credit.

The ALJ found that: the collective bargaining agreement in effect at the time petitioner was hired provided for credit for prior service of up to five years for non-teaching experience directly related to the assigned teaching position and up to four years credit for active military service with honorable discharge; documents admitted into evidence bear notations indicating "five years' related experience" and "five years private exp. (related)"; the petitioner's testimony was credible and supported by the evidence; and, based upon all of the evidence, the five years of experience credited to the petitioner at the time of his hiring did not include military service. Accordingly, the ALJ concluded that petitioner should be awarded the military service credit, commencing from July 20, 2006, the date his petition was filed.

Upon careful and independent review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter for the reasons clearly stated therein, and directed the Board to adjust petitioner's salary guide placement to reflect his military service credit.

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 5, 2009

3-09

OAL DKT. NO. EDU 6434-06
AGENCY DKT. NO. 252-7/06

STEPHEN NEELEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions were filed in accordance with the prescriptions of *N.J.A.C.* 1:1-18.4. Petitioner did not file reply exceptions.

Exceptions of the Board essentially replicate its post-hearing brief offered below. In that the Commissioner finds that the arguments advanced therein were fully considered and addressed by the Administrative Law Judge (ALJ) in her Initial Decision, these will not be revisited here.

Upon her full review – and according the requisite deference to the credibility assessments of the ALJ[1] – the Commissioner agrees with her determination that petitioner was not given the military service credit to which he was entitled for purposes of placement on the salary guide at the time of his hiring by the Board.

[1] The applicable standard of review in this regard is clear and unequivocal – the Commissioner "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))

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons clearly stated therein. The Board is hereby directed to adjust petitioner's salary guide placement to reflect his military service credit, as of July 20, 2006.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/5/09

Date of Mailing: 1/6/09

[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. NO EDU 6434-06
AGENCY REF. NO. 252-7/06

STEPHEN NEELY,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,
Respondent.

Stephen E. Klausner, Esq., for petitioner

John E. Collins, Esq., for respondent, (Parker McCay, attorneys)

Record Closed: October 6, 2008 Decided: November 20, 2008

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner claims the respondent failed to consider his prior military service upon hiring, thereby improperly placing him on the salary guide. The matter was transmitted to the Office of Administrative Law on August 31, 2006, 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. It was scheduled for hearing on May 14, 2007, but adjourned due to the unavailability of counsel. It was then re-scheduled for August 22, 2007, and the parties engaged in extensive settlement negotiations. As a result, the plenary hearing was adjourned to allow the respondent to consider the proposed settlement. The respondent rejected the settlement and the hearing was rescheduled for April 22, 2008. The matter was heard that day but based upon the evidence, I requested additional proofs[1] be submitted. Once those were received and it was determined that no further testimony would be offered, the parties submitted post-hearing briefs and the record closed on October 6, 2008.

FACTUAL DISCUSSION

Stephen Neely worked as a substitute teacher for the Franklin Board of Education in the spring of 2000. He holds a B.S. degree in Geology from the Austin Peay State University in Clarksville, Tennessee. While there, he also served as a teaching assistant for freshman level Geology. Prior to attending college, he served on active duty with the United States Navy between December 1, 1975, and October 19, 1979; i.e., three years, ten months and nineteen days. (P-1, P-2). In 1994, he formed a company, Phoenix Environmental, Inc., in New Jersey. His responsibility, for the six year period of time he operated this company, included training people so they could be certified to work on hazardous waste sites. In 1999, he received a New Jersey provisional certificate to teach Earth Science through the "alternate route program." (C-2). In 2002, he received his permanent teaching certificate.

In December of 2000, the district had an opening for a high school Earth Science teacher. Petitioner was offered, and eventually accepted, the position.

[1] I requested copies of the BOE minutes and/or resolution approving the hiring of the petitioner as well as additional documentation from the petitioner's personnel file generated contemporaneous with his application and hiring.

At issue is whether his military time was credited at the time of hiring for the purposes of placement on the salary guide.

Petitioner contends it was not. **Stephen Neely** testified he responded to an advertisement in the Star-Ledger that indicated interested applicants should forward a resume to the attention of Frank Pepe, the school superintendent at the time. He forwarded an application which included his resume (P-3) and a completed application (C-2). The personnel director, William Stratton, was leaving the district, so he did not interview Neely. Carol Levy, the Director of Science, spoke with him one day after he completed his substitute teacher assignment. A secretary then called him and offered him the job at a particular salary. He responded that he had six years experience including teaching in a training facility so he wanted those years considered in any offer. He has no recollection as to the identity of this secretary. A counter-offer was then made which placed him at step "F;" the beginning of the 6th step, he testified. He accepted this offer. Although his resume included his military background and he indicated it on his application, he never asked for credit for his active military service because he did not know he was entitled to such credit. His resume (P-3), a copy of the one he submitted at the time of application and taken from his personnel file, contains a handwritten notation next to his teaching assistant and undergraduate degree description indicating "one year equivalent." He testified that he had never seen the notation before and it is not in his handwriting.

While completing his alternate route coursework, he became aware that he was entitled to compensation for active military service through a discussion with his instructor sometime in August 2002. In September or October 2002, he asked current personnel director, Gary Hall, if he knew whether he had been credited military service when he was hired. Hall responded that he did not know anything about it and would have to inquire into the matter. Approximately, one to two months later, Hall told him that he would be given "mentor" pay that he was entitled to but that he was not entitled to military service credit. He never

received a letter from the Board denying his request for military service credit. He joined the teachers' union in 2004. Through that membership, he received the services of counsel and his petition was filed in July 2006.

In the answer to the petition, the respondent has taken the position that he was awarded military credit.[2]

Gary Hall has been the Director of Personnel Services since January 2, 2001. He is an attorney admitted to practice in New Jersey and New York. His predecessor, William Stratton, left prior to Hall being hired. There was no interim personnel director. He does not know what the hiring procedure was during that interim. He was advised that in the absence of the personnel director, the superintendent, in this case Frank Pepe, would have made the hiring decisions. Pepe left the district in August 2002.

Hall testified that it is his understanding that credit for active military service is "not mandated" but "can be considered." He recalls Neely addressing this issue with him. He then reviewed Neely's personnel record and told him there was no indication that he was denied any credit. The documents in Neely's file that he considered included his resume. (P-3). He knows that the handwritten notation on page two of that resume was made by Frank Pepe because he recognizes his handwriting, having exchanged a significant quantity of correspondence in the one-and-one-half years they worked together. He understood this notation, next to the teaching assistant position Neely held at Austin Peay, to mean that he was given one year credit in salary step for this teaching experience. On the salary guide, it is his understanding that Neely was awarded five years of prior employment experience but he did not conclusively determine what the other four years represented, although he believes he was awarded four years for active military service. After he reviewed Neely's file, he advised him that there was no indication that he was denied credits he was

[2] See answer to count 5 of the petition.

entitled to receive. Carol Levy is no longer with the school district but he did speak with her on this issue and she told him that she would not have been responsible for such a decision in her function as the Director of Science but that it would have been the responsibility of the personnel director, or in his absence, the superintendent. He did not review any board minutes in his investigation on this issue.

Neely's file also included a copy of his transcript from Austin Peay State University (C-3), a Payroll Action Request Form dated December 8, 2000 (C-4), and an interoffice memo with a pre-typed date of June 9,1998 regarding the high school Earth Science teacher vacancy of December 2000 and handwritten notations indicating the "Interview Committee's" recommendation regarding offering the position to Neely. (C-1).

Both the resume and completed application refer to Neely's military service. The inter-office memorandum from the "interview committee" to William Stratton, Director of Personnel, indicates the following handwritten notations (C-1):

TRANSCRIPTS
Geology 80-90 hrs
1 yrs study
Architecture[3]
lab assistant 1
BA + 20
STEP F
(Provided Transcript
is in order
5 years related experience
$36,760

There is a handwritten initialing of a signature for the interview committee that appears to indicate the letters "CY." (C-1). The December 8, 2000,

[3] After receiving a B.S. degree in Geology, Neely studied architecture at the University of Tennessee from 1984-1987.

completed Payroll Action Request Form reflecting a payroll change indicates the reason as "5 yrs private exp. (related)." (C-4). This also indicates the date of the "board report" as December 11, 2000. (C-4). Based upon my request, the agenda and board meeting minutes for December 11, 2000, were produced after the testimony was completed in this matter. (C-5). They reflect that as recommended by the Superintendent of Schools, and as processed by the Director of Personnel in a report prepared that same day, the appointment of Neely as the high school earth science teacher was approved. (C-5). The salary and reason on the report is noted as "B.A. +20, Step F $36,760. pro-rated." (C-5).

At the time petitioner was hired, the collective bargaining agreement provided, at Article 22 (R-3), with regard to teacher employment:

> A. Any teacher new to the Franklin Township Public Schools may be given credit for prior service. The types of prior service that can be considered for credit and the related limitations are as follows:
>
> 1. Teaching experience in public or approved private schools.
>
> 2. Non-teaching experience that is directly related to the assigned teaching position up to a maximum of five (5) years. The Superintendent of Schools with Board approval may grant credit for this type of service. The Superintendent shall determine whether or not any given non-teaching experience is related to teaching only at the time of initial employment.
>
> 3. Active military and/or Peace Corps service up to a maximum of four (4) years after presenting evidence of honorable service.
>
> 4. National Teacher Corps and/or VISTA service up to a maximum of one (1) year of credit.

Based upon my request for additional documentation, the respondent also submitted a letter dated May 22, 2008, followed by a certification from Gary Hall dated June 3, 2008, attesting to the contents of the letter. After Hall testified on

April 22, 2008, he spoke with Stratton and Pepe, neither of whom is with the district any longer and neither of whom was produced by the respondent as a witness in this case. The certification reiterates Hall's discussion with each regarding their respective recollections of the interview process. Essentially, Stratton does not recall any salary negotiations but that "his understanding at the time was that full credit would be given for all military service up to four (4) years as long as the candidate had received an honorable discharge." Hall's summary of his conversation with Pepe does not state that Neely was given specific credit for military service as opposed to other credit but does indicate the district was not interested in recommending Neely for permanent employment at a salary higher than the one he eventually accepted.

LEGAL ANALYSIS

N.J.S.A. 18A:29-11, provides in pertinent part:

> every member who, after July 1, 1940, has served...in the active military or navy service of the United States... shall be entitled to receive equivalent years of employment credit for such services as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning in this or any other state or territory of the United States, except that the period of such service shall not be credited toward more than four employment or adjustment credits.
>
> Nothing contained in this section shall be construed to reduce the number of employment or adjustment increments to which any member may be entitled under the terms of any law, or regulation, or action of any employing board or officer, of this state, relating to leaves of absence.

Based upon the evidence admitted and having had the opportunity to evaluate the credibility of the witnesses, I make the following FINDINGS OF FACT. At the time Stephen Neely applied for the geology teacher position available at the high school, he submitted his resume (P-3), a completed four page application signed and dated January 13, 2000 (C-2) and a Provisional

Certificate of Eligibility issued by the State Board of Examiners in November 1999 (C-2). The application indicates that the applicant was to return the completed application to the Personnel Office at the Franklin Township school district. (C-2). Former Superintendent Frank Pepe was indirectly involved in the salary negotiations with Neely. This is evidenced by his handwriting on the second page of the resume, indicating "1 year equivalent." (P-3). Hall testified that during the one-and-one-half years he worked with Pepe, they exchanged numerous hand-written documents and so, he was familiar with Pepe's handwriting. No other notation is made on the documentation. While Pepe did not interview Neely, it is apparent that at his direction, an offer was made to Neely. The initial offer was turned down and ultimately an offer was extended that reflected "five years' related experience" (C-1), which was also described as "five years private exp. (related)" (C-4). I make these findings with regard to the interview and negotiations not based upon the hearsay letter and certification of Gary Hall because I don't accord any weight to either because they fail to meet the residuum rule. N.J.A.C. 1:1-15.5. Rather, I base my findings on the credible testimony of Mr. Neely which is also supported by the evidence in this case, particularly, the notations on the Payroll Action Request Form (C-4), the Recommendation for Current Opening memorandum notations (C-1), and the notations on the resume (P-3). Based upon all of this evidence, I find that the five years experience did not include military service. Considering these documents in conjunction with the Collective Bargaining Agreement provision, I find that Neely was credited with the one year teaching assistant position and four years of "private experience (related)" (C-5) to reflect the training he provided to certify individuals to work on hazardous waste sites.

Mr. Hall was a credible witness but he simply had no knowledge of the events at issue as Mr. Neely's hiring took place prior to his assuming the Personnel Director position.

Thus I conclude that military service credit should be awarded. Mr. Neely has provided proof of actual service (P-1) and that he was honorably discharged (P-2). However, that credit should not be retroactive in accordance with the New Jersey Supreme Court's decision in Lavin v.Board of Education of the City of Hackensack, 90 N.J. 145,154-155 (1982) Rather, the credit should computed from the date the petitioner filed his petition with the Department; July 20, 2006. In Lavin, the plaintiff teacher sought retroactive salary increments for three years military service nine years after she was hired. As in that case, respondent herein asserts Neely's request is barred by the ninety day limitation for a petition of appeal to the Commissioner of Education, pursuant to N.J.A.C. 6A:3-1.3(i). Respondent asserts that the ninety days expired sometime in 2002, after Neely inquired of the military service credit. However, the Supreme Court has held both the six year statute of limitations for contract matters and the ninety day limitation inapplicable as it relates to military service. Kaprow v Board of Education of Berkeley Township, 131 N.J. 572, (1993). As the Court noted in both Kaprow and Lavin , the military service credit statute, N.J.S.A. 18A:29-11, is an "emolument that 'bears no relationship to the services to be rendered as an employee,' (and) the statute of limitations should not apply. Lavin, supra, at 150. The Court further noted:

> the legislative purpose of N.J.S.A. 18A:29-11 is to reward veterans for service to their country in time of war. The reward takes the form of crediting the military service as teaching experience even thought there is no functional relationship between the two. The credit has the effect of increasing the number of dollars to which the teacher who is a veteran is entitled. The emolument is not for services rendered or to be rendered for school teaching as such. It was established by the Legislature as a reward or bonus for service in the military, and not for performance as a teacher. Accordingly, the payment should be considered as a statutory entitlement, rather than as an element of the employment contract. That being so, the statute limitation is inapplicable. Id., at 151.

DECISION AND ORDER

Based on the foregoing, petitioner is awarded military service credit commencing from July 20, 2006, the date his petition was filed.

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

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

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

11-20-08

DATE

Ana C. Viscomi

ANA C. VISCOMI, ALJ

Date Received at Agency:

11-20-08

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

APPENDIX

LIST OF WITNESSES

For the Petitioner:

Stephen Neely

For the Respondent:

Gary Hall

LIST OF EXHIBITS

For the Judge:

C-1 June 9, 1998 memorandum re current opening
C-2 Employment application, Provisional Certificate
C-3 Austin Peay transcript
C-4 Payroll Action Request Form
C-5 BOE meeting minutes and agenda

For the Petitioner:

P-1 Discharge Certificate
P-2 Honorable Discharge
P-3 Resume

For the Respondent:

R-1 Interrogatories
R-2 Answers to Interrogatories
R-3 Article 22

4-09

JANICE RITTBERG-SNUFFER AND MICHAEL L. SNUFFER,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF SECAUCUS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners challenged the Board's uniform dress code on behalf of their son, contending that the uniform policy was improperly adopted and that implementation of the policy for their son would result in harm to him. Respondent Board contends that *N.J.S.A.* 18A:11-7 grants school districts the right to develop and implement school uniform dress codes, and that the statutory requirements for implementing the uniform policy were followed.

The ALJ found, *inter alia,* that: the respondent Board adopted a policy for student school uniforms pursuant to *N.J.S.A.* 18A:11-8; parents, staff, and the student body were kept informed prior to adoption of the policy; the Board met statutory terms and conditions in adopting its uniform policy; petitioners failed to carry their burden of proof to show that the adopted policy was in violation of statutory provisions, and further failed to prove that that their son would suffer any harm if required to wear the school uniform. Accordingly, the ALJ concluded that the action of the Board should stand, and dismissed the petition.

The Commissioner concurred with the ALJ that petitioners failed to meet their burden, and further found that there has been no showing that the respondent's uniform policy was improperly adopted or that harm would befall their son if he were required to adhere to the policy. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter 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.

January 7, 2009

OAL DKT. NO. EDU 10502-06
AGENCY DKT. NO. 264-8/06

JANICE RITTBERG-SNUFFER AND MICHAEL L. SNUFFER,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF SECAUCUS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions – dated December 9, 2008 and filed December 10, 2008, in response to an Initial Decision which was mailed to the parties on November 26, 2008 – were untimely pursuant to *N.J.A.C.* 1:1-18.4. As such, these are not considered herein.

Upon her review, the Commissioner concurs with the Administrative Law Judge – for the reasons clearly presented in her decision – that petitioners have failed to satisfy their burden of establishing either that the Board's uniform policy was improperly adopted or that harm would befall their son if he were required to adhere to this policy.

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.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/07/09
Date of Mailing: 1/08/09

* 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 10502-06

AGENCY DKT. NO. 264-8/06

J.R.-S. and M.S. o/b/o S.S.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWN OF SECAUCUS, HUDSON COUNTY,

Respondent.

J.R.-S., petitioner (parent), pro se

Dennis Maycher, Esq., representing respondent (Maycher, Bartzos & Associates, attorneys)

Record Closed: October 21, 2008 Decided: November 25, 2008

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE AND ISSUES

The Secaucus Board of Education School District, respondent, adopted a uniform dress code effective October 1, 2006, via a majority vote. Petitioners J.R.-S. and M.S. challenged the uniform dress code, on behalf of their son S.S., who is classified as eligible for special education and related services. Petitioners' argued in

an earlier case, EDS 10208-06, that their son's IEP be amended to enable his exemption from the uniform dress code. Petitioner's failed to provide qualifying evidence of a harm that would be caused or a medical or religious exception, that could be taken into consideration for an exemption; and therefore the Final Decision denied petitioner's request for an amended IEP with an opt-out provision.

Petitioner now seeks an alternative approach to void the uniform policy by arguing the instant EDU case to determine whether the school district's uniform policy was improperly adopted and contending that implementation of the policy, for their son, will result in his harm. Respondent contends that the State of New Jersey has explicitly granted school districts the right to develop and implement school uniform dress codes. N.J.S.A. 18A:11-7. Respondent further contends that the required legal procedure for implementing the uniform policy was properly followed and therefore petitioners do not have a valid claim that respondent breached statute requirements. The issues are whether petitioners can establish that the uniform policy was improperly adopted; and establish what harm will become their son if he is required to adhere to the policy.

PROCEDURAL HISTORY

The Department of Education Bureau of Controversies and Disputes transmitted this EDU matter to the Office of Administrative Law (OAL) on October 16, 2006, and the scheduling of a hearing date was delayed until the completion of the EDS matter. On August 7, 2007, the instant EDU case was assigned to the undersigned. A pre-hearing was completed on February 6, 2008, and the initial hearing date on April 24, 2008, was postponed due to the unavailability of respondent's witness. A conference was held on July 24, 2008, and a hearing was completed on August 26, 2008. Written summations and replies were received at OAL by October 21, 2008, and on the same date the record was closed.

SUMMARY OF TESTIMONY

Constantino Scerbo, superintendent of schools has been employed by the Secaucus Board of Education for thirty years; seven years as an assistant superintendent and twenty-three years as the superintendent. He supervises four schools in the District: two elementary schools, one middle school and one high school.

In 1996, during the presidency of William Jefferson Clinton, the issue of school uniforms was addressed by our federal government and by parents throughout the school districts in the United States. The administrators and parents in the various schools in Secaucus prompted a uniform policy until the concept drew serious attention in 2005. N.J.SA. 18A:11-1 was reviewed and an open process in each school was undertaken to obtain parental input and acceptance of a uniform policy. The 2005 discussions diminished and efforts to establish a uniform policy were disbanded.

The idea of a uniform policy in Secaucus surfaced again in May 2006. A letter was sent to parents dated June 9, 2006, asking them to respond to a survey regarding an interest in uniforms. Survey responses were due by Friday, June 16. A Board of Education meeting was called for June 15, 2006, at which time a reading of the proposed uniform policy was completed. Another letter was sent to parents on June 19, 2006, asking for additional input and survey responses; additional responses were due back to the Board of Education by June 23, 2006. A second reading of the uniform policy took place on June 20, 2006.

At all meetings and forums the parents and guardians displayed an overwhelming interest in adopting a uniform policy. At most forums 100 percent of the parents or guardians expressed interest in having a uniform policy. Four color-coded surveys were sent to each parent or guardian. The Board of Education was looking for a seventy percent or better rating on the survey and the sought after rating was obtained. Parents mailed the surveys to the Board office and parent and teacher committee members assisted with opening and tallying the results. Of the four

groupings of surveys that went out, seventy-nine percent was the lowest rating for parent interest to implement the policy, and the highest rating was above eighty percent of parents expressing a positive interest in adopting a policy. Efforts were made to reach every parent in the District. When a parent notified the Board that they had not received a survey, the superintendent would immediately cause for one to be mailed out. Information about the uniform policy was provided to parents at meetings, at forums with power-point presentations, through advertisements in the newspaper, on the school website, on Channel 34 cable television and in board meeting reports. Local news reporters wrote newspaper articles about a dress code being considered in Secaucus.

On June 28, 2006, a committee of parents from each of the District schools met with the superintendent to discuss "provider options" and to identify the companies that were willing to come on-site for the sale and purchase of the uniforms. The responsibility of the Board of Education was to check to see what companies did sell the uniforms and the logo. Parents were not required to purchase uniforms or the logo at any specific store.

On cross-examination, Superintendent Scerbo explained that an opt-out provision was not included in the survey vote because there would be confusion. The vote was to determine parent interest in a uniform policy. An opt-out provision for medical or religious reasons is required in all uniform policies and is included in the Secaucus policy. The purpose of the uniform policy was to have all children on an equal basis when they come to school. Scerbo said, "Education is the only matter students should have on their mind. A uniform policy will negate any issue with the type, the style, the cost or the maker of clothing; and there would be a standard dress policy for everyone. The Board of Education also believes that uniformity of dress cuts down on bullying." There are occasional dress-down days. The Secaucus Board of Education uniform policy has been successful except for one child. There is also a "Project Success" component which helps students who need assistance with purchasing their uniforms. Out of the 2,100 students in the Secaucus District, there is only one student, petitioner's son, who does not dress to uniform policy.

Mr. Scerbo also noted that on June 20, 2008, there was a second reading of the random drug policy as well as the uniform policy. Both policies went through without incident. All parents wanted the random drug policy and the vote was overwhelming as was the vote to implement the uniform policy. On August 18, 2006, the Secaucus Board of Education issued a two-page letter that set forth compliance measures for the uniform policy on the elementary levels.

James Fred Ponti has been employed with the Secaucus School District for thirty-three years and is currently the principal of Huber Street School, where petitioner's son attends classes. Mr. Ponti is responsible for structuring calendars, scheduling meetings and events and placing announcements in the newspaper for all forums, which included notices about meetings on the uniform policy.

Mr. Ponti said petitioner's son did not wear solid-color shirts during the first year of implementation of the uniform policy. However, during the 2008/2009 school year he started wearing solid colors. Mr. Ponti and petitioner discussed the policy for non-compliance and reviewed the power-point presentation. Petitioner was unable to make the June 3, 2008, Board of Education meeting because she was working and could not leave work early. A special meeting was scheduled for June 7, 2006, and notices were sent home in student book bags; petitioner was invited to attend that meeting. The uniform policy commenced in October 2006 to meet the three-month implementation requirement period so as to enable parents and students enough time to obtain uniforms and phase into the policy requirements. On October 5, 2006, a letter was issued regarding non-compliance with uniform policy. Petitioner's son was not in compliance in October 2006, which caused for his placement in a special room during lunch. Throughout the 2006-2007 school year petitioner's son wore a t-shirt and every shirt he wore was not in compliance. Some of his shirts had collars, others did not, and he never wore an embroidered school logo. The school colors are blue and yellow and the logo is a bear. During the 2006 school year petitioner's son said to Principal Ponti, "I do not have to wear the uniform my mom said so."

On cross-examination, Mr. Ponti reiterated that information regarding the uniform policy had been posted on the District website and that notices had been sent to parents by way of their children. He said the petitioner phoned him about the policy and he explained how to get further information. Mr. Ponti spoke with the superintendent about petitioner's son being hurt due to no fault of his own and asked if the child could be placed back in class. The superintendent allowed the petitioners son back in class even though he was not compliant with the uniform policy. Petitioner's son has been allowed to participate in all school events pending the outcome of the OAL hearing and has not been deprived of any benefit because of not wearing a uniform.

J.R.-S. is a petitioner and the mother of the student in question. Petitioner stipulated that a survey was not required for the school board to fulfill the requirements of N.J.S.A. 18A:11-8. Petitioner said she only asked for and seeks an "opt-out." She insisted that the uniform policy was six weeks old before the commencement of the forums, hearings, or surveying. She noted that computer-lab students do not dress according to uniform policy and are permitted to take off their tops when in the lab. Petitioner showed actual shirts and a picture of a uniform with a Peter Pan white collar with no logo on it. She noted that the agenda and minutes for the June 20, 2008, meeting reflected that the meeting started at 6:00 p.m. and ended at 6:13 p.m., and that no one was in the audience during the final meeting and reading of the policy because no one knew of the meeting. She acknowledged that at the June 15 and June 20, 2008, meetings there were second readings for the random drug policy and the uniform policy; and both policies passed at both meetings.

FINDINGS OF FACTS

Based on the arguments and documents presented, I **FIND** as follows:

1. Petitioners reside in Secaucus, New Jersey and have a son enrolled in the special education curriculum program in the Town of Secaucus Public School District;

2. Respondent Secaucus Board of Education (Board) operates a K-12 school district comprising two elementary schools, one junior high school and one high school;

3. During the spring of 2006 the District administrator, assistant superintendent, and principals held forums with the Parent Teacher Associations, for the purpose of discussing the implementation of a uniform policy in the District.

4. Information regarding a uniform policy was presented to parents, guardians and everyone in respondent's school district via discussion forums, illustrations via power-point presentations during special and regular Board meetings, via surveys, on Channel 34, the cable network station assigned to the District, via blogs, on the District's website, in newspapers, in articles written by news reporters and by special letters to parents and guardians;

5. On June 9, 2006, the administrator sent letters to parents and guardians explaining the topics covered during the forums on uniforms. Parents and guardians received a letter and survey to complete responses on their position(s) regarding the implementation of a school uniform policy. The parents were instructed to return the survey in a pre-stamped self-addressed-envelope to the Board of Education offices;

6. On June 19, 2006, the administrator again mailed the same letter (June 9) and a survey to parents and guardians;

7. The surveys were returned to the Board offices and reviewed and tallied by a committee comprised of Parent Teacher Association Executive Board Members. The majority of parents and guardians from each District school supported the school uniform policy;

8. The school uniform policy was established by Board Policy 5511 -

"Dress and Grooming";

9. The first reading of Board Policy 5511 was completed at the regular Board meeting of June 15, 2006;

10. The second reading of Board Policy 5511 was completed at the special Board meeting on June 20, 2006, and thereafter was officially adopted by the Board;

11. On June 23, 2006, parents and guardians were informed of the final survey results and implementation instructions for the Board's school uniform policy. The letter indicated that the school uniform policy would be implemented in stages commencing September 2006 and would become mandatory on October 2, 2006;

12. On June 28, 2006, the superintendent sent another letter to parents and guardians to advise that the Uniform Committee; comprised of himself, principals, parents, teachers, students and the assistant superintendent were continuing the process of vendor selection. The letter reminded parents and guardians of the phase-in plan for commencement of the policy;

13. On August 18, 2006, the superintendent mailed a letter to parents and guardians regarding uniform policy compliance measures and the availability of financial assistance for economically-disadvantaged students to purchase uniforms;

14. The Board adhered to the requirements set forth in N.J.S.A. 18A:11-8 to implement the district's uniform policy;

15. The uniform policy was fully implemented on October 2, 2006, three months after the adoption of the policy.

LEGAL ANALYSIS

In accord with N.J.S.A. 18A:11-1, a board of education has the authority to make, amend and repeal rules consistent with the rules of the New Jersey State Department of Education, for the operation and transaction of its business and for governing and managing public schools; and the safekeeping and maintenance of the school district's property. N.J.S.A. 18A:11-7 authorizes public schools to implement uniform-clothing requirements for their students in compliance with the procedures set forth in N.J.S.A. 18A:11-8. Respondent theorized that when students do not concentrate on the type, maker, style and cost of clothing they become equal and unified and are better able to concentrate on academics, thus the efforts to institute a uniform policy. Respondent contends the adoption of Board Policy 5511 - "Dress and Grooming," furthered the development of positive school culture, decreased bullying and increased student focus on curriculum. The weight of the testimony indicates that Secaucus adopted a uniform policy after carefully adhering to the statutorily-mandated procedures required by N.J.S.A. 18A:11-8(a). In Dare v. City of Salem Board of Education, 2007 WL 987223 (N.J. Adm.), the court upheld a school uniform policy by finding that there was a clear record that the Board adhered to the requirements of the implementing statute and met with parents, staff and students to provide information and respond to inquiries about the uniform policy prior to adopting a policy. In the instant case, the testimony and evidence demonstrate that implementing procedures were similar to Dare,supra, and specifically met the state statutory requirements outlined in N.J.S.A. 18A:11-8(a), including an adoption of the uniform policy on June 20, 2006, and implement of the policy on October 2, 2006, which satisfied the three-month-notice requirement.

Respondent's uniform policy complies with N.J.S.A. 18A:11-8(b), in allowing for exceptions based on a student's documented religious practices and/or medical concerns and other reasons. N.J.S.A. 18A:11-8(c) has also been adhered to in respondent's policy and enables students who participate in nationally-recognized

youth organizations, approved by the Board, to wear organization uniforms in school on days that the organization has scheduled meetings.

CONCLUSION

Based on the foregoing, I **CONCLUDE** that respondent adhered to the statutory requirements for offering and implementing a school uniform policy, and that no evidence exists to prove that the policy was illegally adopted. I further **CONCLUDE** that petitioners have not met the burden of proving their case regarding a harm that could be experienced by their child if required to wear the school uniform.

ORDER

Accordingly, it is **ORDERED** that petitioners' petition to void respondent's uniform policy due to improper adoption under the statute and because their son will be harmed if required to adhere to the policy, 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 (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.

November 25, 2008
DATE

SANDRA ANN ROBINSON, ALJ

Date Received at Agency: November 25, 2008

Mailed to Parties:

NOV 26 2008
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lr

APPENDIX

WITNESSES

For Petitioners:

J. R.-S., parent

For Respondent:

Constantino Scerbo, superintendent of schools

James Fred Ponti, principal, Huber School

JOINT EXHIBIT LIST

J-1 Letter from Fred Ponti, principal, "Student of the Month," dated April 3, 2006

J-2 Letter from Constantino Scerbo, superintendent, "Dress Code Survey," dated June 9, 2006

J-3 Correspondence from petitioner to Scerbo, June 9 letter, dated June 15, 2006

J-4 Board of Education Meeting notice and facsimile verifications, dated June 16, 2006

J-5 Letter from Constantino Scerbo, "Dress Code Survey," dated June 19, 2006

J-6 "Possible Provider Options," dated June 19, 2006

J-7 Letter from Constantino Scerbo, "Survey Results," dated June 23, 2006

J-8 Letter from Constantino Scerbo, "Uniform Packages," dated June 28, 2006

J-9 Uniform Tally Sheet and Enrollment by School, dated August 31, 2006

J-10 Secaucus Board of Education Dress & Grooming Policy 5511

J-11 Website printout - "Standardized Dress Code Now More than Ever"

J-12 Huber Street School Schedule of Events for June 2006

J-13 Letter from Fred Ponti, "Uniform Attire," dated July, 2006

J-14 Letter from Constantino Scerbo, "Uniform Policy," dated August 18, 2006

J-15 Letter from Arlene Brofsky, supervisor of special services, "Resolution

Meeting with Petitioner's," dated September 8, 2006

J-16 Letter from Constantino Scerbo, "Uniform Order Status," dated September 9, 2006

J-17 Letter from Arlene Brofsky, "Summary of September 19, 2006 Meeting"

J-18 Letter from Arlene Brofsky, "Response to Unresolved Question from September 19, 2006 Meeting," dated September 28, 2006

J-19 Letter from Arlene Brofsky, "Follow Up Meeting of October 5, 2006," dated October 5, 2006

J-20 Correspondence from petitioner with attachments "Other District Dress Code Policies," dated October 10, 2006

J-21 OPRA Request "Supporting Documents for Uniform Policy Enactment," dated October 26, 2006

J-22 Description of Special Dress Days 2006-2007

J-23 Letter from Arlene Brofsky, "Uniform Policy Non-Compliance," dated January 16, 2007

J-24 Letter from Constantino Scerbo, "2007/2008 Revisions to Uniform Policy," dated May 3, 2007

J-25 Correspondence from petitioners "Acknowledgment of Receipt of IEP," dated May 30, 2007

J-26 Huber Street School PTA Meeting notice "Gym Uniforms," dated June 4, 2007

J-27 Letter from Fred Ponti "Commencement of 2007/2008 School Year," dated August 2007

J-28 Letter from Fred Ponti, "Uniform Compliance Policy," dated August 2007

J-29 Assorted notices from Huber Street School

J-30 Letter from Fred Ponti, "Outerwear and Uniform Policy Compliance," dated October 2007

J-31 Petitioners' response to Arlene Brofsky's letters, dated November 21, 2007

J-32 Letter from Arlene Brofsky, responding to petitioner's November 21, 2007, correspondence, dated November 26, 2007

J-33 Photograph of student uniforms at Clarendon School

J-34 Huber Street School PTA notice "Holiday Bazaar," dated December 10,

2007

J-35 OPRA Request - agenda and minutes from Board of Education Meetings, dated December 10, 2007

J-36 "It's Your Move" flyer on superintendent search

J-37 Letter from Edward Walkiewicz, Board secretary and business administrator, "OPRA Request for School Uniform Contracts," dated February 16, 2007

J-38 Secaucus Public Schools Information Guide and Calendar 2006-2007

J-39 Letter to editor, nj.com, dated December 26, 2007

J-40 Excerpts from S.S.'s Spanish notebook and schedule

J-41 Secaucus Home News article "Board Holds Back to School Meeting," dated September 1, 2005

J-42 Secaucus Home News article "Prospect of Dress Code at Middle/High School Brings Students to Board Meeting," dated June 30, 2005

J-43 Secaucus Home News article "School Board and PTAs to Discuss Implementation of School Uniforms," dated June 1, 2006

J-44 Secaucus Home News article "School Uniforms, Drug Testing Approved for Town's School's," dated June 22, 2006

J-45 Secaucus Home News article "Dress Code," dated June 26, 2006

J-46 Secaucus Home News article "School Uniform Policy Discussed by Board," dated August 3, 2006

J-47 Initial Petition to Commissioner of Education, dated August 2, 2006

J-48 Letter from Kathleen Duncan, Director of Bureau of Controversies and Disputes "Petition of Appeal", dated August 3, 2006

J-49 Secaucus Board of Education's Answer; Letter Brief and Motion to Dismiss, dated August 16, 2006

J-50 Petitioner's Supplement to Initial Petition, dated August 10, 2006

J-51 Letter from Kathleen Duncan, dated August 30, 2006

J-52 Notice of Due Process Hearing Transmittal to the Office of Administrative Law, dated September 28, 2006

J-53 Letter from Kathleen Duncan, dated September 29, 2006

J-54 Notice of Filing with Office of Administrative Law, dated October 16, 2006

J-55 Decision of the Honorable Sandra Ann Robinson, dated October 23, 2006

J-56 Correspondence from petitioners to Kathleen Duncan, dated December 1, 2006

J-57 Letter from Kathleen Duncan, "Response to Petitioner's December 1, 2006, Letter," dated December 6, 2006

J-58 Office of Special Education Program's Request for Hearing Transcript, dated June 18, 2007

J-59 Letter from the Honorable Ken R. Springer, ALJ regarding status of case, dated July 26, 2007

J-60 Correspondence from petitioners regarding response to Judge Springer's Letter of July 26, 2007, dated August 7, 2007

J-61 Notice of Prehearing Conference, dated August 27, 2007

J-62 Notice of Prehearing Conference, dated October 18, 2007

J-63 Email to Honorable Sandra Ann Robinson, "Follow-up to February 6, 2008 Meeting," dated February 6, 2008

J-64 Amended Pre-hearing Order, dated February 8, 2008

J-65 Notice of Plenary Hearing, dated February 14, 2008

J-66 Notice of Plenary Hearing for April 24, 2008

J-67 Secaucus Board of Education web pages <http://www.sboe.org/>

J-68 Email to petitioner from respondent's counsel, dated July 25, 2008

J-69 Letter with attachments to the Honorable Sandra Ann Robinson from respondent's counsel, dated June 13, 2007

J-70 Special PTA Meeting notice for June 7, 2006

RESPONDENT'S EXHIBITS LIST

R-1 Revised Agenda and Minutes, dated May 11, 2006

R-2 Revised Agenda and Minutes, dated May 25, 2006

R-3 Agenda and Minutes, dated June 15, 2006

R-4 Special Board Meeting Agenda and Minutes, dated June 20, 2006

R-5 Special Board Meeting Agenda and Minutes, dated July 6, 2006

R-6 Special Board Meeting Agenda and Minutes, dated July 13, 2006

R-7 Agenda and Minutes, dated July 27, 2006

R-8 Agenda, dated August 31, 2006

R-9 Agenda, dated September 28, 2006

R-10 Agenda, dated October 19, 2006

R11 Agenda, dated November 30, 2006

R-12 Minutes, dated December 21, 2006

R-13 Minutes, dated January 25, 2007

R-14 Minutes, dated February 15, 2007

R-15 Minutes, dated March 29, 2007

R-16 Minutes, dated May 1, 2007

R-17 Minutes, dated June 14, 2007

R-18 Minutes, dated July 26, 2007

R-19 Minutes, dated August 23, 2007

R-20 Minutes, dated September 27, 2007

6-09

OAL DKT. NO. EDU 8168-07
AGENCY DKT. NO. 210-8/07

V.B., on behalf of minor child, J.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER 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.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/07/09

Date of Mailing: 1/08/09

* Notwithstanding that the Board attorney, as the Board's legal representative, did not sign the agreement nor did the record contain a resolution of the Board confirming the settlement's acceptance by that body, the record of this matter includes a letter, dated October 28, 2008, from Board attorney, Michael E. Heston, Esq., to the Administrative Law Judge reporting that the agreement was "approved by the Washington Township Board of Education and executed on its behalf by Dr. Cheryl Simone, Superintendent."



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO. EDU 8168-07
AGENCY DKT. 210-8/07

V.B., O/B/O MINOR CHILD, J.B.,
Petitioner,
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF WASHINGTON,
GLOUCESTER COUNTY.

Christopher C. Cona, Esq., appearing for petitioner

Michael E. Heston, Esq., appearing for respondent Washington Township Board of Education (Capehart & Scatchard, attorneys)

Record Closed: November 5, 2008 Decided: November 19, 2008

BEFORE **JOHN R. FUTEY**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 2, 2007, 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. An in-person pre-hearing conference was conducted on October 18, 2007, and a pre-hearing order was issued, which set the matter for hearing for March 10, 2008. This date was agreed to after petitioner rejected hearing dates of November 13 and 28, 2007 and waived the opportunity for an expedited hearing.

The matter commenced on March 19, 2008, and was continued to September 22, 2008, at which time the parties engaged in extension settlement discussions. They executed a handwritten memorandum of settlement at that time (J-1), subject to the approval of the Washington Township Board of Education (BOE).

A formal settlement agreement was received on November 5, 2008, which contained the original signatures of V.B., and Cheryl L. Simone, Ed.D., Superintendent on behalf of the BOE, at which time the hearing record closed.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-2).

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, as well as the testimony of V.B. under oath on September 22, 2008.

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.

November 19, 2008
DATE

JOHN R. FUTEY, ALJ

Date Received at Agency:
11-26-08

Mailed to Parties:

NOV 25 2008

DATE

OFFICE OF ADMINISTRATIVE LAW

/mamf

EXHIBITS

Jointly submitted

J-1 Memorandum of agreement, dated September 22, 2008 received at the OAL on November 5, 2008

J-2 Settlement Agreement

WITNESSES

For petitioner

V.B.

For respondent

none

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OFFICE OF ADMIN LAW

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 Respondent, Washington Township Board of Education

V.B. on behalf of minor child, J.B.,	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
vs.	:	OAL DOCKET NO. 8168-07 AGENCY DKT. NO. 2108/07
Washington Township Board of Education,	:	CIVIL ACTION
Respondent.	:	**SETTLEMENT AGREEMENT**

This Settlement Agreement is entered into by and between V.B. on behalf of minor child, J.B., Petitioner ("V.B."), and the Washington Township Board of Education, Gloucester County, New Jersey, Respondent ("Board").

RECITALS

WHEREAS, the Board, is a public school board of education organized under and subject to Title 18A of the New Jersey statutes.

WHEREAS, on October 10, 2006 V.B. registered her minor child, J.B., as a student in the Board's public school system indicating 2001 Barnsboro Road, Blackwood, New Jersey as their current address.

WHEREAS, after the Board had mail that it had sent to V.B. at the 2001 Barnsboro Road, Blackwood, New Jersey address returned as undeliverable, the Board began an investigation the results of which indicated that V.B. and her minor son J.B.

appeared to have a home address of 224 South Moore Avenue, Barrington, New Jersey, an address not within the geographic boundary of the Board's public school district.

WHEREAS, upon receiving notice of the Board's determination that J.B. was found to be ineligible to attend the Board's public school system, V.B. requested a residency hearing which was conducted on and attended by V.B. on March 27, 2007.

WHEREAS, upon completion of the hearing and further investigation by the Board, V.B. was informed by letter dated July 17. 2007 that the Board had taken action to exclude J.B. from school as of June 14, 2007 and requested payment in the amount of $8, 719.65 for out-of-district tuition beginning with J.B.'s first day of attendance in the Board's public schools.

WHEREAS, V.B.'s Petition of Appeal of the Board's decision followed on or about August 8, 2007.

WHEREAS, the parties hereto wish to compromise and settle all claims and matters arising from or related to V.B.'s residency issue, without the burden, expense and uncertainty of litigation, on the terms and conditions expressed in this Agreement.

WHEREAS, the parties agree that it would be neither productive nor in the public interest to further pursue litigation of this dispute.

NOW, THEREFORE, in consideration of the mutual terms and conditions hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are acknowledged by each party, V.B. and the Board agree as follows:

1. V.B. agrees to pay the Board, within ninety (90) days of the date that this Settlement Agreement becomes final, the sum of ONE THOUSAND FIVE HUNDRED DOLLARS ($1,500.00) and to pay to the Board the sum of ONE HUNDRED DOLLARS ($100.00) each and every month thereafter until V.B. has paid the Board the total settlement amount of FOUR THOUSAND FOUR HUNDRED DOLLARS ($4,400.00).

2. The Board agrees to accept the settlement amount of FOUR THOUSAND FOUR HUNDRED DOLLARS ($4,400.00), a sum consistent with public policy, as payment in full for the $8, 719.65 in out-of-district tuition.

3. V.B. agrees that in the event she fails to pay the settlement amount of FOUR THOUSAND FOUR HUNDRED DOLLARS ($4,400.00) to the Board as provided above to the entry of an order and judgment for the full EIGHT THOUSAND SEVEN HUNDRED NINETEEN DOLLARS AND SIXTY FIVE CENTS ($8, 719.65) for out-of-district tuition

4. V.B. acknowledges and agrees that she enters into this Settlement Agreement with full understanding of her rights, has had adequate time to confer with her attorney and is satisfied with her attorney's representation and has had opportunity to question either parties' attorney and the Administrative Law Judge.

5. Each of the persons signing this Agreement represents and warrants that he or she has all requisite authority to execute and perform this Agreement.

6. Neither the failure nor any delay on the part of any party to exercise any right, remedy, power or privilege under this Agreement shall operate as a waiver of that right, remedy, power or privilege.

7. This Agreement contains the entire agreement between the parties regarding the matters addressed herein and may not be changed or terminated orally, but only by a written instrument executed by the parties after the date of this Agreement. The Board and V.B. further acknowledge and agree that neither party will make any claim, at any time or place, that this Agreement has been orally altered or modified in any respect whatsoever. It is expressly acknowledged and recognized by all parties that there are no agreements by and among V.B. and Board, whether oral or written, other than this Agreement.

8. The terms and conditions of this Agreement shall be construed as a whole according to the fair meaning and not strictly for or against any party. The parties acknowledge that each of them has reviewed this Agreement, and that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Agreement.

9. If any term of this Agreement or the application of any term of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, all provisions, covenants and conditions of this Agreement, and all of their applications, not so held invalid, void or unenforceable, shall continue in full force and effect and shall not be affected, impaired or invalidated in any way.

10. The laws of the State of New Jersey shall govern the validity, construction, performance, and effect of this Agreement.

11. V.B. acknowledges: (a) She has carefully read this Agreement; (b) She understands the meaning and effect of the terms of this Agreement; (c) The only promises made are those stated in this Agreement; (d) She is signing this Agreement freely, voluntarily and with full knowledge of its terms and consequences.

12. The Board has approved acceptance of this Agreement on this date and has authorized Cheryl Simone, Superintendent, to execute this Agreement on its behalf.

Intending to be legally bound, the parties sign this Agreement as of the dates set forth below:

Virginia Buttaro
V.B.

10/9/08
Date

Washington Township Board of Education

By Cheryl L. Simone
Cheryl L. Simone, Ed.D., Superintendent

10/24/08
Date

1065310

7-09

#7-09SEC

ARTHUR JACOBS,	:	
COMPLAINANT,	:	
V.	:	COMMISSIONER OF EDUCATION
RAYMOND DELBURY, BOARD OF EDUCATION OF THE SUSSEX WANTAGE REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The School Ethics Commission (Commission) found that respondent, a member of the Board of the Sussex Wantage Regional Board of Education, violated *N.J.S.A.* 18A:12-24.1(e), (g) and (i) of the Code of Ethics for School Board Members when he posted a confidential email memorandum which contained information regarding the hospitalization of a staff member for a medical condition to an internet chat room and bulletin board. The Commission recommended the penalty of suspension for six months in this matter. The respondent filed no exceptions, nor did he 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 respondent be suspended for six months. Accordingly, the respondent is suspended for six months as a school official found to have violated the School Ethics Act.

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

January 9, 2009

AGENCY DKT. NO. 348-11/08

ARTHUR JACOBS,	:	
COMPLAINANT,	:	
V.	:	COMMISSIONER OF EDUCATION
RAYMOND DELBURY, BOARD OF EDUCATION OF THE SUSSEX WANTAGE REGIONAL SCHOOL DISTRICT, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.A.C.* 6A:28-6.11 for final determination on the Commission's recommended penalty, have been reviewed. 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.

Upon review, the Commissioner concurs with the penalty recommended by the Commission. Accordingly, respondent is hereby suspended for six months as a school official found to have violated *N.J.S.A.* 18A: 12-24.1(e), (g) and (i).

IT IS SO ORDERED.*

Judith EDay

COMMISSIONER OF EDUCATION

Date of Decision: 1/09/09

Date of Mailing: 1/09/09

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

ARTHUR JACOBS	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**Docket No. C44-07**
RAYMOND DELBURY	:	
SUSSEX WANTAGE REGIONAL	:	**DECISION**
BOARD OF EDUCATION	:	
SUSSEX COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed on November 7, 2007 by Arthur Jacobs, president of the Sussex Wantage Regional Board of Education (Board), alleging that Raymond Delbury, a member of the Board violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. The initial complaint was deficient and, in response to a request from the Commission, the complainant filed an amended complaint on November 20, 2007 correcting the deficiencies. The complainant specifically alleges that the respondent violated N.J.S.A. 18A:12-24.1(b), (c), (d), (e), (g) and (i) of the Code of Ethics for School Board Members. Through his attorney, Donald P. Hogan, Esquire, the respondent timely filed an answer to the complaint. During the public portion of the October 27, 2008 meeting, the Commission found that the complainant did not factually prove that the respondent violated N.J.S.A. 18A:12-24.1(b), (c) and (d). However, the Commission found that the complainant had established that the respondent violated N.J.S.A. 18A:12-24.1(e), (g) and (i) and voted to recommend that the Commissioner of Education suspend the respondent for six months.

SUMMARY OF THE RECORD

The parties were invited to appear at the Commission's October 27, 2008 meeting to present testimony. The complainant appeared and presented testimony. The Board attorney, Bruce W. Padulla, Esquire, appeared, noting for the record that, since this was an intra Board dispute, he was there only to assist the complainant, but not to support or defend the allegations. The complainant presented the testimony of Edward F. Izbicki, superintendent of the Sussex Wantage Regional School District (District), and Thomas Card, the current Board president. The respondent appeared with his attorney, Donald P. Hogan Esquire, and presented testimony. Mr. Hogan noted his procedural objections for the record.[1]

[1] Mr. Hogan objected to the Commission's hearing being held beyond the statutory deadline and asserted that the respondent was denied his right to a hearing and discovery before an Administrative Law Judge. He also objected to the participation in the hearing of Commission members who are members of the New Jersey Association of School Business Officials or the New Jersey Administrators and Supervisors Association.

The complainant testified that the respondent posted information about an employee on NJ.com and that action speaks for itself. Following is the text of the email that was posted on NJ.com and attached to the complaint:

> It became necessary yesterday (Monday October 15th) to remove a staff member from the Wantage School. The staff member is currently hospitalized for treatment of a medical condition. Upon further medical evaluation, additional information will be made available. I will certainly answer your questions if necessary during the Executive Session on October 18th. The Board President was immediately advised, as was our attorney and District Physician. The matter was handled in accordance with contract and recommended guidelines.
>
> Thank you,
>
> Ray Nazzaro

On cross examination, the complainant explained that he learned about the posting from a Board member. He confirmed that the email was sent to all Board members from the business administrator/board secretary and, when the recipient opened the email, there was an indication to "treat as confidential." The complainant stated that, when the email was opened, a Board member first had to indicate yes or no whether to open and receive the email, and, when the recipient clicked on yes to open the email, s/he would see the header indicating that the email was confidential. The complainant testified that he did not know if the email was sent to the respondent's personal or school account.

Edward Izbicki, the current superintendent, testified that, in his prior position as business administrator/board secretary, he was asked by the interim superintendent to forward a memo to all Board members regarding an incident involving a teacher. The witness explained that the interim superintendent forwarded the written memo to him, which he then sent to all Board members on both their personal email accounts and their district email accounts. Dr. Izbicki explained that when the interim superintendent asked for the memo to be distributed he asked that it be marked as confidential. Dr. Izbicki stated that he flagged the email as confidential by clicking on an automatic icon, although he admitted that he did not know where on the email the recipient would see that it was marked confidential. Dr. Izbicki explained that the next day it was brought to his attention by another Board member that the email was posted on NJ.com. Dr. Izbicki claimed that the respondent asked for emails to be sent to the email account of the respondent's wife. He testified that there is no written Board policy regarding email addresses. On cross examination, Dr. Izbicki confirmed that he belonged to NJASBO and NJASA. He admitted that those organizations advocate on behalf of administrators and provide boilerplate contracts for negotiations. He also admitted that he did not have a background in computers.

Tom Card, the current Board president, testified that he received the email concerning confidential employee information. He confirmed that the email was marked as confidential. He explained that he was told by other people that the email was on NJ.com and he saw it there. On cross examination, Mr. Card verified that he received the email on his hotmail account, which he does not share with anyone. Mr. Card stated that he believed the email to be confidential because it contained information about an employee who was possibly being disciplined, although he admitted that the possibility of discipline was not in the email message. Mr. Card claimed that any information about an employee was confidential until it goes to the Board. He confirmed that this was his understanding of the law.

The respondent testified that the email was sent to his wife's email account and that either he or his wife opened it up. He claimed that it was not marked confidential. He explained that, prior to the email, there had been rumors in the community. The respondent maintained that no one told him that the information was confidential. He confirmed that after he received the email he copied it and sent it out over NJ.com. On cross examination, the respondent stated that he had a district email account but did not have a personal email account. He explained that he uses his wife's email account because the Board requested that he provide an email address where he could be reached. The respondent testified that personnel and policy were discussed in executive session because the public can not know what transpires. He again denied that the email was marked as confidential. The respondent verified that the email attached to his answer as Exhibit A was not altered. He also verified that he had attended board member training.

FINDINGS OF FACT

The Commission found the following facts based on the pleadings, testimony and documents on the record.

1. At all times relevant to the complaint, the complainant was president of the Board and the respondent was a member of the Board.

2. The respondent attended board member training.

3. On or about October 17, 2007, the interim superintendent sent a memorandum to the business administrator/board secretary and asked him to forward it to all Board members and mark it as confidential.

3. The business administrator/board secretary copied the memorandum and placed it into an email which he sent to all Board members at both their district and personal email accounts. He flagged the email as confidential by clicking on an automatic icon which would, upon opening the email, notify the email recipient that the content of the email was confidential.

4. The memorandum in the email, as set forth above at page 2, contained information regarding the hospitalization of a staff member for a medical

condition. In the memorandum, the interim superintendent indicated that he would answer questions during the October 18, 2007 executive session.

5. The email was sent to the email account of the respondent's wife which is the email account that the respondent gave to the Board. It was also sent to the respondent's district email account.

6. The email was opened by either the respondent or his wife.

7. The respondent read the entire contents of the email.

8. The respondent posted the memorandum in the email word for word on an internet chat room and bulletin board at www.nj.com/forums/sussex.

ANALYSIS

As an initial matter, the Commission notes that, pursuant to N.J.S.A. 18A:12-29, the complainant bears the burden of factually proving any violations of the Code of Ethics for School Board Members. The complainant contends that the respondent 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.

There is nothing on this record to show that the respondent's conduct was contrary to the educational welfare of children or that the respondent's conduct obstructed the schools ability to meet the individual needs of all children regardless of their ability, race creed, sex, or social standing. The complainant has failed to present the Commission with any factual evidence to support the allegation that the respondent's conduct violated N.J.S.A. 18A:12-24.1(b). Thus, the Commission finds that the complainant has failed to sustain his burden to prove that the respondent violated N.J.S.A. 18A:12-24.1(b) and dismisses this allegation.

The complainant also alleges that the respondent violated N.J.S.A. 18A:12-24.1(c), which provides:

> I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

The complainant provided no evidence to factually establish that the respondent's actions constituted Board action. The respondent's action in posting the email on a public web page was not within the scope of the respondent's duties and responsibilities as a Board member. As noted below, the respondent's action constituted private action.

Previously, in Marc Sovelove v. Paul Breda, C49-05 (September 26, 2006), the Commission found that a Board member's action cannot be both board action and private action. The Commission stated that if the board member's action is found to be board action it cannot be private action. (Id., at page 4) Conversely, if a board member's action is found to be private action it cannot constitute board action. The Commission finds that the complainant did not factually establish that the respondent failed to confine his board action to policy making, planning, and appraisal or that he failed to help frame policies and plans only after the board has consulted those who will be affected by them. Therefore, the Commission dismisses the allegation that the respondent violated N.J.S.A. 18A:12-24.1(c).

The complainant contends that the respondent violated N.J.S.A. 18A:12-24.1(d), which provides:

> I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

Pursuant to N.J.A.C. 6A:28-7.1, "administer the schools" means, in part, "that a member of the district board of education...has become directly involved in activities or functions that are the responsibility of school personnel or the day to day administration of the school district...or has given a direct order to school personnel." There is no factual evidence on this record to show that the respondent's action in posting the email rose to the level of administering the schools. The respondent's action was in no way connected to the administration of the schools as defined above. There is also no factual evidence to show that the respondent failed to see that the schools are well run together with his fellow Board members. The Commission finds that the complainant failed to sustain his burden to prove that the respondent violated N.J.S.A. 18A:12-24.1(d); therefore, the Commission dismisses this allegation.

The complainant also contends that the respondent violated N.J.S.A. 18A:12-24.1(e), which provides:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

To find a violation of N.J.S.A. 18A:12-24.1(e), the Commission must first determine whether the respondent's public posting of the email was a private action. Pursuant to N.J.A.C. 6A:28-7.1 "private action means, in part, action taken by a board member "...that is beyond the scope of the duties and responsibilities..." of a member of the board. Here, it was not within the duty or responsibility of the respondent as a board member to publicly post the email. In publicly posting the email, the respondent was taking private action. Next, the Commission must determine if the respondent's private action could have compromised the Board. The Commission finds that the respondent's private actions could have compromised the Board because the email contained medical

information regarding a District employee and the public posting exposed the Board to adverse consequences including possible litigation. Therefore, the Commission finds that the complainant has sustained his burden of proof and the Commission finds that the respondent violated N.J.S.A. 18A:12-24.1(e).

The complainant further alleges that the respondent violated 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 notes that there was contradictory testimony as to whether the respondent saw the notification on the email flagging the contents of the email as confidential. However, the Commission does not need to reach to this evidence to determine whether the respondent should have known that the information in the email was confidential. The text of the email contained personal information about a staff member that was to be discussed at an executive session of the Board. A reasonable board member would have known that personal information, particularly information related to the removal of a staff member for hospitalization due to a medical concern, was confidential. Furthermore, the fact that, in the email, the superintendent indicated that he would answer Board members' questions at the next executive session, should have also informed the respondent that the information in the email was confidential, since confidential personnel information is only discussed in executive session. Previously, in I/M/O Frank Pizzichillo, C17-02 (January 28, 2003), Commissioner of Education Decision No. 102-03 decided March 6, 2003, the Commission found that a board member should have been convinced that documents given to the Board at a public meeting were confidential due to the specific personal information contained in the documents.[2] In Pizzichillo the documents were not marked confidential, which is similar to this matter where the respondent claims that he did not see that the email was flagged as confidential. Like the board member in Pizzichillo, the respondent should have been convinced by the content of the email that the email was confidential. The respondent's public posting of the confidential information could have needlessly injured the staff member or the schools because it exposed the school to possible litigation and revealed confidential medical information about a staff member. Based on the foregoing, the Commission finds that the complainant has sustained his burden of proof and the Commission finds that the respondent violated N.J.S.A. 18A:12-24.1(g).

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[2] In Pizzichillo, the Commission found that a board member violated N.J.A.C. 18A:12-24.1(e) and (g) when he provided a member of the public with documents he received at a public meeting of the board, which contained a school administrator's payroll records. The Commission found that the documents were confidential and dissemination of the documents was private action that could have compromised the board or needlessly injure an individual or the schools.

Finally the complainant alleges that the respondent violated N.J.S.A. 18A:12-24.1(i), which provides:

> I will support and protect school personnel in proper performance of their duties.

When the respondent publicly posted confidential information that a staff member was removed from the school and hospitalized for a medical condition, the respondent failed to support that staff member. The Commission notes that the respondent did not just release this confidential information to a limited amount of people, but posted it on an internet chat room and bulletin board at www.nj.com/forums/sussex where anyone could access the information. The posting of this confidential information regarding a staff member's medical condition undermined that staff member's ability to effectively execute his or her duties. The Commission finds that the complainant sustained his burden of proof and finds that the respondent violated N.J.S.A. 18A:12-24.1(i).

DECISION

The Commission finds that the complainant has established that the respondent violated N.J.S.A. 18A:12-24.1(e), (g) and (i) of the Code of Ethics for School Board Members. The Commission dismisses the allegations that the respondent violated N.J.S.A. 18A:12-24.1(b), (c) and (d).

PENALTY

The Commission recommends that the Commissioner of Education impose a penalty of suspension for six months. In so doing, the Commission takes into account that, on December 6, 2007, the respondent was censured by the Commissioner of Education for violating N.J.S.A. 18A:12-24.1(d), (e), (i) and (j) of the Code of Ethics for School Board Members. (I/M/O Raymond A. Delbury, C64-06 (October 30, 2007), Commissioner of Education Decision No. 472-07 decided December 6, 2007, affirmed by State Board of Education Decision No. 1-08 decided June 18, 2008)[3] Thus, this is the second time that the respondent has been found to have violated the School Ethics Act. As such, the Commission finds instructive the Commissioner of Education's decision in I/M/O Sara Davis and Rosemary Jackson, Commissioner of Education Decision No. 91-03 decided February 27, 2003,[4] where the Commissioner imposed a more severe sanction

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[3] The Commission found that the respondent violated N.J.S.A. 18A:12-24.1(j) when he went into the school and took pictures of open windows in the middle school and maxi-pads in the board bathroom and then spoke with reporters regarding his concerns giving the reporters copies of the pictures. The Commission also found that the respondent violated N.J.S.A. 18A:12-24.1(d), (e), (i) and (j) when he treated teachers and other education professionals in a demeaning and harassing manner and contacted teachers and administrators directly without going through the superintendent.

[4] In I/M/O/ Sara Davis and Rosemary Jackson, C08-02 (November 26, 2002), the Commission found that board member, Rosemary Jackson had violated N.J.S.A. 18A:12-24(b) and (c) for lobbying the board to have her personal attorney appointed as board solicitor, and recommended that the Commissioner of Education censure Ms. Jackson. Previously in I/M/O Rosemary Jackson, C11-01 (June 26, 2001), the Commission, pursuant to a settlement agreement, recommended that board member Rosemary Jackson be

than that recommended by the Commission because a board member was found to have violated the Act a second time. In that regard, the Commissioner stated:

> Given that the instant violation is Ms. Jackson's second infraction of the School Ethics Act in a short period of time, the Commissioner finds that it evidences a serious lack of attention to and concern for adherence to the law which governs her conduct, which cannot be condoned. It is crucial that board members recognize the importance of maintaining public confidence in them. Central to this effort is a clear recognition that they *must* conform their conduct to the standards set forth in the School Ethics Act. Because he finds it imperative to deter behavior that creates an impression of a violation of the public trust, the Commissioner wants it clearly understood by this and all board members that repetitive violations of the Act cannot and will not be tolerated. (Id., at page 11) (emphasis in text)

The Commission also takes into account that the respondent had knowledge and understanding of his duties and responsibilities under the Act because he had attended board member training. Indeed, the matter docketed as C64-06, which involved similar allegations of violations of the Code of Ethics, was under review by the Commission well before the respondent publicly posted the confidential email. In this regard, the Commission is troubled by the respondent's clear lack of an understanding that the email contained confidential medical information about a staff member that was to be discussed in executive session. To the extent that the respondent questioned whether the email was confidential as suggested in his answer, the appropriate course of action would have been to ask the interim superintendent before he took any action with regard to the email. His failure to do so, coupled with the posting of the confidential email on an internet chat room and bulletin board where thousands or more could gain access, constituted a strident disregard of the Code of Ethics for School Board Members. Given that the instant violation is the respondent's second violation of the Act in a short period of time and given the concerns noted above, the Commission recommends that the Commissioner of Education impose a penalty of a six-month suspension.

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

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reprimanded for voting on a bill list containing a bill of her employer. The Commissioner of Education accepted the penalty recommendation, and Ms. Jackson was reprimanded. (Commissioner of Education Decision No. 238-01 decided July 27, 2001)

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.

Paul C. Garbarini /yb

Paul C. Garbarini, Chairperson

Mailing Date: November 26, 2008

Resolution Adopting Decision – C44-07

Whereas, the School Ethics Commission has considered the pleadings, the testimony and the documents submitted in support thereof; and

Whereas, the Commission found that Raymond Delbury violated N.J.S.A. 18A:12-24.1(e), (g) and (i) of the School Ethics Act; and

Whereas, the Commission voted to recommend to the Commissioner of Education that Mr. Delbury be suspended for six months; and

Whereas, the Commission has reviewed the proposed decision of its staff; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision. The Commission directs its staff to notify all parties to this action of its decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on November 25, 2008.

Joanne Boyle
Executive Director

9-09

#9-09

OAL DKT. NO. EDU 9518-08
AGENCY DKT. NO. 196-7/08

V.G. and L.G., on behalf of minor child, A.G., :
PETITIONER,
:
V. COMMISSIONER OF EDUCATION
:
BOARD OF EDUCATION OF THE DECISION
WEST ESSEX REGIONAL SCHOOL :
DISTRICT, ESSEX COUNTY
RESPONDENT. :

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

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/12/09

Date of Mailing: 1/12/09

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09518-08

AGENCY DKT. NO. 196-7/08

V.G. and L.G. o/b/o A.G.,

Petitioners,

v.

WEST ESSEX REGIONAL BOARD OF EDUCATION,

Respondent.

Steven J. Martino, Esq., for petitioner (Iacullo Martino, attorneys)

Vittorio S. LaPira, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: December 8, 2008 Decided: December 8, 2008

BEFORE **J. HOWARD SOLOMON,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 8, 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.

A hearing was scheduled to commence on November 18, 2008. Prior to that date, the parties agreed to settle this matter and have prepared the attached Stipulation of Settlement and Board Resolution indicating the terms of settlement.

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.

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.

12-8-08
DATE

J. HOWARD SOLOMON, ALJ

Receipt Acknowledged:

DATE

12-10-08
DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 10 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2008 DEC -8 A 8:09

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Attorneys for Respondent
West Essex Regional Board of Education
Our File No.: 114

V.G. and L.G. o/b/o A.G.,	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
Petitioners,	:	
vs.	:	OAL DKT. NO: EDUOS-09518-2008N
	:	AGENCY REF. NO: 196-7/08
WEST ESSEX REGIONAL BOARD OF EDUCATION,	:	
	:	**STIPULATION OF SETTLEMENT**
Respondent.	:	

THIS STIPULATION OF SETTLEMENT, made on the 24th day of November, 2008, by and between V.G. and L.G., on behalf of A.G., who currently resides at 15 Shenandoah Drive, North Caldwell, NJ 07006 (hereinafter referred to as "Petitioners"), and the West Essex Regional Board of Education (hereinafter referred to as "Respondent" or "Board"), with a principal place of business located at 67 West Greenbrook Road, North Caldwell, New Jersey 07006.

WITNESSETH:

WHEREAS, A.G. is a student enrolled in the West Essex Regional High School; and

WHEREAS, on or about May 29, 2008, the Board imposed a long-term suspension on A.G. as a result of his conduct that he engaged in on or around March 11, 2008 and March 20, 2008; and

WHEREAS, A.G., by and through his parents, V.G. and L.G., appealed the Board's decision and imposition of a long-term suspension to the Commissioner of Education; and

WHEREAS, the parties have agreed to settle their disputes amicably as set forth in greater detail herein;

NOW, THEREFORE, based upon the foregoing premises and mutual promises and covenants herein, the parties agree as follows:

1. Paragraph 1 of the Board's May 29, 2008 resolution (hereinafter referred to as the "Resolution") shall be modified as follows: "The Board hereby determines, based upon a preponderance of the competent and credible evidence, on March 11, 2008, A.G. engaged in the writing of graffiti in the school, which resulted in a lockdown of the school, in violation of Board Policy and Regulation No. 5600 (Pupil Discipline), Board Policy No. 5610 (Suspension), N.J.S.A. 18A:37-2 (Causes for Suspension or Expulsion of Pupils), and the Discipline Policy contained in the West Essex Regional High School Student Handbook and determines that such conduct is grounds for discipline."

2. Paragraph 2 of the Resolution shall be modified as follows: "The Board hereby determines, based upon a preponderance of the competent and credible evidence, on March 20, 2008, A.G. engaged was in possession of an unlawful weapon off school grounds, and was in possession of a controlled dangerous substance off school grounds, in violation of Board Policy and Regulation No. 5600 (Pupil Discipline), Board Policy No. 5610 (Suspension), Board Policy and Regulation No. 5530 (Substance Abuse), N.J.S.A. 18A:37-2 (Causes for Suspension or Expulsion of Pupils), and the Discipline Policy contained in the West Essex Regional High School Student Handbook, and determines that such conduct is grounds for discipline."

3. Paragraph 4 of the Resolution shall be modified as follows: "A.G. shall not be present on any of the Board's school campuses outside of or during the regularly scheduled school day from the beginning of his suspension through March 31, 2009, unless specifically authorized to do so by the Superintendent."

4. Paragraph 5 of the Resolution shall be modified as follows: "The Board hereby further determines that A.G. shall not be permitted to participate in any athletic, co-curricular and/or extra-curricular activities sponsored by the Board

through June 30, 2009 and shall not be present for or attend any Board-sponsored activities (e.g., dances, sporting events) either on campus or in any school district where West Essex Regional is participating in the activities from the beginning of his suspension through March 31, 2009."

5. Paragraph 8 of the Resolution shall be modified as follows: "A.G. may apply for reinstatement to the West Essex Regional High School after June 30, 2009, provided that: a. A.G. satisfactorily completes his academic requirements for the remainder of the 2007-2008 and 2008-2009 school years and is recommended by his alternative educational instructors for readmission to West Essex Regional High School; and b. A.G. has no further involvement with law enforcement and no further disciplinary infractions and fully complies with the conditions of his suspension."

6. Paragraph 9 of the Resolution shall be deleted in its entirety and Paragraph 10 shall be renumbered as Paragraph 9.

7. Any and all provisions of the Resolution not otherwise mentioned in this Stipulation of Settlement shall remain in full force and effect.

8. Any and all communications between the Board and any colleges, universities or other entities with permission to obtain details of A.G.'s disciplinary record shall reflect the terms and conditions set forth in this Stipulation of Settlement.

9. This Stipulation of Settlement represents the compromise of disputed claims and shall never be treated as an admission of fact, law, or liability by either party for any purpose. To the contrary, the Board specifically denies any and all fault and/or liability and/or in this matter, and makes this Stipulation of Settlement and compromise only to prevent the expense inherent in litigation. It is expressly stated and agreed by the parties that neither party is the prevailing party for any purpose, including attorney's fees or costs, and agreed that each party shall bear their own attorney's fees and costs.

10. Upon the signatures of all parties and approval by the Board, this Stipulation of Settlement shall be submitted to the Office of Administrative Law, shall be incorporated into a final order, and approved by an Administrative Law Judge.

11. This Stipulation of Settlement and all provisions hereof shall be governed by and construed under the law of the

State of New Jersey, without regard to its choice of law principles.

12. The parties agree to refrain from filing any proceeding regarding the issues that are the subject of the instant petition; however, both parties expressly reserve the right to bring a claim to enforce their rights under the terms and conditions of this Stipulation of Settlement.

13. The parties recognize that each has been represented by legal counsel or a representative of his or her own choosing and that they sign this Stipulation of Settlement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

14. Should any part, term or provision of this Stipulation of Settlement be declared or determined by a court of competent jurisdiction, applying New Jersey law, to be illegal, invalid or unenforceable, the legality, validity or enforceability, of the remaining parts, terms or provisions shall not be affected thereby.

15. This Stipulation of Settlement and compliance with this Stipulation of Settlement shall not be construed as an admission by any party of any liability whatsoever with respect to any matter.

16. This Stipulation of Settlement sets forth the entire agreement between the Board and the Petitioners, and fully supersedes any and all prior agreements or understandings, written or oral between the parties pertaining to the subject matter hereof. This Stipulation of Settlement may only be modified by an instrument in writing signed by both parties.

17. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Stipulation of Settlement and bind the Board to its terms.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seal the year and date set forth below.

WITNESS:

Michael J. Mados
Board Secretary/
School Business Administrator

Dated:

WEST ESSEX REGIONAL
BOARD OF EDUCATION

By: Joyce Candido
Board President

Dated:

WITNESS:

Steven E. Mortimo, Esq.

Dated: 11/26/08

By: V.G., father of A.G.

Dated:

WITNESS:

Steven J. Mortimo Esq.

Dated: 11

By: L.G., mother of A.G.

Dated:

Board of Education of
The West Essex Regional School District – Monday, November 24, 2008

West Essex Regional Board of Education

MISCELLANEOUS – November 24, 2008

2. Motion by **Dr. Acocella** Seconded by **Mrs. Helmstetter** to approve the settlement agreement between the West Essex Board of Education and A.G. as attached.

ROLL CALL:	Yes,	Mr. Antonucci, Mrs. Helmstetter, Mrs. Storey, Dr. Acocella, Mr. Salfi, Mrs. Gerken, and President Mrs. Candido
	No,	Mr. Leonard
	Absent,	Mrs. Rosenberg

I hereby certify that this is an accurate copy of the minutes approving the settlement agreement between the West Essex Board of Education and A.G.

Michael J. Mados, Board Secretary/
School Business Administrator
Z/Board Meeting/Certified Minutes

November 25, 2008

10-09

OAL DKT. NO. EDU 8258-08
AGENCY DKT. NO. 194-7/08

M.E.C., on behalf of minor children, C.C., K.C. and E.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LUMBERTON TOWNSHIP, BURLINGTON 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 – dated January 5, 2009 and filed January 8, 2009, in response to an Initial Decision which was mailed to the parties on December 18, 2008 – were untimely pursuant to *N.J.A.C.* 1:1-18.4. As such these are not considered herein.

Upon such review, the Commissioner concurs with the Administrative Law Judge – for the reasons clearly presented in her decision – that summary decision is appropriately granted to the Board.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/12/09
Date of Mailing: 1/13/09

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

10-09

M.E.C., on behalf of minor children, C.C., K.C. and E.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LUMBERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner alleges that the respondent Board's policy that only members of the Parent Teacher Association (PTA) can serve as room parents and support holiday parties in the classroom violates the Equality in Education regulation, *N.J.A.C.* 6A:7-1-7, by failing to provide equal and bias-free access to all educational activities. The respondent Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: summary decision is appropriate in this matter as there is no genuine issue of material fact challenged; petitioner has not been discriminated against due to her socioeconomic status pursuant to *N.J.A.C.* 6A:7-1-7; the Board's decision to give authority over the room parent program to the PTA was not arbitrary, capricious or in violation of any law or regulation. Accordingly, the ALJ granted the Board's motion for summary decision, and dismissed the petition.

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

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

January 12, 2009

Target Date: 1/15/09
Due Date: 1/30/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 8258-08
AGENCY DKT. NO. 194-7/08

M.E.C. ON BEHALF OF MINOR CHILDREN, C.C., K.C. AND E.C.
Petitioner,
v.
LUMBERTON TOWNSHIP BOARD OF EDUCATION, BURLINGTON COUNTY,
Respondent.

M.E.C., petitioner, pro se

Jeffrey F. Belz, Esq., for respondent

Record Closed: December 16, 2008 Decided: December 16, 2008

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

STATEMENT OF THE CASE

Petitioner M.E.C. on behalf of C.C., K.C. and E.C., minor children, filed a petition with the Commissioner of Education (Commissioner), seeking a determination that the Lumberton Board of Education policy that only members of the Parent Teacher Association (PTA) can serve as room parents and support holiday parties in the

classroom violates the Equality in Education regulation, N.J.A.C. 6A:7-1.7, by failing to provide equal and bias-free access to all educational activities.

PROCEDURAL HISTORY

On July 11, 2008, petitioner M.E.C., on behalf of minor children C.C., K.C. and E.C., filed a petition with the Commissioner. On August 4, 2008, 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 August 6, 2008, 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 24, 2008, Jeffrey Belz, Esq. filed a motion for summary decision on behalf of the Lumberton Board of Education. On November 10, 2008, M.E.C. filed her answer to the motion. On November 24, 2008, Mr. Belz filed a reply to the answer. A hearing is scheduled for December 22, 2008.

FINDINGS OF FACT

The Lumberton Board of Education has a policy that sets forth that the Lumberton PTA organizes and conducts the room parent program that runs classroom parties and other social class activities. The PTA requires that only PTA members may be room parents and support in-class holiday parties. M.E.C. filed letters of complaint with Affirmative Action Officer Terrance Healy and Richard Ceccarelli on February 12, 2008. On February 28, 2008, Mr. Healy responded that PTA membership does not constitute socioeconomic status under the education regulations. On March 12, 2008, M.E.C. wrote a letter back to him strongly disagreeing with his legal interpretation since "socioeconomic" was not defined in the regulation. Mr. Healy stood by his interpretation in a letter to M.E.C. dated March 13, 2008. On March 18, 2008, M.E.C. filed an appeal to the Board. The Board considered her complaints and denied them for the reasons set forth in Mr. Healy's letters.

M.E.C. is the parent of three children who attend elementary school in the Lumberton Township School District. The District has approximately sixteen activities in which all parents may participate with their children. The District also has a room representative or "room parent" program. The room representative assists in school activities throughout the year in addition to organizing class parties. One of M.E.C.'s children had eleven room parents who were led by one head room parent last year. A classroom will typically have two to four parties per year. The room parent communicates with the teacher to decide what type of parties will be held and the food, games and crafts in which the students will partake. The room parent requests parent volunteers to send in items or assist at the party. Only four parents are allowed to attend each party.

It is undisputed that the Lumberton PTA offered to perform the task of organizing classroom parties as a way to ensure the continuation of classroom parties after teachers were unable to expend the necessary time and effort to hold them. The Board accepted the PTA's offer and the PTA sustained the practice of classroom parties by relieving teachers of the responsibility. The Lumberton PTA is part of both the State and the National PTA.

M.E.C. wanted to participate as a volunteer parent to attend one of the classroom parties. She was advised that she could not participate because she was not a member of the PTA. Membership in the PTA is a requisite for any parent who wishes to participate in the classroom parties because they are organized and conducted by the PTA.

The above is undisputed, and therefore **FOUND** as **FACT**.

DISCUSSION

In support of her petition, M.E.C. relies on N.J.A.C. 6A:7-1.7, which sets forth:

> (a) Each district board of education shall provide equal and bias-free access for all students to all school facilities,

> courses, programs, activities and services, regardless of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, religion, disability or socioeconomic status, by:
>
> 1. Ensuring equal and barrier-free access to all school and classroom facilities;
>
> 2. Attaining minority representation within each school...
>
> 3. Utilizing a State approved English language proficiency measure...
>
> 4. Utilizing bias-free multiple measures for determining the special needs of students with disabilities...
>
> 5. Ensuring that support services, including intervention and referral services and school health services ... are available to all students; and
>
> 6. Ensuring that a student is not discriminated against because of a medical condition. ...

I have read the submissions and enclosures of each party. In support of its motion, the Board contends that 1) the above regulation does not apply to parents; 2) the above regulation does not apply to classroom parties; 3) M.E.C. has not been discriminated against due to her socioeconomic status; and 4) the district's action is appropriate, legal and within its managerial prerogative. M.E.C. disputes each of these contentions. However, the only dispute she set forth to the Board's facts was that there are more responsibilities of the room parent than the Board noted. For purposes of deciding the motion, I have used M.E.C.'s description of those responsibilities.

Regarding the Board's argument that N.J.A.C. 6A:7-1.7 does not apply to parents, N.J.A.C. 6A:7-1.7(a) is the only provision that applies to M.E.C.'s situation. Therein, the regulation sets forth six ways in which a board of education is to ensure equal access. The language therein clearly pertains to the ability of all students to receive an equal education. None of the provisions refers to a parental rather than a student right. However, if a situation were to arise in which a disabled parent was unable to attend parent-teacher conferences or student programs because the facilities were not barrier-free, a parent could probably make a colorable claim that N.J.A.C.

6A:7-1.7 applied because the student would be adversely impacted by the parent's disability. However, in the present case, the number of parents that may participate in any classroom party or activity is always limited. There is no absolute right to attend as there would be with parent-teacher conferences. M.E.C.'s children are no more denied access than the children of the parents who were not chosen to work the party because the maximum number of parents had been reached. Thus, M.E.C. cannot show that her participation in a classroom party or other activity as a parent is essential to her children's education.

Next, the Board argues that N.J.A.C. 6A:7-1.7 does not apply to classroom parties. The Board is correct that the six provisions following N.J.A.C. 6A:7-1.7(a) that set forth exactly what a district must do to comply go to the actual education of the child, not to the social aspects of school such as a class party. Nonetheless, N.J.A.C. 6A:7-1.7(a) sets forth a requirement to provide equal access to "facilities, courses, programs activities and services." The State Board of Education therefore contemplated activities such as parties despite the lack of a specific means to address a disparity in students' access to activities. Therefore, I disagree with the Board and **CONCLUDE** that N.J.A.C. 6A:7-1.7 would apply to classroom parties. The question is whether it applies in the present case.

The third point of the Board is that M.E.C. has not been discriminated against due to her socioeconomic status pursuant to N.J.A.C. 6A:7-1.7 as she alleged. All parties agree that the term "socioeconomic" is not defined in the Code. The Board provides the dictionary definition as "of or involving both social and economic factors." Webster's II Dictionary, Third Edition. M.E.C. provides an article from the North Central Regional Educational Laboratory that sets forth, "A family's socioeconomic status is based on family income, parental education level, parental occupation, and social status in the community (such as contacts within the community, group associations, and the community's perception of the family) …." In every definition, there is a financial aspect of "socioeconomic" status. Even in the article provided by M.E.C., social status in the community is just one factor combined with income, education and occupation to determine socioeconomic status. One's social status cannot be separated. Further, M.E.C. has not set forth that the PTA is in any way exclusionary such as to confer a

separated. Further, M.E.C. has not set forth that the PTA is in any way exclusionary such as to confer a social status. She calls it a private organization, but fails to set forth an argument that it is not open to all parents of students in the district who wish to join. She has also not set forth that she is in any way poor, indigent or otherwise socially disadvantaged. M.E.C. has thus not demonstrated that she or her children are being discriminated against due to her socioeconomic status.

Last, the Board argues that the Board's policy of allowing the PTA to organize the room parent program is within its managerial prerogative. M.E.C. has the burden of proving that the Board's actions are unreasonable and not simply within the managerial prerogative of the Board. The Board's prerogative 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." G.M. v. Roselle Board of Education, 95 N.J.A.R. 2d. (EDU) 107, 109. Boards may develop reasonable rules to assist teachers and lighten the burden on them. This is what giving the PTA authority over the room parent program was designed to do. The issue is not whether one agrees with policy. Clearly, no parent likes to be excluded from participation when it comes to an activity involving one's children. However, the only issue is whether M.E.C. can show that the rule is arbitrary or capricious or in violation of a law or regulation. Because PTA membership alone does not confer socioeconomic status, there is no basis to find that M.E.C. can demonstrate a violation of N.J.A.C. 6A:7-1.7.

CONCLUSIONS OF LAW

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). In the present case, there is no genuine issue as to any material fact challenged and therefore, I **CONCLUDE** that the case is appropriate for summary decision. As set forth above, I **CONCLUDE** that M.E.C. has not been discriminated against due to her socioeconomic status pursuant N.J.A.C. 6A:7-1.7. I further **CONCLUDE** that the decision to give authority over the room parent program to

the PTA was a reasonable exercise of managerial prerogative and not arbitrary, capricious or in violation of a law or regulation. Finally, I **CONCLUDE** that the Board policy requiring room parents and attendees at room parent-organized events to be PTA members does not violate N.J.A.C. 6A:7-1.7.

ORDER

It is hereby **ORDERED** that respondent's motion for summary decision is **GRANTED** and M.E.C.'s petition is **DISMISSED.** Accordingly, the hearing date of December 22, 2008 is canceled.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 16, 2008
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency:

December 16, 2008

Mailed to Parties:

DEC 18 2008

CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

bdt

11-09

OAL DKT. NO. EDU 4951-08
(EDU 10505-07 ON REMAND)
AGENCY DKT. NO. 314-10/07

E.T., on behalf of minor child, T.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC 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.

COMMISSIONER OF EDUCATION

Date of Decision: 1/12/09

Date of Mailing: 1/13/09

2008 DEC 31 P 12:1

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4951-08
(On Remand from EDU 10505-07)
AGENCY DKT. NO. 314-10/07

E.T. ON BEHALF OF MINOR CHILD, T.T.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,
Respondent.

E.T., petitioner, pro se

Amy L. Houck, Esq., for respondent (Cooper Levenson, attorneys)

Record Closed: December 17, 2008 Decided: December 23, 2008

BEFORE **EDGAR R. HOLMES,** ALJ, T/A:

This matter was transmitted to the Office of Administrative Law on July 9, 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 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.

December 23, 2008
DATE

EDGAR R. HOLMES, ALJ, T/A

Date Received at Agency:

DEC 30 2008

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

On November 14, 2008 the parties in the matter of E.T o/b/o T.T. v. Egg Harbor Township Board of Education OAL ~~DKT EDU~~ 4951-08 reached the following agreement contingent upon the Egg Harbor Township Board of Education approval at the next Board Meeting.

All documents ~~pertaining to~~ in T.T's student file (pupil records) that have the word terroristic threat on them will be changed to "inappropriate comment" Specifically the word "inappropriate comment" will be substituted for the word "terroristic threat"

This Agreement is subject to Full Board Approval If the Board Approves this Agreement this matter will be resolved and settled. If the Board does not Approve this settlement the matter will be tried before the Honorable Judge Holmes of the Office ~~Administrative~~ of Administrative Law on the next available trial date.

This settlement completely resolves this matter, no party is responsible for the other parties attorney fees.

~~All pending claims against~~

Each party agrees to release and waive any and all claims regarding this matter or any related matter to this Petition.

Petitioner:

Erskine Tolbert

Erskine Tolbert

Respondent:

Amy L. Houck
Solicitor ~~Board~~
Egg Harbor Township
Board of Education

Amy L Houck

COOPER LEVENSON
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AMY L. HOUCK
EMAIL: ahouck@cooperlevenson.com

2008 DEC 18 P 1:55

FILE NO.: 50700.753

December 17, 2008

Sharon D. Danks, Judicial Secretary
Office of Administrative Law
1601 Atlantic Avenue, 6th Floor
Atlantic City, New Jersey 08401

Re: E.T. o/b/o T.T. v. Egg Harbor Township Board of Education
OAL Docket No.: EDU 10505-07
Agency Docket No.: 314-10/07

Dear Ms. Danks:

As you are aware, I represent the Egg Harbor Township Board of Education (the "Board") with regard to the above captioned matter. Pursuant to my telephone conversation with you on Monday, December 15, 2008 enclosed please find a copy of the executed Resolution from the Board regarding this matter.

If you have any questions or concerns, please feel free to contact me.

Very truly yours,

Amy L. Houck

Amy L. Houck

ALH/nw
Enclosure
cc: Erskine Tolbert

CLAC; 291918.1

RESOLUTION

RESOLUTION OF THE EGG HARBOR TOWNSHIP BOARD OF EDUCATION AUTHORIZING THE SETTLEMENT IN THE MATTER OF "T.T. V. EGG HARBOR TOWNSHIP BOARD OF EDUCATION" DOCKET NO. EDU OAL- 4951-08

WHEREAS, the Egg Harbor Township Board of Education ("Board") desires to resolve the pending Petition before the Commissioner of Education between T.T. and the Egg Harbor Township Board of Education ("Board");

WHEREAS, the Board previously agreed to accept the proposed settlement agreement in the matter of T.T. v. Board, based on the essential core terms as discussed in executive session at the November 18, 2008 Board Meeting;

WHEREAS, the written settlement agreement is attached and incorporated into this Resolution as Exhibit A;

NOW THEREFORE, BE IT RESOLVED that the Board does hereby accept and ratify the terms of the written settlement T.T. v. Board, as discussed at the Board's executive session on November 18, 2008.

Dated: November 25, 2008

ATTEST:

Kathleen M Gill

EGG HARBOR TOWNSHIP BOARD OF EDUCATION

BY: James W. Galvin,
JAMES GALVIN, PRESIDENT

OAL DKT. NO. EDU 11394-08
(EDU 3962-08 On Remand)
AGENCY DKT. NO. 82-3/08

K.E. on behalf of minor child X.K.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter and the Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. In the record is a letter from petitioner reporting that a previously proposed settlement – which had not been executed by petitioner and was consequently remanded to the OAL – has been implemented by the parties. Petitioner consequently asks that her appeal be withdrawn.

In light of the foregoing, the Initial Decision is rejected and withdrawal is deemed the appropriate disposition of this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/12/09

Date of Mailing: 1/13/09



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11394-08

(EDU 03962-08 ON REMAND)

K.E. on behalf of minor child X.K.E.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,

Respondent.

K.E., petitioner pro se

John E. Croot, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: December 1, 2008 Decided: December 3, 2008

BEFORE **GAIL M. COOKSON**, ALJ:

Petitioner is the parent to the minor child who was previously enrolled in the school district of the Township of Hillside Board of Education (BOE). The BOE determined during the 2007-2008 school year that the child was not residing in its district and was not entitled to a free public education. Petitioner appealed that decision and the BOE filed a cross-claim for tuition reimbursement. The matter was transmitted

to the Office of Administrative Law (OAL) and was scheduled for a hearing on May 28, 2008. On that date, the parties announced they had reached an accord. The terms were placed on the record before me, including petitioner's consent to the settlement. On July 11, 2008, the BOE forwarded to the undersigned a copy of its resolution formally approving the settlement. On the basis of that record, I filed an Initial Decision Settlement dated July 22, 2008, with the Commissioner of the Department of Education under OAL Docket No. 03962-08.

Upon its careful review, the Commissioner noted that there was no written memorialization of the consent of the petitioner to the terms set forth in the BOE Resolution. Accordingly, the Department of Education remanded the matter on September 11, 2008. By letter received on December 1, 2008, petitioner has confirmed in writing that she consents to the terms of the settlement, that the settlement has already been satisfied and that she requests closure of this matter.

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.

12-3-08
DATE

Gail M. Cookson
GAIL M. COOKSON, ALJ

Date Received at Agency: 12-5-08

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 5 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

November 24, 2008

State of New Jersey
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: Docket # 03962-08 / Docket# 11394-08

Dear Judge Cookson,

Per your letter dated November 18, 2008, I am writing to advise you that I agreed to a settlement and the terms of the settlement were placed on record on May 28, 2008 before you. The settlement was approved by the Board of Education (Hillside) & the settlement was satisfied on July 28, 2008. At this time I am asking you to withdraw my petition & close this case.

If any further information is needed, I can be reached at (973) 651-6380.

Sincerely,

Kawana Elder

#12-09

12-09

OAL DKT. NO. EDU 9963-07
AGENCY DKT. NO. 234-8/07

IN THE MATTER OF THE TENURE	:	
HEARING OF JEREMIAS RONQUILLAS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
PASSAIC, PASSAIC COUNTY.	:	
	:	

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

Upon such review, the Commissioner is unable to properly assess the recommended conclusion of the Administrative Law Judge (ALJ) that the proposed agreement satisfies the 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, since the reasoning underlying such conclusion was not set forth in the Initial Decision.[1]

Accordingly, this matter is remanded to the OAL for issuance of a revised Initial Decision setting forth, with specificity, the basis for the ALJ's recommended approval of the parties' proposed settlement agreement.[2]

IT IS SO ORDERED.[3]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/12/09
Date of Mailing: 1/13/09

[1] Although there is no reference to it in the Initial Decision, the record of this matter includes an audiotape of proceedings before the ALJ. To any extent this recording was intended to satisfy the need for *Cardonick* analysis in this matter, the Commissioner declines to review it as a substitute for the written analysis required pursuant to *N.J.A.C.* 1:1-18.3(c).

[2] In so holding, the Commissioner stresses that she does not preclude the possibility of settlement in this matter; indeed, at this juncture she makes no findings of any kind with respect to the substance of the proposed agreement.

[3] 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

SETTLEMENT

OAL DKT. NO. EDU 09963-07

AGENCY DKT. NO. 234-8/07

IN THE MATTER OF THE TENURE HEARING OF JEREMIAS RONQUILLO, SCHOOL DISTRICT OF THE CITY OF PASSAIC, PASSAIC COUNTY.

Joel M. Miklacki, Esq., for petitioner Passaic Board of Education

Christopher Farella, Esq., for respondent Jeremias Ronquillo (Stahl, Farella & Sarokin, attorneys)

Record Closed: November 12, 2008 Decided: November 26, 2008

BEFORE **JEFFREY A. GERSON,** ALJ:

This matter was transmitted to the Office of Administrative Law on October 3, 2007 for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A prehearing was conducted on October 26, 2007, followed by hearings in December 2007, January 2008, April 2008 and June 2008 and in November 2008. In June 2006 a Settlement Agreement and Release was prepared and executed by the parties on June 27, 2008 and executed by the Board Secretary on June 30, 2008. The Settlement Agreement meets the standards expressly established by the State Board of

Education in In re Cardonick, 1990 S.L.D. 842, 846. However, the record was left open awaiting the court's receipt of a Board Resolution. On November 12, 2008 the court received the Board Resolution and the record closed on that date. A copy of the Settlement Agreement and Release 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.

November 26, 2008
DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 12-3-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 3 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

mvh

51

SETTLEMENT AGREEMENT AND RELEASE

THIS AGREEMENT is made between the **PASSAIC BOARD OF EDUCATION, PASSAIC COUNTY**, individually and collectively, its elected representatives, officers, members, servants, employees, successors, agents, insurers or attorneys, all in both their official and individual capacities (hereinafter collectively referred to as "the Board") with administrative offices located at 101 Passaic Avenue, Passaic, New Jersey 07055 and **Jeremias Ronquillo**, any and all of his executors, administrators, successors, assigns, agents and representatives, residing at 21A Pinebrook Road, Chestnut Ridge Vill, Monsey, NY 10952, hereinafter referred to as "Ronquillo" or the "Employee"). This agreement constitutes the complete and final settlement of any and all disputes arising from or relating to Mr. Ronquillo's employment by the Board and any claims or actions he has brought or could have brought against the Board.

W I T N E S S E T H:

WHEREAS, Employee is employed with the Board, and

WHEREAS, Employee and the Board desire to resolve all outstanding issues with respect to any disciplinary action contemplated and the mutual decision for Employee to resign from his position with the Board.

NOW, THEREFORE, in consideration for the premises and conditions set forth herein, the Board and Ronquillo agree as follows:

1. TERMS.

a. The tenure charges set forth in the Statement of Charges dated on or about August 2, 2007 and referred to the Office of Administrative Law under docket number EDUTH 09963-2007N are withdrawn.

b. The Board agrees to accept the resignation of Mr. Ronquillo, effective as of December 31, 2007 with prejudice.

c. The Board agrees to pay Mr. Ronquillo the sum of $32,812.80, representing full pay from the date of the filed tenure charges, August 2, 2007, through December 31, 2007. The Board further agrees to pay Mr. Ronquillo the sum of $16,250.00, representing the maximum cash-in value of Mr. Ronquillo's accumulated sick days. The Board agrees to pay Mr. Ronquillo the sum of $13,125.12, representing 32 vacation days (10 unused vacation days for 2004-2005 and 22 unused vacation days for 2005-2006). The days are paid at the rate of $410.16 per day, based on Mr. Ronquillo's annual salary of $98,440.52.

d. Mr. Ronquillo shall receive $62,187.92, subject to normal withholdings and deductions. The Board will report the salary payment to the taxing

authorities via an IRS Form 1099. Mr. Ronquillo expressly acknowledges and agrees that he and his heirs, executors, administrators, successors and assigns, and not the Board, will be responsible for any such taxes, liabilities, payments or costs, interests and penalties. Mr. Ronquillo agrees to indemnify and hold harmless the Board to the full extent of any such taxes, liabilities, payments, costs, interest or penalties which may be assessed against the Board in connection with any payment made to or on behalf of Mr. Ronquillo hereunder.

e. The check will be sent to Mr. Ronquillo's Counsel after this Agreement is executed and filed with the Office of Administrative Law and approved of by the Commissioner of Education.

f. Mr. Ronquillo agrees to waive all monetary claims against the Board including, but not limited to, attorneys' fees with respect to this matter.

g. Mr. Ronquillo, for the consideration given by the Board as set forth above, which he acknowledges is adequate and satisfactory to him, hereby commits as follows:

i. Mr. Ronquillo irrevocably and unconditionally remises, releases, waives and forever discharges the Board from any and all manner of liabilities, actions, causes of action, contracts, agreements, promises, claims and demands of any kind or nature whatsoever, in law or equity, whether known or unknown, which Mr. Ronquillo has ever had or now has against the Board including, but not limited to, claims arising out of or relating to or arising from or in connection with his employment with the Board, compensation and/or benefits with the Board and the Administrative Action. Mr. Ronquillo further understands and agrees that this Agreement shall act as a complete bar to any claim, complaints, grievances, disputes, demand or action of any kind whatsoever which could be or could have been brought by him and which seeks personal, equitable or monetary relief for him against the District, including, but not limited to: breach of express or implied contract; fraud; discrimination; retaliation; wages; benefits; other compensation; misrepresentation; defamation; liability in negligence or tort; and claims of any kind which may be brought in any court of law or equity or an administrative agency; claims for arbitration in any forum; the U.S. Constitution, as amended; the Constitution of the State of New Jersey; any municipal ordinance; and/or the following:

1. Any claim, cause of action, demand or complaint arising out of or under Title VII of the U.S. Civil Rights Act of 1964, as amended or the Civil Rights Act of 1991, as amended, which, among other things, prohibits discrimination in employment on account of a person's race, color, religion, sex or national origin;
2. Any claim, cause of action, demand or complaint arising out of or under the U.S. Americans with Disabilities Act of 1990, which, among other things,

prohibits discrimination in employment on account of a person's disability or handicap;

3. Any claim, cause of action, demand or complaint arising out of or under the U.S. Age Discrimination in Employment Act, which, among other things, prohibited discrimination in employment on account of a person's age;
4. Any claim, cause of action, demand or complaint arising out of or under the U.S. Employment Retirement Income Security Act ("ERISA"), which among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute;
5. Any claim, cause of action, demand or complaint arising out of or under the U.S. Fair Labor Standards Act;
6. Any claim, cause of action, demand or complaint arising out of or under the United States Family and Medical Leave Act, which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition, and any claim, cause of action, demand or complaint arising under the New Jersey Family Leave Act.
7. Any claim, cause of action, demand or complaint arising out of or under the National Labor Relations Act;
8. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination, which among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affections or sexual orientation, familiar status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces or the United States;
9. Any claim, cause of action, demand or complaint arising out of or under the Immigration Reform Control Act;
10. Any claim, cause of action, demand or complaint arising out of or under the Occupational Safety & Health Act;
11. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other

things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age;

12. Any claim, cause of action, demand or complaint arising out of or under the Family & Medical Leave Act of 1993;
13. Any claim, cause of action, demand or complaint arising out of or under the Equal Pay Act;
14. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Minimum Wage Law;
15. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Conscientious Employee Protection Act;
16. Any claim, cause of action, demand or complaint arising out of or under the Equal Pay Law for New Jersey;
17. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Worker Health & Safety Act;
18. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Department of Personnel; Sections 1981 through 1988 of Title 42 of the United States Code;
19. Any claim, cause of action, demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which, among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities;
20. Any claim, cause of action, demand or complaint arising out of or under any anti-retaliation provision of any statute or law; and any other federal, state or local law, regulation or ordinance relating to employment; related torts; any other federal, state or local, civil or human rights law or any other local, state or federal law, regulation or ordinance, any, provision of any federal or state constitution, any public policy, contract, tort or common law, or any losses, injuries or damages (including back pay, front pay, liquidated, compensatory or punitive damages, attorney's fees and litigation costs);
21. Any common law claims for negligence, assault, battery, infliction of emotional distress and any and all other common law claims arising out of this litigation;
22. Any employment discrimination; employee benefits; collective bargaining agreement; and the termination of

employment and any other claim arising from or relating to Mr. Ronquillo's employment.

ii. Mr. Ronquillo understands that he is not releasing any claims he may have to enforce the provisions of this Agreement. This release covers both claims that Mr. Ronquillo knows about and those he may not know about, except for claims (i) that may arise after the date Mr. Ronquillo executes this Agreement or (ii) for a breach of this Agreement. Mr. Ronquillo further agrees not to file a lawsuit, administrative claim, grievance or demand for arbitration to assert any of the claims he has given up, released or waived.

iii. If Mr. Ronquillo violates this Complete Release by filing any claim, charge or complaint as prohibited in this subparagraph, Mr. Ronquillo agrees to pay all costs and expenses or defending against the suit incurred by Board, including reasonable attorney's fees.

2. COMPLETE RELEASE.

a. Mr. Ronquillo agrees that he will not talk about, discuss or consult with, advise, counsel or otherwise cooperate with or assist any employees or former employees of the Board in the pursuit of any legal or administrative action(s) against the Board, including, but not limited to, any action(s) in connection with any matters relating to his employment or the termination of his employment, unless compelled to do so by court order or lawful subpoena. Mr. Ronquillo further agrees that he will not participate, directly or indirectly, as a party, witness or otherwise, in any action at law, proceeding in equity or in any administrative proceeding in which the Board or Board personnel are Parties, unless compelled to do so by force of law with respect to the issuses raised in the subject litigation.

b. Mr. Ronquillo acknowledges and agrees that other than the consideration provided for herein, he is not entitled to and will not receive any additional compensation or benefits of any kind from the Board and that no representations have been made to him regarding any such additional compensation or benefits. Nothing in this Agreement is intended to or should be construed to affect Mr. Ronquillo's receipt of the benefits in which he is vested or to which he is entitled under the Board's current pension, disability and/or other vested plans or policies.

c. Except to the extent this Agreement is required to be made public by the New Jersey Open Public Meetings Act, Mr. Ronquillo agrees to maintain the confidentiality of, and refrain from disclosing, making public, or discussing in any way whatsoever, the terms and conditions of this Agreement. Notwithstanding the foregoing, it is understood that as the sole exception to this Confidentiality Provision, Mr. Ronquillo may discuss or disclose this Agreement (i) with his immediate family; (ii) with his attorney(s) or tax advisor(s); and (iii) in response to inquiries from any governmental, regulatory or self-regulatory body or agency with jurisdiction over the activities of Mr. Ronquillo or the Board.

d. Both Parties agree that they shall not issue any communication, written, verbal or otherwise, that disparages, criticizes or otherwise reflects adversely upon the other or which encourages any adverse action, arising out of the subject matter of the within litigation, provided that Both Parties are permitted to testify truthfully under oath pursuant to a subpoena.

e. This Agreement is not and shall not in any way be deemed to constitute an admission or evidence of any wrongdoing or liability on the part of the Board, nor of any violation of any federal, state or local statute, rule, regulation or principle of common law or equity. Rather, this Agreement constitutes the good faith settlement and release of disputed claims, and it is acknowledged and agreed by the Parties that this Agreement is being entered into by the Parties solely to avoid the burden, expense, delay and uncertainties of further litigation and to fully and finally resolve, settle and dismiss with prejudice, any and all claims of any kind whatsoever, whether known or unknown, which Mr. Ronquillo has ever had or now has against the Board arising out of or relating to his employment with the Board, his compensation and benefits with the Board.

f. When asked by prospective employers about Mr. Ronquillo's employment with the Board and separation thereof, the Board agrees that it, or any employee of it, will only disclose Mr. Ronquillo's dates of employment or last job title, unless authorized in writing by Mr. Ronquillo to furnish specific additional information.

g. The Board agrees that upon execution of this Agreement and effective resignation of Mr. Ronquillo, it will not institute, file or voluntarily participate in any action against Mr. Ronquillo.

3. MODIFICATION.

This Agreement may not be changed orally and no modification, amendment or waiver of any provision contained in this Agreement, or any future representation, promise or condition in connection with the subject matter of this Agreement shall be binding upon any party hereto unless made in writing and signed by such party.

4. ENTIRE AGREEMENT.

This Agreement contains the entire agreement and complete settlement between the Parties and supersedes any and all previous agreements of any kind whatsoever between them, whether written or oral. All prior and contemporaneous discussions and negotiations have been and are merged and integrated into, and are superseded by, this Agreement. This is an integrated document.

5. SEVERABILITY.

In the event that any provision of this Agreement or the application thereof should be held to be void, voidable, unlawful or, for any reason, unenforceable, the remaining portion shall remain in full force and effect, and, to that end, the provisions of this Agreement are declared to be severable.

6. ATTORNEYS' FEES AND COSTS.

Mr. Ronquillo and his Counsel agree that Mr. Ronquillo is responsible for his own attorneys' fees and costs incurred in connection with the Administrative Action and his claims against the Board and warrant that both Mr. Ronquillo and his Counsel waive and release any claims against the Board for attorneys' fees and costs, statutory or otherwise, related in any way to the matters covered by this Agreement, and covenant not to sue or otherwise proceed against the Board with respect to any such claims for attorneys' fees and/or costs. By signing this Agreement, Mr. Ronquillo and his Counsel affirm that they are waiving and releasing any claims they may have against the Board for attorneys' fees.

7. NON-ASSIGNABILITY.

Mr. Ronquillo agrees that neither this Agreement nor any portion hereof is assignable. Mr. Ronquillo represents, warrants and covenants that he has not previously assigned or transferred, or purported to assign or transfer, to any individual or entity, any of the rights, claims, demands or causes of action being released herein, and agrees that no such assignment or transfer may occur without a written consent executed by the Board, and any attempt to do so shall be void.

8. COMPLETE AGREEMENT.

This Agreement contains the entire agreement between Ronquillo and the Board with respect to the subject matter and supersedes all prior agreements or understandings dealing with the same subject matter. There is no agreement on the part of the Board to do anything other than as is expressly stated in this Agreement. This Agreement is made and entered into, and shall be subject to, governed by and interpreted in accordance with the laws of the state of New Jersey and shall be fully enforceable in the courts of that state, without regard to principles of conflict of laws. The Parties agree that any suit, action or other legal proceeding arising out of this Agreement shall be brought in Superior Court for the State of New Jersey, County of Passaic.

9. CONSULTATION WITH ATTORNEY.

Ronquillo has consulted with his attorney Christopher Farella, Esq. and Union Representative with respect to this Agreement and reviewed with his attorney and Union Representative all the terms and conditions of this Agreement prior to executing this Agreement.

Mr. Ronquillo certifies that he has read the terms of this Agreement, they have been explained to him by his attorney and that he understands them in full. The execution hereof by Mr. Ronquillo shall indicate that this Agreement conforms to Mr. Ronquillo's understandings and is acceptable to him as a final agreement.

Ronquillo represents and warrants that he enters into this Agreement voluntarily, or his own free will, without any pressure or coercion from any person or entity including, but not limited to, the Board.

WHEREFORE, intending to be legally bound, the Parties have agreed to the aforesaid terms and indicate their agreement by signing below.

PLEASE READ CAREFULLY. THIS AGREEMENT IS A LEGAL DOCUMENT AND INCLUDES A RELEASE OF ALL KNOWN AND UNKNOWN CLAIMS, INCLUDING, WITHOUT LIMITATION, ALL CLAIMS ARISING UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT, THE AMERICANS WITH DISABILITIES ACT, TITLE VII OF THE ADMINISTRATIVE RIGHTS ACT OF 1964, THE EQUAL PAY ACT, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT, THE FAIR LABOR STANDARDS ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT, THE NEW JERSEY LAW AGAINST DISCRIMINATION, THE NEW JERSEY CONSCIENTIOUS EMPLOYEE PROTECTION ACT, STATE AND FEDERAL FAMILY LEAVE LAWS, STATE AND FEDERAL WAGE AND HOUR LAWS AND ANY OTHER FEDERAL, STATE, LOCAL OR COMMON LAW CLAIM.

BY SIGNING THIS AGREEMENT MR. RONQUILLO ACKNOWLEDGES AND AFFIRMS THAT HE IS COMPETENT, THAT HE HAS BEEN AFFORDED AN ADEQUATE TIME PERIOD TO REVIEW AND CONSIDER THIS AGREEMENT AND HAS DONE SO WITH THE ATTORNEY OF HIS CHOOSING, CHRISTOPHER FARELLA, ESQ., THAT HE HAS READ AND UNDERSTANDS AND ACCEPTS THIS DOCUMENT AS FULLY AND FINALLY WAIVING AND RELEASING ANY AND ALL CLAIMS, DEMANDS, DISPUTES AND ANY DIFFERENCES OF ANY KIND WHATSOEVER WHICH HE MAY HAVE HAD OR NOW HAS AGAINST EMPLOYER ARISING OUT OF OR RELATING TO HIS EMPLOYMENT WITH EMPLOYER, HIS COMPENSATION AND BENEFITS WITH THE BOARD, THE ADMINISTRATIVE ACTION, OR OTHERWISE, THAT NO REPRESENTATIONS, PROMISES, OR INDUCEMENTS HAVE BEEN MADE TO HIM EXCEPT AS SET FORTH IN THIS AGREEMENT, AND THAT HE HAS SIGNED THESE DOCUMENTS FREELY AND VOLUNTARILY, INTENDING TO BE LEGALLY BOUND BY ITS TERMS, AND WITH FULL UNDERSTANDING OF ITS CONSEQUENCES.

AGREED AND ACCEPTED:

Jeremias Ronquillo

Date: 6/27/08

Subscribed and sworn to before me
this 27th day of June 2008

Notary Public

PATRICIA A. SMITH
A NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES 03/01/2012

Vincent Capuana, Board President

Date:

Witness:

Henry J. Lee
Business Administrator/Board Secretary

Date: 6/30/2008

52

June 30, 2008

Resolution to Accept Settlement Agreement and Release Concerning the *Tenure Charges for Jeremais Ronquillo*

WHEREIN, the condition in the settlement resignation accepted December 31, 2007 and,

WHEREIN, the compensation to be provided for him based in full through that date of resignation including any time he would be entitled to by way of benefits under the Collective Bargaining Unit sick time, personal days, vacation days and salary through that date

A motion to accept the above resolution was made by Mrs. Robinson and seconded by Mr. Ybarra.

On roll call vote #12, the motion carried 7-0-2, as follows: Vice President Van Rensalier, Dr. Blanco, Mr. Delgado, Mr. Diaz, Mrs. Robinson, Mr. Ybarra and President Capuana voted yes. Mr. Santiago and Mr. Sinnung abstained.

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2013 NOV 12 A 9:39

13-09

OAL DKT. NO. EDU 3917-00
AGENCY DKT. NO. 110-3/00

MERRILL HODDER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Release, 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 Board of Education of the Township of Hanover signed the Stipulation of Settlement and Release 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 and Release 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.*

Priscilla E Da

COMMISSIONER OF EDUCATION

Date of Decision: 1/13/09
Date of Mailing: 1/13/09

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

Target Date: 1/16/09
Due Date: 2/2/89

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03917-00

AGENCY DKT. NO. 110-3/00

MERRILL HODDER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld, Cohen, LLC, attorneys)

Nicholas Celso, III, Esq., for respondent (Schwartz, Simon, Edelson, Celso & Kessler, LLC, attorneys)

Record Closed: November 21, 2008 Decided: December 16, 2008

BEFORE **JEFFREY A. GERSON,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 12, 2000 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 subsequently placed on the inactive list pending a Worker's Compensation determination and ultimately assigned to this judge with a

scheduled hearing dated of July 23, 2008. On July 17, 2008, the parties notified the undersigned that the matter had been settled. The Stipulation of Settlement/Release was prepared and signed by the parties on August 31, 2008 and executed by the Board Secretary on November 11, 2008. A copy of the Stipulation of Settlement/Release 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.

December 16, 2008
DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency:

Dec. 18, 2008

Mailed to Parties:

DEC 22 2008

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLC
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, New Jersey 07962
(973) 301-0001; (973) 993-3152
Attorneys for Hanover Township
Board of Education

RECEIVED
STATE OF N.J.
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	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
MERRILL HODDER, Petitioner, vs.	AGENCY DOCKET NO: 110-3/00 OAL DOCKET NO. EDU 3917-00 ADMINISTRATIVE ACTION
BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY Respondent.	STIPULATION OF SETTLEMENT AND RELEASE

WHEREAS, the Board of Education of the Township of Hanover ("the Board"), with administrative offices located at 61 Highland Avenue, Whippany, New Jersey 07981, 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 Hanover Township School District; and

WHEREAS, Merrill Hodder ("Petitioner"), whose address is 14 William Street, Rockaway, New Jersey 07866, commenced employment with the Board on or about September 1, 1992; and

WHEREAS, Petitioner filed a Petition of Appeal with the Commissioner of Education on or about July 14, 1999, and subsequently withdrew said Petition; and

WHEREAS, Petitioner filed a Petition of Appeal with the Commissioner of Education on or about March 27, 2000, related to an alleged work related injury suffered on or about March 24, 1999, seeking reinstatement of her sick days, sick leave pay pursuant to N.J.S.A. 18A:30-2.1, back pay, other emoluments of employment, costs and attorneys fees; and

WHEREAS, on or about April 14, 2000, the Board filed its answer to the Petition with affirmative defenses; and

WHEREAS, on or about May 12, 2000, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case, which was subsequently placed on the inactive list pending a worker's compensation determination, and ultimately assigned to Administrative Law Judge Jeffrey Gerson with a scheduled hearing date of July 23, 2008; and

WHEREAS, the parties, wishing to resolve the within matter amicably without the need for further, protracted litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by the Court and the Commissioner of Education, if necessary;

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. Payment

In full and final satisfaction of all claims by Petitioner, as more fully detailed below, the Board shall pay to the Petitioner the sum of One Thousand Dollars ($1,000.00). This settlement amount will be paid in a check made payable to Merrill Hodder following the approval of this Stipulation of Settlement and Release by the Court (and Commissioner of Education, if necessary). The Board will issue a 1099 tax form to Petitioner.

2. Withdrawal of Petition

Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Appeal. However, both parties agree that in the event that this agreement is not approved by the Court (and Commissioner of Education, if necessary), that they fully reserve their rights to proceed with this litigation and/or any other cause of action that they might have against one another and that their obligations under this agreement shall be null and void.

3. Resignation

Petitioner has tendered her irrevocable resignation (copy annexed hereto as Ex. A) from all employment with the Board, subject to fulfillment of the terms and conditions set forth in this Stipulation of Settlement and Release ("this Agreement" or "this Settlement"), said resignation to be effective as of the close

of business on the date of approval of the within Settlement by the Court (and Commissioner, if necessary).

4. No Further Compensation/Benefits

Petitioner shall be entitled to no further compensation, emolument of employment or fringe benefit of any kind and specifically waives her right to same, including but not necessarily limited to payment for all unused vacation, sick and personal days and health insurance benefits. However, Petitioner does not waive her right to her current state teacher's pension and health insurance benefits.

5. Release

In exchange for the above consideration, Petitioner, and her heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any claims or rights, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively; its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns, including, but not limited to any claims for attorneys fees, back pay or front pay, any claims for emotional distress or pain and suffering, any claims involving tax liability emanating from this settlement, and any claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retaining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any other claims for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically exempted from this release are any claims arising under the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *et seq.*

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

Petitioner agrees not to disparage the Board, its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns nor to make or solicit any comments, statements, or the like to the media or to others that may be considered to be derogatory or detrimental in nature. The Board agrees to the same terms regarding Petitioner.

8. Surrender of Board Property

Petitioner shall forthwith surrender all school keys and property in her possession to her legal counsel who, in turn shall forward same to the Board's counsel.

9. Board Approval

The Board President has been duly authorized by the Board to execute this Agreement on behalf of the Board of Education.

10. Assent to Terms

Petitioner 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. Petitioner also enters into same without duress and of her own free will and volition.

Petitioner 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 and to revoke this Agreement by delivering written notification to Nicholas Celso, Esq., 44 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 Petitioner will be entitled to none of the consideration described herein.

11. 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.

12. Severability

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then the remaining portions of the Agreement shall remain in full force and effect.

13. 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:

Merrill Hodder
MERRILL HODDER

Date: 8/31/08

WITNESS:

Heather Hodder
/s/

Date: 8/31/08

FOR THE HANOVER TOWNSHIP
BOARD OF EDUCATION:

Brandie J. Linfante
BRANDIE J. LINFANTE, BOARD PRESIDENT

Date: 11/11/08

ATTEST:

Vanessa M. Wolsky
VANESSA M. WOLSKY
Board Secretary/Business Administrator

Date: 11/11/08

Exhibit A

Hanover Township Board of Education
61 Highland Avenue
Whippany, New Jersey 07981

Dear Ladies and Gentlemen:

Subject to the terms and conditions of our Stipulation of Settlement and Release, dated August 31, 2008, and approval of same by the Court (and/or Commissioner of Education, if necessary), I hereby tender my irrevocable resignation from all employment with the Hanover Township Board of Education, effective on the date of approval of said Settlement.

Very truly yours,

Merrill Hodder 8/3/08

Merrill Hodder

16-09

D.Q. on behalf of minor child S.Q.,

PETITIONER,

V.

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

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In June 2006, at the end of her son's sixth grade year, petitioner was notified that S.Q. would be transferred to a different school within the Newark public school system, and was given a list of eight schools to consider. Rather than select from the list provided by the district, D.Q. unilaterally enrolled S.Q. in a non-public school, asserting that all schools offered on the list were classified as schools in need of improvement. S.Q. began attending the non-public school in September 2006. On May 12, 2008, D.Q. filed the instant petition seeking, *inter alia*, reimbursement for tuition and other fees related to S.Q's education at St. Benedict's Preparatory School during his seventh, eighth and ninth grade years. Respondent board filed a motion to dismiss for violation of the 90-day requirement provided in *N.J.A.C.* 6A:3-1.3(i).

The ALJ found, *inter alia*, that: the 90-day filing period pursuant to *N.J.A.C.* 6A:3-1.3(i) commenced on June 23, 2006, when the respondent Board notified petitioner that her son would be transferred to a different school; petitioner's actions in attempting to contact the school principal and requesting her son's school records prior to her filing of the instant petition were not sufficient to put the respondent on notice that she was contesting her son's transfer; and petitioner has not set forth a compelling reason to relax the 90-day rule. Accordingly, the ALJ concluded that the petition should be dismissed as untimely.

The Commissioner concurred with the ALJ that the petitioner's appeal was untimely, 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.

January 21, 2009

OAL DKT. NO. EDU 7544-08
AGENCY DKT. NO. 131-5/08

D.Q. on behalf of minor child S.Q.,	:	
PETITIONER,	:	
V.		COMMISSIONER OF EDUCATION
	:	
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK ESSEX COUNTY.	:	DECISION
	:	

This petition – demanding reimbursement of tuition expenses for the private school education of petitioner's minor child – was adjudicated in the Office of Administrative Law (OAL) by way of motion for summary disposition. The grounds for respondent's motion were its contentions that 1) petitioner had failed to institute her appeal within the time allowed by *N.J.A.C.* 6A:3-1.3(i), and 2) there is no legal authority to support petitioner's claim that her minor child had a right to attend Mount Vernon Elementary School (MVES).

The Administrative Law Judge (ALJ) found that petitioner's claim was time-barred, and did not address respondent's substantive arguments. After thorough and independent review of the record and Initial Decision, the Commissioner concurs that petitioner's appeal was untimely, rendering unnecessary an evaluation of the merits of the controversy.

Petitioner timely filed exceptions.[1] First, she alleges that the date upon which she received the district's notice – that S.Q. could not attend MVES and that she would have to pick another school from a list provided to her – was not June 23, 2006, but rather July 7, 2006. This contention does not help petitioner, since her appeal was untimely regardless of which of the two days is used as the operative date.

Petitioner similarly asserts that the submission of her appeal was delayed because of respondent's failure to provide her with S.Q.'s school records. This argument is also without

[1] Although represented in the OAL by an attorney, petitioner filed the exceptions *pro se.*

merit because, as the ALJ explained, even if the date petitioner allegedly received S.Q.'s school records – *i.e.,* June 18, 2007 – is used as the trigger for the regulatory limitations period for filing an appeal, her appeal was still untimely. Furthermore, her possession *vel non* of S.Q.'s school records would have had no bearing on her ability to enroll S.Q. in a public school. *See, e.g. N.J.A.C.* 6A:16-7.10.

In her exceptions petitioner also complains that the respondent district did not, within ninety days after its notice about S.Q.'s school change, resolve the matter. The Commissioner notes, however, that the ALJ correctly addressed this issue by citing authority which holds that settlement talks and other attempts at amicable resolutions of controversies are independent of the limitations period for filing appeals, and do not mitigate an appellant's duty to file a petition within 90 days of notice of a potentially detrimental action.

Finally, petitioner alleges in her exceptions that she and S.Q. were harassed by administrators in the school district. The record does not support that contention and, assuming *arguendo* that the allegation was true, it would not bear upon the untimeliness of petitioner's appeal.

The Initial Decision dismissing the petition is adopted as the final decision in this matter.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/21/09

Date of Mailing: 1/21/09

* 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
GRANTING MOTION TO DISMISS
OAL DKT. NO. EDU 07544-08
AGENCY DKT. NO. 131-5/08

D.Q. o/b/o MINOR CHILD S.Q.,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF NEWARK,
Respondent.

Paul J. Hirsh, Esq., for petitioner (Paul J. Hirsh, attorney)

Arsen Zartarian, Esq., for respondent (Office of the General Counsel, Newark Public Schools)

Record Closed: November 14, 2008 Decided: December 5, 2008

BEFORE **JOANN LASALA CANDIDO**, ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

Petitioner appeals the denial of reimbursement of private tuition costs by respondent. Petitioner filed her petition of appeal on May 12, 2008, and the matter was transmitted 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 matter is scheduled to

be heard on December 17, 2008. On September 26, 2008, respondent filed a motion for dismissal on the basis that the petition was filed out-of-time pursuant to N.J.A.C. 6A:3-1.3(d), which limits the time a petition must be filed to ninety days from the receipt of the notice of final order, ruling or other action by the district. Petitioner's papers in opposition were filed on November 6, 2008. A telephone conference was held on November 14, 2008 and counsel mutually agreed to waive oral argument. The record closed on that date.

Although designated as a motion to dismiss, the motion falls within the parameters of a motion for summary decision, and is, therefore, controlled by N.J.A.C. 1:1-12.5. For the reasons set forth below, respondent's motion for summary decision is granted.

FINDINGS OF FACT

From the pleadings, the supporting certifications of counsel and the exhibits attached to the parties' papers, I **FIND** the following **FACTS**:

1. S.Q. was a student at Mt. Vernon Elementary School (Mt. Vernon) until his graduation from the sixth grade in June 2006.
2. On June 23, 2006, D.Q., mother of S.Q., was notified that S.Q. would be transferred to another school. D.Q. was given a list of eight schools to consider.
3. Instead of selecting a school from the list, S.Q. was placed unilaterally by D.Q. in a non-public school which S.Q. has been attending since September 2006.
4. Petitioner was notified by respondent of the change in school on June 23, 2006.
5. The petition was filed with the Commissioner of Education on May 8, 2008.
6. The ninety-day filing period, pursuant to N.J.A.C. 6A:3-1.3(d), commenced when respondent notified petitioner on June 23, 2006, that her son would be transferred.

LEGAL ANALYSIS AND CONCLUSION

In this matter, respondent seeks dismissal of the petition on the basis that the petition was not filed in a timely manner as required by N.J.A.C. 6A:3-1.3(i).[1] The ninety-day rule cited above specifically requires that any petition arising under the school laws be filed "no later than the 90th day from 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." In Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572 (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 ninety-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.
>
> [Id. at 582.]

Public policy, which favors providing school districts with a measure of repose, must be weighed against the right of the petitioner to be notified that the school district has taken a position adverse to the petitioner. Adequate notice under N.J.A.C. 6A:3-1.3(i) should also accommodate the dual purposes of the limitations period. Id. at 587.

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[1] N.J.A.C. 6:24-1.2(c) was recodified as N.J.A.C. 6A:3-1.3(d). 32 N.J.R. 1177(a) (April 3, 2000). The language of N.J.A.C. 6A:3-1.3(d) is virtually identical to N.J.A.C. 6:24-1.2(c), except for the additional language, N.J.A.C. 6A:3-1.3(d)(1), which simply codified the previously existing rule, established in Verneret v. Elizabeth Board of Education, 95 N.J.A.R.2d (EDU) 134, that a petition be filed within ninety days regardless of the existence of a pending workers' compensation claim. N.J.A.C. 6A:3-1.3(d) was later recodified at N.J.A.C. 6A:3-1.3(i), 36 N.J.R. 5032(a) (Nov. 15, 2004). 37 N.J.R. 1051(b) (April 4, 2005). Therefore cases interpreting N.J.A.C. 6:24-1.2(c) will apply to N.J.A.C. 6A:3-1.3(i).

For purposes of activating the ninety-day filing period, adequate "notice of a final order, ruling or other action" may be provided informally by an individual board member. See Kaprow, supra, 131 N.J. at 588, holding that an informal note, written by the board secretary on note paper headed, "From the desk of Elaine M. Clay, Board Secretary" satisfied the notice requirement under N.J.A.C. 6:24-1.2(c). Action taken by a board member provides sufficient notice to trigger the ninety-day filing period if it alerts an individual to the existence of facts adverse to his or her interests. Kaprow, supra, 131 N.J. at 588.

In the present case, the ninety-day filing period commenced when the board notified petitioner on June 23, 2006, that her son would be transferred. Petitioner's appeal has not satisfied the ninety-day rule because it was filed with the Commissioner on May 8, 2008. Even assuming that petitioner attempted to obtain her son's school records for eleven months, as she argues, she still has not met the ninety-day filing period.

Petitioner contends that respondent should be estopped from raising the ninety-day requirement because petitioner attempted to contact the principal at Mt. Vernon rather than file a petition. However, the principal failed to return her telephone calls. Moreover, petitioner requested her son's school records in order to file the petition, but the principal did not release those records for eleven months. Petitioner relies on Tuckey v. Harleysville Insurance Company, 236 N.J. Super. 221 (App. Div. 1989), to support her contention. In Tuckey, the Appellate Division held that substantial compliance with the requirements of N.J.S.A. 59:8-4 perfected plaintiffs' claim. Id. at 225. In Tuckey, plaintiff spouses filed a complaint against defendants – city, mayor, insurer, and agent – under the New Jersey Tort Claims Act, N.J.S.A. 59:8-1 to -11, after their boat was damaged by a partially-submerged concrete slab near the defendant city's municipal boat ramp. Id. at 223. The court reversed the grant of summary judgment for defendants - city and mayor - even though plaintiffs did not file their notice of claim within ninety days after the accrual of the cause of action. The court found that defendant city was adequately put on notice because the accident was investigated right away, the city was aware of the circumstances of the accident, and it was aware of

substantially all the requirements in N.J.S.A. 59:8-4.[2] Thus, the city suffered no harm as a result of plaintiffs' delay in filing.

Petitioner argues that, pursuant to Tuckey, if the ninety-day rule has not been satisfied, under certain circumstances the rule may be relaxed allowing a petition to be filed after the ninety-day limitation period has lapsed. However, in school law matters the ninety-day rule has been strictly followed and applied almost without exception. DeMaio v. New Providence Bd. of Educ., 96 N.J.A.R.2d (EDU) 449, 453; Dreher v. Jersey City Bd. of Educ., 87 S.L.D. 1706, aff'd, State Bd., 88 S.L.D. 2439, rev'd on other grounds, No. A-6120-82 (App. Div. Feb. 28, 1958) (a petition filed only two days after the ninety-day period was dismissed as untimely). The Commissioner may relax this rule pursuant to N.J.A.C. 6A:3-1.16[3] under exceptional circumstances. See Kaprow, supra, 131 N.J. at 582 where the court held discretionary waiver of limitations period was not appropriate where the petition was not filed in a timely manner; also DeMaio, supra, 96 N.J.A.R.2d (EDU) at 453 where the court found no compelling reason to justify a waiver or relaxation of the ninety-day limitation period. Relaxation of this 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

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[2] N.J.S.A. 59:8-4 provides in its entirety:

> A claim shall be presented by the claimant or by a person acting on his behalf and shall include:
>
> a. The name and post office address of the claimant;
> b. The post-office address to which the person presenting the claim desires notices to be sent;
> c. The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted;
> d. A general description of the injury, damage or loss incurred so far as it may be known at the time of presentation of the claim;
> e. The name or names of the public entity, employee or employees causing the injury, damage or loss, if known; and
> f. The amount claimed as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed.

[3] N.J.A.C. 6A:3-1.16 provides in pertinent part:

> Where such rules do not reflect a specific statutory requirement or an underlying rule of the OAL, they may be relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

only to the parties themselves. Snow v. Bd. of Educ. of Moorestown, EDU 6404-06, Comm'r (April 20, 2007), <http://lawlibrary.rutgers.edu/oal/search.html>.

This matter is distinguishable from Tuckey because neither petitioner's attempts to contact the principal of Mt. Vernon nor her attempts to request her son's school records were sufficient to put the respondent on notice that petitioner was contesting her son's transfer. Moreover, petitioner's failure to timely file her claim prevented respondent from reaching an appropriate and efficient resolution to this dispute. Petitioner is requesting reimbursement for three years of private school tuition. To ignore the ninety-day requirement and permit a claim at this late stage not only contravenes the express language of N.J.A.C. 6A:3-1.3(i) but would negate the public policy of encouraging prompt resolution of disputes. The initial analysis of a statute's meaning begins with its plain language. Hardwicke v. Am. Boychoir Sch., 188 N.J. 69, 95 (2006) (citations omitted); DiProspero v. Penn, 183 N.J. 477, 493 (2005). Where the language of a statute is clear and unambiguous, its interpreter should not turn to extrinsic interpretive aids in an attempt to ascribe to it further meaning. Id. at 492.

Petitioner has raised the doctrine of equitable estoppel. Although this doctrine is rarely invoked against a governmental entity, our Supreme Court has long held that "the prevention of manifest injustice provides an exception to the general rule." Casamasino v. City of Jersey City, 158 N.J. 333, 354 (1999) (citing County of Morris v. Fauver, 153 N.J. 80, 104 (1998); Vogt v. Borough of Belmar, 14 N.J. 195, 205 (1954)). Thus, assuming petitioner can demonstrate a "manifest injustice," in order to assert the equitable defense of estoppel, petitioner nevertheless must show that the agency "engaged in conduct, either intentionally or under circumstances that induced reliance, and that [petitioner] acted or changed [her] position to [her] detriment." Knorr v. Smeal, 178 N.J. 169, 178 (2003) (citing Miller v. Miller, 97 N.J. 154, 163 (1984)). Here, petitioner has not prevailed over either obstacle.

Although courts encourage parties to amicably resolve their complaints, parties are not thereby relieved from complying with the ninety-day rule. Pacio v. Lakeland Reg'l High Sch. Dist., 89 S.L.D. 2060, 2069 (requests to a board of education for reconsideration for its final decision do not toll the running of the ninety-day rule); see

Riely v. Bd. of Educ. of Hunterdon Cent. High Sch., 173 N.J. Super. 109, 113 (App. Div. 1980) (the ninety-day limitation period was not tolled because petitioner attempted to resolve the claim through arbitration) In this matter, no constitutional issue is presented and no informal administrative determination involving a matter of significant public interest is at stake. Petitioner's action is grounded on her personal dissatisfaction with her son's transfer. Petitioner cannot unilaterally expand her time for filing this action by her repeated requests to have the Board change its placement of her son. Petitioner has not set forth a compelling reason to relax the ninety-day rule, and I therefore **CONCLUDE** that the petition should be dismissed as not timely.

ORDER

Based upon the foregoing, respondent's motion for summary decision is hereby **GRANTED**. Accordingly, the petition filed in this matter is **DISMISSED**.

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

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

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

December 5, 2008
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: 12-5-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 08 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

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17-09

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

January 21, 2009

Jonathan I. Nirenberg, Esq.
Resnick Nirenberg & Cash, P.C.
100 Eagle Rock Avenue, Suite 301
East Hanover, New Jersey 07936

Rita F. Barone, Esq.
Purcell, Ries, Shannon, Mulcahy & O'Neill
One Pluckemin Way, Crossroads Business Center
P.O. Box 754
Bedminster, NJ 07921

Dear Counsel:

I have reviewed the papers filed in conjunction with the respondent Board of Education's motion for reconsideration of my December 29, 2008 decision in the matter of *Bernard Sharkey v. Board of Education of the Township of Washington Morris County*, Agency Dkt. No. 207-8/08, OAL Dkt. No. EDU 9335-07, Commissioner Decision No. 494-08. In that decision, I concurred with the Administrative Law Judge (ALJ) that petitioner was employed in a tenure-eligible position but rejected her conclusion that his length of service was insufficient to achieve tenured status, instead finding that petitioner had attained tenure and must be reinstated with back pay and emoluments.

The Board bases its motion on grounds of mistake pursuant to *N.J.A.C.* 6A:3-1.15(b)2. Specifically, the Board states that a "clerical mistake" was made in counsel's office, since the Initial Decision – mailed by the Office of Administrative Law (OAL) on November 24, 2008 – was received and date-stamped on December 1, 2008 due to the Thanksgiving Holiday, and counsel consequently believed exceptions to be due on December 14, 2008, providing for the full 13 days contemplated by OAL rule. Petitioner replies that *N.J.A.C.* 6A:3-1.15(b)2 is not intended to provide a "second bite of the apple" due to the Board's own mistake, and that – Board counsel having been on notice that her exceptions were untimely through receipt on December 16, 2008 of petitioner's reply objecting to Commissioner consideration of late exceptions – a motion for extension could have been made at that time instead of waiting for the Commissioner to decide the case and then seeking reconsideration when the outcome was not in the Board's favor.

Upon review, I must concur with petitioner that the Board has presented no basis to warrant reconsideration of my prior decision. Both OAL rule (at *N.J.A.C.* 1:1-18.4(a)) and the Initial Decision (at 6) unequivocally state that exceptions to an Initial Decision are due within 13 days *of the date the decision was mailed to the parties* (emphasis supplied); moreover, petitioner clearly and specifically raised the issue of timeliness in his December 15, 2008 reply to the Board's exceptions (at 4), sent to Board counsel via Federal Express, so that the Board could, indeed, have promptly requested an extension *nunc pro tunc* or otherwise moved for Commissioner consideration of the Board's exceptions prior to issuance of the agency's final decision. Lastly, I note that the arguments the Board wishes to have considered on exception – incorporated in full into its motion for reconsideration – are essentially a verbatim repetition of Point A of the Board's June 20, 2008 posthearing brief (at 2-8), which was fully considered by both the ALJ and Commissioner in rendering their respective decisions in this matter.

Accordingly, for the reasons set forth above, I hereby DENY the Board's motion and decline to reconsider my decision of December 29, 2008.*

Sincerely,

Lucille E. Davy
Commissioner

c: 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.

20-09

OAL DKT. NO. EDU 9900-07
AGENCY DKT. NO. 237-8/07

HILLBURN SPARROW, II,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon 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.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/21/09

Date of Mailing: 1/21/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09900-07

AGENCY DKT. NO. 237-8/07

HILBURN SPARROW, II,

Petitioner,

v.

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

Respondent.

Robert M. Schwartz, Esq., for petitioner

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

Record Closed: December 10, 2008 Decided: December 11, 2008

BEFORE **MUMTAZ BARI-BROWN,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 17, 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.

Hearing dates were scheduled on October 21 and 24, 2008. Prior to the date of hearing the parties settled the matter. The attached Settlement Agreement and Board Resolution were submitted on December 10, 2008, 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.

Dec 11, 2008
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: 12-15-08

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 15 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

da

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for Respondent State Operated School District of Paterson

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2008 NOV 25 P 2:24

Hillburn Sparrow II, Petitioner	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
v.	OAL DKT. NO. EDU 09900-2007N AGENCY REF. NO. 237-8/07
State Operated School District Of Paterson, Passaic County, Respondent	SETTLEMENT AGREEMENT

This matter having come before the Court upon the filing of a petition seeking reinstatement of Petitioner's increment withheld as of July 1, 2007; and

WHEREAS, the parties have determined that resolution of this matter without a hearing is in the interests of the public and consistent with furthering the public good, since the parties will not have to resort to a lengthy and costly hearing; and

WHEREAS, the parties agree to fully and finally settle and/or release all claims between them arising out of the withholding of Petitioner's increment as of July 1, 2007;

The parties do hereby agree as follows:

1. The foregoing recitals are incorporated herein.

2. Petitioner's increment withheld as of July 1, 2007 will be reinstated and Petitioner will be reimbursed the amount equal to the increment Petitioner would have received but did not receive retroactive to July 1, 2007.

3. Respondent will issue said payment to Petitioner within forty-five (45) days from the Respondent's receipt of the Final Decision of the Commissioner of Education approving this settlement.

4. In consideration of the foregoing, the Petitioner withdraws his Petition bearing OAL DKT. NO. EDU 09900-2007N and AGENCY REF. NO. 237-8/07.

5. Petitioner hereby releases and forever discharges Respondent 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 Petitioner had, has, and/or may have with regard to the withholding of Petitioner's increment as of July 1, 2007, except as may be necessary to enforce this Agreement.

6. This Agreement does not constitute an admission of wrongdoing by either party.

7. This Agreement shall be binding upon and inure to the benefit of Petitioner, the Respondent District, and any of their respective heirs, legal or personal representatives, employees, officers, directors, successors or assigns.

8. This Agreement sets forth the entire Agreement between the parties and supersedes any and all prior agreements or understandings between the parties.

9. This Agreement shall be construed in accordance with, and all disputes hereunder shall be governed by, the laws of the State of New Jersey.

10. The parties agree that this Agreement will be incorporated into an Initial Decision by the Honorable Mumtaz Bari-Brown, the administrative law judge assigned to preside over the pending action bearing OAL DKT. NO. EDU 09900-2007N and AGENCY REF. NO. 237-8/07, to be submitted to the Commissioner of Education for approval. If this Agreement is not approved by the Commissioner of Education, the proceeding will resume before Judge Bari-Brown until completion.

Hillburn Sparrow II

WITNESS

HILLBURN SPARROW II
Date: 10/27/08

THE STATE OPERATED SCHOOL DISTRICT OF PATERSON

By: _____

WITNESS

Date: 11/4/08

_____

Paterson Public Schools
PERSONNEL TRANSACTION REQUEST & PERSONNEL ACTION FORM

(Please Type)

Date: *11/25/2008*

1. INITIATOR: Carol R. Smeltzer, Esq. School/Dept: Labor Relations Position: L.R. Officer Signature: C Smeltzer

*** PLEASE NOTE**: Action **WILL NOT** occur until the Golden Rod is returned

2. PURPOSE(S) _____ Fill Vacancy _____ Transfer (s) _____ Create/Abolish Position

_____ Resignation _____ Retirement _____ Suspension _____ Dismissal _____ Death

__X__ Other Describe: **Approve Settlement Agreement**

3. EXPLANATION: *Provide a detailed explanation of personnel transaction/request. For all appointments and/or transferrs; section 4 or 5 **MUST** be completed.*

Approve the Settlement Agreement in the matter captioned Hillburn Sparrow II v. State-Operated School District of Paterson (OAL Dkt. No. EDU 09900-2007N/Agency Ref. No. 237-8/07). In the event that the Settlement Agreement is approved by the Commissioner of Education, the District will restore the 2007-2008 increments of Hillburn Sparrow, II (156-54-4642) retroactive to July 1, 2007. See attached Settlement Agreement.

Account # 15000240103013 Not to exceed $ 6,000

4. APPOINTMENT(S): In PC#: N/A Position: _____ Location: _____

Name of Appointee: _____ New Hire: YES NO

Eff. Date: _____ If the employee is **NOT** a new hire please indicate current salary - _____.

Salary Guide: _____ Salary: _____ Level: _____ Step: _____

Comments: _____

5. TRANSFERS:

	Name	Position to be back filled Y/N	From Location	From PC#	From Position	To Location:	To PC#	To Position	EFF. DATE
A.									
B.									
C.									
D.									

APPROVALS REQUIRED

	Signature	Date		Signature	Date
Principal/Admin.			Asst. Sup for Per	Eileen A. Shafer	12-2-08
Asst. Superintendent			Superintendent		12/4/08
Position Control	Isabel Taveras	11/26/08	State Monitor		3
Director of HR		12/2/08			

Original-To Board Office Green-Superintendent Yellow-Personnel Pink-Payroll Gold Initiator

1067

21-09

OAL DKT. NO. EDU 6132-08
AGENCY DKT. NO. 156-6/08

ROBERT C. BAKER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF VENTNOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/21/09

Date of Mailing: 1/21/09

2008 DEC 31 PM 12:06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6132-08
AGENCY DKT. NO. 156-6/08

ROBERT C. BAKER,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF VENTNOR, ATLANTIC COUNTY,
Respondent.

Wayne J. Oppito, Esq., for petitioner (New Jersey Principals and Supervisors Association, attorneys)

Dennis M. Tuohy, Esq., for respondent (Tuohy & Tuohy, attorneys)

Record Closed: December 22, 2008 Decided: December 23, 2008

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

This matter was transmitted to the Office of Administrative Law on June 27, 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 parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures and as placed on the record on December 11, 2008.

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 23, 2008
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency:

DEC 30 2008

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

TUOHY & TUOHY
ATTORNEYS AT LAW
4707 ATLANTIC AVENUE
ATLANTIC CITY, NEW JERSEY 08401

(609) 345-0005
TELECOPIER (609) 345-0007

DENNIS M. TUOHY
CATHERINE A. TUOHY*

*Also Member of N.Y. Bar

RECEIVED
2008 DEC 23 A 11: 37
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

December 22, 2008

Hon. Bruce M. Gorman, A.L.J.
Office of Administrative Law
1601 Atlantic Avenue
6th Floor
Atlantic City, NJ 08401

Re: Robert C. Baker v. Ventnor Board of Education
OAL Docket No. EDUOR 06132-2008S
Agency Ref. No. 156-6/08

Dear Judge Gorman:

Enclosed please find an executed copy of the resolution in the above-referenced matter which was passed on December 17, 2008 at an Executive Session Meeting of the Ventnor Board of Education.

Thank you for your attention to this matter.

Very truly yours,

Dennis M. Tuohy, for
TUOHY & TUOHY

DMT/nmj
Enclosure

cc: Wayne J. Oppito, Esquire (w/encl.)
Carmine Bonanni, Superintendent
Jann L. Cohen, Business Administrator
Larry Pacentrilli, Board President

Ventnor Educational Community Complex

Superintendent
CARMINE C. BONNANI, JR
(609) 487-7918

Business Administrator/Board Secretary
JANN COHEN
(609) 487-7917



400 N. Lafayette Avenue
Ventnor City, New Jersey 08406
Fax (609) 822-0150

On Motion by Gabriel, seconded by Nelson, affirmed by a roll call vote of Callahan, Gabriel, Glick, Martinelli, Morgan, Laveson and Pacentrilli, the Board approved the agreement settlement for Robert Baker v. Ventnor Board of Education as follows:

1) The parties agree that Mr. Baker shall receive a lump sum payment of $1,838.00 on or about July 1, 2009 and another lump sum payment of $1.838.00 on or about July 1, 2010. The above payments are subject to customary and usual deductions.
2) The above payments are contingent upon Mr. Baker continuing to perform in a satisfactory manner as documented by the Superintendent of Schools in Mr. Baker's annual evaluation.
3) This agreement is subject to the approval of the Ventnor Board of Education. The Board Attorney, Dennis Tuohy, Esquire, and the Superintendent of Schools, Carmine Bonanni, represent that they will recommend this agreement to the Board of Education.
4) Subject to the approval of this agreement by the Board of Education, the petitioner withdraws this petition.
5) To the extent permitted by law, the parties agree to keep the terms of this agreement confidential and will not discuss nor disclose the agreement to non- parties.

The above is certified to be a true Motion of the Ventnor City Board of Education, County of Atlantic, State of New Jersey, passed on December 17, 2008 at a Executive Session Meeting of the Board.

Jann L. Cohen
School Business Administrator/Board Secretary

12/23

TUOHY & TUOHY
ATTORNEYS AT LAW

4707 ATLANTIC AVENUE
ATLANTIC CITY, NEW JERSEY 08401

(609) 345-0005
TELECOPIER (609) 345-0007

DENNIS M. TUOHY
CATHERINE A. TUOHY*

*Also Member of N.Y. Bar

December 18, 2008

RECEIVED
2008 DEC 22 A 11:55

Hon. Bruce M. Gorman, A.L.J.
Office of Administrative Law
1601 Atlantic Avenue
6th Floor
Atlantic City, NJ 08401

Re: Robert C. Baker v. Ventnor Board of Education
OAL Docket No. EDUOR 06132-2008S
Agency Ref. No. 156-6/08

Dear Judge Gorman:

Enclosed please find a copy of the certified resolution in the above-referenced matter which was passed last night at the Ventnor board meeting 7-0. This resolution was received in our office via e-mail. I will provide you with a copy of the executed resolution immediately upon receipt.

Thank you for your attention to this matter.

Respectfully,

Dennis M. Tuohy

Dennis M. Tuohy, for
TUOHY & TUOHY

DMT/nmj
Enclosure

cc: Wayne J. Oppito, Esq.

Ventnor Educational Community Complex

Superintendent
CARMINE C. BONNANI, JR
(609) 487-7918

Business Administrator/Board Secretary
JANN COHEN
(609) 487-7917

400 N. Lafayette Avenue
Ventnor City, New Jersey 08406
Fax (609) 822-0150

On Motion by Gabriel, seconded by Nelson, affirmed by a roll call vote of Callahan, Gabriel, Glick, Martinelli, Morgan, Laveson and Pacentrilli, the Board approved the agreement settlement for Robert Baker v. Ventnor Board of Education as follows:

1) The parties agree that Mr. Baker shall receive a lump sum payment of $1,838.00 on or about July 1, 2009 and another lump sum payment of $1.838.00 on or about July 1, 2010. The above payments are subject to customary and usual deductions.
2) The above payments are contingent upon Mr. Baker continuing to perform in a satisfactory manner as documented by the Superintendent of Schools in Mr. Baker's annual evaluation.
3) This agreement is subject to the approval of the Ventnor Board of Education. The Board Attorney, Dennis Tuohy, Esquire, and the Superintendent of Schools, Carmine Bonanni, represent that they will recommend this agreement to the Board of Education.
4) Subject to the approval of this agreement by the Board of Education, the petitioner withdraws this petition.
5) To the extent permitted by law, the parties agree to keep the terms of this agreement confidential and will not discuss nor disclose the agreement to non- parties.

The above is certified to be a true Motion of the Ventnor City Board of Education, County of Atlantic, State of New Jersey, passed on December 17, 2008 at a Executive Session Meeting of the Board.

_____

Jann L. Cohen
School Business Administrator/Board Secretary

15-09

OAL DKT. NO. EDU 3798-08
AGENCY DKT. NO. 70-3/08

MARIAM MANSOUR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner finds that she cannot approve the Settlement Agreement because it is signed by the Associate Superintendent for Human Resources, and neither the file nor the agreement includes any indication that the Board of Education has approved the agreement and designated the associate superintendent to sign it on its behalf; nor, in the alternative, is the agreement signed by the Board attorney as the Board's duly authorized representative in litigation.

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.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/20/09
Date of Mailing: 1/22/09

* 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 03798-08

AGENCY REF.NO.70-3/08

MIRIAM MANSOUR,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch, Porwich and Feintuch, attorneys),

Charlotte Kitler, Esq., for respondent

Record Closed: November 25, 2008 Decided: November 28, 2008

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

The matter was transmitted to the Office of Administrative Law (OAL) on March 25, 2008 for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement on November 25, 2008, 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.

11/28/08
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 12-3-08

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 3 2008
DATE

OFFICE OF ADMINISTRATIVE LAW

id

CHARLOTTE KITLER, Esq.
Jersey City School District
346 Claremont Avenue
Jersey City, New Jersey 07305
Attorney for Respondent

2008 NOV 25 P 2:50
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

MARIAM MANSOUR, Petitioner, v. STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON, Respondent.	BEFORETHE COMISSIONER OF EDUCATION OF NEW JERSEY Agency Dkt. No. 70-3/08 OAL Dkt. No. EDU 03798-08 ***SETTLEMENT AGREEMENT***

THIS AGREEMENT is entered into by and between ***MARIAM MANSOUR***, whose address is 508 Liberty Avenue, Jersey City, New Jersey, 07307, and the ***JERSEY CITY PUBLIC SCHOOL DISTRICT***, which has offices located at 346 Claremont Avenue, Jersey City, New Jersey, 07305, (hereinafter the "District"), hereinafter collectively referred to as the "Parties."

WHEREAS, Mariam Mansour was appointed by the District as a full-time Teacher Assistant on January 18, 2000, and has been assigned to Dickinson High School since September 2002; and

WHEREAS, Ms. Mansour obtained a standard teaching certificate, with endorsement as Teacher of the Handicapped, in September 2004, and has claimed to have functioned as a teacher rather than a Teacher Assistant since that time; and

WHEREAS, Ms. Mansour filed a petition in the within case, alleging that she was entitled to tenure as a teacher and back pay, and the District disputed the claim, noting that Ms. Mansour was never appointed to a position as teacher; and

WHEREAS, the Parties wish to enter into an amicable resolution of the pending matter;

NOW, THEREFORE, the Parties agree as follows:

1. The District will recognize Mariam Mansour as having tenure as a teacher, and having acquired such tenure as of September 4, 2007.

2. The District will place Ms. Mansour on the teachers' salary guide, fourth step, as of September 1, 2008.

3. The District will make payment to Ms. Mansour of $10,000.00 for back pay.

4. Mariam Mansour waives her right to hearing in the within matter.

5. Mariam Mansour releases and discharges the District from any and all claims which she has or might have had against the said District through the date of execution of this Agreement, including any further back pay.

6. Mariam Mansour acknowledges that she signs this Agreement as her own voluntary act and deed, and that she understands and agrees with the terms enumerated herein. Ms. Mansour also acknowledges that she had the opportunity to consult with legal counsel and that she reviewed the Agreement in detail with her attorney and fully understands its terms.

7. This Agreement shall not become effective until it has been approved by the Administrative Law Judge and the Commissioner of Education.

Date: 11-24-08

JERSEY CITY PUBLIC SCHOOL DISTRICT
By: **Flavio Rubano**
Associate Superintendent, Human Resources

Date: 11/19/08

MARIAM MANSOUR

RECEIVED
2008 NOV 25 P 2:50
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

CHARLOTTE KITLER, Esq.
Jersey City School District
346 Claremont Avenue
Jersey City, New Jersey 07305
Attorney for Respondent

MARIAM MANSOUR, Petitioner, v. STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON, Respondent.	BEFORETHE COMISSIONER OF EDUCATION OF NEW JERSEY Agency Dkt. No. 70-3/08 OAL Dkt. No. EDU 03798-08 ***SETTLEMENT AGREEMENT***

THIS AGREEMENT is entered into by and between ***MARIAM MANSOUR***, whose address is 508 Liberty Avenue, Jersey City, New Jersey, 07307, and the ***JERSEY CITY PUBLIC SCHOOL DISTRICT***, which has offices located at 346 Claremont Avenue, Jersey City, New Jersey, 07305, (hereinafter the "District"), hereinafter collectively referred to as the "Parties."

WHEREAS, Mariam Mansour was appointed by the District as a full-time Teacher Assistant on January 18, 2000, and has been assigned to Dickinson High School since September 2002; and

WHEREAS, Ms. Mansour obtained a standard teaching certificate, with endorsement as Teacher of the Handicapped, in September 2004, and has claimed to have functioned as a teacher rather than a Teacher Assistant since that time; and

WHEREAS, Ms. Mansour filed a petition in the within case, alleging that she was entitled to tenure as a teacher and back pay, and the District disputed the claim, noting that Ms. Mansour was never appointed to a position as teacher; and

WHEREAS, the Parties wish to enter into an amicable resolution of the pending matter;

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1. The District will recognize Mariam Mansour as having tenure as a teacher, and having acquired such tenure as of September 4, 2007.

2. The District will place Ms. Mansour on the teachers' salary guide, fourth step, as of September 1, 2008.

3. The District will make payment to Ms. Mansour of $10,000.00 for back pay.

4. Mariam Mansour waives her right to hearing in the within matter.

5. Mariam Mansour releases and discharges the District from any and all claims which she has or might have had against the said District through the date of execution of this Agreement, including any further back pay.

6. Mariam Mansour acknowledges that she signs this Agreement as her own voluntary act and deed, and that she understands and agrees with the terms enumerated herein. Ms. Mansour also acknowledges that she had the opportunity to consult with legal counsel and that she reviewed the Agreement in detail with her attorney and fully understands its terms.

7. This Agreement shall not become effective until it has been approved by the Administrative Law Judge and the Commissioner of Education.

Date: 11-24-08

JERSEY CITY PUBLIC SCHOOL DISTRICT
By: Flavio Rubano
Associate Superintendent, Human Resources

Date: 11/19/08

MARIAM MANSOUR

#27-09

27-09

OAL DKT. NO. EDU 11336-07
AGENCY DKT. NO. 226-8/07

NELLIE BRACEWELL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, the parties' 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 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.

COMMISSIONER OF EDUCATION

Date of Decision: 1/23/09

Date of Mailing: 1/26/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11336-07
AGENCY DKT. NO. 226-8/07

NELLIE BRACEWELL,
Petitioner,
v.
IRVINGTON BOARD OF EDUCATION,
Respondent.

Jennifer Borja, Esq., for petitioner (Timothy R. Smith & Associates, LLC, attorneys)

Kenyatta Stewart, Esq., for respondent (Hunt, Hamlin & Ridley, attorneys)

Record Closed: December 26, 2008 Decided: December 30, 2008

BEFORE **SANDRA ANN ROBINSON,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on October 19, 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.

A hearing was scheduled on April 18, November 12 & 26, 2008. During the pendency of the hearings the parties settled the matter. A Settlement Agreement was prepared and executed indicating the terms of the agreement, which are incorporated herein by reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

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

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

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

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

December 30, 2008

DATE

Sandra Ann Robinson

SANDRA ANN ROBINSON, ALJ

December 30, 2008

Date Received at Agency:

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 5 2009

DATE

OFFICE OF ADMINISTRATIVE LAW

lr

HUNT, HAMLIN & RIDLEY
60 Park Place, 16th Floor
Newark, New Jersey 07102
Tel: (973) 242-4471
Fax: (973) 242-8295
Attorney for Defendant,

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2008 DEC 26 P 3:05

Nellie Bracewell, **Plaintiffs,** **vs.** **Irvington Board of Education,** **Defendant.**	**Cross reference: State v. Bracewell** **Summons No.: S-2005-2057-0709** **OAL Docket No.:** **CASE NO.:** **STIPULATION OF SETTLEMENT AND RELEASE**

This Stipulation of Settlement and Release is made by and between the Irvington Board of Education (the "Board") with administrative office located at 1 University Place, Fourth Floor, Irvington, New Jersey 07111 and Nellie Bracewell, whose address is 141 Montgomery Ave, Irvington, New Jersey 0711. In consideration of mutual promises and undertaking contained in this Stipulation of Settlement and Release and for good and valuable consideration the receipt of which is hereby acknowledge, the undersigned parties state:

WHEREAS, on June 24, 2005, Nellie Bracewell was employed as a lunch aide by the Board; and

WHEREAS, on June 24, 2005, Bracewell was charged with a criminal action for certain acts alleged to have occurred while Ms. Bracewell was an employee of the Board; and

WHEREAS, on May 4, 2007, the criminal complaint against Ms. Bracewell was dismissed by the Irvington Municipal Court; and

WHEREAS, pursuant to N.J.S.A. 18A:16-6.1, Ms. Bracewell's defense counsel forwarded a demand letter to the Board, on or about July 16, 2007, seeking reimbursement from the Board for Ms. Bracewell's attorney's fees and cost associated with the legal defense of the criminal action with which Ms. Bracewell in the amount of $34,779.28; and

WHEREAS, on or about April 18, 2008, Nellie Bracewell's defense counsel filed his Petition for Reimbursement of Legal Fees to the Office of Administrative Law; and

WHEREAS, the parties have determined that it is in their respective best interest to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to Ms. Bracewell the sum of $13,800 in full and complete satisfaction of the amount Ms. Bracewell is claiming to be due and owing to her from the Board for Nellie Bracewell's attorney's fees and costs.
2. This settlement amount will be paid directly to the trust account of Ms. Bracewell's legal counsel, Timothy R. Smith Esq. of Timothy R. Smith & Associates L.L.C., 76 South Orange Avenue, Suite 201, South Orange, New

Jersey, 07079, following the approval of this Stipulation of Settlement and Release by the Commissioner of Education.

3. Nellie Bracewell, in consideration of this Agreement, hereby release the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject matter set forth in the demand for reimbursement, now and forever, except to enforce the terms of this Stipulation of Settlement and Release.
4. Nellie Bracewell acknowledges that she has reviewed this Stipulation of Settlement and Release with her own independent legal counsel and that she entered into it without duress, and of her own free will and volition. She further acknowledges that she fully understands the terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.
5. Nellie Bracewell, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby agrees to withdraw with prejudice the above reference Petition for Reimbursement before the Commissioner of Education.
6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party, and neither party shall be considered a prevailing party for any reason.
7. This Stipulation of Settlement and Release is conditioned upon approval of the Board.

8. The Board's Secretary is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.
9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.
10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amend, modified or revoked except by a new instrument executed in writing by the parties.
11. This Stipulation of Settlement and Release is an agreement which is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

THE IRVINGTON BOARD OF EDUCATION:

By: Reggie Lamptey
Reggie Lamptey, Board Secretary

Date: 12/22/08

ATTORNEY FOR THE BOARD OF EDUCATION:

By: Kenyatta Stewart
Kenyatta Stewart Esq.

Date: 12/22/08

NELLIE BRACEWELL:

By: Nellie Bracewell

Date: 12/5/08

ATTORNEY FOR NELLIE BRACEWELL:

By: _____
Timothy R. Smith Esq.

Date: 12/2/08

A true copy of this Order be served on all counsel and/or parties of record, and interested parties within 7 days of the date hereof.

_____
HON. SANDRA A. ROBINSON

12.30.08

#28-09

28-09

OAL DKT. NOS. EDU 5174-08 AND EDU 5617-08
AGENCY DKT. NOS. 71-3/08 AND 100-4/08
(CONSOLIDATED)

C.C., on behalf of minor children, J.A.S.-L and T.S.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,

RESPONDENT.

AND

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,

PETITIONER,

V.

MICHELLE SMITH,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/23/09

Date of Mailing: 1/26/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

CONSOLIDATED INITIAL DECISIONS

SETTLEMENT

OAL DKT. NO. EDU 5174-08

AGENCY DKT. NO. 49-2/08

C.C. ON BEHALF OF MINOR CHILDREN

J.A.S.-L. and T.S.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP

OF HILLSIDE, UNION COUNTY,

Respondent.

OAL DKT. NO. EDU 05617-08

AGENCY DKT. NO. 71-3/08

BOARD OF EDUCATION OF THE TOWNSHIP

OF HILLSIDE, UNION COUNTY,

Petitioner,

v.

MICHELLE SMITH,

Respondent.

Anthony Malloy III, Esq. for Michelle Smith (Patton Boggs, attorneys)

John E. Croot, Esq., for Hillside Board of Education (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: January 2, 2009 Decided: January 6, 2009

BEFORE **GAIL M. COOKSON**, ALJ:

Petitioner C.C. was the alleged guardian of minor children who were enrolled in the school district of the Township of Hillside Board of Education (BOE) during the 2007-2008 school year. The BOE investigated and determined that the children were not residing in its district and were not entitled to a free public education. Petitioner appealed that decision and the BOE filed a cross-claim for tuition reimbursement. In addition, the BOE brought an administrative action against Michelle Smith, the mother of the children, for tuition reimbursement. Michelle Smith and C.C. were cousins. The matters were transmitted to the Office of Administrative Law (OAL) and consolidated. I scheduled several telephonic conference calls with the parties. Due to the illness of C.C., the hearings on the matters were deferred and settlement discussions encouraged.

On September 18, 2008, the OAL was informed that C.C. had passed away. Additional communications with the parties were held in which it was suggested that the parties discuss this change of circumstances. A hearing was scheduled for October 16, 2008. On October 15, 2008, the parties requested an adjournment because of significant progress toward resolution. On January 2, 2009, the BOE forwarded to the undersigned a copy of its resolution formally approving the Settlement Agreement and Release. Michelle Smith, individually and on behalf of her children, J.A.S.-L. and T.S. had also executed the Settlement Agreement and Release.

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. Michelle Smith, as the parent of the minor children, has the authority to resolve the action brought by C.C. on their behalf challenging the residency decision of the BOE.

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.

1-6-09
DATE

Gail M. Cookson
GAIL M. COOKSON, ALJ

Date Received at Agency:

1-8-09

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 8 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

SCHWARTZ SIMON EDELSTEIN
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Attorneys for Respondent/Petitioner
Hillside Board of Education.

C.C. o/b/o J.A.S.-L. and T.S.

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE,

Respondent.

And

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE,

Petitioner,

v.

MICHELLE SMITH,

Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

AGENCY REF. NO. 49-2/08 and 71-3/08

OAL DOCKET NOS. EDUOS 5174-08 and EDU 5617-08

SETTLEMENT AGREEMENT AND RELEASE

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2009 JAN -6 A 4:2

WHEREAS, a residency investigation conducted by the Hillside Board of Education (hereinafter referred to as "the Board") found that pupils J.A.S.-L. and T.S. were not legally domiciled in Hillside; and

WHEREAS, a residency hearing concerning pupils J.A.S.-L. and T.S. was held before the Board on January 24, 2008; and

WHEREAS, on that date the Board adopted a resolution that J.A.S.-L. and T.S. be removed from the District because they were not domiciled in Hillside; and

WHEREAS, J.A.S.-L. and T.S. were subsequently dis-enrolled from the District; and

WHEREAS, C.C. filed a Petition of Appeal contesting the Board's residency determination, docketed as OAL Docket No. EDUOS 5174-08; and

WHEREAS, the Board filed a Petition of Appeal against Michelle Smith for back tuition and other relief, docketed as OAL Docket No. EDU 5617-08; and

WHEREAS, the two related matters were subsequently consolidated by the Commissioner of Education; and

WHEREAS, on August 28, 2008, Carol Charlie passed away; and

WHEREAS, the remaining parties have discussed this matter in good faith, and have a desire to settle all issues;

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

1. Michelle Smith, as the parent of J.A.S.-L. and T.S., agrees to the withdrawal of the matter currently pending against the Board before the Commissioner of Education and the Office of Administrative Law, OAL Docket No. EDUOS-5174-08, and also agrees that no further action will be taken to seek the same relief; and

2. The Board agrees to withdraw the matter currently pending against Michelle Smith before the Commissioner of Education and the Office of Administrative Law, OAL Docket No. EDU 5617-08, and also agrees that no further action will be taken to seek back tuition from either Michelle Smith or the estate of Ms. Carol Charlie for the period of J.A.S.-L. and T.S.' ineligible attendance in the Hillside School District during the 2007-2008 school year; and

3. Michelle Smith acknowledges that J.A.S.-L. and T.S. are not domiciled within the Hillside School District; and

4. J.A.S.-L. and T.S. may not enroll in the Hillside School District in the future unless sufficient proof is provided of their having establish domicile in Hillside; 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 with the opportunity for the parties to consult 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. Michelle Smith 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 Hillside 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 Hillside Board of Education at its next regularly scheduled meeting.

Date: 10/14/08 Michelle Smith

Michelle Smith, Individually and o/b/o J.A.S.-L. and T.S.

HILLSIDE BOARD OF EDUCATION

Date: December 4, 2008 **By:** Michael Roth

MICHAEL ROTH,
Interim Superintendent

STATE OF NEW JERSEY)
SS:
COUNTY OF ESSEX)

I CERTIFY that on October ____, 2008, Michelle Smith, Individually and o/b/o J.A.S.-L. and T.S., 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.

NOTARY PUBLIC
RICHARD GOLDRICK
STATE OF NEW JERSEY
MY COMMISSION EXPIRES
11-04-2010

Attorney or Notary Public

EDUCATION – Yafet/Smith (continued)

9. Motion to approve the attached resolution concerning the settlement for non-residency for Pupils #4926845403 and #8417448224. (Attachment ED#5-11/08)

Motion: A. Menza Second: J. Korzeneski

Daniels	N	Menza	Y
Garretson	Y	Smith	Absent
Humphrey	Absent	Yafet	Abstain
Isaac	Abstain	Sileem	Y
Korzeneski	Y		

Motion carried: 4 yes, 1 no, 2 abstention

I hereby certify that this is a true copy of the minutes of the Regular Meeting of the Hillside Board of Education held on November 24, 2008.

Kenneth R. Weinheimer
Business Administrator/Board Secretary

Attachment ED#5-11/08

Hillside Board of Education
Settlement of Pending Action Pertaining to the Determination of
Non-Residency of Pupils #4926845403 and 8417448224
RESOLUTION
November 24, 2008

WHEREAS, a residency investigation conducted by the Hillside Board of Education (hereinafter referred to as "the Board") found that pupils #4926845403 and 8417448224 were not legally domiciled in Hillside; and

WHEREAS, a residency hearing concerning #4926845403 and 8417448224 was held before the Board on January 24, 2008; and

WHEREAS, on that date the Board adopted a resolution that #4926845403 and 8417448224 be removed from the District because they were not domiciled in Hillside; and

WHEREAS, #4926845403 and 8417448224 were subsequently dis-enrolled from the District; and

WHEREAS, C.C. filed a Petition of Appeal contesting the Board's residency determination, docketed as OAL Docket No. EDUOS 5174-08; and

WHEREAS, the Board filed a Petition of Appeal against M.S. for back tuition and other relief, docketed as OAL Docket No. EDU 5617-08; and

WHEREAS, the two matters were consolidated by the Commissioner of Education; and

WHEREAS, the consolidated matters transferred to the Office of Administrative Law; and

WHEREAS, on August 28, 2008, **C.C.** passed away; and

WHEREAS, the remaining parties conferred and agreed to a settlement of this matter; and

WHEREAS, the terms of the settlement were incorporated into a Settlement Agreement and Release; and

WHEREAS, the Board of Education, having reviewed the terms of the proposed settlement, has determined that the resolution of this matter without further litigation is in the best interests of the District;

NOW, THEREFORE, BE IT RESOLVED, that the Board of Education approves settlement of the pending action according to the terms set forth in the Settlement Agreement and Release; and

IT IS FURTHER RESOLVED, that the Interim Superintendent is authorized to execute any documents required to complete the settlement.

36-09

#36-09 SEC

AGENCY DKT. NO. 365-12/08

IN THE MATTER OF ELIZABETH FLORES,	:	
BOARD OF TRUSTEES OF THE GOLDEN DOOR	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, HUDSON COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty[1] – have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/26/09

Date of Mailing: 1/27/09

[1] It is noted that respondent did not appeal the Commission's finding of violation to the Commissioner pursuant to *N.J.A.C.* 6A:4.

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D07-08**
ELIZABETH FLORES	:	
JERSEY CITY GOLDEN DOOR	:	**DECISION FOR FAILURE TO**
BOARD OF TRUSTEES	:	**FILE DISCLOSURE STATEMENTS**
HUDSON COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on October 10, 2008, through regular and certified mail return receipt requested, directing Elizabeth Flores, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter of October 10, 2008 enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 16, 2008 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed the disclosure statements on October 15, 2008, but did not file an answer or appear at the Commission's meeting of December 16, 2008.

ANALYSIS

N.J.S.A. 18A:12-25 and 26 of the School Ethics Act require each school official to file personal/relative and financial disclosure statements with the School Ethics Commission. The School Ethics Commission was advised by the Executive County Superintendent that this school official did not file the disclosure statements by April 30, 2008 as required by the Act. The Commission notes that the school official filed the disclosure statements on October 15, 2008 and does not dispute that they were untimely in accordance with the Act.

DECISION/PENALTY RECOMMENDATION

At its meeting on December 16, 2008, the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the school official does not dispute that the disclosure statements were not timely filed and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction 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. 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.

Paul C. Garbarini /jb

Paul C. Garbarini, Chairperson

Mailing Date: December 17, 2008

Resolution Adopting Decision – D07-08

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 16, 2008, the Commission found that Elizabeth Flores violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 16, 2008, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini /jb

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 16, 2008.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/2008 docs/decisions/D07-08

35-09

#35-09 SEC

AGENCY DKT. NO. 364-12/08

IN THE MATTER OF MARIE BANOS-SHIM,	:	
BOARD OF TRUSTEES OF THE GOLDEN DOOR	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL, HUDSON COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty[1] – have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/26/09
Date of Mailing: 1/27/09

[1] It is noted that respondent did not appeal the Commission's finding of violation to the Commissioner pursuant to *N.J.A.C.* 6A:4.

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D06-08**
MARIE BANOS-SHIM	:	
JERSEY CITY GOLDEN DOOR	:	**DECISION FOR FAILURE TO**
BOARD OF TRUSTEES	:	**FILE DISCLOSURE STATEMENTS**
HUDSON COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on October 10, 2008, through regular and certified mail return receipt requested, directing Marie Banos-Shim, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter of October 10, 2008 enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 16, 2008 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed the disclosure statements on October 15, 2008, but did not file an answer or appear at the Commission's meeting of December 16, 2008.

ANALYSIS

N.J.S.A. 18A:12-25 and 26 of the School Ethics Act require each school official to file personal/relative and financial disclosure statements with the School Ethics Commission. The School Ethics Commission was advised by the Executive County Superintendent that this school official did not file the disclosure statements by April 30, 2008 as required by the Act. The Commission notes that the school official filed the disclosure statements on October 15, 2008 and does not dispute that they were untimely in accordance with the Act.

DECISION/PENALTY RECOMMENDATION

At its meeting on December 16, 2008, the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the school official does not dispute that the disclosure statements were not timely filed and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction 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. 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.

Paul C. Garbarini, Chairperson

Mailing Date: December 17, 2008

Resolution Adopting Decision – D06-08

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 16, 2008, the Commission found that Marie Banos-Shim violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 16, 2008, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini /jb

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 16, 2008.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/2008 docs/decisions/D06-08

38-09SEC

38-09

AGENCY DKT. NO. 361-12/08

IN THE MATTER OF JOANNE ARRASURE,	:	
BOARD OF EDUCATION OF THE BOROUGH	:	COMMISSIONER OF EDUCATION
OF EAST NEWARK, HUDSON COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty[1] – have been reviewed. No comments were filed by the respondent and the required disclosure statement(s) had not been filed as of the date of this decision.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to file the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the completed disclosure statement(s) are filed, provided, however, that if such statement(s) are not filed within 30 days of the mailing date of this decision, the above-named respondent shall be summarily removed from office.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/26/09

Date of Mailing: 1/27/09

[1] It is noted that respondent did not appeal the Commission's finding of violation to the Commissioner pursuant to *N.J.A.C.* 6A:4.

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**Docket No.: D11-08**
JOANNE ARRASURE	:	
EAST NEWARK	:	**DECISION FOR FAILURE TO**
BOARD OF EDUCATION	:	**FILE DISCLOSURE STATEMENTS**
HUDSON COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on October 10, 2008, through regular and certified mail return receipt requested, directing Joanne Arrasure, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 16, 2008 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official did not provide an answer to the Commission's OTSC and has failed to file the disclosure statements. The school official did not appear at the Commission's meeting of December 16, 2008.

ANALYSIS

N.J.S.A. 18A:12-25 and 26 of the School Ethics Act require each school official to file personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2008 or 30 days from swearing-in or from the start of employment for newly elected or appointed board members and administrators. The School Ethics Commission was advised by the Executive County Superintendent that this school official did not file the disclosure statements as required by the Act. As of the date of this decision, the school official has neither filed the disclosure statements, nor indicated that the Order to Show Cause was based on inaccurate information. The Commission finds that the school official's failure to file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

At its meeting on December 16, 2008, the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission found that the school official's failure to file the disclosure statements after receipt of the OTSC constituted a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of suspension until the school official files the

disclosure statements, removal if the disclosure statements are not filed within 30 days of the Commissioner's decision, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision.

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.

Paul C. Garbarini /fb

Paul C. Garbarini, Chairperson

Mailing Date: December 17, 2008

Resolution Adopting Decision – D11-08

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 16, 2008, the Commission found that Joanne Arrasure violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 16, 2008, the Commission recommended that the Commissioner of Education impose a sanction of suspension until the school official files the disclosure statements, removal if the disclosure statements are not filed within 30 days of the Commissioner's decision, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision; and

Whereas, the Commission reviewed this decision as prepared by its staff;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that this Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 16, 2008.

Joanne Boyle
Executive Director

PCG/LB/MET/ financial disclosure/2008 docs/decisions/D11-08 suspend-remove-censure

39-09

39-09SEC

AGENCY DKT. NO. 362-12/08

IN THE MATTER OF MICHAEL MOORE,	:	
BOARD OF TRUSTEES OF THE RED BANK	:	COMMISSIONER OF EDUCATION
CHARTER SCHOOL. MONOUTH COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty[1] – have been reviewed. No comments were filed by the respondent and the required disclosure statement(s) had not been filed as of the date of this decision; however, the business manager of the Red Bank Charter School, in a letter dated December 22, 2008, indicated that the respondent was unavailable for the majority of Board meetings during 2007-08 and is not on the Board for the 2008-09 school year.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure, while he was a member of the Board of Trustees, to file the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby censured as a school official found to have violated the School Ethics Act, since the cessation of his membership on the Board precludes the penalty of suspension or removal that would otherwise be warranted as recommended by the Commission.

IT IS SO ORDERED.[2]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/26/09

Date of Mailing: 1/27/09

[1] It is noted that respondent did not appeal the Commission's finding of violation to the Commissioner pursuant to *N.J.A.C.* 6A:4.

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**Docket No.: D21-08**
MICHAEL MOORE	:	
RED BANK CHARTER SCHOOL	:	**DECISION FOR FAILURE TO**
BOARD OF TRUSTEES	:	**FILE DISCLOSURE STATEMENTS**
MONMOUTH COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on October 10, 2008, through regular and certified mail return receipt requested, directing Michael Moore, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 16, 2008 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official did not provide an answer to the Commission's OTSC and has failed to file the disclosure statements. The school official did not appear at the Commission's meeting of December 16, 2008.

ANALYSIS

N.J.S.A. 18A:12-25 and 26 of the School Ethics Act require each school official to file personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2008 or 30 days from swearing-in or from the start of employment for newly elected or appointed board members and administrators. The School Ethics Commission was advised by the Executive County Superintendent that this school official did not file the disclosure statements as required by the Act. As of the date of this decision, the school official has neither filed the disclosure statements, nor indicated that the Order to Show Cause was based on inaccurate information. The Commission finds that the school official's failure to file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

At its meeting on December 16, 2008, the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission found that the school official's failure to file the disclosure statements after receipt of the OTSC constituted a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of suspension until the school official files the

disclosure statements, removal if the disclosure statements are not filed within 30 days of the Commissioner's decision, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision.

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.

Paul C. Garbarini, Chairperson

Mailing Date: December 17, 2008

Resolution Adopting Decision – D21-08

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 16, 2008, the Commission found that Michael Moore violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 16, 2008, the Commission recommended that the Commissioner of Education impose a sanction of suspension until the school official files the disclosure statements, removal if the disclosure statements are not filed within 30 days of the Commissioner's decision, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision; and

Whereas, the Commission reviewed this decision as prepared by its staff;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini/JB

Paul C. Garbarini, Chairperson

I hereby certify that this Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 16, 2008.

Joanne Boyle
Executive Director

PCG/LB/MET/ financial disclosure/2008 docs/decisions/D21-08 suspend-remove-censure

40-09SEC

AGENCY DKT. NO. 360-12/08

IN THE MATTER OF AISHA K. KING, BOARD OF EDUCATION OF THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty[1] – have been reviewed. No comments were filed by the respondent and the required disclosure statement(s) had not been filed as of the date of this decision.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to file the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the completed disclosure statement(s) are filed, provided, however, that if such statement(s) are not filed within 30 days of the mailing date of this decision, the above-named respondent shall be summarily removed from office.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/26/09

Date of Mailing: 1/27/09

[1] It is noted that respondent did not appeal the Commission's finding of violation to the Commissioner pursuant to *N.J.A.C.* 6A:4.

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

SCHOOL ETHICS COMMISSION	:	BEFORE THE SCHOOL ETHICS COMMISSION
v.	:	
	:	Docket No.: D05-08
AISHA K. KING NEWARK BOARD OF EDUCATION ESSEX COUNTY	:	DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on October 10, 2008, through regular and certified mail return receipt requested, directing Aisha K. King, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 16, 2008 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official did not provide an answer to the Commission's OTSC and has failed to file the disclosure statements. The school official did not appear at the Commission's meeting of December 16, 2008.

ANALYSIS

N.J.S.A. 18A:12-25 and 26 of the School Ethics Act require each school official to file personal/relative and financial disclosure statements with the School Ethics Commission. The deadline to file these disclosure statements was April 30, 2008 or 30 days from swearing-in or from the start of employment for newly elected or appointed board members and administrators. The School Ethics Commission was advised by the Executive County Superintendent that this school official did not file the disclosure statements as required by the Act. As of the date of this decision, the school official has neither filed the disclosure statements, nor indicated that the Order to Show Cause was based on inaccurate information. The Commission finds that the school official's failure to file the disclosure statements constitutes a clear violation of N.J.S.A. 18A:12-25 and 26.

DECISION/PENALTY RECOMMENDATION

At its meeting on December 16, 2008, the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission found that the school official's failure to file the disclosure statements after receipt of the OTSC constituted a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction of suspension until the school official files the

disclosure statements, removal if the disclosure statements are not filed within 30 days of the Commissioner's decision, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision.

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.

Paul C Garbarini/jb

Paul C. Garbarini, Chairperson

Mailing Date: December 17, 2008

Resolution Adopting Decision – D05-08

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 16, 2008, the Commission found that Aisha K. King violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 16, 2008, the Commission recommended that the Commissioner of Education impose a sanction of suspension until the school official files the disclosure statements, removal if the disclosure statements are not filed within 30 days of the Commissioner's decision, and censure if the disclosure statements are filed prior to issuance of the Commissioner's decision; and

Whereas, the Commission reviewed this decision as prepared by its staff;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini /gb

Paul C. Garbarini, Chairperson

I hereby certify that this Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 16, 2008.

Joanne Boyle
Executive Director

PCG/LB/MET/ financial disclosure/2008 docs/decisions/D05-08 suspend-remove-censure

41-09SEC

41-09

AGENCY DKT. NO. 370-12/08

IN THE MATTER OF BOB DORIA, :
JERSEY CITY GOLDEN DOOR :
BOARD OF TRUSTEES, HUDSON COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/26/09
Date of Mailing: 1/27/09

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D15-08**
BOB DORIA	:	
JERSEY CITY GOLDEN DOOR	:	**DECISION FOR FAILURE TO**
BOARD OF TRUSTEES	:	**FILE DISCLOSURE STATEMENTS**
HUDSON COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on October 10, 2008, through regular and certified mail return receipt requested, directing Bob Doria, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter of October 10, 2008 enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 16, 2008 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed the disclosure statements on October 15, 2008, but did not file an answer or appear at the Commission's meeting of December 16, 2008.

ANALYSIS

N.J.S.A. 18A:12-25 and 26 of the School Ethics Act require each school official to file personal/relative and financial disclosure statements with the School Ethics Commission. The School Ethics Commission was advised by the Executive County Superintendent that this school official did not file the disclosure statements by April 30, 2008 as required by the Act. The Commission notes that the school official filed the disclosure statements on October 15, 2008 and does not dispute that they were untimely in accordance with the Act.

DECISION/PENALTY RECOMMENDATION

At its meeting on December 16, 2008, the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the school official does not dispute that the disclosure statements were not timely filed and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction 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. 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.

Paul C. Garbarini, Chairperson

Mailing Date: December 17, 2008

Resolution Adopting Decision – D15-08

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 16, 2008, the Commission found that Bob Doria violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 16, 2008, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini /ljb
Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 16, 2008.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/2008 docs/decisions/D15-08

42-09SEC

AGENCY DKT. NO. 369-12/08

IN THE MATTER OF	:	
AUDRA POLITE-CABAILERO,	:	COMMISSIONER OF EDUCATION
SCHOMBURG CHARTER SCHOOL	:	DECISION
BOARD OF TRUSTEES, HUDSON COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Trenton Day

COMMISSIONER OF EDUCATION

Date of Decision: 1/26/09

Date of Mailing: 1/27/09

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D13-08**
AUDRA POLITE-CABAILERO	:	
SCHOMBURG CHARTER SCHOOL	:	**DECISION FOR FAILURE TO**
BOARD OF TRUSTEES	:	**FILE DISCLOSURE STATEMENTS**
HUDSON COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on October 10, 2008, through regular and certified mail return receipt requested, directing Audra Polite-Cabailero, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter of October 10, 2008 enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 16, 2008 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed the disclosure statements on October 15, 2008, but did not file an answer or appear at the Commission's meeting of December 16, 2008.

ANALYSIS

N.J.S.A. 18A:12-25 and 26 of the School Ethics Act require each school official to file personal/relative and financial disclosure statements with the School Ethics Commission. The School Ethics Commission was advised by the Executive County Superintendent that this school official did not file the disclosure statements by April 30, 2008 as required by the Act. The Commission notes that the school official filed the disclosure statements on October 15, 2008 and does not dispute that they were untimely in accordance with the Act.

DECISION/PENALTY RECOMMENDATION

At its meeting on December 16, 2008, the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the school official does not dispute that the disclosure statements were not timely filed and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction 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. 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.

Paul C. Garbarini, Chairperson

Mailing Date: December 17, 2008

Resolution Adopting Decision – D13-08

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 16, 2008, the Commission found that Audra Polite-Cabailero violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 16, 2008, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 16, 2008.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/2008 docs/decisions/D13-08

#37-09SEC

37-09

AGENCY DKT. NO. 367-12/08

IN THE MATTER OF LORENA EREZUMA,	:	
BOARD OF EDUCATION OF TOWN OF	:	COMMISSIONER OF EDUCATION
EAST NEWARK, HUDSON COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty[1] – have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/26/09

Date of Mailing: 1/27/09

[1] It is noted that respondent did not appeal the Commission's finding of violation to the Commissioner pursuant to *N.J.A.C.* 6A:4.

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D10-08**
LORENA EREZUMA EAST NEW YORK BOARD OF EDUCATION HUDSON COUNTY	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on October 10, 2008, through regular and certified mail return receipt requested, directing Lorena Erezuma, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter of October 10, 2008 enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 16, 2008 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed the disclosure statements on November 6, 2008, but did not file an answer or appear at the Commission's meeting of December 16, 2008.

ANALYSIS

N.J.S.A. 18A:12-25 and 26 of the School Ethics Act require each school official to file personal/relative and financial disclosure statements with the School Ethics Commission. The School Ethics Commission was advised by the Executive County Superintendent that this school official did not file the disclosure statements by April 30, 2008 as required by the Act. The Commission notes that the school official filed the disclosure statements on November 6, 2008 and does not dispute that they were untimely in accordance with the Act.

DECISION/PENALTY RECOMMENDATION

At its meeting on December 16, 2008, the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the school official does not dispute that the disclosure statements were not timely filed and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction 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. 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.

Paul C. Garbarini, Chairperson

Mailing Date: December 17, 2008

Resolution Adopting Decision – D10-08

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 16, 2008, the Commission found that Lorena Erezuma violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 16, 2008, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 16, 2008.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/2008 docs/decisions/D10-08

OAL DKT. NO. EDU 10347-08
(EDU 2297-08 ON REMAND)
AGENCY DKT. NO. 62-2/08

IN THE MATTER OF THE TENURE HEARING	:	
OF KAREN ESPOSITO-FAIGENBAUM,	:	COMMISSIONER OF EDUCATION
BRIDGEWATER-RARITAN REGIONAL	:	DECISION ON REMAND
SCHOOL DISTRICT, SOMERSET COUNTY.	:	
	:	

The Initial Decision on Remand of the Office of Administrative Law (OAL), the parties' proposed Stipulation of Settlement and Release, and the record of this matter have been reviewed in light of the Commissioner's decision of November 17, 2008, wherein the Commissioner held that she was unable properly to assess the recommendation of the Administrative Law Judge (ALJ) that the proposed agreement be approved pursuant to the established standards governing settlement of tenure matters, because the reasoning underlying such recommendation was not set forth in the Initial Decision.

Upon review of the Initial Decision on Remand, the Commissioner now 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; see also *N.J.A.C.* 6A:3-5.6(a).

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 for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/26/09
Date of Mailing: 1/27/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10347-08

AGENCY DKT. NO. 62-2/08

(ON REMAND EDU 2297-08)

IN THE MATTER OF THE TENURE HEARING OF KAREN ESPOSITO-FAIGENBAUM, BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY.

Nicholas Celso, III, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso and Kessler, LLC, attorneys)

Edward Cridge, Esq., for respondent (Wills, O'Neill and Mellk, attorneys)

Record Closed: December 22, 2008 Decided: December 31, 2008

BEFORE **STEPHANIE M. WAUTERS**, ALJ:

This initial decision sets forth with specificity the basis of my Initial Decision's recommendation of approval of the parties' settlement agreement. I **HEREBY** incorporate and accept the stipulation of the parties (Exhibit A) as to the satisfaction of the established standards governing settlement of tenure cases pursuant to In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846 and N.J.A.C. 6A:3-5.6. Therefore, I recommend to the

Commissioner her approval of the parties' proposed settlement agreement. I am confident that this settlement protects the students and is in the public interest.

I **FIND** that:

1. The parties have voluntarily agreed to the settlement and the stipulation as to the justification of settlement of tenure charges pursuant to N.J.A.C. 6A:3-5.6.

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 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 31, 2008
DATE

Stephanie M. Wauters
STEPHANIE M. WAUTERS, ALJ

Date Received at Agency:

JAN 5 2009
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cmo

APPENDIX

Exhibit A and Initial Decision

Arnold M. Mellk, Esquire
Edward A. Cridge, Esquire
WILLS O'NEILL & MELLK
10 Nassau Street, P.O. Box 614
Princeton, New Jersey 08542
(609)-924-0700
Attorneys for Respondent Karen Faigenbaum

RECEIVED
2008 DEC 24 A 11:12
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF THE TENURE CHARGES AGAINST KAREN ESPOSITO-FAIGENBAUM	:	BEFORE THE COMMISSIONER OF EDUCATION NEW JERSEY DEPARTMENT OF EDUCATION
BY THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, SOMERSET COUNTY	:	OAL Dkt. No. 2297-08 Agency Dkt. No. 62-2/08

STIPULATION AS TO JUSTIFICATION OF SETTLEMENT OF TENURE CHARGES PURSUANT TO N.J.A.C. 6A:3-5.6

Pursuant to N.J.A.C. 6A:3-5.6, the parties to this matter hereby address the following standards established by the State Board of Education in the matter entitled *In re Cardonick*, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846).

1. Accompaniment by documentation as to the nature of the charges.

The Sworn Tenure Charges are annexed as Exhibit A to the Stipulation of Settlement and Release executed by the parties in this matter.

2. Explication of the circumstances justifying settlement or withdrawal.

A: Procedural Background

In or about September, 2003, Respondent Karen Esposito-Faigenbaum commenced employment as a teacher with the Petitioner Bridgewater-Raritan Regional School District Board of Education.

On March 7, 2007, Respondent, a tenured employee, was suspended from her teaching position with pay in conjunction with criminal charges filed against her in Somerset County.

EXHIBIT A

On April 13, 2007, Respondent was indicted by a Somerset County Grand Jury for alleged conspiracy to possess and attempt to possess a controlled dangerous substance ("CDS"). In or about April, 2007, Respondent applied, and was admitted into Pre-Trial Intervention, pursuant to New Jersey Court Rule 3:28.

On May 22, 2007, Respondent was without pay pursuant to N.J.S.A. 18A:6-8.3.

In or about the Summer of 2007, in contemplation of bringing tenure charges against Respondent, the Board sought to obtain records of the investigation leading to her arrest from the Somerset County Prosecutor's Office. On December 4, 2007, the Board was denied access to said records by the Hon. Julie M. Marino, J.S.C., on the basis that the disclosure of said records was prohibited by the New Jersey Wiretapping and Electronic Surveillance Act; N.J.S.A. 2A: 156A-17.

On or about January 30, 2008, Dr. J. Michael Schilder, Superintendent of Schools, filed sworn tenure charges of unbecoming conduct and/or other just cause against Respondent, predicated on the above mentioned criminal charges, together with a sworn statement of evidence in support of the charges, with Peter Starrs, School Business Administrator/Board Secretary.

On February 26, 2008, the tenure charges were certified to the Commissioner of Education. Respondent was simultaneously served therewith pursuant to N.J.A.C. 6A:3-5.1 *et seq.*

In April, 2008, Respondent successfully completed her Pretrial Intervention, and the criminal charges against her were dismissed. At that time, Respondent had been suspended from her assigned duties for approximately thirteen (13) months.

On or about April 13, 2008, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case, where it was docketed as Agency Docket No. 62-2/08; OAL Docket No. EDU 2297-08S and assigned to Administrative Law Judge Stephanie M. Wauters.

During the discovery phase of this matter, Respondent invoked her Fifth Amendment Privilege and declined to answer certain discovery requests propounded by the Board. In or about June, 2008, the Board moved to compel Respondent's answers.

On August 7, 2008, Judge Wauters denied the Board's motion.

On September 1, 2008, respondent was entitled to reinstatement of her salary, pursuant to N.J.S.A. 18A:6-14, although she continued to remain on suspension.

On September 9, 2008, the Board requested and the Commissioner agreed to interlocutory review of Judge Wauter's denial of the Board's Motion to Compel. On that same date, the parties reached a tentative settlement of the case, and the Board withdrew its request for interlocutory review, without prejudice, on that basis.

On September 29, 2008, the parties mutually executed the Stipulation of Settlement and Release in this Matter.

On September 30, 2008, the parties placed their settlement agreement on the record before Judge Wauters. Pursuant to N.J.A.C. 6A:3-5.6(a)(6), Respondent was advised on the record 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.

B: Circumstances Justifying Settlement

This matter is appropriate due to the substantive, significant evidentiary issues which arose prior to and during the discovery period in this matter. In order to the Board to present any competent, credible evidence in support of the sworn tenure charges, these evidentiary issues would have to be resolved.

The first evidentiary issue is the Board's ability to obtain records or testimony derived from the wiretap investigation of the Somerset County Prosecutor's Office. In or about April, 2008, the Board attempted to obtain such records, arguing that Judge Marino's Order of December 4, 2007 did not apply to certain arrest records, or to testimony of the officer that arrested Respondent. Judge Marino ordered the parties to brief the issue, and has not yet issued her decision. The parties both expressed their intent to file an appeal with the Appellate Division in the event of an adverse decision.

The second evidentiary issue is Respondent's right to invoke her Fifth Amendment Privilege to certain of the Board's discovery requests. This is a matter of State and Federal Constitutional moment: Respondent was prepared to appeal any Order of the Commissioner compelling her to furnish answers to

the Board's discovery requests, in both New Jersey and Federal Court.

It is well established in New Jersey that entry into and completion of Pre-Trial Intervention does not constitute an adjudication or admission of guilt as to the underlying offense. In I/M/O the Tenure Hearing of William Thomas, School District of the City of Plainfield, Agency Dkt. No. 133-5/07, OAL Dkt. No. EDU 5908-07, issued on or about November 26, 2007, the Commissioner held that evidence of admission to PTI, standing alone, is insufficient to justify dismissal from tenure.

Accordingly, until the aforementioned evidentiary issues were resolved, the Board would be unable present any competent, credible evidence in support of the tenure charges. As both parties were prepared to appeal decisions adverse to them on these evidentiary issues, it appeared as though the case might take months, or even years to be resolved. Rather than engage is such expensive, protracted litigation, the parties agreed that the matter was appropriate for settlement.

3. Consent of both the charged and charging parties:

The parties consented to the settlement of this matter by way of mutual execution of the Stipulation of Settlement and Release in this matter. This consent was placed on the record before Judge Wauters on September 30, 2008.

4. Indication that the charged party entered into the agreement with a full understanding of his or her rights.

Respondent acknowledged at paragraph 12 of the Stipulation of Settlement and Release that he entered into the settlement with a full understanding of her rights. On September 30, 2008, Respondent affirmed this understanding, including but not limited to her right to a plenary hearing.

5. A showing that the Agreement is in the public interest.

In order for this matter to proceed to a plenary hearing, the evidentiary issues set forth above would have to be resolved. As they would not be resolved without extensive appellate litigation, it is likely that this case would be pending for at least another year (and possibly longer) before a final disposition. The settlement of this matter is in the public interest because Respondent would be entitled to receive her pay while suspended during this litigation as the 120 period

wherein Respondent may be suspended without pay pursuant to N.J.S.A. 18A:6-14 has passed. Because of the settlement of this matter, the public will not bear the expenses of Respondent's paid suspension, nor of extensive appellate litigation. Even if the Board were ultimately to prevail at a plenary hearing in the OAL, the aforementioned factors would make such a hearing more costly than this settlement, while achieving the same result.

6. **Where the charging party is a teaching staff member, a showing that the teaching staff member has been advised of the Commissioner's duty to refer tenure determinations resulting in a loss of position to the State Board of Examiners for possible suspension or revocation of certificate.**

Respondent was so advised and so acknowledged at paragraph 6 of the Stipulation of Settlement and Release executed by the parties, and reaffirmed her understanding of same before Judge Wauters on September 30, 2008.

IT IS SO STIPULATED

SCHWARTS, SIMON EDELSTEIN CELSO & KESSLER LLC
Attorneys for Petitioner

By: _____
Nicholas Celso, Esq.

Dated: 12-18-08

WILLS, O'NEILL & MELLK
Attorneys for Respondent

By: _____
Edward Cridge, Esq.

Dated: 12/22/08

IT IS SO ACCEPTED

Stephanie M. Wauters
Hon. Stephanie Wauters, ALJ

Dated: December 29, 2008

KAREN ESPOSITO FAIGENBAUM
TENURE HEARING, BRIDGE-
WATER RARITAN REG,

TARGET DUE
12-8-08 12-22-08

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625-0049
(609) 588-6584

A copy of the administrative law judge's

decision is enclosed.

This decision was mailed to the

parties on OCT 23 2008.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2297-08

AGENCY DKT. NO. 62-2/08

IN THE MATTER OF THE TENURE HEARING OF KAREN ESPOSITO-FAIGENBAUM, BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY.

Nicholas Celso, III, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso and Kessler, LLC, attorneys)

Edward Cridge, Esq., for respondent (Wills, O'Neill and Mellk, attorneys)

Record Closed: September 30, 2008 Decided: October 21, 2008

BEFORE **STEPHANIE M. WAUTERS**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 27, 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 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 attached the DVD of the Settlement Agreement with my analysis of its compliance with the standards of In Re Cardonick, 1990 S.L.D. 842, 846 and a transcription of the detailed explanation by Mr. Celso of the evidentiary issues resulting in the complex and lengthy procedures in this case. (See Attachment A).

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

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

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

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

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

October 21, 2008
DATE

Stephanie M. Wauters
STEPHANIE M. WAUTERS, ALJ

Date Received at Agency:

OCT 23 2008

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

cmo

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLC
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, New Jersey 07962
(973) 301-0001 (973) 993-3152
Attorneys for Bridgewater-Raritan
Regional School District
Board of Education

	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
	AGENCY DOCKET NO:62-2/08
IN THE MATTER OF THE TENURE HEARING OF KAREN ESPOSITO-FAIGENBAUM, BOARD OF EDUCATION OF BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNY	OAL DOCKET NO. EDU 2297-08S
	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 entrusted with maintaining and conducting the public schools of the said School District; and

WHEREAS, Karen Esposito-Faigenbaum ("Respondent") commenced employment with the Board in or about September, 2003, as a resource teacher and served in that capacity until the time of her suspension with pay on March 7, 2007; and

WHEREAS, on or about January 30, 2008, Dr. J. Michael Schilder, Superintendent of Schools, filed sworn tenure charges (Ex. A, annexed hereto) of unbecoming conduct and/or other just cause against Respondent, predicated on the above mentioned criminal charges, together with a sworn statement of evidence in support of the charges, with Peter Starrs, School Business Administrator/Board Secretary; and

WHEREAS, on February 26, 2008, 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:10-14; and

WHEREAS, on or about February 28, 2008, the sworn tenure charges, together with a certificate of determination and certificate of service, were filed by the Board with

the Commissioner of Education, and Respondent was simultaneously served with the sworn tenure charges, sworn statement of evidence, certificate of determination and certificate of service, pursuant to N.J.A.C. 6A:3-5.1 *et seq.*; and

WHEREAS, on or about April 13, 2008, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case, where it was docketed as Agency Docket No. 62-2/08; OAL Docket No. EDU 2297-08S and assigned to Administrative Law Judge Stephanie M. Wauters; and

WHEREAS, a number of significant and substantive evidentiary disputes arose between the parties during discovery in this matter, making it apparent that the litigation would be both lengthy and complex; and

WHEREAS, on September 1, 2008, respondent was entitled to reinstatement of her salary, pursuant to N.J.S.A. 18A:6-14, although she continued to remain on suspension; and

WHEREAS, the parties, wishing to resolve the within matter amicably without the need for further litigation, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by the Administrative Law Court and the Commissioner of Education;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. Tenure Charges to be Moot/No Further Board Action

The Board agrees that upon approval of the within Settlement Agreement and Release ("this Agreement" or "this Settlement") by the Commissioner that the subject tenure charges shall be moot and shall 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 this litigation 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 void.

2. Resignation

Respondent has tendered her irrevocable resignation (copy annexed hereto as Ex. B) 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.

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 (including but not necessarily limited to pension deductions, but excluding deductions for all healthcare benefits, except that benefit deductions shall continue until the date of the Commissioner's decision), for the eight month period commencing on September 1, 2008 through April 30, 2009, offset by all salary payments which may have been paid during this period pending the Commissioner's approval of this Settlement. Payments shall be made in accordance with the Board's normal semi-monthly payroll schedule and mailed to respondent.

4. No Further Compensation/Benefits

Respondent shall be entitled to no further compensation, emolument of employment or fringe benefit of any kind and specifically waives her right to same, including but not necessarily limited to payment for all unused vacation, sick and personal days and health insurance benefits.

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 existing at the time this Agreement is executed, 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 Retaining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Law, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any other claims for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel,

defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim.

6. Referral to State Board of Examiners

Respondent acknowledges that she has been apprised of the Commissioner's duty to refer tenure matters, pursuant to N.J.A.C. 6A:3-5.6(a)(6), to the State Board of Examiners for possible suspension or revocation of her certificate.

7. No Admissions

Nothing contained in this Agreement shall be deemed to constitute an admission of wrongdoing or liability by either party.

8. Non-Disparagement

A. Respondent agrees not to make nor solicit defamatory statements about the Board, its past or present officers, administrators, members, agents, or employees.

B. The Board shall provide to prospective employers and the public, unless otherwise requested by respondent, all public information, as well as directory type information concerning employment history, such as: dates of employment, positions held, salary history, and reason for separation—i.e., settlement of tenure charges. Respondent acknowledges that this Settlement is a public document. Nothing contained herein, however, shall be construed to require the Board or its agents to make any untruthful statements regarding respondent, or to provide information other than that which is required by law to be provided. The Board acknowledges that it has no independent knowledge of the allegations underlying the tenure charges, and will make no representation of any such knowledge to any person or entity.

9. 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.

10. Public Interest

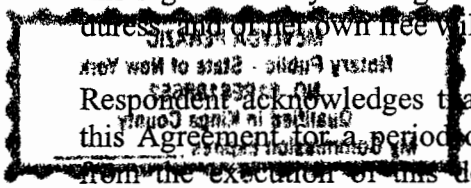
This Settlement will serve the public interest in that the a lengthy and expensive tenure litigation, with pending and expected appeals will be avoided, serving the interests of both parties at minimal public expense, with the result of removing respondent from her present teaching position.

11. Board Approval

The Board President has been duly authorized by Board Resolution (Ex. C) to execute this Agreement on behalf of the Board of Education.

12. 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 Nicholas Celso, Esq., 44 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 Respondent will be entitled to none of the consideration described herein.

13. 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.

14. Severablility

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then the remaining portions of the Agreement shall remain in full force and effect.

15. 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:

Karen Esposito-Faigenbaum Date: 9/18/08

KAREN ESPOSITO-FAIGENBAUM

Sworn before me this 18th day of September, 2008

WITNESS:

Mevlyda Perazic /s/ Date: 9/18/08

MEVLYDA PERAZIC
Notary Public - State of New York
NO. 01PE6188652
Qualified in Kings County
My Commission Expires 6/9/11

BOARD OF EDUCATION OF THE BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT:

_____ Date: 9/29/08

, BOARD PRESIDENT

ATTEST:

_____ Date: 9/29/08

PETER STARRS
Board Secretary/Business Administrator

In the Matter of the Tenure Hearing of Karen Esposito-Faigenbaum,
Bridgewater-Raritan Regional School District, Somerset County
OAL Docket No. EDU 2297-08
Agency Docket No. 62-2/08

ATTACHMENT A

From the beginning of the case, Your Honor, the petitioner encountered significant and substantive evidentiary problems and disputes which arose as a result of the underlying criminal charges against this respondent. And if I might just explain for the record, Your Honor, that Ms. Faigenbaum as the charges, which are annexed to the settlement clearly set forth, was arrested in Somerset County in early February 2007 and charged with illegal possession of a controlled dangerous substance and conspiring with others to engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime. She was subsequently indicted in April of 2007 by a grand jury in Somerset County and -- for those charges, and was suspended at that point in time pursuant to the indictment without pay. She had been suspended a bit earlier with pay, but once she was indicted she was suspended without pay, and continued to remain suspended for a period of time totaling approximately 12 months pursuant to that indictment.

She was admitted into the Somerset County Pretrial Intervention Program and was permitted to serve out a period of probation for a 12-month period which ended I believe on April 20, 2007, at which time the indictment was dismissed. Prior to that, Your Honor, recognizing that as a result of the pretrial intervention program the charges against her would not be pursued, the prosecutor -- the board of education as I mentioned did in fact file the tenure charges against her and those charges were pending when the petitioner began to encounter various evidentiary problems. And those problems arose from the fact that when petitioner attempted to obtain the police records and documents pertinent to the

underlying arrest, it was notified by the Somerset County Prosecutor's Office that the arrest had occurred pursuant to the New Jersey Wiretap Act and that under that act and the provisions of it, the evidence that had been obtained as a result of the electronic eavesdropping that had been authorized in this matter was barred from disclosure except to the court and/or other prosecutorial agencies. And as a result of that, the prosecutor refused to disclose any information or to allow petitioner to obtain any information from any police authorities that would be relevant to making its case before the Commissioner of Education and this Court.

Also pursuant to the Wiretap Act and the provision that allowed the petitioner to make application to the criminal trial judge who presided over the matter for exception to the bar of disclosure and to ask the Court to permit either full or limited disclosure of the underlying documents. We did that, Your Honor, before Judge Marino in Somerset County, and the judge initially ruled that she would not permit disclosure of the prosecutor's records or files pursuant to the Wiretap Act. And the court was fully cognizant because we put it on the record of the fact that there was a collateral action, administrative action, pending in this Court and that that information would be necessary under the precedence of the Commissioner of Education to make the board's case, that mere admission into PTI would be insufficient to justify a dismissal from a tenured position.

Notwithstanding, the judge ruled that she would not permit disclosure. In the interim, discovery was propounding by petitioner upon respondent requesting certain information including a request for admissions which the respondent, through her attorney, upon advice of counsel refused to answer citing her Fifth Amendment privilege against self-incrimination notwithstanding the fact that the indictment against her had been dismissed at that point in time and that there was no present pending or contemplated criminal action against her. So, we were not able to obtain discovery which we desired through the discovery process under the administrative rules of the court and sought this Court's

intervention to compel that discovery. We filed an application before this Court indicating that the Fifth Amendment privilege did not apply and further asking the Court to rule that not only did the privilege not apply, but that no adverse and/or negative inference could be drawn from the respondent's refusal to answer those demands.

This Court ruled upholding the right of the respondent not to respond to the request for admission and denying the petitioner's application for adverse inferences. And petitioner filed a request with the Commissioner of Education for an interlocutory review of that matter, which the Commissioner had agreed to hear. And right at that point where the Commissioner had agreed to hear that matter, petitioner and respondent agreed to this tentative settlement and that application was withdrawn without prejudice pending approval of this settlement. I might also add that as to Judge Marino's original order denying access to police records, petitioner moved before Judge Marino to reconsider her ruling when petitioner in the course of preparing to litigate this case in this tribunal issued a subpoena to the arresting detective which would have required him to appear in the administrative law court to give testimony concerning this matter. The prosecutor's office refused to approve the -- it was the prosecutor's detective whom we had subpoenaed. The prosecutor's office refused to allow the detective to testify until and unless Judge Marino had considered that application.

So, we were before Judge Marino again I believe in early July asking her to not only reconsider her original ruling but to clarify the scope of that ruling and to rule precisely on the question of whether her order barring access to records also meant that the detective could not testify.

So, because of those evidentiary problems, Judge, the procedural posture in which this case was at the time in which the parties entered into a tentative settlement was that petitioner had been blocked at every attempt to obtain the information that it needed to make its case in this Court. And we were awaiting a

ruling from the Superior Court on the application for further guidance which had not yet been forthcoming, and we had a pending application before the Commissioner of Education asking for interlocutory review of this Court's ruling which was adverse to the petitioner. And it was pretty clear to petitioner, and I won't speak for respondent -- counsel can do that himself, but it was clear to petitioner that pending upon the ruling of Judge Marino and depending upon the ruling of the Commissioner that there would be subsequent appeals. At that point in time, Your Honor, respondent had been out of work for well over a year and because of the application of 18A 6:10-14 was entitled to resume receipt of her salary effective September 1 of this year.

So, we were confronted with a situation where we were not able to proceed with the presentation of our case. Plenary hearing on the tenure charges have been docketed in this tribunal for September 30. The interlocutory appeal before the Commissioner was still pending and Judge Marino had not ruled on our application for reconsideration. So, therefore, the parties for reasons that I'm sure the respondent will discuss in a bit more detail felt it was in their mutual best interest to resolve this matter. And we have, therefore, entered into this tentative settlement which seeks amicably to resolve the matter without the need for further litigation in a manner that we think from my client's perspective is cost effective.

144-09

#44-09SEC

AGENCY DKT. NO. 363-12/08

IN THE MATTER OF KENNETH WALLER,	:	
BOARD OF EDUCATION OF TOWNSHIP OF	:	COMMISSIONER OF EDUCATION
IRVINGTON, ESSEX COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty[1] – have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Judith Day

COMMISSIONER OF EDUCATION

Date of Decision: 1/27/09
Date of Mailing: 1/28/09

[1] It is noted that respondent did not appeal the Commission's finding of violation to the Commissioner pursuant to *N.J.A.C.* 6A:4.

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D03-08**
KENNETH WALLER	:	
IRVINGTON	:	**DECISION FOR FAILURE TO**
BOARD OF EDUCATION	:	**FILE DISCLOSURE STATEMENTS**
ESSEX COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on October 10, 2008, through regular and certified mail return receipt requested, directing Kenneth Waller, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter of October 10, 2008 enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 16, 2008 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed an answer on October 16, 2008 and he filed the disclosure statements on October 23, 2008, but did not appear at the Commission's meeting of December 16, 2008.

ANALYSIS

N.J.S.A. 18A:12-25 and 26 of the School Ethics Act require each school official to file personal/relative and financial disclosure statements with the School Ethics Commission. The School Ethics Commission was advised by the Executive County Superintendent that this school official did not file the disclosure statements by April 30, 2008 as required by the Act. The Commission notes that the school official filed the disclosure statements on October 23, 2008 and does not dispute in his answer that they were untimely in accordance with the Act.

DECISION/PENALTY RECOMMENDATION

At its meeting on December 16, 2008, the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the school official does not dispute in his answer that the disclosure statements were not timely filed and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction 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. 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.

Paul C. Garbarini /gb

Paul C. Garbarini, Chairperson

Mailing Date: December 17, 2008

Resolution Adopting Decision – D03-08

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 16, 2008, the Commission found that Kenneth Waller violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 16, 2008, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini/jb

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 16, 2008.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/2008 docs/decisions/D03-08

#45-09SEC

AGENCY DKT. NO. 366-12/08

IN THE MATTER OF JOSEPH RIVERA,	:	
BOARD OF EDUCATION OF TOWN OF	:	COMMISSIONER OF EDUCATION
WEST NEW YORK, HUDSON COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty[1] – have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/27/09

Date of Mailing: 1/28/09

[1] It is noted that respondent did not appeal the Commission's finding of violation to the Commissioner pursuant to *N.J.A.C.* 6A:4.

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D09-08**
JOSEPH RIVERA	:	
WEST NEW YORK	:	**DECISION FOR FAILURE TO**
BOARD OF EDUCATION	:	**FILE DISCLOSURE STATEMENTS**
HUDSON COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on October 10, 2008, through regular and certified mail return receipt requested, directing Joseph Rivera, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter of October 10, 2008 enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 16, 2008 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed the disclosure statements on December 1, 2008, but did not file an answer or appear at the Commission's meeting of December 16, 2008.

ANALYSIS

N.J.S.A. 18A:12-25 and 26 of the School Ethics Act require each school official to file personal/relative and financial disclosure statements with the School Ethics Commission. The School Ethics Commission was advised by the Executive County Superintendent that this school official did not file the disclosure statements by April 30, 2008 as required by the Act. The Commission notes that the school official filed the disclosure statements on December 1, 2008 and does not dispute that they were untimely in accordance with the Act.

DECISION/PENALTY RECOMMENDATION

At its meeting on December 16, 2008, the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the school official does not dispute that the disclosure statements were not timely filed and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction 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. 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.

Paul C. Garbarini, Chairperson

Mailing Date: December 17, 2008

Resolution Adopting Decision – D09-08

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 16, 2008, the Commission found that Joseph Rivera violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 16, 2008, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 16, 2008.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/2008 docs/decisions/D09-08

46-09

#46-09SEC

AGENCY DKT. NO. 371-12/08

IN THE MATTER OF	:	
MIRZA NEGRON-MORALES,	:	COMMISSIONER OF EDUCATION
JERSEY CITY GOLDEN DOOR	:	DECISION
BOARD OF TRUSTEES, HUDSON COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/27/09

Date of Mailing: 1/28/09

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D16-08**
MIRZA NEGRON-MORASLES JERSEY CITY GOLDEN DOOR BOARD OF TRUSTEES HUDSON COUNTY	:	**DECISION FOR FAILURE TO FILE DISCLOSURE STATEMENTS**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on October 10, 2008, through regular and certified mail return receipt requested, directing Mirza Negron-Morales, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter of October 10, 2008 enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 16, 2008 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed the disclosure statements on October 15, 2008, but did not file an answer or appear at the Commission's meeting of December 16, 2008.

ANALYSIS

N.J.S.A. 18A:12-25 and 26 of the School Ethics Act require each school official to file personal/relative and financial disclosure statements with the School Ethics Commission. The School Ethics Commission was advised by the Executive County Superintendent that this school official did not file the disclosure statements by April 30, 2008 as required by the Act. The Commission notes that the school official filed the disclosure statements on October 15, 2008 and does not dispute that they were untimely in accordance with the Act.

DECISION/PENALTY RECOMMENDATION

At its meeting on December 16, 2008, the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the school official does not dispute that the disclosure statements were not timely filed and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction 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. 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.

Paul C. Garbarini/jfb

Paul C. Garbarini, Chairperson

Mailing Date: December 17, 2008

Resolution Adopting Decision – D16-08

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 16, 2008, the Commission found that Mirza Negron-Morales violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 16, 2008, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini /LJB
Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 16, 2008.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/2008 docs/decisions/D16-08

47-09

#47-09SEC

AGENCY DKT. NO. 368-12/08

IN THE MATTER OF CAROL GILLIARD,	:	COMMISSIONER OF EDUCATION
SCHOMBURG CHARTER SCHOOL	:	DECISION
BOARD OF TRUSTEES, HUDSON COUNTY.	:	
	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/27/09

Date of Mailing: 1/28/09

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D12-08**
CAROL GILLIARD	:	
SCHOMBURG CHARTER SCHOOL	:	**DECISION FOR FAILURE TO**
BOARD OF TRUSTEES	:	**FILE DISCLOSURE STATEMENTS**
HUDSON COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on October 10, 2008, through regular and certified mail return receipt requested, directing Carol Gilliard, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter of October 10, 2008 enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 16, 2008 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed the disclosure statements on October 15, 2008, but did not file an answer or appear at the Commission's meeting of December 16, 2008.

ANALYSIS

N.J.S.A. 18A:12-25 and 26 of the School Ethics Act require each school official to file personal/relative and financial disclosure statements with the School Ethics Commission. The School Ethics Commission was advised by the Executive County Superintendent that this school official did not file the disclosure statements by April 30, 2008 as required by the Act. The Commission notes that the school official filed the disclosure statements on October 15, 2008 and does not dispute that they were untimely in accordance with the Act.

DECISION/PENALTY RECOMMENDATION

At its meeting on December 16, 2008, the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the school official does not dispute that the disclosure statements were not timely filed and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction 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. 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.

Paul C. Garbarini /jb
Paul C. Garbarini, Chairperson

Mailing Date: December 17, 2008

Resolution Adopting Decision – D12-08

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 16, 2008, the Commission found that Carol Gilliard violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 16, 2008, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 16, 2008.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/2008 docs/decisions/D12-08

48-09

OAL DKT. NO. EDU 1060-08
AGENCY DKT. NO. 382-12/07

WILLIAM NEWSOME,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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.

COMMISSIONER OF EDUCATION

Date of Decision: 1/28/09

Date of Mailing: 1/28/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01060-08

AGENCY DKT. NO. 382-12/07

WILLIAM NEWSOME,

Petitioner,

v.

DUMONT BOARD OF EDUCATION,

Respondent.

Alfred F. Maurice, Esq., for petitioner (Springstead & Maurice, attorneys)

James L. Plosia, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: December 24, 2008 Decided: December 26, 2008

BEFORE **SANDRA ANN ROBINSON,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on January 7, 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.

A hearing was scheduled on November 25 and 26, 2008. Prior to the hearing the parties settled the matter. A Settlement Agreement was prepared and executed indicating the terms of the agreement, which are incorporated herein by reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

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

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

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

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

December 26, 2008

DATE

Sandra Ann Robinson

SANDRA ANN ROBINSON, ALJ

Date Received at Agency: December 31, 2008

DEC 31 2008

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

lr

APRUZZESE, McDERMOTT,
MASTRO & MURPHY P.C.
25 Independence Boulevard
P.O. Box 112
Liberty Corner, New Jersey 07938
(908) 580-1776
Attorneys for Respondent

DEC 2008
RECEIVED
Apruzzese, McDermott
Mastro & Murphy

WILLIAM NEWSOME,	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
	:	
v.	:	OAL Docket No.: EDU 01060-2008N
	:	Agency Ref. No.: 382-12/07
DUMONT BOARD OF EDUCATION,	:	
	:	
Respondent.	:	**STIPULATION OF SETTLEMENT**

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2008 DEC 24 P 12:39
STATE OF N.J.
OFFICE OF ADMIN. LAW

Petitioner William Newsome ("Newsome" or "Petitioner") and Respondent Dumont Board of Education ("Board") hereby agree to settle the above-captioned matter pursuant to the following terms:

1. Petitioner agrees to dismiss his Petition of Appeal with prejudice.

2. Within 10 business days of this Stipulation of Settlement being issued by the Commissioner of Education as a Final Decision, the Board will forward to Newsome, by way of his attorney, Alfred Maurice, Esq., a check for $2,500, less all appropriate payroll deductions. This check will be a "non-pension payroll check"; that is, no pension deductions will be taken from the check, but all other appropriate deductions will be subtracted from the total amount of the check. Thus, the payment made by the Board pursuant to this agreement will be akin to payments by the Board for stipend work performed by teaching staff members.

3. It is acknowledged and agreed by the parties that this Settlement shall have no impact on the withholding of Newsome's increment, which withholding was affirmed by the Commissioner of Education in this matter and which increment shall remain "withheld" for each and every year of Newsome's employment with the District unless the increment is restored within the sole discretion of the Dumont Board of Education.

4. The parties acknowledge and agree that this Settlement has been entered into as a compromise of disputed claims as a cost benefit analysis given the cost of litigating. Accordingly, by entering into this Settlement, the parties do not acknowledge any wrongdoing or make any admissions with respect to the allegations of the opposing party.

5. The parties agree that, to the maximum extent permitted by law, the parties shall keep this Settlement, the discussions leading to this Settlement, and the facts involved in this matter confidential. The Board agrees that this confidentiality provision shall not preclude Newsome from cooperating with the Board's counsel in a lawsuit currently pending against the Dumont Board of Education and one of its employees.

William Newsome

WILLIAM NEWSOME

Dated: 11/19/08

DUMONT BOARD OF EDUCATION

By: _____

Dated: 12/19/08

I hereby accept the foregoing Stipulation of Settlement having been voluntarily entered into by the parties, and shall forthwith issue the Stipulation of Settlement as a final decision and order in this matter.

Sandra Ann Robinson, ALJ

Sandra Ann Robinson, ALJ

Dated: December 24, 2008

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Approve Stipulation of Settlement

It was moved by Mr. Kohlberger, seconded by Mr. Tolentino, that the Dumont Board of Education approve a Stipulation of Settlement Agreement between the Dumont Board of Education and W. N. per the attached agreement indicated on Schedule D.

Vote was as follows:
Yes: DeWald, Finetto, Healy, Kelly, Tolentino, Kohlberger, Fernandez

I HEREBY CERTIFY THAT THE ABOVE IS A TRUE AND EXACT COPY OF AN EXTRACT FROM THE MINUTES OF A PUBLIC MEETING OF THE DUMONT BOARD OF EDUCATION HELD ON THURSDAY, DECEMBER 18, 2008.

KEVIN CARTOTTO, BOARD SECRETARY

49-09

OAL DKT. NO. EDU 7635-01
AGENCY DKT. NO. 291-7/01

JOAN ADAMOWITZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/28/09

Date of Mailing: 1/28/09



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07635-01

AGENCY DKT. NO. 291-7/01

JOAN ADAMOWITZ,

Petitioner,

v.

HILLSIDE BOARD OF EDUCATION,

UNION COUNTY,

Respondent.

Benjamin A. Spivack, Esq., for petitioner (Oxfeld Cohen, LLC, attorneys)

Eliyahu S. Scheiman, Esq., for respondent (Porzio, Bromberg, Newman, P.C., attorneys)

Record Closed: December 29, 2008 Decided: December 29, 2008

BEFORE **KEN R. SPRINGER**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 7, 2001 for hearing pursuant to N.J.S.A. 52:14B-1 to -13 and N.J.S.A. 52:14F1 to -15.

The parties have agreed to settle this matter and have prepared the attached agreement 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.

3. The individuals signing this agreement on behalf of the Board acknowledge that they have been duly authorized to do so and bind the Board by their action.

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.

December 29, 2008
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Date Received at Agency:

DEC 31 2008
DATE

December 31, 2008
Mailed to Parties:

Laura Sanders
OFFICE OF ADMINISTRATIVE LAW
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

db

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Petitioner Hillside Board of Education

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2008 DEC 29 A 10: 35

JOAN ADAMOWITZ,

Petitioner,

v.

HILLSIDE BOARD OF EDUCATION,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION

OAL DOCKET NO.: EDU 07635-01
AGENCY REF. NO. 291-7/01

STIPULATION OF SETTLEMENT AND RELEASE

TO: Gail Oxfeld-Kanef, Esq.
Oxfeld Cohen, P.C
60 Park Place, 6th Floor
Newark, New Jersey 07102

This Settlement Agreement and Mutual Release ("Agreement") is made and entered into by and between counsel for petitioner, Joan Adamowitz (""Adamowitz") and respondent, Hillside Board of Education (the "Board") for full settlement of all claims that could have been alleged by either party in the above-matter.

WITNESSETH:

WHEREAS, on or about July 16, 2001, Adamowitz filed a Petition of Appeal before the State of New Jersey Commissioner of Education (the "Commissioner"), captioned *Adamowitz v. Hillside Bd. Of Edu.*, OAL Docket No. EDU 07635-01, for reinstatement of alleged back wages and sick pay (the "Petition of Appeal") she allegedly would have earned between 2001-2002;

WHEREAS, said Petition of Appeal was held in abeyance pending resolution of a simultaneously filed Workers' Compensation claim;

11/18/08

Received: 1211228

WHEREAS, the Petitioner's Workers' Compensation claim was resolved via an Order for Medical and/or Temporary Benefits and Order for Dismissal dated April 27, 2007, and stay concomitantly lifted on the Petition of Appeal;

WHEREAS, this matter is currently pending before the Honorable Kenneth R. Springer, A.L.J.; and

WHEREAS, the parties to this Agreement (the "Parties") desire to amicably resolve their differences and avoid additional expenses of further litigation in connection with the Petition of Appeal.

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, it is hereby agreed by and between the parties hereto as follows:

1. This Agreement shall not be construed as an admission by the Parties of any acts or omissions alleged or those that could have been alleged by any of the Parties, or of any acts or omissions alleged or which could have been alleged against any of the Parties. Each party to this Agreement specifically denies any liability whatsoever for damages, injuries, or other claims by any other party to this Agreement or those that were alleged or could be claimed by any of the other Parties.

In exchange for the valuable consideration set forth herein, the Parties mutually release and give up any and all claims and rights they may have against each other for any damages or injuries claims that could have been alleged by either party in connection with this matter.

As used in this Agreement, the term "Board" means: the Hillside Board of Education, its current or former elected or appointed officials, administrators, employees, attorneys, agents, servants, representatives, predecessors and successors, insurance carriers, and all other persons

11/18/08

Selected: 1211228

or entities for whom any of the above have been or may be legally responsible. "Adamowitz" means: Joan Adamowitz. The Parties specifically release the following claims as to each other:

(a) Any and all claims and counterclaims that were brought and that could have been brought in the Petition of Appeal, bearing OAL Docket No. EDU 07635-01: and

(b) Any and all available claims for attorneys' fees and expert costs, and any other fees and costs.

2. In total and complete settlement of any and all potential claims referred to in Paragraph no. 1 above, the Board shall pay Adamowitz the sum of ($35,684.19) as unpaid wages (the "Settlement Sum"). Payment comprising the settlement sum shall be delivered to Gail Oxfeld-Kanef, Esq., Oxfeld Cohen, P.C., 60 Park Place, 6th Floor, Newark New Jersey 07102.

3. All regular payroll taxes and deductions shall be withheld from the Settlement Sum as unpaid wages for the year in which the settlement sum is paid, based on Plaintiff's W-4 Form on file with the Board.

4. The parties agree that neither they nor their attorneys, nor representatives shall reveal to anyone, verbally or in writing, other than as may be mutually agreed to in writing, any of the terms of this Agreement. The Parties acknowledge that this confidentiality requirement is a material term to this Agreement and that violating this Paragraph is a material breach of this Agreement.

5. The parties agree that this Agreement may not be used to establish precedent in any future proceeding of any type whatsoever and that it shall be inadmissible in any such proceeding, other than a proceeding to enforce or prove the existence of this Agreement. This Agreement is a compromise of disputed claims and shall not be construed as an admission by any party of any of the acts or omissions alleged or those that could have been alleged by any party against another party in this matter.

11/13/08

Document #1211228

6. This Agreement contains the entire agreement among the Parties, and fully supersedes any and all prior agreements and understandings among the Parties pertaining to the subject matter of this Agreement. The Parties represent and acknowledge that they have not relied upon any representation or statement by any other party, or their counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth in this Agreement. No other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to be a modification of this Agreement. No waiver, modification, or amendment of this Agreement shall be valid or enforceable unless reduced to writing and signed by the party against whom enforcement is sought.

7. The Parties acknowledge that they are fully satisfied with their respective legal representation in this matter and that they have reviewed the terms of this Agreement with their respective counsel.

8. The Parties acknowledge that each party has engaged counsel in connection with the negotiation and completion of this Agreement, and, consequently, agree that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party will not be used in the interpretation of this Agreement or any amendment or exhibit hereto.

9. The Parties agree that the Superior Court, State of New Jersey, shall have sole exclusive jurisdiction to adjudicate any action to enforce the provisions in this Agreement. Such action shall be brought and venued in the Union County Vicinage. The parties agree that all terms to this Agreement are valid and enforceable by the Superior Court of New Jersey.

JA 11/18/08

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10. This Agreement is subject to ratification by the Board at its next scheduled meeting, and is without prejudice to any party if the terms are not agreed upon.

PETITIONER

John Adamowitz

Dated: 11/18/08

RESPONDENT

Kenneth Weinheimer
Board Secretary/Business Administrator
Hillside Board of Education

Dated: 12/2/08

Nagy Sileem
Board President
Hillside Board of Education

Dated:

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1211228 5

Agenda Regular Meeting – November 24, 2008

LABOR RELATIONS – Garreston/Humphrey

30. Motion to approve a stipulation of settlement and release for employee (J.A.)

Motion: A. Garretson Second: J. Korzenski

Daniels	Y	Menza	Y
Garretson	Y	Smith	Absent
Humphrey	Absent	Yafet	Y
Isaac	Y	Sileem	Y
Korzeneski	Y		

Motion: Carried 1-9 7 Yes 0 no

I hereby certify that this is a true copy of the minutes of the Regular Meeting of the Hillside Board of Education held on November 24, 2008.

Kenneth R. Weinheimer
Business Administrator/Board Secretary

52-09

52-09SEC

AGENCY DKT. NO. 374-12/08

IN THE MATTER OF DIANA BURICH,	:	
SEA BRIGHT BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission, 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. Respondent filed an exception, asking that she be accorded "leniency in the Commission's reprimand as an inexperience [sic] Board Member who should have sought advice and/or been advised on how to appropriately execute documentation filing [sic] on my own behalf." She did not appeal – pursuant to *N.J.A.C.* 6A:4 – the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission. Respondent did not file her disclosure documents until five months after they were due. This failure to timely honor an obligation placed upon board members by law resulted in unnecessary expenditures 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.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/29/09

Date of Mailing: 1/29/09

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D20-08**
DIANA BURICH	:	
SEA BRIGHT	:	**DECISION FOR FAILURE TO**
BOARD OF EDUCATION	:	**FILE DISCLOSURE STATEMENTS**
MONMOUTH COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on October 10, 2008, through regular and certified mail return receipt requested, directing Diana Burich, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter of October 10, 2008 enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 16, 2008 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed the disclosure statements on October 14, 2008, but did not file an answer or appear at the Commission's meeting of December 16, 2008.

ANALYSIS

N.J.S.A. 18A:12-25 and 26 of the School Ethics Act require each school official to file personal/relative and financial disclosure statements with the School Ethics Commission. The School Ethics Commission was advised by the Executive County Superintendent that this school official did not file the disclosure statements by April 30, 2008 as required by the Act. The school official filed the disclosure statements on October 14, 2008. The Commission notes that the school business administrator/board secretary filed a statement on behalf of the school official indicating that the school official had completed the disclosure statements on September 16, 2008, but the business administrator/board secretary had failed to file the statements until October 15, 2008. However, even if the disclosure statements had been received by the Executive County Superintendent on September 16, 2008, they would still have been filed after the April 30, 2008 deadline.

DECISION/PENALTY RECOMMENDATION

At its meeting on December 16, 2008, the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the school official does not dispute that the disclosure statements were not timely filed and, therefore the Commission found that the school official's failure to timely file the disclosure

statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction 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. 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.

Paul C. Garbarini/jb

Paul C. Garbarini, Chairperson

Mailing Date: December 17, 2008

Resolution Adopting Decision – D20-08

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 16, 2008, the Commission found that Diane Burich violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 16, 2008, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini/jb

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 16, 2008.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/2008 docs/decisions/D20-08

51-09

AGENCY DKT. NO. 375-12/08

IN THE MATTER OF DAN BELISARIO,	:	
UPPER PITTSGROVE BOARD OF	:	COMMISSIONER OF EDUCATION
EDUCATION, SALEM COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission, 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. 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.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to timely 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. *

COMMISSIONER OF EDUCATION

Date of Decision: 1/29/09

Date of Mailing: 1/29/09

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D22-08**
DAN BELISARIO	:	
UPPER PITTSGROVE	:	**DECISION FOR FAILURE TO**
BOARD OF EDUCATION	:	**FILE DISCLOSURE STATEMENTS**
SALEM COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on October 10, 2008, through regular and certified mail return receipt requested, directing Dan Belisario, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter of October 10, 2008 enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 16, 2008 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed the disclosure statements on October 16, 2008, but did not file an answer or appear at the Commission's meeting of December 16, 2008.

ANALYSIS

N.J.S.A. 18A:12-25 and 26 of the School Ethics Act require each school official to file personal/relative and financial disclosure statements with the School Ethics Commission. The School Ethics Commission was advised by the Executive County Superintendent that this school official did not file the disclosure statements within 30 days from swearing-in or from the start of employment as required by the Act. The school official filed the disclosure statements on October 16, 2008 and does not dispute that they were untimely in accordance with the Act.

DECISION/PENALTY RECOMMENDATION

At its meeting on December 16, 2008, the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the school official does not dispute that the disclosure statements were not timely filed and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction 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. 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.

Paul C. Garbarini /gb

Paul C. Garbarini, Chairperson

Mailing Date: December 17, 2008

Resolution Adopting Decision – D22-08

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 16, 2008, the Commission found that Dan Belisario violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 16, 2008, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 16, 2008.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/2008 docs/decisions/D22-08

50-09

OAL DKT. NO. EDU 7530-08
AGENCY DKT. NO. 129-5/08

DELIA HUNTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN 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 President of the Board of Education of the Town of Phillipsburg signed the Settlement Agreement 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,[1] 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. 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.[2]

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/28/09

Date of Mailing: 1/29/09

[1] It is noted that the Board Attorney signed the agreement only in the capacity of attestor to the Board President's signature.

[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

SETTLEMENT

OAL DKT. NO. EDU 07530-08

AGENCY DKT. NO. 129-5/08

DELIA HUNTER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,

Respondent.

Mary J. Hammer, Esq., for petitioner (Bucceri and Pincus, attorneys)

Donald E. Souders, Jr., Esq., for respondent (Flori, Perrucci, Steinhardt and Fader, attorneys)

Record Closed: January 6, 2009 Decided: January 9, 2009

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on June 20, 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.

Prior to the hearing dates scheduled to commence in November 2008 the parties settled the matter. A Settlement Agreement was prepared and on November 24, 2008, respondent, the Phillipsburg Board of Education members, voted to adopt the terms and conditions of the agreement. The terms of the agreement executed by the parties are incorporated herein by reference.

Having reviewed the contents of the attached Settlement Agreement, 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.

CONCLUSION AND ORDER

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

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

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

January 9, 2009

DATE

Sandra Ann Robinson

SANDRA ANN ROBINSON, ALJ

Date Received at Agency: 1-13-09

Mailed to Parties: Laura Sanders

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 13 2009

DATE

OFFICE OF ADMINISTRATIVE LAW

BOARD OF EDUCATION

Phillipsburg Public Schools – Phillipsburg, New Jersey
Phillipsburg Education Center
445 Marshall Street
(908) 454-3400

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2009 JAN -6 A 11: 17

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (hereinafter referred to as the "Agreement"), is made and entered into this 24TH day of November, 2008, by and between the:

PHILLIPSBURG BOARD OF EDUCATION, with offices at:
445 Marshall Street, Phillipsburg, New Jersey 08865
(hereinafter referred to as the "District" or "Board"),

-and-

DELIA HUNTER, residing at:
1047 Logan Street, Phillipsburg, NJ 08865
(hereinafter referred to as the "Employee").

WITNESSETH:

WHEREAS, the Employee commenced a due process proceeding against the District by way of Verified Petition filed on or about May 8, 2008, same seeking the recovery of two (2) weeks' wages as a result of allegedly being suspended without pay for period of time from April 1-14, 2008;

WHEREAS, the aforementioned proceeding was transmitted to the Office of Administrative Law and assigned Docket No. EDUOA-07530-2008N as a contested hearing, after which time the parties reached a settlement; and

WHEREAS, the parties are desirous of memorializing the terms of their aforementioned settlement relative to the aforementioned proceedings and all issues raised therein;

NOW, THEREFORE, the parties hereto enter into this Settlement Agreement as follows:

1. The District shall, within fifteen (15) days hereof, pay to the Employee the sum of Five Hundred Thirty Six Dollars and Ninety Seven Cents ($536.97), same representing nine (9) days' pay at the rate of $15.91 per hour.

2. The District shall cause the within Settlement to be approved at its next regularly scheduled meeting on Monday, November 24, 2008.

3. Subject to the Employee receiving the payment required hereunder, the within matter shall be dismissed, with prejudice and, further, the parties shall and hereby release any and all claims and/or defenses which they have, may have and/or those that could have been asserted in the aforementioned proceeding.

4. In the event either party is required to utilize legal counsel to enforce the terms of this Agreement, the non-prevailing party shall be responsible for any and all legal fees and costs incurred in connection therewith.

5. Notices and payments: Any notices required to be sent pursuant to this Agreement shall be considered to be effective when sent by certified mail, return receipt requested, to:

To the Employee:

Ms. Delia Hunter
1047 Logan Street
Phillipsburg, NJ 08865

To the Board

Secretary-Bd. Of Educ.
445 Marshall Street
Phillipsburg, NJ 08865

Copy to:

Mary J. Hammer, Esq.
Bucceri and Pincus
1200 US Highway 46
Clifton, NJ 07013-2440

Donald Souders, Jr., Esq.
Florio Perrucci, et als.
235 Frost Avenue
Phillipsburg, NJ 08865

Any changes in the above addresses must be provided by certified mail, return receipt requested to the other party. Payments should be made payable to "Delia Hunter" at the above-mentioned address, with a copy of the transmittal letter being sent to Employee's counsel.

IN WITNESS WHEREOF, the parties hereto set their hands and seals to this Agreement effective on the day and year first above written.

Delia Hunter

Delia Hunter, Employee

WITNESS:

Peter T. Hunter

PHILLIPSBURG BOARD OF EDUCATION

BY: Paul Rummerfield

Paul Rummerfield, President BOE

ATTEST

Donald E. Souders, Jr., Esquire

54-09

54-09SEC

AGENCY DKT. NO. 372-12/08

IN THE MATTER OF FERDINAND FUENTES, JERSEY CITY GOLDEN DOOR CHARTER SCHOOL BOARD OF TRUSTEES, HUDSON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the decision of the School Ethics Commission, 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. 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.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to timely 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.*

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/29/09

Date of Mailing: 1/29/09

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D17-08**
FERDINAND FUENTES	:	
JERSEY CITY GOLDEN DOOR	:	**DECISION FOR FAILURE TO**
BOARD OF TRUSTEES	:	**FILE DISCLOSURE STATEMENTS**
HUDSON COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on October 10, 2008, through regular and certified mail return receipt requested, directing Ferdinand Fuentes, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter of October 10, 2008 enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 16, 2008 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed an answer on October 17, 2008 and the disclosure statements on October 15, 2008, but did not appear at the Commission's meeting of December 16, 2008.

ANALYSIS

N.J.S.A. 18A:12-25 and 26 of the School Ethics Act require each school official to file personal/relative and financial disclosure statements with the School Ethics Commission. The School Ethics Commission was advised by the Executive County Superintendent that this school official did not file the disclosure statements by April 30, 2008 as required by the Act. The Commission notes that the school official filed the disclosure statements on October 15, 2008. In his answer, Mr. Fuentes claims that the forms were hand delivered to the Executive County Superintendent by September 22, 2008. However, the Commission notes that, if the forms had been received by the Executive County Superintendent on September 22, 2008, they were still untimely.

DECISION/PENALTY RECOMMENDATION

At its meeting on December 16, 2008, the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the school official does not dispute that the disclosure statements were filed by April 30, 2008 as required by the Act and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and

26. The Commission recommended that the Commissioner of Education impose a sanction 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. 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.

Paul C. Garbarini, Chairperson

Mailing Date: December 17, 2008

Resolution Adopting Decision – D17-08

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 16, 2008, the Commission found that Ferdinand Fuentes violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 16, 2008, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini/jb
Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 16, 2008.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/2008 docs/decisions/D17-08

53-09

53-09SEC

AGENCY DKT. NO. 373-12/08

IN THE MATTER OF SAMUEL TAYLOR,	:	
VILLAGE CHARTER SCHOOL BOARD	:	COMMISSIONER OF EDUCATION
OF TRUSTEES, MERCER COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission, 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. 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.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes respondent for failing to timely 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. *

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 1/29/09

Date of Mailing: 1/29/09

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

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D18-08**
SAMUEL TAYLOR	:	
VILLAGE CHARTER SCHOOL	:	**DECISION FOR FAILURE TO**
BOARD OF TRUSTEES	:	**FILE DISCLOSURE STATEMENTS**
MERCER COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause (OTSC) issued on October 10, 2008, through regular and certified mail return receipt requested, directing Samuel Taylor, a "school official" under N.J.S.A. 18A:12-23 of the School Ethics Act, to show cause as to why the Commission should not find the school official in violation of the School Ethics Act, (Act) N.J.S.A. 18A:12-21 et seq., for failing to file personal/relative and financial disclosure statements pursuant to N.J.S.A. 18A:12-25 and 26. In its letter of October 10, 2008 enclosing the OTSC, the Commission provided notification that this school official had 20 days to respond to the OTSC, that the Commission would discuss this matter at its December 16, 2008 meeting, that the school official had the right to attend the meeting, and that the school official could be found in violation of the Act and receive a penalty up to removal. The school official filed the disclosure statements on November 17, 2008, but did not file an answer or appear at the Commission's meeting of December 16, 2008.

ANALYSIS

N.J.S.A. 18A:12-25 and 26 of the School Ethics Act require each school official to file personal/relative and financial disclosure statements with the School Ethics Commission. The School Ethics Commission was advised by the Executive County Superintendent that this school official did not file the disclosure statements by April 30, 2008 as required by the Act. The Commission notes that the school official filed the disclosure statements on November 17, 2008 and does not dispute that they were untimely in accordance with the Act.

DECISION/PENALTY RECOMMENDATION

At its meeting on December 16, 2008, the Commission found probable cause to credit the allegation that the school official violated N.J.S.A. 18A:12-25 and 26. The Commission also found that the school official does not dispute that the disclosure statements were not timely filed and, therefore the Commission found that the school official's failure to timely file the disclosure statements was a clear violation of N.J.S.A. 18A:12-25 and 26. The Commission recommended that the Commissioner of Education impose a sanction 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. 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.

Paul C. Garbarini

Paul C. Garbarini, Chairperson

Mailing Date: December 17, 2008

Resolution Adopting Decision – D18-08

Whereas, the School Ethics Commission has considered its Order to Show Cause in this matter; and

Whereas, at its meeting of December 16, 2008, the Commission found that Samuel Taylor violated N.J.S.A. 18A:12-25 and 26; and

Whereas, at its meeting of December 16, 2008, the Commission recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed this draft decision as prepared by its staff;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 16, 2008.

Joanne Boyle
Executive Director

PCG/LJB/MET/ethics/financial disclosure/2008 docs/decisions/D18-08

55-09

OAL DKT. NO. EDU 7401-00
AGENCY DKT. NO. 173-5/00

SAUNDRA GREEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT 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 filed no exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge – for the reasons clearly presented in his decision – that this matter is appropriately dismissed for lack of prosecution.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/29/09

Date of Mailing: 1/29/09

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

55-09

SAUNDRA GREEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought reimbursement of full salary without loss of sick time for an injury allegedly sustained in 1999 in the course of her employment. Petitioner filed a timely claim before the Division of Worker's Compensation, but that claim was dismissed for lack of prosecution.

Based upon petitioner's failure to prosecute her appeal, the ALJ concluded that the appeal should be dismissed.

The Commissioner adopted the Initial Decision as the final decision in this case, and dismissed the petition of 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.

January 29, 2009



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL FOR FAILURE TO PROSECUTE
OAL DKT. NO. EDU 07401-00
AGENCY DKT. NO. 173-5/00

SAUNDRA GREEN,
Petitioner,
v.
THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Alan S. Porwich, Esq., for petitioner (Feintuch, Porwich & Feintuch, attorneys)

Ken Iwama, General Counsel, respondent

Record Closed: December 31, 2008 Decided: December 31, 2008

BEFORE **KEN R. SPRINGER**, ALJ:

STATEMENT OF THE CASE

Petitioner Saundra Green (Green), a technical coordinator employed by the State-Operated School District of the City of Jersey City (District), seeks reimbursement

of full salary, without loss of sick time, for an injury allegedly sustained in the course of employment. Pursuant to N.J.S.A. 18A: 30-2.1, a school employee absent from work as a result of a personal injury "caused by an accident arising out of and in the course of employment" may receive up to one year of salary, without utilizing any of regular accumulated sick leave. While the Commissioner of Education (Commissioner) has jurisdiction to decide all cases arising under the school laws, the Division of Workers' Compensation possesses primary jurisdiction over claims for work-related injuries. Although Green filed a timely claim before the Division of Workers' Compensation, her claim was dismissed for lack of prosecution. Accordingly, the appeal pending before the Commissioner must also be dismissed.

PROCEDURAL HISTORY

On May 24, 2000, Green filed a verified petition with the Commissioner seeking payment of "full wages with no loss of sick days". In its answer filed on June 5, 2000, the District denied that Green's absences were due to a work-related injury. At the request of both parties, the Office of Administrative Law (OAL) entered a series of orders placing the education case on inactive status pending the outcome of the compensation case. The last order of inactivity, entered on May 27, 2008, expired on November 24, 2008.

FINDINGS OF FACT

Green's petition relates to an injury said to have occurred on September 20, 1999, while she was moving computer equipment in the course of her employment. Thus, the events giving rise to her claim are now more than nine years old.

In my capacity as Assignment Judge for the Newark vicinage, I wrote to the parties on November 12, 2008 to inquire about the current status of this matter. On December 1, 2008, petitioner's attorney advised that the "workers' compensation case was dismissed without prejudice for lack of prosecution but we are in the process of filing a motion to restore the case within the allowed period."

Thereafter, on December 10, 2008, I wrote to the parties requesting a copy of the order of dismissal and directing counsel to "advise in writing by December 17, 2008 why the proceeding before the Commissioner of Education should not also be dismissed for failure to prosecute." To date, no response has been received.

CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that this matter should be dismissed for lack of prosecution.

Appellate courts have held that the Division of Workers' Compensation processes "primary jurisdiction" over claims for work-related injuries and that the function of N.J.S.A. 18A:30-2.1 "is to complement compensation benefits for a strictly limited time." Forgash v. Lower Camden Cty. Sch., 208 N.J. Super. 461, 466 (App. Div. 1985). See also Theodore v. Dover Bd. Of Educ., 183 N.J. Super. 407, 416 (App. Div. 1982).

In the past, sick-leave injury cases were filed with the Commissioner of Education within ninety days of denial, sent to the OAL, and placed on inactive status awaiting a determination by the Division of Workers' Compensation as to whether the claimant sustained a qualifying injury. Veneret v. Elizabeth Bd. of Educ., 95 N.J.A.R.2d (EDU) 134 (St. Bd. 1991). As of September 5, 2006, the Department of Education amended its rules so that prospectively, these cases do not have to be filed with the Commissioner until after the compensation judge has rendered a decision. N.J.A.C. 6A:3-1.3(i)(1).

In accordance with the procedures then in effect, the OAL deferred to the predominant interest of the Division of Workers' Compensation and placed this matter on inactive status to await the outcome in that forum. More then eight years have elapsed since the filing of this education appeal. Recently, petitioner's counsel informed that the OAL that the compensation claim had been dismissed for lack of

prosecution. When given an opportunity to show good cause why the instant matter should not also be dismissed on the same ground, petitioner failed to offer any explanation or justification.

Matters before the Office of Administrative Law "shall proceed with all reasonable expedition." N.J.A.C. 1:1-14.2(a). Moreover, the parties are obligated to advise the clerk and the judge of any event which will delay the conduct of the case. N.J.A.C. 1:1-14.2(b). An administrative law judge may take appropriate action, including dismissing an appeal, "for unreasonable failure to comply with any order of a judge or any requirement of this chapter." N.J.A.C. 1:1-14.14(a). Given the inordinate delay in prosecuting the underlying compensation claim and the absence of any justification for such delay, the case pending before the Commissioner should also be dismissed.

ORDER

It is **ORDERED** that Green's petition is hereby dismissed for lack of prosecution.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 31, 2008
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Date Received at Agency:

December 31, 2008

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 5 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

da/lr

#56-09L

56-09

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

January 28, 2009

Sanford R. Oxfeld, Esq.
Oxfeld Cohen, P.C.
60 Park Place, 6th Floor
Newark, New Jersey 07102-4003

Jeffrey R. Merlino, Esq.
Lindabury, McCormick, Estabrook & Cooper, P.A.
53 Cardinal Drive
P.O. Box 2369
Westfield, NJ 07091-2369

Dear Counsel:

I have reviewed the papers filed in the matter of *J.G. and C.G., on behalf of minor child, J.G. v. Board of Education of the Village of Ridgewood, Bergen County*, Agency Dkt. No. 346-11/08, wherein petitioners seek an order compelling the respondent Board of Education to use a particular service provider for the behavioral therapy ordered for their son by the district's child study team, as well as a finding that any contract between the Board and the provider's former employer restricting the Board's use of said provider is unenforceable as a matter of public policy.

In response to a request for reasons as to how this matter constitutes a dispute arising under the school laws, petitioners state that the Board's failure to utilize the desired service provider has deprived their son of a thorough and efficient education, and that the question of a restrictive covenant – ordinarily a matter for the courts – is appropriately decided by the Commissioner herein because of its impact on J.G.'s education and the dictates of the single controversy doctrine.

Upon review, however, I cannot agree that this matter is properly before me as a controversy under the school laws. Although petitioner is correct that the Commissioner of Education may hear ancillary matters related to primary education law claims, I can find no such claim in this instance. While petitioners contend that the district's choice of service provider has deprived their son of the education to which he is entitled by law as determined by the district's

child study team, the Board responds that it has at all times acted in accordance with J.G.'s Individual Education Plan (IEP) (Answer at 3, Fifth Affirmative Defense). Thus, in essence, this matter represents a dispute between the parties as to the proper implementation of J.G.'s IEP – a dispute which by its very nature raises issues beyond the expertise and adjudicative jurisdiction of the Commissioner of Education. As has previously been held on various occasions, neither the Commissioner nor the Office of Administrative Law – in the context of a school law dispute heard pursuant to *N.J.S.A.* 18A:6-9 – has the authority to reach conclusions regarding the appropriateness of an individualized education program or the manner in which it is implemented. See *E.M., on behalf of minor child, J.B. v. Board of Education of the City of East Orange, Essex County, State-Operated School District of the City of Newark, Essex County, and Board of Trustees of the Greater Newark Charter School, Essex County*, Commissioner's Decision No. 426-08E, decided October 24, 2008, citing *Golden Door Charter School v. State-Operated School District of the City of Jersey City, Hudson County*, Commissioner's Decision No. 100-07, decided March 15, 2007 (noting the cases referenced therein at footnote 11), affirmed by the State Board of Education, August 1, 2007, Decision No. 10-07, and by the Superior Court, Appellate Division, June 17, 2008, Docket No. A0342-07.

Accordingly, I hereby DISMISS the petition of appeal for failure to raise a controversy within the jurisdictional purview of the Commissioner of Education.*

Sincerely,

Lucille E. Davy
Commissioner

c: 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.

57-09

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

December 29, 2008

Jonathan I. Nirenberg, Esq.
Nesnick Nirenberg & Siegler
100 Eagle Rock Avenue, Suite 31
East Hanover, New Jersey 07936

Rita F. Barone, Esq.
Purcell, Ries, Shannon, Mulcahy & O'Neill
One Pluckemin Way, Crossroads Business Center
P.O. Box 754
Bedminster, NJ 07921

Dear Parties:

BERNARD SHARKEY V. BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, MORRIS COUNTY, AGENCY DKT NO. 207-8/07, OAL DKT NO. EDU 9335-07, ACTING COMMISIONER DECISION NO. 494-08

We are enclosing a copy of the decision of the Commissioner of Education dated December 29, 2008 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/bsharkey-494-08
Enclosure
c: State Law Library



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9335-07
AGENCY DKT. NO. 207-8/07

BERNARD SHARKEY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, MORRIS COUNTY,

Respondent.

Jonathan I. Nirenberg, Esq., for petitioner (Nesnick, Nirenberg & Seigler, attorneys)

Rita Barone, Esq., for respondent (Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys)

Record Closed: June 24, 2008 Decided: November 21, 2008

BEFORE **CARIDAD F. RIGO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Bernard Sharkey was employed by respondent Washington Township Board of Education as a financial officer/accounts-payable person. Petitioner began working for respondent on February 1, 2004, and was terminated on February 2, 2007.

Petitioner claims that his termination from employment was improper because he had achieved tenure prior to the notice of termination.

Petitioner filed his petition appealing his termination on August 8, 2007; respondent filed its answer to the petition on August 27, 2007; and the case was transmitted to the Office of Administrative Law (OAL), where it was filed as a contested case on September 4, 2007. After a series of prehearing conferences and exchange of discovery the case was heard on April 17, 2008. The record closed on June 24, 2008. The time for filing this Initial Decision was extended by Orders of Extension.

FINDINGS OF FACT

A Stipulation of Facts is attached, marked Exhibit A.

ISSUES

1. Was petitioner in a tenure-eligible position?

2. If so, did petitioner work the required period of time to acquire tenure?

LEGAL DISCUSSION AND CONCLUSIONS

Petitioner contends that his position was tenure eligible because his position was clerical. N.J.S.A. 18A:17-2(b) is the applicable statute and it provides:

> 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 calendar 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.

In determining whether a position is tenure eligible, the duties performed, rather than the title of the position or job description, are controlling. The case of Barnes v. Board of Education of Jersey City, 85 N.J. Super. 42, 45 (App. Div.), certif. denied, 43 N.J. 450 (1964), holds that the phrase "clerical positions" must be given a broad interpretation. Webster's Ninth New Collegiate Dictionary defines a clerical as "one employed to keep records or accounts or to perform general office work."

Betty Fedyna, an administrative assistant to the superintendent for thirteen and a half years, testified on petitioner's behalf. She stated that Sharkey's job was titled "financial assistant," and that he processed purchase orders and accounts receivables. Sharkey had no supervisory responsibilities. She worked with Sharkey in the central office. Everyone who worked in the central office as staff was tenured.

Elizabeth George is the school district's business administrator and board secretary. She testified that the central office staff included administration staff. Sharkey was already working there when she got there. She stated that Sharkey had oversight over an assistant accounts-payable person. She further testified that the financial officer's responsibility was to maintain the accounting records. Sharkey had to maintain balance sheets, income statements and the treasurer's report on a monthly basis. He gathered information and prepared reports for the auditors. She said that Sharkey's job was more than a bookkeeper, but less than an accountant. Ms. George testified that Sharkey would implement what new systems she established.

Under cross-examination Ms. George defined a bookkeeper as someone who records numbers and processes papers. She said that Sharkey did some bookkeeping, and that he was expected to do more analysis work. Sharkey had to track data and project the utility bills, and he also did data entry. She stated that a college degree was not necessary to do Sharkey's job, only on-the-job experience.

Bernard Sharkey testified that as a financial officer/accounts-payable person at the Board of Education he handled data entry, mail, production of reports for the board secretary, purchase orders, vendor files, updating files, disbursements and invoices. He said he did not supervise anyone. He had no discretion; anything he did had to be approved by Elizabeth George.

Having considered the testimony of the witnesses along with the stipulated facts, I **CONCLUDE** that Bernard Sharkey was in a tenure-eligible clerical position.

The next issue is whether Mr. Sharkey worked the requisite period of time to acquire tenure. N.J.S.A. 18A:17-2 states that a tenure-eligible employee must hold his position after the expiration of a period of employment of three consecutive calendar years in order to obtain tenure. The case of Picogna v. Board of Education of Cherry Hill, 143 N.J. 391 (1996), is very similar to the instant case. Like Sharkey, Picogna was terminated before serving the requisite three years, and he did not acquire tenure. Tenure arises only upon compliance with the precise conditions articulated in the statute. Picogna, supra, 143 N.J. at 399 (citing Zimmerman v. Bd. of Educ. of Newark,

38 N.J. 65 (1962)). Tenure cannot be obtained without the actual service of the time specified in the statute. Id. at 401. Mr. Sharkey was terminated on February 1, 2007, and it is undisputed that he did not work on February 2, 2007. He did not work that one more day to satisfy the statutory requirement of employment *after* expiration of three consecutive years. I **CONCLUDE** that because petitioner did not work the required period of time, he did not acquire tenure.

ORDER

Therefore, it is hereby **ORDERED** that petitioner's appeal of his termination from employment as a financial officer with the Washington Township Board of Education is **DISMISSED**.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** or consideration.

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

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

November 21, 2008

DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: November 21, 2008

Mailed to Parties:

NOV 24 2008

DATE

OFFICE OF ADMINISTRATIVE LAW

lr

APPENDIX

Witnesses:

For petitioner:

Bernard Sharkey

Betty Fedyna

For respondent:

Elizabeth George

EXHIBITS

Exhibit A Stipulated Facts

For petitioner

P-1 Agreement/Contract for salaries with respondent board

P-2 Summary of Board meeting of June 2, 2006

P-3 Petitioner's contract with respondent

P-4 Petitioner's job description

P-5 Policy for Termination

P-6 Respondent's letter dated February 22, 2007

P-7 Respondent's letter dated February 16, 2007

P-8 Respondent's Board meeting of February 15, 2007

P-9 Termination of Employment outline

For respondent

R-1 Job description same as P-4

R-2 Job performance evaluations

R-3 Employment contract

R-4 Petitioner's resume

R-5 Revised job description

RESNICK NIRENBERG & CASH, P.C.
100 Eagle Rock Avenue, Suite 300
East Hanover, New Jersey 07936
Tel: (973) 781-1204
Fax: (973) 781-1205
Attorneys for Petitioner

RECEIVED
STATE OF N.J.
LAW
2008 APR 16 P 10:17

BERNARD SHARKEY,

Petitioner

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, MORRIS COUNTY,

Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

AGENCY DOCKET NO. 207-7/07

STIPULATED FACTS

For purposes of the above-captioned matter, the parties hereby stipulate that the following facts are true:

1. Respondent Washington Township Board of Education employed Petitioner Bernard Sharkey as a Financial Officer/Accounts Payable from February 1, 2004 to March 30, 2007.

2. Wes Fromm was Mr. Sharkey's supervisor from February 1, 2004 until June 2004.

3. Elizabeth George became Mr. Sharkey's supervisor in July 2004, and remained his supervisor until his employment terminated on March 30, 2007.

4. Mr. Sharkey's primary daily job duties as Respondent's Financial Officer/Accounts Payable included the following:

   a. Depositing checks and posting receipts to the appropriate accounts.

b. Making cafeteria income deposits for the Old Farmers Road School and the Long Valley Middle School.

c. Entering purchase orders for special requests into Respondent's accounting system.

d. Entering and reviewing utility bills on Utility Direct.

e. Posting electronic transfers to the proper accounts.

f. Changing the disaster recovery tape.

g. Storing appropriate documents in the district safe.

h. Printing, bursting, and mailing purchase orders.

5. Prior to the 2006/2007 school year, Mr. Sharkey's primary bi-weekly job duties as Respondent's Financial Officer/Accounts Payable included the following, which subsequently became months job duties:

a. Manually issuing invoices for purchase orders.

b. Printing checks.

c. Posting payroll disbursements to various accounts.

d. Creating payroll transfer purchase orders, and posting them to the proper accounts.

e. Printing financial reports for approval and use at Board meetings.

f. Reviewing Board Meeting minutes and making any necessary adjustments, including any necessary adjustments to payroll accounts and any necessary account transfers, as instructed by the Board Secretary.

g. Mailing out checks.

h. Assuring that all payment had the required approval.

i. Filing the completed payment documents in the appropriate location.

6. Mr. Sharkey's primary monthly job duties as Respondent's Financial Officer/Accounts Payable included the following:

a. Printing spreadsheets for receipts and disbursements.

b. Balancing the books for the Custodial Account.

c. Providing data regarding cash account amounts to the Treasurer of Schools, and making any adjustments requested by the Treasurer.

d. Distributing monthly closing reports to the appropriate individuals.

e. Providing the Cafeteria Service account disbursement report to the appropriate individuals.

f. Balancing the Cafeteria and Principle accounts.

g. Posting electronic transfers on bank statements.

h. Posting deposits and disbursements from the Treasurer for CD accounts.

i. Staying current with the Treasurer with respect to recorded cash amounts.

j. Printing invoices for transportation, building use, and school workshops to other school districts and organizations.

k. Reconciling all state aid payments received from the State of New Jersey.

7. During the 2006/2007 school year, Mr. Sharkey's primary monthly job duties as Respondent's Financial Officer/Accounts Payable also included the following:

a. Issuing invoices for purchase orders.

b. Printing financial reports for approval and use at Board Meetings.

c. Reviewing Board Meeting minutes and making any necessary adjustments, including any necessary adjustments to payroll accounts and any necessary account transfers, as instructed by the Board Secretary.

d. Mailing out checks.

e. Assuring that all payment had the required approval.

8. As Financial Officer/Accounts Payable, Mr. Sharkey's year end job responsibilities for Respondent included:

a. Posting new account values for the new year opening balances.

b. Providing blanket purchase orders for utilities, copiers, postage machines, telephones, energy and bus payments.

c. Setting up the master receipts in Respondent's accounting system.

d. Providing a purchase order based on projected payroll account distribution.

e. Closing and establishing records for the new fiscal year, following a script from the vendor of Respondent's accounting system.

f. Using a computerized process to automatically generate 1099's at the end of the year, and mailing them out, including filing them with the Internal Revenue Service.

9. As Financial Officer/Accounts Payable, in addition to his daily, monthly and annually scheduled job duties, Mr. Sharkey's responsibilities for Respondent also included the following:

a. Posting scheduled government deposits to the proper accounts.

b. Printing and distributing account reports.

c. Printing and distributing account history comparison data to the appropriate individuals.

d. Maintaining personnel access security for the budget system.

e. Maintaining account data for General Ledger, Expense, and Revenue.

f. Producing new GAAP accounts for grants and donations when needed.

g. Providing account information to the schools.

h. Transferring monies among bank accounts.

i. Accounting for the payment of outside transportation services.

j. Preparing all filings for the Federal Schools and Libraries Universal Service Fund, and following up with vendors and federal government as required.

k. Preparation of all required final and interim financial reports for grants received in the District for filing with the State Department of Education in coordination with the office of the Assistant Superintendent and the Director of Special Services.

l. Printing monthly financial statements and other standard system forms requested by Respondent's auditors.

m. Reconciling accounts when debits did not equal credits.

n. Printing a spreadsheet showing that debits equaled credits for all cash functional accounts, and providing that report to the Treasurer.

o. Maintaining vendor information on Respondent's accounting system.

p. Mailing disbursement checks that were provided to him.

q. Contacting the school administration when an order could not be printed because the order was over budget.

r. Confirming that Respondent had received all money due from the Treasure, based on data provided to him by his supervisor, Ms. George.

s. Reimbursing schools for the petty cash they spent.

t. Replenishing the petty cash box.

u. Charting the prior year's spending for Energy, Copiers, Postage Machines, Telephones, Utilities and Business Payments to be used by others to prepare the following year's budget and to monitor that they did not go over budget

v. Issuing invoices to schools for the use of Respondent's bus service, and keeping track of payments for the use of Respondent's bus service.

w. Tracking fixed assets exceeding $2,000, by reviewing payments for purchase orders, and added those purchase orders to the files for the corresponding assets.

x. Preparing journal entries on Respondent's accounting system.

10. Respondent formally approved the document attached hereto as Exhibit "A" as the job description for Mr. Sharkey's position.

11. On February 1, 2007, Mr. Sharkey received a letter from his supervisor, Elizabeth George, purporting to terminate his employment as of February 2, 2007.

12. On February 22, 2007, Mr. Sharkey received a letter stating that, during a meeting on February 15, 2007, Respondent had approved his termination effective March 30, 2007.

13. As of March 30, 2007, Mr. Sharkey had not engaged in any neglect, misbehavior or other offense.

14. Respondent never filed any charges against Mr. Sharkey.

15. Respondent never scheduled or conducted a hearing regarding the potential termination of Mr. Sharkey's employment.

16. Mr. Sharkey annual salary with Respondent for the contract year of July 1, 2006 to June 30, 2007 was $42,628.

Stipulated and Agreed:

Purcell, Ries, Shannon, Mulcahy & O'Neill
Attorneys for Respondent

By: Rita Barone
Rita Barone

Dated: April 15, 2008

Resnick Nirenberg & Siegler
Attorneys for Petitioner

By: Jonathan I. Nirenberg

Dated: April 15, 2008

63-09

OAL DKT. NO. EDU 13057-05
AGENCY DKT. NO. 288-10/05

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

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs that this matter is appropriately dismissed in light of petitioner's communication so requesting, which effectively operates as a withdrawal of her claim pursuant to *N.J.A.C.* 1:1-19.2.

Accordingly, the Initial Decision of the OAL dismissing the appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/09/09
Date of Mailing: 2/09/09

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 13057-05
AGENCY DKT. NO. 288-10/05

DENISE BROWN
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,
Respondent.

Laurie W. Fiedler, Esq. on behalf of petitioner (Law Office of Laurie W. Fiedler, LLC)

Joanne Butler, Esq. on behalf of respondent (Schenck, Price, Smith & King)

Record Closed: January 5, 2008 Decided: January 7, 2008

BEFORE **WALTER M. BRASWELL**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The matter was transmitted to the Office of Administrative Law (OAL) on December 23, 2005, 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 January 10, 2006 the matter was placed on the inactive list by ALJ Thomas E. Clancy. On or about April 2, 2007 the matter was reassigned to the undersigned and continued on inactive status. On January 5, 2009 petitioner's counsel advised, in writing, the OAL that this matter has settled in Workers' Compensation Court and requested this matter be dismissed. The letter requesting the dismissal is attached hereto and made a part hereof.

Having reviewed the attached correspondence I **FIND** that the issues in this matter have been resolved and therefore, this matter is hereby **DISMISSED**.

ORDER

Accordingly, I hereby file this Dismissal Order to administratively dispose of this matter since Petitioner no longer has standing to pursue a claim of action.

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

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

1-7-09
DATE

WALTER M. BRASWELL, ALJ

Date Received at Agency: 1-8-09

Mailed to Parties:

JAN 8 2009
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

ljb

LAW OFFICE OF LAURIE W. FIEDLER, LLC
ATTORNEY AT LAW
PREAKNESS VALLEY OFFICE PARK
504 VALLEY ROAD
WAYNE, NJ 07470

PHONE 973-633-6510
FAX 973-633-8262
E-MAIL: HISLAW@AOL.COM

LAURIE W. FIEDLER

January 5, 2009

VIA FACSIMILE 973-648-6124 & REGULAR MAIL
Honorable Walter M. Braswell, A.L.J.
Office of Administrative Law
33 Washington St., 7th Floor
Newark, NJ 07102

Re: Denise Brown v. Paterson Board of Education
OAL: Docket No.: EDU-13057-05

Dear Judge Braswell:

This firm represents Denise Brown in the above-referenced matter. Pursuant to Your Honor's request, please be advised that this case has just settled in Workers' Compensation Court. I respectfully request this matter be dismissed at the Office of Administrative Law. Kindly advise if the Court requires anything further to effect the dismissal.

Should Your Honor require anything further, please do not hesitate to contact me.

Thank you for your consideration.

Respectfully submitted,

Laurie W. Fiedler

Laurie W. Fiedler

LWF/cr

cc: Joanne Butler, Esq. (via facsimile 973-540-7300)

64-09

OAL DKT. NO. EDU 5662-08
AGENCY DKT. NO. 94-4/08

T.J. on behalf of minor children, T.J. and T.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed 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 petition and the counterclaim are hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/09/09

Date of Mailing: 2/09/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05662-08

AGENCY DOCKET NO. 94-4/08

T.J. ON BEHALF OF T.J.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,

Respondent.

T.J. appearing pro se

John E. Croot, Jr., Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, LLC)

Record Closed: January 5, 2009 Decided: January 6, 2009

BEFORE **WALTER M. BRASWELL**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 9, 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. A hearing was conducted on October 9, 2009 at which time the parties prepared and submitted attached settlement indicating the terms to the OAL. On January 5, 2009 the undersigned received the Board Resolution approving the settlement which is attached hereto.

Having reviewed the contents of the attached Stipulation of Settlement, and Board of Education Resolution, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

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

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

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

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

1-5-09
DATE

Walter M. Braswell
WALTER M. BRASWELL, ALJ

Date Received at Agency: 1-8-09

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 8 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2009 JAN -5 P 4:17

EDUCATION – Yafet/Smith (continued)

8. Motion to approve the attached resolution concerning the settlement for non-residency for Pupils #4899632301/#30252 and #30257. (Attachment ED#4-11/08)

Motion: A. Menza Second: June Korzeneski

Daniels	Y	Menza	Y
Garretson	Y	Smith	Absent
Humphrey	Absent	Yafet	Y
Isaac	Y	Sileem	Y
Korzeneski	Y		

Motion carried: 7 yes, 0 no

I hereby certify that this is a true copy of the minutes of the Regular Meeting of the Hillside Board of Education held on November 24, 2008.

Kenneth R. Weinheimer
Business Administrator/Board Secretary

Hillside Board of Education
Settlement of Pending Action Pertaining to the Determination of
Non-Residency of Pupils #4899632301/#30252 and #30257
RESOLUTION
November 24, 2008

WHEREAS, a residency hearing concerning pupils #4899632301/#30252 and #30257 was held before the Hillside Board of Education Residency Committee on February 27, 2008; and

WHEREAS, on February 28, 2008 the Board of Education adopted a resolution that pupils #4899632301/#30252 and #30257 be removed from the District because they were not domiciled in Hillside; and

WHEREAS, T.J., the mother of pupils #4899632301/#30252 and #30257, filed a petition of appeal with the Commissioner of Education; and

WHEREAS, the appeal was transferred to the Office of Administrative Law, Agency Ref. No. 94-4/08; and

WHEREAS, the appeal was scheduled for a hearing on October 9, 2008 before the Hon. Walter M. Braswell, OAL; 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 October 9, 2008: and

WHEREAS, the male student #30257 has graduated from high school, and the female student pupils #4899632301/#30252 has transferred to the Newark public schools for the 2008-2009 school year; and

WHEREAS, the Board of Education, having reviewed the terms of the proposed settlement, has determined that the resolution of this matter without further litigation is in the best interests of the District;

NOW, THEREFORE, BE IT RESOLVED, that the Board of Education approves settlement of the pending action according to the following terms:

- pupils #4899632301/#30252 will not be permitted to re-enroll in the Hillside School District unless proof is submitted that she is validly domiciled in Hillside;
- T.J., the mother of pupils #4899632301/#30252 and #30257, will pay to the District the sum of $2,000.00 for 2007-2008 tuition for the children, payable in monthly installments of $100.00;
- If the payments are not made on time, the District may enter a judgment in the amount of $2,000.00, less any payments made; and
- The Board President and Secretary are authorized to execute any documents required to complete the settlement.

T.J. o/b/o minor children T.J and T.J, Petitioner v. Hillside Board of Education Respondent	COMMISSIONER OF EDUCATION OAL DKT NO. EDU 5662-08 Agency DKT No. 94-4/08

WHEREAS, the Petitioner brought this residency appeal from a determination of the Hillside Board of Education that her children T.J. and T.J. were no longer domiciled in Hillside; and

WHEREAS, the Hillside Board of Education filed a Counterclaim for tuition for the 2007-2008 school year in the amount of $11,545.00 per child; and

WHEREAS, the parties have conferred and wish to settle this matter.

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

1. The male student T.J has now graduated from high school. The female student T.J. has transferred to the Newark Public Schools for the 2008-2009 school year.

2. T.J. will not re-enroll in the Hillside School District unless proof is submitted that she has established a valid domicile in Hillside.

3. Terry Jones, the parent of T.J. and T.J., agrees to pay the Hillside School District $2,000.00 for 2007-2008 tuition, payable in monthly installments of $100.00 commencing on November 1, 2008.

4. If the payments are not made in a timely manner, the School District can seek the entry of a judgment in the amount of $2,000.00, less any payments made.

5. This agreement is subject to approval by the Hillside Board of Education.

6. Ms Jones acknowledges that she has entered this agreement freely, willingly and voluntarily, without duress or coercion.

Dated: 10/9/2008

Terry Jones
Terry Jones, Pro Se

John E. Croot Jr.
Attorney for Hillside Board of Ed.

65-09

#65-09

OAL DKT. NO. EDU 9151-06
AGENCY DKT. NO. 235-7/06

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FUNDING, AND BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs that this matter is appropriately dismissed in light of the parties' fully executed Consent Order, which effectively operates as a withdrawal of petitioner's claim pursuant to *N.J.A.C.* 1:1-19.2.

Accordingly, the Initial Decision of the OAL dismissing the appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/09/09

Date of Mailing: 2/09/09

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 09151-06

AGENCY Case # 235-7/06

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,

Petitioner/Appellant,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FUNDING AND MONTVILLE BOARD OF EDUCATION,

Defendants/Respondents.

Athina Lekas Cornell, Esq., representing appellant Boonton Board of Education (Lindabury, McCormick, Estabrook and Cooper, attorneys)

Melissa Dutton, DAG, representing defendant Department of Education, Office of School Funding (Anne Milgram, Attorney General State of New Jersey)

Marc Zitomer, Esq., representing defendant Montville Board of Education (Schwartz, Simon, Edelstein, Celso and Kessler, attorneys)

Record Closed: January 7, 2009 Decided: January 8, 2009

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

Appellant, the Boonton Board of Education, appealed a determination made by respondent, the New Jersey State Department of Education Office of School Funding (OSF), that student M.J.C. resides in appellant's school district, which requires appellant to absorb the cost of educating M.J.C. The Montville Board of Education was made a party to this matter via appellant's amended complaint, based on the allegation that M.J.C. resided in Montville with her mother during the 2004/2005 school year.

PROCEDURAL HISTORY AND FINDINGS

On August 9, 2006, the Department of Education Bureau of Controversies and Disputes transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. Thereafter, the parties attempted to resolve the matter during several settlement conferences.

On August 17, 2007, the Montville Board of Education filed a Motion to Dismiss based on appellant's failure to appeal the final-residency determination made by the Office of School Funding within ninety days of receiving the determination notice. Oppositions and cross-motions were filed and oral arguments were completed on February 27, 2008. The circumstances of the case raised an issue on whether the case warranted relaxation of strict adherence to the ninety-day filing of an appeal, pursuant to N.J.A.C. 6A:3-1.3(i). DeMaio v New Providence Bd. of Educ., 96 N.J.A.R.2d (EDU) 449, 452. The Motion to Dismiss was denied because genuine issues of material facts remained unresolved regarding M.J.C.'s actual domicile during the 2004/2005 school year.

On September 15, 2008, Montville Board of Education filed for Summary Decision. Oppositions and cross-motions were filed with several extensions granted because of delays in completing discovery. All cross-motions and oppositions were received at OAL by December 31, 2008. On January 5, 2009, appellant's counsel advised the

undersigned that the parties had executed a Consent Order to Dismiss plaintiff's complaint.

ORDER

Based on the foregoing and the Consent Order to dismiss plaintiff's complaint, which includes the parties' acknowledgements that good cause exists to dismiss the complaint, I hereby **ORDER** the **DISMISSAL 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 8, 2009

DATE

Sandra Ann Robinson

SANDRA ANN ROBINSON, ALJ

Date Received at Agency: 1/9/09

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 12 2009

DATE

OFFICE OF ADMINISTRATIVE LAW

LINDABURY, McCORMICK, ESTABROOK & COOPER, P.C.
ATTORNEYS AT LAW
53 CARDINAL DRIVE
P.O. BOX 2369
WESTFIELD, NEW JERSEY 07091-2369
(908) 233-6800
Attorneys for Plaintiff, Boonton Board of Education

BOONTON BOARD OF EDUCATION, *Plaintiff,* v. NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FUNDING and MONTVILLE BOARD OF EDUCATION, *Defendants.*	NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DOCKET NO.: EDU 9151-06N Civil Action **CONSENT ORDER TO DISMISS PLAINTIFF'S COMPLAINT**

This matter having come before the Court on agreement and consent of Lindabury, McCormick, Estabrook & Cooper, P.C., attorneys for plaintiff Boonton Board of Education; and State of New Jersey, Office of the Attorney General, attorneys for New Jersey Department of Education, Office of School Funding; and Schwartz, Simon, Edelstein, Celso & Kessler, LLC, attorneys for defendant Montville Board of Education, for entry of an Order dismissing plaintiff's complaint, entered against said defendants and for good cause shown,

It is on this 7TH day of January, 2009

ORDERED and Agreed that plaintiff's complaint is hereby dismissed; and it is further

ORDERED and Agreed that a copy of the Consent Order shall be served upon all counsel

of record within 10 days of the date of this Order.

Sandra Ann Robinson
Honorable Sandra Ann Robinson, A.L.J.

We hereby consent to the entry
of the above Order:

LINDABURY, McCORMICK, ESTABROOK & COOPER, P.C.

BY: Athina Lekas Cornell
Athina Lekas Cornell, Esq.
Attorney for Plaintiff
Boonton Board of Education

STATE OF NEW JERSEY, OFFICE OF THE ATTORNEY GENERAL

BY: Melissa Dutton
Melissa Dutton, Esq.
Attorney for Defendant
Department of Education,
Office of School Funding

SCHWARTZ, SIMON, EDELSTEIN, CELSO & KESSLER

BY: Marc Ztomer
Marc Ztomer, Esq.
Attorney for Defendant
Montville Board of Education

66-09

#66-09

B.F.-H., on behalf of minor child, A.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WOODBRIDGE TOWNSHIP, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, the grandmother and legal guardian of A.C., appealed the determination of the respondent Board that A.C. is not eligible for a free public education in the Woodbridge Township school district. Petitioner was a long-time resident of Woodbridge, until her home was damaged by fire in 2006 and she began efforts to renovate the structure. Permit approvals and the Township's requirement that the home be demolished and rebuilt resulted in unanticipated delays of more than two years before construction on the house actually began. The petitioner has had her household belongings in storage during this time period, and has lived in a number of locations – including Linden Township – with family and friends while awaiting the reconstruction of her home. The Board asserts that petitioner is not a resident of Woodbridge Township as she does not satisfy the physical residence requirement of domicile, and has her sole residence in Linden.

The ALJ found that: the petitioner has established her domicile in Woodbridge Township in accordance with *N.J.S.A.* 18A-38.1(a); A.C. was entitled to attend Colonia High School in Woodbridge Township free of charge for the 2006-07 and 2007-08 school years, and may continue to attend the school free of charge until her domicile changes; and domicile has not been established in Linden Township pursuant to *N.J.A.C.* 6A:22-3.1(a)(4) because petitioner has not resided in Linden Township on an all-year-round basis for at least one year. The ALJ concluded that respondent Board is responsible for A.C.'s education for the 2006-07 and 2007-08 school years, and is further responsible for A.C.'s education for the 2008-09 school year until such time as her domicile, for school attendance purposes, is established in the Township of Linden on a year-round basis.

Upon a full and independent review, the Commissioner provided clarification and amplified the Initial Decision, which was adopted as the final decision in this matter.

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

February 9, 2009

OAL DKT. NO. EDU 4848-08
AGENCY DKT. NO. 181-6/08

B.F.-H., on behalf of minor child, A.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF WOODBRIDGE TOWNSHIP, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and petitioner's reply thereto – filed in accordance with the directives of *N.J.A.C.* 1:1-18.4 – were duly considered by the Commissioner in reaching her determination here. However, the Board's December 12, 2008 submission was not considered because the above-referenced applicable rule makes no provision for response to reply exceptions.

The Board's exceptions charge that the Administrative Law Judge (ALJ) erroneously found petitioner to be domiciled in Woodbridge Township because "she has the intention of returning to that location when the new home construction [at 806 W. Avenue[1] in Colonia] is complete." Initial Decision at 7 (Board's Exceptions at 3) It asserts that established legal precedent surrounding the concept of domicile clearly belies such a finding in this matter. First, citing *J.B., on behalf of C.B. and E.B. v. Board of Education of the Hopewell Valley Regional School District*, decided by the Commissioner September 23, 1999, the Board maintains that domicile has *two* requisites, *i.e.*, 1) a physical residence and 2) an intent to remain in this location, both of which are required to establish a legal entitlement based on domicile. (*Id.* at 3-4) Secondly, citing *L.B. on behalf of D.B. and S.B. v. Teaneck Board of Education,* decided by the Commissioner September 24, 1998, *aff'd* State Board, January 6, 1999 and *K.L. and K.L. on behalf of minor children, M.L. and C.L. v. Board of Education of*

[1] The street address has been abbreviated to protect the student's privacy.

the Borough of Kinnelon, decided by the Commissioner July 23, 2008, the Board avers that the Commissioner has deemed a mere property interest within a school district insufficient to establish domicile. Rather, petitioner "must actually and physically take up an abode on that property in order to be presently domiciled within a school district." (*Id.* at 5) Next, pointing to *Board of Education of the Township of Livingston v. H.L. and D.L. Individually and as Natural Guardians of K.L. and J.L.*, decided by the Commissioner May 26, 1998, *aff'd* State Board, February 3, 1999, the Board advances that construction is not sufficient to satisfy the physical residence requirement of domicile. (*Id.* at 6) Finally, it argues that – pursuant to *L.B., on behalf of D.B. and S.B. v. Teaneck Board of Education, supra,* – "[m]erely entertaining the possibility, or having a floating intention, of returning to one's former domicile at some later time is not sufficient evidence that one is presently domiciled at that location." (*Id.* at 7-8) In this matter, the Board advances, petitioner has not physically taken up an abode in Colonia since November 2006 when her house was demolished. Although petitioner has paid property taxes on 806 W. Avenue, this location has been no more than a vacant lot from November 2006 until – at the very earliest – August 2008. Pursuant to the above-referenced controlling case law, the Board argues, notwithstanding that petitioner was previously domiciled in Colonia, maintains some ties to that area and possesses a "floating intention" of returning to 806 W. Avenue at some future date, "an actual, physical residence is required to establish domicile at that location, and mere construction does not qualify as a physical residence to establish domicile." (Board's Exceptions at 3)

The Board next excepts to what it asserts is the ALJ's failure to consider the impact of the May 15, 2008 agreement signed by petitioner wherein she "agreed to withdraw A.C. from the Woodbridge Township Public Schools by June 30, 2008, and further agreed not to seek A.C.'s re-enrollment in that school system until she built a house on 806 W. Avenue, Colonia, New Jersey, or otherwise became domiciled in Woodbridge Township." (Board's Exceptions at 8) The plain language of this agreement, the Board argues, is an acknowledgement by petitioner that she is not domiciled in Colonia. As she has not satisfied either of the two conditions which it was agreed would alter this status, A.C. possesses no entitlement to attend the District's schools. Notwithstanding that the ALJ did not

conclude in his decision that petitioner's signing of the May 15, 2008 agreement constituted a "knowing waiver of statutory right" such a conclusion was unnecessary, the Board maintains, as on May 15, 2008 petitioner A.C. never possessed a statutory right to attend the District's schools in the first place because at that time and all relevant time periods surrounding this matter, A.C.'s legal guardian "has lacked a physical residence in Colonia." (Board's Exceptions at 9)

In response, petitioner cites *James A. Lyon Jr. v. Sidney Glaser*, 60 *N.J.* 259 (1972) for the proposition that "[d]omicile is a state of mind and reflects the person's intention; domicile involves taking up residence in a location which is accompanied by an intention to make the home permanently in that location indefinitely." (Petitioner's Reply Exceptions at 6) Furthermore, she argues, "[w]hen a domicile is established, the domicile remains in that particular location, until the person moves from that location with the intention of establishing a domicile in a new location. *Lyon*, *supra* at 264" (*Ibid.*) Petitioner contends that the facts in this matter confirm that these two components of the concept of domicile have clearly been satisfied. Specifically,

> [Petitioner] was domiciled in Colonia, New Jersey having moved there in 1979. When she became the legal guardian [of her granddaughter,] A.C. [in August 2006], A.C. was deemed to be domiciled in Colonia, New Jersey. [Petitioner] had a physical presence in Colonia, New Jersey and an intention to remain permanently there. When there was a fire and subsequent demolition of the home at 806 W. Avenue, [petitioner] had to move temporarily from this area. There was no intention to change domicile or establish a new domicile. [Petitioner] had to move from her home so that it could be demolished and a building permit could be issued. She understood that a new home would be completed in six months. She made plans to live elsewhere for a period of six months. [Petitioner] and A.C. lived with a friend in Edison, New Jersey for a period of three months and then she lived with a friend in Irvington, New Jersey. As the time drew near for permits to be issued to build the new home, there were ongoing issues with the plan to re-build the home which involved issues with the County of Middlesex and the Township of Woodbridge building departments. [Petitioner's] intention to move back to Colonia had to be changed with each setback and she had to make new living arrangements each time that she learned that re-building would be further delayed. Within the last year, looking at the time period from September of 2007 forward, [petitioner] lived in Old Bridge with relatives, in Linden with relatives, she visited relatives in Florida and she then lived in Virginia with a close family friend. In September 2007, [petitioner] lived for a few weeks in Old Bridge. [Petitioner] then lived in Linden from September through January 2008. In January she

> had to undergo surgery and as a result needed to stay with relatives to recuperate. She then stayed in Linden again. By the summer of 2008, from July 2 through July 29, [petitioner] visited relatives in Florida and then stayed with a friend in Virginia for three weeks where she had designated living quarters. In August, [petitioner] had to undergo major surgery and returned to Linden after the surgery. There was no intention to ever establish domicile in any of these locations, and [petitioner] simply lived in these various areas on a temporary basis. [Petitioner] indicated that she lived at various locations so that she would not burden any one friend or family member.
>
> [Petitioner] maintained only one domicile, which was in Colonia, New Jersey. She continued to receive her mail in Colonia and she voted in this area as she had always done for 29 years. [Petitioner] maintained a garden on her land at 806 W. Avenue which she tended to frequently. [Petitioner] continued to handle all business affairs in Colonia, had her taxes done with use of the 806 W. Avenue address and she paid a mortgage, homeowner's insurance, property taxes and sewer bills in Colonia, New Jersey. [Petitioner] worshipped at Saint John Vianny Church where she was a parishioner for 29 years. The drivers license issued to [petitioner] always reflected her address at 806 W. Avenue. [Petitioner] placed all of her worldly possessions in storage with a plan to place these possessions in her home again once the home was re-built. [Petitioner] expended large amounts of money in the re-building of her home and from all actions, it was apparent that she had maintained domicile in Colonia even with living in other locations on a temporary basis. The intention to remain in Colonia was evident in all of her actions. (Petitioner's Reply Exceptions at 8-10)

Petitioner maintains that the cases cited by the Board are clearly distinguishable from this matter in that those cases depicted families who had either never yet lived in a school district or who had only a nebulous intention of returning to a certain school district. While the concept of only a "floating" intention of going to or returning to a particular locale properly describes the cases cited by respondent, such is not the case here as petitioner "had both an intention and a definite plan to return to her home in Colonia, New Jersey." (*Id.* at 13)

With respect to the May 15, 2008 agreement, petitioner – citing *Camden Board of Education v. Alexander*, 181 *N.J.* 187 (2004) and *David A. Garfinkel, M.D. v. Morristown Obstetrics & Gynecology Associates P.A., et al*, 168 *N.J.* 124 (2001) – maintains that it is well-established that language in an agreement which deals with the bargaining away of a statutory right must state such an intent in clear and unambiguous terms, and such an intent will not be assumed absent this specific

language. Moreover, there also must be clear evidence that an individual who is waiving a statutory right made a knowing and voluntary decision to do so. In that the Board's May 15, 2008 agreement lacked this requisite specificity, petitioner argues, that agreement "is lacking validity and is not enforceable." (Petitioner's Reply Exceptions at 14-15, quote at 15)

Upon a comprehensive review of the instant record, the Commissioner concurs with the ALJ that minor child, A.C., was entitled to a free public education in the Woodbridge Township Board of Education's schools for the 2006-07, 2007-08 school years and continues to be so entitled for the current school year. Initially, the Commissioner so finds based on her conclusion that petitioner is a domiciliary of the district. Particularly instructive in so concluding was in *Matter of Unanue*, 255 *N.J. Super.* 362, 374-376 (App. Div. 1991) wherein the Court extensively discussed the concept of domicile, and in pertinent part stated:

> "In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving." ...This identification of domicile with the concept of home continues to have vitality in New Jersey..." Home is the place where a person dwells and which is the center of his domestic, social and civil life."...In that case (*Citizens Bank & Trust Co. v. Glaser*, 70 *N.J.* at 81), the court stated that "the overwhelming proportion of the indicia as to what the decedent regarded as her real, principal and permanent home...as well as the central fulcrum of her life must here be found to converge..." in that location found to be her domicile...Thus, the concepts of home and domicile mean more than physical residence. They also embody the subject's objective and subjective relationship to that residence.
> at 374, 375 (Citations omitted)
>
> ...Thus, a person may not arbitrarily designate a given residence as his domicile. It is necessary that the requisite subjective intent be present since domicile is "very much a matter of the mind – of intention." at 376 (Citations omitted)

It is, therefore, clear that – because of its very nature – determination of a disputed case with respect to domicile requires an evaluation of all the facts and circumstances of the case. (See *Lyon v. Glaser*, 60 *N.J.* 259, 265) Recognizing this, the Commissioner rejects each of the school law cases cited by the Board as standing for a black or white proposition which necessarily must effect the outcome of this

particular case. Because domicile cases are extremely fact sensitive, meaningful comparisons between cases and concepts can be difficult to make when taken out of context. The Commissioner's full review persuades her that none of the cases advanced by the Board is similar enough in nature or factual circumstances to the instant matter so as to provide precedential support for the Board's positions. Rather, the Commissioner finds and concludes that the record in this matter abundantly evidences that petitioner has at all times considered 806 W. Avenue in Colonia – where she has lived since 1979 and raised her family – to be the place where she has her "true, fixed, permanent home and principal establishment and to which whenever [she] is absent, [she] has the intention of returning, and from which [she] has no present intention of moving." (*Unanue, supra)* That petitioner was compelled to leave 806 W. Avenue because of damage to her home which necessitated its demolition and rebuilding, or that she was thwarted in her intention to return to her home by various building permit issues with the County and the Township and, as a consequence, was unable to physically reside at this property for more than two years, does not determine that 806 W. Avenue did not remain her domicile. Petitioner's various temporary living arrangements during this period were no more than that, on her way back to 806 W. Avenue. It is amply evident that petitioner considered this location her domicile and never abandoned her intention to return there at the earliest possible time.

However, even assuming, *arguendo*, that petitioner had not been found to be domiciled in the District, the Commissioner finds that A.C. would have possessed entitlement to a free public education in the schools of Woodbridge Township by virtue of the fact that during the period at issue here petitioner qualified as homeless.[2]

---

[2] It is noted that in the instant petition of appeal filed in this matter on June 26, 2008 – in addition to advancing her domicile argument – petitioner also argued that A.C. was entitled to attend Woodbridge Township schools free of charge because petitioner, B.F.-H. and A.C. were homeless. Petitioner was advised by the Bureau of Controversies and Disputes at that time that any claim of homelessness in her petition was premature and she must immediately seek a determination, pursuant to *N.J.A.C.* 6A:17-2.8(a), from the County Superintendent before such a claim could proceed. The record confirms that petitioner subsequently sought the necessary determination from the Middlesex County Executive Superintendent of Schools and, by letter from him dated August 5, 2008, was advised that he found her not to be homeless. The Commissioner here reverses that finding.

The regulatory provisions governing the education of homeless children defines a "homeless child" as one "who lacks a fixed regular and adequate residence." (*N.J.A.C.* 17-2.2) *N.J.A.C.* 17-2.3 provides further detail to this definition, *i.e.*, a child is homeless when he or she resides in any of the following: 1) a publicly or privately operated shelter designed to provide temporary living accommodations; 2) a public or private place not designated for or ordinarily used as a regular sleeping accommodation; 3) the residence of 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; 4) any temporary location wherein children and youth are awaiting foster care placement.

The instant record evidences that with the demolishment of her home at 806 W. Avenue in November 2006, petitioner and A.C. were displaced from their permanent housing. Petitioner placed her possessions, including furniture, clothing and household items into storage and she and A.C. undertook a series of short-term, temporary living arrangements with various friends and relatives in Edison, Irvington, Old Bridge, Virginia, Florida, Linden, returned again to Old Bridge, and again to Linden, moving frequently in an attempt to minimize imposition and disruption to any one of the individuals who had kindly provided them lodging. It was anticipated that this period of transitory living would last only six months or so, at which time they could return home. Difficulties securing necessary building permits from both the Township and the County building departments served to vastly extend rebuilding time and petitioner and A.C. continued to relocate. The Commissioner finds and concludes that under the definitional construct of "homeless" individuals presented above, petitioner and A.C. qualified as homeless during the period they were displaced from their home until that home's rebuilding, as they "lacked a fixed, regular, and adequate residence." That petitioner's stay in Linden, New Jersey may have been more protracted than other of her temporary accommodations does not alter the finding of homelessness during the stay in that location. During this time petitioner underwent two separate surgeries which necessitated recuperation and her prime consideration had to be with healing rather than

worrying about the disruption her continued presence might be causing family members. Her inability to continuously relocate as she had previously done does not operate to make Linden, New Jersey – any more than her other transitory stops – a "fixed, regular and adequate residence." Educational responsibility in this situation is specifically prescribed by statute. *N.J.S.A.* 18A:7B-12.1 specifies that "the district of residence" is responsible for the education of a homeless child. The district of residence for children whose parent [or guardian] temporarily moves from one school district to another as the result of being homeless is the district in which the parent [guardian] last resided prior to becoming homeless. (*N.J.S.A.* 18A:7B-12(c)). Pursuant to these provisions, respondent – Board of Education of Woodbridge Township – was responsible for the education of A.C. during her entire period of "homelessness".

As to the May 15, 2008 agreement signed by petitioner: given the Commissioner's prior determination that petitioner was domiciled in Woodbridge, this agreement has no effect whatsoever on the outcome of this matter. Even assuming, *arguendo*, that the Commissioner accepts that petitioner could waive A.C.'s unambiguous statutory and constitutional entitlement to a free education (*N.J.S.A.* 18A:38-1 *et seq.*, New Jersey Constitution, Article VIII, Sec. IV, para. 1), by virtue of the signing of a document which clearly and unequivocally 1) advised her that a statutory right was being waived and 2) contained language confirming that petitioner knowingly and voluntarily had the intent to waive such statutory right, the agreement presented to petitioner for signature did not satisfy even a modicum of these requisites and was, therefore, *void ab initio*.

Finally, in light of her determination here, the Commissioner finds it unnecessary to reach to the ALJ's discussion on pp. 8-11 with respect to the Board's claim that, pursuant to *N.J.S.A.* 18A:38-1(d), petitioner and A.C. are domiciled in Linden Township.[3]

[3] It may be helpful, however, for the parties to be aware that the the Commissioner recently clarified the legislative intent and applicability of *N.J.S.A.* 18A:38-1(d) and other "non-domicile" provisions in *M.L.P., on behalf of minor child, C.L.P. v. Board of Education of the Township of Bloomfield, Essex County*, Commissioner decision #495-08, decided December 29, 2008, wherein she stated:

Accordingly, as clarified and amplified above, the Initial Decision of the OAL – finding that minor child, A.C., was entitled to a free public education in the Woodbridge Township schools for the 2006-07 and 2007-08 school years, and continues to be so entitled for the current school year – is adopted as the final decision in this matter.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 2/09/09

Date of Mailing: 2/10/09

In implementing the constitutional imperative for provision of a thorough and efficient system of free public education, the Legislature has provided, through *N.J.S.A.* 18A:38-1(a), that the fundamental entitlement of a child to attend school attaches to a particular local school district based on the domicile of the child – which under common law and decades of decisional precedent has consistently been held to be the domicile of the child's parent, custodian or guardian...(citations omitted)

However, in recognition that children do not always live in the district of their legal domicile, the Legislature has additionally provided, through enactment of *N.J.S.A.* 18A:38-1(b), (d), (e) and (f), that entitlement to attend school shall extend to a limited number of "non-domicile" situations where attendance at school in the district of domicile may not be appropriate or practicable. Thus, to the extent that the statutory scheme focuses...on where a child *is actually living*, it is to *expand* the child's entitlement beyond the district of legal domicile when exceptional circumstances warrant, *not* to remove, replace or preclude exercise of the child's fundamental right to attend school in such district – a right which must be honored where the protections of the statute's "exceptional" provisions are not invoked by the child's parent or guardian. (citations omitted)
(Slip Opinion at 6-7)

[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 4848-08
AGENCY DKT. NO. 181-6/08

B.F.-H. O/B/O MINOR CHILD A.C.,
Petitioner,
v.
BOARD OF EDUCATION OF WOODBRIDGE TOWNSHIP, MIDDLESEX COUNTY,
Respondent.

Luretha M. Stribling, Esq., appearing for the petitioner

Eric I. Bueide, Esq., appearing for the respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: October 14, 2008 Decided: November 17, 2008

BEFORE **DENNIS P. BLAKE**, ALJ:

STATEMENT OF THE CASE

Petitioner previously requested emergent relief from the respondent, Woodbridge Township Board of Education (BOE), in the form of an order allowing her

granddaughter, A.C., to attend summer high school basketball practice. The order in that matter denying emergent relief also found that the issue of petitioner's domicile was moot because of an agreement entered into by petitioner and respondent. The Commissioner of Education rejected the finding of mootness and directed, "a hearing on the merits which more fully explores the concept of domicile and the concept of the legal validity of an argument which purports to waive a statutorily conferred right."

PROCEDURAL HISTORY

The original request for emergent relief was filed with the Department of Education, Bureau of Controversies and Disputes on June 26, 2008. The matter was transmitted to the Office of Administrative Law (OAL) on that date. The OAL initial decision was transmitted to the Department of Education on July 2, 2008. The Decision on the Application for Emergent Relief was returned to the OAL on July 18, 2008. The matter was scheduled for a hearing on September 23, 2008. The matter was heard on that date and the record remained open for the submission of briefs until October 14, 2008.

FINDINGS OF FACT

Testimony of B.F.-H.

B.F.-H., the grandmother of A.C., moved into the residence at 806 W. Avenue, Woodbridge, New Jersey, 29 years ago. She lived there with her husband and six children, five of whom graduated from Colonia High School. In 2006, a decision was made by petitioner and her family members to improve the home. A permit approving the reconstruction was issued by the County of Middlesex in 2006. However, the necessary permits from Woodbridge Township were not granted until recently. Thus, the process for obtaining the permits from Woodbridge Township took in excess of two years. Petitioner's intention was to build a new house. She had been told by the contractor that the Township had ordered the previous house to be torn down. She never intended to move from Woodbridge Township. The contractor gave petitioner a time frame of three to six months for the erection of the new home. In anticipation of

this timetable, petitioner put all of her household goods in storage and made living arrangements with friends and family for that period. She assumed she would be living outside of her home for a maximum of six months. The house was demolished in November, 2006. She stayed with one friend for three months and a second friend for an additional three months. She paid the individuals with whom she lived during those time periods, although no formal leases were ever signed.

Because Woodbridge Township delayed the issuance of the construction permits for such a long period of time, in excess of 23 months, petitioner had to hire a lawyer to resolve the situation. It only took the contractor ten days to receive the necessary approvals from the County. However, it took almost two years to receive the appropriate documentation from the Township of Woodbridge. In the interim, petitioner resided in Edison, Irvington, Old Bridge, the State of Florida, the State of Virginia, and Linden, New Jersey. She continues to live in temporary housing. Her old home, located at the 806 W. Avenue address, had nine rooms. The household goods have been stored for approximately two years.

Petitioner became the guardian for A.C. in 2006. At that time, she was domiciled in the Colonia section of Woodbridge Township. At the present time, she considers herself to be homeless since she does not live in her own home. None of the residences where she has resided in the interim have been adequate for herself or her granddaughter. Her understanding of domicile is the place where one intends to live. She assumes that now, and that all times prior, she was domiciled at 806 W. Avenue. She maintains all her significant ties to the Colonia section of Woodbridge Township. She pays taxes, as well as water and sewer bills there. She maintains homeowner's insurance on the property. She also votes and attends church in Woodbridge Township. She continues to pay the mortgage on 806 W. Avenue, as she has been doing for the past 29 years and continues to receive mail at that address. A.C. has lived with petitioner since 2006. She has attended Colonia High School since that time.

Since the receipt of the documentation from Woodbridge Township, construction has started at the 806 W. Avenue location. That construction began in August 2008.

The foundation has been installed completely and inspections have already taken place. Photographs marked P-1 through P-6 indicate the extent of the foundation work that has been completed since August 2008. Her builder has told petitioner that she will be able to move into her home in November 2008. Once the home is rebuilt, she will reside there with A.C., whose custody she retains.

All of her savings, to the extent of $168,000 to $170,000, have been expended on the construction of this new home at 806 W. Avenue. In addition to those expenses, she has continued to pay the mortgage on that property.

On cross-examination, petitioner admited that there has not been a house at 806 W. Avenue since November 2006. She acknowledges living in Linden Township with relatives, "for maybe a year." The address in Linden Township is 304 G. Street. It is the home of her daughter, A.C. A.C. is the mother of A.C., her ward. She has been sleeping at that location since January 2008. She also lived there from time to time prior to January 2008. Again, she states she is not sure if she resided at 304 G. Street, Linden, for a year. She thought that her home would be done, initially, by March 2007. She moved out of 806 W. Avenue in October or November 2006. She stayed at G. Street in Linden Township for approximately one year. Some of her daughter's family attend Linden Township schools.

Petitioner then gave more details of where she and her granddaughter have lived since vacating the W. Avenue address. They moved out of that address in October or November 2006. This is when petitioner and her family members decided that the residence at W. Avenue had to be rebuilt. There had been damage caused by a fire in the boiler room of the house. She and A.C. lived with a neighbor of petitioner's in Edison, New Jersey, for approximately three months. In approximately February 2007, she decided to move with A.C. to a friend's home in Irvington, New Jersey, where they stayed for a few months. Thereafter, during the summer months, she and her grandchildren, not including A.C., visited family members in Virginia and Florida. In August 2007, she and A.C. stayed at the home of her ex-husband, F.H., at 58 P. Drive in Old Bridge, New Jersey. She stayed there for a month before being hospitalized.

This hospitalization was sometime in January 2008. She then moved to the 304 G. Street address in Linden Township in January 2008, after her hospitalization. She remains living at 304 G. Street until the completion of her house in Woodbridge Township.

She states that she probably lived at the Linden Township address from October 2007 through September 2008. However, she was living with relatives in Florida and Virginia during the summer months. She is not positive if she has lived a full year at the Linden Township address. She states again that she is homeless because she is not in her own house. However, she has never been deprived of a place to sleep or board. She has stayed in these other residences out of necessity.

Salvatore Ciardiello

Mr. Ciardiello is the Woodbridge Township Board of Education attendance officer. His responsibilities are to monitor attendance by students in the district. He investigates where students are living. In September 2007, he was approached by a secretary from the school office, Linda Clark, who indicated receipt of an anonymous phone call advising that A.C. was not living in Woodbridge Township. He frequently relies on anonymous tips in investigating the residence of students. As a result of this tip, he looked at the street address, 806 W. Avenue, and saw a vacant lot in September 2007. He never spoke with A.C. but did speak with petitioner on the telephone. Petitioner told him that she lived in Linden Township in September 2007. A.C. started at Colonia in 2006. It would normally take him a year to catch up with new students. His conversation with petitioner was in mid-September 2007. He reported to the principal that there was no house at the 806 W. Avenue address. Pictures were taken of the address.

STIPULATED FACTS

1. Petitioner pays, to Woodbridge Township, real estate taxes and charges for water and sewer for the property designated as 806 W. Avenue.

2. Petitioner makes mortgage payments and homeowner's insurance payments for the property designated as 806 W. Avenue.

3. Construction for petitioner's new home at 806 W. Avenue began in August 2008.

FACTUAL DISCUSSION

At the time of the emergent hearing in this matter, the lot located at 806 W. Avenue had been vacant for almost two years. Additionally, petitioner had signed an agreement agreeing to withdraw her granddaughter from respondent's school system and not re-enroll her until "(a) my house at 806 W. Avenue in Colonia is built and I am residing in the home with A.C. or (b) we otherwise become domiciled in Woodbridge Township." (R-1). The vacancy of the lot and the executed agreement were both factors indicative of the cessation of domicile in Woodbridge Township. At the final hearing, clear and convincing proof was produced indicating that petitioner's new home was under construction and that she planned to move back to that property in the foreseeable future. Proof of the start of actual construction of the new residence at that property is the most significant evidence that could be produced indicating petitioner's intention to return to 806 W. Avenue.

Petitioner's testimony concerning her living arrangements from October 2006 until the present time was, decidedly, imprecise. Petitioner was made aware, by me, that her maintenance of an all-year-round dwelling place within the Linden Township school district would create domicile within that district. With that knowledge, she testified that she and her granddaughter moved into her daughter's home in Linden Township in September or October 2007 and have remained there, except for several months in the summer.

Petitioner has asserted that she is homeless. However, in her testimony, she defined her homeless condition as "not living in my own house." She acknowledges that she and her daughter have always had a place to sleep.

CONCLUSION OF LAW

N.J.S.A. 18A:38-1 sets forth the conditions under which public schools shall be free to persons over five and under twenty years of age. It defines, inter alia, those persons as follows:

> a. Any person who is domiciled within the school district;
>
> . . .
>
> 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;
>
> [Ibid.]

In this matter, petitioner, whose new home is currently being built on the plot of land where she has resided for most of the last 29 years, clearly intends to return to Woodbridge Township when the construction is completed. Both parties in this matter agree that domicile is established where petitioner has her "true, fixed, permanent home and principal establishment, and to which, whenever [she] is absent, [she] has the intention of returning, and from which [she] has no present intention of moving." L.C. o/b/o B.C. v. Board of Education of Branchburg, 96 N.J.A.R.2d (EDU) 1005, quoting Matter of Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991). Petitioner has proven in this matter that, whatever the cause of the two-year delay in obtaining permits, she intended to maintain her permanent home at 806 W. Avenue and has the intention of returning to that location when the new home construction is complete. Thus, I **CONCLUDE** that petitioner has established her domicile in Woodbridge Township in accordance with N.J.S.A. 18A-38.1(a). Thus, petitioner and her granddaughter, A.C., have been and still are domiciled in Woodbridge Township for purposes of school attendance. Accordingly, A.C. was entitled to attend Colonia High School in Woodbridge Township free of charge for the 2006-2007 and the 2007-2008 school years and may continue to attend Colonia High School free of charge until her domicile

changes. Because of this conclusion, it is not necessary to explore the concept of the legal validity of petitioner's agreement which purported to waive her domiciliary rights.

This conclusion, however, does not end the inquiry in this matter. Petitioner's testimony, although inexact, has established that she and her granddaughter have stayed at her daughter's residence in Linden Township for some period of time between October 2007 and September 2008. This living arrangement was interrupted by trips to stay with family in Florida and Virginia over the summer months of 2008. Respondent has alleged that domicile has now been established in Linden Township, pursuant to N.J.S.A. 18A:38-1(d) and N.J.A.C. 6A:22-3.1(a)(4).

Generally, it has been held that "a person may have only one domicile, although he may have many residences, and that domicile is determined by permanent intention, while residence can be more transitory." Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). Somerville involved a special education child, whose parents were divorced. There was a joint custody arrangement where the child spent equal amounts of time with each parent, who each lived in separate school districts. The child was an out-of-district, special education student who did not attend school in either parent's district. The question in that case was which school district was responsible for the out-of-district costs? The Appellate Division determined that in this particular circumstance, "the single-domicile rule requires reexamination." Id. at 13. Ultimately, the court held, in that specific situation, that the child possessed "dual domicile," therefore, "fairness dictates that both school districts bear equally the costs of the child's special education." Id. at 17. The New Jersey Supreme Court affirmed the Appellate Division's decision but held that any future regulation adopted by the Department of Education addressing this issue would supersede the Court's disposition of the case. 167 N.J. at 58. In his concurrence, joined by Justice LaVecchia, Justice Coleman stated that,

> The Appellate Division's decision should not be viewed as overturning the unitary concept of domicile. Rather, the Court recognized that A.P. has alternating domiciles and therefore that the two school districts involved should share the costs as they had agreed. Nothing in the opinions of the

> Appellate Division or this Court should be viewed as precluding the Department of Education from promulgating regulations that are consistent with the theory that a school-aged child can have only one domicile."
>
> [Ibid.][1]

In December of 2001, several months after Somerville, the State Board of Education (hereinafter "Board") adopted N.J.A.C. 6A:28-2.4, which was recodified in 2004 as N.J.A.C. 6A:22-3.1. N.J.A.C. 6A:22-3.1 declares that the view of the Board, for purposes of school attendance, is that a child may have only one domicile. N.J.A.C. 6A:22-3.1(a)(1)(ii) states,

> Where a student's physical custody is shared on an equal-time, alternating week/month or other similar basis such that the student is not living with one parent for a majority of the school year, and where there is no court order or written agreement between the parents designating the school district for attendance, the student's domicile is the present domicile of the parent with whom the student resided on the last day prior to October 16 preceding the date of application.
>
> [Ibid.]

The plain language of this section of the regulation is counter to both the Appellate Division's and the Supreme Court's holdings in Somerville, which permitted dual domicile in cases of shared custody on an equal-time basis. Therefore, as the Supreme Court stated in Somerville, the regulation supersedes their decision in that case. Thus, the Board has determined that a child may have only one domicile for the purpose of school attendance.

Also included in the regulation adopted by the Board is section 6A:22-3.1(a)(4), which states,

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[1] It is noted that although the school districts in Somerville had a written agreement, the courts decision was based on fairness rather than the existence of the agreement. See Somerville Bd. of Educ., supra, 332 N.J. Super. at 17.

> A student is domiciled in the school district when his or her parent or legal guardian resides within the district on an all-year-round basis for one year or more, notwithstanding the existence of a domicile elsewhere.
>
> [N.J.A.C. 6A:22-3.1(a)(4) (emphasis added).]

This provision, basically states that, although a child may generally be considered domiciled elsewhere in other contexts, if a parent or legal guardian resides in a district on an all-year-round basis for a year or more, that district is to be considered the child's "domicile" for purposes of school attendance. In 2004, during the notice and comment period preceding the regulation's readoption and recodification as 6A:22, the following comment was submitted to the State Board of Education,

> Comment: The commenter suggested that N.J.A.C. 6A:22-3.1(a)(4), which provides that 'a student is domiciled in the school district [when] his or her parent or legal guardian resides within the district on a all-year-round basis for one year or more, notwithstanding the existence of a domicile elsewhere,' be revised to read (addition in boldface, deletion in brackets) '. . . . notwithstanding the existence of a [domicile] **residence** elsewhere," since a person can have only one domicile.
>
> Response: The Department disagrees. The commenter's proposed change would be contrary to the underlying statutory provision, N.J.S.A. 18A:38-1(d), which recognizes a person residing year-round in the school district for the requisite time period as domiciled there **for purposes of school attendance**, even though his or her legal domicile in other contexts may be elsewhere. The proposed Department rule, which pertains solely to entitlement to attend school, accurately reflects the statute's intent and does not confer 'domicile' status in other context.
>
> [36 N.J.R. 4448, comment 2 and response.]

Thus, when read together, N.J.A.C. 6A:22-3.1(a)(4) and the Board's response to comment 2, illustrate the Board's view that, if a parent or legal guardian resides in a district on an all-year-round basis for more than a year, that district becomes their

child's "domicile" for purposes of school attendance, despite the fact that they may also be "domiciled" elsewhere for other purposes.

In the present case, pursuant to N.J.A.C. 6A:22-3.1(a)(1), A.C. is domiciled in Woodbridge Township. In order for petitioner to fulfill the requirements of N.J.A.C. 6A:22-3.1(a)(4), and thus become domiciled in Linden Township, she would have to have lived in Linden Township on an all-year-round basis for at least one year. Petitioner's testimony, indicating interruptions in her residency in Linden Township to live with relatives in Florida and Virginia, reveals that the "all-year-round" requirement of N.J.A.C. 6A:22-3.1(a)(4) has not been met.

According to petitioner's testimony, she has frequently stayed with her daughter in Linden Township since approximately October of 2007, while her home in Woodbridge Township is being rebuilt. A fire had severely damaged petitioner's home, which the Township required be torn down and rebuilt instead of renovated. Petitioner further testified that she has also stayed with relatives in Florida over the summer months of 2008. Thus, petitioner has not resided at the Linden Township address on an "all-year-round basis for one year or more" because petitioner's "stay" in Linden Township was interrupted. Due to the unique and unfortunate circumstances surrounding the present case, a strict reading of N.J.A.C. 6A:22-3.1(a)(4) is necessary and petitioner does not satisfy the requirements of this provision which would establish her domicile, for school attendance purposes, in Linden Township.

I **CONCLUDE** that domicile has not been established in Linden Township pursuant to N.J.A.C. 6A:22-3.1(a)(4) because petitioner has not resided in Linden Township on an all-year-round basis for at least one year. Domicile, for school attendance purposes only, may be established in Linden Township after petitioner has resided on "an all-year-round basis for one year or more." N.J.A.C. 6A:22-3.1(a)(4). However, such residency has been established as of the date of this hearing. If respondent seeks to establish such year-round residency in Linden, the Linden Board of Education must be notified of that intention.

ORDER

I hereby **ORDER that,** respondent, Woodbridge Township, is responsible for A.C.'s education, free of charge, for the 2006–2007 and 2007–2008 school years. I further **ORDER that**, respondent is responsible for A.C.'s education for the 2008 – 2009 school year until such time as her domicile, for school attendance purposes, is established in the Township of Linden on a year-round basis. If respondent seeks to establish such year-round residency in Linden Township, the Linden Township Board of Education must be notified of that intent.

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

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

11-17-08
DATE

DENNIS P. BLAKE, ALJ

Date Received at Agency:

NOV 20 2008
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

/cs

APPENDIX

WITNESSES

For Petitioner:

B. F-H

For Respondent:

Salvatore Ciardiello

EXHIBITS

For Petitioner:

P-1 photo of foundation
P-2 " " "
P-3 " " "
P-4 " " "
P-5 ' " "
P-6 " " "

For Respondent:

R-1 signed agreement
R-2 attorney letter

73-09

MICHAEL SCHAILEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a former teacher in the respondent Board's district – challenges the termination of his employment upon the suspension of his teaching certificates without proceedings under the Tenure Employees Hearing Law, *N.J.S.A.* 18A:6-10 to -18.1, and contends that this was in violation of his tenure rights. Petitioner was terminated after he agreed to a two year suspension of his teaching certificates as a consequence of inappropriately enrolling his instructional aide in the Department's Alternate Route Program for teacher certification by forging his supervisor's signature on several forms which petitioner filed with the Department on the aide's behalf. Respondent Board filed a motion to dismiss the appeal.

The ALJ found, *inter alia*, that: petitioner had acquired tenure in accordance with *N.J.S.A.* 18A:28-5, however, tenure protection under this statute does not apply to teaching staff members who are not holders of "proper certificates in full force and effect"; *N.J.S.A.* 18A:28-14 specifically provides that any teaching staff member who is not the holder of an appropriate certificate in full force and effect may be terminated without charge or trial; and the provisions of *N.J.S.A.* 18A:28-14 are clear and controlling. The ALJ concluded that the respondent Board's actions in terminating petitioner without the filing of tenure charges or a trial were correct, and should be affirmed.

The Commissioner concurred with the ALJ that the respondent Board's motion to dismiss must be granted, as *N.J.S.A.* 18A:28-14 is clear and controlling in this case. Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition of appeal is dismissed.

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

February 19, 2009

OAL DKT. NO. EDU 2878-08
AGENCY DKT. NO. 83-3/08

MICHAEL SCHAILEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN 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 considered by the Commissioner in reaching her determination here. The Board did not file reply exceptions.

As exceptions, petitioner submits his Brief in Opposition to the Board's Motion to Dismiss originally filed with the Administrative Law Judge (ALJ) below. As it is determined that the ALJ fully and fairly addressed and resolved each of the arguments presented in petitioner's brief, these will not be revisited here.

Upon review, the Commissioner is in full agreement with the ALJ that the Board's Motion to Dismiss must be granted, as *N.J.S.A.* 18A:28-14 is clear and controlling here. Consequently, the action of the Board terminating petitioner's employment without the filing of tenure charges or a trial was correct and must be affirmed.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/09

Date of Mailing: 2/19/09

* 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 2878-08
AGENCY DKT. NO. 83-3/08

MICHAEL SCHAILEY,

Petitioner,

v.

BOARD OF EDUCATION OF THE SOUTHERN REGIONAL HIGH SCHOOL DISTRICT, OCEAN COUNTY,

Respondent.

Richard A Friedman, Esq., and **Jason E. Sokolowski**, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Laura M. Benson, Esq., for respondent (Berry, Sahradnik, Kotzas & Benson, attorneys)

Record Closed: December 14, 2008 Decided: January 13, 2009

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this case, the petitioner, a tenured teaching staff member of the respondent Southern Regional High School District challenges the termination of his employment upon the suspension of his teaching certificates without proceedings under the Tenure Employees Hearing Law, and contends that this was in violation of his tenure rights. This matter was transmitted to the Office of Administrative Law (OAL) on April 29, 2008,

for hearing as a contested case. The matter was assigned to me on May 16, 2008, and following telephone prehearing conferences in July and August 2008, the matter was scheduled for hearing on January 23, 2009.

Prior to the scheduled hearing, respondent filed a motion to dismiss the petition of appeal (R-1) and the petitioner responded to the motion (P-1, P-2). This initial decision is based upon respondent's motion to dismiss the petition of appeal.

FACTUAL DISCUSSION

Based on the pleadings filed in this case, and the submissions of the parties in connection with the motion to dismiss, I **FIND** that the facts set forth herein are undisputed.

In September 1986, the New Jersey State Board of Examiners issued to petitioner Michael Schailey a teacher of Health and Physical Education instructional certificate. In July 1987, the Examiners issued petitioner a Teacher of Driver Education instructional certificate.

Since September 1986, petitioner has been employed by respondent, Southern Regional High School District of Ocean County as a teaching staff member. It is undisputed that petitioner acquired tenure with the school district as a teaching staff member.

In February 2006, the school district alleged that petitioner had inappropriately enrolled his instructional aide in the Department of Education's Alternative Route Program for teacher certification by forging his supervisor's signature on several forms petitioner filed with the Department of Education on the aide's behalf. On February 8, 2006, the school district board of education took the following action with respect to petitioner's employment:

1. Petitioner's employment and adjustment increments were withheld for the

2006-2007 school year;

2. Petitioner was suspended from his teaching duties without pay for a period of one (1) month;

3. Petitioner was reassigned from teaching in the school district's high school to a middle school;

4. Petitioner was barred from working in or taking part in any of the school district's extra-curricular activities;

5. Petitioner was removed from the school district's Project Adventure Coordinator Position.

The school district never filed or served any proposed tenure charges on petitioner or filed any tenure charges against petitioner with respect to allegations. The petitioner accepted the board's actions and after his suspension continued working as a teaching staff member until September 20, 2007.

The school district reported petitioner's actions to the New Jersey State Board of Examiners, which resulted in the Board of Examiners filing an Order to Show Cause on June 23, 2006 (P-1, Exhibit A), ordering petitioner to demonstrate why his teaching certificates should not be suspended or revoked as a result of his conduct.

Petitioner entered into a Consent Order with the Board of Examiners on September 13, 2007, to settle the Order to Show Cause without admitting to the allegations contained therein. The Consent Order was approved by a decision of the Board of Examiners on November 1, 2007 (P-1, Exhibit B). As part of the settlement petitioner agreed to a two-year suspension of his teaching certificates effective September 1, 2007, and continuing to August 31, 2009.

It is noted that in anticipation of settling the matter before the Board of Examiners

with a two-year suspension of his teaching certificates, petitioner submitted proposals regarding his continued employment to the school district (P-1, Exhibit C). The school board denied each proposal, stating that it was considering further actions against petitioner's employment (P-1, Exhibit D). In the meantime, petitioner was placed on leave status from the beginning of the 2007-2008 school year receiving his full salary and employment benefits up to and including September 20, 2007.

On December 17, 2007, "under the advice of counsel," school superintendent Craig Henry confirmed that the school district had been formally notified of petitioner's teaching certificates being suspended for a period of two (2) years and that, as a result, the petitioner is no longer an employee of the Southern Regional School District and the execution of the suspension represents a severance of service between the petitioner and the Southern Regional School District. (P-1, Exhibit F). The petitioner challenged this action by filing this petition of appeal.

LEGAL DISCUSSION

It is undisputed that when the respondent school district terminated the petitioner, it did not follow the procedures specified by the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to -18.1, for removal of a tenured teaching staff member. The issue is whether, under the circumstances of this case, respondent's compliance with those procedures is required for petitioner's removal?

In an effort to provide stability and security to teaching staff members who perform their duties in conformity to the reasonable expectations of a school district and in order to protect teaching staff member from arbitrary and unreasonable actions by school districts, N.J.S.A. 18A:28-1 to -18 confers tenure upon such members if they comply with the requirements of the Tenure Act. N.J.S.A. 18A:28-5 specifically provides in relevant part:

> The services of all teaching staff members employed in the positions of teacher, . . . and such other employees as are in positions which require them to hold appropriate certificates

> issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect . . . , shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title . . .

It is undisputed that the petitioner had acquired tenure in accordance with the specific requirements of N.J.S.A. 18A:28-5. However, as pointed out by the respondent school district, the foregoing tenure protection applies to all teaching staff members "excepting those who are not the holders of proper certificates in full force and effect." On its face, this phrase appears to withhold tenure protection from those teaching staff members who do not have teaching certificates which are in full force.

It may be argued that the purpose of the foregoing section of the Tenure Act is to make it clear that a teaching staff member who meets the employment requirements of N.J.S.A. 18A:28-5(a), (b) or (c), must also be the holder of proper certificates in full force and effect at the time in order to acquire tenure, and that once acquired, this provision no longer applies. However, N.J.S.A. 18A:28-14 more specifically provides:

> The services of any teaching staff member who is not the holder of an appropriate certificate, in full force and effect, issued by the state board of examiners under rules and regulations prescribed by the state board of education may be terminated without charge or trial . . .

This section of the Tenure Act needs no interpretation. It makes it clear that no tenure charge or trial is required in order to terminate any teaching staff member when that member does not hold an appropriate certificate that is in full force and effect. Taken together, these sections of the Tenure Act make it absolutely clear that a teaching staff member who does not hold an appropriate certificate that is in full force and effect is not entitled to tenure protection.

The respondent also relies on N.J.S.A. 18A:26-2, which prohibits a board of education from continuing to employ a teaching staff member who does not hold a valid certificate by stating:

> No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in such public schools and of such other certificate, if any, as may be required by law.

The respondent also relies on certain provisions of the New Jersey Administrative Code found at N.J.A.C. 6A:9-5.1 and -5.2 in support of its position. N.J.A.C. 6A:9-5.1(a) requires any person employed as a teaching staff member by a school district board of education to hold a valid and appropriate certificate. N.J.A.C. 6A:9-5.1(c) requires the employing school district to remove any teaching staff member who fails to maintain the mandated license, certificate or authorization. N.J.A.C. 6A:9-5.2(d) requires the termination of the employment of a teaching staff member when the employing district receives written notice that such person is not or has ceased to be the holder of an appropriate certificate required for such employment.

I have reviewed these provisions and I agree with the respondent's position that they are applicable to this matter insofar as they require the petitioner's termination. However, these provisions do not address the necessity for a hearing on tenure charges. Thus, they are of little assistance in determining the specific issue raised by the petitioner in this case.

The petitioner argues that the Commissioner of Education, not the school district, determines whether termination is appropriate with respect to petitioner's actions, and that the school district circumvented the tenure laws by its actions. I respectfully disagree with this position in this case. The Legislature, by enacting N.J.S.A. 18A:28-14, has made it clear that no tenure charge or trial is required in order to terminate a teaching staff member who does not hold an appropriate certificate that is in full force

and effect. Thus, it is the Legislature which has determined that termination is appropriate in this circumstance, notwithstanding the provisions of the tenure law.

Based on the foregoing, I **CONCLUDE** that the provisions of N.J.S.A. 18A:28-14 are clear and controlling, and that the actions of the respondent in terminating the petitioner without the filing of tenure charges or a trial are correct and should be **AFFIRMED**. Therefore, the respondent's motion to dismiss should be **GRANTED** and petitioner's petition should be **DISMISSED**.

DECISION

For the reasons stated above, I hereby **ORDER** that respondent's motion to dismiss is **GRANTED** and petitioner's petition of 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 13, 2009
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Date Received at Agency: 1-13-09

Mailed to Parties:

JAN 14 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

hf/mph

APPENDIX

LIST OF EXHIBITS:

For petitioner:

P-1 Certification of counsel with the following attachments:

- Exhibit A — New Jersey State Board of Examiner's Order to Show Cause, dated January 23, 2006
- Exhibit B — Consent Order executed by attorney for respondent on September 13, 2007 and State Board of Examiner's decision, dated November 1, 2007
- Exhibit C — Attorney for petitioner letter to school district, dated August 3, 2007
- Exhibit D — Superintendent's letter to petitioner, dated August 21, 2007
- Exhibit E — Superintendent's letter to petitioner, dated September 5, 2007
- Exhibit F — Superintendent's letter, dated September 17, 2007 notifying petitioner of severance of service

P-2 Petitioner's brief and opposition to respondent's motion to dismiss

For respondent:

R-1 Notice of motion to dismiss Petition of Appeal

R-2 Certification of counsel

R-3 Brief on behalf of respondent school district

R-4 Letter reply brief on behalf respondent school district

74-09

OAL DKT. NO. EDU 12163-07
AGENCY DKT. NO. 310-10/07

FRANCES MACHCINSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed "Stipulation of Settlement and Settlement Agreement" (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.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/09

Date of Mailing: 2/19/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12163-07

AGENCY DKT. NO. 310-10/07

FRANCES MACHCINSKI,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY,

Respondent.

Jason E. Sokolowski, Esq., for petitioner
(Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Marie-Laurence Fabian, Esq., for respondent
(Porzio, Bromberg and Newman, attorneys)

Record Closed: January 16, 2009 Decided: January 20, 2009

BEFORE **IMRE KARASZEGI,** ALJ:

On November 26, 2007, this 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.

Jan 20, 2009
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 1-22-09

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 22 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

id

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN, P.C.
150 West State Street
Trenton, New Jersey 08608
p.(609) 392-8172
f. (609) 392-8933
Attorneys for Petitioner

2009 JAN 16 A 7:48
OFFICE OF ADMINISTRATIVE LAW

FRANCES MACHCINSKI, Petitioner, v. BLOOMINGDALE BOARD OF EDUCATION, PASSAIC COUNTY, Respondent.	:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW DOCKET NO.: EDUOT 12163-2007N **STIPULATION OF SETTLEMENT AND SETTLEMENT AGREEMENT**

The parties to this matter, Frances Machcinski and the Bloomingdale Board of Education, having reached an agreement to resolve the within matter, hereby request that the Administrative Law Judge and the Commissioner of Education approve the following terms and conditions as their settlement agreement.

1. The parties agree that their agreement to this agreement and its validity is contingent upon the approval of the Commissioner of Education of all of the terms of this agreement, and that if any of the terms of this agreement are rejected by the Commissioner of Education, this agreement shall be deemed null and void, and that in such event, neither parties' position in relation to the petition of appeal shall be prejudiced and the matter shall be returned to the Office of Administrative Law for a hearing in relation to the petition of appeal, provided that nothing in this paragraph or in this agreement shall, in such event, preclude the parties from agreeing to a new,

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

revised, or modified settlement agreement, provided that such agreement is subject to the approval of the Commissioner of Education.

2. The parties agree that based upon and subject to the Commissioner of Education's approval of all of the terms of this agreement, the petitioner shall withdraw the petition of appeal.

3. Rationale for Settlement

A. On or about October 22, 2007, petitioner filed her petition of appeal with the Commissioner against the respondent.

B. The petition of appeal alleges that petitioner, whose employment was reduced from full-time to four-fifths (4 days a week) due to a reduction of force in the 1985-1986 school year, was and is entitled to the increased assignment or classes provided to a less senior employee by respondent starting with the 2007-2008 school year, which violated Petitioner's seniority rights under N.J.S.A. 18A:28-9 et. seq. and N.J.A.C. 6A:32-5.1.

C. Both parties acknowledge that they are desirous of resolving the matters addressed by this agreement, and that upon review of all of the circumstances, and of their respective prospects of success in the matter, it is in the best interests of both parties and the public, and it being consistent with applicable law, to resolve this matter by this settlement agreement.

4. The parties agree that respondent will within two (2) weeks of the approval of the settlement agreement by the Commissioner of Education pay petitioner $9,000.00. This amount represents the approximate difference in salary for the increased assignment or classes for two (2) school years. The parties agree that

payment will be subject to all applicable deductions, together with proper pension deductions.

5. The parties agree that respondent recognizes by acknowledgement/resolution that petitioner commenced employment with respondent on or about September 1, 1979. In addition, respondent recognizes that on or about April 19, 1985, petitioner's employment with respondent was reduced via a reduction in force from full time to four-fifths (4 days a week for the 1985-1986 school year), and that petitioner has continued to teach part-time at four-fifths (.8 position) through the present time. Further, respondent recognizes as a result of the above reduction in force, petitioner acquired and maintains recall/"bumping rights" to any additional work that becomes available from respondent based on petitioner's tenure and seniority rights pursuant to N.J.S.A. 18A:28-9 et. seq. and N.J.A.C. 6A:32-5.1.

6. By settling this matter, petitioner acknowledges that she is waiving her right to a hearing before the Office of Administrative Law and Commissioner of Education, in which she could seek an adjudication on the merits of the petition of appeal. Petitioner further acknowledges that she understands and agrees to the terms of this agreement and that she is satisfied with the legal representation that she received in this matter.

7. The parties agree that their respective covenants and entry into this agreement does not constitute any admission of wrongdoing or guilt on the part of either party.

8. The parties agree that in the event that the Commissioner of Education does not accept any provision of this settlement agreement, this settlement agreement

shall be deemed null and void, and the matter shall be returned to the Office of Administrative Law for a hearing without prejudice to either parties' position and without waiver of any of either parties' legal rights.

9. The respondent board of education has approved the terms of this settlement as acknowledged by the attached resolution.

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A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

John Pituch, President of the Bloomingdale
Board of Education

STATE OF NEW JERSEY :
: SS
COUNTY OF PASSAIC :

I certify that on January 9, 2009, John Pituch, President of the Bloomingdale Board of Education, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

DOROTHY R. BANNON
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 4/16/2010

Dorothy R. Bannon

Fredda C. Rosenberg, Ed. D.
Dr. Fredda C. Rosenberg, Superintendent of Schools
Bloomingdale Public Schools

STATE OF NEW JERSEY :
: SS
COUNTY OF PASSAIC :

I certify that on January 9, 2009, Dr. Fredda C. Rosenberg, Superintendent of the Bloomingdale Public Schools, personally came before me and acknowledged under oath, to my satisfaction, that she is the person named in and personally signed this document, and signed, sealed and delivered this document as her act and deed.

DOROTHY R. BANNON
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 4/16/2010

Dorothy R. Bannon

ZAZZALI,
FAGELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Frances Machcinski

Frances Machcinski, Petitioner

STATE OF NEW JERSEY :
: SS
COUNTY OF PASSAIC :

I certify that on January 9th, 2009, Frances Machcinski, petitioner in the within matter, personally came before me and acknowledged under oath, to my satisfaction, that she is the person named in and personally signed this document, and signed, sealed and delivered this document as her act and deed.

DOROTHY R. BANNON
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 4/16/2010

Dorothy R. Bannon

ZAZZALI,
FAGELLA, NOWAK,
KLEINBAUM
& FRIEDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

RECEIVED

JAN 14 2009

PORZIO, BROMBERG & NEWMAN

BLOOMINGDALE BOARD OF EDUCATION OF THE BOROUGH OF BLOOMINGDALE, PASSAIC COUNTY, NEW JERSEY AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Borough of Bloomingdale in the County of Passaic, New Jersey, convened in a regular meeting on January 5, 2009, at 7:00 P.M., in the Walter T. Bergen School Library.

The following members of the Board of Education were present: Bastante, DeJohn, Devadan, Grecco, Mecionis, O'Leary, Peterson

The following members were absent: Pituch, Open Seat

The following resolution was offered by Mrs. Mecionis, seconded by Mrs. DeJohn, and adopted by the Board of Education by the following roll call vote: All yes, with exception of Mrs. Mecionis who abstained.

TITLE OF RESOLUTION:

RESOLUTION OF THE BLOOMINGDALE BOARD OF EDUCATION AUTHORIZING SETTLEMENT OF A LEGAL DISPUTE

WHEREAS, Frances Machcinski filed a complaint against the Board with the Commissioner of Education alleging a violation of her seniority rights and bearing the docket number EDUOT 12163-2007N; and

WHEREAS, the parties have agreed to settle the dispute rather than proceed to a trial of this matter; and

WHEREAS, the Board has determined that it is in the best interest of the district to avoid the expense of further litigation and to settle this matter in an amicable manner at this time.

NOW, THEREFORE, BE IT RESOLVED by the Bloomingdale Board of Education that it hereby approves the settlement pursuant to the terms set forth in the settlement agreement, a copy of which is on file in the office of the Superintendent, including payment to Ms. Machcinski in the amount of $9,000.00

STATE OF NEW JERSEY)
COUNTY OF PASSAIC) ss:

I, George Hagl, Secretary of the Board of Education of the Borough of Bloomingdale, in the County of Passaic, 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 January 5, 2009, has been compared by me with the original minutes as officially recorded in my office in the minute book of said Bloomingdale 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 5th day of January, 2009.

Seal

George Hagl
Board Secretary

75-09

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,

PETITIONER,

V.

J.D., on behalf of minor child, G.T.,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board sought tuition reimbursement from respondent, J.D., for a period of alleged ineligible attendance of her son in the District's high school. Respondent admitted that she had moved from Clifton and established residency in Paterson as of February 1, 2008, but informed the Board that G.T. was living with his grandmother to enable him to continue attending Clifton High School, and that she intended to establish legal guardianship with the grandmother. Respondent failed to appear at two scheduled hearings in this matter, despite appropriate notice of same.

The ALJ found that: there is no evidence in the record that the grandmother was G.T.'s legal guardian pursuant to a court order or guardianship proceeding, nor is there any evidence of a family or economic hardship; G.T. continued to attend Clifton High School after his mother established residency in Paterson as of February 1, 2008, and continued to attend until June 24, 2008; respondent failed to attend the hearings scheduled for November 25, 2008 and December 10, 2008, and offered no explanation for her failure to appear. Accordingly, the ALJ concluded that the Board is entitled to reimbursement for the cost of G.T.'s education at the daily tuition rate of $60.12 for the period from February 1 through June 24, 2008.

The Commissioner adopted the OAL's Initial Decision as the final decision in this matter, and directed respondent to pay petitioner tuition in the amount of $5,350.68.

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 19, 2009

OAL DKT. NO. EDU 11476-08
AGENCY DKT. NO. 188-7/08

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
J.D., on behalf of minor child, G.T.,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner concurs with the Administrative Law Judge – for the reasons comprehensively presented in her decision – that respondent has failed to sustain her burden of establishing that her child, G.T., was eligible to attend the Board's Clifton High School free of charge during the period February 1, 2008 through June 24, 2008 – a total of 89 days – and, therefore she must pay the Board, at the rate of $60.12 per diem, for this period of his ineligible attendance.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. Respondent is hereby directed to pay the Board $5,350.68 for her child's attendance in the Board's school during the above-referenced time period.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/19/09
Date of Mailing: 2/19/09

* 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 11476-08
AGENCY DKT. NO. 188-7/08

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,
Petitioner,
v.
J.D. ON BEHALF OF MINOR CHILD G.T.,
Respondent.

Joseph A. Rutigliano, Esq., for petitioner (Chasan, Leyner and Lamparello, attorneys)

J.D. on behalf of **G.T.**, respondent, pro se (no appearance)

Record Closed: December 10, 2008 Decided: January 20, 2009

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, the Board of Education of the City of Clifton (the Board) seeks tuition reimbursement from respondent J.D. for a period of alleged ineligible attendance of her son in the District's high school. The Department of Education transmitted the

contested case to the Office of Administrative Law (OAL), where it was filed on September 29, 2008. By letter dated October 14, 2008, I notified counsel for the Board and respondent that the hearing was scheduled for November 25, 2008. A Notice of Plenary Hearing, dated October 16, 2008, was also sent to respondent and counsel for the Board advising of the November 25, 2008, hearing and instructing that, "[i]f you do not attend the hearing, the judge may dismiss your case or order that the action requested by the other party be granted." Although counsel for the Board appeared at the OAL on November 25, 2008, neither respondent nor a representative on respondent's behalf appeared for the hearing. I adjourned the hearing to provide respondent another opportunity to appear, and informed respondent, via letter dated November 25, 2008, that she was being provided "a final opportunity to appear for the hearing, which has been rescheduled to December 10, 2008 at 9:00 a.m." The letter further notified respondent that, "should [she] fail to appear, the Board may present its proofs ex parte in support of it position." A Notice of Plenary Hearing, dated December 1, 2008, was sent to respondent and counsel for the Board advising of the December 10, 2008, hearing, which again instructed that, "[i]f you do not attend the hearing, the judge may dismiss your case or order that the action requested by the other party be granted." Neither respondent nor a representative on respondent's behalf appeared on December 10, 2008, at which time the Board presented testimony by Juanita Ludwig, the District's supervisor of counseling and student services, and various documents in support of its claim. The record closed following the conclusion of the testimony.

FINDINGS OF FACT

Based upon a consideration of the record, coupled with the testimony and the documentary evidence presented on behalf of the Board, I **FIND** the following undisputed **FACTS**:

J.D. failed to attend the hearings scheduled for November 25, 2008, and December 10, 2008. J.D. was afforded proper notice of the hearing dates, and did not contact this office to request an adjournment or to explain the reason for her failure to

appear. J.D. has not contacted this office in writing or by telephone as of the date of this Initial Decision.

Juanita Ludwig has served as the District's supervisor of counseling and student services for five years and has been employed by the Board for twenty-nine years. In this position, Ms. Ludwig is responsible for matters relating to the residency of students attending the District's schools.

J.D. is G.T.'s mother. During the 2007-08 school year, G.T. was a ninth-grade student attending Clifton High School. In May 2008, Ms. Ludwig obtained information that G.T. was not residing in Clifton and that his two siblings had been removed from the District's schools. Following receipt of this information, the District's domicile investigator undertook an investigation of the matter. This investigation disclosed that the residence at which J.D. and her children had resided in Clifton had been occupied by a different individual since February 1, 2008. The investigator located a new address for J.D. in Paterson, where J.D.'s other two children were attending school, and eventually met with J.D. at the Paterson residence.

A few days after this contact, in or around mid May 2008, J.D. met with Ms. Ludwig at the Board's offices. In response to J.D.'s advice that G.T. was living temporarily with his grandmother in Clifton, Ms. Ludwig informed J.D. that she must submit documentation regarding this alleged arrangement. Ms. Ludwig subsequently received a letter from J.D. dated May 28, 2008, in which J.D. acknowledged that she currently resided in Paterson. P-2. J.D. further stated in the letter that her son "just started Clifton High School this year," "[h]e has never been happier and has never enjoyed his schooling as much as he does." J.D. indicated that, "for that reason, I have allowed [him] to stay with his grandmother temporarily . . . until this school year ends," and that "we have already filed to give my mom temporary custody . . . to allow him to stay where he is happy." Ms. Ludwig contacted J.D. after receiving the letter, and informed her of the need to submit a court order regarding the alleged custody arrangement. Ms. Ludwig did not receive such documentation from J.D.

In June 2008, the Board's Residency Committee held a hearing regarding whether G.T. was eligible to attend school in the Clifton school district. Ms. Ludwig is a chairperson on that committee. J.D. was provided notice of the hearing and the opportunity to attend to address why G.T. should remain in the Clifton school. J.D. did not appear at the hearing, and the Board ultimately voted to remove G.T. from the school.

By letter dated June 30, 2008, the Board's attorney informed J.D. that, "[a]fter a proper hearing before the Board's Residency Committee, the Board of Education voted to remove your child from the Clifton school system after determining that you are not properly domiciled in the City of Clifton." P-1. More particularly, the letter stated that "[p]ursuant to N.J.S.A. 18A:38-1(b)(2), the Board of Education concluded that you, as parent or guardian of the child, are not properly domiciled in the City of Clifton." The letter further informed J.D. that she had the right to appeal the decision to the Commissioner within twenty-one days and, should she elect not to appeal the Board's decision, the Board may seek tuition reimbursement from her for the period from the beginning date of G.T.'s ineligible attendance on February 1, 2008, through the last date of his attendance.

J.D. did not file an appeal with the Commissioner from the Board's determination. The Board filed a "complaint" with the Commissioner seeking tuition from J.D. for the period of G.T.'s ineligible attendance in the Clifton schools. Subsequently, J.D. submitted a letter to the Department of Education, dated August 7, 2008, in which J.D. stated that, "[a]lthough my mom had temporary custody of [G.T.] during the last few months of school, I have since taken [G.T.] to the Paterson address for the summer break"; J.D. and her children should again be residents of Clifton as of September 1 or 5; and "[t]here will be no further need for [the grandmother] to have temp custody due to the move back to Clifton." P-4. Ms. Ludwig later received a form signed by J.D. and the grandmother on August 29, 2008, which lists the grandmother as a "temporary guardian." P-3. J.D. did not submit a court order to Ms. Ludwig regarding this alleged arrangement, notwithstanding her advice to J.D. that this type of documentation was required.

J.D. had moved from Clifton and established residency in Paterson as of February 1, 2008. G.T. continued to attend Clifton High School after February 1, 2008. G.T. was enrolled in Clifton High School between February 1, 2008, and June 24, 2008, for a total of eighty-nine school days. The daily tuition rate in the District is $60.12 per day. In September 2008, J.D. and her children moved back to Clifton, and the children have since attended the Clifton schools. The Board does not assert any claim for tuition relative to the 2008-09 school year.

LEGAL DISCUSSION

Public education must be provided free of charge to persons over five and under twenty years of age who are domiciled within the school district, or who are kept in the home of another person domiciled within the school district and supported by such other person gratis as if the student were his/her own child. N.J.S.A. 18A:38-1; N.J.A.C. 6A:22-3.1; N.J.A.C. 6A:22-3.2. A student is domiciled in a school district when the student is living with a parent or legal guardian whose permanent home is located within the school district. N.J.A.C. 6A:22-3.1(a)(1). A legal guardian is the person who has legal control of the student, either by virtue of being the student's parent or through a custody order or guardianship proceeding in accordance with N.J.S.A. 3B:12-52. See J.P. on behalf of S.P. v. Green Brook Twp. Bd. of Educ., 97 N.J.A.R.2d (EDU) 83. In situations where a child is kept in the home of another person domiciled in the school district and supported by such person gratis, that person must submit a sworn statement regarding this arrangement, including such person's intention "to keep and support the child gratuitously for a longer time than merely through the school term." The child's parent must also submit a sworn statement that the parent "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." N.J.S.A. 18A:38-1(b)(1); see N.J.A.C. 6A: 22-3.2.

Should a school district find that the parent or guardian of the child is not domiciled within the district, or the child is not kept in the home of another person domiciled within the district and supported by such person gratis, the superintendent or administrative principal of the district may apply to the board of education for the removal of the child. N.J.S.A. 18A:38-1(b)(2); see N.J.A.C. 6A:22-4.3(b). The parent or guardian is entitled to a hearing before the board. N.J.S.A. 18A:38-1(b)(2). If, in the board's judgment, the parent or guardian is not domiciled within the district, or the child is not kept in the home of another domiciled within the district and supported gratis as provided above, the board may order the removal of the child from the school. Ibid. The parent or guardian is afforded an opportunity to contest the board's decision before the Commissioner within twenty-one days of the date of the decision, and is entitled to a hearing. Ibid.; see N.J.A.C. 6A:22-5.1. In connection therewith, the parent or guardian bears the burden of proving, by a preponderance of the evidence, that the child is eligible for a free education under the statutory criteria. N.J.S.A. 18A:38-1(b)(2). If the evidence does not support the claim of the parent or guardian, the Commissioner "shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district." Ibid.; see N.J.A.C. 6A:22-6.2. In addition, if no appeal to the Commissioner is filed following notice of the determination of ineligibility, the board may assess tuition for any period of a student's ineligible attendance. N.J.S.A. 18A:38-1(b)(2); N.J.A.C. 6A:22-6.1. The tuition is 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. N.J.S.A. 18A:38-1(b)(2); see N.J.A.C. 6A:22-6.3.

CONCLUSION

Succinctly stated, based upon the **FINDINGS of FACT** set forth above, the undisputed evidence clearly establishes G.T.'s ineligible attendance at Clifton High School between February 1, 2008, and June 24, 2008. The record is bereft of any evidence to support that G.T. was residing with the grandmother due to a family or economic hardship, and that J.D. was incapable of supporting him. Indeed, the information J.D. provided to the Board demonstrates that G.T. was residing with the

grandmother for the sole purpose of enabling him to continue attending Clifton High School. Likewise, the evidence fails to establish that the grandmother was G.T.'s legal guardian pursuant to a court order or guardianship proceeding. Accordingly, I **CONCLUDE** that the Board is entitled to reimbursement for the cost of the education provided to G.T. pursuant to the aforesaid statutory and regulatory provisions. I **CONCLUDE** that the Board has established its entitlement to tuition reimbursement from J.D. in the amount of $5,350.68.

ORDER

I **ORDER** that petitioner's application for tuition reimbursement in the amount of $5,350.68 be and hereby is **GRANTED**.

I further **ORDER** that respondent pay tuition reimbursement to petitioner in the amount of $5,350.68.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 20, 2009
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: January 20, 2009

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 21 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

List of Witnesses

For Petitioner:

Juanita Ludwig

For Respondent:

None

List of Exhibits In Evidence

For Petitioner:

P-1 Letter from Anthony V. D'Elia, Esq., to J.D. dated June 30, 2008 (two pages)

P-2 Letter from J.D. to Juanita Ludwig dated May 28, 2008 (two pages)

P-3 Form dated August 29, 2008 (four pages)

P-4 Letter from J.D. to the Department of Education dated August 7, 2008

P-5 Affidavit of Karen L. Perkins (two pages)

For Respondent:

None

77-09

SARA REXACH,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner – a tenured elementary school bilingual teacher employed by respondent since 1985 – appealed the district's withholding of her salary increment for the 2007-2008 school year. Petitioner contended that the Board's withholding of her increment was arbitrary, capricious and unreasonable. The Board contends that the increment withholding was justified, and predicated upon petitioner's unsatisfactory performance and her absenteeism for the 2006-2007 school year.

The ALJ found, *inter alia*, that: each of petitioner's 45 absences during the 2006-2007 school year was approved by respondent when she provided Disability Certificates from her physician; petitioner's alleged failure to implement appropriate instructional practices was predicated upon one observation conducted by an individual who was not her supervisor; and petitioner was not afforded an additional evaluation prior to the annual evaluation conducted on May 30, 2007, despite two evaluations having been the practice since 1985. Accordingly, the ALJ concluded that the petitioner had met her burden of proving that the Board's action was arbitrary, capricious and unreasonable.

The Commissioner adopted the Initial Decision as the final decision in this matter, and directed the Board to restore petitioner's salary increment for the 2006-2007 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.

February 23, 2009

OAL DKT. NO. EDU 12304-07
AGENCY DKT. NO. 364-11/07

SARA REXACH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter – which contains transcripts of proceedings conducted on April 16 and October 3, 2008 – and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The District and petitioner sought and were granted extensions of time within which to submit, respectively, exceptions and replies. These filings were made in accordance with the extended timelines.

The District's exceptions essentially replicate its post-hearing brief advanced before the Administrative Law Judge (ALJ) below. As it is clear that the District's arguments therein were fully considered and addressed by the Administrative Law Judge (ALJ) in her decision, these will not be revisited here.

Upon a full review of the record, the Commissioner agrees with the ALJ, for the reasons clearly presented in her decision, that petitioner has proven – by a preponderance of the credible evidence – that the District's withholding of her salary increment for the 2006-07 school year was arbitrary, capricious and unreasonable.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. The District is hereby directed to restore petitioner's salary increment for the 2006-07 school year.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/23/09

Date of Mailing: 2/23/09

* 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 12304-07

AGENCY DKT. NO. 364-11/07

SARA REXACH,

Petitioner,

v.

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

Respondent.

Eugene G. Liss, Esq., for petitioner

Adam S. Herman, Esq., for respondent (Newark Public Schools, Office of General Counsel)

Record Closed: December 1, 2008 Decided: January 7, 2009

BEFORE **JOANN LASALA CANDIDO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals her denial by the State Operated School District of the City of Newark (District) of her salary increment for the 2007-2008 school year which was allegedly predicated upon her unsatisfactory performance and her absenteeism for 2006-2007 school year. Petitioner challenged this action by the District as arbitrary, capricious and unreasonable. After petitioner filed an appeal with the Department of

Education, the matter was forwarded to the Office of Administrative Law (OAL) where it was received on December 3, 2007. A hearing took place on April 16, 2008, June 30, 2008, and October 3, 2008. The record closed on December 1, 2008, upon receipt of written summations.

ISSUE

Whether the District's withholding of petitioner's increment for the 2007-2008 school year was arbitrary, capricious and unreasonable.

FACTUAL DISCUSSION

On August 17, 2007, respondent notified petitioner that her increment for the 2007-2008 school year would be withheld pursuant to N.J.S.A. 18A:29-14, for the following reasons, as noted by category in her evaluations:

Domain 1: Planning and Preparation

-Failure to Satisfactorily Design Coherent Instruction
-Failure to Satisfactorily Assess Student Learning

Domain 2: Classroom Environment

-Failure to Satisfactorily Reflect Behavior Management
-Failure to Satisfactorily Reflect Procedural Management
-Failure to Satisfactorily Reflect an Environment for a Commitment for Learning

Domain 3: Instruction

-Failure to Satisfactorily Question and Discuss Techniques
-Failure to Satisfactorily Engage Students in Learning
-Failure to Satisfactorily Provide Feedback to Students
-Failure to Satisfactorily Demonstrate Flexibility and Responsiveness

Domain 4: Professional Responsibilities

-Failure to Satisfactorily Reflect on Teaching

Petitioner testified in her own behalf. She is a tenured, certified elementary school bilingual teacher. She has been employed with the Newark Board of Education since 1985 and is currently an eighth-grade bilingual teacher of social studies, science, math and literacy. Since 1985 and through the 2005-2006 school year, petitioner received satisfactory evaluations two times per year in addition to satisfactory annual evaluations as well as salary increments.

Petitioner testified that she became ill during the 2006-2007 school year, suffering from a kidney and liver infection. She submitted Disability Certificates to the school clerk for each of her absences. D-1 through D-4. She also submitted a lesson plan to be used by the substitute teacher in her absence. At the outset of the 2006-2007 school year petitioner had accrued 112 sick days and three personal days. D-8. She used thirty-eight sick days and three personal days by June 8, 2007, for which she was paid. D-9.

During the 2006-2007 school year, petitioner was observed by Vice Principal Rosa Branco on March 23, 2007.[1] She submitted a lesson plan prior to this evaluation. Petitioner described her lesson plan for that day. She testified that she had a special needs student in her classroom for approximately one month until he could be placed in an appropriate program for his special needs. Petitioner placed that student in the back of the classroom when she was observed and gave him a different assignment from the other students. The remaining seven students in her classroom were given a mathematical scientific experiment that entailed the measurement of water through a cup.

Some time prior to the observation, petitioner had been removed from her regular classroom because someone working in that classroom had been electrocuted. She was then permitted to return to her classroom for only a few weeks. She was then instructed to return to her temporary classroom which was located in the basement so that an investigation of the death could be conducted. She described her regular classroom, where the death had occurred, as having no shelves, that it was just a "plain

[1] Petitioner taught twelve students, but only seven were present on that date. One was a special needs student, who would fall asleep in class, and who was assigned to petitioner for a month.

room." In order to make the room more functional, she purchased small plastic shelves for the students to place their books. A document referred to as a Formative Teacher Evaluation was completed by Branco. J-1. No school administrator or supervisor conducted a formal observation of petitioner either prior to or since this date. Petitioner's lesson plan for this observation was approved by her supervisor.

For the March 23, 2007, evaluation, petitioner received an "unsatisfactory" in domains 2(a), 2(d), 2(e), 3(b) and 3(e), which addressed classroom environment and instruction. She received a "basic" in domains 2(b), 3(c) and 3(d), engaging students in learning and providing feedback, and one "proficient" in domain 2(c), which addressed classroom management. No observations were made in domains 1 and 4 during this evaluation. When petitioner received this evaluation on April 5, 2007, she advised the vice principal that she disagreed with its contents and refused to sign it. She stated that no one contacted her to schedule a re-evaluation date nor advised her during the school year that her performance was less than satisfactory.

Petitioner received the annual teacher evaluation on June 12, 2007, (R-5) and was evaluated in all four domains. This evaluation of May 30, 2007, reflected unsatisfactory levels of performance in domains 1(c), 1(d), 2(b), 2(c), 2(d), 3(b), 3(c), 3(d), 3(e) and 4(a). Basic performances were in domain 1(a) and (b), 2(a) and (e), 3(a) and 4(b), (c), (d), (e) and (f).

John Abeigon testified on behalf of petitioner. He is employed with the Newark Teachers Union as a union representative. Abeigon explained that pursuant to the Newark Teachers Union contract, the administrator or supervisor is to re-evaluate a teacher who was rated unsatisfactorily, to give the teacher a second chance to carry out the administrator's recommendations. He further stated that it was incumbent upon the administrator to contact the staff member to schedule the re-evaluation. He further opined that pursuant to the Attendance Improvement Program, which outlines sick and personal leave procedures (D-6), it does not contain a provision for disciplinary action when an employee has an extended absence due to illness, such as here.

Rosa Branco, the vice principal at the McKinley Elementary School where petitioner taught, testified on behalf of respondent. She stated that tenured teachers such as petitioner were observed at least once during the school year, which usually was scheduled for sometime between September and April. Although she was not petitioner's supervisor, she observed petitioner in her classroom on March 23, 2007, for approximately one hour because Branco spoke Spanish and petitioner's supervisor did not. Prior to the observation, Branco provided petitioner with a preplanning form to enable her to choose a particular lesson or subject matter for the evaluation. Branco was dissatisfied with the lack of student participation, claiming petitioner was teaching to only a few students. She noted that another student had fallen asleep. She felt that petitioner was not doing what was expected of a teacher.

Branco observed and rated petitioner in domains 2 (classroom environment) and 3 (instruction). She opined that petitioner was too soft spoken and did not give her students an opportunity to understand nor figure out for themselves what the lesson was about. Nor did she give the students an introduction to the lesson plan or a review by way of a ditto sheet before starting. Her evaluation reflects in domain 2 (classroom environment) that petitioner's room was unorganized and that petitioner only sought participation from the boys. A special needs student slept in the back of the classroom. Branco rated petitioner with an unsatisfactory, one basic and one proficient out of the five components listed. In domain 3, petitioner was rated with two unsatisfactory, and three basic out of the five components listed. No notice or observation was provided to petitioner in March regarding domains 1 and 4.

The annual evaluation prepared by Branco reflected that petitioner's lessons were unsatisfactory and the instructional objectives were rated as basic because she felt that the lesson was not tailored for the entire class. She also rated petitioner as unsatisfactory because she did not access all the students in the classroom, but rather just the ones who participated. She also had difficulty in keeping the students interested in the lesson. Although she was not petitioner's supervisor, Branco prepared the annual evaluation with petitioner's supervisor but did not take into consideration the number of years petitioner had taught nor did she review her personal file before recommending a withholding of her salary increment. On cross-examination, Branco

admitted that petitioner should have been given the opportunity to be observed again and that it was not the "ideal" way to treat a teacher.

Another concern of Branco was petitioner's attendance during the 2006-2007 school year. She stated that a teacher who was absent for thirty-eight, forty or forty-five days not only put a strain on the students, but also on the administration which has to secure a substitute teacher who is bilingual, causing the children to receive instruction from a different teacher.

FINDINGS OF FACT

Based upon a 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**:

1. Petitioner is a tenured eighth-grade bilingual teaching staff member at the McKinley Elementary School and has been employed by the District since 1985.
2. The Newark Teachers Union contract provides for a follow-up observation when a staff member is rated unsatisfactory.
3. Petitioner received two evaluations per year in addition to an annual evaluation from 1985 through the 2004-2005 school year. All were satisfactory.
4. Petitioner received one evaluation on March 23, 2007, and an annual evaluation on May 30, 2007, for the 2006-2007 school year.
5. Petitioner was observed by Vice Principal Branco in her classroom on March 23, 2007.
6. Prior to the observation, petitioner submitted a lesson plan to her supervisor, Mr. Tortorello, for his approval.
7. Branco completed an evaluation form based upon her observation of petitioner during a class on March 23, 2007, and rated petitioner "unsatisfactory" in domain 2 (classroom environment) and domain 3 (instruction).
8. Petitioner was not rated in domains 1 and 4, contrary to policy.
9. Branco found petitioner's overall performance to be less than satisfactory.

10. No one advised petitioner that her performance during the 2006-2007 school year was less than satisfactory.
11. Petitioner was not afforded the opportunity to be re-evaluated pursuant to the terms of the Guidebook for School Administrators and Teachers.
12. Petitioner received an unsatisfactory in her annual evaluation dated May 30, 2007 in performance, attendance and tardiness.
13. By June 8, 2007, petitioner was absent from class for thirty-eight days during the 2006-2007 school year.
14. Petitioner provided Disability Certificates from her physician for her absences. Therefore, her extended illness was not subject to discipline pursuant to the Attendance Improvement Program.

On the **FACTS** presented, I, however, **FIND** that petitioner's absences during the 2006-2007 school year were, technically, excessive. However, I do not **FIND** that they were necessarily illegitimate or deleterious to the overall delivery of educational services as lesson plans were submitted by petitioner during her absences and the record is lacking any evidence illustrating the impact that the absences had, if any, on the school during the period of time during which the absences occurred.

LEGAL ANALYSIS

Salary increments are controlled by N.J.S.A. 18A:29-14, which provides that:

> 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 therefore, 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, 593-94 (1984). The statute was intended to vest local school boards "with the ability to withhold increments from teachers who had not performed well during the previous year." Probst v. Haddonfield Bd. of Educ., 127 N.J. 518, 526 (1991). 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.

The determination to be made is whether the district "had a reasonable basis for its factual conclusion." Id. 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:29-14.
>
> [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)). In contesting a salary increment withholding, a teacher 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. Bd. of Educ. Twp. of Morris, 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd o.b., 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. 27, 2005), affirmed, State Board (June 9, 2006), <http://lawlibrary.rutgers.edu/oal/search.html>.

Here the respondent withheld petitioner's increment for the 2006-2007 school year based upon her failure to implement appropriate instructional practices and for being absent for approximately forty-five days during the 2006-2007 school year. However, it was shown that each of her absences was approved by respondent when she provided Disability Certificates from her physician. As to petitioner purportedly failing to implement appropriate instructional practices, this was predicated upon one observation which was conducted by an individual who is not even her supervisor. Furthermore, petitioner was not afforded an additional evaluation prior to the annual evaluation conducted on May 30, 2007, whereas two evaluations had been the practice since 1985.[2]

Therefore, based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioner has proven by a preponderance of the credible evidence that the District's action was arbitrary, capricious and unreasonable. Petitioner was observed by someone other than her supervisor. Petitioner was not afforded the opportunity to be observed on a second occasion after receiving an unsatisfactory rating

[2] Pursuant to the Guidebook for School Administrators and Teachers, a tenured teacher whose performance is assessed as unsatisfactory or basic, requires more than one observation in addition to the annual evaluation. D-5

as provided by the Newark Teachers Union Contract/Guidebook for School Administrators and Teachers to review the alleged short-comings. Petitioner provided respondent with Disability Certificates to document her absences. Even Branco, one of the District's own witnesses, candidly admitted that petitioner was treated unfairly, and that the situation should have been handled differently and that petitioner should have been afforded notice of any deficiency so that she may have a second observation to show improvement.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioner receive her salary increment for the 2006-2007 school.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 7, 2009
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: January 7, 2009

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 8 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

APPENDIX

WITNESSES

For Petitioner:

Sara Rexach

John Abeigon

For Respondent:

Rosa Branco

EXHIBITS

Joint:

J-1 Formative Teacher Observation dated April 5, 2007

For Petitioner:

D-1, -2, -3 and -4 Disability Certificates dated November 3, 2006, January 9, 2007, January 21, 2007, and February 1, 2007

D-5 Guidebook for School Administrators and Teachers 2006-2007

D-6 Board's Attendance Improvement Program

D-8 Paystub dated September 8, 2006

D-7 Agreement between Newark Teachers Union and Newark Public Schools July 1, 2006, to June 30, 2009

D-9 Paystub dated June 15, 2007

For Respondent:

R-2 Letter to petitioner dated December 5, 2006

R-3 Letter to petitioner (no date)

R-4 Letter to petitioner dated January 17, 2007

R-5 Annual Teacher Evaluation Report dated May 30, 2007

78-09

OAL DKT. NO. EDU 11102-08
AGENCY DKT. NO. 225-7/08

NATALYA PROMYSLOVSKAYA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	

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

Upon such 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.

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/23/09

Date of Mailing: 2/23/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11102-08

AGENCY REF. NO. 225-7/08

NATALYA PROMYSLOVSKAYA ,

Petitioner,

v.

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

Defendant.

Jennifer Borja, Esq., for petitioner (Timothy Smith & Associates, LLC, attorneys)

Karen A. Murray, Esq., for respondent (The Murray Law Firm, attorneys)

Record Closed: January 16, 2009 Decided: January 16, 2009

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

This matter was transmitted to the Office of Administrative Law on September 10, 2008 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.

1/16/'09
DATE

JAMES A. GERAGHTY, ALJ

Date Received at Agency: 1-21-09

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 21 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

db

THE MURRAY LAW FIRM, LLC.
149 Avenue at the Common, Suite 201
Shrewsbury, New Jersey 07702
(732) 389-1010
Attorneys for Respondent, Elizabeth Board of Education

NATALYA PROMYSLOVSKAYA, Petitioner, v. BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY, Respondent.	STATE OF NEW JERSEY COMMISSIONER OF EDUCATION OAL DKT. NO.: EDUOR 11102-2008N AGENCY DOCKET NO.: 225-7/08 SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release is made by and between the Elizabeth Board of Education (the "Board") whose administrative offices are located at 500 North Broad Street, Elizabeth, New Jersey 07207 and the law offices of Timothy R. Smith & Associates, L.L.C. whose offices are locates at 76 South Orange Avenue, Suite 201, South Orange, New Jersey, 07079 for the New Jersey Education Association ("NJEA"), which incurred legal expenses on behalf of its member Natalya Promyslovskaya ("Promyslovskaya"). 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, the undersigned parties state:

WHEREAS, on January 23, 2008, Promyslovskaya was employed as a Teacher by the Board; and

WHEREAS, on that date, a Criminal Complaint was issued against Promyslovskaya for certain acts alleged to have occurred while Promyslovskaya was in the employ of the Board. A copy of the Elizabeth Complaint No. 2004-G-039789 is attached hereto, (Exhibit 1); and

WHEREAS, on February 19, 2008, the Elizabeth Municipal Court sent the matter to Mediation. A copy of the Mediation Consent Agreement is attached hereto, (Exhibit 2); and

WHEREAS, on March 13, 2008, the Elizabeth Municipal Court dismissed the above-referenced Complaint against Promyslovskaya. A copy of the disposition reflecting said dismissal is attached hereto, (Exhibit 3)

WHEREAS, pursuant to N.J.S.A. 18A:16-6.1, Promyslovskaya's defense counsel filed a Petition of Appeal for Indemnification, OAL Dkt. No.: EDUOR 11102-2008, Agency Dkt. No.: 225-7/08, on or about September 10, 2008, seeking reimbursement from the Board for Promyslovskaya's attorney's fees and costs associated with Promyslovskaya's legal defense relative to the Elizabeth Complaint No. 2004-G-039789; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Settlement Agreement and General Release in order to avoid the need for further litigation; and

NOW, THEREFORE, in consideration of mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the NJEA the sum of One Thousand Two Hundred Seventy Dollars and Forty Three Cents ($1,270.43). The aforementioned amount represents full and complete indemnification of the attorney's fees and costs incurred by

Promyslovskaya in relation to Elizabeth Complaint No. 2004-G-039789. A check for this amount shall be drawn to Timothy R. Smith & Associates L.L.C., and sent to their office at 76 South Orange Avenue, Suite 201, South Orange, New Jersey 07079.

2. For and in consideration of the Indemnification set forth in Paragraph One (1) above, Promyslovskaya and her heirs, executors, administrators, successors and assigns, hereby forever release and discharge the Elizabeth Board of Education, its members, successors and assigns and all of its or their past or future members, officers, agents, employees, administrators, attorneys, fiduciaries, successors and assigns (whether acting as agents for the Board, its affiliates or its related entities or in their individual capacities) from any and all claims, demands, causes of action, fees and liabilities of any kind whatsoever (upon any legal or equitable theory, whether contractual, common-law, statutory, federal, state, local, or otherwise), whether known or unknown, which Promyslovskaya ever had, now has or hereafter may have against the Board by reason of any actual or alleged act, omission, transaction, practice, conduct, occurrence or other matter relating to any and all allegations contained in Elizabeth Complaint No. 2004-G-039789.

3. For and in consideration of the Indemnification set forth in Paragraph One (1) above, Promyslovskaya shall withdraw her Petition of Appeal, OAL Dkt. No.: EDUOR 11102-2008, Agency Dkt. No.: 225-7/08, with prejudice, within seven (7) business days after the Board approves the Settlement in this matter.

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 Agreement and General Release cannot be modified, the remaining provisions, terms, clauses, waivers and releases of claims and rights contained in this Agreement shall remain in full force and effect.

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, canceled or terminated except by an express written Agreement duly executed by all the parties or their attorneys on their behalf, which makes specific reference to this Settlement Agreement and General Release.

8. Promyslovskaya 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.

NATALYA PROMYSLOVSKAYA

Natalya Promyslovskaya

Dated: 11-19-08

ELIZABETH BOARD OF EDUCATION

Harold E. Kennedy, Jr.
Board Secretary/School Business Administrator

Dated: 1/12/2009

TIMOTHY R. SMITH & ASSOCIATES, L.L.C.

Timothy R. Smith, Esquire
Attorney for Natalya Promyslovskaya

Dated: 12/10/08

THE MURRAY LAW FIRM, LLC

Karen A. Murray, Esquire
Attorney for the Elizabeth Board of Education

Dated: 12/23/08

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizebeth Board of Education and Natalya Promyslovskaya have discussed a resolution of Office of Administrative Law case (OAL Docket No. EDUOR 11102-2008N; Agency Reference No. 225-7/08); 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 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 DECEMBER 22, 2008

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

February 20, 2009

Shaun A. Bean, Esq.
Podvey, Meanor, Catenacci
Hildner, Cocoziello & Chattman
The Legal Center
One Riverfront Plaza
Newark, NJ 07102-5497

Christopher J. Capone, Esq.
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103 Eisenhower Parkway
Roseland, NJ 07068

Dear Counsel:

I have reviewed respondent Rosenwald's February 18, 2009 motion for reconsideration of the Commissioner's determination that her motion for interlocutory review – of the School Ethics Commission's (SEC) decision to deny, in part, her motion to dismiss the petition in *Horvath et al. v. Rosenwald,* SEC Docket No. C-07-08 – was untimely.

Respondent argues that the Commissioner erred in finding untimeliness because *N.J.A.C.* 6A:4-2.7 allows briefs to be filed within 20 days of the filing of a notice of appeal. This argument is without merit, as *N.J.A.C.* 6A:4-2.7 pertains to the filing of appeals of final orders or decisions.

As explained in the Commissioner's decision of February 17, 2009, the regulation governing the filing with the Commissioner of applications for interlocutory appeals from SEC decisions is *N.J.A.C.* 6A:4-3.3. Under that regulation, a party seeking interlocutory review must file its motion for leave to appeal within five days after service upon it of the order appealed from, and that motion must conform to the requirements of *N.J.A.C.* 6A:4-2.12. Accordingly, pursuant to *N.J.A.C.* 6A:4-2.12, within the mandated five-day period, the party seeking leave to appeal must file its notice of motion accompanied by a brief, a copy of the order appealed from, and an affidavit setting forth the factual basis upon which the motion is based. *See, N.J.A.C.* 6A:4-2.12 (a) – (c).

For the reasons articulated in the Commissioner's February 17, 2009 decision, respondent's motion for reconsideration is denied.

Sincerely,

Lucille E. Davy
Commissioner of Education

C: Joanne Boyle, Director
School Ethics Commission

VIA FACSIMILE AND REGULAR MAIL

2/23/09

80-09

#80-09

MURPHY TRANSPORTATION, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY AND JEWISH COMMUNITY CENTER OF GREATER MONMOUTH, INC., (Improperly pled as The Ruth Hyman Jewish Community Center of Greater Monmouth),	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioning transportation company sought a ruling from the Commissioner declaring that any lease agreement between the respondents to provide district school buses for transporting children to the Jewish Community Center's private summer camp is in violation of *N.J.S.A.* 18A:39-22 and *N.J.A.C.* 6A:27-7.8, and requested reimbursement for fees related to the lawsuit. The parties filed cross motions for summary decision.

The ALJ found that: the sole issue in this case is whether the contract entered into between the Board of Education and the Jewish Community Center (JCC) violated *N.J.S.A.* 18A:39-22 and *N.J.A.C.* 6A:27-7.8; the statute and regulation are both clear that a school district may permit use of school buses owned or leased by the district for senior citizen groups, handicapped citizens and other specifically enumerated groups for specific purposes, and that those specific groups are required to pay part or all costs incurred by the district in permitting the use. The ALJ concluded that neither statute nor regulation prohibits the school board from entering into a lease with a private entity such as the JCC, and accordingly denied petitioner's motion for summary decision.

Upon full review and consideration of the record, the Commissioner rejected the Initial Decision, finding that the plain language of the statute, as well as its legislative history, limits the use of school buses to the transportation of senior citizens, handicapped citizens and participants in programs operated by the municipality in which the school district is situated. Accordingly, the Commissioner granted the respondent's cross motion for summary 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 24, 2009

OAL DKT. NO. EDU 2991-07
AGENCY DKT. NO. 61-3/07

MURPHY TRANSPORTATION, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY AND JEWISH COMMUNITY CENTER OF GREATER MONMOUTH, INC., (Improperly pled as The Ruth Hyman Jewish Community Center of Greater Monmouth),	:	DECISION
RESPONDENTS.	:	

The petitioning transportation company sought a ruling from the Commissioner that the respondent school district is precluded by *N.J.S.A.* 18A:39-22 and *N.J.A.C.* 6A:27-7.8 from leasing its buses to the respondent Jewish Community Center (the JCC) for use in transporting children to the Center's private summer camp. Prior to the scheduled hearing date in the Office of Administrative Law (OAL) the parties moved and cross moved for summary decision.

After consideration of the motion papers the Administrative Law Judge (ALJ) granted summary decision to respondents, finding that *N.J.S.A.* 18A:39-22 and related authority allow the Ocean Township School District "to enter into a lease with a private entity [such as the lease entered into by the Ocean Township school district and the JCC] and require all costs be

covered." Upon review of the record, Initial Decision,[1] and applicable law, the Commissioner rejects the Initial Decision.

It is a long established principle of statutory construction that when a statute is clear and unambiguous on its face, it is not open to construction or interpretation, and its plain meaning must be enforced. *McQueen v. Brown*, 342 *N.J. Super.* 120, 131 (2001), aff'd. 175 *N.J.* 200 (2002). Thus, in construing a statute, we begin by examining its plain language. *Miah v. Ahmed*, 179 *N.J.* 511, 520 (2004). If the language is clear and unambiguous in its meaning, our duty is to enforce it as written. *Bunk v. Port Auth. of N.Y. & N.J.*, 144 *N.J.* 176, 194 (1996). There is no need, if that is the case, to look beyond the statutory terms to determine statutory intent. *State v. Butler*, 89 *N.J.* 220, 226 (1982).

N.J.S.A. 18A:39-22 provides in pertinent part that:

> The board of education of any district may, pursuant to the rules adopted by it, permit the use of school buses owned or leased by the school district for the purpose of transporting senior citizens' groups to and from events within its district or in any contiguous district, and for transporting handicapped citizens in any district, and for transporting children and adults participating in a recreation or other program operated by municipality or municipalities in which the district is located or the municipality in which any constituent district of a regional school district is located; [2]

In construing the statute, the ALJ focused on the language permitting school bus use for senior and disabled citizens "and other specifically enumerated groups for specific

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[1] No exceptions were submitted.

[2] The balance of *N.J.S.A.* 18A:39-22 states:

> provided that each use of school buses for these purposes is approved by the board; provided that such use of school buses shall not interfere with the transportation of school pupils; and provided that school buses so used shall be operated only by persons licensed as bus drivers. The board shall require groups seeking such use of school buses to pay all or part of any costs incurred by the district in permitting such use, including but not limited to the costs of fuel, driver salaries, insurance and depreciation.

purposes . . . ." Initial Decision, p. 5. As mentioned above, the ALJ took that permissive language to signify that school boards were not prohibited from entering into contracts with private entities, such as the JCC.

The Commissioner notes, however, that the relevant language in the above cited statute belies such a broad interpretation. The statute allows three categories of non-school uses for school buses: 1) the transport of senior citizens within a defined geographic area, 2) the transport of disabled persons within a school district, and 3) the transport of people participating in recreational or other programs operated by the municipalities in which the school district is located. Thus, the plain language of the statute itself limits the use of school buses to programs operated by the municipality in which the school district is situated.

Moreover, if there were ambiguity in the language of *N.J.S.A.* 18A:39-22 – such that an alternate construction could be supported – it would be necessary to determine the legislative intent underlying the statute.[3] A look at the legislative history of *N.J.S.A.* 18A:39-22 is instructive.

N.J.S.A. 18A:39-22 has its origins in Public Law 1977, chapter 5, entitled "An act permitting the use of school buses for the transportation of senior citizens' groups and handicapped citizens . . . ." This title was apparently amended by Public Law 1979, chapter 403, to read: An act permitting the use of school buses for the transportation of senior citizens' groups, handicapped citizens and children in certain recreation programs . . . ." (Emphasis added.) In 1989 the title was again changed, to the current text: "An act permitting the use of

[3] If there is ambiguity in the statutory language that leads to more than one plausible interpretation, the Legislature's intent must be ascertained as a guide to interpretation. *Burns v. Belafsky*, 166 *N.J.* 466, 473 (2001). We may turn to extrinsic evidence, including any available legislative history. *Ibid.* Our task is to effectuate the legislative intent in light of the language used and the objects sought to be achieved. *Ibid.* (citations omitted). *See, also, Ramsey Teachers Ass'n v. Board of Educ. of Borough of Ramsey*, 382 *N.J. Super.* 241, 248-49 (App. Div. 2006).

school buses for the transportation of senior citizens' groups, handicapped citizens, and children and adults in certain municipal programs . . . ." (Emphasis added.) The text in the body of these statutory provisions was amended accordingly. (See legislative history for P.L. 1989, Chapter 136, attached.)

The changes in language enacted by the legislature between 1977 and 1989 clearly evidence the legislature's affirmative intent to progressively limit the 'non-educational' use of school buses. The use is narrowed from children's recreational programs in general to municipal programs for children and adults. Thus, both the statutory language and history support petitioner's position that *N.J.S.A.* 18A:39-22 and its ancillary regulation preclude the Ocean Township Board of Education from leasing school buses to the JCC for summer camp transportation. Accordingly, the petitioner's motion for summary decision is granted and respondent's cross motion is denied.

In addition to a determination concerning the legality of respondents' leasing agreement, petitioner asks for "counsel fees, interest and cost of suit . . . ." It is not within the Commissioner's jurisdiction to award counsel fees or costs of suit. Further, petitioner's allegation in paragraph 15 of the petition that it does not demand damages renders moot any award of interest.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 2/24/09

Date of Mailing: 2/25/09

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

P.L.1989, CHAPTER 136: 1989 N.J. ALS 136; 1989 N.J. Laws 136

SYNOPSIS: AN ACT to amend the title of "An act permitting the use of school buses for the transportation of senior citizens' groups and handicapped citizens and supplementing Title 18A of the New Jersey Statutes," approved January 18, 1977 (P.L.1977, c.5), as said title was amended by P.L.1979, c.403, so that the same shall read "An act permitting the use of school buses for the transportation of senior citizens' groups, handicapped citizens and children [2> **[A>** AND ADULTS **<A]** <2] in certain [2> **[D>** recreation **<D]** **[A>** MUNICIPAL **<A]** <2] programs and supplementing Title 18A of the New Jersey Statutes," and to amend the body of said act.

NOTICE: [D> Text within these symbols is deleted **<D]**
[A> UPPERCASE TEXT WITHIN THESE SYMBOLS IS ADDED **<A]**
Matter enclosed in superscript numerals has been adopted as follows:
[1> Assembly AED committee amendments adopted February 1, 1988. <1]
[2> Senate floor amendments adopted September 26, 1988. <2]

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:
[*1] 1. The title of P.L.1977, c.5, as said title was amended by P.L.1979, c.403, is amended to read as follows:
An act permitting the use of school buses for the transportation of senior citizens' groups **[D>** and **<D][A>** , **<A]** handicapped citizens**[A>** , AND CHILDREN **<A]** [2> **[A>** AND ADULTS **<A]** <2] **[A>** IN CERTAIN **<A]** [2> **[D>** **[A>** RECREATION **<A]** **<D]** **[A>** MUNICIPAL **<A]** <2] **[A>** PROGRAMS **<A]** and supplementing Title 18A of the New Jersey Statutes. (cf: P.L.1979, c.403).

[*2] 2. Section 1 of P.L.1977, c.5 (C.18A:39-22) is amended to read as follows:
1. The board of education of any district may, pursuant to rules adopted by it, permit the use of school buses owned or leased by the school district for the purpose of transporting senior citizens' groups to and from **[D>** such **<D]** events within its district or in any contiguous district, **[D>** and **<D]** for transporting handicapped citizens in any district, **[A>** AND FOR TRANSPORTING CHILDREN **<A]** [2> **[A>** AND ADULTS **<A]** <2] **[A>** PARTICIPATING IN A RECREATION **<A]** [2> **[A>** OR OTHER **<A]** <2] **[A>** PROGRAM OPERATED BY **<A]** [1> **[D>** **[A>** A **<A]** **<D]** **[A>** THE **<A]** <1] **[A>** MUNICIPALITY **<A]** [1> **[D>** **[A>** , **<A]** **<D]** **[A>** OR MUNICIPALITIES IN WHICH THE DISTRICT IS LOCATED OR THE MUNICIPALITY IN WHICH ANY CONSTITUENT DISTRICT OF A REGIONAL SCHOOL DISTRICT IS LOCATED; PROVIDED THAT EACH USE OF SCHOOL BUSES FOR THESE PURPOSES IS APPROVED BY THE BOARD **<A]** <1] **[D>** as may be approved by the board **<D]**; provided that such use of school buses shall not interfere with the transportation of school pupils; and provided that school buses so used shall be operated only by persons licensed as bus drivers. The board shall require groups seeking such use of school buses to pay all or part of any costs incurred by the district in permitting such use, including but not limited to the costs of fuel, driver salaries, insurance and depreciation.
(cf: P.L.1979, c.403, s.2)

[*3] 3. Section 2 of P.L.1977, c.5 (C.18A:39-23) is amended to read as follows:
2. The use of school buses **[D>** for the transportation of senior citizens and handicapped citizens **<D]** as herein provided shall not be construed as use for hire and shall in no way affect the no fee registration of such vehicles as provided in R.S.39:3-27. (cf: P.L.1979, c.403, s.3).

[*4] 4. This act shall take effect immediately.

Permits the use of school buses for the transportation of children and adults in recreation and other programs operated by municipalities.

HISTORY:
Approved August 2, 1989



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2991-07
AGENCY REF. NO. 61-3/07

MURPHY TRANSPORTATION, INC.,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY AND JEWISH COMMUNITY CENTER OF GREATER MONMOUTH, INC.,
improperly plead as **THE RUTH HYMAN JEWISH COMMUNITY CENTER OF GREATER MONMOUTH,**
Respondents.

Daniel J. Himelman, Esq., for petitioner (Himelman & Himelman, attorneys)

Michael J. Gross, Esq., for respondent Ocean Township (Kenney, Gross, Kovats, & Parton, attorneys)

Leonard S. Needle, Esq., for respondent Jewish Community Center

Record Closed: January 25, 2008 Decided: January 16, 2009

BEFORE **ANA C. VISCOMI**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner alleges that a contract between respondents, for the transport of Jewish Community Center (hereinafter "JCC") summer campers in Board of Education (BOE) buses, violates N.J.S.A. 18A:39-22. Petitioner sought declaratory judgment in both the initial and amended pleadings; however, in correspondence dated April 3, 2007, the Commissioner of Education exercised her discretion to decline the request pursuant to N.J.S.A. 52:14B-8 and N.J.A.C. 6A:3-2.1(a)1, and instead directed the matter proceed as a petition of appeal pursuant to N.J.A.C. 6A:3-1.1 et seq. The respondents filed their respective answers and the matter was transmitted to the Office of Administrative Law on May 16, 2007, for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14B-1 to -13. The matter was then submitted on motion and cross-motion for summary decision on January 25, 2008.

FACTUAL DISCUSSION

The following factual discussion, derived from the pleadings, is uncontested and therefore deemed findings of fact.

Petitioner, Murphy Transportation, is primarily engaged in pupil transportation services for public and private schools throughout the state. Petitioner also provides transportation services to municipal and private summer camps and other programs and is available on a "for hire" basis as a privately owned school bus contractor. It has maintained a contractual relationship with the respondent, JCC, for several years; providing bus transportation to children who attend the summer camp located at the JCC, in Deal, New Jersey. At the time the petition was filed, Murphy Transportation had a contractual agreement with JCC to provide the use of vans, a few Type 1 school buses and drivers for the summer season commencing in June 2007. However, the

contract did not include several Type 1 buses which the camp required. Respondent Ocean Township BOE entered into an agreement with JCC to provide them with school buses it owns for JCC's private summer camp program. The lease agreement was approved by the respondent Ocean Township BOE at a public meeting of the board on December 19, 2006. The contract called for the rental of a maximum of eight 54-passenger buses owned by the BOE to the JCC from June 22, 2007, through August 19, 2007, during the summer recess of the school district. Pursuant to the contract, JCC paid a flat fee of $2,965 per bus and was responsible for all fuel costs, staffing, moving violations, insurance and towing services. JCC also agreed to indemnify the Board for any claim involving the buses during its use of them.

Although that contract between respondents Ocean Township BOE and JCC has expired, the parties indicated they would continue similar arrangements in the future.

LEGAL ANALYSIS

Petitioner asserts in its motion for summary decision that any future contract or lease agreement for the use of school buses owned by the BOE, such as the contract entered into between the Ocean Township BOE and the JCC, is in direct contravention of those specific permitted uses of school buses owned by a BOE pursuant to N.J.S.A. 18A:39-22 and N.J.A.C. 6A:27-7.8. Petitioner contends that since a BOE receives state aid in connection with the operation of its school buses, it is not permitted to enter into direct competition with independent, privately owned school bus contractors for private business agreements. This would be contrary to statutes, code, and rules and regulations of the Office of Student Transportation of the NJ DOE, it asserts.

Respondent BOE, in opposition to the motion and in support of its cross-motion, asserts neither the statute nor the regulation provide the restrictive language that petitioner suggests. While respondent acknowledges that N.J.S.A. 18A:39-22 creates a specific exception to the general rule that school buses are used for the transportation of students to and from school, the plain wording of the statute authorizes a BOE to allow senior citizen groups, handicapped citizens and municipal recreational programs

to use the buses without paying the BOE for all associated costs. Respondent asserts the statute is permissive and not prohibitive. The statute does not prohibit bus use by other groups, but merely permits certain community groups to utilize the buses without necessarily incurring the full costs related to such use. The regulation supports this interpretation. N.J.A.C. 6A:27-7.8. Respondent asserts that there is no language in the regulation that supports petitioner's position. Rather, N.J.S.A. 18A:11-1(c) and (d) vest local boards of education with the authority to make and amend rules not inconsistent with the other provision of Title 18A and "to 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 of the public schools of the district." Respondent asserts that N.JS.A. 18A:39-1 et seq. confers significant discretion upon the local district and utilizing that discretion, this respondent entered into the contract with the JCC, thereby generating fees for the district rather than having the buses sit idle during the summer. Thus, the district has created income which directly inures to the benefit of taxpayers and enhances the efficiency of the district's operations.

The sole issue presented is whether the contract entered into between respondents Ocean Township BOE and JCC violates N.J.S.A. 18A:39-22 and N.J.A.C. 6A:27-7.8.

N.J.S.A. 18A: 39-22, provides:

> The Board of education of any district may, pursuant to the rules adopted by it, permit the use of school buses owned or leased by the school district for the purpose of transporting senior citizens' groups to and from events within its district or in any contiguous district, and for transporting handicapped citizens in any district, and for transporting children and adults participating in a recreation or other program operated by municipality or municipalities in which the district is located or the municipality in which any constituent district of a regional school district is located; provided that each use of school buses for these purposes is approved by the board; provided that such use of school buses shall not interfere with the transportation of school pupils; and provided that school buses so used shall be operated only by persons licensed as bus drivers. The board shall require

> groups seeking such use of school buses to pay all or part of any costs incurred by the district in permitting such use, including but not limited to the costs of fuel, driver salaries, insurance and depreciation.

The implementation regulation, set forth at N.J.A.C. 6A:27-7.8, provides further requirements such as insurance coverage limits. As a general rule, district BOE shall provide transportation pursuant to N.J.S.A. 18A:39-1 et seq. and shall adopt policies and procedures governing the transportation of students to and from school and school related activities. N.J.A.C. 6A:27-1.1. Local BOE are empowered to make and amend rules not inconsistent with Title 18A and "to 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." N.J.S.A. 18A:11-1(c)(d).

The issue presented is one of statutory construction. When a statute is clear and unambiguous on its face, it is not open to construction or interpretation, and its plain meaning must be enforced. McQueen v. Brown, 342 N.J. Super. 120, 131 (2001), aff'd., 175 N.J. 200 (2002). In this matter the statute and regulation are both clear that a school district may permit use of school buses owned or leased by the district for senior citizens groups, handicapped citizens and other specifically enumerated groups for specific purposes and that those specific groups are required to pay part or all costs incurred by the district in permitting the use, including fuel, insurance etc. This is the plain meaning of both the statute and regulation. Neither prohibits the school board, which is vested with significant authority, to enter into a lease with a private entity, such as the JCC, and require all costs be covered, such as the contract at issue herein.

DECISION AND ORDER

Based on the foregoing, the petitioner's motion for summary decision declaring any future contract between the respondents as null and void is hereby **DENIED** and the respondent Ocean Township Board of Education's cross-motion for summary decision is hereby **GRANTED.**

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

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

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

January 16, 2009
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

Date Received at Agency: 1-16-09

Mailed to Parties:

JAN 22 2009

DATE

OFFICE OF ADMINISTRATIVE LAW

hcf

83-09

OAL DKT. NO EDU 13007-08
AGENCY DKT. NO. 184-6/08

IN THE MATTER OF THE TENURE	:	
HEARING OF STEVEN KUN-SZABO,	:	
NEW JERSEY STATE DEPARTMENT OF	:	COMMISSIONER OF EDUCATION
CORRECTIONS, EAST JERSEY	:	DECISION
STATE PRISON, RAHWAY	:	

The record of this matter, the parties' Stipulation of 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 Administrative Law Judge that the proposed settlement is consistent with established standards governing the settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 2/25/09

Date of Mailing: 2/25/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13007-08

AGENCY REF.NO.184-6/08

IN THE MATTER OF THE TENURE HEARING OF STEVEN KUN-SZABO, NEW JERSEY STATE DEPARTMENT OF CORRECTIONS, EAST JERSEY STATE PRISON, RAHWAY,

---

Christopher C. Josephson, Esq., for petitioner New Jersey State Department of Corrections (Anne Milgram, Attorney General of New Jersey, attorneys)

Rosemarie Cipparulo, Esq., for respondent Steven Kun-Szabo (Weissman & Mintz, attorneys)

Record Closed: January 23, 2009 Decided: January 23, 2009

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

The matter was transmitted to the Office of Administrative Law (OAL) where on October 12, 2007 it was filed for determination as a contested case.

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.

1/23/09
DATE

CAROL I. COHEN, ALJ

Date Received at Agency: 1-27-09

Mailed to Parties:

JAN 27 2009
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

JON S. CORZINE
Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
ARKET STREET
PO BOX 112
TRENTON, NJ 08625-0112

ANNE MILGRAM
Attorney General

ROBERT J. GILSON
Director

January 22, 2009

The Honorable Carol I. Cohen, A.L.J.
Office of Administrative Law
33 Washington St.
Newark, N.J. 07102

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2009 FEB 23 P 12:05

Re: I/M/O the Tenure Hearing of Steven Kun-Szabo
OAL Docket No. EDUTH 13007-2008N
Agency Docket No. 184-6/08

Dear Judge Cohen:

Enclosed herein please find a signed and executed Stipulation of Settlement in the Steven Kun-Szabo tenure matter. If the Stipulation meets with Your Honor's approval, please forward same to the Commissioner of Education for her approval. Thank you for your assistance with this matter. If you have any questions or concerns, please feel free to contact me at your convenience.

Sincerely yours,

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

By: Christopher C. Josephson
Christopher C. Josephson
Deputy Attorney General

c: Rosemarie Cipparulo, Esq.

ANNE MILGRAM
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)984-2906

In the Matter of the Tenure Hearing of STEVEN KUN-SZABO, New Jersey Department of Corrections	:	OAL Dkt. No.: EDUTH 13007-2008N Agency Docket No.: 184-6/08
	:	STIPULATION OF SETTLEMENT

The New Jersey Department of Corrections ("NJDOC" or "Department"), East Jersey State Prison ("EJSP"), which is located at U.S. Route 1 at Rahway Avenue, Woodbridge, New Jersey 07095, represented by ANNE MILGRAM, Attorney General of New Jersey, Christopher C. Josephson, Deputy Attorney General, appearing; and Steven Kun-Szabo, a tenured employee of the NJDOC represented by Rosemarie Cipparulo, Esq. appearing; by way of this Stipulation of Settlement say:

WHEREAS, the NJDOC initiated the filing of tenure charges against Mr. Kun-Szabo, having filed the charges with the Commissioner of Education on or about June 24, 2008; and

WHEREAS, Mr. Kun-Szabo was charged with Conduct Unbecoming a Public Employee and Other Just Cause; and

WHEREAS, the tenure charges alleged that on April 22, 2008,

Steven Kun-Szabo, a "Teacher I" within the Department, who is assigned to EJSP, fabricated allegations that a co-worker, Ms. Joy Black, had engaged in sexual behavior with a corrections officer in an EJSP classroom, in retaliation for Ms. Black having previously filed a complaint against Kun-Szabo with the Department's Equal Employment Division, and thereafter, on April 29, 2008, further retaliated against Ms. Black by following her from room to room in the school area of EJSP and falsely advising her that he was watching her on the instruction of the EJSP Associate Administrator;

WHEREAS, the Department sought the suspension of Mr. Kun-Szabo on the above charges for a period of thirty (30) days without pay; and

WHEREAS, Mr. Kun-Szabo disputed the charges; and

WHEREAS, on October 21, 2008, the matter was referred to the Office of Administrative Law for a plenary hearing; and

WHEREAS, the parties wish to enter into an amicable resolution of the tenure charges filed against Mr. Kun-Szabo; 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. Mr. Kun-Szabo agrees to serve a suspension for twenty (20) days without pay to be served during a time period that is

agreeable to the parties. The suspension may be served in increments of no less than five days beginning within one month of the date that the settlement of this matter is approved by the Commissioner of Education, but not prior to the date that the Commissioner of Education approves settlement. Service of the entire twenty-day suspension must be completed within six months of the date that the Commissioner of Education approves the within settlement.

2. This Agreement shall be part of Mr. Kun-Szabo's official personnel file and may be presented and considered in any subsequent disciplinary action against him.

3. This Agreement constitutes a final and complete resolution of the tenure charges in this matter and fully disposes of all issues in controversy between the parties hereto. Mr. Kun-Szabo agrees not to appeal the tenure action or the terms of this Agreement in any administrative, arbitral or judicial forum.

4. Settlement of this matter is justified and in the public interest because it imposes the desired discipline without the need for a contested tenure hearing. With regard to the penalty, Mr. Kun-Szabo has had one prior disciplinary action taken against him, which resulted in an Official Written Reprimand. The reduction in the length of the suspension without pay from the proposed length to the agreed length is equitable in exchange for eliminating the expense and uncertainty connected with a contested tenure hearing.

5. This Agreement shall not constitute a precedent in any other matter involving Mr. Kun-Szabo or any other employee.

6. 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:

Steven M. J. Kun-Szabo Dated: 7 JANUARY, 2009.
Steven Kun-Szabo

Dated: 1/8/09
Rosemarie Cipparulo, Esq.
Attorney for Steven Kun-Szabo

For the Department of Corrections:

Dated: 1/22/09
ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

Christopher C. Josephson Dated: 1/15/09
By: Christopher C. Josephson
Deputy Attorney General

#86-09

OAL DKT. NO. EDU 3807-07
AGENCY DKT. NO. 77-3/07

D.S. on behalf of minor children, O.F. and C.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
PETITIONER.	:	

The record of this matter, the proposed Settlement Agreement and Release (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.

Section 4 of the Release recites that petitioner will pay respondent installments of $100 on a monthly basis beginning in January 2009 and ending in August 2010. Thus, these provisions anticipated that certain conduct would occur on a date that ultimately fell before the Settlement was considered 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 already implemented the settlement terms, or have

agreed upon a mutually satisfactory alternate date for effectuation of same. The petition and counterclaim are hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/27/09

Date of Mailing: 3/02/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03807-07

AGENCY DKT. NO. 77-3/07

D.S. ON BEHALF OF MINOR CHILDREN,

O.F. AND CC.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP

OF BLOOMFIELD, ESSEX COUNTY,

Respondent.

Novlet Lawrence, Esq., for petitioner

Nicholas J. Dotoli, Esq., for respondent (Schwartz, Simon, Edelstein, Celso and Kessler, attorneys

Record Closed: January 14, 2009 Decided: January 15, 2009

BEFORE **MUMTAZ BARI-BROWN,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on June 6, 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.

A hearing was scheduled on January 14, 2009. Prior to the date of hearing, the parties settled the matter. The attached Settlement Agreement and Board Resolution were submitted on January 14, 2009, 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.

January 15, 2009
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: 1-21-09

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 21 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

da

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

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW

2009 JAN 15 A 10: 14

D.S. o/b/o O.F and C.C.,

Petitioner,

vs.

BLOOMFIELD BOARD OF EDUCATION,

Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

AGENCY REF. NO. 77-3/07

OAL DOCKET NO. EDUOS 03807-2007N

SETTLEMENT AGREEMENT AND RELEASE

WHEREAS, a residency hearing concerning pupils O.F. and C.C. was held before the Board on March 2, 2007; and

WHEREAS, on that date the Board adopted a resolution that O.F. and C.C. be removed from the District because they were allegedly not domiciled in Bloomfield; and

WHEREAS, D.S. filed a Petition of Appeal contesting the Board's residency determination, docketed as OAL Docket No. EDUOS 03807-2007N; and

WHEREAS, the Board filed a Counterclaim for back tuition on March 28, 2007; 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. Desrine Sterling, the parent of O.F. and C.C., 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. Desrine Sterling, in consideration of the Bloomfield Board of Education's settlement and release, agrees to reimburse the Board the sum of $2078.88 (two-thousand, seventy-eight dollars and 88/100) for the period of time that O.F. and C.C. allegedly attended the Bloomfield Public Schools while domiciled in East Orange, NJ; and

4. The Bloomfield Board of Education agrees to accept payment of this settlement in twenty (20) payments of $100.00 to be made on the first of the month with the first scheduled payment due on December 1, 2008, and the final payment of $78.88 due on July 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. The Board has agreed to forego any interest on this sum or prior years' tuition, provided that Desrine Sterling honors the terms of this Agreement. In the event that Ms. Sterling breaches the terms of this Agreement, the Board reserves the right to collect interest on the outstanding balance and proceed with a residency Petition for back-tuition as to O.F. and C.C.

8. Desrine Sterling understands that should she fail to remit the agreed-upon amounts, the Board will take whatever legal action is necessary to enforce this Agreement and collect the entire tuition amount, less a credit for any payment made on account.

9. Desrine Sterling agrees to pay the Board's reasonable attorney's fees and costs, in addition to all collection fees actually incurred, in the event that the Board must take action to collect the tuition amount required to be paid under this Agreement.

10. 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

11. Desrine Sterling 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 Bloomfield 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

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

13. This Agreement is subject to the approval of the Bloomfield Board of Education at its next regularly scheduled meeting.

Date: 12/1/08

Desrine Sterling
Desrine Sterling, Individually and o/b/o O.F. and C.C.

BLOOMFIELD BOARD OF EDUCATION

Date: 1/13/09

By: Frank J. Digesere
Frank J. Digesere
Superintendent

STATE OF NEW JERSEY)

SS:

COUNTY OF ESSEX)

I CERTIFY that on November 12/1/08, 2008, Desrine Sterling, Individually and o/b/o O.F. and C.C., 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

Novlet Lawrence, Esq.
Attorney at Law of State of New Jersey

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2009 JAN 15 A 10:14

BLOOMFIELD BOARD OF EDUCATION

RESOLUTION 402

WHEREAS, the Board of Education hereby approves the settlement and release in the matter captioned: D.S. o/b/o O.F and C.C. v. Bloomfield Board of Education, Docket No. EDUOS 03807-2007N, Agency Ref. No.: 77-3/07, in accordance with the terms and conditions set forth in the agreement; and;

BE IT FURTHER RESOLVED, that the Superintendent is authorized to execute this settlement and release on behalf of the Board of Education.

MOTION Mr. Venezia

2nd Mr. Zlinski

Yes - 9

No - ∅

Signed

1/13/09

Bloomfield BM/BS

88-09

OAL DKT. NO. EDU 1481-08
AGENCY DKT. NO. 393-12/07

M.B., ON BEHALF OF MINOR CHILD, K.M.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/03/09

Date of Mailing: 3/03/09



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01481-08

AGENCY APPEAL NO. 393-12/07

M.B., on behalf of minor child, K.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,

Respondent.

Harvey H. Rothman, Esq., for petitioner (Gerald Poss, P.A. & Associates, attorneys)

John E. Croot, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, LLC, attorneys)

Record Closed: January 28, 2009 Decided: January 28, 2009

BEFORE **BARRY N. FRANK**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 25, 2008 for hearing pursuant to N.J.S.A. 52:14B-1 to -13 and N.J.S.A. 52:14F1 to -15.

The parties have agreed to settle this matter and have prepared the attached Consent Order 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 hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 28, 2009
DATE

BARRY N. FRANK, ALJ

Date Received at Agency:

2-2-09

Mailed to Parties:

FEB 2 2009
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

db

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

M.B. o/b/o K.M.

Petitioner,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE,

Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

AGENCY REF. NO. 393-12/07

OAL DOCKET NO. EDUOS 01481-2008N

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2009 JAN 27 P 12:35

SETTLEMENT AGREEMENT AND RELEASE

WHEREAS, a residency investigation conducted by the Hillside Board of Education (hereinafter referred to as "the Board") found that pupil K.M. was not legally domiciled in Hillside; and

WHEREAS, a residency hearing concerning pupil K.M. was held before the Hillside Board of Education on December 5, 2007; and

WHEREAS, on December 5, 2007 the Board of Education adopted a resolution that K.M. be removed from the District because she was not domiciled in Hillside; and

WHEREAS, Mary Bridgeforth., the guardian ad litem of K.M., filed a petition of appeal with the Commissioner of Education; and

WHEREAS, the appeal was transferred to the Office of Administrative Law, Agency Ref. No. 393-12/07; and

WHEREAS, the appeal was scheduled for a hearing on June 10, 2008 before the Hon. Barry N. Frank, OAL; 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 June 10, 2008; and

WHEREAS, the on June 19, 2008, the Board of Education adopted a resolution approving the settlement; and

WHEREAS, the Court having requested that the terms of the settlement be memorialized in a written agreement.

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

1. K.M. was permitted to complete the 2007-2008 school year in the Hillside School District, and she received her diploma from Hillside High School.

2. The family agreed to pay the sum of $3,000.00 within sixty (60) days of June 10, 2008, and said sum was paid in a timely manner.

3. The parties agree to the withdrawal of the Petition and Counterclaim.

4. 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.

5. 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 or representation of their choice.

6. 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.

7. Mary Bridgeforth 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 Hillside 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

8. This Agreement shall be governed by the Laws of the State of New Jersey.

Date: 12/19/08 Mary Bridgeforth

Mary Bridgeforth, Individually and o/b/o K.M.

HILLSIDE BOARD OF EDUCATION

Date: 1/22/09 **By:** _____

Nagy Sileem, Board President

STATE OF NEW JERSEY)
SS:
COUNTY OF UNION)

I CERTIFY that on ~~November~~ DEC 19, 2008, Mary Bridgeforth, Individually and o/b/o K.M., 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

HARVEY H. ROTHMAN
ATTORNEY AT LAW
STATE OF NEW JERSEY

EDUCATION – Yafet/Smith (continued)

9. Motion to approve the attached resolution concerning the settlement for non-residency for Pupil #5485902429 (Attachment ED#3-06/08)

Motion: Yafet Second: Menza

Daniels	Y	Menza	Y
Garretson	Absent	Smith	Y
Humphrey	Y	Yafet	Y
Isaac	Y	Sileem	Y
Korzeneski	Y		

Motion 9 carried. 8 Yes 0 No

I hereby certify that this is a true copy of the minutes of the Regular Meeting of the Hillside Board of Education held on June 19, 2008.

Kenneth R. Weinheimer
Business Administrator/Board Secretary

Shading indicates additions since Committee Meeting
Underlining indicates additions since initially sent to board.

Hillside Board of Education
Settlement of Pending Action Pertaining to the Determination of
Non-Residency of Pupil #5485902429
June 19, 2008

WHEREAS, a residency hearing concerning pupil #5485902429 was held before the Hillside Board of Education on December 5, 2007; and

WHEREAS, on December 5, 2007 the Board of Education adopted a resolution that pupil #5485902429 be removed from the District because she was not domiciled in Hillside; and

WHEREAS, the guardian ad litem of pupil #5485902429, filed a petition of appeal with the Commissioner of Education; and

WHEREAS, the appeal was transferred to the Office of Administrative Law, Agency Ref. No. 393-12/07; and

WHEREAS, the appeal was scheduled for a hearing on June 10, 2008 before the Hon. Barry N. Frank, OAL; 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 June 10, 2008: and

WHEREAS, the Board of Education, having reviewed the terms of the proposed settlement, has determined that the resolution of this matter without further litigation is in the best interests of the District;

NOW, THEREFORE, BE IT RESOLVED, that the Board of Education approves settlement of the pending action according to the following terms:

- Pupil #5485902429 will be permitted to complete the 2007-08 school year in the Hillside School District, and, if she completes all requirements and is otherwise eligible, receive her diploma from Hillside High School;
- The family will pay to the District the sum of $3,000.00 within sixty (60) days of June 10, 2008;
- If the payment is not made on time, the District may enter a judgment in the amount of $9,066.30; and
- The Board President and Board Secretary are authorized to execute any documents required to complete the settlement.

89-09

89-09R

OAL DKT. NO. EDU 1340-09
(EDU 3917-00 ON REMAND)
AGENCY DKT. NO. 110-3/00

MERRILL HODDER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, Stipulation of Settlement and Release, and Initial Decision on Remand – issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1 – have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the parties' agreement as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/03/09

Date of Mailing: 3/03/09



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01340-09

AGENCY DKT. NO. 110-3/00

ON REMAND

OAL DKT. NO. EDU 3917-00

MERRILL HODDER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner (Oxfeld, Cohen, LLC, attorneys)

Nicholas Celso, III, Esq., for respondent (Schwartz, Simon, Edelson, Celso & Kessler, LLC, attorneys)

Record Closed: January 23, 2009 Decided: February 3, 2009

BEFORE **JEFFREY A. GERSON,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 12, 2000 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 subsequently placed on the inactive list pending a Worker's Compensation determination and ultimately assigned to this judge with a

scheduled hearing dated of July 23, 2008. On July 17, 2008, the parties notified the undersigned that the matter had been settled. The Stipulation of Settlement/Release was prepared and signed by the parties on August 31, 2008 and executed by the Board Secretary on November 11, 2008. A copy of the Stipulation of Settlement/Release 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.

February 3, 2009

DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 2-9-09

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 9 2009

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLC
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, New Jersey 07962
(973) 301-0001; (973) 993-3152
Attorneys for Hanover Township
Board of Education

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2008 NOV 21 A 8:52

	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
MERRILL HODDER, Petitioner, vs. BOARD OF EDUCATION OF THE TOWNSHIP OF HANOVER, MORRIS COUNTY Respondent.	AGENCY DOCKET NO: 110-3/00 OAL DOCKET NO. EDU 3917-00 ADMINISTRATIVE ACTION STIPULATION OF SETTLEMENT AND RELEASE

WHEREAS, the Board of Education of the Township of Hanover ("the Board"), with administrative offices located at 61 Highland Avenue, Whippany, New Jersey 07981, 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 Hanover Township School District; and

WHEREAS, Merrill Hodder ("Petitioner"), whose address is 14 William Street, Rockaway, New Jersey 07866, commenced employment with the Board on or about September 1, 1992; and

WHEREAS, Petitioner filed a Petition of Appeal with the Commissioner of Education on or about July 14, 1999, and subsequently withdrew said Petition; and

WHEREAS, Petitioner filed a Petition of Appeal with the Commissioner of Education on or about March 27, 2000, related to an alleged work related injury suffered on or about March 24, 1999, seeking reinstatement of her sick days, sick leave pay pursuant to N.J.S.A. 18A:30-2.1, back pay, other emoluments of employment, costs and attorneys fees; and

WHEREAS, on or about April 14, 2000, the Board filed its answer to the Petition with affirmative defenses; and

WHEREAS, on or about May 12, 2000, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case, which was subsequently placed on the inactive list pending a worker's compensation determination, and ultimately assigned to Administrative Law Judge Jeffrey Gerson with a scheduled hearing date of July 23, 2008; and

WHEREAS, the parties, wishing to resolve the within matter amicably without the need for further, protracted litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by the Court and the Commissioner of Education, if necessary;

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. Payment

In full and final satisfaction of all claims by Petitioner, as more fully detailed below, the Board shall pay to the Petitioner the sum of One Thousand Dollars ($1,000.00). This settlement amount will be paid in a check made payable to Merrill Hodder following the approval of this Stipulation of Settlement and Release by the Court (and Commissioner of Education, if necessary). The Board will issue a 1099 tax form to Petitioner.

2. Withdrawal of Petition

Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Appeal. However, both parties agree that in the event that this agreement is not approved by the Court (and Commissioner of Education, if necessary), that they fully reserve their rights to proceed with this litigation and/or any other cause of action that they might have against one another and that their obligations under this agreement shall be null and void.

3. Resignation

Petitioner has tendered her irrevocable resignation (copy annexed hereto as Ex. A) from all employment with the Board, subject to fulfillment of the terms and conditions set forth in this Stipulation of Settlement and Release ("this Agreement" or "this Settlement"), said resignation to be effective as of the close

of business on the date of approval of the within Settlement by the Court (and Commissioner, if necessary).

4. No Further Compensation/Benefits

Petitioner shall be entitled to no further compensation, emolument of employment or fringe benefit of any kind and specifically waives her right to same, including but not necessarily limited to payment for all unused vacation, sick and personal days and health insurance benefits. However, Petitioner does not waive her right to her current state teacher's pension and health insurance benefits.

5. Release

In exchange for the above consideration, Petitioner, and her heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any claims or rights, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively; its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns, including, but not limited to any claims for attorneys fees, back pay or front pay, any claims for emotional distress or pain and suffering, any claims involving tax liability emanating from this settlement, and any claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retaining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any other claims for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically exempted from this release are any claims arising under the Workers' Compensation Act, *N.J.S.A.* 34:15-1 *et seq.*

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

Petitioner agrees not to disparage the Board, its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns nor to make or solicit any comments, statements, or the like to the media or to others that may be considered to be derogatory or detrimental in nature. The Board agrees to the same terms regarding Petitioner.

8. Surrender of Board Property

Petitioner shall forthwith surrender all school keys and property in her possession to her legal counsel who, in turn shall forward same to the Board's counsel.

9. Board Approval

The Board President has been duly authorized by the Board to execute this Agreement on behalf of the Board of Education.

10. Assent to Terms

Petitioner 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. Petitioner also enters into same without duress and of her own free will and volition.

Petitioner 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 and to revoke this Agreement by delivering written notification to Nicholas Celso, Esq., 44 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 Petitioner will be entitled to none of the consideration described herein.

11. 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.

12. Severability

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then the remaining portions of the Agreement shall remain in full force and effect.

13. 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:

Merrill Hodder
MERRILL HODDER

Date: 8/31/08

WITNESS:

Heather Hodder
/s/

Date: 8/31/08

FOR THE HANOVER TOWNSHIP
BOARD OF EDUCATION:

Brandie J. Linfante
BRANDIE J. LINFANTE, BOARD PRESIDENT

Date: 11/11/08

ATTEST:

Vanessa M. Welsky
VANESSA M. WOLSKY
Board Secretary/Business Administrator

Date: 11/11/08

Exhibit A

Hanover Township Board of Education
61 Highland Avenue
Whippany, New Jersey 07981

Dear Ladies and Gentlemen:

Subject to the terms and conditions of our Stipulation of Settlement and Release, dated August 31, 2008, and approval of same by the Court (and/or Commissioner of Education, if necessary), I hereby tender my irrevocable resignation from all employment with the Hanover Township Board of Education, effective on the date of approval of said Settlement.

Very truly yours,

Merrill Hodder 8/31/08

Merrill Hodder

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 7:30 on October 21, 2008 in the Memorial Junior School Library, 61 Highland Avenue, Whippany, New Jersey.

The following members of the Board were present:

Mrs. Brandie J. Linfante, President
Mr. Anthony J. Scarpino
Mrs. Trish Mattia
Mrs. Carol Fomchenko
Mr. John T. Sheridan, Vice President
Mrs. Charlene Peterson
Mr. Brian Cahill
Mr. Won Kyu Rim
Mr. Michael Alwell

There were no members of the Board absent:

At said meeting the following resolution was adopted:

A. PERSONNEL

15. Approve the following resolution:

RESOLVED, that the Board hereby approves the Stipulation of Settlement and Release in the matter of Merrill Hodder v. Board of Education of the Township of Hanover, Dkt. No. EDU 3917-00, and authorizes the Board President and Secretary to execute same on behalf of the Board. The Business Administrator and Superintendent are further authorized to take all further steps required by the terms of the Settlement to fully implement same.

Roll Call: 9 yes, 0 no

I certify that the above extract of the minutes of October 21, 2008 of the Hanover Township Board of Education to be a true and accurate copy of the official minutes of the meeting.

Date: 1/20/09

Vanessa M. Wolsky
Vanessa M. Wolsky
School Business Administrator/Board Secretary

92-09L

92-09

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

March 11, 2009

Arsen Zartarian, Esq.
The Newark Public Schools
Office of General Counsel
2 Cedar Street
Newark, New Jersey 07102-3091

Eugene G. Liss, Esq.
94 Main Street, 1st Floor
Little Falls, NJ 07424

Dear Counsel:

Upon review of the record in *In the Matter of the Tenure Hearing of Lisa Salvatore, State-operated School District of the City of Newark, Essex County,* Agency Dkt. No. 22-2/09, I note: 1) respondent's February 26, 2009 letter representing that she was unable to respond to tenure charges at the District level because such charges were mailed to the wrong address; and 2) the District's February 27, 2009 reply consenting to withdraw the above-captioned matter, without prejudice, so that respondent may have an opportunity to so respond prior to any certification of charges to the Commissioner.

Under the circumstances, I find that withdrawal of the certified tenure charges is appropriate, and, accordingly, I hereby dismiss this matter without prejudice to the District's right to re-certify any or all such charges after consideration of respondent's answer to them.

Sincerely,

Lucille E. Davy
Commissioner

c: Executive County Superintendent
State Law Library

Mailed 3/12/09

93-09

D.S.J., on behalf of minor child, J.J.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner sought reversal of the final decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying her request for a "hardship waiver" to allow her son, J.J., to participate in Parsippany High School interscholastic basketball contests for the 2008-2009 school year, following his December 2008 transfer from a private school without a *bona* fide change in parental residence. Petitioner contended that the transfer was for urgent and unforeseen academic reasons, and not for athletic advantage.

The NJSIAA argued that the "hardship" provision of its transfer rule permits waivers from athletic ineligibility *only* where the transfer is compelled by an "unforeseeable, unavoidable, and uncorrectable act, condition or event that causes the imposition of severe and non-athletic burden upon the student or his family," such as such as the unexpected inability to pay private school tuition due to job loss, and that transfer of a student for academic reasons simply does not constitute the type of hardship intended by the rule.

The Commissioner upheld the NJSIAA's decision and dismissed the petition, noting that: 1) the transfer rule on its face precludes granting of a waiver except under extraordinary circumstances, so that legitimate – even commendable – reasons for a transfer will not suffice in the absence of such circumstances; and 2) the NJSIAA has chosen, in the interest of ensuring integrity and fairness in athletic competition statewide, to apply its rule narrowly, deeming parental attempts to address academic or educational issues – even if both serious and unexpected – not to be the type of calamitous "act, condition or event" contemplated by a rule intended to accommodate victims of uncontrollable external forces. Thus, the Commissioner – who may not substitute her judgment for that of the NJSIAA on appeal – could not find that the NJSIAA acted arbitrarily or unreasonably in denying a waiver to petitioner.

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 13, 2009

AGENCY DKT. NO. 12-1/09

D.S.J., on behalf of minor child, J.J.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	
RESPONDENT.	:	

For Petitioner, Patrick J. Jennings, Esq.

For Respondent, Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell, P.C.)

This matter came before the Commissioner of Education on January 20, 2009, through the filing of a petition of appeal by D.S.J. (petitioner) on behalf her minor son (J.J.), in full conformance with applicable procedural rules at *N.J.A.C.* 6A:3-7.1.[1] In her appeal, petitioner sought reversal, on an expedited basis, of the final decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying her request for a "hardship waiver" that would allow J.J. to participate in Parsippany High School interscholastic basketball contests for the 2008-09 school year, following his December 1, 2008 transfer from Seton Hall Preparatory High School without a *bona fide* change in parental residence. Petitioner concurrently filed a motion for emergent relief, seeking J.J.'s participation during the pendency of the appeal, which was denied by the Commissioner in a letter decision dated January 23, 2009. In her decision, the

[1] Petitioner provided what she represented to be the entire record before the NJSIAA, as well as proof that an official statement of items had been duly requested from the NJSIAA and would be supplied to the Commissioner upon receipt (Petition of Appeal at ¶8-9; Exhibit F). As events transpired, no statement of items was forthcoming; however, the NJSIAA's answer to the petition (at 2) admitted petitioner's representation as to the content of the record.

Commissioner established an expedited schedule – consistent with the provisions of *N.J.A.C.* 6A:3-7.2 through 6A:3-7.4 – affording petitioner the opportunity to submit further argument on the merits of her appeal and directing the NJSIAA to answer the petition and file a responsive brief. Petitioner's submission, in the form of a detailed certification with appended exhibit,[2] was timely filed on January 27, 2009; the NJSIAA's answer and brief timely followed on January 30, 2009. Upon receipt of these submissions, the record was closed and the matter proceeded to determination.

OPERATIVE FACTS

1. J.J. is currently a junior at Parsippany High School, which he entered on December 1, 2008 following his transfer from Seton Hall Preparatory High School (Seton Hall). J.J. attended Seton Hall during his freshman and sophomore years (2006-07 and 2007-08), and during the three months of his junior year (2008-09) prior to the transfer. Before entering Seton Hall, J.J. had attended public school (Grades 4-8) in the Parsippany school district, where he and petitioner reside. (Petition of Appeal at ¶11, 12, 22; Exhibit D, items D,E,F,G,H)

2. Although not a classified student, J.J. received academic support services in grammar and middle school. Thus assisted, he did well in public school and standardized testing (Terra Nova and Grade Eight Proficiency Assessment) through the 8th grade, and additionally passed the admission tests for Seton Hall and the Morris County School of Technology; no recommendation was made at that time to continue support services into the 9th grade. J.J. decided to attend Seton Hall, where he found it necessary during his first two years to avail himself of help classes and in-school tutoring – the latter recommended by a guidance counselor in response to petitioner's expressed concerns about J.J.'s performance. J.J's grades ranged from A through C, averaging 2.64 in his freshman year and 3.11 in his sophomore year, for a cumulative average of 2.91 and a class rank of 191/251 at the end of his sophomore year. (Petition of Appeal at ¶22-27; Exhibit D, Items E, I, J; Exhibit E, Item A; Exhibit B at 90-91[3])

[2] The referenced exhibit is a copy of the summary report presented to the NJSIAA at hearing (Exhibit D, Item K; see Operative Fact No. 7), together with its underlying detailed report and documentation, which was not a part of the record before the NJSIAA. The NJSIAA did not object to inclusion of petitioner's factual elaborations (through the certification) or the expanded report in the record before the Commissioner.

[3] Exhibit B is the transcript of petitioner's hearing before the NJISAA.

3. Petitioner was concerned that J.J. was not achieving at the desired level of excellence despite working hard, completing homework, and participating in class; of particular concern were his C's in English and History. Petitioner was also concerned about the wide variance in J.J.'s test grades, which were rarely clustered around the course average he ultimately received; she was especially concerned that the lowest of such grades were inconsistent with his daily work and had the effect of precluding him from "achieving markedly higher course averages." (Petition of Appeal at ¶28; Exhibit D, Item H; Exhibit B at 91-92)

4. Upon receiving J.J.'s final exam and course grades at the end of his sophomore year, petitioner decided that, despite everyone's best efforts, J.J. was not going to be successful at Seton Hall, and that maybe a change was needed. However, because she lived and worked out of state for the summer, she was unable to carry out her intention. (Exhibit D, Item H; Exhibit B at 93-94)

5. On returning in the fall, petitioner pondered how to make her son more successful, considering that he did not have the best grades he could get, which would limit his success factors moving forward, such as college opportunities and perhaps even his ability to complete high school – since his school work as a junior and senior would get progressively harder and he was already struggling. Petitioner made inquiry regarding J.J.'s possible attendance at a private school (not identified) with smaller classes, but that school indicated that J.J.'s English grade would keep him from being successful, and she did not pursue the matter further. (Exhibit D, Item H; Exhibit B at 94-96, 99)

6. On the advice of professional educators whom she knew in a context not relating to J.J., petitioner had J.J. tested privately – since J.J. had not been recommended for in-school testing and petitioner was told that private testing would be more extensive than in-school testing in any event – to ascertain what was preventing him from achieving at a level consistent with his efforts and goals, and to identify what would be necessary to enable him to improve. Petitioner also arranged for J.J. to receive private one-on-one tutoring in English and SAT preparation, with providers developing strategies based on his demonstrated needs and abilities, beginning on September 25, 2008; as of January 2, 2009, he had attended 20 one-hour sessions.[4] J.J. remained at Seton Hall during this process because he was not failing – nor could petitioner say that he would fail – and she saw no purpose in transferring him without a plan, which only came after seeing the results of the referenced testing (See No. 7 below). (Petition of Appeal at ¶29-30; Exhibit D, Item H; Exhibit E, Item B; Exhibit B at 95-96, 98-99, 102).

7. The primary professional evaluator consulted by petitioner concluded, in an undated summary report reflecting the results of testing conducted on October 27

[4] Although the record does not definitively so establish, it appears from the referenced exhibit that such tutoring was ongoing as of the date of the letter.

and November 4, 2008,[5] that J.J.'s performance during testing "puts him at academic risk," and that he had a "language based disability" and "would benefit from a Section 504 plan with assistance in a Learning Strategies Class and Collaborative Class in English and possibly math." She further concluded that "accommodations for helping [J.J.] manage his school work and developing memory strategies appear essential for him to learn in the school environment at this time." (Petition of Appeal at ¶31-32; Exhibit D, Item K)

8. Presented with this assessment and believing that Seton Hall could not offer the services necessary to enable J.J. to reach his goals,[6] petitioner made the decision to put J.J. back into the school district where he had previously been successful, with the goal of trying – through the services available in public schools – to increase his grades and get him to be the best student he could be.[7] Petitioner transferred J.J. into Parsippany High School, where he began attending school on December 1, 2008. (Petition of Appeal at ¶33; Exhibit D, Item H; Exhibit B at 94-95)

9. Assistant Principal/Athletic Director Ryan Miller believes that the plan put together by petitioner and her professional experts, as effectuated at Parsippany High School, has made J.J. more academically successful. J.J.'s grades since the transfer have gone from F to C in algebra, C to B- in English, D to B+ in history, and B to B+ in Spanish. (Exhibit B at 97)

10. Although J.J. did not participate in basketball during the portion of his junior year he remained at Seton Hall, he did play freshman and junior varsity basketball during 9th and 10th grades. Pursuant to NJSIAA rules effective for transfers occurring on or after September 1, 2008, such participation rendered him ineligible to participate in interscholastic basketball contests during his junior year at Parsippany, since he had not transferred to another school as a result of a *bona fide* change in parental address. (Exhibit D, Item D; NJSIAA Bylaws, Article V, Section 4.K(2))

11. Petitioner requested that Parsippany High School seek a "hardship" waiver from the NJSIAA so that J.J. could play in interscholastic contests as a junior (Exhibit D, Item C). Pursuant to NJSIAA bylaws, a hearing was held before NJSIAA's Eligibility Appeals Committee (EAC) on January 7, 2009, after which the EAC

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[5] These dates are not indicated in the summary report, but may be found in Exhibit A of Petitioner's Supplemental Affidavit (see Note 2 above).

[6] It is noted that the record does not permit a conclusion as to the accuracy of this belief.

[7] Petitioner also obtained a January 2, 2009 statement from the provider of J.J.'s English tutoring services (see Operative Fact No. 6 above) that "staffing and resources to provide [assistance of the type the provider was offering to J.J.] are commonly available in public schools and often are not available in private school settings." (Exhibit E, Item B)

voted unanimously[8] to deny petitioner's request for waiver. A written decision embodying the EAC's determination, which is the final decision of the NJSIAA, was issued on January 9, 2009 (Exhibit C). The decision stated that petitioner's decision to transfer J.J. to another setting to improve his academic performance, however commendable, did not amount to an "unforeseeable, unavoidable, and uncorrectable act, condition or event that causes the imposition of severe and non-athletic burden upon the student or his family" as required by NJSIAA bylaws, and thus could not meet the standard for waiver; however, the EAC did urge J.J. to practice with the basketball team and seek to join the squad in competition as a senior. Petitioner retained legal counsel (Exhibit F), who on January 20, 2009 filed the instant appeal.

PETITIONER'S POSITION

From the outset, petitioner has stressed that she did not transfer her son to obtain an athletic advantage, but solely for academic reasons. When questioned by the EAC at the conclusion of her hearing – where she appeared without representation – as to how J.J's situation as she had described it constituted a hardship as specifically defined by NJSIAA bylaws, petitioner responded as follows:

> I guess if when he had the service we didn't think he needed it and now we think he needs it. I'm not sure how that doesn't meet the criteria. I mean as a parent, the criteria for hardship – my son has – should be able to go to school and not be frustrated or believe that people believe he's not doing what he's supposed to be doing. Was not the case here. He had an issue. It wasn't to the extent he needed to be classified. It was never recommended for him to be tested. When you do private testing, it's actually more extensive then when you do in-schoolhouse testing. It was recommended to go outside the school district, and have him tested outside the school district. What we were looking for, we were looking for why he can't achieve the goals that he wants to achieve. I'm not saying I'm looking for my son to have been the top student in the school. That's not what I was looking for. What I was looking for was my son if he works hard and he tries that he should be able to achieve the goals that he's attempting to achieve. I think that's really what the point of going to school and everything is.

[8] With one abstention, by a committee member affiliated with Seton Hall. (Exhibit B at 88, 103)

> Now, if he had turned around and stayed at Seton Hall Prep, and again we're talking skills based – we're talking in this case a deficiency in vocabulary skills, which cuts across all of your classes. If we had not attempted to work on this, this does become a hardship now. You're saying that maybe he doesn't pass all his classes at the end of the junior year or he doesn't pass his classes at the end of his senior year, he does not get to go to college. That's a lifetime impact. So, we're not talking about, you know, just one little issue. We're talking about the issue or impact of life in general and what his success factors will be as he moves forward. (Exhibit B at 98-99)

On appeal, through counsel, petitioner further contended that the NJSIAA (upheld by the Commissioner in her ruling on emergent relief) erred in characterizing petitioner's transfer of J.J. from Seton Hall to Parsippany High as simply an attempt to "improve his academic performance," when it, in fact, represented a necessary parental intervention to rescue a child from "all but certain educational failure". According to petitioner, J.J. clearly met the standard for waiver of the NJSIAA ineligibility rule, since the need for his transfer was: "unforeseeable" in that no one had advised petitioner prior to discovery of J.J.'s learning disability through testing in the fall of 2008 that the boy might have deficiencies requiring further intervention; "uncorrectable" because J.J. could not get the services he needed at Seton Hall; and "unavoidable" because, once petitioner had irrefutable evidence – as set forth in detail in her certification and exhibit on appeal[9]– that J.J. would become an "academic casualty" if he remained at Seton Hall, she had no alternative but to effectuate his transfer in order to avoid the severe hardship that would otherwise have befallen him. (Petition of Appeal at ¶34; Brief in Support of Motion for Emergent Relief at 4; Certification of D.S.J., with attached Exhibit A)

[9] See Note 2 above.

THE NJSIAA'S POSITION

The NJSIAA states that the entire purpose of the "hardship" provision, newly incorporated into its bylaws for the 2008-09 school year, is to grant waivers from athletic ineligibility upon transfer of a student – as it has already done on a number of occasions this year – *only* where the transfer is compelled by circumstances which are beyond the expectation and control of the student's parent and beyond the power of the parent to correct, and which impose a severe hardship on the student or family – such as the unexpected inability to pay private school tuition due to job loss or other economic circumstances. The NJSIAA reiterates that Article V, Section 4.K(2) of its bylaws explicitly requires an "unforeseeable, unavoidable, and uncorrectable act, condition or event that causes the imposition of severe and non-athletic burden upon the student or his family" in order for a waiver to be granted, and that transfer of a student to improve his or her academic performance simply does not, in its view, constitute the type of hardship required by this standard. According to the NJSIAA, petitioner's arguments on appeal essentially reflect assertions already considered by the EAC, and her supplementary documentation "merely emphasize[s] what was found by the EAC, namely that [J.J.'s] transfer was undertaken to enhance [his] academic performance and while commendable, did not constitute a hardship as defined by the Bylaw." What petitioner effectively seeks, the NJSIAA asserts, is to have the Commissioner substitute her judgment for that of the NJSIAA – in violation of the applicable standard of review. (NJSIAA's Answer at 3-4 and Letter Brief at 1-3, quotation at 3).

DETERMINATION

Upon careful review and consideration, the Commissioner determines to uphold the decision of the NJSIAA and dismiss petitioner's appeal.

The NJSIAA is a voluntary association of public and nonpublic schools, organized pursuant to *N.J.S.A.* 18A:11-3, to oversee athletics for its member schools in accordance with a constitution, bylaws, rules and regulations approved by the Commissioner of Education and adopted annually by member schools, for which they become school policy enforceable by the NJSIAA.

It is well-established that the Commissioner's scope of review in matters involving NJSIAA determinations is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that the Association applied such rules in a patently arbitrary, capricious or unreasonable manner. *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Nor may the Commissioner substitute her own judgment for that of the NJSIAA, even if she were to decide differently in a *de novo* hearing, where due process has been provided and where there is adequate basis for the decision reached by the NJSIAA committee. *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259. As codified to provide clear notice to the public and regulated parties:[10]

> 1. If the NJSIAA has granted a petitioner due process and its decision is supported by sufficient credible evidence in the record as a whole, the Commissioner shall not substitute his ***judgment for that of the NJSIAA, even if the Commissioner might judge otherwise in a *de novo* review.
>
> 2. The Commissioner shall not overturn NJSIAA's application of its own rules absent a demonstration by the petitioner that such rules were applied in an arbitrary, capricious, or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a).

[10] *See* 31 *N.J.R.* 4173(a) and 32 *N.J.R.* 1177(a).

Additionally, the New Jersey courts have spoken as to the narrow scope of "arbitrary, capricious, or unreasonable" in the context of challenges such as that herein:

> In the law, "arbitrary" and "capricious" means having no rational basis. *** Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.*** (citations omitted) *Bayshore Sew. Co. v. Dep't of Envt. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

Thus, petitioners seeking to overturn decisions of the NJSIAA bear a heavy burden, and, considering the record of this matter in light of the prescribed standard of review, the Commissioner cannot find that petitioner herein has met her burden so as to entitle her to prevail on appeal.

In order to address the evident potential for abuse of student transfers in the realm of interscholastic athletics, the NJSIAA has chosen, effective with the 2008-09 school year, to adopt and enforce strict rules barring any 10th-, 11th- or 12th-grade student who transfers from one school to another without a *bona fide* change in parental address from competitive participation for a period of one year in any sport in which he or she has previously participated at the high school level, with exceptions allowed only upon demonstration that the transfer was the result of an "unforeseeable, unavoidable, and uncorrectable act, condition or event that causes the imposition of severe and non-athletic burden upon the student or his family." Thus, NJSIAA rules on their face establish a standard precluding waiver under anything less than extraordinary circumstances, and, in adopting such rules, the NJSIAA has served notice on its member schools, parents and students that – in the absence of such circumstances – legitimate, even

commendable, reasons for a transfer will not suffice to enable a student to overcome the regulatory barrier to immediate participation in certain athletic contests.

Moreover – as evidenced by the EAC's questioning of petitioner, the committee's ruling and NJSIAA's defense of it on appeal – the NJSIAA has chosen to interpret and apply its rule narrowly so as to grant as few exceptions as possible, deeming parental attempts to address academic or educational issues not to meet the requisite standard because academic/educational developments – even if both serious and unexpected – are not the type of calamitous "act, condition or event" contemplated by a rule intended to accommodate victims of uncontrollable external forces. While the Commissioner understands petitioner's reasoning and commends her commitment to her son's education – as did the NJSIAA – the fact remains that, while the Commissioner might wish to read the rule more broadly in the context of the present matter, she cannot substitute her judgment for that of the NJSIAA, nor can she find the NJSIAA to have applied its rules in a patently arbitrary or unreasonable manner, particularly in light of: the NJSIAA's duty to ensure fairness and integrity in athletic competition statewide; the potential for creation of an unworkable "slippery slope" if parental decisions to transfer students for academic reasons were deemed to fall within the purview of the "hardship" waiver; and J.J.'s freedom to participate in other sports and to practice with the basketball team until he is eligible to join it for competition in his senior year. *N.J.A.C.* 6A:3-7.5(a)[11]

Accordingly, the Commissioner having found that petitioner was afforded the due process to which she was entitled and that the NJSIAA's decision denying her request for waiver

[11] The Commissioner additionally rejects any suggestion that the one-year ineligibility rule – as opposed to its predecessor, which provided for 30 days of ineligibility with no provision for waiver – should not be applied to J.J. because out-of-state summer employment obligations kept petitioner from completing her plans for testing and transfer of J.J. prior to the September 1, 2008 effective date of the one-year rule.

was neither arbitrary nor unreasonable, the NJSIAA's decision is upheld and the petition of appeal dismissed.

IT IS SO ORDERED.[12]

COMMISSIONER OF EDUCATION

Date of Decision: March 13, 2009

Date of ~~Mailing~~: March 13, 2009
Faxing

[12] This decision, as the final decision of the State administrative agency, may be appealed to the Superior Court pursuant to *N.J.S.A.* 18A:11-3 and *N.J.A.C.* 6A:3-7.6.

94-09

PETER LACHENAUER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the denial by respondent District of his request for a hearing concerning his removal as a teacher, pursuant to *N.J.A.C.* 6A:32-4.6. The District contended that the petition should be dismissed for untimeliness, pursuant to *N.J.A.C.* 6A:3-1.3(i), and further argued that petitioner was not entitled to a hearing under *N.J.A.C.* 6A:32-4.6 as he received notice of termination pursuant to his employment contract rather than notice of nonrenewal for a subsequent school year. The District filed a motion for summary decision, based on petitioner's failure to timely file his petition.

The ALJ expressed the view that petitioner should have been entitled to a statement of reasons for non-reemployment pursuant to *N.J.S.A.* 18A:27-3.2, citing *Donaldson v. Board of Education of the City of North Wildwood,* 65 *N.J.* 236, 246-47 (1974), but ultimately concluded that the petition must be dismissed for untimeliness, as the petition was filed more than 90 days after any arguably appropriate trigger date.

Upon a full and independent review, the Commissioner concurred with the ALJ's determination that petitioner failed to file his appeal within the time allowed by applicable regulations. The Commissioner did not, however, adopt that portion of the Initial Decision that suggests that the principles set forth in *Donaldson* must necessarily be applied to actions taken pursuant to a mutual contract termination provision. Accordingly, the Commissioner adopted only the portion of the Initial Decision wherein the petition is 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 18, 2009

OAL DKT NO. EDU 11820-08
AGENCY DKT. NO. 271-9/08

PETER LACHENAUER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The petitioner, who was discharged pursuant to a contractual provision allowing termination upon 30 days notice, contends that he was improperly denied a statement of reasons for his termination and an informal hearing before the respondent district's State superintendent. The matter was adjudicated in the Office of Administrative Law (OAL) by way of motion for summary disposition.

The Administrative Law Judge (ALJ) concluded that the petition must be dismissed for untimeliness. The ALJ also expressed the view that a teaching staff member whose employment has been ended pursuant to a mutual contractual termination provision should have the same right to a statement of reasons as is bestowed by *N.J.S.A.* 18A:27-3.2, and the same access to an informal appearance before the employing board of education as was encouraged by the Court in the case of *Donaldson v. Board of Education of the City of North Wildwood,* 65 *N.J.* 236, 246-47 (1974).

Petitioner did not except to the dismissal for untimeliness, but did submit an 'exception' endorsing the ALJ's opinion concerning the rights due to an employee who has been fired pursuant to a contractual termination clause. Respondent, understandably, had no objection to the ALJ's determination about the timeliness of the petition but excepted to the ALJ's analysis of the rights of an employee fired via the employer's exercise of a contractual termination provision.

After independent review of the record, motion papers, Initial Decision and the parties' exceptions, the Commissioner concurs with the ALJ's determination that petitioner had failed to file his appeal with the Commissioner within the time allowed by the applicable regulations. 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.

Accordingly, the Commissioner adopts only the portion of the Initial Decision wherein the petition is dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/09

Date of Mailing: 3/18/09

* 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
SUMMARY DECISION
OAL DKT. NO. EDU 11820-08
AGENCY DKT. NO. 271-9/08

PETER LACHENAUER,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Eugene G. Liss, Esq., for petitioner

Arsen Zartarian, Esq., for respondent (Arsen Zartarian, Interim General Counsel)

Record Closed: January 12, 2009 Decided: February 3, 2009

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

STATEMENT OF CASE AND PROCEDURAL HISTORY

Petitioner Peter Lachenauer appealed the denial by respondent State-Operated School District of the City of Newark, Essex County (District) of his request for a hearing concerning his removal as a teacher. N.J.A.C. 6A:32-4.6 provides that, when a nontenured teaching staff member has requested and has received a written statement

of reasons for nonremployment pursuant to N.J.S.A. 18A:27-3.2, he or she may request and be allowed an informal appearance before the district board. The District contends that this regulation does not apply to a teacher who receives notice of termination pursuant to his employment contract rather than notice of nonrenewal for a subsequent school year. It further argues that Lachenauer's petition should be dismissed as having been filed out of time under N.J.A.C. 6A:3-1.3(i).

At issue is whether the manner in which the District removed Lachenauer entitled him to an informal appearance. There is also an issue as to whether Lachenauer timely filed his petition.

Lachenauer filed his petition with the Commissioner of Education on September 4, 2008. After receiving the District's Answer on September 30, 2008, the Bureau of Controversies and Disputes of the Department of Education referred the matter to the Office of Administrative Law (OAL) on October 14, 2008, 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 District filed a Motion for Summary Decision to which Lachenauer replied on January 12, 2009.

STATEMENT OF FACTS

I **FIND** the following undisputed **FACTS**:

The District employed Lachenauer as a nontenured English teacher under an employment contract for the 2007-2008 school year commencing on September 1, 2007, and ending on June 30, 2008. Section 5 of the contract provided that, "The appointment and employment hereunder may be terminated by either party, at any time, upon thirty (30) days written notice prior to the attainment of tenure. The thirty (30) day written notice requirement may be waived when termination is for cause."

Assistant Superintendent Roger Leon sent a memorandum on April 2, 2008, to Rita Salley, executive director human resource services, advising that the principal of East Side High School has recommended that Lachenauer's contract not be renewed

for the forthcoming year and that he agreed that Lachenauer's contract should not be renewed.

On April 25, 2008, the District notified Lachenauer as follows: "Based upon appropriate recommendations from administrative staff, the district is exercising its right under Section 5 of the employment contract, which was entered into between you and the District on May 4, 2007, as a Teacher of English. This action is effective immediately. You will receive a check on May 2, 2008 that will represent payment for thirty (30) days, per your contract."

Upon receipt of the District's April 25 letter, Lachenauer sent the following letter on May 2, 2008, to State District Superintendent of School Marion Bolden:

> I have received your letter notifying me that my employment contract will not be renewed for the 2008-2009 school year. According to Title 18A:27-3.2 I am requesting a written statement of reasons for my non-reemployment. I understand you have the thirty (30) calendar days to send me the reasons.
>
> Once the reasons are mailed to me, please accept this letter as my request for an informal appearance before you pursuant to N.J.A.C. 6:3-4.2. As per the code the reason for a hearing is non-adversarial, rather to provide me with an opportunity to persuade you to reconsider your decision. I understand my hearing should take place within thirty (30) calendar days of my receipt of reasons.

Salley informed Lachenauer on June 6, 2008, that, "Human Resource Services is in receipt of you [sic] request for an informal hearing relative to your termination of employment. Please be advised that N.J.A.C. 6:3-4.2 [N.J.A.C. 6A:32-4.6] does not apply to this action and your request is denied." Lachenauer would have received the letter on June 9, 2008.

Lachenauer filed this petition on September 4, 2008, which is 132 days after the April 25, 2008, notice of termination of employment and 87 days after the receipt of the June denial of the request for an informal hearing.

LEGAL DISCUSSION

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 Wesfield, 17 N.J. 67, 74 (1954).

Recently, the New Jersey Supreme Court 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).

Neither party disputes any of the facts proffered by the other. Instead they differ on the legal characterization of the process the District used to sever its relationship with Lachenauer.

The District contends that it terminated Lachenauer on April 25, 2008, within its rights under the employment contract rather than provide him with a notice of nonreemployment under N.J.S.A. 18A:27-3.2, and that, with the termination process, it is not required to provide Lachenauer with an informal appearance before the State Operated District.

N.J.S.A. 18A:27-10 requires that, on or before May 15 in each year, each nontenured teaching staff member continuously employed since the preceding September 30 shall receive either a written offer of a contract of employment for the next year or a written notice from the chief school administrator that such employment will not be offered. In the latter instance, the teaching staff member may, within fifteen days, request in writing a statement of the reasons for such nonemployment, which shall be given to the teaching staff member in writing within thirty days. N.J.S.A. 18A:27-3.2. After receipt of the written statement of reasons for nonreemployment, the teaching staff member may request an informal appearance before the district board of education. N.J.S.A. 18A:27-4.1(b); N.J.A.C. 6A:32-4.6. A nontenured officer or employee who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed. N.J.S.A. 18A:27-4.1(b).

The District could have proceeded with the nonrenewal route for Lachenauer as Salley had recommended in her April 2, 2008, memorandum. Had it done so, Lachenauer would have been allowed to finish out his contract year to June 30, 2008, and clearly would have been able to avail himself of the rights to a written statement of reasons for nonrenewal and an informal appearance. The District, however, took a different path than nonrenewal and instead decided to exercise its contractual rights with Lachenauer to terminate him immediately rather than at the conclusion of the school year and his contractual period. Because it terminated Lachenauer before the conclusion of the school year, as it had a right to do under the employment contract, rather than notifying him of the nonrenewal of his contract for the next school year, the Board contends that it has no obligation under the above statutes and regulations to

give Lachenauer reasons for his dismissal and an opportunity to appear before District representatives. I disagree.

The enactment of N.J.S.A. 18A:27-3.2 and N.J.S.A. 18A:27-4.1(b) followed the Supreme Court decision in Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974). The Court concluded that a nontenured school teacher is entitled to a statement of reasons for her non-retention by a school board. Although that case factually involved a teacher who had been notified that her contract would not be renewed for the succeeding year and the ensuing statutes refer to contract nonrenewal or nonremployment situations rather than midterm terminations, the underpinning of the Court's opinion is applicable to both situations.

> 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 v. Portsmouth School District, 435 F.2d 1182, 1184-1185 (1st Cir. 1970)] and perhaps the very requirement that reasons be stated would, as suggested in [Monks v. N.J. State Parole Board, 58 N.J. 238, 249 (1971)], serve as a significant discipline on the board itself against arbitrary or abusive exercise of its broad discretionary powers.
>
> The contrary arguments appear to us to be minimal in nature. There would of course be some administrative burdens but surely they would not be undue. And the tenure system would not be adversely affected for the requirement that reasons be stated would in nowise curb the breadth of

> the board's discretionary authority to decide whether any particular teacher should or should not be reengaged.
>
> [Id. at 245-246.]

The reasons enunciated by the Donaldson Court for an obligation of a board of education to give a statement of reasons for a contract nonrenewal are no less applicable to a mid-term contract termination. The District has provided no authority to support its argument that a mid-term terminated employee enjoys or should enjoy fewer of these rights established by Donaldson than a non-renewed employee. There is no showing that the Legislature, in codifying Donaldson, intended to distinguish between a teaching staff member terminated before the expiration of a contract year or one terminated at the end of a school year by virtue of the nonrenewal of the contract for a succeeding year. Surely, a mid-term termination has the same effect as a later nonrenewal, only sooner. The cases the District cite are inapposite in that they simply establish that a board, when terminating an employee in accordance with the terms of a contract, need not demonstrate good cause. It need not establish good cause in a nonrenewal situation as well. An employee terminated per his contract one day or six months before the conclusion of a school year should be entitled, upon request, to a statement of reasons and the opportunity for an appearance before the decision maker.

Notwithstanding any rights to which Lachenauer may have been entitled, I **CONCLUDE** that his petition must be dismissed as having been filed out of time.

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>.

Lachenauer failed to file his petition within ninety days of the onset of any arguably appropriate trigger date. The District served Lachenauer with his termination letter on April 25, 2008. He filed his petition with the Commissioner on September 4, 2008, 132 days later. In the event of a nonrenewal or, in this case, a termination, a petitioner is required to file his petition within ninety days of the notice of his nonrenewal, not within ninety days of the exhaustion of other avenues and mechanisms. Ibid. Lachenauer did not do so. See also LeMee v. Bd. of Educ. of the Village of Ridgewood, 1990 S.L.D. 663, 667 (the day petitioner received notice that her contract was not renewed was the date that the ninety-day timeline commenced, notwithstanding the request to appear before the board of education to try to convince the board to change its decision and offer a contract of employment). "A cause of action accrues, so that the applicable period of limitation commences to run, when the party seeking to bring the action has an enforceable right." Ibid.; Also see Andreaggi v. Relis, 171 N.J. Super. 203, 235-236 (Ch. Div. 1979). Lachenauer's enforceable right commenced on April 25, 2008.

Lachenauer argues, however, that his petition does not appeal his termination but rather the failure of the District to afford him his statutory right to receive reasons for his termination and be afforded an informal appearance. He requests as relief an informal hearing and reinstatement until a hearing is held and a subsequent

determination is made. This argument also fails the limitations test. On May 2, 2008, Lachenauer requested that the District provide him with a statement of reasons for nonemployment within thirty days pursuant to N.J.S.A. 18A:27-3.2. If the limitation period began on May 2, 2008, 125 days would have elapsed before Lachenauer filed his petition. At the latest, the limitation period would have begun on June 2, 2008, when the thirty-day response period expired with no communication from the District. By that date, Lachenauer would have known that the District had failed to comply with what he contended was its statutory obligation. Since Lachenauer filed the petition more than ninety days from June 2, 2008, it was beyond the strictly construed limitation period and must therefore fail. I disagree with Lachenauer's contention that the limitation period would not have commenced until he received, on June 9, 2008, the District's June 6, 2008, letter denying his request for an informal hearing. Under Lachenauer's faulty contention, if the District had never responded to his May 2, 2008, letter, the limitation period would be open ended.

ORDER

It is hereby **ORDERED** that the District's Motion for Summary Decision be **GRANTED**.

It is further **ORDERED** that petitioner's appeal of the determination of the District be **DISMISSED**.

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

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

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

February 3, 2009
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: 2/3/09

Mailed to Parties: Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 4 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

id

95-09

IN THE MATTER OF THE TENURE HEARING OF SCOTT POWELL, SCHOOL DISTRICT OF THE TOWNSHIP OF LOPATCONG, WARREN COUNTY.

AND

SCOTT POWELL,

PETITIONER

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF LOPATCONG, WARREN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The petitioning Board certified tenure charges of conduct unbecoming, incapacity, and other just cause against respondent Scott Powell – a tenured special education teacher – for alleged inappropriate, unprofessional and offensive behavior toward students in his charge, including: directing students to inappropriately touch him in class; engaging in personal work during his class time; and using obscenities and vulgar hand gestures in the presence of his students. The Board sought dismissal of respondent from his tenured employment. Consolidated into this case are the respondent's increment withholding appeals for the 2006-07, 2007-08, and 2008-09 school years.

The ALJ found that: the Board carried its burden of proving the tenure charges of unbecoming conduct and incapacity against respondent; respondent's actions were violative of the public trust and his behavior constituted conduct unbecoming a teacher; the Board's determination to remove respondent was reasonable and necessary in order to insure the safety and well being of students; and the Board properly denied respondent's increments and/or salary adjustments for the 2006-07, 2007-08, and 2008-09 school years. The ALJ determined that the tenure charges were sustained, and ordered respondent dismissed from his tenured teaching position.

Upon independent review of the record, the Commissioner concurred with the ALJ's findings as to the seriousness and unacceptability of respondent's conduct, and found that the Board had sustained its burden of the proving the charge of unbecoming conduct by a preponderance of credible evidence; however, the Commissioner found that the record contains insufficient evidence to sustain the charge of incapacity, and dismissed this charge. Accordingly, the Commissioner adopted, with modification, the Initial Decision of the OAL as the final decision in this matter. A copy of this decision will be 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.

March 18, 2009

OAL DKT. NOS. EDU 7065-07 (1425-06, 7630-06 ON REMAND), 1519-08 AND 9521-08 (CONSOLIDATED)
AGENCY DKT. NOS. 374-12/05, 188-5/06, 391-12/07 AND 192-7/08

IN THE MATTER OF THE TENURE HEARING OF SCOTT POWELL, SCHOOL DISTRICT OF THE TOWNSHIP OF LOPATCONG, WARREN COUNTY.	:	
AND	:	COMMISSIONER OF EDUCATION
SCOTT POWELL, PETITIONER	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF LOPATCONG, WARREN COUNTY, RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions on behalf of Mr. Powell and the Board's reply thereto – filed in accordance with the timelines dictated by *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her decision herein.

Respondent's extensive exception submission is largely reiterative of arguments advanced before the Administrative Law Judge (ALJ) below.[1] As the Commissioner finds that

[1] As observed by the Board in its reply exceptions – "[t]his is demonstrated by the fact that more than half – approximately forty-eight (48) – of the ninety (90) pages that constitute Mr. Powell's written exceptions simply repeat verbatim the Proposed Findings of Fact contained in Mr. Powell's August 29, 2008 Post Hearing Brief. Furthermore, it is also worth noting that, save for a couple of paragraphs here and there, the arguments set forth, and

these were, in relevant part, addressed and resolved in the Initial Decision, they will not be revisited here. Respondent additionally charges that the ALJ failed to make factual findings sufficient to allow the Commissioner to determine whether the conclusions she reached were proper and supported by competent evidence and he, therefore, urges that this matter be remanded to the OAL to cure this significant deficiency. (Respondent's Exceptions at 2-5)

Upon a comprehensive review of the entire record of this matter – which includes transcripts of each of the 11 days of hearing[2] – and finding respondent's exceptions without merit, the Commissioner concurs with the ALJ that the Board has proven its charge of unbecoming conduct against respondent by a preponderance of the credible evidence and that termination from his employment is warranted.

In reaching her determination herein, the Commissioner fully recognized that the outcome of this matter with regard to the proving of the charge of unbecoming conduct turns almost exclusively on the credibility of witnesses – the administrators, the students themselves and the respondent – and the weighing of evidence. Consideration of the credibility of the students must focus on such matters as the story they tell, the inconsistencies and gaps therein and the possible motives which may have led them, individually or as a group, to prevaricate. As for respondent, his own testimony forms the primary bulwark of his defense and, in addition to his obvious personal motivations for presenting his case as he does, the record must be thoroughly reviewed to see if his defense is secure, or if – when viewed in light of the Board's evidence – it is contaminated with fatal deficiencies. The ALJ having had the opportunity to

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even the cases cited, in the remaining forty-two (42) pages of Mr. Powell's written exceptions are verbatim the same that were set forth in Mr. Powell's August 29, 2008 Post Hearing Brief and October 6, 2008 Reply Brief." (Board's Reply Exceptions at 3)

[2] The hearing was conducted on October 30, November 28, and December 7, 2007, January 4, January 9, January 10, April 30, May 9, May 16, May 27, and June 26, 2008.

assess the credibility of the various witnesses who appeared before her and having made findings of fact based on their testimony, the standard governing the Commissioner's review is clear and unequivocal:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. (*N.J.S.A.* 52:14B-10(c))

The Commissioner observes that the ALJ documents a clear understanding of her responsibility in this regard by her extensive recitation as to the reasons underlying her credibility assessments:

> In evaluating the testimony and evidence in this matter, I am very mindful of the gravity of the charges and more importantly the penalty that goes along with it. I have carefully and thoroughly observed the witnesses, considered their testimony along with the documentary evidence presented. I FIND that the school personnel and the students testified credibly. I have largely relied on the testimony of the students and have given their testimony a great deal of weight because they were in Mr. Powell's classroom. The students are the only witnesses with first-hand knowledge of all of the allegations pending against Powell. They were the recipients of Powell's actions and inactions.
>
> All of the students testified consistently and clearly without any hesitation. They testified that they were either asked to rub/push Powell's shoulder and/or back, or that they saw another student rub/push Powell's shoulder and/or back. All of the students were consistent as to what Powell did and said. I find their consistency of particular note because of their ages at the time the incidents occurred and the time that had expired between the incidents and their testifying. Of note, I find that several of the students testified that they were uncomfortable or felt uncomfortable for another student rubbing Mr. Powell's back yet those very same students did not reveal how uncomfortable they felt to anyone prior to June of 2005. This I FIND to be a confirmation that these back rubbing/pushing incidents occurred. These students had no motive to lie, they have nothing to gain or lose, and at the time of their testimony Powell was no longer their teacher nor were they in the same school, for they all had graduated to the middle school.

> ***Mr. Powell was not as consistent and at times contradicted himself. Mr. Powell at first testified that he did have occasions when he touched a student. He said he had to touch the student to direct his/her attention to the learning task at hand. When Mr. Powell was confronted with discussing his personal family problems and his medical problems with his students he admitted to such behaviors but then rationalized their happening and promising that they would not happen again. Then at times during his testimony he denied that any touching or inappropriate discussion of personal family issues or his medical issues occurred. Mr. Powell admitted to touching R.'s hair (one of the twins). He admitted to asking a student named Joseph to push on his back. Powell testified that he did not recall how many times he asked Joseph to do it. He also testified to asking Joseph during class time and when other students were not around. Powell acknowledged that he had been warned numerous times, verbally and in writing, not to touch students or not to have students touch him. I FIND that these admissions or acknowledgements by Mr. Powell are indicative of the students' and the other school personnel's truthfulness. I FIND that Mr. Powell's testimony actually corroborates the students' and Mr. Purdy. (Initial Decision, at 27-28)

Contrary to respondent's exception contention, the Commissioner determines that the findings issued by the ALJ provide her with a sufficient basis for reviewing the ALJ's conclusions and recommendations. In this connection, the Commissioner is fully aware that "the ultimate determination of the agency and the ALJ's recommendations must be accompanied by basic findings of fact sufficient to support them." *State Dept. of Health v. Tegnazian*, 194 *N.J. Super.* 435, 442-443. The purpose of such findings "is to enable a reviewing court to conduct an intelligent review of the administrative decision and determine if the facts upon which the order is grounded afford a reasonable basis therefor." (*Id.* at 443) In this matter, the Commissioner concludes that the ALJ fairly summarized the testimony and evidence on both sides, explained how she weighed the proofs before her and further explained why she credited, or discredited, certain testimony. The ALJ's conclusions are clearly aligned and consistent with those credibility determinations.

The Commissioner finds that it is readily ascertainable – as illustrated above – which testimony the ALJ accepted as fact, and she further finds that these facts provide a reasonable basis for her conclusions. The Commissioner's considered review of the entire record before her provides no basis whatsoever for alteration of the ALJ's determinations.

However, notwithstanding that the Commissioner finds that the record amply establishes that the Board has sustained its burden of establishing that respondent is guilty of unbecoming conduct, contrary to the conclusion of the ALJ, she does not find that the Board has met its burden of establishing its second charge against respondent – that of incapacity – as it is determined that the instant record contains insufficient medical evidence to sustain this charge and, therefore, the Board's incapacity charge is hereby dismissed..

With respect to respondent's petitions in this consolidated matter seeking restoration of his salary increments for the 2006-07, 2007-08 and 2008-09 school years, the Commissioner concurs with the ALJ that these appeals have been subsumed in the factual determinations of the instant tenure case and, therefore, the Board properly denied these salary adjustments for the years at issue for the reasons detailed in the Initial Decision at 30-31.[3]

Turning to the appropriate penalty to be imposed in this manner, 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 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 the Matter of the Tenure Hearing of Deborah Suitt-Green, State-operated School District of the City of Newark,*

[3] It is noted, however, that on Page 31 of her decision the ALJ states "Also by virtue of the tenure charges having been sustained herein Powell's employment was terminated on December 13, 2005." By way of clarification, any order terminating respondent's tenured employment must emanate from the Commissioner and would be effective upon the issuance of her decision.

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). She is likewise fully aware that it has long been recognized that – by virtue of the unique position they occupy – educators must be held to an enhanced standard of behavior. As was succinctly stated in *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 *S.L.D.* 302, 321

> [Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. *This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.*

Moreover, as a teacher of special needs elementary school students, recognition of and strict adherence to this requisite standard of behavior is, of necessity, even more crucial.

It is evident on this record that respondent has been in the Board's employ in excess of 25 years, during which time he has received many positive evaluations. However, these factors – which ordinarily could serve to mitigate against respondent's termination – are outweighed by the fact that his unfitness to teach has been demonstrated by a series of incidents – beginning as early as 1986 and continuing, albeit intermittently, to June of 2005 – where respondent exhibited a pattern of poor impulse control, poor insight and poor judgment in his interactions with students under his charge. (See *Redcay v. State Bd. of Ed.*, 130 *N.J.L.* 369 (Sup. Ct. 1943), *aff'd* 131 *N.J.L.* 326 (*E. & A.* 1944) Despite repeated oral and written admonishments from school administrators, respondent has been unwilling or unable to correct his inappropriate behavior. Such an unacceptable pattern of misconduct provides the

Commissioner with little promise that respondent will in the future achieve comportment to the standard which is reasonably demanded of a teaching staff member in this regard, specifically self-restraint, prudence and controlled behavior in his interactions with students. Consequently, the Commissioner is compelled to terminate respondent from his tenured position.

Accordingly, the recommended Initial Decision of the OAL, as modified above, is adopted for the reasons articulated therein. The Commissioner hereby directs that Scott Powell be dismissed from his tenured employment with the Board of Education of the Township of Lopatcong as of the date of this decision. A copy of this decision shall be transmitted to the State Board of Examiners for action as that body deems appropriate.

IT IS SO ORDERED[4]

COMMISSIONER OF EDUCATION

Date of Decision: 3/18/09

Date of Mailing: 3/18/09

[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. NOS. EDU 1425-06;
EDU 7630-06; EDU 7065-07;
EDU 1519-08 AND EDU 9521-08

IN THE MATTER OF THE TENURE HEARING OF SCOTT POWELL, BOARD OF EDUCATION OF THE TOWNSHIP OF LOPATCONG.

John B. Comegno II, Esq., for petitioner Board of Education of the Township of Lopatcong (Comegno Law Group, attorneys)

Sheldon A. Pincus, Esq., for respondent Scott Powell (Bucceri and Pincus, attorneys)

Record Closed: October 13, 2008 Decided: February 2, 2009

BEFORE **CARIDAD F. RIGO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In November 2005, petitioner, the Board of Education of the Township of Lopatcong, filed certified tenure charges against the respondent, Scott Powell. Respondent is a tenured special education teacher in the Lopatcong school district.

Petitioner, in its two-count petition, alleges that respondent behaved in an unbecoming manner and was unfit to perform his duties as a special education teacher.

On January 19, 2006, the Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) for a hearing as a contested case. Several hearings and telephone conferences were conducted. On April 26, 2007, the parties prepared and submitted a Settlement Agreement disposing of OAL docket numbers EDU 01425-06 and EDU 7630-06. The latter docket number pertains to respondent's petition claiming that the Lopatcong Board of Education was arbitrary and capricious and acted in bad faith by withholding his salary increments for the 2006-2007 school year. At that time those cases were consolidated.

On June 15, 2007, the Commissioner of Education rejected the proposed settlement and directed that the case be remanded to the OAL for further processing. See Order of Consolidation dated January 9, 2008, signed nunc pro tunc.

On December 20, 2007, respondent Powell filed a petition alleging that the Lopatcong Board of Education was arbitrary and capricious and acted in bad faith by withholding his salary increment for the 2007-2008 school year. On July 7, 2008, respondent Powell filed a petition alleging that the Lopatcong Board of Education was arbitrary and capricious and acted in bad faith by withholding his salary increment for the 2008-2009 school year. These matters were consolidated by Orders dated August 24, 2006, and January 25, 2008.

Numerous in-person and telephone conferences were held for purposes of establishing hearing dates, settling of discovery issues and a variety of other things. Hearings began on October 30, 2007, and continued until June 26, 2008. At the conclusion of the hearings, and in accordance with N.J.S.A. 52:14B-10.1, the attorneys requested time to submit closing briefs upon receipt of the transcripts. The record closed on October 13, 2008.

THE CHARGES

Charge No. 1

The first charge alleges that throughout the 2004-2005 school year, and possibly prior to 2004, respondent behaved inappropriately and committed inappropriate physical acts towards his special education students.

Charge No. 2

The second charge alleges that because respondent's inappropriate behaviors with the students were not caused by any underlying or treatable psychiatric condition, it is foreseeable that his inappropriate physical acts towards his students would continue. The charge further alleges that respondent is and will continue to be incapacitated to perform his duties as a special education teacher in a school setting, and he is therefore unemployable as a public school teacher.

DISCUSSION OF THE TESTIMONY AND EVIDENCE

Hearings were held on October 29, and 30, 2007, November 28, 2007,December 7, 2007, January 4, 9, and 10, 2008, April 29, 2008, May 9, 16, and 27, 2008, and June 26, 2008. The following is a summary of the testimony and documentary evidence received during the hearing days.

Scott Powell

Petitioner's first witness was the respondent, Scott Powell. Mr. Powell testified that he received his teacher's certificate from New Jersey in the Fall of 1976. He also received his certification to teach in Pennsylvania in 1976. Mr. Powell stated that he has never taught in Pennsylvania. He said he applied for a teaching position in Allentown, Pennsylvania, in August 2006, but he was not offered a position.

He taught at the Mt. Scott Institute in Washington, New Jersey, an all-male school, from 1976 until 1978. He testified that he did not recall if he was ever evaluated while at the Mt. Scott Institute. He said he never asked a student at Mt. Scott to rub his back, nor did he ever work on personal business.

After Mt. Scott he went to Bloomsbury Elementary School, where he taught basic skills and was a resource teacher for grades one through eight. He taught at Bloomsbury from 1978 until 1980. He developed his own lesson plans. He said he did not recall receiving any criticism.

He said he applied for a teaching position at the Lopatcong schools in May or June 1980. He interviewed for the position as a teacher with Sal Drago. He got the job and he worked for the Lopatcong school system from September 1980 until June 2005, when he got suspended.

Mr. Powell was asked to define a reprimand, and he did so by saying that to be reprimanded is to be scolded. He admitted that he was reprimanded about fifteen times, although he has not really counted, by Lopatcong. He admitted to receiving verbal and written reprimands. He stated that he was verbally reprimanded perhaps four or five times. He was issued a written reprimand in the spring of 1982 for coming to school late. He said he was reprimanded for having physical contact with students about four or five times.

Mr. Powell related that he remembers being reprimanded for having inappropriate physical contact with a student when he put his hands on a child's head. Mr. Powell recalled that he had a conference with that particular child's parent regarding that incident. He recalled the incident took place in June of 1986 when shown exhibit DD. According to Mr. Powell this incident was of note because he put his hands on a student's face. Powell explained that he put his hand on the student's chin to praise him for doing good work. He also said that he needed to raise the child's face in order to make eye contact with him because the child kept his head down.

According to the parent of the child involved in the face touching incident Powell used the expression "pain in the balls". Powell denies having said that to the child. See exhibit DD.

Mr. Powell was asked to give examples of when it was appropriate to touch a student. He responded by saying it was appropriate to touch a student when: trying to hold a child back from some impending harm like running into traffic, when separating students that are fighting, when assisting a child with motor difficulties in holding a pencil. He also was asked to give examples of inappropriate physical contact with a student and he said the following: giving a student a hug, a kiss, rubbing a student's back and vice versa. He stated that it was inappropriate for a student to rub a teacher's back.

Mr. Powell stated that it was inappropriate for a teacher to take a student into the bathroom unless it was a necessity that was previously documented in an IEP.

Mr. Powell was shown exhibits marked FF and GG, which were memos dating March 22, 1996, and May 19, 1999, wherein parents complained about Mr. Powell's yelling, talking to his students about his injuries and accidents, asking the students to push on his back, and Powell walking and holding on to his private area, and using the boy's lavatory instead of using the teacher's lavatory. Mr. Powell denied all of the incidents but admitted that he may have used the boy's lavatory twice because of an urgent need.

Mr. Powell was questioned about using other teacher's materials and resources and he denied ever doing that. He stated that he had a conflict with another teacher that he was working with. He admitted that he may have received some personal calls while in class.

With reference to exhibit GG Mr. Powell admitted that he may have on occasion yelled; he explained that he had had throat surgery and at times it was difficult to modulate his voice. He admitted to discussing his injuries and accidents with his students. He stated that he asked a student named Joseph to push on his back. He

stated that he did not recall how many times he asked Joseph to do it but it was during class and other students were around.

Still under direct examination, Mr. Powell testified that Joseph would come on his own volition to push on his back. Mr. Powell stated that Joseph would come up from behind him and press against his back. Mr. Powell said he told Joseph not to do it. Powell said that when he told Joseph not to press on his back Joseph got very upset. He said that he never did anything to correct or change the situation nor did he ever relay this information to the administrators of the school.

Mr. Powell was shown exhibit II, said exhibit was a memo dated March 12, 2002. Initially Mr. Powell did not recall ever seeing this memo; however, after reading it his memory was refreshed. Mr. Powell recalls discussing all of the items listed in that memo with Mr. Purdy.

Mr. Powell was shown exhibit JJ, this was a memo written on November 5, 2003, regarding a conference about Mr. Powell always touching twin students G. and R., third graders in his class. Mr. Powell recalled reading the memo and discussing the matter with his administrators. At first Mr. Powell denied always touching R., however he later admitted to touching R. once while waiting at dismissal time; he said he touched R. to keep him from crossing the parking lot when the lot was full of cars. Powell denied playing with R.'s hair. Mr. Powell stated that he initially put his hand on R.'s shoulder and then on R.'s head as in a patting motion. Mr. Powell testified that he thought it was appropriate to touch R.'s head in getting R. to look at him and make eye contact. Mr. Powell denied continuously touching R. during class.

Mr. Powell's attention was also drawn to the corrective action plan outlined in exhibit JJ. Powell recalled that one of the corrective actions he was to take was not to touch any student for any reason.

Mr. Powell said that he agreed that it was not professional for a teacher to ask a student to rub his back.

Mr. Powell was shown exhibit marked KK. Mr. Powell stated that he did not know why this letter or request was made. KK was a hand-written note from a parent asking that in the future their child not be placed in Powell's class. The letter is dated September 21, 2004.

Mr. Powell denied all of the allegations contained in Charge 1 of the petition.

Mr. Powell admitted that on occasion while in school during his preparation time he used the computer in his class for personal matters.

Mr. Powell related that once in May of 2005, he was pressing his back against the corner of the wall rubbing his back when a third grader asked him what he was doing. Powell said he told the student about his medical history, by saying that he tore his shoulder.

Mr. Powell denied telling his students that he would give them detention if they did not rub his back.

Mr. Powell was shown exhibit marked TT. Powell admits that this was a writing he did on the school computer for his son because his home computer was broken. Mr. Powell denied working on document contained in exhibit TT at school but stated that he opened the document at the computer at school. He said that his son wrote the document and he opened the document at school on the school's computer.

Mr. Powell testified that he was told not to have students touch him. He testified that he was warned on more than one occasion not to discuss his personal matters with students.

Albert Purdy

Albert Purdy was the superintendent and principal of the elementary school for the Lopatcong Board of Education. Mr. Purdy received his certification in elementary education in 1967. He is certified as social studies teacher and school superintendent.

He has a masters degree in educational administration from Lehigh University. He worked for the Lopatcong Board of Education from 1973 until he retired in June of 2005. In total he taught for six years and was involved in school administration for thirty-two years.

Mr. Purdy testified that Mr. Powell was hired in September of 1980 as a special education teacher and resource room teacher. Mr. Purdy was Mr. Powell's supervisor.

Mr. Purdy testified as to an incident involving Mr. Powell and student B. in 1986. Mr. Purdy said that on or about June 13, 1986, B.'s parents came to him because B. complained to his parents that Mr. Powell was touching his face and used the expression "pain in the balls." Mr. Purdy said that he did not get conclusive proof that Powell did those things but that he documented the complaint. Purdy said he told Powell not to touch the students.

Mr. Purdy said that basically between 1980 and 1986 there were no incidents involving Mr. Powell, the same between 1986 through 1994. Then in March of 1996 a series of complaints surfaced as seen in exhibit marked FF. Purdy said that the majority of the complaints in exhibit FF pertained to complaints from other teachers and staff. Purdy said the major complaints against Powell at that time was that he did not adequately plan for his students and/or he did not perform his teaching responsibilities and that Powell used the male student's bathroom instead of the male teacher's bathroom.

Next Mr. Purdy testified as to the touching and yelling incidents complaints lodged in May of 1999. See exhibit GG. Mr. Purdy testified that he met with Powell and Powell admitted to him that he had the students touch/massage his shoulder because sometimes his arm froze on him. Purdy said Powell admitted to yelling sometimes because he could not control his voice due to throat surgery.

Mr. Purdy testified that on June 9, 1999, he wrote Powell a memo confirming a conference and telephone calls he had with Powell about a particular student. Purdy

said that at that time he recommended to Powell that he receive additional training; he did not know if Powell did the additional training.

Mr. Purdy acknowledged that on March 12, 2002, he wrote Powell another memo wherein he outlined the behavior and performance parameters he was to follow. Mr. Purdy testified that items 1 through 8 had been brought to his attention by the students, parents and other teachers. See exhibit marked II.

Mr. Purdy then testified as to his memo dated November 5, 2003, exhibit marked JJ. Mr. Purdy said that he again admonished Powell about touching the students.

Mr. Purdy testified that he does not recall Powell ever responding to any of his memos.

Purdy next testified as to a complaint he received from parent S.S. in a letter dated September 21, 2004. See exhibit KK. Purdy, at the time of his testimony, said that he could not specifically recall this particular parent, however he recalled that this parent did not want their child in Powell's class.

Purdy said that for the 2004-2005 academic year Powell was a special education teacher and a resource room teacher and was in a self-contained classroom.

Purdy testified that in June of 2005 several parents and teachers brought to his attention that they had overheard their children talking about Mr. Powell. The parents relayed and complained that Mr. Powell would ask his male students to rub or push on his back. Purdy said that in total there were seven students, the students were third graders about eight and nine years of age.

Purdy said that he investigated the allegations by talking to all seven of the students. Purdy said that the students told him Powell would threaten them with lunch detention if they did not massage his back. Purdy said the students said the back rubbing occurred more than one time. He said all of the students in essence relayed the same thing. Purdy said the students said Powell would make noises when they

massaged his back. Purdy said the students told him that Powell was always on the computer during class doing work for his son.

Mr. Purdy said that he and Rosemary Kowalchuk met with Powell and informed him of the complaints and that Powell responded by admitting that on one or two occasions he asked a student to massage his back.

Mr. Purdy testified that on June 7, 2005, the Lopatcong Board of Education met. Mr. Purdy stated that he recommended to the Board that they suspend Mr. Powell. The Board resolved to suspend Mr. Powell with pay. According to Mr. Purdy the Lopatcong Board of Education is a nine-member board and all nine members were present and approved the resolution.

Mr. Purdy said he retired effective July 1, 2005, therefore he had no further contact with Powell or the Board.

Under cross-examination Mr. Purdy stated that he could not recall exactly who said what when the parents relayed or complained to him about Powell. He could only recall the specifics of who they were or the child they were talking about if he saw a written note with names. Purdy testified that he always told the parents to put their concerns in writing but many times the parents did not.

During cross examination Mr. Purdy was asked why he didn't call DYFS. Mr. Purdy responded that generally he was not satisfied with DYFS and/or Institutional Abuse. And, it was a child touching a teacher, not the reverse. Mr. Purdy stated that he called the local police but the police said because there was no sexual behavior it was best that he Mr. Purdy handle it internally.

Mr. Purdy also stated that child T.K., a student of Powell, allegedly always touched Mr. Powell and that child was repeatedly told not to do so.

Mr. Purdy was presented with exhibits marked R-14, -15, and -16, copies of Powell's evaluations. Mr. Purdy testified that in essence Mr. Powell received good

evaluations. Mr. Purdy further stated that Powell was generally amenable and tried to correct any teaching technique that was necessary.

E.D.

E.D. is a parent of J.D. Powell was J.D.'s basic reading skills teacher in the 2004-2005 school year, he was in the third grade at that time. E.D. related that J.D. had a play date with D. and that while the boys were playing she overheard them talk about being hungry and that they were frequently late for lunch at school because they were giving Mr. Powell a back rub. E.D. said when she questioned the boys they said giving Mr. Powell a back rub made them feel weird and it upset them.

E.D testified that she then asked J.D. the who, what, when and why of the back-rubbing incidents. She said J.D. said it was everyday, it was all of the boys in class and that only one time it was a girl, her name was A. E.D. said J.D. told her that Mr. Powell said that if the boys were to tell they would get lunch detention and that he (Powell) would get fired.

E.D. said that J.D. told her Powell cursed in class. That Powell never taught them because he was always on the computer looking at colleges for his son. J.D. told her how Powell looked at "girl" magazines. E.D. said J.D. told her Powell unzipped his pants to tuck in his shirt. E.D. also said J.D. told her that Powell demonstrated on himself and other children how he wanted his back rubbed.

J.D. told her Powell talked about his family issues, how he slept on the couch because he fought with his wife. That Powell had bumps on his back and that Powell moaned and groaned. E.D. said J.D. told her Powell had a women's underwear magazine on his desk and was reading it during class. E.D. said J.D. told her it was "Victoria's Secret."

E.D. said that J.D. was afraid of going to Powell's class so he would often get sick. She said J.D. always complained about his stomach. J.D. complained about having to rub Powell's back so J.D. did not want to go to school.

E.D. testified that she brought the situation to Mr. Purdy's attention the following Monday. She went with D.'s mother and A.'s father. She said Purdy met with all three of them. She said she relayed to Mr. Purdy what J.D. and D. relayed to her. She said she asked Purdy to investigate. She said she did not want J.D. in Powell's class. She said Purdy asked her to put all of her concerns in writing, which she did but did not discuss the contents of the letter with anyone.

E.D said that J.D. has major anxiety and swift mood swings. She said she took J.D. for counseling once. She also said there were many times when J.D. did not want to go to school. She said J.D. has trust issues, he feels his teachers have something against him. She said her son is still dealing with the Powell issues.

Under cross-examination E.D. stated that she had met with the Board's attorneys three or four times prior to the day she testified. She said at one time she had a conference with Mr. Powell regarding J.D.; however, Powell talked about his son's cancer. She said the first time J.D. told her anything about Mr. Powell was on June 13, 2005. She said J.D. told her he was late for lunch sometimes because he or other students were rubbing Mr. Powell's back. She also said J.D. told her every day Mr. Powell would ask a student to rub his back. She also stated that J.D. never told Mr. Purdy about Mr. Powell cursing and unzipping his pants because it was the night before she testified that J.D. revealed those allegations to her.

J.D.

J.D. at the time of his testimony was eleven years old and was in the third grade when he was in Mr. Powell's class. He is the child of E.D.

J.D. testified that his reading class with Mr. Powell was held in a classroom in the back of the library, there were windows that you could look in and out of but they were always covered. He said the window on the door was also covered. He said Mr. Powell's desk was the furthest away from the entrance of the room, on the left side. Mr. Powell's work area consisted of two desks, his desk and a computer desk.

J.D. testified that Mr. Powell made students give him back rubs. He said Mr. Powell made him, D., and T., rub his back all of the time.[1] He recalls that he saw A., give Powell a back rub, but he only saw her do it one time. He never saw V. give Powell a back rub.[2]

J.D. testified that Powell made them do it everyday. He said Powell told them he had bumps in his back. He said Powell would have one boy at a time but all the boys everyday. J.D. said that Powell had bumps on his back. He also said Powell would moan when he and the other students rubbed his back.

He said Powell would be sitting at the computer and the boy would be behind him using his hands and elbows. J.D. said that Powell showed them how to do it using D., J., and T. as models. J.D. further explained that Powell rubbed the boys back using his hands and elbows and that Powell did this one time on each of the boys.

J.D. further testified that Powell told the boys not to tell their parents because he would get fired and they would get lunch detention.

J.D. stated that it made him feel uncomfortable. J.D. said he never said no to Powell. J.D. said that lunch detention consisted of sitting on a table alone facing the wall. J.D. also said he was late to lunch a lot because of the back-rubbing assignments.

J.D. said he saw Powell stand up, unzip his pants and tuck in his shirt.

J.D. said Powell cursed in class once. He used the "F" word when a janitor moved something. He said Powell called D. a "fat ass" because D. broke a chair. J.D. said Powell made D. write the "F" word on a napkin.

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[1] D. and T. are two other students in his class.
[2] A. and V. were two female students in the class with J.D.

J.D. testified that he saw Powell looking at a "Victoria's Secret" magazine one time; he said the magazine was on Powell's desk.

J.D. said that Powell told him he was sleeping on the couch at home because he was having fights with his wife. Powell also told him his son had cancer.

J.D. said the students never used the computer because Powell was always on it. He said he did not know what Powell was doing on the computer.

Under cross-examination J.D. testified that he remembers being absent a lot. He said he and D. were good friends in the third grade. He said D. was the first boy to be asked to rub Powell's back.

J.D. said that a couple of days into the semester Powell told them his back story and then Powell told them that if they did not rub his back they would get lunch detention. He said Mr. Powell complained of neck and back pain.

D.R.

D.R. at the time of his testimony was eleven years old. At the time he went to Mr. Powell's classes he was in the third grade. D.R. recalled that C., V., J.D., and A. were all in the class with him. He does not remember T. being in the class. D.R. remembers the classroom having windows but the windows were covered with blinds and stickers.

D.R. testified that J.D., C., and he all rubbed Powell's back everyday. D.R. said he could not remember when the back rubbing started. D.R. said Powell never asked the girls to rub his back. He said he only remembers rubbing Powell's back with his hands. He said Powell told him he would get lunch detention if he told a teacher or anybody. He said he was always five minutes late for lunch. D.R. testified that different students would rub Powell's back each day.

D.R. said that Powell would look at "Victoria's Secret" magazine off and on. He said Powell would also look at magazines throughout the class and that Powell would look at the magazines while getting his back rubbed. D.R. said Powell would always be on the computer looking for colleges for his son.

D.R. said he heard someone say the "F" word. He said he told Powell and Powell told him to write the word down and told him that it was not a bad word. He said Powell also used the words "fat ass" towards him when he sat on a chair and it broke.

D.R. said he heard Powell say that he needed a college for his son and a dress for his wife. D.R. said Powell told him that he messed up his back because he slept on the couch.

Under cross-examination D.R. testified that the subject of Mr. Powell came up on an overnight with J.D., when they were eating pizza. He said J.D.'s mother started asking him and J.D. questions when he and J.D. started talking about giving Mr. Powell back rubs. J.D. said he never saw A. rub Mr. Powell's back.[3] D.R. said that while students rubbed his back Powell would be looking at the "Victoria's Secret" magazine. He said he never saw Powell touch anyone.

V.N.

V.N. is an eleven-year-old girl who was in Mr. Powell's class in the third grade. V.N. named D.R., T., J.D., C., T., and A., as other students in the class. She said she never rubbed Mr. Powell's back.

V.N. said she saw T. rub Mr. Powell's back. She testified that she felt uncomfortable for T. when he rubbed Powell's back. V.N. said she could not remember how often she saw students rub Mr. Powell's back but she saw it more than once. She said that when she saw T. rub Powell's back he used his hands. V.N. testified that Powell would be sitting in a chair or at a chair at his desk. She said Powell would

[3] A. was a female student in Powell's class.

always be sitting. V.N. said she does not remember Powell saying not to tell anyone about the back rubs.

V.N. further stated that when they were in class they would read books and Mr. Powell would be on the computer.

V.N. testified that Powell had magazines like "Victorian" [sic] magazines.

V.N. said she never heard Powell or a student say a bad word.

V.N. testified that sometimes she was late for lunch.

Under cross-examination V.N. said that she only remembers seeing T. rub Mr. Powell's back. She said Mr. Powell called her Queen V. as a nickname and that Powell's nickname for A. was Queen A.

V.N. stated that she does not recall seeing any "Victoria's Secret" magazines on Mr. Powell's desk.[4]

A.D.

A.D. is an eleven-year-old girl who was also in Mr. Powell's third-grade reading class. She recalls T., D.R., and V.N. as her classmates.

A.D. testified that she remembers Powell asking some kids to rub his back. She said D.R. usually did it but she did not recall for sure. She said Powell never asked her to rub his back. She did not remember how often Powell asked D. to rub his back nor did she remember how D.R. rubbed Powell's back. She did say that D.R. would rub Powell's back at his desk.

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[4] Respondent presents that Powell had a Victorian Trading Company catalog. See exhibit 78.

A.D. said that in Powell's class she generally read and wrote. A.D. said she did not remember seeing a computer in the classroom and she never used a computer in the class.

A.D. said she never heard Powell use a bad word in class. She said sometimes Powell talked about his son, she said it was not often and she could not remember what he said about his son. A.D. said she did not remember seeing any magazines in the classroom.

Under cross-examination A.D. testified that in Powell's class she mainly read short stories and worked on grammar. She went to Powell's class everyday. She testified that there were windows in Powell's class and the windows did not have blinds.

She said that she never heard Powell threaten anyone with lunch detention.

She said Powell touched her hair once pulling it away from her face. She said it did not bother her.

Under re-direct she re-iterated that D.R. rubbed Powell at Powell's desk and that Powell was usually reading.

D.L.

D.L. is eleven years of age and was in the third grade at the time he attended Mr. Powell's reading class. Some of his classmates were K., S., and M.

D.L. testified that Mr. Powell made M. rub his back. He said Powell asked him to help M. rub his back. He said he would direct M's elbow. D.L. said Powell would be at his desk that was located in the left corner of the room. He did not remember seeing a computer in the classroom. He said that M. would rub Powell's back once every other day. He said the other students would be reading when Powell was getting his back rubbed. D.L. said Powell only asked M. D.L. said he never told anyone about the back

rubs and he had not discussed the back-rubbing incidents with anyone other than K.'s parents.

D.L. said he did not recall seeing any magazines in the class.

D.L. said he never heard Powell use a bad word in class.

D.L. said Powell talked about his hip replacement and that it hurt. He said that Powell talked about his son and that his son was in the newspaper.

D.L. said that Rosemary Kowalchuk (the Lopatcong principal) was his aunt. He testified that he never spoke to his aunt about Powell and the back rubs.

Under cross-examination D.L. testified that there were no blinds on the windows or the doors of the classroom.

D.L. recalled that the back rubbing started around October of the school year. He stated that Powell told him to help M. rub his back but he did not remember how many times he helped M.

T.B.

T.B. is eleven years of age. He was in the third grade when he had Mr. Powell as his reading teacher. He recalled that Mr. Powell's classroom was located outside of the library; that there was a window with blinds on them and that sometimes the blinds were closed.

He said T. and V. were in his class. T.B. testified that pretty much everyone touched Mr. Powell by rubbing his back. He stated that they did it because they did not know any better.

T.B. said Powell told them his back hurt and he asked him to rub his back. T.B. testified that kids would go up to him and rub his back while Powell was sitting at his

desk. T.B. said he felt disgusting and he thought it was disgusting. He said Powell would pick a kid and say come here and rub my back.

T.B. said he rubbed Powell's back a couple of times each week. He never said no because he didn't know if he said no that he wouldn't get into trouble. Powell told him he would get detention. T.B. said that Powell told him that two or three times. He said his friend T. said no to Powell. T.B. said he talked to V. and T. about rubbing Powell's back but he never told his parents or anyone else.

T.B. further stated that Powell sometimes used the computer while getting his back rubbed. T.B. said Powell made no sounds while getting his back rubbed.

T.B. said he heard Powell use the "F" word when the janitor moved his newspaper.

T.B. also stated that Powell told then about his back pains, his son and his family.

T.B. does not recall Powell looking at any magazines.

T.B. said he was never late leaving Powell's class.

Under cross-examination T.B. testified that he told his parents about Powell and the back rubbing in the Spring. He testified that he remembers rubbing Powell's back a couple of times a week. He recalled that Powell told his friend T. that he would get a detention if he didn't rub his back. T.B. further testified that usually Powell would pick on a child to read while another rubbed his back.

Under re-direct testimony he said he saw V. rub Powell's back.

M.C.

M.C. was eleven years old and is currently in the sixth grade. He was in the third grade when he had Mr. Powell for reading. M.C. only remembers being in the class with three or four other kids. He only remembers K.M. and himself as being the only boys in the class. M.C. recalls that the class was held in a room in the library. He remembered that the room had windows but did not recall if they were covered.

M.C. stated that Powell told him to rub his back. M.C. testified that Powell told him to do so only one time. He testified that Powell asked K.M. to rub his back but he did not see him do it because K.M. told him Powell told him to do it after class. M.C. testified that K.M. told him he thought it was weird.

M.C. said that when he rubbed Powell's back he used his elbow. M.C. testified that he felt weird rubbing Powell with his elbow. He said Powell was sitting at his desk. He said Powell would sometimes sit at the computer. He also said Powell would use the computer most of the time.

M.C. did not recall seeing any magazines in class. M.C. said Powell talked about his son but he could not remember what Powell said about his son.

M.C. testified that Powell told him his hip hurt and he did so every couple of days.

M.C. said that he discussed Powell's back rubbing with J.

Under cross-examination M.C. stated that he spoke to his mom about what happened in Powell's class. He further stated that he never heard Powell say a bad word and he never heard Powell use the "F" word.

Rosemary Kowalchuk

Rosemary Kowalchuk stated that she began working for the Lopatcong Board of Education in July of 1997 as an assistant principal. She has a degree in special education and elementary education that she received in 1975. In 1991 she received a master's degree in school administration. She has certifications in special education, supervisor and principal. Since 2003 she is the principal of the middle school.

She supervised Powell from 2003 until 2005.

Ms. Kowalchuk stated that the students and staff all received training on when it was appropriate to have physical contact with a child. She stated that there were three, possibly four in-school trainings/seminars per year. She said Powell was in attendance at most of these seminars. She said that it was never appropriate for a teacher to have physical contact with a student unless the student was ill or the teacher was breaking up a fight. She said it was the rule in school that it was inappropriate for a teacher to hug a student or touch a student's hair. She said that no touching was the rule. She said the rule was also in the reverse in that students were not to touch teachers.

Ms. Kowalchuk testified that she and Mr. Purdy met with Mr. Powell on May 19, 1999. She stated that at that meeting Powell admitted to asking students to push on his back.

Michael A. Rossi, Jr.

Michael A. Rossi, Jr. is the current superintendent of schools for the Lopatcong Board of Education. He received a bachelor's degree from Moravia College in 1988, and a master's degree from Tufts University in 1990. He said he received a second master's degree from Montclair University in 1995; and he received a Ph.D. in education from Seton Hall University in 2002.

Mr. Rossi stated that he taught throughout the time he was getting his advanced education. He taught fourth and fifth grades in Massachusetts. He taught at the Randolph High School from 1992 through 1996. He is certified in New Jersey as a supervisor, principal and school administrator.

He stated that he began working for the Lopatcong Board of Education in July 2005 and is the superintendent and the elementary school principal. He testified that he first became aware of the allegations against Mr. Powell in June of 2005. He said he attended the June meeting of the Board when the Board resolved to suspend Mr. Powell.

Mr. Rossi said that based on the information he received and a review of the school district file he recommended that tenure charges be filed against Mr. Powell. Mr. Rossi also noted that the district did not have any written rebuttals from Mr. Powell.

Daniel Hall Greenfield, M.D.

Daniel Hall Greenfield testified as petitioner's expert in the field of psychiatry. He was qualified as an expert in psychiatry with the consent of the parties. His curriculum vita was admitted into evidence without objection and is marked as exhibit O. Dr. Greenfield stated he has practiced psychiatry for twenty-eight years.

Dr. Greenfield stated that he was retained by the Lopatcong Board of Education sometime in June of 2005, to evaluate Mr. Powell. He was requested to conduct an evaluation of Powell to:

1. Determine if Powell had a bona-fide psychiatric condition amenable to treatment.
2. To say that if Powell did not have a bona-fide psychiatric condition, would Powell be likely to change, and
3. Are Powell's behaviors likely to re-occur.

More specifically, Dr. Greenfield said the primary question he was to answer was: Does Mr. Powell have a bona-fide treatable psychiatric condition or disorder? Dr. Greenfield stated that he could not find a diagnosis or a condition/disease for Mr. Powell and therefore there is no treatment or remedy for Powell.

Dr. Greenfield said he performed a psychiatric/neuropsychiatric evaluation on Mr. Powell in September 2005, that report is in evidence and is marked exhibit N.

Dr. Greenfield stated that in the process of the evaluation Powell was cooperative and forth coming. He saw no cognitive loss. He said that Powell did not "mask" at the evaluation. In other words, Powell did not make things look better than they were or said he was feeling better than he was. Dr. Greenfield said Powell was "up front" with him; Powell was candid and honest.

Dr. Greenfield testified that after administering a series of standardized and non-standardized psychological, chemical dependency, and related tests along with a review of the information and records provided by the Board he determined that Mr. Powell did not suffer from any clinical disorder. Dr. Greenfield said that Mr. Powell had no personality disorder. Dr. Greenfield said that Mr. Powell does have musculoskeletal/orthopedic problems involving his neck, back, hips and left shoulder which are sources of chronic pain.

Dr. Greenfield further testified that his evaluation indicates that Powell has psychosocial and environmental problems due to his situation with the Lopatcong school district. In other words, the present tenure charges and the possibility of becoming unemployed with no source of income are causing Powell distress. However, once this situation is concluded the problems will either remain, get worse, or go away, it depends on the how the situation is concluded.

Dr. Greenfield also opined that Powell has poor impulse control, poor insight and poor judgment.

Dr. Greenfield stated that Powell's present suspension was stressing him. However, he noted that Powell was coping well with the situation and was not expressing depressive or other psychiatric/psychological symptomatology.

Dr. Greenfield testified that if Mr. Powell committed the alleged acts as outlined in the tenure charges he did so due to failures or lapses in judgment.

Dr. Greenfield said that since Powell does not have a diagnosable or treatable condition there is nothing to treat; there is no problem to address.

On direct examination Dr. Greenfield was asked if the alleged acts were in fact committed by Powell would he be likely to do them again. Dr. Greenfield testified that it is possible. Greenfield said the affect of all of the litigation and possible loss of employment may tell Powell not to do it again. However, Dr. Greenfield said that these alleged inappropriate behaviors were a pattern, they were repeated behaviors and he had no reason to believe it would not happen again. He said this pattern could be driven by a diagnosable psychiatric disorder that is not evident at this time. Dr. Greenfield also stated that no single test or test result will provide a psychiatric diagnosis.

Dr. Greenfield opined that because Powell is under stress he may very well continue to exhibit this pattern of behavior therefore, Powell should not return to work as a teacher.[5]

[5] Powell has three sons, one of whom has Neurofibrosarcoma along with other extensive and serious medical problems, along with the stress involved in dealing with his neck, back, hip and shoulder problems

Respondent's Case

Scott Powell

Scott Powell testified on his own behalf on direct examination. The prior testimony summarized herein was delivered under direct examination as petitioner's first witness in petitioner's presentation.

Mr. Powell testified that in the 2004-2005 school year he was assigned to the elementary school and he had two basic skills classes. Both classes were in the morning. Powell stated that each of his students had a specific learning disability or problem that needed to be addressed, they were all special needs students.

Mr. Powell said that D.R. needed to learn to take more time with his work. D.R. was a behavior problem in that he always wanted attention and he often interfered with T. Mr. Powell stated that on December 14, 2004, D.R. made the class late for lunch. See exhibit R-2, p. 155.

Powell said that J.D. had a lack of confidence and was absent a lot; he needed to work on his comprehension and oral reading. He said J.D. was not a behavior problem.

Powell said A. needed to set limits. She needed prompting to get her work done on time. She needed to stay on task. Powell said she was a forgetful child. He said A. would often forget her lunch tickets and the group would have to wait for her to return with her ticket so they could go to lunch as a group. A. was not a behavior problem.

V.N. was reading below grade level, she too lacked self-confidence. V.N. was very dependent on others to complete her tasks. She had no behavior problems.

M.C. was a talkative; his talking interfered with his work. Powell said M.C. was very inquisitive.

T.B. had trouble with writing and comprehension according to Powell. He exhibited no behavioral problems.

Powell said D.L. was a quiet child that needed to be kept on task.

K.M. had no behavior problems and was a quiet child; he sometimes needed to be kept on task.

Powell said that student C.D. needed to be kept on task and he had difficulty with his writing skills.

T.K. was a student that needed help to complete his work. He had problems with verbal expression. Powell said that this child always touched his sweaters and commented on their softness. Powell testified that he noted in his plan book, exhibit R-2 page 140, that T. touched his sweater. This incident occurred on October 21, 2004. Mr. Powell testified that he had a conversation with Mr. Purdy about T. touching him and saying his clothing was soft.

Mr. Powell stated that he would submit his plan books at the end of each month and Mr. Purdy would review what he did the month before and what he was going to do for the next three days.

Mr. Powell said that his classroom was a cut-out room in the library. The classroom had a window that had a bamboo shade; the shade was usually half-way down. He said people frequently walked by his room when they were in the library.

Mr. Powell testified that he never had the catalogue "Victoria's Secret" in class, he had a catalogue called "Victoria Trading Company," which is a catalogue for Victorian-era things. He said he brought the catalogue into class to show the students what a parasol looked like. Exhibit R-78.

Mr. Powell denied talking to Mr. Purdy about his alleged conduct on June 3, 2002. Mr. Powell denies all of the contents of exhibit X.

Mr. Powell said he never asked J.D. to rub his back. Powell said he never asked D.R. to rub his back. Powell denies telling his students he slept on the couch because he had a fight with his wife. Mr. Powell said he never told his students he had bumps on his back or making any moaning noises.

Mr. Powell said he has talked about his sons to the students because one of his sons appeared in the local newspaper.

Mr. Powell denied he unzipped his pants to tuck his shirt in.

Mr. Powell denied using the "F" word or using the word "ass."

Mr. Powell said he never touched A.'s hair except one time when her hair was on her face.

Mr. Powell said that C.D. once told him his mother also suffered from muscle spasms. Mr. Powell said he allowed C.D. to push on his back one time, he said this happened in 2005.

Mr. Powell was shown exhibit EE that relates an incident that occurred in June 1994. Mr. Powell stated that this incident did not happen.

Mr. Powell denies taking any student to the student's bathroom. Mr. Powell acknowledged that he used the student's bathroom when he had an urgent need and the "Boys'" restroom was more accessible.

Mr. Powell said that in May of 1999 a student named J.S. pressed on his back, Powell said this touching was not solicited by him.

Under cross-examination Mr. Powell stated that it is general practice for the school principal to collect lesson-plan books at the end of the year but that in the 2004-2005 school year he did not hand his in. Mr. Powell explained that he did not turn in his

lesson books because he did not have students that he had to grade. In other words, he had no grades to turn in.

Christopher Barback, Esquire, Ph.D.

Dr. Barback testified as respondent's expert in the field of psychology. He was found to be an expert in the field of psychology with the consent of the parties. His curriculum vita was admitted into evidence without objection and is marked exhibit T. Dr. Barback is a licensed attorney and practices law; he is also a licensed psychologist but does not practice. Dr. Barback said he had an extensive background in clinical psychology. Dr. Barback stated he has been practicing law since 1989.

Dr. Barback stated that he was retained to review and comment on the adequacy of Dr. Greenfield's report. Dr. Barback said he did not meet with Mr. Powell. Dr. Barback stated that Dr. Greenfield's report was based on too little information. Barback opines that Greenfield should have interviewed Powell on more than one occasion. Barback felt that Greenfield and Powell should have had multiple sessions because people can differ from day to day. Barback also opines that Greenfield should have interviewed Mrs. Powell as well in order to determine consistency.

Dr. Barback stated that Greenfield's conclusion was premature and that Greenfield had insufficient data to make the conclusions he did. Barback said that he does not question the tests used by Greenfield but questions how the test results were used. Barback said that if Powell suffers from poor impulse control, poor insight and poor judgment that these psychological problems are common and treatable.

Dr. Barback testified that after reading Greenfield's report and Powell's responses to the questions he thinks Powell suffers from significant psychological problems. Barback also opines that these problems are generally treatable. And, that if Powell receives on-going treatment, the appropriate on-the-job monitoring and is re-introduced to teaching duties, Powell's chances of exhibiting inappropriate behaviors would be substantially reduced.

ISSUE

The issue is whether the Lopatcong Board of Education has demonstrated by a preponderance of the credible evidence that Scott Powell committed one or more of the charges filed against him, and if so, what is the appropriate penalty.

LEGAL DISCUSSION AND CONCLUSION

Where the facts are contested, the trier of fact must weigh the credibility of the witnesses in order to make factual findings concerning the disputed facts. Credibility is the value that a fact finder gives to a witness's testimony, requiring an overall assessment of the witness's story 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). Credible testimony must proceed from the mouth of a credible witness and 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 credibility decisions on common sense, which is also referred to as intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

Respondent argues that there has and is insufficient evidence establishing any of the charges. According to the respondent, petitioner's witnesses were inconsistent, their testimony had discrepancies and caused doubt about what is alleged to have occurred in Powell's classroom. In sum, respondent says that there is not a residuum of competent evidence establishing that Mr. Powell behaved inappropriately and had inappropriate physical contact with his students.

In evaluating the testimony and evidence in this matter, I am very mindful of the gravity of the charges and more importantly the penalty that goes along with it. I have carefully and thoroughly observed the witnesses, considered their testimony along with the documentary evidence presented. I **FIND** that the school personnel and the students testified credibly. I have largely relied on the testimony of the students and have given their testimony a great deal of weight because they were in Mr. Powell's

classroom. The students are the only witnesses with first-hand knowledge of all of the allegations pending against Powell. They were the recipients of Powell's actions and inactions.

All of the students testified consistently and clearly without any hesitation. They testified that they were either asked to rub/push Powell's shoulder and/or back, or that they saw another student rub/push Powell's shoulder and/or back. All of the students were consistent as to what Powell did and said. I find their consistency of particular note because of their ages at the time the incidents occurred and the time that had expired between the incidents and their testifying. Of note, I find that several of the students testified that they were uncomfortable or felt uncomfortable for another student rubbing Mr. Powell's back yet those very same students did not reveal how uncomfortable they felt to anyone prior to June of 2005. This I **FIND** to be a confirmation that these back rubbing/pushing incidents occurred. These students had no motive to lie, they have nothing to gain or to lose, and at the time of their testimony Powell was no longer their teacher nor were they in the same school, for they all had graduated to the middle school.

Mr. Purdy, the elementary school principal and superintendent, testified that he had concerns about Powell's inappropriate behaviors in the classroom since 1986. However, because of the seriousness of the allegations and the lack of sufficient substantiation nothing more than warnings or admonishments were given to Mr. Powell. I **FIND** that although these prior incidents were unproven they substantiate Powell's pattern of behavior. I **FIND** that these prior unproven incidents corroborate the testimony of the students.

Mr. Powell was not as consistent and at times contradicted himself. Mr. Powell at first testified that he did have occasions when he touched a student. He said he had to touch the student to direct his/her attention to the learning task at hand. When Mr. Powell was confronted with discussing his personal family problems and his medical problems with his students he admitted to such behaviors but then rationalized their happening and promising that they would not happen again. Then at times during his testimony he denied that any touching or inappropriate discussion of personal family

issues or his medical issues occurred. Mr. Powell admitted to discussing his shoulder problem with a third grader. Mr. Powell admitted to touching R.'s hair (one of the twins). He admitted to asking a student named Joseph to push on his back; Powell testified that he did not recall how many times he asked Joseph to do it. He also testified to asking Joseph during class time and when other students were not around. Powell acknowledged that he had been warned numerous times, verbally and in writing, not to touch students or not to have students touch him. I **FIND** that these admissions or acknowledgements by Mr. Powell are indicative of the students' and the other school personnel's truthfulness. I **FIND** that Mr. Powell's testimony actually corroborates the students' and Mr. Purdy.

The testimonies of Dr. Greenfield and Dr. Barback can best be summarized thusly: Dr. Greenfield opines that Powell is suffering from psychosocial and environmental problems due to his problems with his employer, the Lopatcong Board of Education. According to Greenfield, Powell has poor impulse control, poor insight and poor judgment much of which may be resolved when the case concludes, because he would not be under such emotional stress. Dr. Barback on the other hand opines that Powell suffers from significant psychological problems which are treatable. However, Dr. Barback does not specify what psychological problems Powell may have nor does he specify the treatment. Therefore, I am left to my own devices with respect to a diagnosable condition or disease and treatment and a predictable prognosis. I **FIND** that the testimony of either one of these witnesses do not weigh in on whether or not Powell committed the acts he is accused of.

The dismissal of a tenured person in the public educational system can only be for inefficiency, incapacity, unbecoming conduct, or other just cause. N.J.S.A. 18A:6-10(b). Although the terms of N.J.S.A. 18A-6-10(b) are general, it fairly and adequately conveys its meaning. Clearly stated it means that a teacher must be fit to discharge the duties and functions of the office or position. In re Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), certif. denied, 65 N.J. 292 (1974). Lack of fitness to remain a teacher is best demonstrated by a series of incidents. I **FIND** that this case is a perfect example of how to determine fitness to teach via series of incidents. We have here a series of incidents beginning as early as 1986 and ending in June of 2005. If one takes each

incident individually perhaps fitness or unfitness cannot be determined. However, taking all of them together in a series one can see a definite pattern.

Thus, on balance, having **FOUND** that the students were credible, and that Mr. Powell was incredible and suffers from behaviors that are not attributable to any disease or condition, along with the undisputed **FACTS** that his misbehaviors began in 1986 and continued, although at times intermittently, until June 2005, and such inappropriate behaviors were brought to his attention many times from 1986 until June 2005, (exhibits DD, EE, FF, GG, HH, H, JJ, KK), I am constrained to **FIND** that Mr. Powell is simply not corrigible and therefore unfit to continue his employment with the Lopatcong Board of Education.

I **FIND** that the charge of inappropriate physical behavior towards his students throughout the 2004-2005 and possibly prior to 2004 has been proven by a preponderance of the credible evidence.

I further **FIND** that the charge of incapacity to perform his duties as a special education teacher in a school setting has been proven by a preponderance of the credible evidence.

Mr. Powell as an educator is held to certain prescribed standards of conduct. Because teachers have the custody and care of children they are required to exercise a higher degree of self-restraint, judgment and control, the very same things Drs. Greenfield and Barback believe are Mr. Powell's problems. Teachers are expected to exhibit exemplary behaviors not necessarily required of other types of employees. In re Lucarelli, 97 N.J.A.R.2d (EDU) 537, 541; In re Sammons, 1972 S.L.D. 302 (Comm'r June 12, 1972); In re Wachendorf, EDU-6860-04, Initial Decision (May 3, 2005), aff'd, Comm'r (July 14, 2005), <http://lawlibrary.rutgers.edu/oal/search.html>. Mr. Powell was a special education teacher assigned to teach reading and writing to students that needed special types of instruction in the basic skills; these were students with special needs because of a myriad of handicaps. Therefore, he was required to exercise an even higher degree of care, control and self-restraint. His behaviors towards his students had to be measured.

Having **FOUND** that Mr. Powell behaved inappropriately with his students, is incapable of performing his duties as a special education teacher and, more importantly, is not corrigible, the only remaining question is: What penalty should be imposed? In the case of In re Tordo, 1974 S.L.D. 97, 98-99, the Commissioner stated:

> Teachers [and educators] 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. When a teacher...violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.

Factors determining the degree of discipline to be imposed include the teacher's prior disciplinary record and the gravity of the misconduct in the instant case, as well as the concept of progressive discipline. W. New York v. Bock, 38 N.J. 500, 522-24 (1962). Mr. Powell had numerous complaints about his behaviors towards his students. Mr. Powell himself testified of the times that he and Mr. Purdy discussed his conduct in the classroom and what corrective measures Mr. Powell was to take.

Taken this matter as a whole, as there are enough incidences of unbecoming conduct and unfitness, I **CONCLUDE** and sustain Mr. Powell's dismissal as a special education teacher.

On April 25, 2006, the Lopatcong Board of Education resolved to withhold Powell's salary increments for the 2006-2007 school year. On September 25, 2007, the Lopatcong Board of Education again resolved to withhold Powell's salary increment for the 2007-2008 school year. And, on May 30, 2008, the Lopatcong Board of Education resolved to withhold Powell's salary increment for the 2008-2009 school year. Mr. Powell filed petitions, bearing OAL docket numbers EDU 07630-06, EDU 01519-08 and EDU 09521-08, seeking to restore his employment and adjustment increments pursuant to N.J.S.A. 18A:29-14. As previously mentioned, all of the above dockets were consolidated under the present docket number of the main tenure case EDU 01425-06.

All of the issues involved in the increment-denial appeals have been subsumed in the factual determinations in the chief tenure case. Therefore, I **CONCLUDE** that the Lopatcong Board of Education properly denied Powell's increments and/or salary adjustments for the academic years 2006-2007, 2007-2008 and 2008-2009. Increments are based on the performance of good service. Powell was placed on suspension with pay from on or about June 14, 2005. And, on December 13, 2005, Powell's employment suspension began for purposes of suspension without pay for 120 calendar days; his full pay was reinstated on April 13, 2006. Exhibit ZZ. Powell has not performed since June 14, 2005, therefore there is no basis for him to receive increments. Exhibit J. Also by virtue of the tenure charges having been sustained herein Powell's employment was terminated on December 13, 2005.

ORDER

Based on all of the foregoing, I hereby **ORDER** that respondent Scott Powell be **DISMISSED** as a tenured teacher/employee of the Lopatcong Township Board of Education.

And, I hereby **AFFIRM** the Lopatcong's Township Board of Education's denials of Scott Powell's salary increments for the academic years of 2006-2007, 2007-2008 and 2008-2009.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** or consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 2, 2009

DATE

CARIDAD F. RIGO, ALJ

February 2, 2009

Date Received at Agency:

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 3 2009

DATE

OFFICE OF ADMINISTRATIVE LAW

lr

APPENDIX

WITNESSES

For petitioner:

Scott Powell

Albert Purdy

E.D.

J.D.

D.R.

V.N.

A.D.

D.L.

T.B.

M.C.

Rosemary Kowalchuk

Michael A. Rossi, Jr.

Daniel Hall Greenfield, M.D.

For respondent:

Scott Powell

Christopher Barback, Esq., Ph.D.

EXHIBITS

For petitioner:

P-A Statement of Tenure Charges without Exhibits

P-B Statement of Evidence without Exhibits

P-C Powell's Response to Tenure Charges

P-D Answer and Affirmative Defenses to Tenure Charges

P-J Board Emergent Resolution regarding Powell

P-K Board Resolution No. 93-06 regarding Probable Cause

P-L Letter from Albert Purdey to Powell regarding Participation in Psychiatric Evaluation

P-N Dr. Daniel Greenfield's Psychiatric/ Neuropsychiatric Evaluation

P-O Curriculum Vitae of Daniel Greenfield, MD MPH, MS

P-R Report of Christopher Barback, Esquire, Ph.D.

P-S Addendum Report of Christopher Barback, Esquire, Ph.D.

P-T Curriculum Vitae of Christopher Barback, Esquire, Ph.D.

P-U Retainer Agreement with Christopher Barback, Esquire, Ph.D., for Services as Expert

P-W Albert Purdy Notes from June 6, 2005 Parent Conference/Interviews

P-X Albert Purdy Notes from Interviews with Students

P-Y Rosemary Kowalchuk Notes from June 6, 2005 Parent Conference/Interviews

P-Z Letter from E.D. regarding: Inappropriate Touching and Request for No-Contact with Powell

P-AA Letter from E.D. regarding: Inappropriate Touching

P-BB Letter from A.D. regarding: Inappropriate Touching

P-CC Letter from D.R. regarding: Inappropriate Touching

P-DD Parent Conference Report Completed by Albert Purdy for Complaints Against Mr. Powell

P-EE Letter from Albert Purdy to Office of Institutional House

P-FF Memo from Albert Purdy to Powell regarding: Use of student's lavatories and escorting students from class to class

P-GG Memorandum from Rosemary Kowalchuk to Board regarding: Powell's excessive yelling, admittedly asking student to push on his back and holding private area while in the classroom

P-HH Memorandum from Rosemary Kowalchuk to Powell regarding: Powell discussing his medical issues with student in class

P-II Memorandum from Rosemary Kowalchuk to Powell regarding: reprimand for unprofessional or inappropriate actions in class, leaning over table to get closet to students, scratching his groin or private area

P-JJ Memorandum from Albert Purdy to Powell regarding: inappropriate touching of a student and playing with a student's hair

P-KK Letter from Parent to Albert Purdy and Rosemary Kowalchuk regarding: requesting that son/daughter not be placed in Powell's classroom because it is no loner a positive learning experience

TT-1* Mr. Powell's Schedule for the 2004-2005 school year

TT-2* Documents from Computer in Powell's classroom

TT-3* Documents from Computer in Powell's classroom

TT-4* Documents from Computer in Powell's classroom

TT-5* Documents from Computer in Powell's classroom

TT-6* Documents from Computer in Powell's classroom

TT-7* Documents from Computer in Powell's classroom

TT-8* Documents from Computer in Powell's classroom

VV Letter to S. Powell from IAIU regarding: Findings

WW Letter to Mr. & Mrs. D. from IAIU regarding: Findings

XX Letter to M. Rossi from IAIU regarding: Findings

YY Letter to S. Powell from A. Purdy regarding: RICE notice

ZZ Letter to S. Powell from T. Barna regarding: Tenure charges

1 Letter to S. Powell from M. Rossi regarding: Rice notice

2 Minutes of Board Meeting on April 25, 2006 regarding: increment withholdings for 2006-2007

3 Letter to S. Powell from T. Barna regarding: increment withholdings for 2006-2007

4 Letter to S. Powell from T. Barna regarding: employment offer for 2007-2008 school year

5 Letter to S. Powell regarding: re-installment of increment withholding

6 Letter to S. Powell from T. Barna regarding: Rice notice

7 Minutes of Board Meeting on September 25, 2007 regarding: increment withholdings for 2007-2008

8 Letter to S. Powell from T. Barna regarding: Board action and revised letter of intent

* With handwritten notations redacted

For respondent:

R-1 Elementary Plan Book 2004-2005

R-2 Bate Stamped Photo Copy of Exhibit R-1

R-3 Middle School Plan Book 2004-2005

R-4 Bate Stamped Photo Copy of Exhibit R-3

R-5 Section from Part II of Staff Handbook (Bate Stamped 001578) entitled "Class Schedules for Elementary Schools"

R-6 Section from Part II of Staff Handbook (Bate Stamped 001579) entitled "Class Schedules for Middle School"

R-7 Section from Part II of Staff Handbook (Bate Stamped 001580) entitled "Half-Day Class Schedules for Elementary School"

R-8 Section from Part II of Staff Handbook (Bate Stamped 001581) entitled "Half-Day Class Schedules for Elementary School"

R-9 Section from Part IV of Staff Handbook (Bate Stamped 001626) entitled "Elementary and Middle School Lunch Schedules"

R-10 Map of Lopatcong Elementary School (Bate Stamped 001659)

R-11 Map of Lopatcong Middle School/Second Floor (Bate Stamped 001660)

R-12 Map of Lopatcong Middle School/First Floor (Bate Stamped 001661)

R-13 IDEA Non-Public Time Records (Bate Stamped 00757-00764)

R-14 Classroom Evaluation Report dated October 20, 1980 (Bate Stamped 001961-001963)

R-15 Classroom Evaluation Report dated March 13, 1981 (Bate Stamped 001955-001960)

R-16 Classroom Evaluation Report dated April 2, 1981 (Bate Stamped 001950-001954)

R-17 Annual Evaluation Report dated May 28, 1981 (Bate Stamped 001895-001896)

R-18 Classroom Evaluation Report dated December 8, 1981 (Bate Stamped 001946-001948)

R-19 Classroom Evaluation Report dated February 10, 1982 (Bate Stamped 001943-001945)

R-20 Classroom Evaluation Report dated March 22, 1982 (Bate Stamped 001940-001942)

R-21 Annual Conference Report dated May 13, 1982 (Bate Stamped 001893-001894)

R-22 Summary Observation and Supervision Report 1981-1982 (Bate Stamped 001949)

R-23 Letter of Recommendation dated September 27, 1982 (Bate Stamped 001385)

R-24 Classroom Evaluation Report dated March 22, 1982 (Bate Stamped 001933, 001935-001936)

R-25 Classroom Evaluation Report dated January 24, 1983 (Bate Stamped 001929-001932)

R-26 Classroom Evaluation Report dated March 22, 1983 (Bate Stamped 001925-001928)

R-27 Annual Conference Report dated May 13, 1983 (Bate Stamped 001925-001928)

R-28 Memo to File from Drago dated December 13, 1983 (Bate Stamped 001382)

R-29 Classroom Evaluation Report dated January 17, 1984 (Bate Stamped 001934, 001937-001939)

R-30 Annual Conference Report 1983-1984 (Bate Stamped 001889-001890)

R-31 Classroom Evaluation Report dated January 16, 1985 (Bate Stamped 001921-001924)

R-32 Memo to Powell/Summary of Conferences/ Dated February 1, 1985 (Bate Stamped 001369)

R-33 Classroom Evaluation Report dated April 10, 1985 (Bate Stamped 001917-001920)

R-34 Annual Conference Report dated June 3, 1985 (Bate Stamped 001885-001888)

R-35 Classroom Observation Report dated October 17, 1985 (Bate Stamped 001914-001916)

R-36 Annual Conference Report dated May 30, 1986 (Bate Stamped 001883-001884)

R-37 Classroom Observation Report dated October 30, 1986 (Bate Stamped 001911-001913)

R-38 Annual Conference Report dated June 2, 1987 (Bate Stamped 001876-001877)

R-39 Classroom Observation Report dated February 8, 1988 (Bate Stamped 001908-001910)

R-40 Annual Conference Report dated May 23, 1988 (Bate Stamped 001870-001873)

R-41 Classroom Observation Report dated November 8, 1988 (Bate Stamped 001905-001907)

R-42 Classroom Observation Report dated March 10, 1989 (Bate Stamped 001902-001904)

R-43 Annual Conference Report dated May 25, 1989 (Bated Stamped 001881-001882)

R-44 Annual Conference Report dated May 16, 1990 (Bate Stamped 001868-001869)

R-45 Classroom Observation Report dated February 13, 1991 (Bate Stamped 001899-001901)

R-46 Annual Conference Report dated May 17, 1991 (Bate Stamped 001866-001867)

R-47 Classroom Observation Report dated May 12, 1992 (Bate Stamped 001964-001971)

R-48 Annual Conference Report dated May 21, 1992 (Bate Stamped 001864-001865)

R-49 Classroom Observation Report dated January 26, 1993 (Bate Stamped 001874, 001876-001877)

R-50 Annual Conference Summary, dated June 10, 1993 (Bate Stamped 001827)

R-51 Classroom Observation Report dated November 12, 1993 (Bate Stamped 001851-001853)

R-52 Memo from Powell to Purdy dated November 24, 1993 (Bate Stamped 001854)

R-53 Classroom Observation Report dated April 6, 1994 (Bate Stamped 01839-001843)

R-54 Summative Evaluation dated June 3, 1994 (Bate Stamped 001826-001825)

R-55 Classroom Observation Report dated January 26, 1995 (Bate Stamped 001818-001820)

R-56 Summative Evaluation, dated May 30, 1995 (Bate Stamped 001821-001823)

R-57 Classroom Observation Report dated March 29, 1996 (Bate Stamped 001814-001816)

R-58 Classroom Observation Report dated April 6, 1998 (Bate Stamped 001797-001799)

R-59 Summative Evaluation dated June 11, 1998 (Bate Stamped 001792-001793)

R-60 Annual Conference Summary dated June 11, 1998 (Bate Stamped 001791)

R-61 Observation Report dated March 7, 2002 (Bate Stamped 001786-001788)

R-62 Observation Report dated May 7, 2004 (Bate Stamped 001783-001785)

R-63 Extract from Board Meeting Minutes – April 25, 2006 (I note that Exhibit R-63 is also marked as Petitioner's Exhibit 2).

R-64 Memo from Barna to Powell dated May 1, 2006 (I note that Exhibit R-64 is also marked and made part of Petitioner's Exhibit 3).

R-65 Letter of Intent dated May 3, 2006 (I note that Exhibit R-65 is also marked and made part of Petitioner's Exhibit 3).

R-66 Letter from Rossi to Powell dated April 24, 2006 (I note that Exhibit R-66 is also marked as Petitioner's Exhibit 1).

R-67 Board Policy 4111.2 and Regulations 4111.2R

R-68 Letter from Barna to Powell dated September 19, 2007 (I note that Exhibit R-68 is also marked as Petitioner Exhibit 5).

R-69 Letter from Barna to Powell dated September 26, 2007 (I note that Exhibit R-69 is also marked as Petitioner Exhibit 8).

R-70 Conference Notes May 16, 1986

R-71 Memo Mehlman to Powell dated September 24, 1992

R-72 Letter to Purdy dated January 15, 1993

R-73 Meeting Notes dated April 20, 1993

R-74 Memo Mehlman to Powell dated March 7, 1994

R-75 Notes

R-76 Notes

R-77 Letter from Purdy to Dawn Miele/Easton YMCA dated July 26, 1989.

R-78 Victorian Trading Company Catalog (Photocopy)

R-79 Photocopy of News Article

R-80 Memorandum from Purdy to Mehlman, Krusman, Powell and Purdy dated January 24, 1997

R-81 Copy of Complete File from the N.J. Department of Children and Families submitted to Mark G. Toscano, Esq., under cover letter dated January 24, 2008

R-82 Deposition of Dr. Daniel P. Greenfield, October 20, 2006

R-82(a) Greenfield Deposition Exhibit R-1/Curriculum Vitae of Dr. Greenfield (I note that Exhibit R-82(a) is also marked as Petitioner Exhibit O.)

R-82(b) Greenfield Deposition Exhibit R-2/Greenfield Report dated September 22, 2005 (I note that Exhibit R-82(b) is also marked as Petitioner Exhibit N).

R-82(c) Greenfield Deposition Exhibit R-3/Questionnaire – Beck Depression Inventory (BDI)

R-82(d) Greenfield Deposition Exhibit R-4/Addiction Assessment Questionnaire

R-82(e) Greenfield Deposition Exhibit R-5/Questionnaire- Michigan Alcohol Screening Test (MAST)

R-82(f) Greenfield Deposition Exhibit R-6/Drug Abuse Screening Test (DAST)

R-82(g) Greenfield Deposition Exhibit R-7/Alcohol Use Disorders Identification Test (AUDIT)

R-82(h) Greenfield Deposition Exhibit R-8/Mini-Mental State Exam (MMSE)

R-82(i) Greenfield Deposition Exhibit R-9/Questionnaire-Cognitive Capacity Screening Examination (CCSE)

R-82(j) Greenfield Deposition Exhibit R-10/Past Medical History Questionnaire

R-82(k) Greenfield Deposition Exhibit R-11/Extended Score Report/MMPI-2 (I note that while Petitioner has marked this as part of its Exhibit M, that part of Exhibit M appears to be in a different order and/or missing pages from the exhibit marked at Dr. Greenfield's deposition.)

R-82(l) Greenfield Deposition Exhibit R-12/ MCMI-III Interpretive Report (I note that Exhibit R-82(l) is also marked as part of Petitioner Exhibit M.)

R-82(m) Greenfield Deposition Exhibit R-13/Letter from Greenfield to Comegno dated April 25, 2006 Re: MMPI-2 and MCMI-III Scoring Sheets

R-82(n) Greenfield Deposition Exhibit R-14/Greenfield Notes

R-82(o) Greenfield Deposition Exhibit R-15/Letter from Greenfield to Comegno dated February 28, 2006, together with Transcription of Greenfield Notes.

R-82(p) Greenfield Deposition Exhibit R-16/Statement of Tenure Charges and Statement of Evidence (I note that Exhibit 84(p) is also marked as Petitioner Exhibit A, B, W, Y, Z, AA, BB, CC, J, L, DD, EE, FF, GG, HH, II, JJ and KK.)

R-82(q) Greenfield Deposition Exhibit R-17/Scoring Sheets MCMI-III

R-82(r) Greenfield Deposition Exhibit R-18/MMPI-2 Scoring Sheets

R-82(s) Greenfield Deposition Exhibit R-19/Greenfield Financial Requirements

R-82(t) Greenfield Deposition Exhibit R-20/ Letter Greenfield to Comegno dated March 3, 2006.

R-82(u) Memoranda and Notes Provided to Greenfield by Purdy

R-82(v) Records and Materials Provided to Greenfield by Purdy

R-82(w) Memoranda Provided to Greenfield by Purdy

R-82(x) Global Assessment of Functioning (GAF) Scale

96-09L

96-09

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

March 19, 2009

Jane B. Capasso, Esq.
Lipman, Antonelli, Batt, Dunlap,
Wodlinger & Gilson
110 North Sixth Street
P.O. Box 729
Vineland, NJ 08362-0729

Ned P. Rogovoy, Esq.
Madison Square Complex
782 S. Brewster Road, Unit A6
Vineland, New Jersey 08361

Dear Counsel:

Upon review of the tenure charges captioned *In the Matter of the Tenure Hearing of Sherri Calabrese, Cumberland Regional School District, Cumberland County*, Agency Dkt. No. 31-2/09 – together with respondent's answer to such charges, the investigative findings referenced by both parties, and the responsive submissions to the March 5, 2009 directive of the Bureau of Controversies and Disputes asking for reasons why this matter should not be dismissed without further proceedings – I have concluded that the charges as pled are insufficient to warrant respondent's termination from tenured employment or reduction in her salary, but that the Board should not be precluded from pursuing new charges if it deems appropriate.

The Board, in arguing against dismissal of the charges, states its belief that sexual relationships between school employees and students – even adult students off school grounds – cannot be permitted to occur with impunity, and that the discovery to be conducted in this matter will reveal a nexus between the relationship in question, which respondent contends arose outside the school setting in a family context, and respondent's employment as a school attendance secretary and cheerleading coach.

Whatever the Board's intentions, however, the fact remains that the charges *as pled* are nothing more than a recitation of how certain allegations against respondent came to the Board's attention, the actions taken in response to such allegations, the course and results of investigations conducted by the County Prosecutor and the Institutional Abuse Unit of the Department of Children and Families – which found no substantiated allegations warranting action – and the Board's bare assertion that respondent's conduct violated the public trust notwithstanding that she was found to

have engaged in neither child abuse nor criminal activity. Although the Board's recitation infers that respondent could have engaged in instances of very serious misbehavior as a school employee, the only conduct *actually charged against her* is that she admittedly engaged in a consensual sexual relationship, away from school, with a young adult male who was, at the time of initial sexual contact, four or five days away from graduating from high school in the district. However, the mere existence of a relationship between a school employee and a consenting adult who happens to be a student in the employee's district is not – in and of itself, and under all circumstances – a sufficient basis to warrant the employee's dismissal or reduction in salary. While such a relationship may, indeed, be a violation of the public trust as charged by the Board in this case, that cannot be determined in the context of a tenure hearing where no specific allegations have been made as to, for example, the origin and duration of the relationship, the manner in which it was conducted, the nature and extent of the parties' interaction in the school setting, or the impact of the relationship on the school environment.

Accordingly, pursuant to *N.J.S.A.* 18A:6-16, I hereby dismiss the instant charges. I do so, however, *without prejudice* to the Board's ability to pursue and certify, in accordance with applicable statute and rule, new charges as it deems appropriate, identifying the *specific bases* on which it contends that respondent's conduct, if proven, warrants termination of her tenured school employment or reduction in her salary.

Sincerely,

Lucille E. Davy
Commissioner

VIA FAX AND REGULAR MAIL
c: Executive County Superintendent
State Law Library

98-09

OAL DKT. NO. EDU 8978-08
AGENCY DKT. NO. 277-9/08

C.A.M., on behalf of minor child, A.C.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of both 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 the notification sent to the parties by OAL on February 11, 2009, providing them thirteen days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by either party, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/25/09

Date of Mailing: 3/25/09

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

99-09

99-09R

PATRICIA MILANO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a certified pre-school teacher employed in respondent's district – contended that she had acquired tenure for the years she taught under contracts with the Township of Franklin Board of Education. The underlying merits of this matter were decided previously in an Initial Decision issued in June 2008, but the matter was remanded to the OAL by the Commissioner in July 2008 because the ALJ had not resolved the threshold question of whether the petitioner's cause of action was ripe for adjudication since the petition did not allege suffering of any loss of pay, employment or other specific benefit.

Incorporating his June 2008 Initial Decision – which ordered that the petitioner had acquired tenure on September 2, 2004 – the ALJ found that this matter is ripe for determination because the issue of tenure impacts directly on the health insurance benefits available to the family of the petitioner, as well as the out-of-pocket monthly expense to petitioner of paying for these benefits. Accordingly, the ALJ ordered the matter ripe for adjudication.

The Commissioner considered both the June 2008 Initial Decision and the instant supplementary decision, and agreed with the ALJ that the petition was timely filed and that the petitioner acquired tenure in respondent's district. The Commissioner found, however, that the record shows that petitioner acquired tenure pursuant to *N.J.S.A.* 18A:28-5(c) on October 3, 2004. Accordingly, the Commissioner adopted the Initial Decision and the supplementary decision with this modification, and directed the Board to compensate the petitioner for the difference in health insurance costs between individual and family coverage for the period she should have been granted tenure status.

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 25, 2009

OAL DKT. NO. EDU 8206-08
(EDU 6797-06 ON REMAND)
AGENCY DKT. NO. 286-8/06

PATRICIA MILANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the supplementary Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the supplementary decision.

By way of background, the underlying merits of this matter were previously before the Commissioner in July 2008, wherein she reviewed the Administrative Law Judge's (ALJ) June 9, 2008 decision granting petitioner summary decision. Petitioner in this underlying matter had sought a declaration that she had achieved tenure in the district, while the Board interposed a defense of untimeliness of the petition. When this matter was originally transmitted to the OAL, the Agency included a Special Feature request which, in pertinent part stated: "Request threshold consideration of whether petitioner's cause of action is ripe for adjudication, since petition does not allege suffering of any loss of pay, employment or other specific benefit." In his June 2008 decision, the ALJ found that the petition of appeal was timely and that petitioner did acquire tenure in respondent's district in September of 2004; however, his decision

did not address the requested foundational issue. In that the ALJ's June 9, 2008 decision did not resolve the requisite threshold question, the Commissioner – on July 24, 2008, decision #321-08, – found that neither the petition's timeliness nor the merits of the parties' respective positions was appropriately before her at that time and she, therefore, remanded the matter to the OAL again requesting a determination as to whether the petitioner's cause of action was ripe for adjudication. With the receipt of the instant supplementary decision finding that petitioner suffered monetary damages as a consequence of the Board's denial of tenure, the Commissioner can now proceed with her review and determination of the ALJ's June 9, 2008 recommendation on the merits of this matter.[1]

Upon a full review of the record – and finding the Board's exception arguments reiterative of those presented to the ALJ below, which it is determined were satisfactorily addressed and resolved in the Initial Decision – the Commissioner agrees with the ALJ, for the reasons detailed on pp. 4-9 of his decision, that the petition of appeal was timely filed and that petitioner acquired tenure in the Franklin School District. The Commissioner, however, does not agree with the ALJ that petitioner's tenured status was acquired on September 2, 2004. Notwithstanding that the first academic year of the pre-school program in which petitioner was to teach commenced during the 2001-02 academic year, the record reflects that petitioner's offer of employment was made and accepted on September 20, 2001, with an expressed effective date of October 2, 2001 (See Exhibit B). Consequently, the Commissioner finds and concludes that petitioner acquired tenure, pursuant to *N.J.S.A.* 18A:28-5(c), on October 3, 2004.

Accordingly, the Initial Decision of June 9, 2008 – as modified above – and the instant supplementary decision are adopted. The Board is hereby directed to compensate

[1] A copy of the ALJ's June 9, 2008 initial decision – along with the Commissioner's July 24, 2008 decision wherein the Board's exception and petitioner's reply arguments on exception are summarized – is attached.

petitioner the difference in health insurance costs between individual and family coverage for the period she should have been granted tenure status.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/25/09

Date of Mailing: 3/25/09

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

#321-08

PATRICIA MILANO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a certified pre-school teacher employed in respondent's district – was originally hired by Franklin Township Schools in September 2001 when the district initiated an Early Childhood Education Program. Shortly thereafter, the district entered into a contract with the Hunterdon County Educational Services Commission (HCESC) to operate its early childhood program, with the district providing the facility. Petitioner claims that respondent Board advised her that if she wanted to continue to work, she had to resign and take the HCESC job, and that she was assured that she would be retained by HCESC at the same salary and benefits. Petitioner resigned, and then was employed by HCESC – working at the Franklin Township worksite – through June 2005. Respondent Board did not renew its contract with HCESC for 2005-06, and reinstated the Early Childhood Education Program directly through the district; petitioner was re-appointed by the Board in July 2005 as a preschool teacher. Petitioner argues that she has taught continually at Kingston School in Franklin Township since 2001; that HCESC was merely a conduit for respondent Board to employ petitioner; and that she has complied with the requirements of *N.J.S.A.* 18A:28-5 and has achieved tenure. The petition sought a declaration that Milano has achieved tenure. Respondent Board contended, *inter alia*, that the petition was untimely.

The ALJ rejected respondent's arguments, finding that: the appeal was timely filed; the actions of the Board constituted a takeover of the Early Childhood Program pursuant to *N.J.S.A.* 18A:28-17; and that the petitioner did acquire tenure in respondent's district, in September of 2004. The ALJ granted petitioner's motion for summary decision and ordered that petitioner acquired tenure on September 2, 2004.

The Commissioner found that neither the petition's timeliness nor the merits of the parties' respective positions are appropriately before the Commissioner at this time. The petitioner requested no relief beyond a declaration that she had acquired tenure, and the appeal was transmitted to the OAL with the express instruction that the ripeness of petitioner's claim be considered as a threshold issue. This not having been done, the Commissioner remanded the matter to the OAL for determination of whether petitioner has, in fact, raised a cause of action that is ripe for Commissioner adjudication.

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 24, 2008

OAL DKT. NO. EDU 6797-06
AGENCY DKT. NO. 286-8/06

PATRICIA MILANO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions by the Board of Education (Board) and petitioner's reply thereto, both duly filed pursuant to *N.J.A.C.* 1:1-18.4.

On exception, the Board argues that the Administrative Law Judge (ALJ) erred in finding that the petition of appeal in this matter was timely filed based on the Board's lack of formal notice to petitioner that it did not deem her tenured. Citing prior decisional law for the proposition that formal notice is not required where sufficient information has been communicated to enable the affected party to make the claim at issue, the Board renews its contention that petitioner's own communication of January 11, 2006 (Exhibit P-3) reflects her clear understanding of the Board's position at that point – yet she did not file her petition until August, well beyond the 90 days permitted by *N.J.A.C.* 6A:3-1.3(d). (Board's Exceptions at 1-4) The Board also takes exception to the ALJ's counting of petitioner's years of service with the Hunterdon County Educational

Services Commission (the ESC) toward acquisition of tenure in the Board's district, reiterating its stance that the Board did not take over the ESC's preschool program, as is plainly required by the statute and case law relied upon by petitioner. (*Id.* at 4-5)

In reply, petitioner – in addition to asserting that, for the reasons expressed by the ALJ, her petition was, in fact, timely filed – objects to the Board pressing a claim of untimeliness at this point in proceedings. Citing state and federal decisional law precluding the raising of a statute of limitations defense at the end stage of litigation, petitioner contends that – although untimely filing was raised as an affirmative defense in the answer to the petition of appeal – the Board cannot now seek to enforce a claim it did nothing to pursue during the nearly one-and-a-half years this matter proceeded through in-person and telephone conferences among counsel and the court, exchange of discovery, and settlement discussions. (Petitioner's Reply at 1-5) Petitioner also urges rejection of the Board's stance with respect to her acquisition of tenure, relying by reference on her prior submission to the ALJ. (*Id.* at 5-6)

Upon review, the Commissioner finds that – notwithstanding the arguments of the parties and the findings and conclusions of the Initial Decision – neither the petition's timeliness nor the merits of the parties' respective positions are appropriately before the Commissioner at this time. It has long been held that the rights flowing from claimed or actual tenured status remain inchoate until an employee suffers an adverse action in alleged violation of such rights;[1] here, however, petitioner seeks no relief beyond a declaration that

[1] See, for example, *Edison Township Education Association v. Board of Education of the Township of Edison*, 1984 *S.L.D.* 1073, 1083, aff'd by the State Board of Education, 1984 *S.L.D.* 1085, aff'd, Docket #A-2030-84T7 (App. Div. 1986); *Ellen Francey v. Board of Education of the City of Salem, Salem County*, 92 *N.J.A.R.*2d (EDU) 449, aff'd with modification by the State Board of Education, 96 *N.J.A.R.*2d (EDU) 347, aff'd 286 *N.J. Super.* 354 (App. Div. 1996); and *Doreen Barca v. Board of Education of the Township of Holmdel, Monmouth County,* Commissioner's Decision No. 200-01, decided June 22, 2001.

she has acquired tenure in the respondent's district – alleging no loss of pay, reduction in employment or deprivation of other specific benefit as a result of the facts pleaded.[2] For this reason, petitioner's appeal was transmitted to the OAL with the express instruction that the ripeness of her claim be considered as a threshold issue;[3] the Initial Decision, however, makes no findings or recommendation in this respect, nor is there any indication on record that the issue was considered by the ALJ and parties during the course of proceedings at the OAL.

Accordingly – not being satisfied that the matter is appropriately before her at this time and being loath to render what would be tantamount to an unauthorized advisory opinion – for the reasons expressed herein, the Commissioner declines to reach the findings and conclusions of the Initial Decision and remands this matter to the OAL for the requested determination of whether petitioner has, in fact, raised a cause of action that is ripe for Commissioner adjudication.

IT IS SO ORDERED.[4]

Lucille T Davy
COMMISSIONER OF EDUCATION

Date of Decision: 7/24/08
Date of Mailing: 7/25/08

[2] Although petitioner's brief in support of her motion for summary decision (at 6) indicates that she seeks an order crediting her with accrued sick leave and reimbursing her for certain health insurance costs in addition to declaring her tenured, no amendment was made to the petition either requesting such relief or stating the factual and legal basis for it.

[3] The agency transmittal form states in pertinent part: "Request threshold consideration of whether petitioner's cause of action is ripe for adjudication, since petition does not allege suffering of any loss of pay, employment or other specific benefit."

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

#321-08

PATRICIA MILANO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a certified pre-school teacher employed in respondent's district – was originally hired by Franklin Township Schools in September 2001 when the district initiated an Early Childhood Education Program. Shortly thereafter, the district entered into a contract with the Hunterdon County Educational Services Commission (HCESC) to operate its early childhood program, with the district providing the facility. Petitioner claims that respondent Board advised her that if she wanted to continue to work, she had to resign and take the HCESC job, and that she was assured that she would be retained by HCESC at the same salary and benefits. Petitioner resigned, and then was employed by HCESC – working at the Franklin Township worksite – through June 2005. Respondent Board did not renew its contract with HCESC for 2005-06, and reinstated the Early Childhood Education Program directly through the district; petitioner was re-appointed by the Board in July 2005 as a preschool teacher. Petitioner argues that she has taught continually at Kingston School in Franklin Township since 2001; that HCESC was merely a conduit for respondent Board to employ petitioner; and that she has complied with the requirements of *N.J.S.A.* 18A:28-5 and has achieved tenure. The petition sought a declaration that Milano has achieved tenure. Respondent Board contended, *inter alia*, that the petition was untimely.

The ALJ rejected respondent's arguments, finding that: the appeal was timely filed; the actions of the Board constituted a takeover of the Early Childhood Program pursuant to *N.J.S.A.* 18A:28-17; and that the petitioner did acquire tenure in respondent's district, in September of 2004. The ALJ granted petitioner's motion for summary decision and ordered that petitioner acquired tenure on September 2, 2004.

The Commissioner found that neither the petition's timeliness nor the merits of the parties' respective positions are appropriately before the Commissioner at this time. The petitioner requested no relief beyond a declaration that she had acquired tenure, and the appeal was transmitted to the OAL with the express instruction that the ripeness of petitioner's claim be considered as a threshold issue. This not having been done, the Commissioner remanded the matter to the OAL for determination of whether petitioner has, in fact, raised a cause of action that is ripe for Commissioner adjudication.

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 24, 2008

OAL DKT. NO. EDU 6797-06
AGENCY DKT. NO. 286-8/06

PATRICIA MILANO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions by the Board of Education (Board) and petitioner's reply thereto, both duly filed pursuant to *N.J.A.C.* 1:1-18.4.

On exception, the Board argues that the Administrative Law Judge (ALJ) erred in finding that the petition of appeal in this matter was timely filed based on the Board's lack of formal notice to petitioner that it did not deem her tenured. Citing prior decisional law for the proposition that formal notice is not required where sufficient information has been communicated to enable the affected party to make the claim at issue, the Board renews its contention that petitioner's own communication of January 11, 2006 (Exhibit P-3) reflects her clear understanding of the Board's position at that point – yet she did not file her petition until August, well beyond the 90 days permitted by *N.J.A.C.* 6A:3-1.3(d). (Board's Exceptions at 1-4) The Board also takes exception to the ALJ's counting of petitioner's years of service with the Hunterdon County Educational

Services Commission (the ESC) toward acquisition of tenure in the Board's district, reiterating its stance that the Board did not take over the ESC's preschool program, as is plainly required by the statute and case law relied upon by petitioner. (*Id.* at 4-5)

In reply, petitioner – in addition to asserting that, for the reasons expressed by the ALJ, her petition was, in fact, timely filed – objects to the Board pressing a claim of untimeliness at this point in proceedings. Citing state and federal decisional law precluding the raising of a statute of limitations defense at the end stage of litigation, petitioner contends that – although untimely filing was raised as an affirmative defense in the answer to the petition of appeal – the Board cannot now seek to enforce a claim it did nothing to pursue during the nearly one-and-a-half years this matter proceeded through in-person and telephone conferences among counsel and the court, exchange of discovery, and settlement discussions. (Petitioner's Reply at 1-5) Petitioner also urges rejection of the Board's stance with respect to her acquisition of tenure, relying by reference on her prior submission to the ALJ. (*Id.* at 5-6)

Upon review, the Commissioner finds that – notwithstanding the arguments of the parties and the findings and conclusions of the Initial Decision – neither the petition's timeliness nor the merits of the parties' respective positions are appropriately before the Commissioner at this time. It has long been held that the rights flowing from claimed or actual tenured status remain inchoate until an employee suffers an adverse action in alleged violation of such rights;[1] here, however, petitioner seeks no relief beyond a declaration that

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she has acquired tenure in the respondent's district – alleging no loss of pay, reduction in employment or deprivation of other specific benefit as a result of the facts pleaded.[2] For this reason, petitioner's appeal was transmitted to the OAL with the express instruction that the ripeness of her claim be considered as a threshold issue;[3] the Initial Decision, however, makes no findings or recommendation in this respect, nor is there any indication on record that the issue was considered by the ALJ and parties during the course of proceedings at the OAL.

Accordingly – not being satisfied that the matter is appropriately before her at this time and being loath to render what would be tantamount to an unauthorized advisory opinion – for the reasons expressed herein, the Commissioner declines to reach the findings and conclusions of the Initial Decision and remands this matter to the OAL for the requested determination of whether petitioner has, in fact, raised a cause of action that is ripe for Commissioner adjudication.

IT IS SO ORDERED.[4]

Lucille T Davy
COMMISSIONER OF EDUCATION

Date of Decision: 7/24/08
Date of Mailing: 7/25/08

[2] Although petitioner's brief in support of her motion for summary decision (at 6) indicates that she seeks an order crediting her with accrued sick leave and reimbursing her for certain health insurance costs in addition to declaring her tenured, no amendment was made to the petition either requesting such relief or stating the factual and legal basis for it.

[3] The agency transmittal form states in pertinent part: "Request threshold consideration of whether petitioner's cause of action is ripe for adjudication, since petition does not allege suffering of any loss of pay, employment or other specific benefit."

[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 8206-08
AGENCY DKT. NO. 286-8/06
(ON REMAND EDU 6797-06)

PATRICIA MILANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,
Respondent.

Stephen E. Klausner, Esq., for petitioner

Rita F. Barone, Esq., for respondent (Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys)

Record Closed: February 5, 2009 Decided: February 10, 2009

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

STATEMENT OF THE CASE

In this matter, Patricia Milano (Petitioner) alleges that she has acquired tenure for the years she has taught under contracts with Township of Franklin Board of Education

(Franklin) and the Hunterdon County Educational Service Commission (HCESC). The issue to be determined is whether this matter is ripe for adjudication.

PROCEDURAL HISTORY

On August 16, 2006, petitioner filed a Verified Petition with the Commissioner of the Department of Education (Department) alleging that she has acquired tenure. On September 12, 2006, Franklin filed an Answer to Petition. On September 22, 2006, the case was transmitted to the Office of Administrative Law where it was filed as a contested case.

The parties agreed that there were no facts in issue. After numerous extensions by both parties, petitioner filed a motion for summary decision, and Franklin filed a response and cross-motion for summary decision. On June 3, 2008, the motion was argued at the OAL (Hamilton). On June 8, 2008, petitioner's motion was granted, determining she had acquired tenure (J-1). On July 24, 2008, the Commissioner remanded the matter to determine the threshold issue of whether the matter was ripe for adjudication (J-2).

On November 3, 2009 and January 16, 2009, petitioner filed letter briefs. On February 5, 2009, a conference call was conducted to determine the status of Franklin's response. During the call it was determined that Franklin had no facts to offer in response. Franklin offered no response.

STATEMENT OF FACTS

The employment and teaching history have been determined in the summary decision motion and are incorporated herein (P-1). At issue is whether the petitioner has sought any relief beyond the determination of tenure.

Petitioner asserts petitioner has a monetary interest in the determination of tenure. Franklin provides a two-tier health insurance system for their employees.

Employees without tenure are provided an individual health insurance package. Employees with tenure are provided a family health insurance package.

During the time when tenure was at issue, the petitioner was required to pay $200.00 per month for three years to obtain health insurance benefits for her family.

The preceding information is undisputed and found as fact.

CONCLUSIONS OF LAW

The doctrine of ripeness of a controversy protects against deciding issues before they are necessary. A controversy or dispute must be viable or ripe before it may be heard by the Commissioner. See Bott, et. al. v. Middletown Twp. Bd. of Educ, OAL DKT. EDU 4124-81 (Oct 30, 1981), adopted Comm. Ed. (Dec. 21, 1981), holding that a mere assertion of future harm renders the claim premature. State courts have refrained from rendering rulings that would be only advisory and from acting in the abstract. N.J. Civil Service Ass'n v. State of New Jersey, 88 N.J. 605, 611 (1982). See also Crescent Park Tenants Ass'n. v. Realty Eq. Corp. of N.Y., 58 N.J. 98, 107-108 (1971); The Proprietary Ass'n v. Bd. of Pharmacy, 16 N.J. 62, 72 (1954); N.J. Turnpike Authority v. Parsons, 3 N.J. 235, 240 (1949).

In the instant case, there is a controversy or dispute that is ripe for determination because the issue of tenure impacts directly on the health insurance benefits available to the family of the petitioner, as well as a possible out of pocket monthly expense to the petitioner to pay for these benefits.

Therefore, I **FIND** that this matter is ripe for adjudication.

DECISION AND ORDER

It is **ORDERED** that this matter is ripe for adjudication.

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

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

2/10/09
DATE

DONALD J. STEIN, ALJ

Date Received at Agency: 2/24/09

FEB 25 2009

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

APPENDIX
EXHIBITS

For Petitioner:

None

For Respondent:

None

Joint exhibits:

J-1 Initial Decision

J-2 Final Decision

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 6797-06
AGENCY DKT. NO. 286-8/06

PATRICIA MILANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, SOMERSET COUNTY,
Respondent.

Stephen E. Klausner, Esq., for petitioner

Rita F. Barone, Esq., for respondent (Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys)

Record Closed: June 3, 2008 Decided: June 9, 2008

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

STATEMENT OF THE CASE

In this matter, Patricia Milano (Petitioner) alleges that she has acquired tenure for the years she has taught under contracts with Township of Franklin Board of Education (Franklin) and the Hunterdon County Educational Service Commission (HCESC).

PROCEDURAL HISTORY

On August 16, 2006, petitioner filed a Verified Petition with the Commissioner of the Department of Education (Department) alleging that she has acquired tenure. On September 12, 2006, Franklin filed an Answer to Petition. On September 22, 2006, the case was transmitted to the Office of Administrative Law where it was filed as a contested case.

The parties agreed that there were no facts in issue. After numerous extensions by both parties, petitioner filed a motion for summary decision, and Franklin filed a response and cross-motion for summary decision. On June 3, 2008, the motion was argued at the OAL (Hamilton).

STATEMENT OF FACTS

In 1989, the petitioner was certified by the Board of Examiners as a teacher, and has endorsements in elementary school and Pre-K (P-1). In September 2001, Franklin initiated an Early Childhood Education Program for the 2001-2002 academic year, and hired the petitioner (P-2). In November 15, 2001, Franklin executed a contract with HCESC to operate their early education program beginning November 19, 2001. Franklin provided the facility and paid HCESC to provide a teacher, nurse, transportation, and administrative services.

In November 2001, Franklin claims that the petitioner was advised that her job was being terminated and that she become employed with HCESC from Dec. 1, 2001, to June, 2005. Petitioner claims that Franklin advised her that if she wanted to continue to work, she had to resign and take the HCESC job, and that she was assured that she would be retained by HCESC at the same salary and benefits.

On December 1, 2001, petitioner began teaching as a pre-school teacher through the Early Childhood Education program administered by HCESC under contract with Franklin for the academic year 2001 - 2002. Petitioner was assured that she would be performing the identical duties and continue to work at the Franklin Township work site until the completion of the new Franklin Township High School.

In June 2002 through June 2005, petitioner was renewed as a preschool teacher, and Franklin renewed their contract with HCESC for the academic years 2002-2003, 2003-2004, and 2004-2005. Pursuant to the contract, petitioner followed the Franklin, not the HCESC calendar for holidays and scheduling. She was observed and or evaluated by the Franklin Director of Early Childhood Education at least once a year.

In the Spring 2005, Franklin did not renew their contract with HCESC to administer the Early Education Program for the 2005-2006 academic year, and then reinstated the Early Education Program directly through the School District. On July 12, 2005, the petitioner was appointed by Franklin to the position of pre-school teacher for the Early Education Program for the 2005-2006 academic year.

In December 2005, petitioner inquired about tenure and was advised by the Director of Personnel that her past employer was HCESC, not Franklin. On January 11, 2006, the petitioner wrote to the Superintendent requesting a meeting to discuss the denial of her tenure (P-3).

Petitioner asserts that Franklin ignored her request for a meeting, and therefore she did not receive notice of a final decision from Franklin. Franklin asserts that petitioner was sent a letter dated January 11, 2006, from the director of the personnel department. However, the exhibit attached is not a letter to the petitioner, but the letter from petitioner (P-3).

On August 14th, 2006, petitioner filed the petition seeking the declaration of (1) her tenure rights, (2) credit for sick leave, and (3) reimbursement for the difference between an individual and a family plan for health insurance.

CONCLUSIONS OF LAW

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

TIMELINESS OF PETITION

N.J.A.C. 6A:3-1.3(i) requires that a petition be filed within 90 days "from the date of receipt of notice of final order, ruling, or other action by the District Board of Education." Petitioner's letter dated January 11, 2006, clearly requested a meeting to discuss the tenure issue. The record is devoid of any written notice from Franklin to petitioner. There is no evidence that Franklin responded in writing to the letter. The only evidence presented was a verbal discussion by the Director of Personnel before the January 11, 2006, letter.

The oral communication by the Director Of Personnel is not sufficient. Written notice from the Board of Education is required. In North Plainfield Education Association v. Board of Education, 96 N.J. 587 (1984), a signed document drafted by the Board of Education was required for notice. In Riley v. Hunterdon Central High School Board of Education, 173 N.J. Super. 109 (App. Div. 1980), and Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572 (1992), notice began upon receipt of a letter from the Board. In Nissman v. Board of Educ. of the Twp. of Long Beach, 272 N.J. Super. 373 (App Div. 1994), notice began upon receipt by petitioner of the school board resolution that petitioner's contract not be renewed and that she not be offered a new contract or granted tenure.

Therefore the motion for summary decision by the Township of Franklin Board of Education is **DENIED**.

TENURE RIGHTS

The basic tenure statute, N.J.S.A. 18A:28-5, is intended to confer tenure rights on teachers when they teach for three years and one day under the same appropriate certificate, in a position which requires a teaching certificate.

Petitioner argues since she taught in the school under HCESC from Fall 2001, and was retained by Franklin to teach that school when it operated under the control of Franklin starting in the 2005-2006 school year, Franklin is required recognize and preserve her tenure rights.

N.J.S.A. 18A:28-17 states that:

> Whenever the local board of education of any school district in this State shall undertake the operation of any school previously operated by an Educational Services Commission, a Jointure Commission, the Commissioner of Education, the State Board of Education, the board of trustees of any State college, or any officer, board or commission under his, its or their authority, all accumulated sick leave, tenure and pension rights of all teaching staff members in said school, shall be recognized and preserved by the board assuming operational control of the school, and any periods of prior employment, by said Educational Services Commission, Jointure Commission, Commissioner of Education, State Board of Education or board of trustees of any State college, or any officer, board or commission under his, its or their authority, shall count toward the acquisition of tenure to the same extent as if all of such employment had been in such school district.

Franklin argues that it did not take over the program since HCESC is still in operation with other programs.

Franklin also argues that since the school program was not a special education program, the program in question is not a school. Franklin's argument hinges on the meanings of "undertake the operation of," and "school."

Before addressing these issues, the Educational Services Commission should be discussed. An Educational Services Commission is a creature of statute, N.J.S.A. 18A:6-51 to -70. Whenever five or more boards of education deem it advisable to do so, they petition the State Board of Education to establish a commission to provide educational and administrative services. N.J.S.A. 18A:6-52(a).

These commissions are usually established as a cost-saving mechanism for school boards. For example, in the case of special education students, while the board has an obligation to provide a special education program, the cost can be prohibitive. The students requiring the special education are a fraction of the entire student body, but they require certain extra expenditures. By pooling together, five or more boards of education can take advantage of economies of scale by having one centralized facility provide the educational and administrative services special to these students.

In this way, an Educational Services Commission is similar to a county special services district. County special services school districts were first authorized in 1971 by statute. Under N.J.S.A. 18A:46-29 to -46, a county's board of chosen freeholders may establish a special district for the education and treatment of special education students. Because an Educational Services Commission works on programs for a large number of school districts, when a school district undertakes the operation of one of the programs, as in the present case, the Educational Services Commission still retains and operates other programs for the other districts.

Shelko v. Mercer County Special Services School District, 97 N.J. 414 (1984), appears to address the issue presented in this matter, and involved a teacher who worked for two years in a local school district special education program. The program was taken over by a county special services district. The Court held that her tenure rights were preserved despite this transfer. The statute at issue in that case, N.J.S.A. 18A:28-16, states that:

> Whenever an Educational Services Commission, a Jointure Commission, the Commissioner of Education, the State Board of Education, the board of trustees of any State college, or any officer, board or commission under

> his, its or their authority shall undertake the operation of any school previously operated by a school district in this State, all accumulated sick leave, tenure and pension rights of all teaching staff members in said school shall be recognized and preserved by the agency assuming operational control of the school, and any periods of prior employment in such school district shall count toward the acquisition of tenure to the same extent as if all of such employment had been under the Educational Services Commission, Jointure Commission, the Commissioner of Education, the State Board of Education, or the board of trustees of any State college, as the case may be.

Shelko rejected the argument that the statute is not applicable because the petitioner was not teaching in a special education program because this "would read all practical meaning out of the statute, because by definition the special services school districts never take over the entire operation of a school but are limited to providing educational services for the disabled."

Shelko cited Stuermer v. Board of Educ. of the Special Services School Dist. of Bergen Cty. 1978 S.L.D. 628, the Commissioner of Education, which explained that "since Jointure Commissions were created only for the purpose of special education classes, 'school' as referenced in N.J.S.A. 18A:28-16 must mean special education classes." The Court did not intend for their holding to support the proposition that the only program that would be covered by the statute would be a special education program provided for by a county special services district. Such an interpretation would read words into the statute that the legislature did not write.

The school board in Shelko had argued that N.J.S.A. 18A:28-16 should not apply when the county special services district took over the special education program of the school district, but not an entire school. The Court rejected that argument pointing out that, "the special services school districts never take over the entire operation of a school but are limited to providing educational services for the disabled." Shelko, supra, 97 N.J. at 422-423. In the same way, a school board like Franklin can not undertake the entire operation of an Educational Services Commission like HCESC.

The court in Shelko held that N.J.S.A. 18A:28-16 applied because the entire school program, not the entire school, was taken over, and concluded:

> Our overwhelming sense of the reality of the situation is that this is precisely the kind of takeover the Legislature contemplated. It is conceded that before and after the transition we are essentially looking at the same teachers, the same students, the same curriculum, and the same classroom. When a transition from local to district control of such a program looks, sounds, and acts like a takeover, we should treat it as a takeover. [Shelko, supra, 97 N.J. at 420]

In the present case, when Franklin implemented the program they had previously operated through a contract with HCESC, they retained the same teacher (petitioner) for the same pre-school teaching position that required the appropriate certification with a pre-K endorsement. The curriculum was the same curriculum and was designed to achieve the Early Childhood Program Expectations: Standards of Quality appropriate for participation in the Early Childhood Program. Franklin has not claimed or produced any evidence that the programs were different. Therefore, I **CONCLUDE** that the actions of Franklin constitute a takeover of the Early Childhood Program.

Franklin further argues that the Early Childhood Education Program is not a school. The argument must also be rejected. The program was led by a teacher who was required to have appropriate credentials, certification, and endorsement. The program took place in schoolrooms in school buildings leased from the Franklin Township School District. The children were transported to and from the program. The program took place daily on a normal school schedule. Snacks were provided. The program had a curriculum which conformed to the Early Childhood Educational Program Expectations: Standards of Quality.

These elements are important in consideration of what is a school. No elements that make up a school experience are missing. Because the early education program was funded by a state grant, Early Childhood Program Aid, Franklin and HCESC were required to run the program according to the "requirements for early childhood education programs," N.J.A.C. 6A:8-3.4, which include the regulated program

expectations, and monitoring by the county superintendent. Petitioner has provided direct educational services to students on a regular daily basis in a school setting. And when the program was discontinued with HCESC and implemented by Franklin, no part of the program remained under the control of HCESC.

Because of its remedial purpose, the Tenure Act should be liberally construed to achieve its purpose. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 74 (1982). The purpose of the statute in question, N.J.S.A. 18A:28-17, is not to carve out an exception to the granting of tenure rights to teachers. The purpose of the statute is to extend the protection of teachers' tenure rights to teachers working for Educational Service Commissions when the administration of the program is implemented directly by a school board. The preferred reading of a statute with a purpose of extending rights is not a reading that would deny rights. Where the meaning of "undertake the operation of any school" is purported to be ambiguous, the meaning consistent with the principal design of the statute, to extend tenure rights to a teacher, is the only meaning consistent with basic principles of statutory construction.

Therefore, I **CONCLUDE** that the petitioner acquired tenure.

It must now be determined when the petitioner acquired tenure. N.J.S.A. 18A:28-5, calculates the time required for tenure as follows:

> (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.

Because Milano's contracts were for academic years, from September 1-June 30, condition N.J.S.A. 18A:28-5(a), which refers to calendar years, is irrelevant.

Petitioner's contract of employment began on October 2, 2001, but she did not actually begin teaching in the classroom until December 1, 2001, when HCESC

completely implemented the program. Nevertheless, it is a fact that the first academic year of the pre-school program commenced during the 2001-2002 academic year.

Therefore, petitioner acquired tenure on September 2, 2004, after she had begun her fourth academic year.

CONCLUSION

Petitioner had no written notice of a final action by the school board, her 90-day period for filing a petition had not yet commenced. Therefore her petition filed on August 14, 2006, was timely.

Petitioner acquired tenure rights while teaching in the Franklin Township School District in a program administered through a contract between the Franklin Township Board of Education and the HCESC Educational Services Commission. The Franklin Township Board of Education undertook the operation of the program from the HCESC Educational Services Commission, and hired petitioner, all tenure rights she had acquired are to be recognized and preserved by the Franklin Township Board of Education.

Petitioner acquired tenure no later than September 2, 2004, the date she had worked the equivalent of three full academic years and the beginning of her fourth academic year employed as a teacher with a certificate in a position that required a certificate.

DECISION AND ORDER

The Petitioner's motion for summary decision is **GRANTED**, and the Township of Franklin Board of Education's motion for summary decision is **DENIED.** Therefore, it is **ORDERED** that petitioner acquired tenure on September 2, 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 days and unless 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 9, 2008
DATE

DONALD J. STEIN, ALJ

Date Received at Agency:

June 9, 2008

Mailed to Parties:

JUN 11 2008
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW
OFFICE OF ADMINISTRATIVE LAW

/cs/bdt

EXHIBITS

For Petitioner:

P-1 Instructional certificate

P-2 Petitioner's contract with Franklin

P-3 Letter from petitioner

For Respondent:

None

Joint exhibits:

J-1 Joint Stipulation of Facts and attachments

101-09

OAL DKT. NO. EDU 2991-07
AGENCY DKT. NO. 61-3/07

MURPHY TRANSPORTATION, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY AND JEWISH COMMUNITY CENTER OF GREATER MONMOUTH, INC., (Improperly pled as The Ruth Hyman Jewish Community Center of Greater Monmouth),	:	DECISION
RESPONDENTS.	:	

Respondent Ocean Township Board of Education's motion for reconsideration and a stay of the Commissioner's February 24, 2009 decision, and petitioner's reply thereto have been fully reviewed. No submission has been received from the Jewish Community Center of Greater Monmouth.

As to the request for reconsideration, the Commissioner finds that the respondent board of education has failed to meet the standards of *N.J.A.C.* 6A:3-1.15(b)(2), and accordingly the Commissioner denies same. With respect to the application for a stay, the record lacks a copy of the notice of appeal that must be filed concurrent with or prior to any motion for a stay of the Commissioner's decision. *N.J.A.C.* 6A:3-1.15(a). In addition, the Commissioner is not

persuaded that respondent is likely to prevail on appeal, given the current wording of the applicable statutory law. Accordingly, respondent's request for a stay is denied.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/25/09

Date of Mailing: 3/27/09

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

#102-09

C.P. on behalf of minor child, Z.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a residency appeal on behalf of her grandson, Z.P., who is enrolled as an elementary school student in the Ewing Public Schools for the 2008-09 school year. The respondent Board sought reimbursement of tuition for the period of Z.P.'s alleged ineligible attendance. Petitioner failed to appear for the hearing held in January 2009; respondent Board submitted an affidavit attesting to the tuition owed for Z.P.'s period of ineligible attendance.

The ALJ found that: petitioner failed to meet her burden of proving by a preponderance of the evidence that Z.P. is entitled to a free education in Ewing schools, and concluded that the petition should be dismissed for lack of prosecution and that the Board's counterclaim for tuition in the amount of $7,286 should be granted.

The Commissioner noted that the record showed that respondent Board presented a custody order and an affidavit implicitly conceding that Z.P.'s period of ineligibility ended on November 21, 2008. Accordingly, the instant petition was rendered moot. However, the Commissioner found that respondent presented sufficient evidence to show that for a period of time, Z.P. attended school in respondent's district without satisfying eligibility requirements; therefore, respondent's counterclaim 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.

March 27, 2009

OAL DKT. NO. EDU 10134-08
AGENCY DKT. NO. 293-10/08

C.P. on behalf of minor child, Z.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner's review of the record in this matter[1] reveals the following. C.P., the grandmother of Z.P., enrolled Z.P. in respondent's school district in the summer of 2007. Prior to February 5, 2008, it came to the attention of respondent's attendance officer that Z.P. may have been residing with his mother in Trenton. After an investigation, including surveillance of the Ewing address in February, March and April of 2008, the attendance officer concluded that Z.P. was not residing with his grandmother in Ewing.

A notice of ineligibility was sent to Z.P.'s mother, S.P., and a hearing took place before respondent on August 27, 2008, wherein S.P. gave testimony. At the conclusion of the hearing respondent disenrolled Z.P.

C.P. filed a petition of appeal with the Commissioner on October 14, 2008; respondent answered and counterclaimed on October 20, 2008; and the matter was transmitted to the Office of Administrative Law (OAL) on October 21, 2008. On November 21, 2008, a court

[1] No exceptions were filed.

order was issued awarding C.P. residential custody of Z.P, but that order was not, at that time, brought to the attention of the OAL.

Notices of a January 26, 2009 hearing were sent by the OAL to the parties. On that date respondent appeared but petitioner did not. The record was opened; respondent's exhibits – including a copy of the above referenced custody order (R-5) – were accepted; and the record remained open for the purpose of receiving supplemental evidence from respondent concerning the amount due on its counterclaim for tuition for Z.P.'s period of ineligible attendance. Petitioner failed to provide an explanation to the Administrative Law Judge (ALJ) for her absence.

On February 11, 2009, respondent supplemented the record by filing evidence supporting its tuition claim. In an affidavit, the residency officer provided the *per diem* rate and the number of days Z.P. attended school in respondent's district without being eligible to do so. The attendance officer used, as the first day of ineligible attendance, the first day of the above referenced surveillance. The date of the previously mentioned custody order served as the terminus of the period of ineligibility.

At the outset, the Commissioner notes that the district appears to have, *de facto,* abandoned its position that Z.P. is ineligible for a free public education in its district, rendering the petition moot. More specifically, while the petitioner did not attend the hearing, the respondent nonetheless presented the custody order and an affidavit implicitly conceding that Z.P.'s period of ineligibility ended on November 21, 2008.

However, the Commissioner also finds that respondent presented sufficient evidence to support its position that, for a period of time, Z.P. attended school in respondent's

district without satisfying the eligibility requirements. Accordingly, respondent's counterclaim is granted and respondent is awarded tuition in the amount of $ 7,826.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 3/27/09

Date of Mailing: 3/30/09

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10134-08
AGENCY DKT. NO. 293-10/08

C.P. ON BEHALF OF MINOR CHILD Z.P.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,
Respondent.

No appearance by or on behalf of C.P.

Jeffrey F. Belz, Esq., for respondent

Record Closed: February 11, 2009 Decided: February 18, 2009

BEFORE **ISRAEL D. DUBIN**, ALJ:

C.P., on behalf of her grandson, Z.P., has filed a *Pro Se* Residency Appeal challenging an adverse residency determination of the Ewing Township Board of Education. She has asserted that her daughter, S.P., grandson, Z.P., and Z.P.'s two siblings live with her in her home within the Ewing Township School District, and that Z.P. is therefore entitled to receive a free public education in the district. The Board has filed an Answer in which it claims that Z.P. resides with his mother and at least one of

his two siblings in an apartment in the City of Trenton and has not established residency within the district. The Board has also asserted a counterclaim for tuition expenses incurred.

C.P. filed her *Pro Se* Residency Appeal on October 1, 2008; the Board filed its Answer on October 20, 2008; and the Bureau of Controversies and Disputes, New Jersey Department of Education, transmitted the matter to the Office of Administrative Law for an expedited hearing and determination as a contested case on October 28, 2008. The matter was scheduled for hearing on January 26, 2009 at 9:00 a.m.

Although counsel for the Board and the Board's witness appeared at that time, C.P. failed to appear. After waiting thirty minutes for C.P. and hearing nothing from her regarding her intention to appear and proceed, the record was opened. Because C.P. did not appear and did not contact the OAL to explain her absence, I **CONCLUDE** that she has failed to meet her burden of proving by a preponderance of the evidence that Z.P. is entitled to a free education in the Ewing School District and that her residency appeal should be and is hereby **DISMISSED** for lack of prosecution.

On February 11, 2009, the Board supplemented its documentation by submitting the affidavit of David Mikalauskas, Attendance and Residency Officer for the Board since 1989, in which he calculated the tuition that C.P. owes as the result of her grandson's ineligible attendance in the school district. According to Mr. Mikalauskas, the per diem tuition for Z.P., a grammar school student, as determined by the New Jersey Department of Education, is $55.51 per day. Multiplying that figure by the total number of days of ineligible attendance from the first date of surveillance, February 5, 2008, 141, Mr. Mikalauskas determined that the total tuition owed by C.P. to the Ewing Township School District is $7,826.00.[1]

On the undisputed evidence presented, I find that C.P. owes the Ewing School District $7,286.00 for the period of ineligible attendance of her grandson, Z.P., in the district. I therefore **CONCLUDE** that C.P.'s challenge to the Board's adverse residency

[1] The actual figure should have been the somewhat higher $7,826.91.

determination should be **DISMISSED** for lack of prosecution, and I further **CONCLUDE** that the Board's counterclaim against C.P. for tuition owing for ineligible attendance in the amount of $7,286.00 should be **GRANTED**. I so **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.

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 18, 2009
DATE

ISRAEL D. DUBIN, ALJ

Date Received at Agency:

FEB 20 2009

DATE

February 18, 2009

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

cmo

APPENDIX

WITNESSES

For Petitioner:

None

For Respondent:

David Mikalauskas

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Surveillance Report
R-2 *Pro Se* Residency Appeal
R-3 Ewing Township Board of Education Resolution
R-4 Trenton Housing Authority Approval Letter
R-4A Residential Lease Agreement Contract
R-5 Custody Consent Order
R-6 Host Family Affidavit
R-7 Parent's Affidavit
R-8 Certification of David Mikalauskas

103-09

#103-09

OAL DKT. NO. EDU 1803-09
AGENCY DKT. NO. 1-1/09

K.M., on behalf of minor child, K.M.,	:	
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 "Withdrawal Form" transmitted to the Commissioner by the Office of Administrative Law (OAL), have been reviewed. As the record contains a letter from petitioner withdrawing her appeal, the petition is dismissed.

Notwithstanding the dismissal of the petition, the Commissioner notes that the respondent board's answer in this residency matter contains a counterclaim for tuition which was left unresolved by the Administrative Law Judge. In that respondent has failed to submit into the record an affidavit – by the appropriate board employee – attesting to the amount of tuition due from petitioner as a consequence of the ineligible attendance of her child in respondent's schools, this matter must be remanded to the OAL for supplementation of the record and an appropriate recommended order regarding the payment of tuition.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/30/09
Date of Mailing: 3/31/09

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

104-09

KEVIN GOLDBERG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought relocation of his child's school bus stop, expressing concern that the location selected by the respondent Board requires a walk of 2/10 of a mile along a street with no sidewalks between petitioner's house and the bus stop, and is therefore unsafe. Respondent Board subsequently filed a motion to dismiss the petition, which was not opposed by the petitioner.

Following a site visit to observe the existing and proposed bus stops, the ALJ determined that: there was nothing unsafe about the existing bus stop; petitioner alleged nothing arbitrary, capricious, or unreasonable is the district's establishment of the existing bus stop, and did not oppose the motion to dismiss. Accordingly, the ALJ granted respondent's motion to dismiss.

Upon a full and independent review, the Commissioner concurred with the ALJ's recommendation that the petition should be 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 31, 2009

OAL DKT. NO. EDU 10345-08
AGENCY DKT. NO. 338-11/08

KEVIN GOLDBERG,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner, *pro se,* sought the relocation of his child's school bus stop to his driveway. His petition was filed on November 14, 2008, and his motion for emergent relief was filed on November 21, 2008. On November 26, 2008, the date set for the emergent relief hearing in the Office of Administrative Law (OAL), petitioner withdrew his motion for emergent relief. (Initial Decision at 2) On December 10, 2008, respondent filed an answer and motion to dismiss the petition.

The Administrative Law Judge (ALJ) and the parties participated in a site visit on December 19, 2008, to observe the existing and proposed bus stop locations. (Initial Decision at 3) The visit, according to the ALJ, revealed nothing hazardous about the existing bus stop location and, rather, demonstrated that the use of petitioner's driveway as a bus stop would require unsafe bus maneuvers, potentially violative of motor vehicle laws and regulations. (Initial Decision at 3-4)

Correspondence in the record indicates that on December 29, 2008, the ALJ sent the parties copies of the OAL decision in a prior case concerning the location of a school bus stop. According to the ALJ, in a subsequent teleconference – on January 8, 2009 – petitioner then advised her that he would not oppose the motion to dismiss the petition. (Initial Decision at 2) The record was closed, and the ALJ recommended dismissal of the petition.

After review of the record and Initial Decision, and in light of petitioner's decision not to oppose respondent's motion to dismiss the petition, the Commissioner concurs with the ALJ's recommendation that the petition should be dismissed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 3/31/09

Date of Mailing: 3/31/09

[1] 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 10345-08
AGENCY DKT. NO. 338-11/08

KEVIN GOLDBERG,
Petitioner
v.
BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY,[1]
Respondent.

Kevin Goldberg, petitioner, pro se

Victor J. Medina, Esq., for respondent (Medina, Martinez & Castroll, attorneys)

Record Closed: January 9, 2009 Decided: February 23, 2009

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner contends the location of his daughter's current school bus stop is unsafe and seeks its relocation to his driveway. Petitioner originally sought emergent

[1] By letter dated December 1, 2008, petitioner voluntarily dismissed his claim against respondent Department of Transportation, West Windsor Township.

relief in his pleading filed on or about November 14, 2008, and the matter was transmitted to the Office of Administrative Law on November 21, 2008, seeking emergent relief pending the disposition of his case. The matter was scheduled for an emergent relief hearing on November 26, 2008. The parties appeared and petitioner withdrew his request for emergent relief. As a result of a pre-hearing conference that day, the hearing was then scheduled for January 29, 2009; a site visit for December 19, 2009, and respondent directed to file an answer to the petition as well as a motion to dismiss the petition by December 10, 2008. Petitioner did not file opposition to the motion to dismiss. During a conference call on January 8, 2009, petitioner advised he would not be opposing the motion. The record then closed.

FACTUAL DISCUSSION

Petitioner lives on South Post Road in Princeton Junction, New Jersey, within the boundaries of the West Windsor-Plainsboro Regional School District. His daughter attends kindergarten at the Dutch Neck Elementary School. She, along with two other students, is assigned to a single bus stop along South Post Road, less than .2 miles from the Goldberg residence. Petitioner accompanies his daughter to the bus stop every day. This bus stop location was selected by Ed Treadaway, the Director of Transportation, prior to the beginning of the school year. At the request of the petitioner, Treadaway re-evaluated the bus stop location and denied petitioner's request to relocate the stop. He then appealed the decision to Assistant Superintendent Thomas Smith. In a letter dated September 17, 2008, Smith advised Goldberg he was upholding Treadaway's decision based upon the information Goldberg provided him, his review of the district Transportation Policy and his physical review of the bus stop. He also indicated:

> During this process, I reviewed the proximity of the stop to you and your neighbors' homes, the type of street on which you reside, the traffic during transportation times, and the current bus route. Please know that there are many other locations where students are required to walk further distances under similar circumstances. Mr. Treadway's bus stop location is an effort to provide consistency throughout the district while providing our students with an efficient bus route; however, in an effort to provide a resolution for you and your neighbors, I would like to offer you and the

> other parents an opportunity to propose a new location for the stop on South Post Road. You and your neighbors may propose one location that will replace the stop at 412 and following Mr. Treadaway's review, we will make an appropriate determination.[2] Please note that we do not consider additional stops to be an appropriate option due to efficiency and safety concerns.

A site visit was conducted on December 19, 2008. South Post Road has no sidewalks or marked shoulder lanes. It is a marked dead end street. One side is lined with single-family residences and the opposite side, Mercer County Park. The site visit was arranged so that it would coincide with the petitioner daughter meeting the bus at her designated spot. The street layout is fairly straight and there are no visual obstructions from the walk to the bus stop from the petitioner's house. Although the petitioner contended in his pleading that "during rush hour traffic there is a good amount of vehicles on our roadway," on the day of the site visit, from approximately 15 minutes prior to the bus arriving for the morning pick-up until approximately 15 minutes after the bus left, less than 5 vehicles traversed on the roadway. The school bus entered South Post Road and made a right turn into a parking lot at the Mercer County Park. It then made a U-turn and exited the park by making a left turn.[3] It stopped immediately after

---

[2] Petitioner chose the same stop location as he originally proposed.

[3] It should be noted that although the petition indicates:

> (T)he Dutch Neck bus now enters the Mercer County Park entrance, turns around in the park by backing up in the park intersection, and pulls out on South Post Road. ... The bus has been observed on numerous occasions to drive over the center median when pulling out of the park due to the tight turn back onto South Post Rd.

this turn by the school bus driver was not authorized by the district as part of the new bus route selected by Treadaway. Once notified by the petitioner, the district contacted the contract vendor and advised this method of turning around in the parking lot was to cease and that the bus driver was to execute a U-turn in the parking lot, as had been authorized, and not back-up the school bus. The petitioner indicated that since he communicated the problem to the district through counsel, the bus driver no longer backed-up the vehicle in the parking lot, but rather, made a U-turn as required.

that turn at a driveway; the designated bus stop location utilized by the petitioner's daughter and two other children.[4]

LEGAL ANALYSIS

Respondent has filed a motion to dismiss the petition for failure to state a claim for which relief may be granted pursuant to N.J.A.C. 6A:3-1.5(g).[5] During the conference call of January 8, 2009, petitioner advised he would not oppose this motion. Nonetheless, a brief discussion of the merits of the application is warranted. R. 4:6-2(e), requires a judge considering such a motion to accord all reasonable inferences in deciding such a motion to the non-moving party. It is well settled that the action of the Board of Education in the designation of a school bus stop location may not be set aside unless such action was arbitrary, unreasonable or capricious. Bailey v Board of Ed. of Maurice River Township, EDU 924-03 (November 10, 2003). As long as the Board of Education decision has a rational basis, the Commissioner will not substitute her judgment. Lemma v Branchburg Board of Education, EDU 8953-97 Initial Decision (July 22, 1998), adopted Comm'r (August 28, 1998). A review of the petition reveals the petitioner has failed to allege any conduct on the part of the district that could lead reasonable minds to conclude it acted in an arbitrary, capricious or unreasonable manner. As respondent has asserted in its motion to dismiss, the petitioner: has not made any complaint as to the lack of rational for Mr. Treadway's initial determination of the school bus assignment; failed to allege any facts to indicate that the review process undertaken by Assistant Superintendent Smith was irrational or arbitrary; and not made

[4] It should also be noted the district caused a second school bus to attend the site visit, after the bus transporting the petitioner's daughter left the area, for the purpose of reviewing the proposed bus stop the petitioner suggested. In order for the school bus stop to be re-located to the petitioner's driveway, two mean of accomplishing a turn-around on South Post Road are available. Both are unsafe and potentially, violative of state motor vehicle laws and regulations. The first option would require the school bus to pass the petitioner's house on the left, make a right turn onto a gravel driveway and then make a "K" turn back onto South Post Road. This caused the bus to back up into a tree in order to make the left turn back onto South Post Road. The second option required the school bus to travel down a narrow one-lane in either direction road to the terminus of South Post Road. The roadway is separated by double solid yellow lines. On either side of the road exists overgrown brush and low-lying tree branches. Once the school bus reaches the end of the road, it must negotiate a U-turn over a gravel circular roadway marked by a soft dirt shoulder. The area to turn around is so narrow that multiple attempts of driving forward and then backward must be made. If the school bus stays to the right of the double solid yellow lines, it strikes overhead branches and the overgrown brush to each side of the roadway.

[5] In the interest of expediting resolution of the within matter in the event the motion was denied, respondent was directed during the pre-hearing conference of November 26, 2008, to simultaneously file a answer to the petition.

any allegations that the respondent failed to follow its own policies as to consideration of a bus stop grievance. Simply put, petitioner just prefers a bus stop located in front of his house. This presents an insufficient basis for this case to proceed forward, even if the petitioner had opposed the within application. The mere fact that a second bus stop alternative may exist, --although in this case the site visit made it abundantly evident the path the bus must travel to arrive at that bus stop is unsafe and potentially violative of state motor vehicle laws and regulations, -- is an insufficient basis absent a showing of arbitrary, capricious or unreasonable conduct on the part of the school district board of education. Bailey, supra.

DECISION AND ORDER

Based on the foregoing, the respondent's motion to dismiss is hereby **GRANTED.**

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

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

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

2-23-09

DATE

ANA C. VISCOMI, ALJ

Date Received at Agency:

FEB 25 2009

DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/lam

APPENDIX

LIST OF WITNESSES

For the petitioner:

None

For the respondent:

None

LIST OF EXHIBITS

For the petitioner:

None

For the respondent:

Motion to dismiss

105-09

#105-09

EAST RUTHERFORD EDUCATION ASSOCIATION, on behalf of KAREN DOLINSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EAST RITHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning education association contended that, pursuant to *N.J.S.A.* 18A:17-2, the respondent Board violated the tenure rights of Karen Dolinsky by reducing her salary when it eliminated her ten-month secretarial position and hired her as a twelve-month secretary. Respondent Board denied that Dolinsky's salary had been reduced, and claimed that the terms and conditions of the position of twelve-month secretary are clear under the collective negotiation agreement between the Board and the petitioner. The Board also claimed that this matter should be dismissed on grounds of *res judicata* and collateral estoppel, and should be barred by the entire controversy doctrine.

The ALJ found that: the petition should not be dismissed on the grounds of *res judicata* or collateral estoppel, nor should the petitioner's claim be barred by the entire controversy doctrine; Dolinsky's per diem rate in her ten-month position for the 2007-2008 school year was $192.57, compared to her per diem rate in the twelve month position of $184.64 for the 2008-2009 school year; and that the Board reduced Dolinsky's compensation in violation of the tenure statute for secretaries, despite the fact that her pay has been in accordance with the 2008-2009 school year salary of a twelve-month secretary under the collective negotiation agreement. Accordingly, the ALJ ordered that the Board pay Dolinsky for the 2008-2009 school year and thereafter at a salary consistent with a per diem rate of $192.57 until the salaries of the other twelve-month secretaries catch up.

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.

March 30, 2009

OAL DKT. NO.EDU 12709-08
AGENCY DKT. NO. 285-9/08

EAST RUTHERFORD EDUCATION ASSOCIATION, on behalf of KAREN DOLINSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EAST RITHERFORD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The Commissioner adopts the Initial Decision for the reasons set forth therein, with the following comment.

In 1995 the State Board of Education issued a decision in a case with a similar fact pattern to the instant matter, *i.e. Patricia Casey* v. *Board of Education of the Township of Cinnaminson, Burlington County,* 95 *N.J.A.R.2d (EDU)* 585. Noting that the petitioner therein was not transferred from one tenurable position to another, but rather was reassigned within the same tenurable position (there "clerk", herein "secretary") and contrasting the case with the facts in *Kigerl v. Board of Education of the Borough of South Plainfield*, 1981 *S.L.D.* 889, 895, *aff'd* 1981 *S.L.D.* 896, where the petitioner's reduction in compensation resulted from her "own choice of a [lesser paying] position rather than available higher paid assignments," the State Board explained:

[1] No exceptions were received from the parties.

> Petitioner herein was not given a choice of positions, but rather was reassigned by the Board from a 10-month to a 12-month assignment within her tenured clerical position. As a consequence, while petitioner's annual salary increased as a result of her extended work year, the rate at which she was compensated decreased. Such a reduction, in the absence of tenure proceedings, is expressly prohibited by *N.J.S.A.* 18A:17-2.
>
> *Casey, supra,* at 586.

Accordingly, respondent's motion for dismissal or summary disposition is denied; petitioner's cross motion for summary decision is granted; and respondent is ordered to pay petitioner at the *per diem* rate of $192.57 for the 2008-2009 school year. As neither party has excepted to the Administrative Law Judge's recommendation that petitioner's *per diem* pay rate remain at $192.57 until the salaries of the other twelve-month employees 'catch up,' the Commissioner adopts that recommendation.

IT IS SO ORDERED.[2]

Grielle E Day

COMMISSIONER OF EDUCATION

Date of Decision: 3/30/09

Date of Mailing: 3/31/09

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 12709-08
AGENCY DKT. NO. 285-9/08

EAST RUTHERFORD EDUCATION ASSOCIATION, ON BEHALF OF KAREN DOLINSKY,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Joseph A. Rutigliano, Esq., for respondent (Chasan, Leyner and Lamparello, attorneys)

Record Closed: January 21, 2009 Decided: February 13, 2009

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

STATEMENT OF CASE AND PROCEDURAL HISTORY

Petitioner East Rutherford Education Association o/b/o Karen Dolinsky (Association) contends that the Board of Education of the Borough of Rutherford (District or Board) violated the tenure rights of Dolinsky by reducing her salary when it abolished her 212-day secretarial position and retained her as a twelve-month secretary. N.J.S.A. 18A:17-2 provides that any person who has acquired tenure in any secretarial or clerical position with a school district shall hold her position under tenure during good behavior and efficiency and shall not be reduced in compensation. The Board denies that Dolinsky's salary has been reduced and claims instead that the terms and conditions of the position of twelve-month secretary, for which Dolinsky applied and was accepted, are clear under the collective negotiation agreement between the Board and the Association. The Board also contends that this matter should be dismissed on grounds of res judicata and collateral estoppel and should be barred by the entire controversy doctrine.

The Association filed its petition with the Commissioner of Education on September 23, 2008. After receiving the Board's motion to dismiss or, in the alternative, for summary decision on December 15, 2008, the Bureau of Controversies and Disputes of the Department of Education referred the matter to the Office of Administrative Law (OAL) on December 31, 2008, 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. Upon receipt of the Association's December 18, 2008, cross-motion for summary decision and the Board's reply on January 21, 2009, I closed the record.

STATEMENT OF FACTS

In their cross-motions for summary decision, the parties agree that there are no issues of material fact. Accordingly I **FIND** the following undisputed **FACTS**:

The Board had employed two "212-day" or ten-month secretaries and two full-time or twelve-month secretaries. The 212-day secretaries did not work for five weeks during the summer or during the December, winter and spring recesses. They earned ninety-two percent of the full-time secretarial guide under the collective negotiation agreement between the Association and the Board for the period July 1, 2001, through June 30, 2004.

For educational and operational reasons, the Board determined to abolish, effective January 1, 2007, the 212-day secretarial positions, one of which had been held by Dolinsky with tenure, and to instead operate with four full-time secretaries. The Board did not, however, actually abolish that position until June 30, 2008.

The Association filed an unfair practice charge with the Public Employment Relations Commission (PERC) alleging that the Board unilaterally abolished the two 212-day secretary positions without the agreement of the Association; that the Board's action was retaliation against the 212-day secretaries as they were union officers, and that the action was a unilateral change of the expired collective negotiation agreement. The Board's response to the unfair practice charge was that it had the managerial prerogative to abolish positions under the New Jersey Employer-Employee Relations Act. N.J.S.A. 34:13A-1 et seq.

The Association also filed a contractual grievance on September 21, 2006, which concluded with a March 30, 2007, advisory arbitration opinion by Edmund Gerber. Arbitrator Gerber's advisory arbitration opinion sustained the grievance and concluded that the Board had violated the collective negotiation agreement when it announced its intent to reassign the two 212-day secretaries to full-time positions. He advised the Board to rescind its announcement to reassign the 212-day secretaries and to take no further unilateral actions to that end. The Board declined to follow the arbitrator's decision, asserting that the arbitrator misstated the issue since the Board had not proposed to reassign any personnel, but rather was proposing to abolish positions. It further asserted that the arbitrator's decision failed to address whether the Board may abolish positions.

On June 27, 2007, the Association withdrew its unfair practice charge indicating it would pursue a remedy in court. It then filed an action in Superior Court alleging that, if the Board abolished the 212-day secretarial positions, it would be a unilateral change in the "grandfather" clause in the collective negotiation agreement and attempting to compel the Board to renegotiate the terms of the additional full-time secretaries' employment with the Association.

On September 28, 2007, the Board filed a Petition for Scope of Negotiations Determination with PERC seeking a ruling that the Board has the managerial prerogative to abolish the 212-day secretarial positions. PERC ruled on April 24, 2008, that the Board has the managerial prerogative to reduce the number of secretarial employees and in that sense abolish the 212-day secretary positions without negotiations.

Lisa A. Firko, J.S.C. granted the Board's Motion for Summary Judgment and dismissed the Association's court action on August 1, 2008. In her oral opinion, Judge Firko held both that the grandfather clause found in the collective negotiation agreement does not guarantee secretaries lifetime employment and that the Board should be allowed to exercise its managerial prerogative to abolish the 212-day secretarial positions pursuant to and consistent with the findings of PERC.

As the Board was abolishing the two 212-day secretarial positions, it advertised for and ultimately hired two additional full-time secretaries. Dolinsky voluntarily applied for a full-time position and was subsequently hired for it effective July 1, 2008. The other 212-day secretary did not apply for the full-time position.

The March 30, 2001, collective negotiation agreement between the Board and the Association contains the negotiated provisions for the twelve-month secretarial positions, one of which Dolinsky now occupies. According to the salary guide in the contract, Dolinsky's salary as a 212-day secretary was $42,367 for 2007-2008 and,

according to Dolinsky, would have been $44,167 in 2008-2009. As a full-time secretary in 2008-2009, Dolinsky's salary is $48,008.

Dolinsky has provided a daily rate of pay breakdown, the numbers for which the Board has not disputed. As a 212-day secretary worked 212 days and also enjoyed eight paid holidays, she was actually paid for 220 days. Using a factor of 1/220th, the per diem rate for the 2007-2008 school year was $192.57, and would have been $200.76 for the 2008-2009 school year if the position had not been abolished. Twelve-month secretaries are either on paid vacation, paid holiday or working twelve months of the year. The salary for a full-time secretary for the 2008-2009 school year is $48,008. Using a factor of 1/260th (52 weeks times 5 days) the per diem rate would be $184.64.

LEGAL DISCUSSION

Several statutes cover the tenure rights of various employees of a public school district. N.J.S.A. 18A:6-10 provides that no person shall be reduced in compensation if she is under tenure of office, position or employment during good behavior and efficiency in the public school system. Under N.J.S.A. 18A:28-5, the services of all teaching staff members except those who are not holders of proper certificates shall be under tenure during good behavior and efficiency, and they shall not be reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause. Although the position of secretary does not require the holding of an appropriate certificate, she may also enjoy tenure after a requisite period of employment. N.J.S.A. 18A:17-2(b). "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 hold his office, position or employment under tenure during good behavior and efficiency and shall not be . . . reduced in compensation, except for neglect, misbehavior or other offense." N.J.S.A. 18A:17-2(c). There is no dispute that Dolinsky was tenured in a secretarial position when the District abolished the 212-day secretarial position and accepted her into a twelve-month secretarial position.

The Commissioner of Education has jurisdiction to hear and determine all controversies and disputes arising under the above school laws. N.J.S.A. 18A:6-9.

As the sole issue Dolinsky raises in her petition is whether the Board is violating her rights under the above tenure statutes by allegedly reducing her salary upon becoming a twelve-month secretary, I **CONCLUDE** that the petition should not be dismissed on the grounds of res judicata or collateral estoppel, nor should Dolinsky's present claim be barred by the entire controversy doctrine.

The Association's filing with PERC alleged that the Board was guilty of unfair practices by unilaterally abolishing the two 212-day secretary positions contrary to the grandfather clause of the collective negotiations agreement; by retaliating against the two 212-day secretaries because they are Association officers and chief negotiators, and by seeking to unilaterally delete a term and condition of employment in the expired collective negotiation unit.

The issue in the advisory arbitration proceeding as framed by the arbitrator (incorrectly according to the Board) was whether the Board violated the work year and work hours clause of the collective negotiation agreement when it announced that the 212-day secretaries would be reassigned to full-time positions.

In the Superior Court action, the Association sought a declaratory judgment that the Board's intent to eliminate the two 212-day secretaries and assign them to full-year positions is ultra vires and in violation of the terms of the collective negotiation agreement between the parties.

The issue in the Board's petition for scope of negotiations determination filed with PERC was whether it has a managerial prerogative to abolish the 212-day secretary position represented by the Association.

Each of the various prior proceedings involved essentially the same question: May the Board abolish the 212-day secretary position without negotiations and

notwithstanding provisions to the contrary in the collective negotiation unit. None of those proceedings addressed, nor was raised, the issue of the pay consequences pursuant to the tenure statutes of a 212-day secretary becoming a twelve-month secretary.

Res judicata prevents a losing party from re-opening a prior proceeding which was determined on the merits. Muscarelle v. State, 175 N.J. Super. 384, 394 (App. Div. 1980), appeal dismissed, 87 N.J. 321 (1981). Res judicata requires a final judgment by a court of competent jurisdiction; identity of issues; identity of parties, and identity to the cause of action. T.W. v. A.W., 224 N.J. Super. 675, 682 (App. Div. 1988). Res judicata applies when either party attempts to relitigate the same cause of action. Collateral estoppel applies when either party attempts to relitigate facts necessary to a prior judgment. Ibid. Collateral estoppel requires as follows: the issue to be precluded is identical to the issue decided in the previous case; the issue was actually litigated in the previous case; the court in the previous case issued a final judgment on the merits; the determination of the issue was essential to the judgment relating to the previous case, and the party against whom the doctrine is asserted was a party to or in privity with a party to the previous case. Selective Ins. Co. v. McAllister, 327 N.J. Super. 168, 173 (App. Div. 2000). Neither doctrine applies here since there was no identity of issues—the abolition of the 212-day secretary position versus the pay consequence of hiring a former 212-day secretary for a twelve-month secretary position.

The Board aptly argues that the purpose of the entire controversy doctrine is "to encourage comprehensive and conclusive litigation determinations, to avoid fragmentation of litigation, and to promote party fairness and judicial economy and efficiency." K-Land Corp. No. 28 v. Landis Sewerage Auth., 173 N.J. 59, 70 (2002). However, the Commissioner of Education, rather than PERC, an arbitrator or a Superior Court trial judge, has first-instance primary jurisdiction to hear and determine all controversies and disputes arising under the school laws. N.J.S.A. 18A:6-9; also see, Archway Programs v. Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 424 (App. Div. 2002). The tenure statutes and their compensation consequences are part of the school laws. One should defer to the primary jurisdiction of an agency where failure to

do so would be inconsistent with the statutory scheme conferring regulatory authority on the agency, particularly where the statutes do not provide alternate routes for issue resolution. Id. at 425-26.

Additionally, Dolinsky's pay status would not have been ripe for adjudication until an appropriate forum established the prerogative of the Board to abolish the position of the 212-day secretary. Finally, whereas some of the prior proceedings dealt with interpretations of the collective negotiation agreement (although not its salary provisions), the statutory mandate that no tenured secretary shall be reduced in compensation during good behavior and efficiency prevails over inconsistent provisions in a collective negotiation agreement. Bassett v. Bd. of Educ. of Oakland, 223 N.J. Super. 136, 142 (App. Div. 1988), aff'g in part and modifying in part, State Bd., 1987 S.L.D. 2528; also see Canfield v. Bd. of Educ. of Pine Hill, 51 N.J. 400 (1968) (reversing for the reasons expressed in the dissenting opinion of Judge Gaulkin, 97 N.J. Super. 483 (App. Div. 1967)).

I further **CONCLUDE** that the Board has reduced Dolinsky's compensation in violation of the tenure statute for secretaries. This is so even though the Board has been paying Dolinsky in accordance with the 2008-2009 school-year salary of a twelve-month secretary under the collective negotiation agreement.

Bassett, supra, 223 N.J. Super. 136 is instructive. Bassett was a full-time tenured reading teacher whose position was eliminated by reason of a Reduction In Force (RIF). She was offered and accepted reassignment to a part-time position of supplemental and compensatory education teacher in the same instructional area. She complained that she suffered an improper reduction in compensation by being paid at the collectively negotiated hourly rate for hourly rate teachers rather than at the proportional compensation level of her former full-time position. The Commissioner, State Board of Education and Appellate Division all concluded that payment at the rate for hourly rate teachers contravened Bassett's statutory protection as a tenured teacher against salary reduction. They rejected the Oakland Board's argument that the parties to the collective negotiation agreement had the legal right to agree to different

schedules for the hourly rate and part-time categories and that any other result would violate the contract and impair the integrity of the negotiation process. The Court agreed with the State Board that, since the statutory mandate for tenured employees prevails over inconsistent contractual provisions, the hourly rate prescription of the contract was unenforceable in this case. Id. at 142. Oakland was directed to pay Bassett as an hourly rate teacher but at a full-time teacher's rate. Id. at 143.

Riegel v. Board of Education of Berkeley Heights, EDU 3149-98, Initial Decision (December 30, 1998), adopted, Commissioner (February 22, 1999), <http://lawlibrary.rutgers.edu/oal/search.html> is also similar to the present matter. Riegel had been a tenured school psychologist with the Union County Regional High School District. As a result of the dissolution of the regional school district, Riegel was transferred to Governor Livingston High School in Berkeley Heights which had been a constituent district of the Union County Regional High School District. Although Riegel received a raise upon her transfer, she was required to work 189 rather than her previous 185 days. Consequently, her per diem rate was lower than that at the regional school district. As here, while she claimed a violation of the tenure statute, the Board contended that she was being paid the salary lawfully negotiated with the teachers' union. Relying on Bassett, the ALJ and the Commissioner concluded that the tenure statute required that Riegel must be compensated at her previous per diem rate and that a collective negotiation agreement term may not contravene or supersede a condition of employment set by statute. Even though Riegel's annual salary and monthly salary were not reduced, her salary was, nonetheless reduced because the per diem rate was less than that representing her earnings the previous year as an employee of the regional school district. Also see Casey v. Bd. of Educ. of Cinnaminson, 95 N.J.A.R.2d (EDU) 585.

Notwithstanding Dolinsky's overall increase in salary as a twelve-month secretary for 2008-2009 over that which she had earned in 2007-2008 as a 212-day secretary because she was working more days, her per diem rate from 2007-2008 to 2008-2009 was reduced from $192.57 to $184.64. Even though the District has been paying Dolinsky in 2008-2009 in accordance with the salary guide for twelve-month employees

under the collective negotiation agreement with the Association, it must nevertheless pay Dolinsky in accordance with N.J.S.A. 18A:17-2(c) by not reducing her compensation. The District satisfies this requirement by paying Dolinsky at her 2007-2008 212-day secretary per diem rate rather than at the higher per diem rate she would have received if she had remained a 212-day secretary in 2008-2009. Future increases in salary, or salary expectation, is not an appropriate factor to be considered when determining the validity of a transfer or reassignment since tenured employees have no vested right in any future increases in salary. Williams v. Bd. of Educ. of Plainfield, 176 N.J. Super. 154 (App. Div. 1980). The District abolished Dolinsky's 212-day secretary position by the end of the 2007-2008 school year. Although the District could not reduce Dolinsky's 2007-2008 compensation upon moving her to the twelve-month secretary position, it was not obligated to award her what would have been the 2008-2009 212-day secretary's compensation level when she never worked in a position that paid that level of compensation.

ORDER

It is hereby **ORDERED** that the Board's Motion to Dismiss or, in the alternative, for Summary Decision be **DENIED**.

It is further **ORDERED** that Dolinsky's Cross-Motion for Summary Decision and her Petition be **GRANTED** consistent with this Order.

It is further **ORDERED** that the Board pay Dolinsky for the 2008-2009 school year and thereafter at a salary consistent with a per diem rate of $192.57 until the salaries of the other twelve-month secretaries catch up ("red-circled").

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 13 2009
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: 2/13/09

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 17 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

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106-09

OAL DKT. NOS. EDU 4329-08 and EDU 8153-08 (CONSOLIDATED)
AGENCY DKT. NOS. 120-5/08 AND 174-6/08

LAURA LACROSS,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND		
IN THE MATTER OF THE TENURE HEARING OF LAURA LACROSS, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.	:	

The record of these consolidated matters, the parties' proposed Stipulation of Settlement, and the Initial Decision of 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 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.

Lucille Davy
COMMISSIONER OF EDUCATION

Date of Decision: 4/02/09
Date of Mailing: 4/02/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NOS. EDU 4329-08 AND EDU 8153-08 (CONSOLIDATED)

AGENCY DKT. NOS. 120-5/08 AND 174-6/08

LAURA LACROSS,

Petitioner,

v.

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

Respondent,

and

IN THE MATTER OF THE TENURE HEARING OF LAURA LACROSS, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

Michael T. Barrett, Esq., for Laura LaCross (Bergman & Barrett, attorneys)

Rocky L. Peterson, Esq., for the School District of the City of Trenton, Mercer County (Hill Wallack, attorneys)

Record Closed: February 18, 2009 Decided: February 19, 2009

BEFORE **DOUGLAS H. HURD,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In the first of these matters having OAL DKT. NO. EDU 4329-08, petitioner claims board failed to return her to work following clearance at the end of a voluntary medical leave. The matter was transmitted to the Office of Administrative Law (OAL) on May 27, 2008, for hearing as a contested case. This second matter, having OAL DKT. NO. EDU 8153-08 was transmitted to the OAL on July 29 2008, and involves the Board's certified tenured charges. This case was assigned to this Administrative Law Judge. Due to the delay of counsel being secured by the Trenton Board of Education, the matters were not preheard until September 9, 2008. At the request of the parties, these matters were consolidated for hearing.

Hearing dates were scheduled and heard. Prior to the conclusion of the hearing, the parties entered into successful settlement negotiations. On January 28, 2009, the parties filed a fully executed Stipulation of Settlement, which was subject to board approval. On February 18, 2009, the Board Resolution was received and the record in this matter closed.

The filed Stipulation of Settlement and the Board Resolution indicating the terms thereof, 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.

February 19, 2009

DATE

DOUGLAS H. HURD, ALJ

Date Received at Agency:

FEB 20 2009

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/lam

HILL WALLACK LLP
ATTORNEYS AT LAW

202 Carnegie Center, P.O. Box 5226, Princeton, NJ 08543-5226
Telephone: (609) 924-0808, Fax: (609) 452-1888
www.hillwallack.com

Writer's Direct Dial: (609) 734-6332
dml@hillwallack.com

2009 FEB 18 P 2:15
STA
OFFIC

February 13, 2009

Via Facsimile 609-588-6574 and Regular Mail
Hon. Douglas H. Hurd, A.L.J.
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, NJ 08625-0049

Re: Laura Lacross v. Board of Education of the City of Trenton
Agency Docket No. 120-5/08
OAL Docket No. EDUOR 4329-08S

Dear Judge Hurd:

Enclosed for Your Honor's review is a Board Resolution approving of the Stipulation of Settlement in the above-referenced matter. As you will recall, I recently forwarded a copy of the fully executed Stipulation of Settlement to you. Your chambers thereafter indicated to me that once a Board Resolution approving the settlement could be adopted and forwarded to you, all documents regarding the settlement would be forwarded by your chambers to the Commissioner of Education for review and approval.

Please let me know if anything else is necessary to effectuate this process.

Respectfully yours,
HILL WALLACK LLP

Dana M. Lane

DML:ar
Enc.
cc: Michael T. Barrett, Esq. (w/enc., via facsimile 609-683-0288)

RESOLUTION AUTHORIZING APPROVAL OF SETTLEMENT AGREEMENT WITH LAURA LACROSS

WHEREAS, the Trenton Board of Education has reviewed the Stipulation of Settlement Agreement between Laura LaCross and the Board of Education in regard to OAL Docket Nos. EDUOR 04329-2008S and EDUTH 08153-2008S; and

WHEREAS, the Board has voted on this date to approve the Stipulation of Settlement Agreement; therefore be it

RESOLVED that the Trenton Board of Education approves the Stipulation of Settlement Agreement between Laura LaCross and the Board of Education.

L. Diane Campbell

Dr. L. Diane Campbell
Board President

Jayne S Howard

Jayne S. Howard
School Business Administrator/Board Secretary

January 12, 2009
ADOPTED

HILL WALLACK LLP
202 Carnegie Center
CN 5226
Princeton, NJ 08543-5226
(609) 924-0808
Attorneys for Trenton Board of Education

LAURA LACROSS, Petitioner, vs. TRENTON BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUOR 04329-2008S DEPARTMENT OF EDUCATION REFERENCE NO. 120-5/08
TRENTON BOARD OF EDUCATION, Petitioner, vs. LAURA LACROSS, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUTH 08153-2008S DEPARTMENT OF EDUCATION REFERENCE NO. 174-6/08 **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, Laura LaCross ("LaCross") is a tenured teacher employed by the Trenton Public Schools; and

WHEREAS, on April 28, 2008 LaCross filed a Verified Petition with the Commissioner of Education under Docket Number EDUOR 04329-2008S, attached hereto as Exhibit A, alleging a delayed approval for her return to work after a medical leave of absence; and

WHEREAS, LaCross sought to be reinstated to her teaching position with all back pay restored with interest; and

WHEREAS, the Trenton Board of Education, through counsel, filed an Answer to the Verified Petition, attached hereto as Exhibit B, generally denying all allegations; and

WHEREAS, on June 9, 2008, the Trenton Board of Education passed a Resolution in approval of a Statement of Tenure Charges and Statement of Evidence against LaCross, attached hereto as Exhibit C; and

WHEREAS, the Statement of Tenure Charges and Statement of Evidence, filed on June 16, 2008 under Docket Number EDUTH 08153-2008S, attached hereto as Exhibits D and E, were based upon LaCross' incapacity to continue in her teaching position; and

WHEREAS, the Tenure Charges were substantiated by a psychiatric evaluation performed by Dr. James L. Hewitt on behalf of the Trenton Board of Education, attached hereto as Exhibit F; and

WHEREAS, Dr. Hewitt concluded that LaCross was not fit to return to work due to bipolar disorder and signs of mixed personality disorder; and

WHEREAS, LaCross filed an Answer to the Statement of Tenure Charges on June 17, 2008, attached hereto as Exhibit G, generally denying the bases of the charges.

WHEREAS, LaCross is in the process of applying for disability retirement; and

WHEREAS, the parties have exchanged discovery; and

WHEREAS, the Trenton Board of Education inadvertently paid LaCross for an unpaid leave of absence from her teaching position during the 2006-07 school year, amounting to an overpayment in the amount of $65,649.60; and

WHEREAS, a payroll check to LaCross in the amount of $4,746.07 was voided in October 2008 in partial satisfaction of the inadvertent overpayment; and

WHEREAS, these matters have been consolidated by the Honorable Douglas H. Hurd, Administrative Law Judge by Order dated September 10, 2008, attached hereto as Exhibit H; 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; and

WHEREAS, LaCross has been advised by counsel of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate;

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. LaCross will withdraw her Verified Petition seeking back pay and will resign her employment with the Trenton Board of Education effective June 30, 2009. The Trenton Board of Education will not be liable for any further salary obligations to LaCross. The Trenton Board of Education will continue LaCross' medical benefits until the settlement is approved by the Commissioner of Education. LaCross' resignation effective June 30, 2009, the continuation of her medical benefits and the voiding of the October 2008 payroll check in partial satisfaction of the amount owed by LaCross to the Trenton Board of Education regarding her unpaid leave of absence during the 2006-07 school year leaves an outstanding balance owed by LaCross to the Trenton Board of Education in the amount of $9,487.00. The Trenton Board of Education agrees to waive this outstanding balance if the settlement is approved. Once the settlement is approved, no monies are owed to either party and the Trenton Board of Education will cooperate in the dismissal of the Tenure Charges due to LaCross' admitted inability to perform and handle classroom activity. Both parties agree, however, that in the event this agreement 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 the incapacity of LaCross. Furthermore, it is in the public's interest to allow LaCross to apply for and obtain disability retirement since she is medically unable to continue working as a teacher. The students of the Trenton Public Schools are best served by replacing incapable teachers with effective, competent teachers. The parties are in agreement that the most efficient way of facilitating this is to move forward with a prompt settlement and avoid further unnecessary litigation when all parties are in agreement as to the best course of action and the inability of LaCross to perform the duties of a teacher in the District.

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 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 and which could have been raised in the within matter.

4. Board Approval

The Board President has been duly authorized by the Board at its Executive Session of November 24, 2008 to execute this Agreement on behalf of the Board of Education. The Board will execute a Resolution approving the settlement in the near future.

5. Assent to Terms

Both parties hereby acknowledge having entered into this agreement with a full understanding of their rights and that they were fully informed of the implications of this agreement by legal counsel. Neither party enters into this agreement under duress. Both parties enter this agreement 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 agreement is revoked, it will not be effective or enforceable. By signing this Stipulation of Settlement, LaCross acknowledges 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.

6. Entire Agreement

This agreement 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 agreement to be contrary to law, the remaining portions of the agreement shall remain in full force and effect.

8. 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 parties have knowingly and voluntarily executed and delivered this Stipulation of Settlement on the dates set forth below.

PETITIONER

Laura LaCross

LAURA LACROSS

DATED: 1-23-09

TRENTON BOARD OF EDUCATION

By: L. Diane Banks Campbell

L. DIANE BANKS CAMPBELL, President

ATTEST:

By: Jayne S Howard

JAYNE S. HOWARD, Board Secretary

DATED: 1-26-09

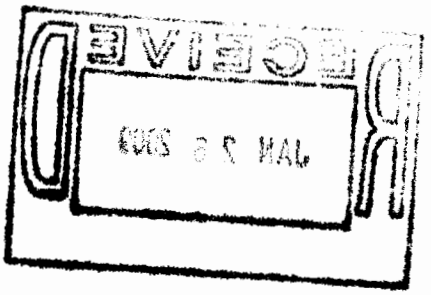


EXHIBIT A

BERGMAN & BARRETT
BY: **MICHAEL T. BARRETT, ESQUIRE**
MONTGOMERY KNOLL
9 TAMARACK CIRCLE
SKILLMAN, NEW JERSEY 08558
(609) 921-1502
Attorney for Petitioner

LAURA LA CROSS, Petitioner vs. CITY OF TRENTON BOARD OF EDUCATION, Mercer County Respondent	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO. AGENCY DOCKET NO. **VERIFIED PETITION**

Petitioner, Laura La Cross, residing at 33 Magnolia Court, Lawrenceville, Mercer County, New Jersey, hereby requests the Commissioner of Education to consider a controversy which has arisen between the Petitioner and Respondent, City of Trenton Board of Education, with administrative offices at 108 North Clinton Avenue, Trenton, Mercer County, New Jersey pursuant to the authority of the Commissioner to hear and determine controversies under the school law (N.J.S.A. 18A: 6-9) by reasons of the following facts:

1. The Petitioner, Laura La Cross, is a tenured teacher of many years in the City of Trenton School District.

2. During the spring of the 2006-2007 school year, in accordance with the law and the contract between the parties, the Petitioner requested a medical leave of absence through the balance of the school year (June 30, 2007).

3. In or around July, 2007, in anticipation of the upcoming 2007-2008 school year,

the Petitioner was released by her physician to return to work without restrictions, effective immediately and certainly by September 1, 2007, the first contractual day of the school year. That release document was provided to the employer.

4. In or around August, 2007, a representative from the Human Resources Department of the Respondent contacted Petitioner and requested that she submit to a medical examination pursuant to N.J.S.A. 18A: 16-2. The Petitioner agreed to so submit.

5. The Human Resources official indicated that the Petitioner would be provided with an appointment date, time and place to report and that the information would be forwarded within a day or two.

6. No information was forthcoming and the Petitioner made repeated requests of the Department to be provided with information concerning the scheduling of a medical exam.

7. Despite those repeated requests, no exam date was given by the first contractual day of school and the Petitioner contacted the Human Resources Department for assignment. Upon reporting, the Petitioner was told that she would be advised that day of an examination date and time. She was not.

8. This back and forth continued through the month of September. It was not until September 20, 2007 that the Petitioner was finally scheduled to see a Board physician.

9. When the Petitioner finally saw the Board physician, she was medically cleared to return to work. She reported to the Human Resources office and was told that there were no positions available.

10. On or around October 17, 2007 the Board, through then interim Human Resources Director, corresponded with Petitioner placing her on a "leave of absence with pay",

effective October 16, 2007. There was no basis for this "leave" as Petitioner had been returned to work by the Respondent's physician.

11. On or around December 5, 2007, Petitioner received a second letter; this one from Interim Human Resources Director Pat Lucas, indicating that "Petitioner's request for medical leave from October 16, 2007 through November 30, 2007 had been granted". Petitioner never made a request of any kind to this effect.

12. Indeed, Petitioner has repeatedly requested that she be returned to work as there is no basis to keep her out of work. Despite these requests, she has not been returned to work.

13. In addition, since December 1, 2007 the Petitioner has received no pay of any kind and, as stated, has not been returned to work.

14. N.J.S.A. 18A: 6-10 prohibits the dismissal or reduction in compensation of any tenured staff member without just and sufficient cause as specifically enumerated in that statute and without the appropriate procedural due process as provided for in that statute and others as well as the Administrative Code.

15. The actions of Respondent have worked to deprive the Petitioner of her legal, contractual and statutory rights and are otherwise in violation of the law.

WHEREFORE, the Petitioner requests that the Commissioner of Education reinstate her to a teaching position, restore all back pay with interest and other emoluments of employment and provide any further relief that is just and equitable.

4-28-08
Date

Michael T. Barrett, Esq.

VERIFICATION

I, Laura LaCross the Petitioner in this matter, hereby verify that the within allegations are true to the best of my knowledge.

LAURA LACROSS

To Tom Summers

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

May 1, 2008

PETITIONER/ATTORNEY
Michael T. Barrett, Esq.
Bergman & Barrett
9 Tamarack Circle
Montgomery Knoll
U.S. Highway 206 North
Skillman, NJ 08558

RESPONDENT/ATTORNEY
Board Secretary
Trenton Board of Education
108 North Clinton Avenue
Trenton, NJ 08609-1014

Dear Parties:

LAURA LaCROSS V. BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY

Agency Dkt. No.: 120-5/08 Document filed by: XX Petitioner ____ Respondent

This will acknowledge receipt of the following document(s) filed with the Commissioner on May 1, 2008 in the above-captioned matter:

XX **Petition of Appeal**
N.J.A.C. 6A:3-1.5, requires respondent within 20 days from receipt of Petition to file an Answer with proof of service upon petitioner.

XX **Documents submitted in triplicate (original + 2 copies) with phone number.**

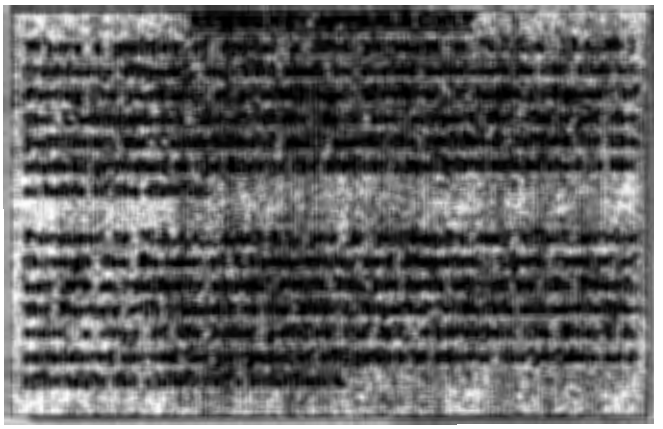
XX **Proof of Service**

____ **Verification or Certification**

____ **Residency Appeal – *SEE BOX AT RIGHT***

____ **Answer – Transmitting to OAL**

____ **Motion for Emergent Relief**



A REVIEW OF THE PLEADINGS REVEALS THE FOLLOWING INFORMATION HAS NOT BEEN PROVIDED. PLEASE NOTE AND FILE WITH THIS OFFICE:

____ No proof of service included (*N.J.A.C.* 6A:3-1.3). ____ No notarized verification (*N.J.A.C.* 6A:3-1.4(a)).

XX Other VERIFICATION DOES NOT CONFORM TO N.J.A.C. 6A:3-1.4(a)

THIS MATTER MAY NOT MOVE FORWARD IF ABOVE-SPECIFIED DEFICIENCIES REMAIN UNADDRESSED. **If you have any questions, please contact this office at (609) 292-5706.**

PLEASE NOTE:* SUBMISSIONS MAY BE MADE BY FAX ONLY WITH THE PRIOR CONSENT OF THE DIRECTOR and only under extraordinary circumstances where over ten (10) pages. *Please contact the Bureau at (609) 292-5706 to obtain permission prior to faxing documents.

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/kk:o/acknowl pet/llacross
VIA REGULAR MAIL

EXHIBIT B

SUMNERS GEORGE
A Professional Corporation
849 West State Street
Trenton, NJ 08618
(609) 393-6604
Attorneys for Respondent, City of Trenton Board of Education, Mercer County

2008 MAY 14 PM 2:02

LAURA LACROSS,	: BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY
Petitioner,	:
	: OAL DOCKET NO.
vs.	: AGENCY DOCKET NO.
CITY OF TRENTON BOARD OF EDUCATION, MERCER COUNTY,	:
	: ***ANSWER TO VERIFIED PETITION***
Respondent.	:

Respondent, City of Trenton Board of Education, Mercer County, with its principal place of business at 108 North Clinton Avenue, Trenton, New Jersey 08609, by way of Answer to Verified Petition, says:

1. Respondent admits the allegations of this paragraph.

2. Respondent admits the allegations of this paragraph.

3. Respondent neither admits nor denies the allegations of this paragraph, leaving Petitioner to her proofs.

4. Respondent admits the allegations of this paragraph.

5. Respondent denies the allegations of this paragraph.

6. Respondent denies the allegations of this paragraph.

7. Respondent denies the allegations of this paragraph.

8. Respondent denies the allegations of this paragraph.

9. Respondent denies the allegations of this paragraph.

10. Respondent denies the allegations of this paragraph.

11. Respondent admits the allegations of this paragraph.

12. Respondent denies the allegations of this paragraph.

13. Respondent admits the allegations of this paragraph.

14. The allegations contained in this paragraph sets forth legal conclusions, therefore, no response is required.

15. Respondent denies the allegations of this paragraph.

Wherefore, it is respectfully requested that the Verified Petition be dismissed with prejudice.

Affirmative Defenses

1. Petition has not been filed in a timely manner in accordance with ***N.J.A.C.*** 6A:3-1.3(d).

2. Petition does not set forth a cause of action upon which relief can be granted in accordance with ***N.J.A.C.*** 6A:1-1 et. seq. and ***N.J.S.A.*** 18A:1-1 et. seq.

SUMNERS GEORGE, P.C.
Attorneys for Respondent
Trenton Board of Education

By: _____
Harold W. George, Esq.

Dated: May 14, 2008

SUMNERS GEORGE
A Professional Corporation
849 West State Street
Trenton, NJ 08618
(609) 393-6604
Attorneys for Respondent, City of Trenton Board of Education, Mercer County

LAURA LACROSS, Petitioner, vs. CITY OF TRENTON BOARD OF EDUCATION, MERCER COUNTY, Respondent.	: BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY : : OAL DOCKET NO. : AGENCY DOCKET NO. : : : : ***PROOF OF SERVICE***

RAMONA MONCLOVA, hereby certifies and states:

1. I am a secretary at the law firm of Sumners George, P.C., attorneys for Respondent, City of Trenton Board of Education, Mercer County.

2. On May 14, 2008, I caused an Answer to Verified Petition to be served as follows:

Original and three (3) copies Via Hand Delivery
Lucille E. Davy, Commissioner
c/o M. Kathleen Duncan, Director
Bureau of Controversies and Disputes
New Jersey Department of Education
100 Riverview Executive Plaza
Trenton, NJ 08625-0500

One (1) copy via Fax and Regular Mail
Michael T. Barrett, Esq.
Bergman & Barrett Attorneys at Law
P.O. Box 1273
Princeton, NJ 08542

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.

Ramona Monclova

Ramona Monclova, Secretary

Dated: May 14, 2008

EXHIBIT C

HAROLD W. GEORGE, P.C.
A Professional Corporation
849 West State Street
Trenton, NJ 08618
(609) 393-6604
Attorneys for Petitioner, Trenton Board of Education

2008 JUN 16 PM 1:57

	: BEFORE THE COMMISSIONER OF
	: EDUCATION, STATE OF NEW JERSEY
IN THE MATTER OF THE	:
TENURE CHARGES AGAINST	: AGENCY DOCKET NO.
LAURA LACROSS, BOARD OF	: OAL DOCKET NO.
EDUCATION OF THE CITY OF	:
TRENTON, MERCER COUNTY	: ***CERTIFICATE OF DETERMINATION***
	:

JAYNE S. HOWARD, hereby certifies as follows:

1. I am the Business Administrator/Board Secretary of the Board of Education of the City of Trenton, Mercer County, New Jersey.

2. The Board of Education reviewed the written tenure charges accompanying this certification and the written evidence in support thereof, together with the charged employee's response thereto. Upon such consideration, the Trenton Board of Education has determined that there is probable cause to credit the evidence in support of the charges, and that the charges and the evidence in support of the charges are sufficient, if credited, to warrant dismissal or a reduction in salary.

3. The Board of Education's determination as set forth above was made at a duly advertised meeting of the Board held on June 9, 2008 at the Board Administration Building, 108 North Clinton Avenue, Trenton, New Jersey, commencing at 7:00 p.m. Upon making the aforesaid determination, the Board of Education further determined and voted to suspend the charged employee, without pay, for 120 days.

4. The Board of Education's determination was made by a majority vote of the whole number of members of the Board.

5. 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.

Jayne S. Howard

Jayne S. Howard

Dated: June 9, 2008

RESOLUTION
TRENTON BOARD OF EDUCATION

WHEREAS, on June 9, 2008, Board Secretary, Jayne S. Howard, filed with the Trenton Board of Education Tenure Charges and Written Statement of Evidence against teacher, Laura LaCross, for charges of incapacity, and other just cause; and

WHEREAS, the Board has considered the tenure charges, the written statement in support of the charges, and the response submitted by the employee;

NOW, THEREFORE, BE IT

RESOLVED, that the Trenton Board of Education hereby determines that there is probable cause to credit the evidence in support of the aforesaid charges, and that the charges and the evidence in support of the charges are sufficient, if true in fact, to warrant dismissal of Laura LaCross from her teaching position, or a reduction in her salary; and be it

FURTHER RESOLVED, that the said tenure charges be and are hereby certified to the Commissioner of Education, and the Board Attorney is hereby authorized and directed to file such charges with the Commissioner; and be it

FURTHER RESOLVED, that Laura LaCross be and is hereby suspended from her teaching position without pay for 120 days, effective immediately, and the Board Secretary is directed to forthwith notify Laura LaCross of the Board's action.

Jayne S. Howard
Business Administrator/Board Secretary
Trenton Board of Education

L. Diane Banks Campbell, Ed.D.
President
Trenton Board of Education

HAROLD W. GEORGE
A Professional Corporation
849 West State Street
Trenton, NJ 08618
(609) 393-6604
Attorneys for Petitioner, Trenton Board of Education

	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY
IN THE MATTER OF THE TENURE CHARGES AGAINST LAURA LACROSS, BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY	AGENCY DOCKET NO. OAL DOCKET NO. ***PROOF OF SERVICE***

RAMONA MONCLOVA hereby certifies and states:

1. I am a secretary at the law firm of Harold W. George, P.C., attorneys for Petitioner, Trenton Board of Education.

2. On June 13, 2008, Respondent was notified of the Board of Education's determination to certify tenure charges and to suspend her without pay for 120 days by causing such written notification to be served upon Respondent and her attorney addressed as follows:

<u>One (1) copy via Regular and Certified Mail</u>
Ms. Laura LaCross
33 Magnolia Court
Lawrenceville, NJ 08648

<u>One (1) copy via Regular Mail</u>
Michael T. Barrett, Esq.
Bergman & Barrett Attorneys at Law
P.O. Box 1273
Princeton, NJ 08542

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.

Ramona Monclova

Dated: June 13, 2008

EXHIBIT D

HAROLD W. GEORGE
A Professional Corporation
849 West State Street
Trenton, NJ 08618
(609) 393-6604
Attorneys for Petitioner, Trenton Board of Education

2008 JUN 16 PM 1:57

IN THE MATTER OF THE TENURE CHARGES AGAINST LAURA, LACROSS, BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY.	: BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY : AGENCY DOCKET NO. : OAL DOCKET NO. ***STATEMENT OF TENURE CHARGES***

The undersigned, Patricia Lucas, Interim Assistant Superintendent for Human Resources for the School District of the City of Trenton, County of Mercer, State of New Jersey ("Petitioner"), pursuant to *N.J.S.A.* 18A:6-10 et. seq., hereby institutes the following tenure charges against the Respondent, Laura LaCross:

CHARGE ONE - INCAPACITY

1. Respondent has had a history of excessive absenteeism since the 2005-2006 school year.

2. During the 2005-2006 school year, Respondent was absent 161 days.

3. For the current school year, 2007-2008, Respondent was cleared to return to work by her physician on August 27, 2007.

4. However, she was placed on a leave of absence with pay effective October 16, 2007 pending an investigation into a situation in which she was involved at Trenton Central High School

5. On November 15, 2007, James L. Hewitt, M.D. conducted a psychiatric evaluation of Respondent on behalf of the Petitioner to determine whether she was fit to return to work.

6. Dr. Hewitt concluded that Respondent has bipolar disorder. He also concluded that there are signs of a mixed personality disorder. Finally, he concluded that she was no more stable than she was when she was out of work and, therefore, she was unfit for duty. His recommendation was based upon the following facts:

- While waiting for her psychiatric evaluation at The Corporate Health Center, Respondent was observed talking to the TV as if she were part of the program.
- Respondent feels that her only problem is her migraines from which she has suffered since she was ten years old.
- She stated she was asked to go home after an incident where she claimed a female student punched her. The students witnessing the event claimed that Respondent slapped the girl.
- Respondent was escorted from the building as a result of this incident.
- Based upon her treatment, she felt that the School District was trying to get rid of her.
- When the discussion turned to her past psychiatric problems, Respondent revealed that her boyfriend had assaulted her after stalking her. The boyfriend was incarcerated, but when he was released, he attempted to contact her. She stated she was afraid of him.
- Respondent stated she was taking Wellbutrin, Effexor, Topamax, Clonazepam, and Fiorinal, which are usually used to treat depression and mood disorders.
- Aside from the assault by her boyfriend, she has had no other traumatic events.
- Based upon her emotional instability, irrational thinking, and apparent mood swings, Dr. Hewitt opined that she was unfit for duty.

WHEREFORE, Respondent should be suspended without pay for 120 days following certification of the charges and terminated from employment based upon incapacity pursuant to *N.J.S.A.* 18A:6-10 et. seq.

Patricia Lucas
Interim Assistant Superintendent Human Resources

Subscribed and sworn to
before me this 16th day
of May, 2008

Notary Public Attorney-At-Law
State of New Jersey

EXHIBIT E

HAROLD W. GEORGE
A Professional Corporation
849 West State Street
Trenton, NJ 08618
(609) 393-6604
Attorneys for Petitioner, Trenton Board of Education

RECEIVED & FILED
2008 JUN 16 PM 1:57

	: BEFORE THE COMMISSIONER OF
IN THE MATTER OF THE TENURE	: EDUCATION, STATE OF NEW JERSEY
CHARGES AGAINST LAURA,	:
LACROSS, BOARD OF	: AGENCY DOCKET NO.
EDUCATION OF THE CITY OF	: OAL DOCKET NO.
TRENTON, MERCER COUNTY.	:
	: ***STATEMENT OF EVIDENCE***

Patricia Lucas, being of full age, being duly sworn, upon her oath, deposes and says:

1. I am employed by the Board of Education of the City of Trenton, County of Mercer, State of New Jersey, as Interim Assistant Superintendent for Human Resources, and have been employed in that capacity since November 2007.

2. In my role as Interim Assistant Superintendent for Human Resources, it is my responsibility to serve as custodian of personnel records for all school district employees and to ensure that the district's personnel policies are followed.

3. During the 2005-2006 school year, Respondent was absent 161 days. ***(Exhibit A – Attendance Record, 2005-2006 School Year)***

4. On May 30, 2006, Petitioner withheld Respondent's increment for the 2006-2007 school year due to absenteeism. (***Exhibit B – May 31, 2006, letter by Assistant Superintendent Carolyn Gibson***)

5. On August 28, 2007, Respondent was so disruptive when she went to be examined at The Corporate Health Center and had to be escorted out of the Building. ***(Exhibit C – Correspondence Sheet from The Corporate Health Center)***

6. For the current 2007-2008 school year, Respondent was cleared to return to work on August 27, 2007. (***Exhibit D – August 27, 2007 letter by Dr. Stephanie Nahas, Jefferson University Hospital Headache Center***)

7. However, she was placed on a leave of absence with pay effective October 16, 2007 pending an investigation into a situation in which she was involved at Trenton Central High School. (***Exhibit E – October 17, 2007 letter by Interim Assistant Superintendent John Fox***)

8. On November 15, 2007, James L. Hewitt, M.D. conducted a psychiatric evaluation of Respondent on behalf of the Petitioner to determine whether she was fit to return to work and concluded that she has bipolar disorder and is unfit for duty. (***Exhibit F – November 15, 2007 Psychiatric Evaluation by James L. Hewitt, M.D.***)

9. On November 26, 2007, the Petitioner approved Respondent's request for an administrative leave of absence with pay effective October 16, 2007 through November 30, 2007. ***(Exhibit G – December 4, 2007 letter by Patricia Lucas, Interim Assistan Superintendent)***

Patricia Lucas
Interim Assistant Superintendent Human Resources

Subscribed and sworn to
before me this 16th day
of May, 2008

Notary Public ~~Attorney-At-Law~~
State of New Jersey

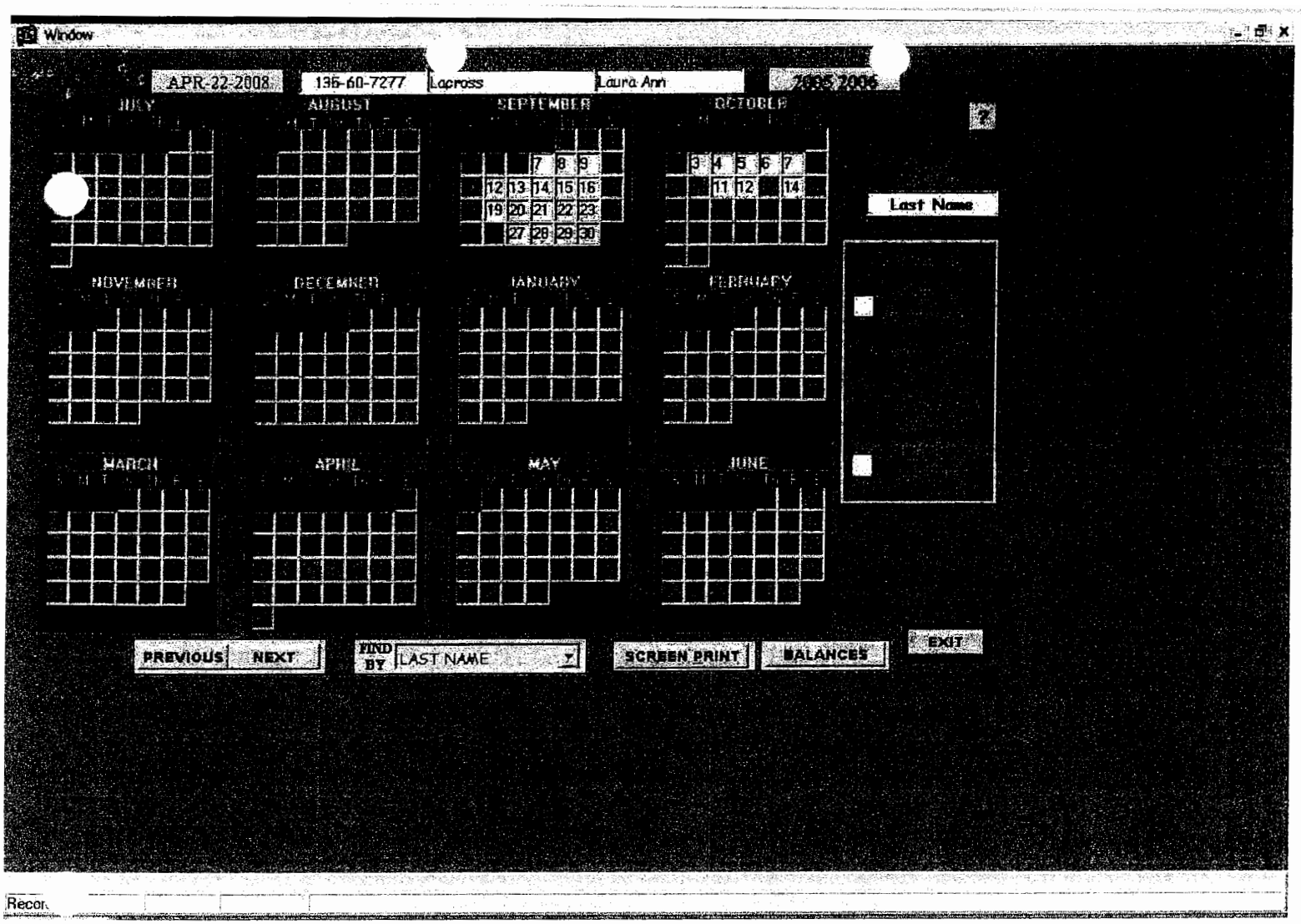

Window
APR-22-2008
136-60-7277
Lacross
Laura Ann
2005-2006
JULY
AUGUST
SEPTEMBER
OCTOBER
Last Name
NOVEMBER
DECEMBER
JANUARY
FEBRUARY
MARCH
APRIL
MAY
JUNE
PREVIOUS
NEXT
FIND BY
LAST NAME
SCREEN PRINT
BALANCES
EXIT

EXHIBIT A

TRENTON PUBLIC SCHOOLS
Central Services Building
Human Resources Department
108 North Clinton Avenue
Trenton, New Jersey 08609

James H. Lytle, Ed.D.
Superintendent of Schools
(609) 656-5454 • (609) 989-2682 [FAX]
torch@trenton.k12.nj.us

Carolyn Gibson
Asst Superintendent Human Resources
(609) 656-5471• (609) 278-3081 [FAX]
cgibson@trenton.k12.nj.us

May 31, 2006

Ms. Laura Ann Lacross
33 Magnolia Ct
Lawrenceville, NJ 08648

Dear Ms. Lacross:

At the meeting of the Board of Education held on Tuesday, May 30, 2006, the Board of Education approved the Superintendent's recommendation to withhold your increment for the 2006-2007 school year.

Should you have any questions regarding this matter, please contact me at 609-656- 5471.

Sincerely yours,

Carolyn Gibson
Assistant Superintendent
Human Resources

CG:gm

EXHIBIT B

THE CORPORATE
HEALTH CENTER
A Service of Capital Health System

CORRESPONDENCE SHEET

Name: Laura La Cross **Company:** TBOE

8.28.07		This Patient was asked to step into	
		my office due to her loud and disruptive	
		behavior at the front desk. Patient	
		had been in the room waiting for the	
		doctor and she did not want to wait	
		any longer. She became loud and	
		argumentative when she was informed that	
		she would have to call TBOE to reschedule	
		her appointment. ~~I~~ did not argue	
		with her because I previously witnessed	
		her speaking to the television while she	
		was in our waiting room. She told me	
		that I would have "bad Karma" and	
		I escorted her out of the building	
		and called hospital security	
		A Lipson	

832 Brunswick Avenue, Trenton, NJ 08638
Phone: 609-695-7471 Fax: 609-393-5272 Internet: www.capitalhealth.org
- The Occupational Health Solution -

Jefferson | Headache Center

Department of Neurology 111 South 11th Street
Suite 8130 Gibbon Building
Philadelphia, PA 19107-5092
215-955-ACHE (2243)
Fax: 215-955-2060
www.jefferson.edu/headache

August 27,2007

REC'D SEP 1 2 2007

RE: LAURA LACROSS

DATE OF BIRTH: 12/6/65

TO WHOM IT MAY CONCERN:

Please be advised that LAURA LACROSS is under my care for the treatment of MIGRAINE HEADACHES. While this condition warrants close follow up care; she is cleared to to RETURN TO WORK with no restrictions.

Please refer any questions to my office.

Thank You.

Stephanie Nahas M.D.

EXHIBIT D

TRENTON BOARD OF EDUCATION
HUMAN RESOURCES DEPARTMENT
108 North Clinton Avenue
Trenton, New Jersey 08609

John Fox
Interim Assistant Superintendent
Human Resources
(609) 656-4900, x5702
(609) 278-3081 (Fax)
cgibson@trenton.k12.nj.us

MAILED RETURN RECIEPT REQUESTED #7006 0810 0002 1232 4545

October 17, 2007

Ms. Laura Lacross
33 Magnolia Court
Lawrenceville, New Jersey 08648

Dear Ms. Lacross:

Please be advised that pending an investigation into a situation that you were involved at Trenton Central High School and the results of a physician's examination of you, you are being placed on a leave of absence with pay effective October 16, 2007.

Should you have any question about this matter, please feel free to contact me at your convenience at 609-656-5471.

Yours truly,

John Fox
Interim Assistant Superintendent
Human Resources

Cc: Rodney Lofton
Pam Owens
Sharon Taylor
Thomas Moore
File

EXHIBIT E

James L. Hewitt, M.D.
442 Warwick Road
Lawnside, New Jersey 08045
856-547-1166
FAX: 856-547-5228

November 15, 2007

Laura LaCross **Psychiatric Evaluation**

Laura LaCross is a 41-year-old woman who was seen by me on November 15, 2007, for a psychiatric assessment at the request of the Trenton Board of Education. She was psychiatrically evaluated to determine fitness for duty.

Prior to the interview I learned from school officials that there are concerns about her emotional stability. There was an incident where she became involved in an argument with a student. The other student was hostile and provocative but Ms. LaCross apparently did not manage it well. There was physical contact between Ms. LaCross and the student. The student accused Ms. LaCross of hitting her whereas Ms. LaCross said the girl moved into her personal space causing contact between Ms. LaCross's hand and the student. The incident was observed by other students. A teacher in the other half of the room overheard what happened and saw some of what happened. I do not have any direct information from these observers.

I learned that she has been working for the school district for a number of years. In the recent years there have been problems with excessive absenteeism. She was out 161 days during the 2005/2006 school year. During the 2006/2007 school year, she was there for 10 days in September and then out for the rest of the year. For the current school year she returned on September 21st. She was assigned duties as a daily substitute. This meant that she would fill in for teachers who were not there to teach their customary classes.

In the process of being cleared to return to teach, she was seen at the Industrial Clinic which is utilized by the school district for employees. She was observed to be talking to the TV as if she was part of the program. She was characterized as belligerent. She told me that she was made to wait for two hours and treated rudely.

I explained to her the parameters of the interview in terms of it being an independent evaluation in reference to fitness for duty. She expressed puzzlement about why she would need to see a psychiatrist since her only problem has been headaches. She told me that she feels harassed and has done nothing wrong. She put her problems purely in terms of migraine headaches. She went on to tell me that she was asked to leave the school after a female student punched her. She quoted various school officials as acting without authority and asking her to go home. She told me of other remarks by school officials which I have no way of substantiating.

In talking about the incident in question, she said that a student came into the class without authorization. The girl was talking loudly and disrupting the classroom. When

EXHIBIT F

Ms. LaCross confronted the girl, the girl used profanity and continued with her defiance. She called security. When the girl left the room, other students would not tell her what the girls name was.

She described the classroom where the incident took place as a form of shop class which had been divided into two classrooms. There is little sound privacy. The other teacher heard the confrontation and intervened but to no avail. The confrontation escalated. When the safety officers arrived, it took two of them to restrain the student. The girl's friends claimed that Ms. LaCross slapped her. Ms. LaCross shared with me that she was pointing at the girl. She acknowledged that she was agitated at the time but then became defensive as she shared that she was escorted out of the building as if she needed controlling, whereas what she felt at the time was threatened by the student. She went to say that she feels like the district is trying to get rid of her.

I obtained information about her education and her work history. She graduated from high school in 1984. She graduated from college in 1988 with a B.S. in Psychology. She was unable to find a job in her field and so she turned to teaching. She obtained her Masters as part of obtaining necessary credits for her teaching certification. Over the years she has taught various subjects. She has always loved her job and never felt pressure.

She reports that she has had migraines off and on since age 10. There is a family history of migraines. She has been on various medications. The doctor treating her headaches told her it would be important to stay home and get well. She ran out of sick days but had a disability plan and when it ran out, she felt the financial pressures to return to teaching.

She said that the 2006/2007 was a stressful year but the records indicate that she was out for most of the year. She took the focus off of her own difficulties by talking about a school official being caught and making up credits to get students graduated. She laughed as she shared this story.

She then went on to talk about her principal telling her that she was not wanted and that she was being written up unfairly, for example being late or having her time sheet changed. She complained that she was written up about her poor lesson plans but she was never told how to do it.

She spontaneously told me that the school officials do not know her. How do they know me? How can they say that I am acting weird? I then ask about past psychiatric history. She tells me it is personal and then tells me that she was beaten up by her ex-boyfriend. Apparently he was stalking her. He broke into her house and assaulted her. He was charged, convicted and incarcerated. After getting out of jail he attempted to

make contact with her which represented a violation of probation. She has some fears of him but feels that he will not bother her.

I ask about medication and she tells me that she is on Wellbutrin, Effexor, Topamax, Clonazepam and Fiorinal as well as various vitamins. These medications are generally used to treat depression and mood disorders, so I ask her about mental health issues. She told me that she has never had a psychiatric diagnosis, that the medication has been given to her to help with migraines. I try to question her generalizations but she becomes evasive and finally says that she has depression secondary to her migraines and that the migraines make her explosive, that is emotional.

She reports no other traumatic events other than the one with the ex-boyfriend. She was involved in an automobile accident over the summer which was upsetting but she was not seriously injured. She has never had any work-related injuries, though when I bring it up she says a girl punched her in the chest and it hurt.

I attempt to obtain information about her emotional and social development in order to determine a diagnosis. She is uncomfortable providing candid information. She does talk at length about the ex-boyfriend. She has never been married and never had children. She tells me that she is fully capable of teaching.

Mental Status:

Laura LaCross is a 41-year-old woman who is dressed professionally for the interview. Her speech is articulate. Vocabulary and syntax are consistent with at least average intelligence. There is nothing unusual in terms of modulation of pitch, tone and melody of speech. There is reasonable reciprocity and complexity to verbal and non-verbal communication.

There is a great deal of expressed emotion. She shows signs of emotional instability. She becomes very excited and at other times agitated by various topics. She comes across as having mood swings but when I question her about them she denies them. She comes across as suspicious and mistrustful almost to the point of paranoia. She believes there is a conspiracy. She does not come across as overtly delusional. She does not show any current signs of psychosis.

Her lack of awareness of her own emotional instability, impulsivity and irrational thinking makes it difficult to have a discussion with her about the extent of her problems. She relies on a somatic explanation of her difficulties, e.g. her migraine-type headaches.

She has trouble sustaining attention and focus. She jumps from one topic to another. At times her actions seem inappropriate, such as laughing about misconduct of other

school officials or her perceptions of misconduct by these people. She comes across as egocentric and unable to understand the impact her actions have on others. She shows evidence of mood swings and prolonged periods of agitation.

Impressions:

1) Bipolar Disorder

2) She reports symptoms consistent with posttraumatic stress disorder but they may be better explained by a diagnosis of Bipolar Disorder. There are also signs of a mixed personality disorder as well as a somatoform disorder. I do not believe that she has not been told by treating health practitioners that she has a mental health diagnosis. I do not believe that her only difficulty is migraine headaches. I do not see any signs that she is any more stable now than when she was out of work. The difference seems to be that there are financial pressures and she no longer has a disability plan that can provide an income. The description available to me about the incident with the student was evidence that she is unfit for duty.

I advised her that I am available to review information from treating professionals. None has been provided to me by the writing of this report. I do not think that she is fit to return to duty.

James L. Hewitt

James L. Hewitt, M.D.

JLH/EBS:kls

TRENTON PUBLIC SCHOOLS
Central Services Building
Human Resources Department
108 North Clinton Avenue
Trenton, New Jersey 08609

Patricia Lucas
Interim Assistant Superintendent Human Resources
(609) 656-5475• (609) 278-3081 [FAX]
plucas@trenton.k12.nj.us

December 4, 2007

Ms. Laura Ann Lacross
33 Magnolia Ct
Lawrenceville, NJ 08648

Dear Ms. Lacross:

At the meeting of the Board of Education held on Monday, November 26, 2007, the Board of Education approved the Superintendent's recommendation to accept your request for an administrative leave of absence with pay, effective October 16, 2007 through November 30, 2007.

Sincerely,

Patricia Lucas
Interim Assistant Superintendent
Human Resources

PL:lr

Distribution

___Recipient
___Immediate Supervisor
___Personnel File

EXHIBIT G

EXHIBIT F

James L. Hewitt, M.D.
442 Warwick Road
Lawnside, New Jersey 08045
856-547-1166
FAX: 856-547-5228

November 15, 2007

Laura LaCross **Psychiatric Evaluation**

Laura LaCross is a 41-year-old woman who was seen by me on November 15, 2007, for a psychiatric assessment at the request of the Trenton Board of Education. She was psychiatrically evaluated to determine fitness for duty.

Prior to the interview I learned from school officials that there are concerns about her emotional stability. There was an incident where she became involved in an argument with a student. The other student was hostile and provocative but Ms. LaCross apparently did not manage it well. There was physical contact between Ms. LaCross and the student. The student accused Ms. LaCross of hitting her whereas Ms. LaCross said the girl moved into her personal space causing contact between Ms. LaCross's hand and the student. The incident was observed by other students. A teacher in the other half of the room overheard what happened and saw some of what happened. I do not have any direct information from these observers.

I learned that she has been working for the school district for a number of years. In the recent years there have been problems with excessive absenteeism. She was out 161 days during the 2005/2006 school year. During the 2006/2007 school year, she was there for 10 days in September and then out for the rest of the year. For the current school year she returned on September 21st. She was assigned duties as a daily substitute. This meant that she would fill in for teachers who were not there to teach their customary classes.

In the process of being cleared to return to teach, she was seen at the Industrial Clinic which is utilized by the school district for employees. She was observed to be talking to the TV as if she was part of the program. She was characterized as belligerent. She told me that she was made to wait for two hours and treated rudely.

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James L. Hewitt, M.D.
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She described the classroom where the incident took place as a form of shop class which had been divided into two classrooms. There is little sound privacy. The other teacher heard the confrontation and intervened but to no avail. The confrontation escalated. When the safety officers arrived, it took two of them to restrain the student. The girl's friends claimed that Ms. LaCross slapped her. Ms. LaCross shared with me that she was pointing at the girl. She acknowledged that she was agitated at the time but then became defensive as she shared that she was escorted out of the building as if she needed controlling, whereas what she felt at the time was threatened by the student. She went to say that she feels like the district is trying to get rid of her.

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She reports no other traumatic events other than the one with the ex-boyfriend. She was involved in an automobile accident over the summer which was upsetting but she was not seriously injured. She has never had any work-related injuries, though when I bring it up she says a girl punched her in the chest and it hurt.

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Mental Status:

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school officials or her perceptions of misconduct by these people. She comes across as egocentric and unable to understand the impact her actions have on others. She shows evidence of mood swings and prolonged periods of agitation.

Impressions:

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2) She reports symptoms consistent with posttraumatic stress disorder but they may be better explained by a diagnosis of Bipolar Disorder. There are also signs of a mixed personality disorder as well as a somatoform disorder. I do not believe that she has not been told by treating health practitioners that she has a mental health diagnosis. I do not believe that her only difficulty is migraine headaches. I do not see any signs that she is any more stable now than when she was out of work. The difference seems to be that there are financial pressures and she no longer has a disability plan that can provide an income. The description available to me about the incident with the student was evidence that she is unfit for duty.

I advised her that I am available to review information from treating professionals. None has been provided to me by the writing of this report. I do not think that she is fit to return to duty.

James L. Hewitt

James L. Hewitt, M.D.

JLH/EBS:kls

EXHIBIT G

BERGMAN & BARRETT
BY: MICHAEL T. BARRETT, ESQUIRE
9 TAMARACK CIRCLE
SKILLMAN, NJ 08558
(609) 921-1502
Attorneys for Respondent: Laura LaCross

IN THE MATTER OF THE TENURE CHARGES AGAINST LAURA LA CROSS, BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY AGENCY DKT. NO.: OAL DKT. NO.: ANSWER TO STATEMENT OF TENURE CHARGES

CHARGE ONE - INCAPACITY

1. The allegations contained in Charge One, paragraph 1 are denied.

2. The allegations contained in Charge One, paragraph 2 are denied.

3. The allegations contained in Charge One paragraph 3 are admitted.

4. The allegations contained in Charge One, paragraph 4 are admitted to the extent that they allege that Respondent was placed on a leave of absence with pay, however she did not request a leave as suggested by the Board in its Statement of Evidence. Rather, Respondent was placed on a leave by the Board despite having been given clearance to return to work.

5. The allegations contained in Charge One, paragraph 6 are denied in their entirety and the Board is left to its proofs thereon.

WHEREFORE, the Respondent asks that the Statement of Tenure Charges be dismissed.



MICHAEL T. BARRETT, ESQ.

Dated: 6/10/08

EXHIBIT H

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

CONSOLIDATION

OAL DKT. NOS. EDU 4329-08 AND EDU 8153-08

AGENCY DKT. NOS. 120-5/08 AND 174-6/08

LAURA LACROSS,

Petitioner,

v.

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

Respondent,

and

IN THE MATTER OF THE TENURE HEARING OF LAURA LACROSS, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

Michael T. Barrett, Esq., for Laura LaCross (Bergman & Barrett, attorneys)

Rocky L. Peterson, Esq., for the School District of the City of Trenton, Mercer County (Hill Wallack, attorneys)

BEFORE **DOUGLAS H. HURD,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In the first of these matters having OAL DKT. NO. EDU 4329-08, petitioner claims board failed to return her to work following clearance at the end of a voluntary medical leave. The matter was transmitted to the Office of Administrative Law (OAL) on May 27, 2008, for hearing as a contested case. This second matter, having OAL DKT. NO. EDU 8153-08 was transmitted to the OAL on July 29 2008, and involves the Board's certified tenured charges. This case was assigned to this Administrative Law Judge. Due to the delay of counsel being secured by the Trenton Board of Education, the matters were not preheard until September 9, 2008.

During that prehearing conference, the parties moved to consolidate these matters; and no objections having been heard; and

Having reviewed the papers, I **FIND** these matters concern the same parties and events.

I **CONCLUDE** that the interests of efficiency and economy will be served by consolidation.

Therefore, it is **ORDERED** that these matters be **CONSOLIDATED** for all purposes including hearing and disposition and it is further **ORDERED** that the consolidated matters proceed to hearing.

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.

September 10, 2008

DATE

DOUGLAS H. HURD, ALJ

/lam

107-09

P.B., on behalf of minor child, C.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCEVILLE, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *Pro Se* Residency Appeal challenging the Board's residency determination that her granddaughter, C.K., is not eligible for a free education in the Township of Lawrenceville School District. Petitioner contended that C.K. resides with her in Lawrenceville, although the child sometimes stays with her mother in Trenton. Respondent Board claimed that C.K. is not eligible to attend Lawrenceville schools under *N.J.S.A.* 18A:38-1 (b), as she is domiciled in Trenton with her mother, T.B., and that P.B. – as grandmother – is not the proper party to bring this action on behalf of the interest of C.K.

The ALJ found, *inter alia*, that: petitioner does have standing to bring the instant appeal on behalf of her daughter and granddaughter; petitioner is not the legal guardian of C.K.; petitioner does not support C.K. *gratis* as required by law; and there is no intention of having C.K. reside with petitioner beyond the school term, as she spends weekends in Trenton with her mother. The ALJ concluded that petitioner failed to demonstrate by a preponderance of credible evidence that C.K. is entitled to attend the respondent's schools free of charge, and ordered the appeal dismissed.

Upon independent review of the record, the Commissioner adopted the recommended decision of the OAL and dismissed the petition, noting that the respondent Board had elected to waive any tuition due from P.B. as a consequence of C.K.'s ineligible attendance in its 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.

April 2, 2009

OAL DKT. NO. EDU 8990-08
AGENCY DKT. NO. 278-9/08

P.B., on behalf of minor child, C.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCEVILLE, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon her full review, the Commissioner initially concurs with the Administrative Law Judge (ALJ) that P.B. is the appropriate petitioner in this affidavit residency matter. She further agrees that petitioner has failed to sustain her burden of establishing that her minor grandchild, C.K., is entitled to a free public education, pursuant to *N.J.S.A.* 18A:38-1(b)(1), in the Lawrenceville Township Schools and, consequently, C.K. may appropriately be disenrolled by the Board. It is duly noted, however, that the Board has elected to waive any tuition due from P.B. as a consequence of C.K.'s ineligible attendance in its schools.

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

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/02/09
Date of Mailing: 4/02/09

* 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 8990-08
AGENCY DKT. NO. 278-9/08

P.B., O/B/O OF MINOR CHILD, C.K.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCEVILLE, MERCER COUNTY,
Respondent.

P.B., petitioner, pro se

John E. Collins, Esq., for respondent

Record Closed: January 19, 2009 Decided: February 25, 2009

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a)

Petitioner resides in Lawrenceville, Mercer County, New Jersey. In a petition filed before the Commissioner of Education, petitioner seeks an Order by which her granddaughter, C.K., would attend, free of charge, the public schools operated by the Lawrence Township Board of Education (Board). Petitioner makes claim that C.K. resides with her and is entitled to such attendance under N.J.S.A. 18A:38-1 (b). The Board says C.K. is not entitled to attend its public schools free of charge, that the requirements of the statute are not met in this case, and that petitioner, as grandmother, is not the proper party to present this claim on behalf of her granddaughter. The Board says C.K.'s natural mother, who lives in Trenton, New Jersey, is the appropriate person to bring this action on behalf of the interest of C.K.

C.K. continues attendance at the Lawrence Township Public School pending disposition of this claim.

A hearing was scheduled for January 6, 2009, but adjourned at petitioner's request because of pressing family personal business. The matter was rescheduled and the hearing was conducted January 16, 2009, at the Office of Administrative Law, Mercerville. The record closed January 19, 2009, pursuant to N.J.A.C. 1:1-1.4.

The conclusion is reached in this initial decision that C.K. is not eligible by reason of N.J.S.A. 18A:38 -1 (b) (1) to attend the Lawrence Township Board of Education schools free of charge.

STANDING

On the issue of standing, it is accurate to say petitioner resides in Lawrenceville, while C.K.'s natural mother, T.B., resides in Trenton. Indeed, T.B. was present at the hearing, along with petitioner. Petitioner brought the petition of appeal on behalf of her granddaughter because she feels more competent to do so than does her daughter. Moreover, petitioner says she is entitled to bring the petition because she resides in Lawrenceville; her daughter is a resident of Trenton.

C.K. was initially enrolled at the Lawrence schools in 2005 on the basis of an affidavit (R-1) T.B. filed with the Board, together with an affidavit (R-2) of petitioner. Eventually, the Board determined on the basis of its attendance office surveillance reports to disenroll C.K. from its school because it found at a hearing on the matter that C.K. is not domiciled in its geographic boundaries but that she is domiciled in Trenton with her mother, T.B. Petitioner, the grandmother of C.K. and the mother of T.B., filed a Pro Se Residency Appeal on behalf of C.K.

N.J.S.A.18A:38-1 (b) 1 provides in part as follows:

> 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.

In a similar case to this matter, the Commissioner of Education held as follows:

> It is clear from the language in N.J.S.A. 18A:38-l b (1) that the Legislature contemplated, in affidavit student cases, the resident, for all practical purposes, would be acting in the stead of the child's parent or legal guardian and should, therefore, be the party granted the legal standing to appeal a board's adverse determination, even where the affidavit student is presently enrolled in the district . It is for this reason that the Legislature established the "test," or list of criteria, which a resident must satisfy in order to demonstrate that the student is entitled to a free education in the district.

See, H.K. and G.K., on behalf of minor children, J.K. and C.K. v. Board of Education of the Township of Cherry Hill, Camden County, OAL Dkt. No. EDU 673-97, Agency Dkt. No. 5-1/97, Commissioner of Education, Decision, August 8, 1998.

Petitioner, as a resident of Lawrenceville, is acting in the stead of C.K.'s mother, T.B., who is a resident of Trenton. C.K. is enrolled in the Lawrence schools on the basis of the 2005 certifications filed by petitioner and by T.B. C.K. is, indeed, a so-called "affidavit student"; a student whose claim to enrollment in a public school is predicated upon affidavits filed, or in this case, certifications in lieu of affidavits.

I **CONCLUDE,** notwithstanding my words to the contrary on the record, petitioner has standing to bring this pro se appeal to the Commissioner of Education on behalf of C.K.

FACTS

Except as otherwise noted, the facts established by a preponderance of credible evidence in the record are these:

1. C.K. began enrollment as a first grader in the Lawrence Township public school in September 2005.

2. At the time of first enrollment on or about September 3, 2005, T.B. filed an affidavit with the Board attesting to her and her daughter's, C.K., then current residence in Lawrenceville with her mother, petitioner. T.B. attested she and C.K. intended to remain "indefinitely" as residents with her mother in Lawrenceville.

3. T.B. attested that the reason she and C.K. were then living with petitioner is "No permanent residence".

4. T.B. attested that the "last school previously attended" by C.K. was Parker Elementary School in Trenton.

5. Petitioner filed an affidavit (R-2) with the Board dated September 3, 2005, regarding the enrollment of her granddaughter, C.K., at the Lawrenceville public school.

6. Petitioner attests that her residence in Lawrenceville was considered by her to be temporary, and that her daughter and two children were residing with her as "guests".

6a. T.B. presently has four children; one is about one year old, then C.K., then another is 13, while the fourth is 18 years of age.

7. Petitioner attests that C.K. would not be living at another residence over the summer; that is, she would be permanently residing with her in Lawrenceville.

8. Despite C.K. having been accepted for enrollment in the Lawrence Township public school on the strength of the affidavits, and as she continues to be so enrolled, the principal of the Slackwood Elementary School to which she was

assigned, Dr. Patricia Wendell, expressed concern at or about the beginning of the 2007-08 academic year to the school attendance office that C.K. was reporting late to school and suspected C.K. not residing with petitioner. (See, N.J.A.C. 6A:22-4.3 (a))

9. The assistant registrar, Cynthia A. Kandrac, who was also the liaison between petitioner and the school, explained that in October 2005 a one-time surveillance of petitioner's residence was done by her office. She explains nothing untoward was observed, and consequently no additional action was taken at the time. C.K. continued in the Lawrence Township School.

10. Regular surveillance by the Board's attendance office, David Boehm, began on November 14, 2007, with the approval of the Board Secretary/School Business Administrator, Thomas Eldridge. Surveillance reports (R-6) were prepared and signed.

10a. The reports (R-6) show surveillance was done on at least 21 separate occasions between November 14, 2007 and May 14, 2008. The locations surveilled were petitioner's residence, the Whittaker Avenue, Trenton, address provided by T.B., an address given by T.B. on Hamilton Avenue that came to the attention of the attendance office, Virginia Avenue in Trenton, and the Slackwood Avenue school. The goal of this effort, engaged in on 19 of the 21 occasions by Mr. Boehm, was to determine whether C.K. was residing with petitioner on a daily basis. Ms. Kandrac performed the surveillance on the other two occasions, accompanied by the Board Secretary. Petitioner was notified that surveillance was to begin.

10b. The surveillance reports show, generally, that C.K. was observed leaving petitioner's residence on two occasions and proceeded to the Slackwood school.

10c. C.K. was observed on six occasions leaving the Whittaker Avenue address on her way to a local store or other unknown destination. She was not observed on the other 13 occasions.

10c. During the surveillance, the location was changed in terms of petitioner's residence because it was discovered there was a rear exit to the apartment building.

11. In the meantime, an unsigned and undated statement, purporting to be an affidavit to show hardship, was filed by T.B. with Assistant Registrar Kandrac in or about the end of January 2008. This document relates that T.B.'s home address is Virginia Avenue, in Trenton, not Slack Avenue in Lawrenceville, as she earlier reported in her fully executed affidavit.

12. It is also reported in this statement that C.K. stays with her mother at the Virginia Avenue address every week-end, and during vacation time.

13. The unsigned statement prepared in what appears to be the handwriting of T.B., reports she, T.B., financially supports her daughter, C.K. Indeed, at hearing, T.B. testified she purchases C.K.'s clothing and school supplies.

14. In a similar, though signed, statement by petitioner, but not notarized, and submitted to Ms. Kandrac in or about the end of January 2008, petitioner reports C.K. visits her parents every weekend, and over school vacations, and that the parents financially contribute to C.K.'s upkeep. It is recited that the parents contribute "All needed expenses for [C.K.'s] survival". (R-5)

15. On each date on which Ms. Kandrac personally surveilled, she also verified that C.K. was in school attendance. Mr. Boehm also verified C.K. was in school attendance the days he did the surveillance. This means, of course, that if C.K. was at school even though she was not observed leaving petitioner's

Lawrenceville residence in the morning then the inference may be drawn she was not residing at petitioner's Lawrenceville home for purposes of school attendance. If C.K. was observed making egress in the morning from her mother's home in Trenton on school days, then the inference may be drawn that C.K. was residing with her mother in the Trenton school district for purposes of school attendance.

16. It appears that T.B. participates in a program entitled NJ CARES FOR KIDS. While that participation is and of itself not crucial to a determination here, the fact that T.B. filed a different address with that program than she did with the Lawrence School District which suggests T.B.'s actual residence is other than with petitioner in Lawrenceville.

17. T.B. was involved in a fender-bender accident in front of the school on or about February 6, 2008. She provided her address to the police as being on Hamilton Avenue in Trenton, and she added her daughter, C.K., lives with her.

In addition to the foregoing, other facts relevant to the issue of whether C.K. is entitled to a free public school education in the Lawrence Township schools on the basis of being a so-called affidavit student are established by petitioner's testimony and the testimony of T.B. Petitioner testified her daughter, T.B., does have various residences throughout the area, although for the most part, she says, C.K. remains in her custody. There is no formal custody agreement in existence.

Petitioner explains that from time to time she, petitioner, leaves the state for weeks at a time to care for her sister over whom she has guardianship. During these times, T.B. assumes the care of C.K. and her two sons. Even when petitioner is not out of state and C.K. stays with her, C.K. returns to her mother on the week-ends and during vacation time at the Whittaker, Trenton, address. Petitioner testified "circumstances are not reliable" at the Whittaker Avenue address. When asked why

she is of that view, petitioner explained because the owner of the property has her own family, and there are not enough rooms.

Petitioner testified that while her daughter, T.B., has personal difficulties, she did allow her to live with her for a time. Petitioner testified she wanted and wants C.K. to live with her permanently, but T.B. moved out of her residence after about a month in 2005. Since 2007, T.B. and C.K. have been in and out of her residence.

Petitioner testified that when she filed for bankruptcy, T.B. simply had to help her out financially, and still does. Petitioner explains T.B. must contribute to her daughter's upkeep, because she simply cannot afford to do so.

T.B. testified that while C.K. is in her presence while her mother is out of state, she insists there is a distinction to be drawn between merely being with the child and "caring" for the child. T.B. says her mother cares for C.K., presumably in the sense of taking care of her basic needs, while she, T.B., is merely with C.K. T.B. explains she cannot care for C.K. for lack of resources.

T.B. says her residence on Whittaker Avenue has one bedroom in her friend's house, and because of the size of her friend's family there is not much room. T.B.'s youngest son, who is three years of age, is presently living with her; he had been living with the father.

T.B. says she has many "unstable circumstances" which is why she tends to go back and forth to her mother's, petitioner's, residence. T.B. is presently employed, although she says it is part-time work that she does.

Based on the testimony of petitioner and her daughter, T.B., I **FIND** the following facts:

18. Petitioner does not, I infer, support C.K. as if she were petitioner's own daughter.

19. While C.K. remains in the abode of petitioner during the regular school week when petitioner is present, she returns home to her mother on the week-ends and during vacation time. I therefore **CONCLUDE** that neither C.K. nor her mother, T.B., intended to have C.K. return to petitioner's residence as her permanent residence.

20. On diverse dates throughout the school and academic year, petitioner is out of state and cannot physically care for, or even be in the presence of, C.K.

21. During the petitioner's absences from the state, C.K. stays with her mother on Whittaker Street in Trenton.

22. T.B. financially supports C.K., even during the times C.K. stays with petitioner, through the purchase of clothing and school supplies. (See, N.J.A.C. 6A;22-3.2 (a) 4). Since petitioner's bankruptcy this year, T.B.'s contribution towards the upkeep of C.K. increased though there is no quantifiable amount of such an increase in the record.

23. For purposes of school attendance and given all the attendant circumstances in this case, there is no distinction to be drawn between "merely being with the child" and 'caring' for the child.

24. The fact is established that for school attendance purposes under law, C.K. lives with her mother. She does stay occasionally with her grandmother, petitioner. This fact is established by petitioner's testimony regarding her trips out of state for weeks at a time, and T.B.'s testimony that C.K. stays with her when her mother is out of state, that C.K. is with T.B. on week-ends even when petitioner is in state, and C.K. is with T.B. during vacation periods from school. The surveillance reports establish that

more often than not and while C.K. is in attendance at school, she makes her egress from a residence other than petitioner's address.

25. There is no evidence to show either petitioner or her daughter, T.B., the mother of C.K., is homeless.

The record shows the Board did provide petitioner and C.K., along with T.B., a hearing pursuant to N.J.S.A.18A:38- (b) 2 and N.J.A.C. 6A: 22-4.3 (c) on the issue of whether C.K. is eligible under N.J.S.A. 18A:38 -1(a) or (b). The hearing was held August 27, 2008.

The Board advised T.B., C.K.'s mother, by letter dated August 28, 2008, that pursuant to N.J.S.A. 18A:38-1(b)2, C.K. was disenrolled from its schools. The Board explained its action was based on its finding that C.K.'s domicile is not in its school district; rather, she is domiciled in Trenton with her mother

The Board also advised petitioner it elected not to seek tuition for C.K.'s past attendance, although it had legal authority to do so. Finally, the Board explained to T.B. she had the right to challenge its determination to the Commissioner of Education.

ANALYSIS

N.J.S.A. 18A:38-1 provides:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> a. Any person domiciled who is domiciled within the school district.

Paragraph a. of the statute entitles a child to a free public school education in the district in which they are domiciled. The domicile of an unemancipated child is the

domicile of the parent, custodian, or guardian. P.B.K. v. Board of Educ. of The Borough of Tenafly, 343 N.J. Super. 419 (App. Div. 2001).

In this case, the mother is the one who, as between mother and father, has taken responsibility for the care, custody, and control of C.K. Petitioner is not the legal guardian of C.K. The domicile of C.K., therefore, is that of the mother which is Trenton, New Jersey. Therefore, under paragraph a. of the statute, I **CONCLUDE** C.K. is not eligible by reason of domicile to attend the Lawrence Township Public Schools free of charge.

Next, petitioner has the burden to demonstrate C.K. is entitled to attend the Lawrence Township schools free of charge based on paragraph (b) (1) of the statute.

> 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 intends so to keep and support the child gratuitously for a longer time than merely through the school term * * * 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 . . .
>
> 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 heave 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 . . .
>
> 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 win which orders of the commissioner are enforced . . .
>
> (2) If the superintendent or administrative principal of a school district finds that . . . the child is not kept in the home of another person domiciled within the school district and supported by him gratis as if the child was the person' own child as provided for in paragraph (1) of this subsection, the superintendent or administrative principal may apply to the board of education for the removal of the child.

Paragraph b., subparagraph (1), of the statute would allow C.K. to attend the Lawrence Township Schools if certain conditions were met. That part of the statute reads:

> 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 her were such other person's own child, upon filing by such other person with the secretary of the board of education of the district . . . a sworn statement that he is domiciled with 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 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.

N.J.A.C. 6A:22-3.2 (a) 1 instructs that an otherwise eligible student, kept in the home of a person other than the student's parent or legal guardian, is eligible to attend school in that school district if:

> i. The student's parent or guardian has filed, together with documentation to support its validity, a sworn statement that he or she is not capable of supporting or providing care for the student due to family or economic hardship and that the student is not residing with the other person solely for the purpose of receiving a free public education.

There is no evidence to show economic hardship confronting T.B. The evidence does show petitioner's residence in Lawrenceville is not considered by either T.B., or by

inference, C.K., to be a permanent residence to which they return when absent because there is every intention of T.B. to have C.K. return to her Trenton abode on the week-ends and during school vacation periods. C.K. visits with her grandmother, petitioner, to have a colorable claim to attend Lawrenceville Public Schools.

Petitioner does not assume all personal obligations for the child relative to school requirements. Nor does petitioner intend to keep and support the C.K. gratuitously for a longer time than merely through the school term. T.B. contributes to the support of expenses in Lawrenceville, including clothing and school supplies for C.K., because petitioner does not have the resources to provide for herself, much less the resources necessary to provide for her granddaughter, C.K. While T.B. testified her contributions to the support of C.K. were limited to clothing and school supplies, I am persuaded, and so **FIND**, that T.B. not only contributes to C.K.'s clothing and school supplies, but she contributes to household expenses for the time C.K. lives there. This finding is based on petitioner's testimony that after her filing for bankruptcy she needs to secure assistance from T.B.

CONCLUSIONS

As noted earlier, it is recognized petitioner has standing to have brought this appeal on behalf of her daughter, T.B., and her granddaughter, C.K. However, the facts are not on petitioner's side and, as a result, the law is not on her side regarding C.K.'s attendance at the Lawrence Township Public Schools free of charge.

I **CONCLUDE** petitioner failed in her burden to demonstrate by a preponderance of credible evidence that C.K. is entitled to attend the Lawrence Township Public Schools free of charge under N.J.S.A. 18:38- b (1).

The record is absent of evidence to show there is hardship based on the facts presented. In addition, the record shows petitioner does not support C.K. gratis contrary to the requirement of law. Finally, the record shows there is no intention of having C.K. reside with petitioner beyond the school term – or even during the school

term – as if the child were petitioner's own, for she already spends week-ends in Trenton with her mother. Therefore, the inference is drawn that the purpose for C.K. living with petitioner in Lawrenceville instead of with her mother in Trenton is for C.K. to attend the Lawrence Township Public Schools rather than the Trenton Public Schools.

Having concluded petitioner failed to show C.K. is eligible for free public school attendance at the Lawrence Township Public Schools by reason of domicile, or, on the strength of her affidavit, the Residency Appeal is **DISMISSED.**

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.

Daniel B McKeown

February 25, 2009
DATE

DANIEL B. MC KEOWN, ALJ (t/a)

Date Received at Agency:

Mailed to Parties:

MAR 3 2009
DATE

CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/bdt

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Affidavit – September 3, 2005
R-2 Affidavit – September 3, 2005
R-3 Hearing Submission
R-4 Written Statement
R-5 Written Statement
R-6 Surveillance Reports

WITNESSES

For Petitioner:

Petitioner, P.B.
Mother, T.B

For Respondent:

Cynthia A. Kandrac
David Boehm

108-09

#108-09

J.D. ON BEHALF OF MINOR CHILD, A.D.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *Pro Se* residency appeal, challenging the respondent Board's determination that her sister, A.D., is not entitled to a free public education in the Lenape Regional High School District. Respondent Board filed a motion for summary decision, which was not answered by the petitioner.

The ALJ found that: petitioner failed to establish that her parents are incapable of supporting or providing care for A.D. due to a family or economic hardship pursuant to *N.J.S.A.* 18A:38-1, and that A.D. was sent to reside with J.D. solely for the purpose of receiving a free education in the respondent's district. Accordingly, the ALJ concluded that A.D. is not entitled to a free education in the Lenape Regional High School District, and that the Board is entitled to reimbursement of tuition in the amount of $ 6,382.32.

Upon a full 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 2, 2009

OAL DKT. NO. EDU 8979-08
AGENCY DKT. NO. 269-9/08

J.D., ON BEHALF OF MINOR CHILD, A.D.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs that petitioner has not demonstrated A.D.'s entitlement to attend the schools of the district pursuant to *N.J.S.A.* 18A:38-1, and that the Lenape Regional High School Board of Education is entitled to collect tuition for the period of her ineligible attendance in the district.

Accordingly, the Initial Decision of the OAL – directing that J.D. be assessed tuition in the amount of $6,382.32 – is adopted as the final decision in this matter.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/02/09

Date of Mailing: 4/03/09

* 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
SUMMARY DECISION
OAL DKT. NO. EDU 8979-08
AGENCY DKT. NO. 269-9/08

J.D., ON BEHALF OF MINOR CHILD, A.D.,
Petitioner,
v.
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL, BURLINGTON COUNTY,
Respondent.

No appearance by or on behalf of petitioner

Kimberly A. Sukinik, Esq., for respondent (Comegno Law Group, attorneys)

Record Closed: February 13, 2009 Decided: February 19, 2009

BEFORE **ISRAEL D. DUBIN**, ALJ:

J.D. appeals the decision of the Lenape Regional High School Board of Education that her sister, A.D., is not entitled to a free public education as an affidavit student in the school district. J.D. filed her *Pro Se* Residency Appeal on September 8, 2008, the Board filed its Answer and Counterclaim, as well as a Motion for Summary

Decision, on September 26, 2008, and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on October 10, 2008.

A telephone pre-hearing conference was scheduled for December 8, 2008, but J.D. could not be reached at the appointed time. By letter dated December 10, 2008, I noted J.D.'s failure to make herself available for the call and urged her to call my secretary in order to reschedule it. I also advised her that a failure to call or otherwise contact my secretary by January 2, 2009, could result in my granting Board's motion. Nevertheless, she has neither responded to the letter nor submitted a response to the motion.

Given J.D.'s failure to respond, the following facts are essentially undisputed. On August 29, 2008, J.D. filed an application with the Lenape Regional High School District Board of Education seeking non-resident pupil status for her sister, A.D. In her supporting affidavit as non-resident parent, B.D., the mother of J.D. and A.D., stated that she and A.D.'s father, M.D., would "make any necessary contributions for food, clothing, medical, lodging and other needs [A.D.] may have." B.D. also stated that the reason for having A.D. reside with J.D. was to "give her a fresh start."

As B.D. explained, A.D. had had some disciplinary problems at her previous high school and undergone counseling over the summer, making significant changes in her behavior. However "[b]ecause of reputations easily given in H.S. we thought it would be best to give her a fresh start so that she can excel in her studies." Additionally, A.D.'s brother, who lived at home with the parents, had been battling drug addiction for several years and this had taken its toll on her. She had begun acting out and having anxiety attacks, and needed relief from an environment that her brother had "caused to be unhealthy;" relief J.D. had been providing each weekend while school was in session. Attending Lenape Regional High School "would be just the new start she needed to be finally on the right path."

By letter dated September 4, 2008, the Board notified J.D. that A.D. was ineligible for enrollment in the District's schools because the parents had stated that

they were capable of financially supporting her and would continue supporting her while she resided with her. Additionally, she had stated that A.D. would be residing with her in order to give her a fresh start, which it asserted was not a valid reason under State law. J.D. filed her *Pro Se* Residency Appeal four days later, on September 8, 2008.

Summary decision must be granted if the pleadings and affidavits show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5; Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (1995). While viewing the evidentiary material presented in the light most favorable to the non-moving party, the court must determine whether there is sufficient evidence to permit a rational fact-finder to resolve the alleged disputed issues in favor of the moving party. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995). When a motion for summary decision is made and supported, an adverse party in order to prevail "must by responding affidavit set forth specifics showing that there is a genuine issue which can only be determined in an evidentiary hearing." N.J.A.C. 1:1-12.5(b). In the event the adverse party does not so respond, a summary decision, if appropriate, shall be entered. Ibid. Since J.D. has not so responded, I **CONCLUDE** that the matter is ripe for summary decision.

Public schooling must be provided to persons over the age of five and under the age of twenty who are domiciled within a particular school district. N.J.S.A. 18A:38-1(a). "The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving . . . ." In the Matter of Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991). Minors lack the capacity to choose their own domicile, so their domicile is that of their parent or guardian. In the context of Title 18A, the Commissioner of Education has held that special factors must exist to warrant departure from the traditional rule that a child's domicile is that of the child's parent(s). C.N. v. South Orange Bd. of Educ., 96 N.J.A.R. 2d 913.

If she is to prevail in this matter, J.D. must prove by a preponderance of the competent and credible evidence that she (1) is domiciled in the Lenape Regional High School District; (2) is supporting her sister, A.D., *gratis*; (3) will assume all personal responsibilities for A.D. relative to school requirements; (4) intends to support A.D. gratuitously for longer than the school year; (5) their parents are incapable of supporting or providing care for A.D. due to a family or economic hardship; and (6) their parents did not send A.D. to live with her solely to receive a free education in the District. N.J.S.A. 18A:38-1. With the exception of the first requirement, J.D. has failed to meet her burden.

In her affidavit as J.D.'s non-resident parent, B.D. affirmed that she and her husband were able and, in fact, intended to contribute towards A.D.'s food, clothing, medical expenses, lodging and any other needs A.D. might have. In other words, they were not incapable of supporting or providing for her. Rather than claiming hardship, B.D. openly acknowledged that the reason for having A.D. live with her sister was to give her a "fresh start" and an opportunity to "excel in her studies."

However, the fact that a child has had disciplinary problems in a particular district in the past and, having addressed those problems, is in need of a fresh start where her prior reputation does not precede her, does not constitute a hardship warranting a free education in a different district. Unfortunately, nor does the stress engendered by living at home with a sibling attempting to overcome substance abuse.

On the facts presented, I find that J.D. has failed to establish that her parents are incapable of supporting or providing care for A.D. due to a family or economic hardship and further find that the parents sent A.D. to reside with her solely for the purpose of receiving a free education in the District. Accordingly, I **CONCLUDE** that A.D. was not entitled to a free public education in the Lenape Regional High School District and that the Board is entitled to reimbursement of residence tuition in the amount of $6,382.32.[1]

[1] Yearly tuition of $13,676 divided by 180 school days equals a daily tuition rate of $75.98. The total number of days of ineligible attendance, 84, multiplied by the daily tuition rate of $75.98 equals $6,382.32. See Certification of James H. Hager, Business Administrator; Exhibit R-5.

Based upon the foregoing, it is **ORDERED** that the Board's motion for summary decision is **GRANTED** and J.D.'s appeal of the Board's determination is **DISMISSED**. And it is further **ORDERED** that J.D. be assessed tuition costs in the amount of $6,382.32 for A.D.'s attendance at the Lenape Regional High School for the 84 days she was ineligible to attend school in 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.

February 19, 2009
DATE

ISRAEL D. DUBIN, ALJ

Date Received at Agency:

FEB 23 2009

February 19, 2009

Mailed to Parties:

DIRECTOR/ACTING
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/cmo

APPENDIX
EXHIBITS

For Petitioner:

None

For Respondent/Movant:

R-1 Affidavit of Non-Resident Parent, B.D. (attached to Answer and Counterclaim as Exhibit 1)

R-2 Ineligibility Letter (attached to Answer and Counterclaim as Exhibit 2)

R-3 *Pro Se* Residency Appeal

R-4 December 10, 2008 Letter to J.D.

R-5 Certification of James H. Hager, Business Administrator

109-09

OAL DKT. NO. EDU 5663-08
AGENCY DKT. NO. 93-3/08

L.W., ON BEHALF OF MINOR CHILD, J.W.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/02/09
Date of Mailing: 4/02/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05663-08

AGENCY DKT. NO. 93-3/08

L.W. ON BEHALF OF MINOR CHILD J.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE, UNION COUNTY,

Respondent.

L.W., parent of **J.W.**, appearing pro se

John E. Croot, Jr., Esq., for respondent (Schwartz, Simon, Edelstein, Celso and Kessler, attorneys

Record Closed: February 26, 2009 Decided: February 26, 2009

BEFORE **MUMTAZ BARI-BROWN,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 9, 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.

A hearing was scheduled on February 26, 2009. On the date of hearing, the parties settled the matter. The attached Settlement Agreement and Board Resolution

were submitted on February 26, 2009, 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.

February 26, 2009
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: 3-2-09

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 2 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

da

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLC
44 Whippany Road, Suite 210
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Tel. (973) 301-0001; Fax (973) 993-3152
Attorneys for Hillside Board of Education

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2009 FEB 26 P 4: 1

L.W. o/b/o I.W.

Petitioner,

v9.

BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSIDE,

Respondent.

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

AGENCY REF. NO. 93-3/08

OAL DOCKET NO. EDUOS 05663-2008N

SETTLEMENT AGREEMENT AND RELEASE

WHEREAS, a residency investigation conducted by the Hillside Board of Education (hereinafter referred to as "the Board") found that pupil J.W. was not legally domiciled in Hillside; and

WHEREAS, a residency hearing concerning pupil J.W. was held before a committee of the Board on March 17, 2008; and

WHEREAS, on March 19, 2008, the Board adopted a resolution that J.W. be removed from the District because he was not domiciled in Hillside; and

WHEREAS, J.W. was subsequently not re-enrolled in the District for the 2008-2009 school year; and

WHEREAS, Lakesha Washington filed a Petition of Appeal contesting the Board's residency determination, docketed as OAL Docket No. EDUOS 5663-2008N

WHEREAS, the Board filed counterclaims against Lakesha Washington for back tuition and other relief; and

WHEREAS, J.W. is no longer residing in the district and is no longer eligible to attend school in the Hillside School District; and

WHEREAS, J.W. will not be permitted to attend school in Hillside unless it can be demonstrated that the child is residing in the district; and

WHEREAS, the parties have discussed this matter in good faith, and have a desire to settle all issues;

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

1. Lakesha Washington, as the parent of J.W., agrees to the withdrawal of the matter currently pending against the Board before the Commissioner of Education and the Office of Administrative Law, OAL Docket No. EDUOS-5663-2008N, and also agrees that no further action will be taken to seek the same relief;

2. The Board agrees to withdraw its counterclaims against Lakesha Washington before the Commissioner of Education and the Office of Administrative Law and also agrees that no further action will be taken to seek back tuition for the period of J.W.'s attendance in the Hillside School District during the 2007-2008 school year;

3. Lakesha Washington acknowledges that J.W. is no longer domiciled within the Hillside School District;

4. J.W. may not enroll in the Hillside School District in the future unless sufficient proof is provided of his having established domicile in Hillside;

5. The parties agree that no monies shall be exchanged between them;

6. 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;

7. 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 or representation of their choice;

8. 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;

9. The parties acknowledges that this Agreement constitutes a full and final settlement as to all issues;

10. Lakesha Washington, individually and on behalf of J.W. agrees, in consideration for the terms hereof, to release the Board, collectively and individually, and its agents, servants and employees from any and all claims which were or could have been raised to date;

11. The Board agrees, in consideration for the terms hereof, to release Lakesha Washington and her heirs from any and all claims which were or could have been raised to date;

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

13. This Agreement is subject to the approval of the Hillside Board of Education at its next regularly scheduled meeting.

HILLSIDE BOARD OF EDUCATION

Date: February 19, 2009 **By:** Michael Roth
MICHAEL ROTH,
Interim Superintendent

Date: 2-2-09 Lakesha Washington
Lakesha Washington, individually, and on behalf of J.W.

STATE OF NEW JERSEY)
SS:
COUNTY OF ESSEX)

I CERTIFY that on February 2, 2009, Lakesha Washington, Individually and o/b/o J.W., 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.

Brian Raney, Esq.
Attorney or Notary Public
BRIAN RANEY, ESQ.
Hillside NJ, NY

Agenda Regular Meeting – January 22, 2009

RESIDENCY/SUSPENSIONS

Motion to approve the resolution determining that the case pertaining to Student 2250067313, a non-resident of Hillside, be settled in accordance with the terms of the same. (Attachment RES #4-01/09)

Motion: A. Menza Second: J. Korzeneski

Daniels	Absent	Menza	Yes
Garretson	Absent	Smith	Yes
Humphrey	Yes	Yafet	Yes
Isaac	Yes	Sileem	Yes
Korzeneski	Yes		

Motion carried: 7 Yes, 0 No, 0 Abstain

I hereby certify that this is a true copy of the minutes of the Regular Meeting of the Hillside Board of Education held on January 22, 2009.

Kenneth R. Weinheimer
Business Administrator/Board Secretary

Attachment: RES#4-01/09

RESOLUTION
January 22, 2009

WHEREAS, a residency investigation conducted by the Hillside Board of Education (hereinafter referred to as "the Board") found that pupil 2250067313 was not legally domiciled in Hillside; and

WHEREAS, a residency hearing concerning 2250067313 was held before a committee of the Board on March 17, 2008; and

WHEREAS, on March 19, 2008, after considering the committee's recommendation, the Board adopted a resolution that 2250067313 be removed from the District because he was not domiciled in Hillside; and

WHEREAS, 2250067313 was not enrolled in the District for the 2008-2009 school year; and

WHEREAS, the mother of student 2250067313, L.W. filed a Petition of Appeal contesting the Board's residency determination, docketed as OAL Docket No. EDUOS 5663-2008N; and

WHEREAS, the Board filed counterclaims against L.W. for back tuition and other relief; and

WHEREAS, the parties conferred and agreed to a settlement of this matter; and

WHEREAS, the terms of the settlement were incorporated into a Settlement Agreement and Release; and

WHEREAS, the Board of Education, having reviewed the terms of the proposed settlement, has determined that the resolution of this matter without further litigation is in the best interests of the District;

NOW, THEREFORE, BE IT RESOLVED, that the Board of Education approves settlement of the pending action according to the terms set forth in the Settlement Agreement and Release; and

IT IS FURTHER RESOLVED, that the Interim Superintendent is authorized to execute any documents required to complete the settlement.

110-09

OAL DKT. NO. EDU 6484-08
AGENCY DKT. NO. 224-7/08

LISA LEIBOWITZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon 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.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/02/09

Date of Mailing: 4/02/09



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6484-08

AGENCY DKT. NO. 224-7/08

LISA LEIBOWITZ,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG, SOMERSET COUNTY,

Respondent.

Stephen B. Hunter, Esq., for petitioner (Detzky & Hunter, attorneys)

David B. Rubin, Esq., for respondent

Record Closed: February 23, 2009 Decided: February 23, 2009

BEFORE **STEPHANIE M. WAUTERS**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 21, 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 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.

February 23, 2009
DATE

Stephanie M. Wauters
STEPHANIE M. WAUTERS, ALJ

Date Received at Agency:

FEB 27 2009

DATE

Mailed to Parties:

Jeff Rendus
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mph

SETTLEMENT AGREEMENT

WHEREAS, Lisa ~~Liebowitz~~ Leibowitz-Sloe ("Employee") was employed by the Branchburg Township Board of Education ("the Board) as a teaching staff member commencing with the 2004-2005 school year; and

WHEREAS, Employee has initiated an administrative proceeding before the Commissioner of Education challenging the non-renewal of her employment contract for the 2008-2009 school year on the ground that she acquired tenure pursuant to N.J.S.A. 18A:28-5c no later than the conclusion of the 2007-2008 school year, Lisa Liebowitz v. Branchburg Board of Education, OAL Dkt. No. EDUOR 06484, Agency Ref. No. 224-7/08 ("the Action"); and

WHEREAS, the parties have amicably resolved their differences and are desirous of memorializing their agreement;

NOW, THEREFORE, BE IT AGREED, in consideration of the mutual promises exchanged below, as follows:

1. The Board acknowledges that Employee acquired tenure in the position of teacher no later than the conclusion of the 2007-2008 school year, pursuant to N.J.S.A. 18A:28-5c.

2. The notice of non-renewal previously sent to Employee in or about May 2008 is hereby rescinded.

3. Employee is granted an unpaid maternity leave retroactive to the commencement of the 2008-2009 school year, and through the conclusion thereof.

4. Employee shall not return to work prior to the commencement of the 2009-2010 school year, and shall receive no compensation for the 2008-2009 school year, or until such time as she actually resumes her teaching duties.

5. This Settlement Agreement is entered into solely to avoid the expense and inconvenience of continued litigation, and does not constitute an admission of wrongdoing by either party, or a concession by either party of the correctness of the other party's position.

6. By executing this Settlement Agreement, Employee forever releases the Board, its members, employees, agents and representatives from any claims of any nature, known or unknown, arising from her employment relationship with the Board based on any facts occurring prior to the execution hereof, including, but not limited to, any claims raised in the Action, or under federal or state anti-discrimination laws such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Rehabilitation Act of 1973, the New Jersey Law Against Discrimination, the New Jersey Conscientious Employee Protection Act, the Family Medical Leave Act, and any and all federal, state and local laws.

7. Employee acknowledges that she has reviewed the terms of this Settlement Agreement with her independent legal counsel, understands the terms hereof, and executes it voluntarily and not under coercion.

8. Upon exchange of fully-executed copies of this Settlement Agreement, Employee will cause the petition of appeal in the Action to be dismissed with prejudice.

Lisa Leibowitz

LISA LEIBOWITZ
LEIBOWITZ for

Dated: 12/4/2008

BRANCHBURG TOWNSHIP BOARD OF EDUCATION

By: Marie A. Caprio

Dated: 1/30/09

BRANCHBURG TOWNSHIP SCHOOL DISTRICT

"Excellence in Education"

240 Baird Road • Branchburg, New Jersey 08876-4200 • FAX (908) 526-6144

Business Administrator/Board Secretary
(908) 722-3335

I hereby certify that the following is a true and accurate excerpt of the minutes of the meeting of the Branchburg Township Board of Education held on February 12, 2009.

Motion by Mr. Wright, seconded by Mr. Gruber, that Item 7D be moved upon the recommendation of the Superintendent.

On call of the vote, Item 7D was approved by Roll Call vote with Mrs. Looby abstaining.

D. <u>Approval of Resolution</u>

BE IT RESOLVED, that the Board of Education approves and ratifies a settlement in the matter of Leibowitz v. Branchburg Township Board of Education, OAL Dkt. No. EDU 06484, and authorizes the Board President to execute a settlement agreement in a form acceptable to the Board Attorney.

John H. Bolil
Board Secretary/Interim Business Administrator

2/13/09
Date

09-052

111-09

OAL DKT. NO. EDU 1463-09
(EDU 3798-08 ON REMAND)
AGENCY DKT. NO. 70-3/08

MARIAM MANSOUR,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, Settlement Agreement, and Initial Decision on Remand 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 review, the Commissioner approves the settlement terms and adopts the parties' agreement as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/03/09

Date of Mailing: 4/03/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01463-09

AGENCY REF.NO. 70-3/08

MARIAM MANSOUR,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY, HUDSON COUNTY,

Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch, Porwich and Feintuch, attorneys)

Robert J. Pruchnik, Esq., Assistant General Counsel, for respondent (Kenichi Iwama, General Counsel)

Record Closed: March 24, 2009 Decided: March 24, 2009

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

The matter was transmitted to the Office of Administrative Law (OAL) on Remand January 27, 2009.

The parties have agreed to a new settlement which embodies the requirements of the remand and submitted the attached Settlement Agreement and General Release on March 19, 2009, 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.

3/24/09
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 3-26-09

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 26 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

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STATE OF N.J.
OFFICE OF ADMIN. LAW
2009 MAR 23 A 11: 36

Kenichi Iwama, Esq.
Jersey City School District
346 Claremont Avenue
Jersey City, New Jersey 07305
General Counsel for Respondent

MARIAM MANSOUR, Petitioner, v. STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, COUNTY OF HUDSON, Respondent.	BEFORETHE COMISSIONER OF EDUCATION OF NEW JERSEY Agency Dkt. No. 70-3/08 OAL Dkt. No. EDU 03798-08 ***SETTLEMENT AGREEMENT***

THIS AGREEMENT is entered into by and between ***MARIAM MANSOUR***, whose address is 508 Liberty Avenue, Jersey City, New Jersey, 07307, and the Respondent, ***STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,*** which has offices located at 346 Claremont Avenue, Jersey City, New Jersey, 07305, (hereinafter the "District"), hereinafter collectively referred to as the "Parties."

WHEREAS, Mariam Mansour was appointed by the District as a full-time Teacher Assistant on January 18, 2000, and has been assigned to Dickinson High School since September 2002; and

WHEREAS, Ms. Mansour obtained a standard teaching certificate, with endorsement as Teacher of the Handicapped, in September 2004, and has claimed to have functioned as a teacher rather than a Teacher Assistant since that time; and

WHEREAS, Ms. Mansour filed a petition in the within case, alleging that she was entitled to tenure as a teacher and back pay, and the District disputed the claim, noting that Ms. Mansour was never appointed to a position as teacher; and

WHEREAS, the Parties wish to enter into an amicable resolution of the pending matter;

NOW, THEREFORE, the Parties agree as follows:

1. The District will recognize Mariam Mansour as having tenure as a teacher, and having acquired such tenure as of September 4, 2007.

2. The District will place Ms. Mansour on the teachers' salary guide, fourth step, as of September 1, 2008.

3. The District will make payment to Ms. Mansour of $10,000.00 for back pay.

4. Mariam Mansour waives her right to hearing in the within matter.

5. Mariam Mansour releases and discharges the District from any and all claims which she has or might have had against the said District through the date of execution of this Agreement, including any further back pay.

6. Mariam Mansour acknowledges that she signs this Agreement as her own voluntary act and deed, and that she understands and agrees with the terms enumerated herein. Ms. Mansour also acknowledges that she had the opportunity to consult with legal counsel and that she reviewed the Agreement in detail with her attorney and fully understands its terms.

7. The parties acknowledge that the Respondent's General Counsel, Kenichi Iwama, Esq., is the District's duly authorized representative in litigation.

8. This Agreement shall not become effective until it has been approved by the Administrative Law Judge and the Commissioner of Education.

Date: 3/9/09

FOR THE STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF JERSEY CITY
By: Kenichi Iwama, Esq.
General counsel

Date: 3/10/09

MARIAM MANSOUR

113-09

#113-09L

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

April 6, 2009

Jennifer L. Campbell, DAG
NJ Department of Law & Public Safety
Division of Law, Education Section
P.O. Box 112
Trenton, NJ 08625-0112

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Morristown, NJ 07692-1997

Re: *In the Matter of the Petition for Authorization to Conduct a Referendum on the Withdrawal of North Haledon School District from the Passaic County Manchester Regional High School District, Passaic County,* Agency Docket No. 64-2/06, OAL Dkt. No. EDU 03063-06, Commissioner Appeal Docket No. 2-7/08A

Dear Counsel:

I have reviewed the papers filed in conjunction with the Department of Education's request for interlocutory review of that portion of the February 27, 2009 order of Administrative Law Judge Maria M. LaFiandra (ALJ) which grants leave to depose former Commissioner of Education William Librera (Librera) with respect to the above-captioned matter.

The other parties to this matter have opposed the Department's request, contending that Librera's deposition is essential to: 1) meet the mandate of the State Board of Education regarding the record to be developed in this proceeding, as further defined by the Commissioner in transmitting the matter to the Office of Administrative Law (OAL); and 2) enable the parties to understand the basis of, and thus argue fully their positions with respect to, the cost apportionment formula devised by Librera in response to the directive of the Court (the Librera formula). They further argue that, to any extent the information sought from Librera may arguably be protected by the deliberative process privilege, that privilege has been both overcome by necessity and waived by the State Board and Commissioner in their respective directives as to the scope of proceedings on remand.

Upon consideration, I cannot agree with these arguments and have determined to reject the ALJ's order.

I have carefully reviewed the operative State Board decisions, together with the Commissioner letters referenced therein and the parties' submissions on interlocutory review; I have additionally reviewed the file forwarded to me on July 16, 2008 when jurisdiction over this matter – which had been retained by the State Board in both its February 1, 2006 decision remanding the matter to the Commissioner and its decision of November 7, 2007 declining to modify the scope of remand – was transferred to me, effective July 7, 2008, by enactment of P.L. 2008, c. 36. Having done so, I am fully satisfied that the record as it now stands – amplified through the proceedings on remand conducted at the OAL subsequent to the State Board's review and decision – provides an understanding of the manner in which the Librera formula was derived that is more than sufficient for purposes of this proceeding.

From his own decisions, and from the deposition of Yut'se Thomas and affidavit of Allen T. Dupree now on record, it is clear that Commissioner Librera took a pragmatic approach to the task before him, which – it must be stressed – arose in his supervisory rather than his adjudicative capacity. Specifically, the record shows that he: solicited the views of all interested parties through meetings, public testimony and written submissions; ascertained that each of the constituent districts was persisting in pressing for cost apportionment on the basis of either 100% equalized valuation or 100% pupil enrollment as best worked to its benefit, and that no voluntary compromise would be forthcoming; reasoned that some combination of equalized valuation and pupil enrollment would likely provide relief to North Haledon while recognizing Haledon and Prospect Park's larger number of students but lesser ability to pay, as required by State law generally linking a district's contribution to the funding of its schools to its level of wealth; directed staff in the Division of Finance to prepare a number of simulations demonstrating how various combinations of equalized valuation and pupil enrollment, and various adjustments in implementation, would impact on each constituent district; and then, based upon these, chose the result he believed would provide the best balance in effectuating the Court's directive under the circumstances. He further provided for a transitional phase-in so that impacts could be absorbed over a limited time, directing a two-year cycle for purposes of certainty in budgeting during the initial transition period and using student enrollment parameters that, it appears to me, are self-evidently designed to have the effect of providing a more representative – and hence more equitable under the circumstances – "snapshot" of the district's overall pupil population than would parameters based solely on actual enrollment in grades 9-12, after students leave the constituent district to attend school in the regional district or elsewhere.

Probing into why Librera chose the particular apportionment and transition methods he did – 67% equalized valuation and 33% pupil enrollment, with progressive implementation over a four-year period and adjustments as noted, as opposed to, say, 70% - 30% over a three-year period, or 65% - 35% over a five-year period, with different adjustments or none – is neither necessary nor appropriate, since the effect of the final formula can be judged on its own merits, and Librera's personal thought process in concluding that such formula represented the best balance under the circumstances is precisely the sort of deliberation that must remain privileged if an agency is to properly engage in its work. *Education Law Center v. New Jersey State Department of Education*, _N.J._ (A-100-07, decided March 26, 2009)

Moreover, I remain convinced, as stated in my May 11, 2007 letter seeking to expand the scope of the OAL hearing, that no useful purpose is served by continued focus on the Librera formula *per se* – with which all of the regional district's constituent members are openly dissatisfied and which Librera himself hoped would be replaced by a formula of the districts' own devising – and that the interests of all parties would best be served by shifting the focus of further OAL proceedings in this matter to development of a current factual record that can provide the basis for the ALJ's recommendation to me of an equitable and transparent method of cost apportionment for the regional district, thereby effectuating both the ultimate goal of the present proceeding and the result demanded by the Court.

Because I now have jurisdiction over this matter and the submissions in the file transferred to me by the State Board reveal that the parties themselves – while concerned about a lack of authority for my attempted expansion of the OAL hearing and the concomitant possibility that the State Board would not accept its results – were entirely in agreement that the scope of hearing proposed in my May 11, 2007 letter would, in fact, be a beneficial and efficient way to proceed, I am now directing, pursuant to my authority under P.L. 2008, c. 36, a modification of the scope of the State Board's remand directive so as to permit the OAL hearing to proceed as set forth in my May 11, 2007 letter to OAL Director and Chief Administrative Law Judge Laura Sanders. A copy of that letter is appended hereto for the convenience of the parties and the OAL.

Accordingly, for the reasons expressed herein, I deny leave to depose former Commissioner Librera and direct that the scope of OAL proceedings be modified as set forth above.

Sincerely,

Lucille E. Davy
Commissioner

Attachment
c: Clerk, OAL
Honorable Maria LaFiandra, ALJ
Acting Executive County Superintendent, Passaic County
State Law Library
OAL Law Library

VIA FACSIMILE AND REGULAR MAIL

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

May 11, 2007

Laura Sanders, Director and Chief ALJ
Office of Administrative Law
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625

Re: *In the Matter of the Petition for Authorization to Conduct a Referendum on the Withdrawal of North Haledon School District from the Passaic County Manchester Regional High School District, Passaic County,* Agency Docket No. 64-2/06, OAL Dkt. No. EDU 03063-06N

Dear Judge Sanders:

Thank you for your letter of May 3, 2007 requesting clarification of my request for an uncontested case hearing in the above-captioned matter, in the interest of ensuring that proceedings at the Office of Administrative Law (OAL) provide useful assistance to me in addressing the charge of the Supreme Court for development of an equitable cost apportionment method for the Passaic County Manchester Regional School District.

As you know, in remanding the apportionment determination of former Commissioner Librera to me on appeal, the State Board of Education indicated that it could not properly review such determination – which had been reached not through the contested case process but "in consultation with the constituent municipalities," as directed by the Court – because the record did not provide a sufficient explanation of the methodology underlying it. The Board, therefore, requested that I "amplify the record by providing the basis and rationale for the specific determinations set forth in the decision of January 18, 2005," noting that "in developing the record pursuant to [the Board's] remand, [I would not be] precluded from initiating any further proceedings [deemed] necessary in order to develop a complete record, including transmittal to the Office of Administrative Law for hearing."

In response to the State Board's directive, I requested that the OAL develop a record as to the methodology used to devise the cost apportionment set forth in Commissioner Librera's January 18, 2005 letter and afford all the affected entities an opportunity to argue fully their positions with regard to it. Additionally, recognizing – as

Commissioner Librera himself did in his March 15, 2005 letter granting a stay of the January 18 cost reapportionment – that all of the parties were dissatisfied and that adjustments to this reapportionment would almost certainly be made in subsequent proceedings, I additionally requested that the OAL make recommendations for clarification or revision of Commissioner Librera's determination as warranted based upon the record developed at hearing. At this point, however, with the departure of Commissioner Librera and the other Department personnel instrumental in the development of the January 18 apportionment, I believe it is necessary to shift the focus of OAL proceedings from this apportionment *per se* to development of a record that can serve as the basis for a fair and transparent apportionment method, one whose derivation can be clearly ascertained in relation to the underlying facts and law.

It would, therefore, be most helpful to me in fulfilling my obligation to the Court and the State Board to have the OAL: 1) take such testimony, evidence and argument as the parties wish to offer and fully set it forth on the record; 2) make consequent findings of fact and conclusions of law; and 3) offer a recommendation as to the most appropriate method for apportioning the costs of the regional district under all of the circumstances.

Thank you again for the opportunity to provide clarification in this matter. If I can be of further assistance, do not hesitate to contact me.

Sincerely,

Lucille E. Davy
Acting Commissioner

c: Vito A. Gagliardi, Jr., Esq.
Francis J. Campbell, Esq.
Rodney T. Hara, Esq.
Allen P. Dzwilewski, Esq.
Michael Walters, DAG
Dr. Robert Gilmartin, Acting Passaic County Superintendent of Schools

114-09

IN THE MATTER OF THE TENURE :

HEARING OF WILLIAM TRACY, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE CITY OF : DECISION

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 to: enforce the Board's attendance policy; ensure proper certification of teaching staff involved in the Special Review Assessments (SRA); and properly assign teachers in areas in which they are certified. The Board sought dismissal of respondent from his tenured employment.

The ALJ found: that the respondent made no effort to create or monitor a proper attendance system for the Daylight/Twilight School, as required by the Board's attendance policy and by law; that the principal's role in the SRA is not clearly defined by regulations, and consequently respondent's reliance on the SRA Coordinator in matters concerning certification of staff involved in scoring the tests was not unreasonable; that the Board was responsible for hiring the teachers who were then assigned to schools by the Human Resources department without adequate attention to proper certification; and that respondent could not then be faulted for assigning the teachers he was given to classrooms. The ALJ concluded that the tenure charge related to enforcement of the Board's attendance policy has been substantiated; however, the Board failed to carry its burden of proving the tenure charges related to SRA administration and inappropriate teaching assignments. Accordingly, the ALJ determined that a six-month suspension is the appropriate penalty, rather than termination and loss of tenure.

Upon a thorough and independent review of the record – which did not contain transcripts of the hearing conducted at the OAL – the Commissioner concurred with the ALJ's findings, and adopted the Initial Decision as the final decision in this matter. The Commissioner directed that respondent be suspended from his tenured position, without pay, for six-months, prospectively, commencing on 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.

April 8, 2009

114-09

OAL DKT. NO. EDU 6213-08
AGENCY DKT NO. 183-6/08

IN THE MATTER OF THE TENURE	:	
HEARING OF WILLIAM TRACY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
TRENTON, MERCER COUNTY.	:	
	:	

The record of this matter and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Exceptions of both the Board and respondent – filed in accordance with the prescribed timelines of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her determination herein.[1]

The Board first excepts to the ALJ's conclusion of law on the Special Review Assessments (SRA) charge. Although finding as fact that respondent allowed the SRA to be scored by an individual who he knew lacked secondary level mathematics certification and that this was outside of the State's required procedure for scoring the SRA, the ALJ, the Board complains, inexplicably found that he should not be held liable for these infractions because his reliance on his SRA coordinator was not so inappropriate as to allow the sustaining of a "separate, stand-alone charge of conduct unbecoming." To the contrary, the Board argues,

[1] The Commissioner is compelled to clarify that the Administrative Law Judge's (ALJ) ordering of charges in her Initial Decision in this matter – and, in one instance, titling of the charge – was not the sequence utilized by the Board in its filed charges. Specifically, the ALJ's Charge 1 – which she titled Appearance of a Forged Signature by a Noncertified Teacher on Special Review Assessments was Charge Two in the Board's filing and captioned Failure to Ensure Proper Certification of Teaching Staff Involved in SRA Process (this charge is essentially two-pronged in nature: 1) the Board alleges that respondent allowed a math teacher who did not have a certificate in mathematics to score the SRA, and 2) the Board alleges that this teacher's signature on the SRA documents was a forgery); the ALJ's Charge II – Assignment of Teachers in Areas Where They Were not Certified was the Board's Charge Three; and the ALJ's Charge III – Failure to Enforce the Board's Attendance Policy was the Board's Charge One.

respondent's reliance on his SRA coordinator does not absolve him of responsibility for ensuring the proper administration of the SRA test, particularly given that this test is a major indicator of whether a student is prepared to satisfactorily progress to the next educational level. "Incorrect scoring on this test is not acceptable and it is harmful to the student as it sends a false sense of security to the public as to the student's ability to handle and properly understand the test subject (here, mathematics)" (Board's Exceptions at 1-2, quotes at 2)

With respect to the assignment of teachers to areas in which they were not certified, the District excepts to the ALJ's finding that respondent "could have believed" that the Department had approved the waivers allowing teachers to teach outside of their areas of certification. Such a finding, it contends, was belied by the testimony of Superintendent James Lytle, the evaluation which was conducted on the Daylight/Twilight School (Exhibit R32) which criticized the program for using non-certificated teachers, and two of respondent's evaluations (Exhibits P-26 and R-35) which gave him an "unsatisfactory" rating in the category of ensuring that certified teachers were teaching in their core content certified areas. Based on these, it is clear that the District and the administration believed that respondent had the responsibility for ensuring that teachers taught in their core content certificated areas. (Board's Exceptions at 3)

Finally, the Board is in full agreement with the ALJ's findings of fact and conclusions of law with regard to the charge of failure to enforce the board's attendance policy. It does, however, disagree with her penalty determination in this matter. It claims that respondent has admitted violations of each of the charges: "a. SRA mathematics tests possibly not scored correctly, contrary to State guidelines; b. Use of non-certified teachers to teach the core content curriculum areas which, by State law, require certified instructors in that content

area; and c. Failure to administer, or even establish a coherent and accountable attendance policy for the Daylight/Twilight School." The Board maintains that these violations all constitute conduct unbecoming and warrant no less than respondent's termination from the District. (Board's Exceptions at 4-5)

Respondent's exceptions initially present a factual recitation and references to hearing testimony which he alleges allowed the ALJ to correctly conclude that the charge with respect to improprieties in the SRA scoring process and the one alleging that respondent had allowed teachers to teach outside of their certification had not been proven by the Board. (Respondent's Exceptions at 4-12)

With respect to the attendance policy charge, respondent argues that the ALJ's conclusion that 33 of the 91 graduates of the Daylight/Twilight School in 2005-06 had more than the allowable fifteen absences is solely predicated on testimony of DOE investigators Daryl Minus-Vincent and James Thomas McBee. He maintains a differentiated analysis of these numbers is necessary because of the structural differences between the Daylight/Twilight High School and the Central High School, and charges that nothing in the record indicates that the DOE investigators took any consideration of the differentiated structure of the two schools. Respondent claims that his testimony – as well as that of vice principal Bart LaGrassa, teacher William Winters and former superintendent of schools, Dr. James H. Lytle – confirms that in order to preserve the retrieval aspect of the school, attendance at Daylight/Twilight had to be reset for each cycle and not based on a cumulative total for the year, as is done at Central High School. Therefore, respondent argues, if he "was acting in accordance with how his superintendent believed attendance needed to be calculated, then there is no basis for the charge that he failed to adhere to the Board's attendance policy." (Respondent's Exceptions at 12-16,

quote at 16) As to the issue of attendance record keeping, respondent charges that this was not part of the tenure charge: none of the Board's witnesses testified with regard to inadequate record keeping; there was no testimony as to how attendance records in the District were kept or tabulated; no testimony as to what teachers in other schools did to track attendance; and no testimony to indicate that respondent acted any differently than other administrators in the District in this regard. Therefore, respondent posits the record contains no standards against which his conduct could be evaluated. (*Id.* at 17)

Respondent's exceptions conclude by urging that all of the charges against him be dismissed and he be immediately reinstated to his principal position with back pay and emoluments due and owing. (*Id.* at 19)

Upon a comprehensive review of the record of this matter – which it is specifically noted did not contain transcripts of the hearing conducted at the OAL[2] – and finding the parties' exception arguments unpersuasive, the Commissioner determines to adopt the Administrative Law Judge's recommended decision.

Initially, the Commissioner recognizes that in this, as in all tenure matters, the Board bears the burden of proving each of its charges of unbecoming conduct against respondent by a preponderance of the competent, relevant and credible evidence. The Commissioner has given full consideration to all evidentiary proofs which comprise the record and is cognizant of the fact that of particular importance was 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:

[2] Such absence of transcripts is curious in light of the fact that the parties' exceptions make certain representations based on testimony they allege was adduced at the hearing which cannot be reviewed absent the relevant transcripts.

> 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)).

A considered review persuades the Commissioner that the ALJ's comprehensive discussion and resultant factual findings with respect to each of the Board's charges against respondent (Initial Decision at 4-19) are well grounded in the record, thereby providing no cause whatsoever for alteration of her determinations.

In summary, the Commissioner concurs with the ALJ that the Board did not meet its burden of proving unbecoming conduct against respondent on its charge relating to improprieties in the SRA process (ALJ Charge 1; District's Charge Two) for the reasons presented in her decision, specifically:

> ...the Board has not proven the most critical component of the charge, which is fraud in the SRA process. The evidence establishes that Fabisch scored the exam, and that Fabisch, while not then secondary-certified as a mathematics teacher, did achieve certification a year later. The lesser component, which is selecting and then failing to adequately supervise the Daylight/Twilight SRA coordinator, is proven to the degree that respondent named Charles Cirillo as SRA coordinator, and then relied on Cirillo, who was wrong about the requirements.
>
> As it happens, neither the statutory language authorizing the SRA, *N.J.S.A.* 18A:7C-3, nor the regulations at *N.J.A.C.* 6A:8-4.1 *et seq.*, nor the 2006 SRA Manual delineate any specific responsibility for the principal. While the Board is required to administer the statewide assessments, and the chief school administrator to report the results, and the district and school SRA coordinators to maintain the security of the exams, there is no mention of a direct role for the principal. The Manual is even silent on who is to select the scoring panels. The only explicit indication that the principal is involved is the "Principal and Superintendent Certification of Proficiency and Compliance with the Process," which accompanies submissions of SRAs to the County.

> Given this statutory silence, I CONCLUDE that the primary responsibility for the SRA rested with the Board, the superintendent, and the SRA coordinators, and that Tracy's reliance on Cirillo, who was unfortunately mistaken about the requirements, was reasonable, given that the regulatory scheme does not place the principal at the center of test administration. Moreover, I am persuaded that Tracy's argument that the HSPA and SRA in aggregate function as a kind of report card on the principal is sensible, in that the principal, as school leader, is responsible for providing the instruction that should lead to subject mastery. While ideally, Tracy should have insisted that Cirillo back up his verbal assurance with something from the State Department of Education, I CONCLUDE that Tracy's reliance on the SRA coordinator was not so inappropriate as to sustain a separate, stand-alone charge of conduct unbecoming. This is particularly so since by the following year Fabisch had obtained her secondary-level certification. Moreover, the emergency was occasioned by the fact that a school with an enrollment of more than 2,000 students had only two instructors certified to teach mathematics at the secondary level. (Initial Decision at 20-21)

Similarly, the Commissioner concurs with the ALJ that the Board has failed to sustain its burden of proof with regard to the charge that respondent is guilty of unbecoming conduct for assigning teachers to areas in which they were not certified (ALJ's Charge II; District's Charge Three) As aptly explained by the ALJ, the seminal issue on this charge is one of "responsibility":

> Lytle testified that a cabinet-level group including himself, the Board secretary, and the Board counsel drafted resolutions for the Board. *N.J.A.C.* 6A:5-1.5(a) requires that an application for a waiver must be signed by the chief school administrator, and approved by the district board of education. Therefore, I CONCLUDE that it was up to Lytle and the Board to follow up on the waiver, not Tracy, and that Tracy held a sincere but mistaken belief that the waivers had been granted.
>
> Further, as a threshold matter, the education statutes vest authority for hiring teachers with boards of education, not school principals. [citation omitted] *N.J.S.A.* 18A:27-1 states that "[n]o teaching staff member shall be appointed, except by a record roll call

majority vote of the full membership of the board of education appointing him." Similarly, foundational case law affirms the statutory right of boards to transfer teachers within the scope of their certificates. [citation omitted]

To hold respondent responsible for the Board's decision to hire teachers not holding high school certifications or certifications in needed areas and to allow transfer of those teachers to the Daylight/Twilight High School vests the principal with a power that belongs solely to the Board. Tracy did not make the decision to transfer two industrial arts teachers and an art teacher to a high school that taught neither industrial arts nor art. He simply did not have that power. He could advocate, he could lobby, but it was the Board that hired teachers, and Human Resources that assigned them to schools.

Once the assignment of teachers was made, however, respondent was undoubtedly responsible for finding something useful to do with them. In 2006-2007, Tracy had at least seven math assignments to cover, and only one math-certified teacher to utilize after Gregory Howard went out on medical leave. Granted, evidence that Tracy did anything to remedy the situation is minimal. Tracy testified that he went to Human Resources, reviewed resumes, and sought to set up interviews for qualified math and science candidates. He acknowledged assigning a business teacher to a chemistry course on a trial basis – an experiment the teacher himself deemed unsuccessful. The waivers and July memo document Tracy advocating for elementary-certified teachers to help students whose entry-level math skills are not ready for high school. Tracy continues to advocate strongly for that need. Nonetheless, the simple fact is that Tracy was handed teachers not certified in areas of instruction where he needed teachers, and expected to do something with them. The Board cannot now complain that he assigned them to classrooms. I CONCLUDE, therefore, that the tenure charge related to inappropriate teaching assignments has not been proved.
(Initial Decision at 21-22)

As to the Board's charge that respondent is guilty of unbecoming conduct for his failure to enforce the board's attendance policy, the Commissioner is in full agreement with the ALJ that the Board has met its burden of proving this charge. The Commissioner finds, as did

the ALJ, that central to the establishment of this charge were the dual issues of "authority" and "accountability":

> 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)

Finally, the Commissioner agrees with the ALJ that, as the Board has sustained only one of its unbecoming conduct charges against respondent, its fourth charge – which essentially alleges that the first three charges, in the aggregate, demonstrate an overall pattern of unsatisfactory performance necessitating loss of respondent's tenured position – has not been established.

Turning to the appropriate penalty to be imposed in this matter, the Commissioner is mindful that she is required to consider respondent's prior record in the District, the nature and

gravity of his offense under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and must consider any harm or injurious effect which his conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer,* 93 *N.J. Super.* 404, 421-22 (App. Div. 1967) Notwithstanding that the Board has sustained only one of its charges of unbecoming conduct against respondent – that of his failure to adhere to the Board's attendance policy – the Commissioner does not view this as a *de minimis* infraction. Respondent's dereliction of his duty to create, widely publicize and monitor a proper attendance policy clearly had a detrimental effect on the Board, impermissibly usurping the Board's authority in the establishment of uniform standards in its schools and seriously compromising its ability to conform to its regulatory obligations with respect to the attendance component of graduation requirements at the Daylight/Twilight High School. Although recognizing the necessity of impressing upon respondent the seriousness of the abdication of his responsibilities in this regard, the Commissioner is nonetheless compelled to concur with the ALJ that this proven charge does not warrant the extreme penalty of respondent's dismissal from his tenured position. Rather, when viewed in light of the totality of the circumstances existing in this matter, the Commissioner accepts as valid the ALJ's cogent analysis in connection with her recommended penalty in this regard:

> No doubt, the Board's difficulties in staffing and Tracy's problems with administration were aggravated by the extraordinary growth of the school, from one building and 400 students to seven buildings operating on three shifts serving a mixed population of adults and teenagers – all of this within about five years. At bottom, respondent's argument is that the school was a victim of its own success.
>
> Fear that the success was illusory threads its way through all the Board's arguments, but there are no proofs to show this was true. The Board had demonstrated that respondent cannot show why, when, or in most cases even if students missing more than fifteen

> days of school received appropriate waivers that allowed them to secure credits. But that failure has only an inferential, not a direct, link to inadequate education....
>
> There is something deeply unfair about the loss of tenure in a situation where the Board itself did not adequately document what it created, where multiple schools with different missions were collapsed into one entity, where a single vice principal was assigned to a school with 2,100 enrollees in seven buildings, where evidence does show some test score improvement, and where the substantial enrollment reflected success in the core mission of bringing people back to studying toward a high school diploma.

Consequently, the Commissioner accepts the ALJ's recommendation that respondent should suffer a six-month suspension from his position, and stresses that such suspension must be served prospectively.

Accordingly, the recommended decision of the OAL is adopted – for the reasons well expressed therein. The Commissioner hereby directs that respondent be suspended from his tenured position – without pay – for six-months commencing on the date of this decision.

IT IS SO ORDERED.[3]

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/08/09

Date of Mailing: 4/09/09

[3] 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 6213-08
AGENCY DKT. NO. 183-6/08

IN THE MATTER OF THE TENURE HEARING OF WILLIAM TRACY, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

Rocky L. Peterson, Esq., for petitioner Trenton Board of Education (Hill Wallack, attorneys)

Robert M. Schwartz, Esq., for respondent William Tracy

Record Closed: January 30, 2009 Decided: February 23, 2009

BEFORE **LAURA SANDERS**, CHIEF ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

William Tracy (or respondent) is employed by the Board of Education of the City of Trenton (Board) in the position of principal assigned to its Daylight/Twilight School The parties agree that Tracy has met the precise conditions set out in N.J.S.A. 18A:28-5 for having acquired tenure in that position. On June 23, 2008, the Board, pursuant to N.J.S.A. 18A:6-10 et seq., certified charges of conduct unbecoming a teacher and other just cause against respondent. Tracy denies that he engaged in conduct unbecoming a

teacher, and he denies that the Board has any just cause under law to remove him from his tenured employment.

The specifications to the charges are, first, that respondent failed to adequately supervise the Special Review Assessment (SRA), a test process created and authorized by the New Jersey Department of Education (NJ DOE) to allow students who have not passed the High School Proficiency Assessment (HSPA) to graduate from high school. See N.J.A.C. 6A:8-4.1(a). The Board alleges that the inadequate supervision created circumstances in which the Board certified SRA test scores from Daylight/Twilight students to the NJ DOE, when it is unclear who scored the tests. More specifically, the Board alleges both that the examinations were scored by an unqualified teacher in the field of mathematics, and that a signature appearing on some of the tests was forged. Second, the Board has charged respondent with assigning teachers in the Daylight/Twilight School to teach subject matter in which they were not properly certificated. Third, the Board alleges that respondent failed to properly administer its attendance policy. Lastly, it alleges that the combined conduct of the first three charges is so egregious that the only appropriate discipline to be imposed by the Commissioner is the removal of respondent from his tenured employment.

Tracy timely filed an answer to the tenure charges with the New Jersey Department of Education. The Department determined to transfer the matter to the Office of Administrative Law under N.J.S.A. 18A:6-16. The matter was filed at the OAL on July 18, 2008, and due to scheduling problems with the schedule of counsel, heard on November 20, 21, and 25, and December 4, and 12, 2008, and January 6, 21, 23, and 30, 2009.

FACTUAL DISCUSSION AND FINDINGS

Background

William Tracy, a twenty-four-year veteran of the Philadelphia school system, was hired by the Trenton School District on July 27, 1999, to serve as a vice principal at Trenton Central High School. Between 1993 and 1999 he had worked as a coordinator

for a small learning community within University City High School in Philadelphia integrating sports and health with education. From 1977 to 1999 he ran a new program at University City High School, an alternative high school for youths aged seventeen and older, which was the nation's first Twilight School.

Respondent was recruited to the Trenton School District by another former employee of the Philadelphia School District, James H. Lytle, who had become the Trenton superintendent of schools. Superintendent Lytle is no longer in the Trenton Board's employ; he has been succeeded by Rodney Lofton. Initially Tracy was assigned to Trenton Central's new Twilight alternative program, so named for the availability of classes starting at 3:30 p.m.

Throughout 1999, 2000, and 2001, Lytle, the Board, and various staff members worked on building an alternative education program in Trenton. In this period, the Board approved a resolution to apply for re-establishment of a Trenton Adult High School (December 20, 1999); submitted proposals to the New Jersey Department of Education (NJ DOE) for approval of an alternative high school, a program for the foreign-born, and an alternative middle school (1999-2000); and sought waivers from the NJ DOE to allow teachers to team-teach in areas outside their areas of certification and to allow the use of elementary school teachers at the secondary level (2000). These efforts culminated on September 24, 2001, with the Board adopting a resolution establishing the Daylight/Twilight Program as "a distinct and separate high school." The Board also approved the curriculum for the Daylight/Twilight School under N.J.S.A. 18A:7C-2, 18A:7C-3, 18A:7C-4, Standards for Graduation, and N.J.A.C. 6A:8-5.1, Graduation Requirements. P-4.

The 2000-2001 Trenton Central Course Selection Catalog described the Daylight/Twilight Program (subsequently the Daylight/Twilight High School) as:

> [A]n alternative educational experience for residents of the City of Trenton in need of a high school diploma. It is established primarily to provide an opportunity for success through the implementation of non-traditional schedule configuration. There is no maximum age for enrollment in

> this program. It is established primarily to facilitate the return of "school leavers" from the community back to an educational setting. . . . Students enrolled in this program are subject to the same graduation standards as any other TCHS student. However, its strict attendance policy allows for no more than three (3) absences per term (marking period).
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> [P-2.]

When the Daylight/Twilight Program opened within Trenton Central in 1999, it enrolled 300 students. By year end it had 600, and by 2005 the separate Daylight/Twilight High School had an enrollment of 2,163. Tracy was named principal of the school in July 2001, and remained in that role until his suspension in December 2007.

The current charges are an outgrowth of a letter sent to State Senator Shirley Turner, which in turn triggered inquiries by the New Jersey Department of Education and the office of the new superintendent of schools, Rodney Lofton.

Charge I – Appearance of a Forged Signature by a Noncertified Teacher on Special Review Assessments

The Board charged that in the 2006-2007 and 2007-2008 school years, a teacher not certified to teach mathematics scored the math portion of the Special Review Assessment (SRA). It further charged that the signatures on the sheet certifying who scored the tests were forged. Although the charge covered two years, the Board offered little evidence concerning the 2007-2008 tests, and therefore no findings of fact are possible with regard to that year. The hearing and documents focused on the 2006-2007 year.

In response to questions from the superintendent's staff, Tracy submitted a memorandum stating that in the 2006-2007 year, the math review was conducted by Vijay Bansal, a teacher certified in secondary mathematics, and by Deidre Fabisch, a teacher described as "highly qualified in mathematics." P-14. Although neither the Special Review Assessment Administration Manual for the 2006-2007 school year (P-

13) nor the regulations concerning the SRA assign any specific role to school principals, the SRA School Summary Form, which is part of the required paperwork, requires certifications by the principal and superintendent that the district has complied "with all New Jersey Department of Education policy and procedures for implementation of the SRA process . . . ." The Board offered the SRA School Summary Form submitted to the NJ DOE on April 3, 2007. It included certifications by Tracy and Rodney Lofton, Trenton superintendent of schools, and was signed by the school district's SRA coordinator, Roberta Monclova. P-14 at 6. With the exception of one student, that particular certification predated the nineteen student SRA profile forms that Fabisch was identified as having scored.

Kathleen Smallwood-Johnson, who has been special assistant to Lofton since October 2007, and Sharon Larmore, an in-house counsel to the district, met together with Fabisch as part of the Board's investigation. Smallwood-Johnson testified that in her conversation with Fabisch, the teacher said that she was certified in math, that she did not score any tests, and that she had signed a blank paper given to her by Charles Cirillo, a teacher who was running the process. Fabisch told Smallwood-Johnson she did not sign the test forms she was shown by Smallwood-Johnson. Larmore testified that Fabisch initially said she was an HSPA instructor but did not know about the SRA. Larmore also stated that not only did Fabisch tell her that the signatures on the student forms were not hers, the second math scorer, Vijay Bansal, also told her that the signatures on the forms were not his, although he did the scoring. (All sides agree that Bansal had the necessary math certifications to be a scorer.)

Although the principal's role in the SRA is not clearly defined by regulation or the Manual, Tracy said he appointed the Daylight/Twilight SRA coordinator. In approximately 2003 he selected Charles Cirillo, a social studies teacher, because he had previously been an accountant, and Tracy knew the SRA process required vast amounts of record keeping.

Cirillo testified that Fabisch, who at the time was considered highly qualified in mathematics under the federal No Child Left Behind law, scored the exams and signed the forms. Scorers picked up and returned tests as their time allowed. He stated that

the graders did not always sign the forms in his presence. One would grade the exam, return it to him, then the second would take the exam and score it. He said he only talked to Tracy when he gave Tracy the final paperwork to forward to the superintendent's office.

Tracy testified that he relied upon Cirillo, whom he understood to be trained in the administration of the SRA exam. He deliberately kept a distance from it, as he did not want to be accused of trying in any way to influence the tests. Cirillo told him that Fabisch was not certified, but that in training he had been told by trainers from the NJ DOE that it was acceptable to utilize a highly qualified teacher in an emergency. The emergency was the fact that Daylight/Twilight only had two secondary-math-certified teachers, and when one took medical leave, the school no longer had two scorers with the requisite credentials. Tracy acknowledged that it would have been wiser to try to employ a properly certified teacher from another part of the district, noting that it was part of his remedial plan for moving forward.

Fabisch testified that she was a highly qualified math teacher within the meaning of the federal No Child Left Behind law prior to her receipt of her high school mathematics certification in February 2008. She said she did not remember being asked by Tracy or anyone else to score SRA exams. Shown the signatures on the nineteen SRA forms that identify her as math-certified and as having scored the exams, she repeatedly stated that they did not look like her signatures. She also stated repeatedly that she could have signed them and could not have signed them, could have scored them and could not have scored them, could have been a scorer with Bansal and could not have been. She did not recall. Asked whether she scored exams during her teacher preparation period, she said she couldn't remember having a preparation period in 2007. She also did not know who the coordinator was, except that Cirillo ran the HSPA.

The conflicting testimony is troubling, as it raises some doubt as to who exactly scored and signed those tests. Fabisch's hands shook through most of the time she was testifying, and the shaking, coupled with her professed loss of memory regarding virtually all events, undermined her credibility. According to Smallwood-Johnson,

Fabisch originally said she signed a blank paper given to her by Cirillo. Larmore testified that Bansal also said the signatures were not his. However, both the printing and the signatures at the bottom of the page have enough differences to rule out a single form copied repeatedly. The district offered no other samples of Fabisch's handwriting and no handwriting expert to testify as to whether the signatures were hers. Based on Cirillo's comments and Tracy's memorandum in response to the Board investigation, I **FIND** as **FACT** that Fabisch scored the nineteen exams at a time when she did not possess the necessary certification in math. I further **FIND** that by the following year, she did acquire a certification in secondary-level mathematics.

Smallwood-Johnson testified that as the principal, Tracy had the ultimate responsibility for the integrity of the SRA process. Tracy said he delegated appropriately to someone who was trained in the process. I **FIND** as **FACT** that Tracy allowed the SRA to be scored by someone he knew to lack certification as a secondary-level mathematics teacher. I further **FIND** that this was outside the State's procedures for scoring the SRA.

Charge II – Assignment of Teachers in Areas Where They Were Not Certified

The Board of Education charges that Tracy assigned teachers to teach outside their areas of certification, and that for the 2005-2006 and 2006-2007 school years more than ten teachers were so assigned. The Board contends that the district sought a specific waiver from the State Department of Education to allow teachers to provide educational instruction outside their area of certification in the 2000-2001 school year. The Board further contends that the State Department of Education refused to grant the waiver, and that Tracy was present at a July 2001 meeting in which State representatives told the district the waiver was not approved. Tracy contends that he thought the waiver was approved, and that, in any case, the Daylight/Twilight School was organized as an "Option Two" school, which by definition gave it the flexibility to assign teachers as needed.

There is really no dispute about teachers instructing in subject areas for which they did not hold high school subject-matter certification. A May 2005 report entitled

"Strategic Inquiry, A Visiting Team Perspective" stated that of the forty-one core teachers at Daylight/Twilight, only twenty-two were certified in a content area. The Board offered a list of staff assignments for the 2005-2006 year. P-18. It lists ten teachers as having "highly qualified" status in an area but teaching in another area. Those assigned to math included teachers highly qualified in social studies, elementary education (two), and English. Among teachers assigned to science, one was listed as highly qualified in art, another in social studies, and a third in special education. Language arts assignments included two teachers highly qualified in social studies, and one in elementary education. A list for the 2006-2007 year shows fewer teachers instructing outside of their subject-level certification. In addition to Fabisch, who was certified in psychology, two teachers certified in industrial arts and two certified in special education were assigned to mathematics. A teacher certified in social studies was assigned to language arts. There is also no conflict about who was responsible for assigning teachers to the classroom. Everyone agrees it was Tracy.

But the threshold question is who was responsible for assigning teachers lacking appropriate subject-matter certifications to Daylight/Twilight. Four witnesses testified that assignment of teachers to schools was the responsibility of the district's Human Resources department. These were Smallwood-Johnson, Lytle, Tracy, and Hope Grant, the current principal of Daylight/Twilight. Rodney Lofton, who has been superintendent of the Trenton schools for two years, acknowledged that the district as a whole has been the subject of criticism by the NJ DOE for assigning teachers outside of their certification areas. He said he believes that practice has contributed to the very low scores in State assessments shown by Trenton students. His concern is that a student being taught by a teacher who is not highly qualified to teach in the area is perhaps not learning what he should be in order to receive a passing grade.

For the sake of completeness, it should be noted that the record includes much material from the Board about the lack of explicit approval from the NJ DOE regarding either creation of Daylight/Twilight as an Option Two school or the 2001 waivers to allow extensive use of teachers outside of their certifications and to allow use of elementary-level teachers in the high school. Of most significance is a memo summarizing a July

25, 2001, meeting between the New Jersey Department of Education and Trenton staff, including Tracy and Lytle. The memo stated:

> Mr. Tracy questioned the waiver of certification code submitted by the district as part of the alternative program application in August 2000. The district understood that this waiver allowed them the freedom to assign staff outside of their areas of certification at the Daylight/Twilight School. It was pointed out that the waiver only applies as part of the application for an alternative education program. Therefore, it was stressed that since the waiver does not apply to the Daylight/Twilight School, the district must ensure that all staff at Daylight/Twilight hold the appropriate subject field endorsement for their assignment.
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> [P-17.]

The record also includes a considerable amount of evidence related to Tracy's defense, which is that he thought the waivers were approved, and that he understood the Board to have created Daylight/Twilight as an Option Two alternative high school.

Running through all of these proofs is a fundamental confusion over what the Board actually created when it passed the resolution endorsing the spin-off of the Daylight/Twilight Program out of Trenton Central High School into a freestanding high school. Was the new entity an alternative high school? An adult school? A school for the foreign born? All of them at once? Or just a separate high school with different hours of operation? The NJ DOE's memo of July 2001 suggests that the NJ DOE viewed the Daylight/Twilight School as separate from the alternative education program. Meanwhile, testimony from Lytle, Tracy, and others in the district at the time of its creation establishes that they all believed the alternative education program was the primary reason for the creation of the new school, and that adults were part of the school from inception.

The actual board resolution of September 24, 2001, officially establishing the Daylight/Twilight Program "as a distinct and separate high school" resolves none of these questions. The one-page resolution includes a paragraph that states that the Board approved the curriculum for the Daylight/Twilight School under N.J.S.A. 18A:7C-

2, 18A:7C-3, 18A:7C-4, Standards for Graduation, and N.J.A.C. 6A:8-5.1, Graduation Requirements. P-4. No evidence recording approval of a particular curriculum or standard of graduation for the Daylight/Twilight School was offered. Although there were adult students in the program at the time, the resolution does not address their presence or whether they were to be treated differently from the students of normal high school age.

N.J.A.C. 6A:8-5.1 obligates boards of education to develop and implement requirements for a State-endorsed diploma through two options: (i) the standard course of class study leading to 110 credits in specified subjects; and (ii) program completion leading to 110 credits through in-depth experiences linked to the Core Curriculum Content Standards, such as interdisciplinary courses, independent study, magnet programs, distance learning, internships and other structured learning experiences. The September resolution includes no information or attachments to indicate whether the Board intended to have the Daylight/Twilight School use a standard course of class study, the program completion form using in-depth experiences linked to the Core Curriculum Content Standards, or both. The "program completion" form is generally known as "Option Two."

James Thomas McBee, Jr., director of Abbott Services for the NJ DOE since April 2007, testified that a board has the authority to approve Option Two programs, that there is no process through which boards seek approval from the NJ DOE for Option Two programs, and that no one at the NJ DOE reviews board resolutions to determine if those resolutions were done properly. On reviewing the Board's September 2001 resolution, he characterized it as a resolution establishing a high school but not authorizing Option Two programs.

The failure to record fundamental choices aggravated the confusion with the NJ DOE. James Lytle, Trenton superintendent of schools from July 1998 to June 2006, testified that although in one sense the school Tracy operated was a single unit serving three community segments—high-school-aged students, adults, and immigrants—the Trenton discussions with the NJ DOE treated them as separate programs—Daylight/Twilight serving the youth, an adult school, and a school for the foreign born.

They were all formed in the wake of what is commonly known as "Abbott V," which included a focus on innovative secondary-school programs that would lead to increased school attendance and higher motivation to learn, through elements such as combined academic-vocational instruction, work-based learning experiences, and career academies. Abbott v. Burke, 153 N.J. 480, 570-71 (1998). In 2001, N.J.A.C. 6:19-1.4(i), later recodified as N.J.A.C. 6A:24-1.4(j), required Abbott Districts to establish alternative schools. For purposes of HSPA and SRA testing and maximizing State aid under various programs, the Trenton district sought separate school codes to allow better outcome tracking. Lytle said that the intent was always to legitimize what they and others believed to be an extremely successful alternative high school program. Lytle also stated that in the wake of Abbott V, the Department of Education was so swamped that at one point the assistant director with responsibility for Abbott Districts sent out a memo saying that any waiver application that did not receive a response within forty-five days was deemed approved. Thus, the apparent lack of an explicit approval might not indicate that the Department rejected the waivers to use teachers outside their certifications and to use elementary school teachers in the high school.

Lytle testified that he thought the Board had the authority and did create Daylight/Twilight as an Option Two school. A cabinet-level committee including the Board attorney, the Board secretary, and himself, among others, reviewed resolutions before they were put before the Board of Education for a vote. As far as he was concerned, the NJ DOE did approve, since the department reviewed the school plans and the school budget, and met with the school management teams annually. Further, the NJ DOE approved the budget annually. Sharon Larmore, who has worked as an in-house counsel to the Trenton Board of Education since 1994, testified that she had long believed Daylight/Twilight to be an Option Two school.

Leaving aside all of the proofs and counter-proofs over what was created, the evidence clearly shows that Daylight/Twilight had ten teachers assigned to instructional areas in which they did not possess high school subject-area certification in the 2005-2006 school year, and a similar number in the 2006-2007 school year. I **FIND** this as **FACT**.

Virtually all witnesses ascribed responsibility for school assignments to Human Resources, and I **FIND** as **FACT** that it was Human Resources that assigned teachers to schools, although it was Tracy's responsibility to use them properly once they arrived at Daylight/Twilight.

Based upon the September 2001 Board resolution, the memorandum that stated that the Board could choose to create an Option Two program, McBee's testimony, and Lytle's testimony, I **FIND** as **FACT** that the Trenton Board of Education was not required to seek approval from the NJ DOE to implement an Option Two program. I further **FIND** that the resolution the Board approved in September 2001 includes a reference to the particular segment of code that includes within it the provisions for Option Two. Based upon Lytle's testimony, I **FIND** that Tracy had no role in drafting or interpreting the Board resolutions that gave life to the school he was asked to lead. Given that Lytle characterized Daylight/Twilight as an alternative high school, and Larmore, who is an attorney working for the Board, characterized Daylight/Twilight as an Option Two school, I **FIND** that as a non-lawyer, Tracy reasonably could have believed that the Board resolution of September 2001 authorized Option Two programs at Daylight/Twilight.

At one point, William Tracy said he submitted waivers to the administration, but he does not know what happened to them. At another, he said he thought they had been approved. Based on the testimony of Smallwood-Johnson, the memorandum spelling out the need for a separate waiver, and the absence of approval of such a waiver, I **FIND** as **FACT** that the NJ DOE never granted a waiver to the Daylight/Twilight School to utilize teachers outside of the teachers' areas of certification. I further **FIND**, given Lytle's testimony about the complexities of interaction between the district and the various segments of the NJ DOE, that Tracy could have been left with the erroneous belief that the NJ DOE had eventually approved the waivers.

Charge III – Failure to Enforce the Board's Attendance Policy

Tracy is charged with failing to enforce the Board of Education's attendance policy—a charge that incorporates four distinct disputes. The first is whether the Board

approved an attendance policy for Daylight/Twilight that was different than that of Trenton Central. The second is whether Daylight/Twilight's attendance policy was looser or tighter than Trenton Central's. The third is whether, if Daylight/Twilight operated primarily under Option Two, that created authority to operate differently from the usual standards. The fourth is whether Tracy failed to maintain adequate watch on student attendance.

No documentation supporting any separate Board resolution specifically addressing an attendance policy for Daylight/Twilight was offered. Smallwood-Johnson suggested that this is because none exists. Tracy relies upon the very public nature of the student handbook as evidence that the Board understood the program. The Trenton Central High School Course Selection Catalog for 2000-2001 stated that the Daylight/Twilight program's "strict attendance policy allows for no more than three (3) absences per term (marking period)." P-2.

Sharon Larmore stated that schools are required to be in session for 180 days per year. The Board's policy limits students to a total of fifteen absences per year. While Daylight-Twilight ran on four ten-week cycles, Trenton Central operated on a semester system. Hope Grant, the current principal of Daylight/Twilight, noted that the fifteen-absence limit is "a little bit debatable," because the policy also allows for excused absences for things such as medical reasons or incarceration. Students bring in notes, and there is an appeal process which allows the fifteen-day limit to be waived for good cause. Grant characterized Option Two as a program that allows other means than seat time for the awarding of credits. Grant also acknowledged that students can be dropped from Trenton Central for attendance problems, then be picked up at Daylight/Twilight without having the missed attendance follow the student. She said this occurs because Daylight/Twilight is intended as a retrieval program.

The Board offered an alphabetic listing of attendance of Daylight/Twilight students for the 2005-2006 and 2006-2007 school years. P-8; P-9. The listing included many, many students with far more than fifteen absences, primarily listed as either "unc" or "unx." William R. Winters, Jr., who worked in the records office part time in 2004-2005 and took on the record office full time in 2005-2006, explained that the listing was

printed from the district's central attendance database. He does not know how the district uses all of the codes; he has utilized "unc" and "unx" interchangeably to mean that he did not know exactly why the student was absent. Winters entered the data for students attending school at locations that did not have a computerized link to the SASI system. The attendance lists do not show anything about course credit or graduation.

The district also provided a list entitled "School-Age Graduates" from Daylight/Twilight for 2006 and 2007. P-10; P-11. The graduate list does not show absences and does not distinguish among the student populations. A comparison of the first one hundred names of 2006 graduates with the 2005-2006 attendance list produced twenty-six graduates with more than fifteen absences listed for 2005-2006. The number of absences ranged from sixteen to fifty-seven days. The graduation list indicated twenty-four graduates not listed in the student absence listing. Whether this is because they had no absences at all or because of some other factor was not addressed by the testimony.

Darryl Minus-Vincent, an educational program development specialist at the NJ DOE for about eight years and liaison to the Trenton School District, testified that he investigated attendance records at both Trenton Central and Daylight/Twilight. Minus-Vincent's investigation included meeting with the district director of Assessment and Accountability. According to Minus-Vincent, of 408 Daylight/Twilight graduates in 2006, only 91 were aged seventeen to nineteen. Of these 91, Minus-Vincent identified 33 as having more than fifteen absences. P-20. While the principal may determine to waive the attendance requirement for particular students, Minus-Vincent stated that he was unable to locate any documentation waiving the requirements. Minus-Vincent linked the absence issue with an overall concern about students receiving enough minutes of instruction to meet the goals of the Core Curriculum Content Standards. Minus-Vincent said it was not clear whether students were receiving five credits for a ten-week-cycle class.

During Tracy's time at Daylight/Twilight, the school operated on ten-week cycles, each of them a freestanding unit. Tracy testified that because a student at Daylight/Twilight was at risk of losing credit if he or she had four absences in the first

ten weeks, the school was actually operating on a policy that was stricter than that of Trenton Central. Thus, for example, a student could lose all credit for English I in cycle 1 due to having four absences. Since the next cycle was a fresh start, the student could again take English I and achieve credit, so long as no more than three absences occurred and the student earned a grade of D or above. Consistent with the Board attendance policy, which allows an appeal process, a student who misses more than three days could file an appeal and seek credit based on extenuating circumstances. Tracy acknowledged that it was possible for a student to miss an unexcused twenty days in the first cycle, then three each in the next three cycles, ending up with twenty-nine missed days of school and credit for the courses taken in the three later cycles. He argued that this is the mission of a retrieval program—to keep students from dropping out entirely if they make a big mistake early in the year. Otherwise, after the first two months, the student has no incentive to complete the year, because there is no opportunity to earn credit.

With regard to the number of minutes of teaching, Tracy said that the school was organized around the NJ DOE's standards for summer school. Early on, he said, students were receiving five credits for a one-cycle mathematics class. However, he said that was revised to require two cycles for five credits in mathematics, which meant that students received much more than the 7,200 minutes of instruction required. This, he said, contributed to a rise in mathematics scores on the HSPA and SRA.

Lytle also testified that the four-week cycles and the resetting of the attendance bar each cycle were crucial to the retrieval-program concept. The point of the alternative high school was to keep young people in school past the time of compulsory attendance. Additionally, it was aimed at helping students turn their conduct around, and learn to attend school regularly.

With regard to the appeal process, Smallwood-Johnson testified that she was not able to locate any documentation that students with excessive absences had been given waivers. No one produced any documentation concerning excused absences.

Tracy testified that he did not personally monitor attendance. He extended a lot of trust and power to both the teacher-leaders and the classroom teachers. The teachers were responsible for keeping track of documentation. He assumed that the district monitored attendance, and that the teachers were doing what they were supposed to, because in the nine years between the program start and the time he was suspended, no one ever made any inquiry. There were so many other things to do, he was not going to put effort into something he thought was going well. Tracy said he was confident that students were not getting credits for courses they did not take. He also pointed out that in the seven years that Daylight/Twilight was a freestanding institution, there was never more than one vice principal, and they turned over constantly until Bart LaGrassa arrived.

Beginning in 2006, Bart LaGrassa was a vice principal of the Daylight/Twilight School, assigned to the Smith Avenue location, which had about 400 students. LaGrassa testified that Smith Avenue did not have any means of linking to the district's computerized attendance system, commonly known as SASI. Therefore, teachers did daily attendance reports by hand. Those reports were collected and transported to the Belleview location, where they were entered by William J. Winters, Jr., into SASI. If a student accumulated more than three absences, LaGrassa and the teacher would determine whether the excess absences should be waived and the student allowed to earn credit. Occasionally, he would consult Tracy if he was unsure about whether to grant credit or not. The way anyone outside of the school could have determined whether the absences had been waived was by looking at the report card. If there were more than three absences and a grade of D or better, then the absences had been waived. Otherwise the absences and an F appeared.

William J. Winters testified that due to the inability of the SASI system to roll credits from year to year to create a transcript for Daylight/Twilight students, he created an Access database for Daylight/Twilight to allow everyone to know how many credits students were accumulating. Winters, who is certified in general business, education and marketing and has a master's degree in business administration plus thirty years of experience in marketing research, taught English at Daylight/Twilight for several years, then in 2005 took over full-time responsibility for Daylight/Twilight's records office.

Despite his lack of background in the area, he also functioned one cycle as a chemistry teacher, an experiment he characterized as unsuccessful. Winters said that report cards were run by the district's computer system. He would receive copies of the report cards, which he would use to update the credits and classes for each student. If a passing grade was on the report card, but there were too many absences, he would give the report card to Tracy or one of the teacher-leaders or someone else. If the report card did not come back, then he never entered credit for the course. He entered credits only if Tracy or someone else told him to give the student credit. The point of the database was to allow Daylight/Twilight administrators to know how many credits in each subject area had been earned by each student, so they could determine what courses were still needed and whether a student had accumulated the necessary credits to graduate.

In a memo to Kathleen Smallwood-Johnson dated December 3, 2007, Tracy defended the school's attendance policy. He stated that "[b]ased on information provided by previous administration, Option Two dictated al [sic] operational procedures"; that he was never told he had to follow the attendance policy of Trenton Central High School; that Abbott Districts require an alternative school; and that "Option Two is recommended by the New Jersey DOE and we have functioned under these guidelines since our inception nine years ago." P-12.

Two pieces of evidence concerning operation of Option Two programs were offered. The first was an October 16, 2001, memorandum from the Commissioner to chief school administrators that explained that the two content areas generating the most instances for implementing Option II were physical education and dance. It states:

> Once a local school district decides to permit program completion rather than the traditional credit route, a mechanism must be put into place to ensure that the instructional objectives and Core Curriculum Content Standards are being met. This should be clearly documented and included as part of the student's records. Building principals may want to develop a reporting form or checklist pertinent to the type of alternative activity so the student's attendance, participation and achievement can be clearly documented.

[R-17.]

An advisory to all chief school administrators and high school principals from the NJ DOE in June 2004 (R-19) explained that "Option Two allows students to obtain credit for learning experiences outside of the traditional classroom environment." It included approved examples involving college-level work, international study, volunteer work, interdisciplinary science and English/World Civilizations courses, and credits for marching band and concert choir. The advisory states that the building principal has primary responsibility and authority for implementing an Option Two program and ensuring that student progress is properly documented.

Asked about how the online courses available at Daylight/Twilight were administered, Tracy said the vendor, Advanced Academics, was able to track not only how long the students were logged onto a site, but what actual work was done. Tracy and others did a presentation to the Board of Education on the program. In addition, all of the tests in the subjects have to be taken in the presence of an actual teacher. Moreover, on-line courses were generally only available to adults, not students who were minors.

When it comes to attendance, it is clear that Lytle's strategy of seeking approval for three schools—an adult school, a school for the foreign born, and an alternative high school—when only one administrative entity and multiple school buildings were involved, seems to have muddied the waters instead of creating the transparency Lytle said he was seeking. Based on the documentation, McBee's comments, and those of Lytle, I **FIND** that even if the Board's September 2001 resolution is deemed to be sufficient to create an Option Two program within the Daylight/Twilight School, there is no documentation to establish any separate understanding on attendance for any segment of the school's population.

The only publicly available documentation about Daylight/Twilight's attendance policy offered consisted of the Trenton Central High School Course Selection Catalog for 2000-2001, stating that the Daylight/Twilight Program's "strict attendance policy

allows for no more than three (3) absences per term (marking period)" (P-2), and Daylight/Twilight's online handbook, also referring to the three absences per term. I **FIND** as **FACT** that beyond those two sentences, Daylight/Twilight had no written policies or procedures on attendance, even though both Lytle and Tracy contended that the policy was crucial to the mission of the school. I further **FIND** that lacking any further description, a Board member could have inferred that the total number of possible absences was twelve, which would have been stricter than the Board's written policy.

In the absence of any document demonstrating that the Board had any knowledge of how the policy actually operated in practice, I **FIND** as **FACT** that the Board did not explicitly ever approve a separate attendance policy for Daylight/Twilight.

Based on LaGrassa's testimony, which was that when a waiver was granted, a student received a passing grade for the course allowing the earning of credit despite excessive absences, I **FIND** as **FACT** that LaGrassa's description is what actually happened at the branch of Daylight/Twilight where he was the vice principal, and that no documentation existed at the Smith Avenue location. I further **FIND** as **FACT** that there is no other documentary evidence concerning the granting of waivers at Daylight/Twilight.

Minus-Vincent's testimony and memorandum indicated that 33 of 91 non-adult-school graduates in the 2005-2006 school year had excessive absences. Although the graduation lists and the student attendance rolls lack necessary linkages, the student attendance roll does show a number of students with absences consistent with Minus-Vincent's description. Therefore, I **FIND** as fact that Daylight/Twilight graduated students with more than the fifteen absences allowed by the Trenton Board of Education attendance policy.

I also **FIND** based on Tracy's testimony that he delegated the operation of the student attendance system entirely to the teachers, and that no evidence exists to show that waivers were properly granted.

CONCLUSIONS OF LAW

Conclusions with regard to the three specific charges and the fourth general charge of conduct unbecoming based on the other three are discussed separately. In each instance, the District bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a). Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metropolitan Bottling Co., 26 N.J. 263 (1958).

With regard to the tenure charge related to improper administration of the SRA examination, the Board has not proven the most critical component of the charge, which is fraud in the SRA process. The evidence establishes that Fabisch scored the exam, and that Fabisch, while not then secondary-certified as a mathematics teacher, did achieve certification a year later. The lesser component, which is selecting and then failing to adequately supervise the Daylight/Twilight SRA coordinator, is proven to the degree that respondent named Charles Cirillo as SRA coordinator, and then relied on Cirillo, who was wrong about the requirements.

As it happens, neither the statutory language authorizing the SRA, N.J.S.A. 18A:7C-3, nor the regulations at N.J.A.C. 6A:8-4.1 et seq., nor the 2006 SRA Manual delineate any specific responsibility for the principal. While the Board is required to administer the statewide assessments, and the chief school administrator to report the results, and the district and school SRA coordinators to maintain the security of the exams, there is no mention of a direct role for the principal. The manual is even silent on who is to select the scoring panels. The only explicit indication that the principal is involved is the "Principal and Superintendent Certification of Proficiency and Compliance with the Process," which accompanies submissions of SRAs to the County.

Given this statutory silence, I **CONCLUDE** that the primary responsibility for the SRA rested with the Board, the superintendent, and the SRA coordinators, and that Tracy's reliance on Cirillo, who was unfortunately mistaken about the requirements, was reasonable, given that the regulatory scheme does not place the principal at the center

of test administration. Moreover, I am persuaded that Tracy's argument that the HSPA and SRA in aggregate function as a kind of report card on the principal is sensible, in that the principal, as school leader, is responsible for providing the instruction that should lead to subject mastery. While ideally, Tracy should have insisted that Cirillo back up his verbal assurance with something from the State Department of Education, I **CONCLUDE** that Tracy's reliance on the SRA coordinator was not so inappropriate as to sustain a separate, stand-alone charge of conduct unbecoming. This is particularly so since by the following year Fabisch had obtained her secondary-level certification. Moreover, the emergency was occasioned by the fact that a school with an enrollment of more than 2,000 students had only two instructors certified to teach mathematics at the secondary level.

With regard to the assignment of teachers to areas in which they were not certified, the issue is responsibility. Lytle testified that a cabinet-level group including himself, the Board secretary, and the Board counsel drafted resolutions for the Board. N.J.A.C. 6A:5-1.5(a) requires that an application for a waiver must be signed by the chief school administrator, and approved by the district board of education. Therefore, I **CONCLUDE** that it was up to Lytle and the Board to follow up on the waiver, not Tracy, and that Tracy held a sincere but mistaken belief that the waivers had been granted.

Further, as a threshold matter, the education statutes vest authority for hiring teachers with boards of education, not school principals. Rotondo v. Carlstadt-East Rutherford Reg'l High Sch. Dist., 276 N.J. Super. 36 (App. Div. 1994). N.J.S.A. 18A:27-1 states that "[n]o teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him." Similarly, foundational case law affirms the statutory right of boards to transfer teachers within the scope of their certificates. Greenway v. Camden Bd. of Educ., 129 N.J.L. 461 (E. & A. 1942), aff'g 129 N.J.L. 46 (Sup. Ct.).

To hold respondent responsible for the Board's decision to hire teachers not holding high school certifications or certifications in needed areas and to allow transfer of those teachers to the Daylight/Twilight High School vests the principal with a power that belongs solely to the Board. Tracy did not make the decision to transfer two

industrial arts teachers and an art teacher to a high school that taught neither industrial arts nor art. He simply did not have that power. He could advocate, he could lobby, but it was the Board that hired teachers, and Human Resources that assigned them to schools.

Once the assignment of teachers was made, however, respondent was undoubtedly responsible for finding something useful to do with them. In 2006-2007, Tracy had at least seven math assignments to cover, and only one math-certified teacher to utilize after Gregory Howard went out on medical leave. Granted, evidence that Tracy did anything to remedy the situation is minimal. Tracy testified that he went to Human Resources, reviewed résumés, and sought to set up interviews for qualified math and science candidates. He acknowledged assigning a business teacher to a chemistry course on a trial basis—an experiment the teacher himself deemed unsuccessful. The waivers and July memo document Tracy advocating for elementary-certified teachers to help students whose entry-level math skills are not ready for high school. Tracy continues to advocate strongly for that need. Nonetheless, the simple fact is that Tracy was handed teachers not certified in areas of instruction where he needed teachers, and expected to do something with them. The Board cannot now complain that he assigned them to classrooms. I **CONCLUDE**, therefore, that the tenure charge related to inappropriate teaching assignments has not been proved.

The third specific charge is a failure to adhere to the Trenton Board of Education's attendance policy, with the result that scores of students were permitted to earn credit and graduate without adhering to the Trenton Board of Education's attendance policy.

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 of 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:32-13.1(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 comfortable 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 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.

The final charge of "unbecoming conduct" simply states that the first three charges together constituted an overall pattern of deficient performance that should lead to loss of tenure. The phrase "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 Atl. City, 152 N.J. 532, 554 (1998) (citation omitted). Behavior rising to the level of unbecoming conduct need not "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (citation omitted). 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.), certif. denied, 65 N.J. 292 (1974).

With regard to the SRA charge, the most serious aspect was not proved. Indeed, the evidence suggests that the contents of the exams were properly graded, even if the scorer was still a year away from certification. In addition, the situation was in part created by the Board, which failed to assign more than two secondary-certified mathematics teachers to a school with more than 2,000 students. With regard to the second charge, it was the Board and Human Resources that placed the non-certified teachers at Daylight/Twilight, and, therefore, the Board has not sustained that charge either.

This leaves only the attendance charge as sustained, such that the conduct-unbecoming charge rests upon it alone.

No doubt, the Board's difficulties in staffing and Tracy's problems with administration were aggravated by the extraordinary growth of the school, from one building and 400 students to seven buildings operating on three shifts serving a mixed population of adults and teenagers—all of this within about five years. At bottom, respondent's argument is that the school was a victim of its own success.

Fear that the success was illusory threads its way through all the Board's arguments, but there are no proofs to show this was true. The Board has demonstrated that respondent cannot show why, when, or in most cases even if students missing more than fifteen days of school received appropriate waivers that allowed them to secure credits. But that failure has only an inferential, not a direct, link to inadequate education.

Tenure protects teachers (and principals) 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 tenured teachers and staff 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). Accordingly, N.J.S.A. 18A:6-10 provides that no person under tenure in a school district shall be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause."

There is something deeply unfair about the loss of tenure in a situation where the Board itself did not adequately document what it created, where multiple schools with different missions were collapsed into one entity, where a single vice principal was assigned to a school with 2,100 enrollees in seven buildings, and where the substantial enrollment reflected success in the core mission of bringing people back to studying toward a high school diploma.

For that reason, I **CONCLUDE** that a six-month suspension is warranted, but not termination and the loss of tenure.

ORDER

Therefore, I **ORDER** that the respondent, William Tracy, is **GUILTY** of the charge of failure to properly enforce the Trenton Board of Education attendance policy, but not guilty of any of the other three charges. I further **ORDER** that respondent 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 23, 2009
DATE

Laura Sanders
LAURA SANDERS, CHIEF ALJ

Date Received at Agency:

FEB 24 2009

February 23, 2009

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/caa

WITNESSES

For Petitioner, Board of Education of the City of Trenton

Kathleen Smallwood-Johnson, special assistant to superintendent of schools
Charles L. Cirillo, social studies teacher
Sharon Larmore, legal counsel, Trenton School District
Hope Grant, principal, Daylight/Twilight High School
Deirdre Fabisch, mathematics teacher
Rodney Lofton, superintendent, Trenton Public Schools
James McBee, director of Abbott Services, NJ DOE
Daryl Minus-Vincent, educational program development specialist, NJ DOE

For Respondent, William Tracy

William R. Winters, Jr.
Bart C. LaGrassa, vice principal, Daylight/Twilight
William Tracy
James H. Lytle, former superintendent, Trenton Public Schools

EXHIBITS

For Petitioner, Board of Education of the City of Trenton

P-1 Daylight/Twilight High School Course Handbook
P-2 Experts from Trenton Central High School Course Selection Catalog 2000-2001 (two pages)
P-3 Board of Education Resolution seeking school codes dated April 30, 2001
P-4 Board of Education Resolution establishing Daylight/Twilight Program as separate school and approving the curriculum and standards for graduation, dated September 24, 2001
P-5 Board of Education Application for waivers for use of teachers dated April 3, 2008 (five pages)
P-6 Letter of Appointment of William Tracy as a vice principal dated August 12, 1999
P-7 Statement of Assurance of Principal Position by New Jersey State Board of Examiners dated July 23, 2001
P-8 Student Absences, September 8, 2005, to June 22, 2006
P-9 Student Absences September 7, 2006, to June 23, 2007
P-10 Daylight/Twilight High School 2006 School-Age Graduates
P-11 Daylight/Twilight High School 2007 School-Age Graduates
P-12 Memorandum from William Tracy to Kathleen Smallwood-Johnson dated December 3, 2007
P-13 Special Review Assessment (SRA) Administration Manual, 2006-2007 School Year

P-14 Memorandum from William Tracy listing staff members participating in SRA Process, and SRA student profile forms (forty-eight pages)
P-15 Certification of Kathleen Smallwood-Johnson dated April 28, 2008 (two pages)
P-16 Certification of Sharon D. Larmore dated April 28, 2008 (two pages)
P-17 Letter including notes of meeting between Board staff and NJ DOE dated July 25, 2001 (three pages)
P-18 Listing of staff assignments at Daylight/Twilight School for 2005-2006, 2006-2007 and 2007-2008 (four pages)
P-19 Letter to Rodney Lofton from James T. McBee, Jr., dated September 10, 2007 (two pages)
P-20 Memorandum: Report on Inquiry Regarding Central High School and Daylight/Twilight High School (six pages)
P-21 Board policy regarding absences and excuses
P-22 Statement of Evidence attached to tenure charges, dated May 16, 2008 (four pages)
P-23 Resolution to Approve the Daylight/Twilight Alternative Education Program dated August 25, 2008
P-24 Approval of Revised Resolution to Amend Date on Option Two for Trenton Public Schools dated April 28, 2008
P-25 SRA Guide from New Jersey Department of Education website copyrighted 2006, printed out on December 8, 2008
P-26 Trenton Public Schools Evaluation Booklet, School Based Administrator, for William Tracy, dated March 13, 2006 (eight pages)

For Respondent, William Tracy

R-1 December 2, 1999, correspondence from Thomas Henry, Director of Office of School-to-Career and College Initiatives
R-2 Resolution to approve application for the re-establishment of a Trenton Adult High School dated December 20, 1999, Proposal for Trenton Central High School's Adult School, Budget for Adult High School, and letter from James H. Lytle, Ed.D., Superintendent of Schools, to Thomas A. Henry, Ed.D., Director of the Office of School-to-Career and College Initiatives, NJDOE, dated January 3, 2000 (thirteen pages)
R-3 January 3, 2000, letter to Henry with note identified as by James H. Lytle, indicating hand-delivery to NJDOE of adult school proposal on January 3, 2000 (eleven pages)
R-4 Resolution to Obtain Two Waivers from the NJ State Department of Education for Alternative Education dated June 26, 2000, and Equivalency Application (four pages)
R-5 Agenda and minutes dated July 31, 2000, reporting award from Geraldine Dodge Foundation (three pages)
R-6 Not identified
R-7 Letter dated January 21, 2001, from James H. Lytle to Thomas J. Rubino, County Superintendent of Schools (two pages)
R-8 Not identified
R-9 Minutes of Meeting Pertaining to Trenton High Schools dated March 8, 2001 (three pages)

R-10 Not identified
R-11 Letter and Board Resolution to Apply for School Codes dated May 3, 2001 (two pages)
R-12 Internal request to run Daylight/Twilight summer school and establish budget dated May 4, 2001 (two pages)
R-13 Letter describing meeting with Trenton Education Association re Daylight/Twilight School, dated June 20, 2001, applying and copy of P-17 (five pages)
R-14 Not identified
R-15 Same as P-4
R-16 Memorandum from Melvin L. Wyns, Business Administrator, Trenton Public Schools, to Thomas Rubino, County Superintendent, dated September 28, 2001
R-17 Not identified
R-18 Not identified
R-19 Memorandum from Richard C. Ten Eyck, Assistant Commissioner, NJ DOE, to Chief School Administrators and High School Principals regarding High School Graduation Requirements and Option Two dated June 14, 2004 (fourteen pages)
R-20 Not identified
R-21 Not identified
R-22 Not identified
R-23 Not identified
R-24 Not identified
R-25 Not identified
R-26 Not identified
R-27 Not identified
R-28 Employment contracts and employment information for Deirdre Fabisch (forty-two pages), identified but not in evidence
R-29 Not identified
R-30 No document identified or offered
R-31 Commissioner's Evaluation of the Trenton School District, July 23, 2007 (123 pages) -- identified and subject to judicial notice as a public document available on website; only the first five pages actually referred to specifically at hearing
R-32 Report: Strategic Inquiry, an Initiative in System-Wide Innovation and Improvement, Center for Evidence-Based Evaluation, dated May 16 through 20, 2005 (forty-five pages)
R-33 Trenton Public Schools Annual School Based Administrator Evaluation Packet for William Tracy, 2000-2001 School Year (twelve pages)
R-34 Trenton Public Schools Annual School Based Administrator Evaluation Packet for William Tracy, 2002-2003 School Year (eight pages)
R-35 Trenton Public Schools School Based Administrator Evaluation Booklet for William Tracy, dated May 4, 2007 (ten pages)
R-36 Trenton Public Schools Annual School Based Administrator Evaluation Packet for William Tracy, 2001-2002 School Year (six pages)

115-09

OAL DKT. NO. EDE 2085-07
STATE BOARD OF EXAMINERS DKT. NO. 0607-148
AGENCY DKT NO. 4-7/08A
(STATE BOARD DOCKET #18-08)

IN THE MATTER OF THE SUSPENSION	:	
OF THE CERTIFICATES OF	:	COMMISSIONER OF EDUCATION
STEVEN KRAMER BY THE	:	DECISION
STATE BOARD OF EXAMINERS.	:	
	:	

Decision on Reconsideration by the State Board of Examiners, October 7, 2008

For the Respondent-Appellant, Robert M. Schwartz, Esq.

For the Petitioner-Respondent State Board of Examiners,
Cynthia Raymond Rimol, Deputy Attorney General (Anne Milgram,
Attorney General of New Jersey)

This matter was transferred to me for determination pursuant to *P.L.* 2008, *c.* 36. I have thoroughly reviewed the record and the papers filed in connection with respondent's appeal of the State Board of Examiners' order of October 7, 2008, suspending his administrative certificates for the period from February 21, 2008 until May 1, 2008.

After full consideration of the record and all submissions, the decision of the State Board of Examiners is affirmed for the reasons expressed therein.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/08/09
Date of Mailing: 4/09/09

*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
STEVEN KRAMER	:	DECISION ON RECONSIDERATION
_____	:	DOCKET NO: 0607-148

DATE: OCTOBER 7, 2008

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
STEVEN KRAMER	:	DECISION ON RECONSIDERATION
_____	:	DOCKET NO: 0607-148

At its meeting of December 7, 2006, the State Board of Examiners reviewed a decision forwarded by the Commissioner of Education that had approved a settlement between the Montville Board of Education (Montville) and Steven Kramer, a tenured principal in the district. *In the Matter of the Tenure Hearing of Steven Kramer,* Docket No. 178-5/06 (Commissioner's Decision, September 7, 2006). Montville had certified tenure charges against Kramer alleging conduct unbecoming a teaching staff member. Montville asserted that Kramer had improperly directed that the fire alarm in the high school be turned off. In the settlement, Kramer resigned his tenured position and the district withdrew the tenure charges. Although the Commissioner approved the settlement, pursuant to *N.J.A.C.* 6A:9-17.6(a)1, he transmitted the matter to the Board of Examiners for its review. Kramer currently holds Teacher of Social Studies and Teacher of Reading certificates, both issued in September 1976, a Principal/Supervisor certificate, issued in June 1977, a Reading Specialist certificate, issued in May 1979 and a School Administrator certificate, issued in April 1982.

Thereafter, on January 18, 2007, the State Board of Examiners issued Kramer an Order to Show Cause as to why his certificates should not be suspended or revoked. The Order was predicated on the charges of unbecoming conduct that had been alleged in the tenure hearing.

The Board sent Kramer the Order to Show Cause by regular and certified mail on January 25, 2007. The Order provided that Kramer's Answer was due within 30 days. Kramer filed an Answer on February 7, 2007. In his Answer Kramer admitted that the district had brought tenure

charges against him. (Answer, ¶ 3). He also admitted that the Commissioner approved a scttlement between him and Montville. (Answer, ¶ 5). Kramer denied that he engaged in any conduct requiring suspension or revocation of his certificates. (Answer, Affirmative Defenses). Notwithstanding Kramer's denials, the Examiners found probable cause to consider the suspension or revocation of his certificates.

The Examiners transmitted the case to the Office of Administrative Law (OAL). Administrative Law Judge (ALJ) Joseph Martone heard testimony on July 6 and 23, 2007. After receiving post-hearing submissions, the record closed and the ALJ issued an Initial Decision on October 29, 2007. *In the Matter of the Certificates of Steven Kramer,* Dkt No. EDE 2085-07 (Initial Decision, October 29, 2007).

In that decision, ALJ Martone noted that Montville High School had undergone major renovations including the installation of a new alarm system that was to be integrated into the old system. (Initial Decision, slip op. at 3.) After the construction project was completed the alarm system would sound at least six times per month, sometimes during nights. (Initial Decision, slip op. at 3.) When the alarm sounded during school hours, all of the students would have to be evacuated from the building. (Initial Decision, slip op. at 3.) In October 2004, the Montville Fire Chief sent a letter to the Superintendent complaining about the number of fire alarm malfunctions at the High School within the beginning of the school year. (Initial Decision, slip op. at 4.) The Chief urged the district to correct the malfunction quickly, otherwise fines would be issued. (Initial Decision, slip op. at 4.) Dr. Kramer testified that he had complained about the fire alarm system repeatedly, but that nothing was done. (Initial Decision, slip op. at 4-5.) The hearing testimony confirmed that false fire alarms continued unabated. (Initial Decision, slip op. at 5.) Evacuation of the high school caused disruptions from 30 to 60 minutes or more each time the alarm sounded. (Initial Decision, slip op. at 5.)

In mid-October 2005, Dr. Kramer ordered that the system be put on test mode during the school day, which meant that the fire department would not be notified in the event of an alarm trigger. (Initial Decision, slip op. at 5-6.) Dr. Kramer developed a system whereby administrators and custodians were assigned zones in the building and reported in by walkie-talkies in the event of an emergency. (Initial Decision, slip op. at 6.) The fire alarm system was still in test mode on March 24, 2006, when a fire broke out in a trash receptacle in the boys' bathroom. (Initial Decision, slip op. at 6-7.) Although the fire was quickly extinguished by the Custodial supervisor, the smell of smoke lingered in the hallway. (Initial Decision, slip op. at 7.) A police officer at the school for another incident, told Dr. Kramer to notify the fire department. (Initial Decision, slip op. at 7.) When the fire chief learned about the fire through a phone call from his daughter, a student at the school, he went to the alarm company where he discovered the system had been on test mode. (Initial Decision, slip op. at 7-8.) When he arrived at the high school, the fire chief met with Dr. Kramer and the Custodial supervisor. (Initial Decision, slip op. at 8.) Dr. Kramer told the chief that the fire alarm was in test mode. (Initial Decision, slip op. at 8.) On March 28, 2006, a Notice of Violation and Order to Correct was served upon Dr. Kramer based upon the events of March 24, 2006. (Initial Decision, slip op. at 8.) Dr. Kramer did not inform the Superintendent about the fire until March 29, 2006. (Initial Decision, slip op. at 8.)

After considering all the testimony and the case law, ALJ Martone determined that Dr. Kramer's failure to notify fire officials immediately did not constitute unbecoming conduct. (Initial Decision, slip op. at 12-14.) The ALJ also found that "Dr. Kramer's placing the fire alarm system on test mode was clearly an error in judgment." (Initial Decision, slip op. at 21.) The ALJ stated that Dr. Kramer instituted the "human system" for reporting fires as a last resort when repeated complaints to the administration about the false alarms went uncorrected and

student education was continually disrupted. (Initial Decision, slip op. at 21.) ALJ Martone therefore concluded that since the students were not at risk on March 24, 2006, and Dr. Kramer had acted from the best of intentions, he had not engaged in unbecoming conduct. (Initial Decision, slip op. at 21-22.) The ALJ therefore concluded that no sanction needed to be imposed on Dr. Kramer's certificates and he dismissed the Order to Show Cause. (Initial Decision, slip op. at 22.)

The Deputy Attorney General (DAG) representing the Board of Examiners filed Exceptions to the Initial Decision and Dr. Kramer filed Reply Exceptions. In her Exceptions, the DAG argued that the ALJ acknowledged that Dr. Kramer had put the alarm system on test mode for a prolonged period of time and that the bathroom fire was not reported to the fire department upon its detection. (Exceptions, pp. 1-2.) The DAG further argued that Dr. Kramer's conduct, as found by the ALJ, warranted action against his certificates. (Exceptions, p. 2.) The DAG claimed that Dr. Kramer's actions put the students at risk of harm, even though Dr. Kramer's "human" alarm system happened to work on the day of the March 24, 2006 fire. (Exceptions, p. 3.) Accordingly, the DAG argued that the Board of Examiners should act against Dr. Kramer's certificates. (Exceptions, p. 4.) In his Reply Exceptions, Dr. Kramer argued that the ALJ found that he did not commit an act of unbecoming conduct because even if there was an error in judgment he had acted out of the best of intentions. (Reply Exceptions, p. 5.) Dr. Kramer stated that ALJ Martone found that he always had the safety of the students as a concern and that if there was a fault with safety, it should be directed toward the district "for allowing this situation to have continued unabated for so long...." (Reply Exceptions, p. 6.) Moreover, Dr. Kramer claimed that he acted in good faith and "took all the precautions he could to ensure the safety of students and staff." (Reply Exceptions, p. 7.) Thus, according to Dr. Kramer, since his actions

were necessary and ALJ Martone determined they did not rise to the level of unbecoming conduct, the ALJ was correct in dismissing the Order to Show Cause. (Reply Exceptions, p. 7.)

On January 17, 2008 after reviewing the decision exceptions and reply exceptions, the Board of Examiners issued a decision in the case rejecting the decision of the ALJ. The Board determined that credibility was not at issue since Dr. Kramer did not deny that he ordered the fire alarm system to be put on test mode. The Board found that although there were disruptions to the educational system with ongoing false alarms, Dr. Kramer's actions put the entire school at risk, especially because having the alarm in test mode eliminated the immediate notification of fire officials. Moreover, since Dr. Kramer did not put the fire department on notice regarding the "test mode" status, they had to rely on him or other school officials to impart information, something that was only done belatedly. Thus, the Board held that Dr. Kramer's actions constituted conduct unbecoming a teacher and warranted a penalty. *N.J.A.C.* 6A:9-17.5.

In assessing an appropriate penalty, the Board weighed Dr. Kramer's actions as an administrator in departing from safety rules against his long and distinguished career as an educator. Therefore, the Board held that the appropriate response to Dr. Kramer's breach was the suspension of his two administrative certificates for a period of two years from the effective date of the Board's vote, February 21, 2008.

Kramer filed an appeal from the Board of Examiners' decision with the State Board of Education. He also filed a motion with the Board of Examiners to stay its decision pending his appeal. At its meeting of May 1, 2008, the Board voted to grant Kramer's motion for a stay. In addition, the Board voted to move *sua sponte* to reconsider its decision of February 21, 2008 and to provide the parties with an opportunity to file briefs on the motion. Both parties filed briefs in response.

In his brief, Kramer argued that the ALJ's decision should be affirmed in its entirety and that the Board of Examiners erred in finding that Kramer put the students at risk and in imposing a penalty. The Board's DAG responded that there was no basis for the Board to reconsider its prior decision since it had not discovered new information or uncovered a fraud, misrepresentation or misconduct of another party. *N.J.A.C.* 6A:9-17.20(b). Moreover, the DAG asserted that there was no mistake in the Examiners' decision which would warrant reconsideration. The DAG claimed that the Examiners correctly found that Kramer's conduct was unbecoming and that contrary to Kramer's assertion, only its conclusions of law, not of fact, were different from the ALJ's.

After reviewing the submissions, the ALJ's decision and its own prior decision, the Board of Examiners has decided to reconsider its decision in this case. The Board determines that it should give greater weight to the circumstances that led to Kramer's decision to disable the fire alarm from fire department notification. Kramer honestly believed he was doing his best to keep his students safe while minimizing needless disruptions to the educational process. While the Board does not condone his ultimate solution, it understands Kramer's frustration in light of the district's inaction and his attempt to fulfill his role as an administrator in extremely trying circumstances. Accordingly, while the Board does not agree with Kramer that no penalty is warranted here, it does believe that its prior penalty was too harsh. The Board therefore finds that a suspension of Kramer's administrative certificates from February 21, 2008, when the Board first rendered its decision, until May 1, 2008, when the Board granted Kramer's stay, is sufficient given the unique circumstances of this case.

Accordingly, on July 17, 2008, the Board of Examiners voted to suspend Dr. Kramer's Principal/Supervisor and School Administrator certificates from February 21, 2008 until May 1, 2008. On this 11th day of September 2008 the Board of Examiners voted to adopt its formal

written decision and it is therefore ORDERED that the suspension of Steven Kramer's administrative certificates for a period from February 21, 2008 until May 1, 2008 be effective immediately.

Robert R. Higgins, Secretary
State Board of Examiners

Date of Mailing: 10/7/08

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-28.

116-09L

116-09

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

April 9, 2009

Monica Dodd Pelestis, Esq.
393 Blackwell Street
Dover, NJ 07801

Patrick F. Carrigg, Esq.
Lenox, Socey, Formidoni, Brown, Giordano,
Cooley & Casey
3131 Princeton Pike – 1B
Trenton, NJ 08648

Dear Counsel:

I have reviewed the papers filed in connection with the Petition for Declaratory Ruling in the matter captioned *Dr. Clarence Alston v. Board of Education of Pleasantville, Atlantic County*, Agency Dkt. No. 51-3/09. Therein petitioner, a Chief School Administrator, seeks 1) that I interpret the provisions of *N.J.S.A.* 18A:17-15 and declare that his employment agreement's stated terms are inconsistent with this provision and determine that his contract is, therefore, deemed to run through July 1, 2010; or 2) that I interpret the provisions of *N.J.S.A.* 18A:17-20 and find that the Board's vote to non-renew his employment effective June 30, 2009 was procedurally deficient and seeks to deprive him of benefits by removing him from his position prior to the end of his employment agreement's stated terms and, therefore, his contract be deemed renewed for another term of the same duration as the prior contract. Please be advised that I have determined not to consider this matter as one for declaratory ruling, pursuant to my discretionary authority under *N.J.A.C.* 6A:3-2.1. 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,

Lucille Davy

Lucille E. Davy
Commissioner

LED/DA/MKD/MH
County Superintendent

#119-09

119-09

OAL DKT. NO. EDU 6120-08
AGENCY DKT. NO. 167-6/08

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
ANDREA LAMB, D.U.E. SEASON	:	DECISION
CHARTER SCHOOL, CAMDEN COUNTY.	:	
	:	

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 Chief Education Officer of D.U.E. Season Charter School 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 of Trustee'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. 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.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/14/09
Date of Mailing: 4/14/09

* 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

SETTLEMENT

OAL DKT. NO. EDU 6120-08

AGENCY DKT. NO. 167-6/08

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF ANDREA LAMB, D.U.E. SEASON CHARTER SCHOOL, CAMDEN COUNTY.

LaTonya N. Bland, Esq., for petitioner (Capehart & Scatchard, P.A., attorneys)

Patricia A. Barasch, Esq., for respondent (Schall & Barasch, LLC, attorneys)

Record Closed: February 10, 2009 Decided: March 3, 2009

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

STATEMENT OF THE CASE

This case concerns petitioner's request that respondent's teaching certificate be suspended due to her resignation without sufficient notice. 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 D.U.E. Season Charter School employed Andrea Lamb under contract for a term from August 13, 2007 to June 30, 2008. Ms. Lamb submitted a resignation letter on February 6, 2008 to be effective February 22, 2008. Ms. Lamb stopped working for the school on February 22, 2008. On May 22, 2008, the School had an Order to Show Cause signed by Commissioner Lucille Davy seeking the suspension of the teaching certificate of Ms. Lamb. On June 16, 2008, Ms. Lamb filed an Answer with the Commissioner of Education. The matter was transmitted to the Office of Administrative Law on June 17, 2008 and filed 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.

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.

3/3/09
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency:

MAR 6 2009
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

CAPEHART & SCATCHARD, P.A.
A Professional Corporation
Laurel Corporate Center
8000 Midlantic Drive, Suite 300 S
Mt. Laurel, New Jersey 08054
(856)234-6800
Attorneys for D.U.E. Season Charter School

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF ANDREA LAMB.	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY DOCKET NO. 167-6/08
D.U.E. SEASON CHARTER SCHOOL, Petitioner, vs. ANDREA LAMB, Respondent.	:	**SETTLEMENT AGREEMENT**

WHEREAS, Andrea Lamb is a former employee with the D.U.E. Season Charter School, who entered into an employment contract with the Board of Trustees of the D.U.E. Season Charter School on July 18, 2007, for the term of August 13, 2007 through June 30, 2008; and

WHEREAS, Andrea Lamb submitted a Letter of resignation on or about February 6, 2008 which was effective on or about February 22, 2008; and

WHEREAS, Andrea Lamb ceased to perform duties as a teacher on or about February 22, 2008; and

WHEREAS, D.U.E. Season Charter School instituted the above-captioned matter seeking the Suspension of the Teaching Certificate of Andrea Lamb; and

WHEREAS, the parties have agreed to a full and final settlement of all claims and matters asserted in or which could have been asserted in the contested matter above, and any claims that could be asserted in any civil suit, administrative action, or in a state or federal court proceeding that relate directly or indirectly to the employment of Andrea Lamb with D.U.E. Season Charter School; and

WHEREAS, the parties have, in resolving this matter, also agreed to a Release and Waiver provision which, covers directly or indirectly, the employment of Andrea Lamb with D.U.E. Season Charter School and monetary damage claims of D.U.E. Season Charter School, as described in paragraph 4 below;

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

(1) The Respondent will pay to the Petitioner the total amount of $2,600.00, representing the cost and legal fees incurred as a result of Respondent's resignation and this action;

(2) Except for payment of the settlement amount in accordance with the terms of paragraph (1), the parties shall not be responsible financially or otherwise for any other cost or obligation.

MUTUAL RELEASE AND WAIVER

(3) In consideration of the settlement payment described in paragraph (1) and for other good and valuable consideration, the parties release, waive and forever discharge the each other (including the former and present board members, officers, employees, agents, and servants

of the D.U.E. Season Charter School) from any and all claims and causes of action whether known or unknown, whether asserted or unasserted, contingent or otherwise, relating directly or indirectly to the matter captioned D.U.E. Season Charter School v. Andrea Lamb, Agency No. 167-6/08. With respect to the claims that were asserted or that could have been asserted in the Petition, Defenses, Counterclaims, or separate actions, this Release and Waiver includes, but is not limited to: (a) any claim concerning failure to provide the proper notice of resignation; (b) any claim for loss, monetary damages, personal injury, property damage, reimbursement, attorneys fees and costs, and expert fees; (c) claims or causes 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.), the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., the New Jersey Constitution, the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et sue., 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.

BY THEIR SIGNATURES TO THIS AGREEMENT, DORIS CARPENTER, Chief Education Officer of D.U.E. Season Charter School, AND ANDREA LAMB, ACKNOWLEDGE THAT THEY HAVE READ THIS RELEASE AND WAIVER, AND ACCEPT AND AGREE TO THE PROVISIONS IT CONTAINS. THEY FURTHER ACKNOWLEDGE THAT THEY ARE EXECUTING THIS RELEASE AND WAIVER VOLUNTARILY, WITH THE FULL UNDERSTANDING OF ITS CONSEQUENCES, AND THAT THEY HAVE HAD THE OPPORTUNITY TO OBTAIN THE ADVICE OF COUNSEL WITH RESPECT TO IT.

(4) The Petition **IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF ANDREA LAMB,** bearing Agency No. 167-6/08 shall be dismissed.

(5) The Respondent agrees not to file a petition or complaint with respect to matters asserted or that could have been asserted in connection with her employment with D.U.E. Season Charter School, and with respect to matters resolved by this Agreement.

Date: _____

Andrea Lamb

Date: _____

Dr. Doris Carpenter, Chief Education Officer of
D.U.E. Season Charter School

120-09

120–09

OAL DKT. NO. EDU 9812-08
AGENCY DKT. NO. 206-7/08

MARIA A. INGRAFFIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, 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.

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 4/15/09

Date of Mailing: 4/15/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9812-08

AGENCY DKT. NO. 206-7/08

MARIA A. INGRAFFIA,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Alan S. Porwich, Esq., for petitioner (Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, Esq., for respondent (Jersey City Public Schools, Office of General Counsel)

Record Closed: March 5, 2009 Decided: March 11, 2009

BEFORE **JOSEPH A. PAONE,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on August 25, 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.

After a prehearing telephone conference, which was conducted on December 29, 2008, the parties settled the matter. A Stipulation of Settlement was prepared and executed indicating the terms of the agreement, which are incorporated herein by reference.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

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

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

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

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

March 11, 2009

DATE

JOSEPH A. PAONE, ALJ

March 11, 2009

Date Received at Agency:

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 16 2009

DATE

OFFICE OF ADMINISTRATIVE LAW

lr

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

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MARIA A. INGRAFFIA,	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
Petitioner,	:	
	:	Agency Dkt. No. 206-7/08
vs.	:	
	:	**STIPULATION OF SETTLEMENT**
JERSEY CITY SCHOOL DISTRICT,	:	
Respondent.	:	

THIS MATTER having been brought before the Office of Administrative Law by Feintuch, Porwich & Feintuch, attorneys for Petitioner, with Charlotte Kitler, Esq., appearing for Respondent, and the parties having adjusted the differences between them, and for good cause being shown,

IT IS HEREBY STIPULATED AND AGREED that Respondent shall restore 5 days to Petitioner's sick leave bank which were deducted subsequent to Petitioner's work-related accident on June 1, 2006.

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

FEINTUCH, PORWICH & FEINTUCH
Attorneys for Petitioner

By: _____
ALAN S. PORWICH
DATED: 1/23/09

_____
KEN IWAMA, ESQ.
Attorney for Respondent
DATED: 2/27/09

_____
MARIA A. INGRAFFIA, Petitioner
DATED: 1/16/09

122-09

BOARD OF EDUCATION OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY,

PETITIONER,

V.

JAMES JANAKAT,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Board of Education of the Borough of East Rutherford filed a Petition of Appeal contending that James Janakat – a member of the Board of Education – had violated two sections of the New Jersey Administrative Code when he removed a student folder from one of the District's schools in May 2000 without permission. The Board sought a determination from the Commissioner as to whether Janakat's actions constituted a violation of *N.J.A.C.* 6:3-6:5 and 6:3-6.6, and as to appropriate sanctions.

The ALJ found that: credibility is not an issue as the facts in the matter were stipulated; respondent entered the school building to attend an auction and found school files left in the hallway unsecured and unattended; and the Board offered nothing to refute the respondent's contention that he removed one file for the purpose of showing it to the business administrator because he felt it was his responsibility as a Board member to ascertain why the files were left unattended and unsecured. The ALJ concluded that the respondent did not knowingly violate any code provisions, and dismissed the petition.

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 15, 2009

OAL DKT. NO. EDU 9203-00
AGENCY DKT. NO. 206-6/00

BOARD OF EDUCATION OF THE BOROUGH OF EAST RUTHERFORD, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
JAMES JANAKAT,	:	DECISION
RESPONDENT.	:	

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

Upon full consideration, the Commissioner concurs with the Administrative Law Judge that summary decision is appropriately granted to respondent.

Accordingly, the recommended decision of the OAL is adopted – for the reasons stated therein – and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 4/15/09

Date of Mailing: 4/15/09

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

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDU 9203-00

AGENCY DKT. NO. 206-6/00

EAST RUTHERFORD BOARD OF EDUCATION,

Petitioner,

v.

JAMES JANAKAT,

Respondent.

Thomas Kobin, Esq., for petitioner (Chasen, Leyner, Bariso and Lamparello, attorneys)

Mark A. Wenczel, Esq., for respondent (Gaccione, Pamaco and Beck, attorneys)

Record Closed: September 9, 2002 Decided: March 18, 2009

BEFORE **JEFFREY A. GERSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In June 2000, the Board of Education of East Rutherford requested that the Commissioner of Education resolve a controversy that had risen between the Board

and James Janakat, a member of the Board of Education. The petition contended that Janakat, in removing a student folder from Lincoln School in East Rutherford, had violated two sections of the New Jersey Administrative Code.

On or about July 10, 2000, Janakat filed an Answer to the petition denying all of the pertinent allegations accept for the fact that he admitted that he was a Board of Education member of the Borough of East Rutherford.

The matter was listed for hearing on April 5, 2001, but was adjourned as a result of the unavailability of one of the attorneys.

Prior to the rescheduling of the matter, a request was made on or about July 16, 2001, to have a telephone conference because it was indicated that a resolution to the matter might be reached without the necessity of a hearing.

As a result of the telephone conference, it was agreed that a stipulation of facts would be submitted and that there would be a recommendation for withdrawal of the matter after the issuance of a letter of reprimand.

In March 2002, after a second telephone conference, Mr. Janakat submitted an affidavit covering his background and experience and another telephone conference was requested.

The file remained inactive for a significant time period since the undersigned, not having the legal authority to issue a letter of reprimand, was under the mistaken impression that the Board of Education would be issuing such a letter, at which time the petition would be withdrawn.

The file was mislabeled as resolved as a result of my misunderstanding of from where the letter of reprimand would be emanating from.

No contact with the Office of Administrative Law was initiated by any of the parties, and it was not until late 2008 that it was discovered that the latter had never been completed.

FACTS

Both petitioner, Board of Education of East Rutherford, and respondent, James Janakat stipulated to the following **FACTS**:

1. On Saturday, May 20, 2000, James Janakat, a member of the Board of Education, entered the Lincoln School on Vreeland Avenue in East Rutherford, in order to attend an auction that was held earlier that day on the lower floor of the school.
2. In its petition, petitioner alleged that respondent entered the building without any authority or permission at a time when no one was present in the school. However, Respondent intended to visit the school on May 20, 2000, in order to attend the auction and upon entering through the side door of the building believed the auction was still going on.
3. Petitioner alleged that respondent proceeded to remove school property including one student folder of student M.K. from the second floor of the school and attempted to leave the premises with said property.
4. Some time after entering the public building, respondent observed several boxes of what appeared to him at that time to be school files, which appeared to have been left in the hallway of the school unsecured and unlabelled. Respondent proceeded to bring one sample folder to the attention of the school business administrator or superintendent of schools, and to discuss with them why the files were unattended and unsecured.
5. Respondent believed it was within his duties as a trustee of the Board of Education to bring to the attention of the School District administration that files had been left unsecured in a hallway, on a day in which the public would be circulating in the building for a public event.

6. Respondent did not leave the school grounds with the property, but rather, same was taken by Special Officer Sciandra of the East Rutherford Police Department.
7. Petitioner alleged that the actions of respondent constituted a Public Records Violation pursuant to N.J.A.C. 6:3-6.5 and N.J.A.C. 6:3-6.6.
8. Respondent, however, alleges that he believed that he acted in good faith when he observed certain records had been left unlocked, unsecured, and unlabelled, and as a trustee of the School District, believed he could merely bring same to the attention of School District personnel. Consequently, James Janakat removed the file, but he did not know at that time what type of documents the folder contained, as there was no sign on the files indicating that they were confidential materials.
9. Respondent further alleges that he believes that the individual identified by petitioner as the individual whose file was at issue has not been a student of the school district for approximately twenty years and that the files were being discarded on May 20, 2000. As a result, respondent believes the files were not confidential and he did not violate the Public Records laws.

THE LAW

N.J.A.C. 6:3-6.5 provides in pertinent part:

> A District board of education, in order to fulfill its legal responsibility as a board, has access through the Chief School Administrator or his or her designee to information contained in a pupil's record.

N.J.A.C. 6:3-6.6 provides in pertinent part:

> The Chief School Administrator or his or her designee shall be present during the period of inspection [of a pupil's record] to provide interpretation of the records where necessary to prevent their alternation, damage or loss.

DISCUSSION

On the date in question, Janakat entered the school building in order to attend an auction that was being conducted therein and found school files left in a hallway unsecured and unlabelled. Janakat alleges, and the Board offered nothing to refute the contention, that he removed one file for the purpose of showing it to the business administrator. Janakat also alleges that the file was that of a student who attended the school district approximately twenty-years earlier and that Janakat was under the impression that the files were being discarded.

Credibility is not in issue since the facts are stipulated. Although aspects of the stipulated facts are punctuated with terms such as "alleged" and "believed" since the burden of proof by a preponderance of the evidence is on the petitioner, the only conclusion that can be reached is that Janakat did not knowingly violate any Code provisions. The files left unattended and unlabelled in a hallway of the school lend credence to the idea that these files were in the process of being discarded.

Although Janakat may very well have been better served by not bringing a sample of the files apparently discarded to anybody's attention but rather to just notify someone of what appears to be a rather casual treatment of such files, the stipulated facts and the burden of proof placed on the petitioner leave the Board's contention unsubstantiated.

ORDER

The petition alleging violation of the Administrative Code by James Janakat is hereby **DISMISSED**.

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

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

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

March 18, 2009

DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 3/18/09

Date E-mailed to Parties: 3/18/09

sej

123-09

SCHOOL ETHICS COMMISSION DKT. NO. C13-07
AGENCY DOCKET NO. 14-11/08A

STEPHEN BROWN, CAROL LISA AND GLENN GARRISON,	
PETITIONERS,	
V.	COMMISSIONER OF EDUCATION
DAVID MATTHEWS, BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	DECISION
RESPONDENT.	

Decision issued by the School Ethics Commission, October 28, 2008

For the Respondent-Appellant, Schwartz, Simon, Edelstein, Celso and Kessler, LLC (Marc H. Zitomer, Esq.)

For the Complainants-Respondents, Schenck, Price, Smith & King, LLP (Sidney A. Sayovitz, Esq.)

Upon a comprehensive consideration of the record and the parties' submissions on appeal, and cognizant of the applicable standard of review in this matter,[1] the Commissioner affirms the decision of the School Ethics Commission – for the reasons expressed therein – that the appellant violated *N.J.S.A.* 18A:12-24.1, Code of Ethics for School Board Members, (d) when he attended the January 4, 2007 meeting with Bergen Tech without Board authorization, (e) as a consequence of his interactions with respect to Ms. Mullins; and (i) as a result of his refusal to cooperate

[1] "In determining appeals from decisions of ...the School Ethics Commission..., the Commissioner shall ascertain whether the decision is supported by sufficient credible evidence in the record and shall not disturb the decision unless the appellant has demonstrated that the ...Commission acted in a manner that was arbitrary, capricious or contrary to law." *N.J.A.C.* 6A:4-4.1(a)

with affirmative action officer Ms. Finn-Bruce's investigation and his making statements of an offensive nature to her. The Commissioner, additionally, adopts the recommendation of the School Ethics Commission – for the reasons stated in its decision – that the appropriate sanction under the circumstances is a censure.

IT IS SO ORDERED.*

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/14/09

Date of Mailing: 4/15/09

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

STEPHEN BROWN, CAROL LISA AND GLENN GARRISON	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	**Docket No. C13-07**
DAVID MATTHEWS *CITY OF ENGLEWOOD BOARD OF EDUCATION BERGEN COUNTY*	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed on March 26, 2007 by Stephen Brown and Glenn Garrison, members of the Board of Education of the City of Englewood ("Board") and Carol Lisa, former Superintendent of the Englewood Public School District ("District"), alleging that David Matthews, a former member of the Board, violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. The complainants specifically allege that the respondent violated N.J.S.A. 18A:12-24.1(a), (b), (c), (d), (e), (f), (g), (i) and (j) of the Code of Ethics for School Board Members.

Through his attorney, Marc Zitomer, Esquire, the respondent denied the allegations, filed a Motion to Dismiss in Lieu of an Answer and asked the Commission to impose sanctions against the complainants pursuant to N.J.S.A. 18A:12-29(e). The Commission notified the complainants that it received the respondent's Motion to Dismiss and gave them an opportunity to respond to the motion. On October 5, 2007, the Commission received a response to the Motion to Dismiss from the complainants, together with supporting affidavits.

The Commission considered the complaint, the Motion to Dismiss and the complainants' Brief in Opposition to the Motion at its October 30, 2007 meeting, at which time the Commission voted to grant the respondent's Motion to Dismiss only as to paragraphs 22, 35, 36, 37, 38, 39, 40, 41, 43, 44 and 58 of the complaint and further voted to find that the complaint was not frivolous. A decision on the Motion to Dismiss was adopted by the Commission on December 18, 2007. On January 15, 2008, the respondent filed an Answer to the remaining allegations in the complaint.

The matter was scheduled for a hearing on the merits of the complainants' claims at the Commission's meeting on April 23, 2008. However, pursuant to a request from the complainants' attorney, which was not opposed by the respondent's counsel, the matter was adjourned and rescheduled for the June 24, 2008 and August 26, 2008 meetings. The parties, their counsel and witnesses appeared, as set forth below. After presentation of the complainants' case on August 26, 2008, the Commission granted the respondent's Motion to Dismiss paragraphs six through eight, 33, 34, 45, 42 and 47 through 49 of the complaint and to table the remaining allegations pending receipt and review of post hearing documents, which were submitted by the parties on September 15, 2008. At the September 23, 2008 meeting, the

Commission found that the respondent violated N.J.S.A. 18A:12-24.1(d), (e) and (i) and the Commission recommended a penalty of censure.

THE PLEADINGS[1]

The complainants initially contend that the respondent twice improperly voted on a contract involving the JCC Thurnauer School of Music providing an after-school program to students in the District's elementary schools. The complainants allege that on September 21, 2006 and December 21, 2006, resolutions involving contracts in the amounts of $25,984 and $38,976, respectively, were presented to the Board and the respondent participated in the discussions of the resolution and voted on the same while he was a duly appointed member of Board of Trustees for the JCC Thurnauer School of Music. The complainants assert that the respondent should have abstained from participating in these discussions and voting on the contracts. (Complaint at paragraphs 6-8).

The complainants explain that, in November 2006, the Board considered the possible return of Susan Mullins, the Deputy Superintendent, to the Board of Education of the Vocational Schools in Bergen County ("Bergen Tech"). Ms. Mullins had been providing administrative services in the District pursuant to an Interlocal Services Agreement between the Board and Bergen Tech. However, a subsequent court-ordered injunction barred the Board from making any alteration to the Interlocal Services Agreement, absent a petition to the Commissioner of Education; consequently, the Board continued to pay Ms. Mullins per the agreement and instructed Ms. Lisa to "delegate special assignments to Ms. Mullins and oversee her work." (Id. at paragraph 9-12) The complainants also state that the Board had decided not to retain the services of another Bergen Tech administrator, Ellen Conlon, Director of Curriculum and Instruction, who was providing services to the District pursuant to an Interlocal Services Agreement.

The Board decided to send a delegation to speak with the Bergen Tech Superintendent for the purposes of negotiating an amicable resolution to the Interlocal Services Agreement. (Id. at paragraph 13). In this connection, the complainants contend:

- At the December 28, 2006 Board meeting, a delegation of Board members was selected to attend the meeting with the Bergen Tech Superintendent on January 4, 2007; respondent was not selected to attend. (Id. at paragraphs 14, 15)

- Without Board knowledge or approval, and prior to the January 4th meeting, the respondent "took it upon himself to contact Bergen Tech's Superintendent on numerous occasions to discuss the terms and conditions of terminating the Interlocal Services Agreement, as well as returning Mullins to Bergen Tech." (Id. at paragraph 16)

- Respondent appeared at the meeting on January 4, 2007. When challenged about his appearance, he responded that the Board President does not control the Board and he would not be a "second class Board member." The Board delegation, according to the

[1] The allegations listed do not include those that were dismissed by the Commission at its meeting on October 30, 2007.

complainants, was forced to allow the respondent to remain at the meeting. (Id. at paragraphs 17-20)

- Respondent participated in the meeting, despite the objection of the Board's delegation and in direct defiance of the Board's unanimous decision that he was not included in the delegation. (Id. at paragraph 21)

As to the respondent's interactions regarding Ms. Mullins and Ms. Conlon, the complainants also allege:

- Respondent went to Ms. Conlon's office unannounced on February 26, 2007 to discuss her status under the Interlocal Services Agreement. He did so without the knowledge or permission of Superintendent Lisa or prior notice and approval of the Board. (Id. at paragraph 23)

- Respondent unduly interfered with the performance of Ms. Conlon's duties since she was, at the time, engaged in the task of receiving and securing standardized test packets. (Id. at paragraph 24)

- Respondent stated to Ms. Conlon that "the buzz" was that she was a good worker and he asked her if she would like to stay in the District. Complainants allege that the respondent had no authority to offer Ms. Conlon continued employment and his private action compromised the Board's position regarding Ms. Conlon, causing her undue stress. (Id. at paragraph 25)

- Respondent made an unannounced visit to Ms. Mullin's office, on or about February 23, 2007, without prior permission or consent from Superintendent Lisa, and stated that it was embarrassing for the Board to have three assistant superintendents. The complainants contend that the respondent advised Ms. Mullins to simply return to Bergen Tech because the Board should no longer have to pay her salary. (Id. at paragraphs 26-27)

- Respondent told Ms. Mullins that it was undignified for her to work under such circumstances, that he would give her a good reference if she left the District, and that she should be embarrassed to continue to take money from the Board. The respondent then resorted to cajoling Ms. Mullins into leaving the Board, indicating that she would be given a party if she left. Respondent's actions were unknown to the Board. (Id. at paragraphs 29-32)

- Respondent communicated with Superintendent Lisa demanding that she authorize stopping payment to Ms. Mullins because the District was a "laughing stock" for having three assistant superintendents. (Id. at paragraph 33)

The complainants further allege that the respondent has acted inappropriately at public meetings and in private meetings and conferences. In this connection, the complainants contend:

- At the public meeting, the respondent gave the public attending the meeting a budget timeline used by a previous superintendent for an old budget for the sole and exclusive purpose of embarrassing the administration, since it was entirely inapplicable to the current budget process. (Id. at paragraph 42)

The complainants assert that the respondent has interacted inappropriately with other District personnel in the following instances:

- On numerous occasions, the respondent has entered the District's schools to discuss Board business and/or to request that District employees provide him with information, without Board knowledge or support, in an effort to second-guess the administration and/or micro-manage the District. (Id. at paragraph 45)

- On March 20, 2007, without Board knowledge or authorization, the respondent directed Richard Segall, Assistant Superintendent, to compile data for him regarding student enrollment in advanced placement classes. Respondent never communicated his request to Ms. Lisa before speaking with Mr. Segall and she did not approve that the work be performed. (Id. at paragraph 46)

- The respondent directed the former Business Administrator, Cheryl Balletto, to provide him with copies of all of Superintendent Lisa's requests for expense reimbursement for the preceding year, despite the fact that each request had already been disclosed to the Board in its monthly bill lists and was voted on for payment on a monthly basis. The complainants allege that respondent sought this information for the purpose of trying to "unearth some impropriety so as to discredit Superintendent Lisa." In compiling the data, the complainants claim that the business administrator was distracted from performing her job for no justifiable reason. (Id. at paragraph 47-49)

- Upon being interviewed by the District's affirmative action officer (AAO), Lisa Finn-Bruce, the respondent claimed that Ms. Finn-Bruce could not impartially perform her duties. Ms. Finn-Bruce sought intervention from the Board President. The respondent refused to cooperate with Ms. Finn-Bruce's investigation. As a result of a telephone conversation with the respondent on March 21, 2007, Ms. Finn-Bruce went to Superintendent Lisa's office in a state of hysteria. Ms. Finn-Bruce reported that the respondent "verbally attacked, yelled at her and was abusive toward her" when they spoke. Ms. Finn-Bruce immediately resigned as the AAO. (Id. at paragraphs 52-55)

- Respondent has caused other employees to fear for their safety and be afraid to come forward in fear of retaliation. (Id. at paragraph 56)

- Respondent becomes infuriated when he does not get his way and resorts to yelling, name calling, making intimidating remarks and/or broadcasting unsubstantiated allegations of wrong-doing. (Id. at paragraph 57)

In his Answer filed on January 15, 2008, the respondent admits that he voted on resolutions pertaining to the JCC Thornauer School on September 21, 2006 and

December 21, 2006. However, the respondent affirms that he was never a member of the Board of Trustees or Board of Directors of the JCC Thornauer School of Music. Rather, the respondent states that he is a member of the advisory committee of the Music School. The purpose of the committee, according to the respondent, is to promote music in the larger community. (Answer at pp. 1-2)

Respondent admits that at the Board's regular meeting on November 16, 2006, it passed a resolution accepting Ms. Mullins' letter of resignation from her position as Deputy Superintendent and endorsed her return to Bergen Tech. The respondent further admits that Bergen Tech objected to this action and sought judicial intervention. The respondent admits that the Board decided to limit Ms. Mullins' presence in the District and charged Ms. Lisa with delegating special assignments to her. The respondent denies that the Board engaged in a substantive discussion about Ms. Conlon's return to the Bergen Tech, although the Board discussed providing notice to Bergen Tech of its intent to terminate the contract effective July 1, 2007. The respondent also admits that the Board decided that it would send a delegation to speak to the Bergen Tech Superintendent for purposes of negotiating an amicable resolution to the agreement. (Id. at pp. 3-5)

The respondent denies that the Board decided that only three Board members would attend the meeting with the Bergen Tech Superintendent. Rather, the respondent avows that, at its meeting on December 21, 2006, the Board decided that four members would attend the meeting: President Stephen Brown, Vice President Glenn Garrison, Shirley Smith and himself. (Id. at pp. 5-6)

The respondent admits that the meeting was scheduled for January 4, 2007 and affirms that on the day of the meeting, Stephen Brown contacted him two hours before the scheduled start of the meeting and left him a voicemail message that he should not attend the meeting. The respondent maintains that Mr. Brown had no authority to do so since the Board had approved his attendance at the meeting. As a result of Mr. Brown's message, the respondent contacted his New Jersey School Board's Association (NJSBA) representative who advised him that if the Board had decided that the respondent was part of the delegation, he should attend the meeting. The respondent denies that he discussed any terms and conditions of terminating the agreement or returning Ms. Mullins to the Bergen Tech with Mr. Aloia prior to the January 4th meeting, which he admits that he attended, although he denies stating that he would not be treated as a second class citizen. (Id. at pp. 6-7)

The respondent admits speaking to Ms. Conlon, but does not recall the date. He denies discussing her status under the agreement and states that his sole purpose for speaking with her was to express his condolences regarding the recent passing of her mother. The respondent denies that he "unduly interfered" with Ms. Conlon's duties on that date, as he was only there for about 10 minutes and she never asked him to leave. According to the respondent, Ms. Conlon expressed her appreciation for his sentiments and condolences. The respondent admits that, during the conversation, he told her that she was a good employee, although he denies asking Ms. Conlon if she wanted to stay in the District and he denies offering her employment. The respondent maintains that at the time of this conversation, he did not know that Ms. Conlon had

expressed her intention to return to Bergen Tech, since he does not recall that the matter was discussed with the Board during any meeting he attended. (Id. at pp. 5, 9-10)

Respondent admits stopping by the office of Ms. Mullins without an appointment some time in February 2007, as he was at the Board office for another reason and Ms. Mullins invited him into her office when she saw him. The respondent asserts that Ms. Mullins was visibly upset and he told her that if he were her, he would not go through the humiliation associated with the matter and he would simply return to Bergen Tech, where she is a tenured employee. In this connection, the respondent asserts that his comments were suggestions and not directives. He admits telling Ms. Mullins that he believed it was embarrassing that the Board had three assistant superintendents and further admits that he asked her why she was subjecting herself to this kind of stress. The respondent admits telling Ms. Mullins that he would provide a reference for her, after she initiated the conversation. The respondent estimates their conversation lasted about 15 minutes. The respondent denies that he told the Superintendent to stop paying Ms. Mullins, although he admits that he informed the Board at a meeting that it should consider stopping payment to Ms. Mullins because she was not properly certified to hold her position. (Id. at pp. 11-14)

As to paragraph 42 of the complaint, the respondent admits to having disseminated a budget timeline from another school district at a public meeting; he denies that this was a budget timeline used by a previous superintendent for an "old budget." He asserts that he disseminated the timeline to illustrate that the preliminary budget did not have to be presented to the Board for the first time in March, but could have been presented earlier to allow for more consideration. (Id. at p. 17)

As to the complainants' allegation at paragraph 45 of the complaint that on "numerous occasions" he entered the schools to discuss Board business or request that employees provide him with information, the respondent asserts that this allegation offers no dates and is therefore, vague and speculative. (Ibid.)

The respondent admits to requesting that then Assistant Superintendent Richard Segall provide the Board with the number of students enrolled in each Advanced Placement (AP) course and specifically, the number of students from the regular high school who were enrolled in these courses. (Ibid.)

The respondent admits to requesting that the Business Administrator provide him with copies of the Superintendent's requests for reimbursements over the past year because he wanted to ascertain whether the Superintendent was being reimbursed large sums of money, as he had heard from another Board member. The respondent maintains that this information, however, is public record and he had the right to request it. The respondent denies that there was anything unethical in this regard and further denies that in making the request, he distracted the Business Administrator from performing a more critical task. (Id. at pp. 18-19)

The respondent admits that an affirmative action complaint was filed with Ms. Finn-Bruce and that he was told the complaint was filed by Superintendent Lisa. Ms. Finn-Bruce informed the respondent that the complaint alleged a hostile work environment. The respondent

admits that Ms. Finn-Bruce requested to meet with him to discuss the complaint, but that he informed her that he would not meet with her until he received a copy of the complaint. Because Ms. Finn-Bruce did not provide a copy of the complaint, he did not meet with her. The respondent denies that he became argumentative with Ms. Finn-Bruce and asserts that, to the contrary, she was argumentative and hostile toward him. The respondent asserts that Ms. Finn-Bruce called him at home and on his mobile phone at least eight times to discuss the matter over a two week period. The respondent contends that Ms. Finn-Bruce spoke to numerous people in the District about the matter before even contacting him. The respondent insisted on written proof from the Department of Education that Ms. Finn-Bruce had the authority to investigate him. The respondent admits that he questioned whether Ms. Finn-Bruce could impartially perform the investigation since she reported to Ms. Lisa. (Id. at pp. 20-21)

The respondent admits to speaking with Ms. Finn-Bruce on March 21, 2007, at which time he again requested a copy of the complaint, which, according to the respondent, seemed to agitate Ms. Finn-Bruce. The respondent contends that although Ms. Finn-Bruce promised on several occasions to provide the complaint by fax or by courier, she never did so. The respondent denies that he was abusive toward Ms. Finn-Bruce. He admits telling her that he refused to be lynched. (Id. at p. 22)

The respondent denies that he has caused employees to fear for their safety as alleged in paragraph 56 and asserts that he has good reputation in the District. The respondent further denies the allegations in paragraph 57 that he becomes infuriated and resorts to name-calling and intimidation. (Id. at p. 23)

EVIDENCE

On June 24, 2008, the complainants, Carol Lisa, Stephen Brown and Glenn Garrison were present to give testimony. The respondent, David Matthews, was also present.

Ms. Lisa testified about her role and position in the district as the former Superintendent. She provided testimony regarding the Interlocal Services Agreement between Bergen Tech and Englewood. Ms. Lisa stated that respondent entered the schools approximately 61 times from 2005 to 2007; she also received phone calls and emails from the respondent. Ms. Lisa stated that the respondent made multiple requests to staff to provide him with information. She testified that the Board had no knowledge of the respondent's conduct.

Ms. Lisa testified that the respondent made requests for information on her reimbursements. She stated that the respondent's conduct showed a pattern of disregard, as evidenced by his visits to Susan Mullins and to Ellen Conlon and his interactions with Cheryl Balletto causing her to resign. She testified about an incident where the respondent came into her office and interrupted a meeting. After that incident, she testified that she filed an Affirmative Action complaint against the respondent because of his treatment of her and refused to she see him without an appointment. Ms. Lisa testified that the Board tried to advise the respondent about his disregard of Board policies.

On cross-examination, Ms. Lisa acknowledged that her reimbursements were public records. She further testified that the bill lists were not itemized. Ms. Lisa admitted that she was not present when the respondent met with Ms. Mullins and with the Affirmative Action Officer. She testified that she did not know the timelines relative to the Open Public Records Act. Ms. Lisa stated that she had one call with Mr. Aloia upon the death of former Superintendent Grecco. She also stated that Susan Mullins had discussions with Mr. Aloia.

Steven Brown was the Board President during the 2006-2007 school year. He testified that although the Board had entered into the Interlocal Services Agreement with Bergen Tech, the Board later recognized that it was facing a shortfall of $2.2 million and it needed to save money. The Board decided to return Ms. Mullins to Bergen Tech. Englewood's attempts to terminate the agreement, however, were halted by the court injunction that Bergen Tech obtained to stop the board from returning Ms. Mullins to Bergen Tech.

The following exhibits were introduced by Mr. Brown: C-1 is an Order to Show Cause with Temporary Restraints issued by the Superior Court, Bergen County; C-2 is the Board's Resolution adopted on November 18, 2006 accepting Ms. Mullins' request to be relieved of her position of Deputy Superintendent and endorsing her return to Bergen Tech; and C-3 is a copy of the minutes from a closed session on December 21, 2006 wherein the Board determined that Board members "SB, GG and SS" would meet with Bob Aloia, the Superintendent of Bergen Tech.

Mr. Brown testified that on January 4, 2007, the respondent showed up at the meeting at Bergen Tech, to everyone's surprise, notwithstanding that the Board's resolution of December 21, 2006 states he was not among the delegation. According to Mr. Brown, when asked what he was doing there, the respondent replied that he was not a second class citizen and he had the right to be there. The delegation proceeded to meet with Mr. Aloia, who informed them that they needed one year's notice to cancel the agreement. Mr. Brown testified that Mr. Aloia seemed to know what the Englewood delegation was about to propose and to be ready with a negative response to the proposal. Mr. Brown stated that the respondent acknowledged that he talked to Mr. Aloia at least once or twice per week. Mr. Brown also explained that it was his belief that information about Englewood's plans vis a vis the interlocal agreement was leaked to Mr. Aloia.

Mr. Brown testified that the district then made arrangements for Ms. Mullins to work from home and communicate with the Superintendent. He later received a call from Superintendent Lisa informing him that Ms. Mullins had come to her office saying that the respondent told her she needed to return to Bergen Tech and questioned whether the Board had changed its position. Mr. Brown confirmed that the Board had not changed its position. Mr. Brown stated that he was enraged both as an attorney and as Board president since speaking with Ms. Mullins might provide her with fodder for future litigation.

Mr. Brown testified as to a similar incident involving Ellen Conlon. After the January 4th meeting, Ms. Conlon informed Englewood that she would like to go back to Bergen Tech. Again, he received a call from the Superintendent informing him that the respondent went to Ms. Conlon's office and told her that she was a good employee and she should stay. The

Superintendent questioned whether the Board's direction had changed and Mr. Brown confirmed that it had not. Mr. Brown stated that the Board had not directed the respondent to go to Mullins and Conlon.

When asked about the affidavits submitted by Board members Kamar and Smith on behalf of the respondent, Mr. Brown said they did not tell the truth. He testified that it was clear from the Board's meeting who was to be part of the January 4th delegation. The Board did not achieve its goals as a result of that meeting because the $2.2 million gap remained.

Mr. Brown explained that Board members were annually advised about behavior and parameters of conduct and that at almost every meeting there was a discussion about an infraction by the respondent. The Superintendent, according to Mr. Brown, was repeatedly "putting out fires" in that she had to address the respondent's ongoing requests. Mr. Brown stated that the Board has policies about communication with school administrators, but when the respondent wanted it done, he would do it. He felt it was his right.

Glenn Garrison has been on the Board since 2004, and was vice president at the time of the events alleged in this complaint and is the current president. He testified that the Board had meetings to discuss the respondent's behavior; the first discussion was the day after he was elected. Mr. Garrison testified that the Superintendent made a "cry for help" due to the respondent's requests being burdensome on herself and her staff.

Mr. Garrison was present when the Bergen Tech delegation was chosen. The Board's attorney recommended a small delegation to discuss the agreement. Thus, the Board selected the President (Mr. Brown), the Vice President (Mr. Garrison) and Shirley Smith, who had been on the Board "since the beginning" of the agreement. Mr. Garrison testified that the delegation drove together to the meeting and the respondent walked up to them stating that he was not a second class citizen and no one tells him what to do. Mr. Garrison stated that Mr. Aloia seemed to know what the Board was going to say—that they wanted to get out of the contract in June 2007. He refused. The meeting, according to Mr. Garrison, was over in two minutes.

Mr. Garrison stated that he did not recall speaking to the respondent prior to the meeting. Mr. Garrison testified that Mr. Aloia had already worked out the personnel issues and was "well prepped." Mr. Garrison testified that because the respondent admitted to speaking with Mr. Aloia on a regular basis, "it doesn't smell right." Mr. Garrison stated that the minutes marked as Exhibit C-3 were approved.

Lisa Finn-Bruce provided testimony on August 26, 2008. She was the district's Affirmative Action Officer (AAO) from 2005 to 2007. She testified that her AAO activities were guided by the State's manual and training. As the AAO, Ms. Finn-Bruce received a complaint in January 2007 about the respondent filed by Ms. Lisa. The nature of the complaint, according to Ms. Finn-Bruce, was harassment and sexism. The complaint involved an allegation about the respondent, the work environment and language that he used. Ms. Finn-Bruce testified that she worked for Ms. Lisa and was asked to investigate the complaint. She interviewed Ms. Lisa and anyone who had heard the statements alleged to have been made by the respondent. Ms. Finn-Bruce explained that she then handed the matter over to "someone else who would decide

what to do." She also spoke with Lorraine Capezzuto, the secretary and Cheryl Balletto, who was the Business Administrator. Ms. Finn-Bruce stated that she also interviewed two other people who were in the office (outside the door) when the conversation which was the basis of the complaint took place.

Ms. Finn-Bruce explained that as the AAO, her job was to gather the facts. She stated that she just wrote down what people said and would present the information to Ms. Lisa and the Board. In this instance, she called the county office and was told she should hand over her notes to the Board President. Ms. Finn-Bruce testified that she attempted to meet with Mr. Matthews to get his side of the story. She stated that she called him in early March and asked to meet. She stated that she called him "a number of times," but he would not meet with her.

The witness identified Exhibit C-4, an unsigned letter dated March 19, 2007 from her to Mr. Matthews requesting a meeting. The witness identified Exhibit C-5, a signed letter dated March 19, 2007 from her to Superintendent Lisa stating that she has contacted Mr. Matthews on several occasions, but that he has not agreed to meet with her. Therein, Ms. Finn-Bruce states that she would like to recuse herself from the investigation.

Ms. Finn-Bruce testified that State and county officials told her that she had to interview Mr. Matthews. She could not simply mail him the complaint. Ms. Finn-Bruce stated that as a matter of procedure, she never shared the complaint until meeting with respondent. According to Ms. Finn-Bruce, when she spoke with Mr. Matthews on one occasion, he was very upset. It was very difficult to get a word in; he was yelling at her. She felt she had to contact state officials to obtain advice about how to proceed, which led to her writing the C-5 letter. When she spoke with Ms. O'Connor in the county office, she was told that she needed to meet with the respondent before handing over the matter to someone else.

Ms. Finn-Bruce testified that she had known the respondent and had been in social situations with him; they had common friends and he also came to her husband's funeral. She testified that Mr. Matthews told her that she "had the noose around his neck" and was "part of the lynch mob." In her 23 years of educational experience, Ms. Finn-Bruce affirmed that no one has ever spoken to her like that. She stated that she tried to speak with him to get his side of the story, but he continued to yell at her for about 10 minutes.

The witness identified Exhibit C-6, an unsigned letter dated March 21, 2007 from her to Ms. Lisa wherein she asks to resign her position as AAO as of that date. The witness identified Exhibit C-7, an unsigned letter dated April 12, 2007 from her to Ms. Lisa, wherein she submits the results of her investigation. The witness identified Exhibit C-8 as her investigation notes. Ms. Finn Bruce testified that does not know what ever happened with the investigation.

Ms. Finn-Bruce testified that she does not know what the board knew about the complaint; she stated that she did not say anything to them, although she spoke with Mr. Brown as the Board President. She stated that it was protocol not to hand over the complaint to the respondent. She would let respondents see the complaint when they met with her. In this case, Mr. Matthews never met with her and never heard about the contents of the complaint. Ms. Finn-

Bruce testified that her AAO duties were not full time and the Board appointed someone else to assume those duties after she resigned. There was no stipend for the AAO.

Ms. Finn-Bruce testified that she resigned on March 21. 2007. She acknowledged that the April 12, 2007 letter was "signed" as AAO, but said it was not accurate. Ms. Finn-Bruce also acknowledged that some letters were not signed. She stated that "It depends on who typed it." Ms. Finn-Bruce explained that C-4 and C-5 were written on the same day. As to the letter marked as C-5 which states that Mr. Matthews had requested a copy of the policy which would provide the district with the jurisdiction to investigate him as a board member, Ms. Finn-Bruce testified that she did not provide Mr. Matthews with the policy.

On cross-examination, Ms. Finn-Bruce testified that she followed procedure with respect to the conduct of her investigations as the AAO. She never handed over the complaint before meeting with the respondent. This procedure was used by the State in its manual.

Ms. Finn-Bruce testified that she did not report directly to Ms. Lisa, the complainant, and she was just gathering the evidence and not making a decision. She acknowledged that she knew Mr. Matthews socially, but she did not initially consider recusing herself. She stated that she maintained confidentiality and intended to be fair. She reiterated that she only had to write what he said. According to Ms. Finn-Bruce, the Board would make determinations.

Ms. Finn-Bruce stated that she tried calling Mr. Matthews two or three times and did speak with him, although he would not meet with her. According to Ms. Finn-Bruce, the "lynch mob" conversation took place on March 21, 2007. As to why she asked to be recused two days before that conversation, Ms. Finn-Bruce replied that she did so because Mr. Matthews would not meet with her.

Board member Stephen Brown was recalled as a witness. He testified that the Board was presented with the resignation of Ms. Finn-Bruce and a resolution hiring another person to take these duties. Mr. Brown testified that they knew there was an allegation from Ms. Lisa, but they did not know the substance. The Board got information that Ms. Finn-Bruce was asking to be removed because of an issue with Mr. Matthews. At that meeting, Mr. Matthews wanted evidence that Ms. Finn-Bruce really resigned. The April 12th letter was sent to all Board members because Mr. Matthews pushed for evidence that she actually resigned.

Mr. Matthews testified that he served on the Board from 1996 to 2008. He did not run in 2008. Mr. Matthews stated that there was never a complaint filed against him. He affirmed that he is familiar with the Code of Ethics for School Board Members; he has attended seven or eight conventions. He takes pride in being an ethical person. He served with four other superintendents and never had any problem with these people.

Mr. Matthews testified that the delegation to attend the Bergen Tech meeting was discussed by the Board. The Board wanted to end the Interlocal Services Agreement the following June 2007; he was in favor of ending the agreement. Mr. Matthews testified that the delegation was to be the board president, the vice president and another long-time member (Smith) and himself. Mr. Matthews testified that he is certain he was chosen to be among the

delegation and had phone records demonstrating that he called Mr. Garrison and Mr. Brown numerous times to discuss the matter.

Mr. Matthews testified that he had a conversation with Mr. Garrison about the January 4th meeting and Mr. Garrison never said he was not a part of the delegation. According to Mr. Matthews, Mr. Brown left him a voicemail that he was not to attend the meeting, so he called his NJSBA representative to ask if he should attend. The representative called him back and she said it was absolutely OK to attend, as long as there are not five board members. He arrived five minutes before the meeting occurred. Others arrived and they exchanged pleasantries. Mr. Brown asked, "Why are you here?" Mr. Matthews participated in the meeting. He stated that the Board's goal was ultimately achieved. Mr. Matthews testified he never discussed the Board's strategy with Mr. Aloia prior to the meeting. He acknowledged that he was friendly with Mr. Aloia when he was the Englewood School District's Business Administrator. Mr. Matthews testified that he never discussed returning Ms. Mullins to Bergen Tech.

As to the meeting with Ms. Conlon in paragraph 23 of the complaint, Mr. Matthews testified that he had gone to the Board office and someone told him that Ms. Conlon's mother had passed away; he did not go to the building to speak with her, but while there, expressed his condolences. They discussed her mother's funeral. He told Ms. Conlon he knew that she was leaving. He stated that he heard she was a good worker and was sorry to see her go. Mr. Matthews testified that they had just been told by the Superintendent that Ms. Conlon was going back to the Bergen Tech. Her salary had jumped $20,000 or $30,000. Mr. Matthews testified that the length of the conversation was five to seven minutes. According to Mr. Matthews, Ms. Conlon welcomed people to stop by her office to discuss curriculum issues. The conversation did not seem to upset her. Ms. Conlon thanked Mr. Matthews for stopping by to express his condolences. Mr. Matthews testified that he does not recall using the word "buzz," but he mentioned that he had heard she was a good worker. Mr. Matthews stated if he needs the Board president to express condolences, then he missed something in training.

Mr. Matthews testified that Ms. Mullins was the assistant superintendent. He went to the Board office to get a document dealing with Board business and Ms. Mullins asked him to come to her office. Mr. Matthews testified that they had a friendly relationship; they had gone to lunch together and would discuss educational issues. While in her office, Mr. Matthews testified that they chatted a couple minutes. Ms. Mullins appeared to be upset because the Board wanted her to leave; there was a controversy about her salary which was about $180,000.

Mr. Matthews acknowledged that he told Ms. Mullins that it was embarrassing that there were three assistant superintendents in a district that had about 2,700 students. However, he did not direct that she return to Bergen Tech. Ms. Mullins was upset about her treatment by the Board; she was almost near tears and she felt she could speak to him about it. He asked her, "Why are you putting yourself through this?" Mr. Matthews testified that he said nothing whatsoever about the salary, although he did say there was "no way we could justify having three assistant superintendents." In her affidavit, Ms. Mullins mentioned a letter of reference. Mr. Matthews testified that the letter of reference arose in connection with an opening for a superintendent in the Montclair School District. He asked whether Ms. Mullins was interested in the Montclair position, but this did not occur on the day in question. Mr. Matthews testified that

it was a tradition that the Board gives its "top officials" a going away dinner. He mentioned that she could be a part of that.

As to conversation with Mr. Segall in paragraph 46 of the complaint, Mr. Matthews testified that he was a member of the Academic Affairs Committee which dealt with improving academic programs. Mr. Segall was the district's liaison for that committee. The Board would pay for students to take the advanced placement (AP) exam. Mr. Matthews testified that he requested a breakdown showing how many academy students and how many regular high school students were taking AP courses. He stated that when he brought it up at the committee meeting, the head of the committee did not object. According to Mr. Matthews, Mr. Segall said he would "run it past the Superintendent." Mr. Matthews acknowledged that the information was not requested through the Superintendent. He believed that the district did not want this information to be public. Mr. Segall told him that the Superintendent did not approve the request. Months went by; ultimately Mr. Matthews got the data by making an OPRA request.

On the issue of the complaint made to the AAO, Mr. Matthews testified that Ms. Finn-Bruce called him and told him that a complaint was filed regarding a hostile work environment. The first he heard about "sexism" was today. Ms. Finn-Bruce never mentioned who filed the complaint until well into the conversation. When he was told it was the Superintendent who filed the complaint, he asked for a copy and Ms. Finn-Bruce agreed. Ms. Finn-Bruce said that she would give him the complaint when he came in.

Mr. Matthews testified that he questioned how he could create a hostile work environment when he did not work for the Board. He questioned the AAO's authority. Further, Mr. Matthews testified that he questioned Ms. Finn-Bruce about how she could be objective when she reported to the Superintendent. Mr. Matthews stated that it was not fair that she had already conducted the investigation and he would not come in until he was given a written copy of the complaint.

Mr. Matthews testified that when Ms. Finn-Bruce later called and asked why no appointment had been made, he again replied that he wanted to see the complaint and he again questioned her authority to investigate him as a board member and a private citizen. She then said she would fax him the charges. He asked for copy of the Board's policy that would provide it with the authority to investigate this matter. Mr. Matthews testified that he was never provided either the complaint or the policy. He believed that the Superintendent did not like to be questioned.

As to the document marked as Exhibit C-4, Mr. Matthews testified that the letter did not include his proper address and he never received the correspondence.

Mr. Matthews acknowledged that, after he had received five, six or seven calls from Ms. Finn-Bruce, he accused her of placing a noose around his neck. He told Ms. Finn-Bruce that she has become part of the lynch mob and that she was being used by people who have an agenda that has nothing to do with education. When asked about whether he raised his voice in the conversation with Ms. Finn-Bruce, Mr. Matthews stated that this was a matter of opinion. He acknowledged that he sometimes speaks loudly and if he raised his voice, it was not in a

disrespectful manner. Mr. Matthews testified that he was irritated and felt he was being railroaded.

Mr. Matthews could not account for why the Exhibit C-3 minutes do not indicate that he was selected for the delegation. He acknowledged that he probably did not read the minutes prior to approving them.

On cross-examination, Mr. Matthews was presented with a copy of an email (Exhibit C-9) dated January 2, 2007 from the Board's counsel to the Board confirming the January 4th meeting to discuss the Interlocal Services Agreement. Counsel therein confirms that Mr. Brown, Mr. Garrison and Ms. Smith would attend. Mr. Matthews testified that he does not recall receiving this email, although he acknowledged that his email address was on the document. He stated that he was not as diligent as he could be with personal emails. Mr. Matthews stated that the board attorney had no authority to tell him whether he should be at a meeting. Mr. Matthews stated that the email "means nothing to me."

Mr. Matthews acknowledged that in his discussion with the NJSBA representative, he did not state that the Board had decided he was not part of the delegation because this was not true. When questioned why he reached out to the NJSBA representative if he was sure that he was authorized to attend the meeting, Mr. Matthews replied that after receiving the call from Mr. Brown, he wanted to be sure he was doing the right thing.

In addition to the testimony and exhibits brought into evidence, as set forth above, the complainants submitted the following affidavits from the following people to support the allegations in the complaint:

- Stephen Brown, former Board President: attesting to the Interlocal Services Agreement, the Board's selection of a delegation to attend the Bergen Tech meeting, the meeting on January 4, 2007, and the Board's budget meeting in March 2007;

- Glenn Garrison, former Vice President: attesting to information about the JCC Thurnauer School of Music, the respondent's statements about discussions with Mr. Aloia, the Interlocal Services Agreement, the Board's selection of a delegation to attend the Bergen Tech meeting, the meeting on January 4, 2007 and the Board's budget meeting in March 2007;

- Carol Lisa, former Superintendent: attesting to the Interlocal Services Agreement, the respondent's regular visits and requests, the Board's budget meeting in March 2007, and respondent's intimidation of her staff;

- Susan Mullins, former Assistant Superintendent: attesting to a conversation with the respondent on or about February 23, 2007 in her office wherein he advised her to immediately return to Bergen Tech;

- Ellen Conlon, former Director of Curriculum and Instruction: attesting to a conversation with the respondent on or about February 16, 2007 in her office wherein he asked if he could speak to her about staying in Englewood;

- Richard Segall, former Assistant Superintendent: attesting to how Board members were advised in early 2007 to make requests through the Superintendent and to the respondent's directive on March 20, 2007 to provide him with information on student enrollment in AP classes, although the request had not gone through the Superintendent; and

- Lisa Finn-Bruce, former Affirmative Action Officer: generally attesting to her investigation of the complaint filed by the Superintendent and her conversations with the respondent, one of which resulted in his yelling at her and accusing her of trying to lynch him.

In addition to his testimony and affidavit, the respondent submitted affidavits from Board members Sheik Kamar and Shirley Smith which attest that they were present at the Board's meeting on December 21, 2006 when the Board decided to select a delegation to meet with the Bergen Tech Superintendent. Both Kamar and Smith certify that the Board decided that the delegation would include: Stephen Brown, Glenn Garrison, Shirley Smith and David Matthews. Both Board members attest there is "no doubt" that the respondent was selected to be part of the delegation.

At the Commission's meeting on August 26, 2008, the respondent also submitted the affidavits of Robert J. Aloia and Cheryl Balletto:[2]

- Robert J. Aloia, Superintendent of Bergen Tech: attests that he recalls the meeting on January 4, 2007 and affirms that, prior to the meeting, he does not recall speaking with the respondent regarding any aspect of the Interlocal Services Agreement; and

- Cheryl Balletto, former Business Administrator: attests that in December 2006, the Board of Education selected a delegation to attend the Bergen Tech meeting and that the respondent was selected by a majority of the Board to be part of that delegation and also attests to providing the respondent with documentation pertaining to Superintendent Lisa's requests for reimbursement.

In the complainants' closing statement, they argued that the respondent's attendance at the January 4, 2007 meeting with Bergen Tech was not authorized by the Board and was a violation of N.J.S.A. 18A:12-24.1(e); that the respondent's interactions with Ellen Conlon, Susan

[2] Mr. Sayovitz objected to these documents going into the record inasmuch as the complainants had no prior notice of these documents and no opportunity to cross-examine witnesses who did not appear. The Commission considered the parties' arguments and decided to accept the two affidavits into the record and to accord the documents whatever weight it deemed appropriate, keeping in mind that there was no opportunity for the complainants to cross-examine, as with some of the affidavits submitted by the complainants.

Mullins and Richard Segall constitute a violation of N.J.S.A. 18A:12-24.1(d) as he was administering the schools; and that the respondent's refusal to cooperate with the district's Affirmative Action Officer's (AAO) investigation and his tirade against the AAO constitute a violation of N.J.S.A. 18A:12-24.1(i).[3] The respondent maintained in his closing statement that he has been wrongly and maliciously accused of violating the Code of Ethics for School Board Members and that the complainants have failed to sustain their burden of proof.

MOTION TO DISMISS

Pursuant to N.J.A.C. 6A:28-6.9(c), upon completion of complainants' case, and prior to the respondent's testimony, as set forth above, the respondent moved to dismiss the allegations set forth below.[4] After hearing arguments from counsel, the Commission asked the parties to leave the room so that it could deliberate. It is the complainants' burden to factually establish violation(s) of the Code of Ethics for School Board Members. The Commission granted the respondent's Motion to Dismiss paragraphs six through eight, 33, 34, 42, 45 and 47 through 49 of the complaint, as summarized below.

JCC Thurnauer School at paragraphs 6-8

The respondent contends that no testimony was offered with respect to these allegations and the complainants failed to meet their burden of proof. The Commission concurred, noting that the affidavits and other documents submitted by the complainants and the respondent do not, alone, establish a violation of the Code of Ethics for School Board members. The Commission granted the respondent's Motion to Dismiss paragraphs six through eight of the complaint.

Bergen Tech Meeting at paragraphs 9-21 of the complaint

The respondent asserts that there was conflicting evidence as to whether the respondent was selected by the Board to be part of the delegation to the Bergen Tech meeting on January 4, 2007 and the complainants had, therefore, not proven their case. Notwithstanding the apparently conflicting evidence, the Commission denied the respondent's Motion to Dismiss paragraphs 9-21 of the complaint prior to hearing testimony from the respondent.

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[3] At the School Ethics Commission's meeting on August 26, 2008, one of the Commissioners requested a copy of a document that Ms. Lisa Finn-Bruce referenced in her testimony, *infra*, as that which is published by the New Jersey Department of Education offering guidance to affirmative action officers in the conduct of their investigations. The Commission notified the complainants that although it may take official notice of public documents pursuant to N.J.A.C. 1:1-15.2, the document now available on the Department of Education's website entitled, An Introductory Manual for Affirmative Action Officers, http://www.state.nj.us/education/equity/aao.pdf, was revised as of July 2008, subsequent to the date of events in this matter. Accordingly, the complainants were provided an opportunity to submit a copy of the manual published by the New Jersey Department of Education for affirmative action officers that was used for the 2006-2007 school year to the record. By letter dated September 15, 2008, the complainants advised that they were unable to locate a copy of the manual for the Affirmative Action Officers that was in effect during the 2006-2007 school year.

[4] N.J.A.C. 6A:28-6.9(c) provides that all hearings shall be conducted in accordance with the rules of the OAL. Such rules permit a party to make an oral motion during a hearing and to state the grounds for the motion. N.J.A.C. 1:1-12.1(a)1 and 2.

The Conlon Conversation at paragraphs 23-25 of the complaint

The respondent asserted that, even assuming he engaged in a conversation with Ms. Conlon, as alleged, such facts do not establish a violation of the Code of Ethics for School Board Members. The Commission disagreed and denied the respondent's Motion to Dismiss paragraphs 23-25 of the complaint prior to hearing testimony from the respondent.

The Mullins Conversation at paragraphs 26-32 of the complaint

The respondent asserted that, even assuming he engaged in a conversation with Ms. Mullins, as alleged, such facts do not establish a violation of the Code of Ethics for School Board Members. The Commission disagreed and denied the respondent's Motion to Dismiss paragraphs 26-32 of the complaint prior to hearing testimony from the respondent.

Paragraphs 33, 34, 45, 59-68

The respondent asserts that these paragraphs do not include dates as required by N.J.A.C. 6A:28-6.3 and therefore, should be dismissed. The Commission concurred that paragraphs 33, 34 and 45 fail to meet the regulatory requirements of a complaint and are properly dismissed. However, the Commission found that paragraphs 59-68 of the complaint are essentially summaries of prior allegations and do not allege any new facts. Accordingly, the Commission denied the Motion to Dismiss paragraphs 59-69 of the complaint.

Paragraph 42 of the complaint

The respondent admits in his Answer to having disseminated a budget timeline from another school district at a public meeting, but asserts that this is not a violation of the Code of Ethics for School Board Members. The Commission concurred and granted the respondent's Motion to Dismiss paragraph 42 of the complaint.

The Segall request at paragraph 46 of the complaint

The respondent admits in his Answer to requesting student AP data from Mr. Segall, but asserts that such facts do not establish a violation of the Code of Ethics for School Board Members. The Commission disagreed and denied the respondent's Motion to Dismiss paragraph 46 of the complaint prior to hearing testimony from the respondent.

The Balletto request at paragraphs 47-49 of the complaint

The respondent admits in his Answer that he requested expense reimbursement information from the Business Administrator, but asserts that such information is a matter of public record and, therefore, there is no violation of the Code of Ethics for School Board Members. The Commission noted that Ms. Lisa acknowledged in her testimony that her reimbursements were a matter of public record. It, therefore, concurred with the respondent and granted the respondent's Motion to Dismiss paragraphs 47-49 of the complaint.

The Finn-Bruce allegations at paragraphs 50-57 of the complaint

The respondent asserted that the record showed that Ms. Finn-Bruce had a conflict as the AAO and as such, the complainants have, therefore, not proven the allegations in these paragraphs. The Commission disagreed and denied the respondent's Motion to Dismiss paragraphs 50-57 of the complaint prior to hearing testimony from the respondent.

FINDINGS OF FACT

As the trier of fact in this matter, the Commission had the opportunity to observe the demeanor of the witnesses and to judge their credibility. As such, the Commission found that, with the exception of the issue of the respondent's attendance at the Bergen Tech meeting on January 4, 2007, the material facts in this matter are not in dispute, and are set forth below. As for the Bergen Tech issue, the Commission found Board members Brown and Garrison to be credible witnesses who offered consistent testimony which was not weakened by cross-examination. The Commission therefore finds that the testimony of these witnesses, together with the document placed into evidence by Stephen Brown, Exhibit C-3, should be accorded greater weight than the affidavits which offer a contrary depiction of events as submitted by Board members Kamar and Smith, as well as former Board Secretary, Ms. Balletto. Thus, following are the facts based on the pleadings, testimony and documents on the record.

1. The respondent was a member of the Board from 1996 until 2008. He is no longer serving on the Board.

2. Stephen Brown was president of the Board during the 2006-2007 school year.

3. Glenn Garrison is the current president of the Board; he was Vice President during the 2006-2007 school year.

4. Carol Lisa is an employee of Bergen Tech who came to the Englewood School District on July 1, 2003 pursuant to an Interlocal Services Agreement between the District and Bergen Tech. During the time period of this complaint, Ms. Lisa was the Superintendent.

5. Cheryl Balletto was the former Board Secretary/Business Administrator. She is no longer employed in the District.

6. Susan Mullins is an employee of the Bergen Tech who came to the Englewood School District on January 1, 2002 pursuant to the Interlocal Services Agreement between the District and Bergen Tech. She left the District in the Spring of 2007; her title was Assistant Superintendent for Curriculum and Instruction.

7. At the Board's regular meeting on November 16, 2006, it passed a resolution accepting Ms. Mullins' letter of resignation from her position as Deputy Superintendent and endorsed her return to Bergen Tech. (Exhibit C-2)

8. Bergen Tech objected to this action and sought judicial intervention. A restraining order was issued in November 2006 enjoining the Board from taking any action to alter the Interlocal Services Agreement or reassign Ms. Mullins. (Exhibit C-1) The Board thereafter decided to limit Ms. Mullins' presence in the District and charged Ms. Lisa with delegating special assignments to her.

9. The Board decided that it would send a delegation to speak to the Bergen Tech Superintendent for purposes of negotiating an amicable resolution to the agreement. The meeting was scheduled for January 4, 2007.

10. Pursuant to a public meeting held on December 21, 2006, the Board's closed minutes state, in pertinent part "Inter-local Agreement – 1. Decision SB, GG, & SS to meet with Bob Aloia; 2. SM to work from home and periodically come in on an as needed basis." The minutes are signed by Cheryl Baletto, the former Business Administrator, although the resolution says "Board Attorney" under her name. The minutes state that the following Board members were present: Sheik Kamar, Miriam Lubam, Henry Pruitt III, David Matthews, Margaret Mora, Shirley Smith, Joan Meltzer, Glenn Garrison and Stephen Brown. The following persons were also listed in the minutes as present: Carol Lisa, Superintendent, Cheryl Balletto, Business Administrator/Board Secretary, Mark Tabakian, Board Attorney. (Exhibit C-3)

11. The respondent was not selected by the Board to attend the Bergen Tech meeting to be held on January 4, 2007.

12. An email dated January 2, 2007 from the Board's attorney states: "Happy New Year to all. This will confirm that the meeting to discuss the Interlocal with tech is confirmed for Jan. 4th at 4 pm. The Board's consensus at the meeting of Jan 21st [sic] is that the Bd Pres, Bd. Vice-Pres and Shirley Smith will represent the Board at the meeting. This meeting will be held at Bob Aloia's office in Paramus." (Exhibit C-9) The email is addressed to nine recipients, including the respondent.

13. On the day of the meeting, Stephen Brown contacted the respondent and left him a voicemail message that he should not attend the meeting. As a result of Mr. Brown's message, the respondent contacted his NJSBA representative who advised him that if the Board had decided that the respondent was part of the delegation, he should attend the meeting.

14. The respondent attended the meeting on January 4, 2007.

15. Ellen Conlon is an employee of the Bergen Tech who came to the Englewood School District in February 2002 pursuant to the Interlocal Services Agreement between the District and Bergen Tech. Her title was Director of Curriculum and Instruction.

16. The respondent had a conversation with Ms. Conlon on or about February 16, 2007 wherein he expressed his condolences regarding the recent passing of her mother and also told her that she was a good employee.

17. The respondent had a conversation with Ms. Mullins in February 2007. The respondent told her that if he were her, he would not go through the humiliation associated with the Interlocal Services Agreement and he would simply return to Bergen Tech, where she is a tenured employee. He told Ms. Mullins that he believed it was embarrassing that the Board had three assistant superintendents and asked her why she was subjecting herself to this kind of stress. He told her that he would provide her with a reference.

18. The respondent informed the Board at a meeting that it should consider stopping payment to Ms. Mullins because she was not properly certified for the position.

19. Richard Segall was the Assistant Superintendent and liaison to the Board's Academic Affairs Committee.

20. In early 2007, the Board was advised that any Board member requests to personnel working in the District must be directed through the Superintendent.

21. On March 20, 2007, the respondent requested that Richard Segall provide him with the number of students enrolled in each AP course and specifically, the number of students from the regular high school who were enrolled in these courses. The request was related to issues being handled by the committee and made through the committee, but not through the Superintendent.

22. Lisa-Finn Bruce was the former Affirmative Action Officer (AAO) for the District.

23. On or about January 2007, the Superintendent filed a complaint against the respondent alleging a hostile work environment. As the AAO, it was Ms. Finn-Bruce's responsibility to investigate complaints.

24. Ms. Finn-Bruce ultimately reported to Ms. Lisa as the Superintendent, although she did not report to her directly.

25. Ms. Finn-Bruce knew the respondent socially prior to receiving the complaint.

26. Upon receiving the complaint, Ms. Finn-Bruce did not initially recuse herself and, instead, attempted to conduct the investigation. The respondent questioned whether Ms. Finn-Bruce could impartially perform the investigation.

27. Ms. Finn-Bruce requested to meet with the respondent to discuss the complaint, but he informed her that he would not meet with her until he received a copy of the complaint.

28. It was the District's practice for Ms. Finn-Bruce to provide a copy of the complaint to a named respondent only upon meeting with that person.

29. The respondent never met with Ms. Finn-Bruce and Ms. Finn-Bruce did not provide the respondent with a copy of the complaint.

30. The respondent insisted that Ms. Finn-Bruce provide him with the authority to investigate this allegation, inasmuch as he was a private citizen and not a Board employee. Ms. Finn-Bruce did not provide the respondent with a copy of Board policy or any other authority.

31. Although Ms. Finn-Bruce produced a letter dated March 19, 2007 addressed to Mr. Matthews wherein she requested a meeting concerning the matter that was under investigation, (Exhibit C-4), the letter is not signed and the address for the respondent was incorrect.

32. By letter dated March 19, 2007, Ms. Finn-Bruce informed Superintendent Lisa that she has contacted Mr. Matthews on several occasions in an effort to meet with the respondent, but that he has not agreed to meet with her. Therein, Ms. Finn-Bruce also indicated that the respondent requested a copy of the District's policy which states that Board members are under its jurisdiction. She asks to be recused from the investigation "because; I can not function as the District Affirmative Action Officer working in this atmosphere." [sic] Ms. Finn-Bruce further states that she has informed county and State officials of the matter. (Exhibit C-5) The letter is signed.

33. The respondent spoke to Ms. Finn-Bruce on March 21, 2007, at which time he again requested a copy of the complaint. The conversation escalated as both parties were frustrated and Mr. Matthews had become irritated. The respondent used the "noose around the neck" phrase in this conversation; he raised his voice and told Ms. Finn-Bruce that he refused to be lynched.

34. Ms. Finn-Bruce was quite upset by the conversation with Mr. Matthews.

35. By letter dated March 21, 2007 addressed to Ms. Lisa, Ms. Finn-Bruce resigned her position as AAO. The letter is not signed.

36. By letter dated April 12, 2007 addressed to Superintendent Lisa, Ms. Finn-Bruce reiterated that she tried to complete the investigation that she received on January 12, 2007, that she contacted the respondent on several occasions, but he would not meet with her or submit a statement. Ms. Finn-Bruce submitted the results of her investigation, based on the witnesses she had interviewed. Ms. Finn-Bruce stated, "The hostile work environment statements cooberated by two witnesses substantiate the complaint. The accounts were consistent with gender-based speech, which facilitates a hostile work environment." (Exhibit C-7 and C-8) The letter is not signed, but includes the title, "Affirmative Action Officer."

ANALYSIS

The Commission initially notes that, pursuant to N.J.S.A. 18A:12-29, the complainant bears the burden of factually proving any violations of the Code of Ethics for School Board

Members. The relevant portions of the Code of Ethics for School Board Members are as follows:

> d. I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.
>
> e. I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.
>
> i. I will support and protect school personnel in proper performance of their duties. (N.J.S.A. 18A:12-24.1(d), (e) and (i))

Board's Delegation to Attend the Bergen Tech Meeting on January 4, 2007.

In the complainants' closing statement, they argue that the respondent's attendance at the January 4, 2007 meeting with Bergen Tech was not authorized by the Board and was a violation of N.J.S.A. 18A:12-24.1(e). In accordance with the facts set forth above, the Commission agrees that the respondent was not selected by the Board to be among the delegation of Board members to attend the Bergen Tech meeting on January 4, 2007.

Pursuant to N.J.A.C. 6A:28-7.1, "private action" is defined as action taken by a member of a district board of education or a member of a charter school board of trustees that is beyond the scope of the duties and responsibilities of a member of a district board of education or a member of a charter school board of trustees. Because the respondent was not selected by the Board to attend the meeting, his undisputed attendance constituted private action. Further, the Commission finds that private action of this kind may compromise the Board. Mr. Brown credibility testified that the District was experiencing a shortfall of $2.2 million and it needed to save money, which was the reason for seeking to terminate the Interlocal Services Agreement. The delegation that was selected by the Board to meet with Mr. Aloia was chosen *after* a restraining order was issued in November 2006 enjoining the Board from taking any action to alter the Interlocal Services Agreement or reassign Ms. Mullins. Thus, the Board was in a delicate negotiating position as it entered the meeting with Bergen Tech. The respondent's decision to attend the meeting outside of the express authority of the Board was, in this context, reckless behavior that could have compromised the Board's position. Accordingly, the Commission finds that the respondent violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members.

Conlon Conversation, Mullins Conversation and Segall Request

The complainants maintain that the respondent's interactions with Ellen Conlon, Susan Mullins and Richard Segall constitute a violation of N.J.S.A. 18A:12-24.1(d) as he was administering the schools. To "administer the schools" means that a member of the district board of education has become directly involved in activities or functions that are the responsibility of school personnel or the day to day administration of the school district.

N.J.A.C. 6A:28-7.1. While the Commission does not find that the respondent's interactions with Ms. Conlon and Mr. Segall, as set forth in the factual findings, rises to the level of administering the schools, the Commission finds that the complainants have established that the respondent's actions with respect to Ms. Mullins shows that he became directly involved in activities or functions that were the responsibility of school personnel.

Here, it is important to note once again that a restraining order was issued in November 2006 enjoining the Board from taking any action to alter the Interlocal Services Agreement or reassign Ms. Mullins. (Exhibit C-1) The Board thereafter decided to limit Ms. Mullins' presence in the District and charged Ms. Lisa with delegating special assignments to her. The Board's action in this regard was confirmed in its minutes of the December 21, 2006 meeting (Exhibit C-3).

Mr. Brown credibly testified that the district made arrangements for Ms. Mullins to work from home and to communicate with the Superintendent. It is irrelevant what the respondent personally thought about this arrangement; the district was under a court order with respect to this employee and the Board had taken a position about how it would abide by the order. By telling Ms. Mullins in February 2007 that if he were her, he would not go through the humiliation associated with the Interlocal Services Agreement and he would simply return to Bergen Tech, and that he believed it was embarrassing that the Board had three assistant superintendents, the respondent overstepped his duties as a board member and encroached on the oversight and management functions that were specifically assigned to the Superintendent. Indeed, Mr. Brown testified that he feared this conversation might provide Ms. Mullins with fodder for future litigation. Accordingly, the Commission finds that the respondent violated N.J.S.A. 18A:12-24.1(d) of the Code of Ethics for School Board Members.

AAO Complaint/Finn-Bruce

The complainants maintain that the respondent's refusal to cooperate with Ms. Finn-Bruce's Affirmative Action investigation and his tirade against her constitutes a violation of N.J.S.A. 18A:12-24.1(i). The Commission acknowledges that the respondent raised valid questions about Ms. Finn-Bruce's authority to conduct an investigation of him as a Board member, as well as her impartiality in the matter, given that she was a subordinate of Ms. Lisa's, the person who filed the complaint alleging a hostile working environment. The fact remains, however, that Ms. Finn-Bruce, as the Affirmative Action Officer, was charged with conducting the investigation; to the extent that the assignment was improper, this was not the fault of Ms. Finn-Bruce. The respondent's refusal to cooperate with Ms. Finn-Bruce merely engaged the two in a tug-of-war which accomplished nothing and frustrated this employee in the execution of her duties, to the point where she resigned as the AAO.

Furthermore, the respondent does not deny that he spoke to Ms. Finn-Bruce on March 21, 2007, at which time he again requested a copy of the complaint. As the Commission found, the conversation escalated as both parties were frustrated and Mr. Matthews had become irritated. The respondent admitted in testimony that he used the "noose around the neck" phrase in this conversation; he raised his voice and told Ms. Finn-Bruce that he refused to be lynched. Notwithstanding the frustration felt by the respondent, which was apparent in his testimony, the

Commission cannot disregard the offensive nature of the statements made to Ms. Finn-Bruce who was trying to do her job. Again, to the extent the respondent maintained that Ms. Finn-Bruce was improperly assigned this investigation, the respondent, as an experienced Board member, should have known that his recourse was not with Ms. Finn-Bruce and he should not have engaged her in combative and insulting dialogue to challenge her authority. Accordingly, the Commission finds that the respondent violated N.J.S.A. 18A:12-24.1(i) of the Code of Ethics for School Board Members.

DECISION

The Commission finds that the complainant has established that the respondent violated N.J.S.A. 18A:12-24.1(d), (e) and (i) of the Code of Ethics for School Board Members. The Commission dismisses the allegations that the respondent violated N.J.S.A. 18A:12-24.1(a), (b), (c), (f), (g), and (j), as set forth in the complaint.

PENALTY

The Commission recommends that the Commissioner of Education impose a penalty of censure. In so doing, the Commission finds instructive the matter entitled I/M/O Charles Fischer, C30-03. Therein, the Commission found the Board member in violation of N.J.S.A. 18A:12-24.1(e) and (i) when he contacted the complainant, a business office employee, at her home on Friday evening to obtain copies of reports which he said he needed for a meeting on Sunday. The Board member admitted to raising his voice at the complainant, albeit that he claimed it was in response to her yelling, rather than out of anger. The Commission determined that when the respondent requested that the complainant return to the office to obtain the information he was seeking, such conduct was private action that may compromise the Board. The Commission noted that if the respondent was dissatisfied with the complainant's responses, he should have hung up and called the Superintendent, rather than raise his voice at a Board employee. Moreover, the respondent's insistence that the complainant provide the reports, together with his request that she return to work to obtain them, were not supportive of her as an employee performing her duties.

Although in Fischer, the Commission recommended a penalty of reprimand, the Commission finds the facts in this matter to be more compelling, particularly since the respondent was also found to have violated N.J.S.A. 18A:12-24.1(d). Recently, the Commission recommended a penalty of censure where the Board member was found to have violated 18A:12-24.1(d) when she spoke with the district's facilities coordinator and later appeared at a Board Personnel meeting regarding a personnel action affecting her cousin by marriage. *See*, I/M/O Doris Graves, Pleasantville Bd. of Education, C47-05 (May 27, 2008); approved by Commissioner, July 10, 2008.

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.



Paul C. Garbarini
Chairperson

Mailing Date: October 28, 2008

Resolution Adopting Decision – C13-07

Whereas, the School Ethics Commission has considered the pleadings, testimony and all documentary evidence brought to the record; and

Whereas, at it meeting on September 23, 2008, the Commission found that the respondent violated N.J.S.A. 18A:12-24.1(d), (e) and (i) of the Code of Ethics for School Board Members; and

Whereas, the Commission dismissed the allegations that the respondent violated N.J.S.A. 18A:12-24.1(a), (b), (c), (f), (g), and (j), as set forth in the complaint;

Whereas, the Commission found that censure is the appropriate penalty to recommend in this matter;

Now Therefore Be It Resolved, that the Commission hereby adopts the proposed decision referenced as it decision in this matter and directs it staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at it public meeting on October 27, 2008.

Joanne Boyle, Executive Director

124-09

124-09

OAL DKT. NO. EDU 890-09
AGENCY DKT. NO. 54-3/09

NELS W. LUTHMAN, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, OCEAN COUNTY, WENDY SAXTON, BOARD SECRETARY, AND GUS KAKAVAS,	:	DECISION
RESPONDENTS.	:	

The record of this matter – deemed returned to the agency pursuant to *N.J.A.C.* 1:1-3.3 – and the Initial Decision on Application for Emergent Relief issued by the Office of Administrative Law (OAL) have been reviewed.

Upon review, the Commissioner concurs with the Administrative Law Judge that the fact of respondent Kakavas's wife's employment as a senior secretary at Toms River High School South does not, standing by itself alone, create a conflict of interest pursuant to *N.J.S.A.* 18A:12-2 so as to prohibit Kakavas from seeking election to the respondent Board of Education, or from serving if elected.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL denying petitioner's application for emergent relief and dismissing the petition of appeal is adopted as the final decision in this matter.[1]

IT IS SO ORDERED.[2]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/16/09

Date of Mailing: 4/16/09

[1] As was noted by the ALJ, the nature of this matter is such that the decision on emergent relief fully disposes of all issues in dispute between the parties, so that no further proceedings are necessary and the matter is appropriately dismissed.

[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
ON EMERGENT RELIEF
OAL DKT. NO. EDU 890-09
AGENCY DKT. NO. 54-3/09

NELS W. LUTHMAN, JR.,
Petitioner,
v.
BOARD OF EDUCATION OF TOMS RIVER REGIONAL SCHOOL DISTRICT, WENDY SAXTON, BOARD SECRETARY, OCEAN COUNTY AND GUS KAKAVAS,
Respondents

Nels W. Luthman, Jr., petitioner, pro se

Thomas E. Monahan, Esq., for respondents (Gilmore & Monahan, attorneys)

Record Closed: March 26, 2009 Decided: April 2, 2009

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of petitioner's challenge to the candidacy of Gus Kakavis to be a member of the Toms River Regional School Board, pursuant to N.J.S.A. 18A:12-2. The matter

was transmitted to the Office of Administrative Law on March 23, 2009 and oral argument was heard on March 26, 2009.

The facts are undisputed. Gus Kakavis is a candidate for school board in Toms River in the upcoming April 21, 2009 election. Robin Kakavas, his wife, is employed by the Board as a senior secretary at Toms River High School South. Petitioner believes that this employment gives Mr. Kakavis an "indirect" interest in a contract, which is a disqualification under N.J.S.A. 18A:12-2. Respondents argue that petitioner fails to distinguish between disqualifying conflicts, governed by N.J.S.A. 18A:12-2, and lesser entanglements that can be cured through the School Ethics Act, N.J.S.A. 18A: 12-21 et seq.; see *Bd. of Ed. of City of Sea Isle v. Kennedy*, 393 *N.J. Super*. 93 (App. Div. 2007).

Ethics questions are fact sensitive, but in this instance it appears a regulation has considered our situation. N.J.A.C. 6A:23A-6.2 conditions State aid on the establishment of certain anti-nepotism policies. Among these subsection (a)(2) prohibits any relative of a school board member from becoming employed in the district, but allows persons already so employed to continue though a relative is elected to the board. The Department could not take this position and also believe that the latter circumstance violates N.J.S.A. 18A: 12-2. Petitioner argues that the middle ground does not cure the problem. A Board member whose wife is employed by the District may relate differently to issues of compensation and benefits than would otherwise be the case, even when the contracts are negotiated broadly through collective bargaining. This is an "indirect" interest in a contract, is not tempered by the timing of the employment, and at the least creates an appearance question. Whatever the merits of this position, it is more restrictive than current policy.

Although this matter is in the OAL on an application for emergent relief under *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), there is no factual dispute and no plenary hearing is required to resolve the disagreement. Based on the foregoing, it is ordered that this petition be denied.

This decision 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 decision. If the Commissioner of the Department of Education does not adopt, modify or reject this decision 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.

DATE 4/2/07

SOLOMON A. METZGER, ALJ

/cad

#126-09

12609

OAL DKT. NO. EDU 6490-07
AGENCY DKT. NO. 200-7/07

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
W.E., ON BEHALF OF MINOR CHILD, J.E., AND BOARD OF EDUCATION OF THE TOWNSHIP OF RIVERSIDE, BURLINGTON COUNTY,	:	
RESPONDENTS.	:	

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

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/21/09
Date of Mailing: 4/21/09

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 06490-07

AGENCY DKT. NO. 200-7/07

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

Petitioner,

v.

W.E., PARENT/GUARDIAN OF MINOR J.E., AND BOARD OF EDUCATION OF THE TOWNSHIP OF RIVERSIDE, BURLINGTON COUNTY,

Respondent.

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

Roger A. Barbour, Esq., for respondent Riverside Township Board of Education (Parker McCay, attorneys)

Record Closed: March 16, 2009 Decided: March 26, 2009

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

This matter concerns a Petition of Appeal filed with the Commissioner of Education by Gloucester City Board of Education regarding a controversy over the

residency status of student J.E. and liability for payment of tuition and fees for education. The Commissioner of Education transmitted the matter to the Office of Administrative Law 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 agreed to a settlement of all issues in dispute and prepared a Stipulation of Settlement, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy.

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

I hereby **FILE** 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**, which by law is authorized to make a 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.

March 26, 2009
DATE

JEFF S. MASIN, ALJ

3-30-09
Date Received at Agency:

Mailed to Parties:

MAR 27 2009

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

RESOLUTION OF THE CITY OF GLOUCESTER BOARD OF EDUCATION APPROVING THE SETTLEMENT AGREEMENT BETWEEN THE CITY OF GLOUCESTER BOARD OF EDUCATION AND THE TOWNSHIP OF RIVERSIDE BOARD OF EDUCATION

WHEREAS, a Petition of Appeal was filed on behalf of the City of Gloucester Board of Education ("Gloucester ") against the Township of Riverside Board of Education ("Riverside") with the Commissioner of Education claiming that a certain pupil, J.E., was domiciled in the Township of Riverside and that accordingly Riverside was liable for payment of tuition and fees for J.E. to attend Brookfield Academy from January 2006 through June 2008; and,

WHEREAS, the Petition of Appeal was transmitted to the Office of Administrative Law for a hearing before the Honorable Jeffrey Masin, A.L.J.; and

WHEREAS, Gloucester and Riverside, through their respective counsel engaged in extensive settlement discussions in this matter; and

WHEREAS, as a result of those settlement discussions the parties have expressed a desire to settle the matter; and

WHEREAS, the Board believes it to be the best interest of the City of Gloucester School District to settle all disputes in accordance with the terms of this Agreement.

NOW, THEREFORE, BE IT RESOLVED ON THE 10th OF MARCH, 2009, BY THE CITY OF GLOUCESTER BOARD OF EDUCATION AS FOLLOWS:

1. The Settlement Agreement between the City of Gloucester Board of Education and the Township of Riverside Board of Education is hereby approved.

2. The Board of Education President is hereby authorized to execute the Settlement Agreement.

BARBOUR & BARBOUR, PA.
P.O. Box 345
10 North Chestnut Avenue
Maple Shade, New Jersey 08052
(609) 779-0888 Voice
(609) 779-0005 Facsimile
Attorneys for Respondent Riverside Township Board of Education

GLOUCESTER CITY BOE	State of New Jersey Office of Administrative Law
v.	OAL Docket No. EDUOS-06490-2007S
W.E. O/B/O J.E. & RIVERSIDE TWP. BOE	Agency Ref. No. 2007/07

SETTLEMENT AGREEMENT REGARDING J.E. TUITION DISPUTE

THIS AGREEMENT, made and entered by and between **The Gloucester City Board of Education**, hereinafter referred to as "**Petitioner**" and **The Riverside Township Board of Education**, hereinafter referred to as "**Respondent,**" is dated February 17, 2009.

WITNESSETH:

Whereas this matter was opened to the New Jersey Department of Education by means of a Petition of Appeal, which was subsequently transferred to the Office of Administrative Law;

Whereas in that Petition of Appeal, the Petitioner was seeking an Order requiring that Respondent be declared as the district of residence for J.E.; and

Whereas in that Petition of Appeal, the Petitioner was also seeking to have Respondent pay for the costs of J.E.'s education from the period of January 2006, through her graduation in June, 2008; and

Whereas, the Respondent and the Petitioner are both desirous of resolving their disputed in dispute without having to resort to further litigation;

Whereas the parties appeared before the Honorable Jeff S. Masin, P.A.L.J., on January 7, 2009, which was the date scheduled for the hearing of the matters in dispute;

Whereas the hearing was adjourned so that the parties could engage in further settlement discussions based upon developments with witnesses and anticipated testimony and availability, and with the acquisition of documentary evidence to support such settlement discussions, and ;

Whereas the attorneys for the parties reached this settlement under the guidance of the Administrative Law Judge, and after appearances and discussions by the parties and their counsel;

NOW, WHEREFORE, based on the foregoing, the settlement of this matter is memorialized as follows:

1. The total amount due to the Garfield Park Academy for educational services, regarding the costs of tuition, related services, and transportation for J.E. from the period of January 2006 through June 2008 shall be forty thousand ($40,000.00) dollars.

2. The total educational costs of forty thousand ($40,000.00) dollars for J.E. shall be paid by the parties as follows:

A. The total sum of twelve thousand, three hundred, thirty-three ($12,333.00) dollars shall be paid by the Respondent, Riverside.

B. The total sum of twenty-seven thousand, six hundred, sixty-seven ($27,667.00) dollars shall be paid by the Respondent, ~~Riverside.~~ Gloucester City

3. The parties agree that this settlement resolves all matters which are or could have been in dispute between them arising from or involving the instant matter.

Witness:

Margaret M. McConnell

Dated: ~~February~~ 3/10, 2009

For Petitioner: Gloucester City Board of Education

Louisa W. Llewellyn

By: _____
Frank P. Cavallo, Jr., Esq.

Witness:

Dated: February 25, 2009

For the Respondent: Riverside Township Board of Education

By: _____
Roger A. Barbour, Esq.

127-09

#127-09

OAL DKT. NO. EDU 11072-08
AGENCY DKT. NO. 220-7/08

PATRICE HUGHES,	:	
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 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. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 4/21/09

Date of Mailing: 4/21/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11072-08
AGENCY DKT. NO. 220-7/08

PATRICE HUGHES,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Timothy R. Smith, Esq., for petitioner (Timothy R. Smith & Associates, attorneys)

Karen A. Murray, Esq., for respondent (The Murray Law Firm, attorneys)

Record Closed: March 26, 2009 Decided: April 1, 2009

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

On or about July 28, 2008, petitioner Patrice Hughes filed a Petition of Appeal with the Commissioner of Education alleging that respondent Board of Education of the City of Elizabeth (the Board) is required to reimburse petitioner for certain legal fees and costs

pursuant to N.J.S.A. 18A:16-6.1. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on September 8, 2008, for determination as a contested case. A hearing was scheduled for February 23, 2008, which was adjourned at the parties' joint request to provide more time towards finalizing an amicable resolution. Subsequently, under letter dated March 24, 2009, counsel for the Board submitted the attached Settlement Agreement and General Release 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.

April 1, 2009
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: 4-6-09

Mailed to Parties:
Laura Sardiello
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 6 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

THE MURRAY LAW FIRM, LLC.
149 Avenue at the Common, Suite 201
Shrewsbury, New Jersey 07702
(732) 389-1010
Attorneys for Respondent, Elizabeth Board of Education

2011 MAR 25 A 8:25
STATE OF NEW JERSEY

PATRICE HUGHES **Petitioner,** **v.** **BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,** **Respondent.**	**STATE OF NEW JERSEY COMMISSIONER OF EDUCATION** **OAL DKT. NO. EDUOR 11072-2008** **AGENCY DKT. NO. 220-7/08** **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release is made by and between the Elizabeth Board of Education (the "Board") whose administrative offices are located at 500 North Broad Street, Elizabeth, New Jersey 07207 and the law offices of Timothy R. Smith & Associates, L.L.C. whose offices are locates at 76 South Orange Avenue, Suite 201, South Orange, New Jersey, 07079 for the New Jersey Education Association ("NJEA"), which incurred legal expenses on behalf of its member Patrice Hughes ("Hughes"). 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, the undersigned parties state:

WHEREAS, on May 25, 2007, Hughes was employed as a ~~bus driver~~ teacher PSE by the Board; and

WHEREAS, on that date, a Citizen Complaint was issued for certain acts alleged to have occurred while Hughes was in the employ of the Board. A copy of the Elizabeth Complaint No. S-2007-004400-2004 is attached hereto, (Exhibit 1); and

WHEREAS, on October 17, 2007, the Elizabeth Municipal Court dismissed the above-referenced Complaint against Hughes. A copy of the disposition reflecting said dismissal is attached hereto, (Exhibit 2)

WHEREAS, pursuant to N.J.S.A. 18A:16-6.1, Hughes's defense counsel sought reimbursement from the Board for attorney's fees and costs associated with her legal defense relative to the Elizabeth Complaint No. S-2007-004400-2004; 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 One Thousand Four Hundred Sixty Dollars and Thirty Two Cents ($1,460.32). The aforementioned amount represents full and complete indemnification of the attorney's fees and costs incurred by Hughes in relation to Elizabeth Complaint No. S-2007-004400-2004. A check for this amount shall be drawn to Timothy R. Smith & Associates L.L.C., and sent to their office at 76 South Orange Avenue, Suite 201, South Orange, New Jersey 07079.

2. For and in consideration of the Indemnification set forth in Paragraph One (1) above, Hughes and her heirs, executors, administrators, successors and assigns, hereby

forever release and discharge the Elizabeth Board of Education, its members, successors and assigns and all of its or their past or future members, officers, agents, employees, administrators, attorneys, fiduciaries, successors and assigns (whether acting as agents for the Board, its affiliates or its related entities or in their individual capacities) from any and all claims, demands, causes of action, fees and liabilities of any kind whatsoever (upon any legal or equitable theory, whether contractual, common-law, statutory, federal, state, local, or otherwise), whether known or unknown, which Hughes 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. S- 2007-004400-2004.

3. For and in consideration of the Indemnification set forth in Paragraph One (1) above, Hughes shall withdraw her Petition of Appeal, OAL Dkt. No. EDUOR 11072-2008N, Agency Dkt. No. 220-7/08, with prejudice, within seven (7) business days after the Board approves the Settlement in this matter.

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 Agreement and General Release cannot be modified, the remaining provisions, terms, clauses, waivers and releases of claims and rights contained in this Agreement shall remain in full force and effect.

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. Hughes 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.

PATRICE HUGHES

Patrice Hughes

Dated: 2/20/09

ELIZABETH BOARD OF EDUCATION

Harold E. Kennedy, Jr.
Board Secretary/School Business Administrator

Dated: 3/23/2009

TIMOTHY R. SMITH & ASSOCIATES, L.L.C.

Timothy R. Smith, Esquire
Attorney for Patrice Hughes

Dated: 4/8/09

THE MURRAY LAW FIRM, LLC

Karen A. Murray, Esquire
Attorney for the Elizabeth Board of Education

Dated: 3/24/09

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Patrice Hughes have discussed a resolution of Office of Administrative Law case (OAL Docket No. EDUOR 11072-2008N; Agency Reference # 220-7/08); 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 which shall be filed in the Office of the School Business Administrator/Board Secretary, provided that it is fully signed by all parties.

Elizabeth, New Jersey
February 19, 2009

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128-09

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

SYNOPSIS

Petitioner, a retired tenured teacher, contends that the Board violated *N.J.S.A.* 18A:30-2.1 when it charged her sick days for time lost due to a work-related injury. The Board filed a motion for summary decision, arguing that petitioner's appeal is time-barred by the 90-day limitation period of *N.J.A.C.* 6A:3-1.3(i)1.

The ALJ found that: the facts in this matter are not in dispute; petitioner filed a petition with the Division of Workers' Compensation, which settled on April 25, 2008; petitioner received the Workers' Compensation settlement order from her attorney on June 9, 2008; petitioner thought she had 90 days from that date to file a petition with the Commissioner; and petitioner's argument that there is a Constitutional defect in the regulation since it disregards the issue of notice to a petitioner is without merit. The ALJ concluded that the instant appeal was untimely filed, and dismissed the petition.

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.

April 21, 2009

128-09

OAL DKT. NO. EDU 11470-08
AGENCY DKT. NO. 254-8/08

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

The record of this matter, the Initial Decision and the exceptions thereto have been reviewed. For the reasons set forth therein, the Commissioner adopts the Initial Decision of the Office of Administrative Law (OAL) as the final decision in this case.

In her exceptions, petitioner maintains that *N.J.A.C.* 6A:3-1.3(i)(1) – the regulation governing the deadline for school employee appeals to the Commissioner for the restoration of sick days – must control the instant controversy. Under that provision, a petitioner is required to file an appeal to the Commissioner within 90 days of the order deciding or settling his/her workers' compensation claim. In this case, the order was dated April 25, 2008. Ninety days from that date was July 24, 2008, but petitioner filed her appeal on August 28, 2008.

Petitioner's exceptions repeat, *verbatim*, the contentions in her brief opposing summary judgment below – *i.e.,* that the 90 day limitations period should be relaxed in her case because she allegedly did not receive a copy of the above referenced April 25, 2008 settlement order until June 9, 2008, on which day her lawyer sent her a copy of the order with apologies for

neglecting to forward it sooner.[1] The Commissioner is constrained to agree with the Administrative Law Judge's (ALJ) rejection of that argument.

The delay in receiving the April 25, 2008 workers' compensation settlement order notwithstanding, petitioner still had 45 days from June 9, 2008 to institute an action before the Commissioner. Further, as the ALJ explained, petitioner did not consult with her lawyers to test her belief that she had 90 days from June 9, 2008 to file, and her unsubstantiated belief about the law cannot serve as an excuse for her tardy filing or grounds for relaxation of the regulatory 90-day deadline for instituting petitions.[2]

Finally, it is unnecessary to address petitioner's arguments concerning the absence of a notice provision in *N.J.A.C.* 6A:3-1.3(i)(1), since petitioner concededly had 45 days or more between her actual notice of the date of the April 25, 2008 settlement order and the filing deadline of July 24, 2008. Accordingly, for the reasons set forth in the Initial Decision, the petition is hereby dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 4/21/09

Date of Mailing: 4/21/09

[1] Respondent points out that petitioner was likely aware of the existence of the settlement order before June 9, 2008.
[2] Petitioner's delayed receipt of the workers' compensation settlement order is an issue between petitioner and her attorney.
[3] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11470-08
AGENCY DKT. NO. 254-8/08

BEVERLY GUSLER,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,
Respondent.

Mary J. Hammer, Esq., for petitioner (Bucceri & Pincus, attorneys)

Mark S. Tabenkin, Esq, for respondent (Paterson Public Schools)

Record Closed: February 17, 2009 Decided: March 16, 2009

BEFORE **JEFFREY A. GERSON,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Beverly Gusler was a tenured teaching staff member at the State Operated School District of Paterson until her retirement in January 2006.

On March 14, 2005, Gusler suffered a work related injury which resulted in her being absent from work.

Gusler contends that the State Operated School District of Paterson charged her sick days for time lost due to the work related injury in violation of N.J.S.A. 18A:30-2.1.

On or about August 19, 2008, Gusler filed a verified petition with the Commissioner of Education seeking reimbursement for the charged sick days.

The State Operated School District of Paterson filed a Motion for Summary Decision contending that Gusler's present action is barred by the 90 day limitation period of N.J.A.C. 6A:3-1.3(i)1.

FACTS

The facts in this matter are not in dispute. Gusler filed a petition with the Division of Worker's Compensation which settled on April 25, 2008. Although Ms. Gusler may not have received the Order on that date, she acknowledges receiving a copy of the Order on or about June 9, 2008. She did not however provide her attorney with a copy of the Order until August 5, 2008 which then led to Ms. Hammer filing this current petition with the Commissioner of Education on or about August 21, 2008.

According to the Certification filed by Ms. Gusler, she was under the mistaken impression that she had 90 days from the time she received a copy of the Order to file her petition with the Commissioner.

Gusler contends that she should not be penalized because the attorney who had represented her in the Worker's Compensation action did not send the Order of April 2008 to her in a timely fashion.

LAW

N.J.A.C. 6A:3-1.3(i) states as follows:

> 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 Supreme Court has noted that "the 90 day limitation period represents a reasonable procedural requirement. It provides finality in education matters." Kaprow v. Board of Education of Berkely Township 131 N.J. 572, 583 (1992) the Courts of New Jersey and the Commissioner of Education have strictly interpreted the 90 day limitation period to dismiss untimely actions. Riley v. Hunterdon Central High Board of Education 173 N.J. Super 109 (App. Div. 1980).

Gusler argues that she believes that she had 90 days from the receipt of the Order (June 9, 2008) and that there is a Constitutional defect in the regulation since it disregards the issue of notice to a petitioner.

DISCUSSION AND CONCLUSION

To waive the 90 day requirement for filing a petition in this matter would unnecessarily negate the purpose of the provision. Gusler concedes receiving the Worker's Compensation Order in June 2008 which would have given her until sometime in July 2008 to file her petitioner. Despite having two attorneys involved in this matter, one for the Worker's Compensation case and one for this petition, Gusler took responsibility upon herself of reaching a legal conclusion which is simply unsupportable in that she thought she had 90 days from when she actually received the Order from her Worker's Compensation attorney. To accept this rationale would be to allow a petitioner to unilaterally amend the 90 day filing requirement.

A mistake of law made by a layman does not give rise to a reason to disregard the plain language of the code provision. It is therefore **ORDERED** that the petition filed by Beverly Gusler seeking reinstatement of sick days 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 (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.

March 16, 2009

DATE

JEFFREY A. GERSON, ALJ

Date E-mailed to Agency: 3/16/09

Date E-mailed to Parties: 3/16/09

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

April 22, 2009

Joann and Gregory [redacted], *Pro Se*
[redacted]
Haddon Heights, NJ 08035

Kelly M. Estevam, Esq.
Capehart & Scatchard, P.A.
Laurel Corporate Center
8000 Midlantic Drive
Suite 300 South
Mount Laurel, NJ 08054

Dear Parties:

I have reviewed the petition and answer filed in the matter of *Joann and Gregory [redacted] v. Board of Education of the Borough of Haddon Heights, Camden County, and Eugene Greer,* Agency Dkt. No. 34-2/09, and, having done so, have determined to dismiss the appeal for failure to state a claim cognizable before the Commissioner of Education.

In their petition, Mr. and Mrs. Solly recount a series of events indicating their dissatisfaction with the manner in which the Haddon Heights Board of Education and its administrators responded to an incident involving a substitute teacher (Eugene Greer) and their son, who is a classified student receiving special education services. They ask that I remove Mr. Greer from teaching in the Haddon Heights School District and order that "appropriate steps be taken to insure that all staff and substitute teachers be properly trained in caring for and awareness of a child with special needs (IEP)."

The Board, in turn, responds that it fully investigated petitioners' claims and determined that Mr. Greer's removal was not warranted under the circumstances – a determination that represents a discretionary employment decision of the Board over which the Commissioner of Education has no jurisdiction. It also appends petitioners' letter to the director of the district's child study team, wherein petitioners' legal and educational position with respect to the incident in question is more explicitly set forth than in the petition of appeal.

Initially, with respect to the district's alleged failure to deal appropriately with Mr. Greer, I am constrained by the fact that, under New Jersey law, the hiring, evaluation, discipline, and retention of staff – including substitute teachers – rests with the local board of education rather than the State, and there is no basis on which the Commissioner of Education may become involved in penalizing a particular school employee outside the context of adjudicating tenure charges and increment withholding disputes, or reviewing penalties recommended by the School Ethics Commission for violation of the School Ethics Act. (Similarly, actions against an employee's certificate or credential must be taken by the State Board of Examiners.) Therefore, as to the Board's decision to retain Mr. Greer's services as a substitute teacher, there is no relief I can offer petitioners, and hence, no basis for further proceedings in this forum.

Moreover, it is clear from the record as a totality that petitioners' primary concern is their belief that the Board has ignored a staff member's inappropriate and unlawful use of physical management and restraint of their special education child, minimized allegations they deem to be very serious by inadequately investigating what actually occurred during the incident in question, and failed to ensure that all district staff are properly trained in appropriate methods of interaction with special needs children. Allegations of this type, however, arise under special education law – which provides for their investigation by the Department's Office of Special Education Programs pursuant to *N.J.A.C.* 6A:14-9.2 – and are consequently outside the jurisdictional purview of the Commissioner of Education. *N.J.A.C.* 6A:14-1.1 *et seq.*; *Bd. of Ed. of Lenape Reg. High Sch. District, Burlington County v. New Jersey State Department of Education, Office of Special Education Programs*, decided by the Commissioner March 16, 2006, affirmed by the State Board of Education, April 4, 2007, affirmed by the Superior Court, Appellate Division, 399 *N.J. Super.* 595, 606 (App. Div. 2008).

Accordingly, because petitioners have made no claim over which I have jurisdiction or upon which I may grant relief, I hereby decline to continue with contested case proceedings and dismiss the petition of appeal.*

Sincerely,

Lucille E. Davy
Commissioner

c: Executive County Superintendent
State Law Library

Mailed 4/23/09

4/22/09

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. Nothing herein is intended to preclude petitioners from filing a complaint pursuant to *N.J.A.C.* 6A:14-9.2.

#130-09

130-09

RUTH JULIA JONES,

PETITIONER,

V.

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

RESPONDENT,

AND

IN THE MATTER OF THE TENURE HEARING OF RUTH JULIA JONES, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner filed a claim in January 2008 alleging that the Board was violating her tenure rights by not allowing her to return to employment after her physician cleared her to return to work without restrictions effective September 4, 2007. The petitioner seeks reinstatement to a teaching position along with back pay and interest. The Board filed tenure charges against petitioner in May 2008, alleging incapacity for continued employment as a teacher. The two matters were consolidated at the request of the parties.

The ALJ found that: the Board has not demonstrated that the Ms. Jones is incapacitated from being a teacher in the Trenton School District; Jones has demonstrated that the District did violate her tenure rights by not reinstating her following receipt of the November 15, 2007 report of the Board's own independent medical examiner, which clearly found that Jones was capable of performing the duties of an elementary school teacher for students below the fifth grade; the Board had an obligation at that time to look for vacancies and to determine whether Jones had seniority to exercise bumping rights, and failed to do so. Accordingly, the ALJ concluded that Jones is able to return to work because the Board did not demonstrate that she is incapacitated to do so, and her tenure rights were violated when the Board failed to make any attempt to find an appropriate position for her once she was cleared to return to work. The ALJ ordered that Jones be allowed to return to work as a teacher in the District, and that she is entitled to back pay from November 15, 2007 to the present.

Upon independent and careful review of the record, the Commissioner adopted the Initial Decision as the final decision in this matter and ordered the Board to effectuate the order of the ALJ forthwith.

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 28, 2009

OAL DKT. NOS. EDU 2284-08 AND EDU 4721-08 (CONSOLIDATED)
AGENCY DKT. NOS. 39-1/08 AND 155-5/08

RUTH JULIA JONES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
IN THE MATTER OF THE TENURE HEARING OF RUTH JULIA JONES, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.	:	

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

In its exceptions, the Board contends that the Administrative Law Judge (ALJ) erred in finding that Ms. Jones was able to return to work without restriction. According to the Board, the testimony of Dr. Hewitt and Ms. Jones herself clearly shows that Jones' fear, apprehension and anxiety at working in the Trenton Public Schools would not be eliminated – even teaching at a lower grade level – so that her return would do a disservice to both the district

[1] It is noted that, although the hearing in this matter was conducted over two days, November 18, 2008 and December 5, 2008 (Initial Decision at 2), the record includes a transcript for the November 18, 2008 hearing only. The testimony of Dr. Hewitt and Interim Assistant Superintendent Patricia Lucas was taken on this date and is fully set forth in the transcript, while the testimony of Ms. Jones and Dr. Tobe is on record only through its summation and analysis in the Initial Decision (at 2-5, 7-8).

and its students; the record further demonstrates, the Board avers, that Ms. Jones suffered at least one anxiety attack in 2008 – indicating that she is not ready for the stress that will accompany her return to teaching in an urban environment. (Board's Exceptions at 1, 2, 3, 4) The Board additionally proffers that Dr. Hewitt's October 29, 2007 report and November 15, 2007 addendum are – contrary to the finding of the ALJ – more credible and accurate than Dr. Tobe's October 2, 2008 report, since the former were completed in close proximity to the incidents of "assault" claimed by Ms. Jones, which occurred during the 2006-07 school year. (*Id.* at 1, 2, 3)

The Board also contends – because the record demonstrates that, at the very least, Ms. Jones cannot continue to teach at the intermediate level or higher and must be placed in an elementary level position if she is to return to work – that the ALJ should not have ordered the Board to effectuate such return without: 1) affording it time to determine whether a suitable position exists at the elementary level and whether Jones has bumping rights over teachers currently assigned there; and 2) specifying an alternative remedy in the event no suitable position can be found. (Board's Exceptions at 2, 3, 4)

Upon review, the Commissioner finds the Board's exceptions to be without merit and adopts the Initial Decision of the ALJ.

Initially, the Commissioner concurs with the ALJ that the Board failed to prove its tenure charge of incapacity, since the reports (Dr. Hewitt's) on which it relies were completed well before the filing of tenure charges in May 2008 and over a year prior to the more recent assessment (Dr. Tobe's) showing Ms. Jones' bipolar disorder to have been successfully stabilized since that time through medication, therapy and Jones' own efforts, and opining that – based on such stabilization and continuing positive attitude – Jones is able to return to work

without restriction.[2] The Commissioner further agrees that the Board violated Ms. Jones' tenure rights when it failed, in November 2007, even to attempt to locate a position for her at the level where she was found fully able to function by the Board's own independent medical examiner (Dr. Hewitt).

The Commissioner, therefore, finds the relief awarded Ms. Jones by the ALJ – return to work as a teacher and back pay from November 15, 2007 to the present – to be entirely appropriate. There is no need, as claimed by the Board, for it to be afforded time to locate a "suitable" position at the elementary level, since Ms. Jones has been found able to work without restriction and is thus entitled to be placed in any teaching position within the scope of her certification that is held by a nontenured or less senior staff member; nor is there a need for specification of an alternative remedy, since, if no position currently exists to which Ms. Jones may lawfully claim entitlement, she must be placed on the Board's preferred eligible list for reemployment when such a position does become available.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter and the Board is directed to effectuate the order of the ALJ forthwith.

IT IS SO ORDERED.[3]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 4/28/09

Date of Mailing: 4/28/09

[2] It is of no moment that Dr. Hewitt's reports were completed closer to the events that precipitated Jones' absence since the issue here is her fitness to return to work following treatment. The Commissioner further notes, as did the ALJ, that Dr. Hewitt's final report did not deem Jones entirely incapacitated, but rather found her to be fully capable of teaching students below 5th grade.

[3] 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 2284-08 and EDU 4721-08 (Consolidated)
AGENCY DKT. NOS. 39-1/08 AND 155-5/08

RUTH JULIA JONES,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent,
and
IN THE MATTER OF THE TENURE HEARING OF RUTH JULIA JONES, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY.

Michael T. Barrett, Esq., for Ruth Julia Jones (Bergman & Barrett, attorneys)

Rocky L. Peterson, Esq., for the School District of the City of Trenton, Mercer County (Hill Wallack, attorneys)

Record Closed: January 26, 2009 Decided: February 4, 2009

BEFORE **DOUGLAS H. HURD**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On January 31, 2008, the Bureau of Controversies and Disputes received a Verified Petition filed by petitioner, Ruth Julia Jones. Jones, a tenured teacher in the City of Trenton School District, claims that the Board is violating her tenure rights by not allowing her to return to work. She seeks reinstatement to a teaching position, along with back pay and interest. On March 10, 2008, respondent, the City of Trenton Board of Education, filed an Answer to the Verified Petition. The matter was transferred to the Office of Administrative Law, where it was filed on March 27, 2008 and assigned docket number EDU 2284-08.

On May 30, 2008, the Bureau of Controversies and Disputes received a copy of Tenure Charges and Statement of Evidence filed by the City of Trenton Board of Education against Jones. The Board charges that Jones is incapacitated from her employment as a teacher. On June 4, 2008, Jones filed an Answer to the Tenure Charges. The matter was transferred to the Office of Administrative Law, where it was filed on June 18, 2008, and assigned docket number EDU 4721-08.

The parties moved to consolidate both cases. I found that both matters concerned the same parties and events, and on September 25, 2008, **ORDERED** the cases to be consolidated. Hearings were held on November 18 and December 5, 2008. Following the second hearing, the Board requested time to review additional evidence to determine if more hearing dates were needed. By letter dated January 26, 2009, the Board advised me that it did not want additional hearing dates, and that the record could be closed.

EVIDENCE

1. Petitioner's Evidence:

Jones and Dr. Edward Tobe testified on behalf of petitioner. Jones also relied on various exhibits admitted into evidence.

Jones is certified to teach Kindergarten through 8th grade. She began teaching in Trenton in the 1999/2000 school year. For the beginning years at the school she mostly taught pre-K to 5th grade students. She was assigned to the Monument School in Trenton.

In the first few days of the 2005/2006 school year there was a shooting outside the school, which resulted in a death. The school was closed and the children dismissed for the day. No students were hurt, and Jones was not threatened nor did she witness the actual shooting. The shooting was on a Friday. Jones returned on Monday, but she experienced a panic attack at the school. This led to her going to the emergency room. Jones, based on her doctor's recommendation, did not return to teach at the school for the rest of the 2005/2006 school year. She was diagnosed with bi-polar disorder by Dr. Amin – her treating psychiatrist.

Jones was cleared by her doctor to return to teaching in the District for the 2006/2007 school year. She was assigned to teach the 6th and 7th grades. During the course of the year she was injured three times. The first incident occurred when a student accidentally stepped on her foot. This resulted in injuries to her ankle and big toe. She returned to work, but on a modified schedule. The second incident occurred when two students were fighting. During the fight, one of the students rolled into Jones' causing her to injure her back and hand. She was out of work for a few days as a result of this incident. In the third incident, a student struck Jones with a bottle of hair gel.

As a result of these three incidents and the overall stress of the job, Dr. Amin directed Jones not to return to work. On April 16, 2007, Dr. Amin completed a Certification of Health Care Provider form indicating Jones would be incapacitated until June 29, 2007. The Certification states that Jones was depressed, anxious, fearful, experience nightmares and "can't think about returning to work." P-2, Exhibit F.

Dr. Amin cleared Jones to return to work without restrictions, effective September 4, 2007. Jones presented the doctor note to the Board, but she was told that she needed to be examined by one of the Board's doctors. Jones wanted the Board examination soon so she could return to work. She kept contacting the Board, but the

examination was not scheduled until October 29, 2007. During this time, Jones was not allowed to return to work.

Dr. James Hewitt examined petitioner on October 29, 2007 for about 45 to 60 minutes. Dr. Hewitt did not have Jones' medical treatment records at the time he conducted his examination. Jones claimed that she had already provided the records to Dr. Hewitt. In any event, he conducted his examination on October 29, 2007. Following the examination, Dr. Hewitt wrote a report, which was admitted into evidence. J-1. He then spoke to Dr. Amin and reviewed some of Dr. Amin's reports. Based on this further information, Dr. Hewitt wrote a supplemental report. J-2.

Jones' case relied on various parts of Dr. Hewitt's reports indicating that she could return to work managing a "classroom with younger children, say fifth grade, sixth grade and certainly elementary school." J-2. Dr. Hewitt also testified that Jones could return to teach younger grades, but that she could not handle teaching 7th and 8th graders.

Jones testified that she did not receive Dr. Hewitt's reports until February 2008. During this time period, Jones still was not allowed to return to work. The petition Jones filed claiming that her tenure rights were being violated by not being allowed to return to work was dated January 21, 2008. That petition notes that Jones at that time still had not been provided with Dr. Hewitt's reports.

Jones testified that she is ready to teach, and that she does not need to be restricted by location or by the grade level of the students. She would prefer to teach lower elementary students, however. She testified that she currently takes medication for the bi-polar disorder, and that she sees a therapist once a week and a psychiatrist about once a month. Jones testified to being able to deal with her bi-polar disorder and stressors because of the therapy and medication. She testified that she is more able now to handle panic attacks and stressors than she was one-year ago.

Dr. Tobe testified on behalf of petitioner. His report was admitted into evidence as J-3. He is a Board-certified psychiatrist, and has experience examining teachers'

fitness for duty. He is a consultant for the Vineland school district in this regard. Tobe examined Jones on October 2, 2008. Based on his evaluation and review of her treatment records, Dr. Tobe concluded that Jones can return to work without restrictions because she has been successfully stabilized. He testified that her prognosis is good because she is a compliant patient, she has accepted her diagnosis and has sought out treatment. He opined that her diagnosis of being bi-polar does not matter because she is stabilized. In his report he states:

- Jones is "on appropriate mood stabilizing medications."
- "She has actively searched out treating physicians who would be able to advance her treatment to provide optimum outcome."
- "There is no reason to believe that if Ms. Jones reenters the work force at any environment, she will have a bipolar disorder episode or decompensation."
- Jones is a "bright woman", her "judgment is intact" and she is "insightful."
- "She has the same risk of any other faculty member in working in an environment that exposes faculty members to significant stress due to the nature of the student body."

2. *Respondent's Evidence:*

Dr. Hewitt and Patricia Lucas, Interim Assistant Superintendent Human Resources, testified on behalf of respondent. They also relied upon various exhibits, primarily Dr. Hewitt's reports. J-1 and J-2.

Dr. Hewitt testified about his examination of Jones in October 2007, and his findings in J-1 and J-2. He is a Board-certified psychiatrist. Dr. Hewitt testified that Jones is not fit to return to work because she is in the same condition she was in when she left work in March 2007. Dr. Hewitt testified that Jones does not have a severe bipolar disorder. He said her problems are dealing with the stress of the job and her concern about working in an unsafe neighborhood. Dr. Hewitt opined that Jones exaggerated and overreacted to the three incidents during the 2006/2007 school year mentioned above.

Dr. Hewitt admitted to not seeing Jones since the examination in October 2007. Dr. Hewitt did review Dr. Tobe's report. He agreed with Dr. Tobe's clinical impressions, but disagreed with his conclusions. However, he did agree with Dr. Tobe that Jones may have made progress with new medications. He did not know the dosage or frequency of her current medications.

He gave an opinion that Jones is still not able to return to work without restrictions. Dr. Hewitt testified that Jones could return to teaching lower elementary school children, but that she could not teach 7th and 8th graders. In this regard, he notes that Jones was fine teaching the lower elementary school children during her first few years in Trenton. He testified that Jones would need a teacher's aide if she taught in the middle school.

Dr. Hewitt makes the following observations in his reports:

- "Her exaggerated expressed emotion and tendency to exaggerate are consistent with her reporting to me a history of mood swings and anxiety attacks." J-1.
- She appears to be emotionally unstable, although there is no evidence during the interview of mood swings...." J-1.
- "Her thinking is logical and goal directed." J-1.
- There is no evidence of psychosis in the sense of racing thoughts, disorganized thinking or hallucinations." J-1.
- "There is no objective evidence to indicate that Ms. Jones is any more ready to return to work than she was in March 2007." J-1.
- "She seems to be unable to handle the stress of working as a teacher in the Trenton School District." J-1
- "I also have ongoing concerns about her ability to manage a classroom based on her mental health problems."
- "In my opinion, she might be able to manage a classroom with younger children, say fifth grade, sixth grade and certainly elementary school. I am speaking in terms of her ability to manage the classroom. I am not in a position to comment on her ability to handle the content area of teaching any specific subject or grade level." J-2.

Dr. Hewitt concluded his second report by stating:

> It is my opinion that Ms. Jones is not able to return to her former position. If a less demanding position is available within district, she may be able to manage her duties without becoming emotionally unstable and

> having to go out of work again. I believe that she is stable enough to start teaching but have reservations about whether she would be able to manage the demands of being a teacher, particularly if she does not have a significantly different position than what she has had over the last few years.
> J-2.

Lucas started employment with the District in November 2007. Lucas testified that she cannot guarantee Jones could return to a position teaching in the lower elementary school grades. She said that the District did not even look to put Jones into a lower grade position back in the Fall of 2007. She said there are no vacancies at this time to teach in the lower grades. She did not indicate whether Jones has seniority rights over other teachers, however.

ANALYSIS

1. Tenure Charges

The Board seeks to terminate Jones from employment based upon incapacity pursuant to N.J.S.A. 18A:6-10 *et seq.* The Board, however, has not demonstrated that Jones is incapacitated from being a teacher in the Trenton School District.

The Board's primary witness, Dr. Hewitt, and his reports were not persuasive. Dr. Hewitt's opinions lacked persuasiveness because it has been over one-year since he conducted his 45- to 60-minute examination. Although he has looked at the current report by Dr. Tobe, he admitted to not knowing her medications or dosage at this point. And he even said that she could have made progress over the past year. Furthermore, Dr. Hewitt's conclusion that Jones could not return to work was diluted with his opinion that she might be able to manage a classroom of 5th graders, 6th graders and "certainly" younger grades.

Dr. Tobe, on the other hand, provided very persuasive testimony. His examination of October 2, 2008, was timely. He provided detailed knowledge of Jones, her treatments and medications. Based on his examination and review of records, it was his sound opinion that she could return to work because she has been successfully

stabilized. Dr. Tobe's testimony was highly credible, supported by the evidence and consistent with the testimony provided by Jones.

Jones also was a credible witness. She came across as sincere in her desire to keep her bi-polar symptoms under control. Indeed, the continued therapy and monitoring of her medications has led to her being successfully stabilized.

In summary, Dr. Tobe was far more persuasive than Dr. Hewitt on the issue of whether Jones was incapacitated from returning to work. Dr. Tobe's report and testimony were more credible in demonstrating that Jones is not incapacitated and is able to return to her position with the District.

2. *Violation of Tenure Rights*

N.J.S.A. 18A:6-10 prohibits the dismissal or reduction in compensation of any tenure staff member without just and sufficient cause as specifically enumerated therein. Jones' petition seeks to have her reinstated to her teaching position, with back pay.

As noted above, I **CONCLUDE** that the District did not demonstrate that Jones' was incapacitated from returning to work currently. The question for the violation of tenure rights' issue is whether Jones can demonstrate she was not incapacitated as of September 2007, when she says she was ready, willing and able to return to work. The note by Dr. Amin states that Jones is able to return to work without restrictions as of September 4, 2007. Even though that note existed, the District did properly obtain an independent medical examination by Dr. Hewitt.

In his November 15, 2007, report Dr. Hewitt did opine that Jones "certainly" might be able to manage a classroom of students below 5th grade. Lucas testified that the District did not even see if such positions were available to Jones back then. For some reason, Jones did not even get Dr. Hewitt's report until February 2008.

Based on the foregoing, I **CONCLUDE** that Jones has demonstrated that the District did violate her tenure rights by not reinstating her following its receipt of Dr. Hewitt's report, dated November 15, 2007. That report clearly does not find Jones to be incapacitated from performing the duties of an elementary school teacher for students below 5th grade. The District at that time had an obligation to see what positions were available and whether Jones had seniority to exercise bumping rights at that point.

CONCLUSION AND ORDER

In conclusion, the evidence demonstrated that Jones is able to return to work because the Board did not demonstrate she is incapacitated from performing her job as a teacher. Dr. Tobe persuasively testified that she can return to work without restrictions. The evidence also demonstrated that Jones' tenure rights were violated following Dr. Hewitt's report that indicated she was able to return to teaching students below the 5th grade. The District failed in its obligation to look for vacancies at that point, or exercise the bumping procedure if necessary.

It is therefore **ORDERED** that Jones be allowed to return to work as a teacher, and that she is entitled to back pay from November 15, 2007 to the present.

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

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

2-4-09

DATE

DOUGLAS H. HURD, ALJ

2-4-09

Date Received at Agency:

FEB 10 2009

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

/lam

WITNESSES

For petitioner:

Ruth Julia Jones, petitioner

Edward Tobe, D.O., P.A.

For respondent:

James Hewitt, M.D.

Patricia Lucas, Interim Assistant Superintendent Human Resources

EXHIBITS

Joint:

J-1 Hewitt Evaluation, dated 10/29/07

J-2 Hewitt Evaluation, dated 11/15/07

J-3 Tobe Evaluation, dated 10/2/08

For petitioner:

P-1 Statement of Tenure Charges

P-2 Statement of Evidence

For respondent:

R-1 Prescription

132-09

JOANNE H. GARNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	DECISION
RESPONDENT.	:	
	:	

SYNOPSIS

Petitioner, a veteran school bus driver, appealed the Department's determination to suspend her school bus endorsement pursuant to *N.J.S.A.* 18A:39-28 after a child was left on her bus because of her failure to conduct the mandatory visual inspection at the end of the route.

The ALJ found that: petitioner completed an assigned school bus route on January 2, 2008 and left the bus without first conducting the mandated visual inspection to determine that no child had been left on the bus; an eleven year old child was in fact left on the bus, and was later discovered on the bus, unharmed; and, under the terms set by the Legislature, the penalty for such offense is mandatory. Accordingly, the ALJ 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.

Upon full review and consideration of the record, the Commissioner concurred with the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter. The Department was directed to notify the Motor Vehicle Commission of its obligation to suspend the petitioner's school bus endorsement for six months, and to notify the petitioner's employer that she is ineligible for continued employment as a school bus driver during the period of 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.

May 1, 2009

OAL DKT. NO. EDU 6655-08
AGENCY DKT. NO. 236-8/08

JOANNE H. GARNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge that – since petitioner does not dispute that she failed to conduct the visual inspection required by law and completed her route without realizing that a child had been left on the bus, and since the child was not harmed and the offense was petitioner's first – a six-month suspension of petitioner's school bus endorsement is mandated by *N.J.S.A.* 18A:39-28 *et seq.*

Accordingly, for the reasons expressed therein,[1] the Initial Decision of the OAL is adopted as the final decision in this matter. The Department is directed to notify the

[1] Additional support for the conclusion that the statute allows no discretion as to penalty once an offense is found may be gleaned from the legislative history of the bill (Senate Bill 328/Assembly Bill 2728) ultimately enacted as P.L. 2007, c. 77. Specifically, the Assembly Education Committee Statement of January 22, 2007 noted that the committee was releasing the bill – which did not at that point, in either its Senate or Assembly version, include any reference to notice or opportunity for hearing – with the understanding that a school bus driver would "have access to any available due process procedures prior to the revocation of the driver's endorsement" (http://www.njleg.state.nj.us/2006/Bills/S0500/328_S2.HTM). On February 22, 2007 , the full Assembly amended the bill (http://www.njleg.state.nj.us/2006/Bills/S0500/328_R1.HTM) to make the Legislature's intent explicit, adding the present references to notice and opportunity for hearing – placing them specifically in relation to determination of the offense, not in relation to penalty – and issuing a statement

Motor Vehicle Commission of its obligation to suspend petitioner's school bus endorsement for the requisite period, and to notify petitioner's employer that she is ineligible for continued employment as a school bus driver during the period of suspension.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 5/01/09
Date of Mailing: 5/01/09

(http://www.njleg.state.nj.us/2006/Bills/S0500/328_S3.HTM) indicating that it was seeking to provide "that *prior to a determination* that a school bus driver has left a pupil on the school bus at the end of his route or that the driver acted with gross negligence, the driver will be provided notice and an opportunity to be heard *on the issue*" (*emphasis supplied*).

[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. NO. EDU 06655-08S

AGENCY DKT. NO. 236-8/08

JOANNE H. GARNER,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT,

Respondent.

Joanne H. Garner, petitioner, pro se

Jennifer L. Campbell, Deputy Attorney General, for respondent (Anne Milgram, Attorney General of New Jersey, attorney)

Record Closed: March 25, 2009 Decided: April 3, 2009

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

Joanne H. Garner appeals from a determination of the respondent, suspending her school bus endorsement for six months under the provisions of N.J.S.A. 18A:39-28 and 29, for an incident in which she left a student on a school bus on January 2, 2008. In doing so, she allegedly violated N.J.S.A. 18A:39-28, which mandates that the bus driver conduct a visual check of the bus at the end of any transportation route to determine that no pupil has been left on the bus. That decision was presented to Garner by letter dated July 23, 2008. Garner filed a Petition of Appeal on August 6, 2008. The imposition of the suspension was delayed until the determination of the merits of the appeal. The Department of Education (DOE) forwarded the contested

case to the Office of Administrative Law under N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A telephone hearing was held on March 25, 2009 and the record closed on that date.

The DOE acted under the terms of N.J.S.A. 18A:39-29, which provides for the mandatory imposition of a six-month suspension where a school bus driver violates the requirement imposed by 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. For the purposes of this act, "school bus" means every motor vehicle operated by, or under contract with, a public or governmental agency, or religious or other charitable organization or corporation, or privately operated for compensation for the transportation of children to or from school for secular or religious education, which complies with the regulations of the Department of Education affecting school buses, including "School Vehicle Type I" and "School Vehicle Type II" as defined pursuant to R.S.39:1-1.

As noted, the Legislature has determined that where a driver violates this law for the first time, the penalty is mandatory.

> 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.

In the present matter, in her response to discovery and in her testimony during a hearing held on March 25, 2009, Ms. Garner has candidly admitted that while employed as a school bus driver, she did leave an eleven-year-old child on a school bus at the end of her route. The child was discovered on the bus, was not harmed, and, she claims, did not leave the bus for the entire time that the child was left alone. She notes that the Cumberland County Prosecutor's Office reviewed the case and determined that no criminal activity occurred and that no summons should issue. She notes that she

has been a school bus driver for seventeen years, and this is her first instance of having left a child on a bus. She does not deny liability under the terms of N.J.S.A. 18A: 39-28. However, she fears that loss of her endorsement will lead to unemployment and the loss of her home.

Findings and Conclusions

Based upon the undisputed facts, I **FIND** that on January 2, 2008, Joanne H. Garner, employed as a school bus driver, completed an assigned school bus route and then left the bus without first conducting the mandated visual inspection to determine that no child had been left on the bus. A child was indeed left on the bus, was later discovered on the bus, unharmed. I also **FIND** that Ms. Garner has been a school bus driver for approximately seventeen or eighteen years as of this date and that she has never before left a child on a bus.

The legislation in question in this case was enacted by the Legislature in 2007. L. 2007, c. 77, § 1, eff. May 4, 2007. Counsel for the DOE advises that this appears to be the first contested case decided under this legislation. As was explained to Ms. Garner, the Legislature determined that in imposing upon school bus drivers this requirement for visual inspection of the bus at the completion of a route to assure that no students were left behind on the bus, it decided that the sanction for a first time violation of the law would be a six month suspension of the endorsement; for a second violation the mandated penalty is permanent revocation. The legislation uses the word "shall" in regard to the imposition of the sanctions, and when used in legislation, "shall" is a word generally denoting mandatory, rather than discretionary, application.

> Settled principles of statutory construction guide us in our interpretation of the legislature's use of the words "may" and "shall" in the same statutory sentence. Under the "plain meaning" rule of statutory construction, the word "may" ordinarily is permissive and the word "shall" generally is mandatory. See, e.g., Harvey v. Board of Chosen Freeholders of Essex County, 30 N.J. 381, 391, 153 A.2d 10 (1959). Where a statutory provision contains both the words "may" and "shall," it is presumed that the lawmaker intended to distinguish between them, "shall" being construed as mandatory and "may" as permissive. Bell v. Western Employer's Insurance Company, 173 N.J. Super. 60, 65, 413 A.2d 363 (App.Div.1980); Sutherland Statutory Construction, § 57.11 (1992).
>
> [Rosa Aponte-Correa, formerly known as Rosa Aponte v. Allstate Insurance Company, 162 N.J. 318 (2000).

Therefore, under the terms set by the Legislature, where the violation has been established, no consideration of the circumstances of the event or of the driver may be considered in determining the penalty. The mandatory nature of the sanction may fairly be read as an indication of the Legislature's strong reaction to any such act on the part of someone entrusted with the care and safety of students, who in many instances are of tender years. While Ms. Garner would understandably desire that her many years of service count for something in weighing the penalty for her admitted violation of the law, especially where no harm came to the child left behind, I **CONCLUDE** that the Legislature has chosen to preclude any such consideration and that under these circumstances, I have no alternative but to impose a six-month suspension of the "S" endorsement. 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.

April 3, 2009
DATE

JEFF S. MASIN, ALJ

April 3, 2009

Date Received at Agency:

APR

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

None

FOR THE RESPONDENT:

Certification of Counsel dated February 3, 2009, with attached: Exhibit A, Letter dated October 21, 2008, from Jennifer Campbell to Joanne Garner; Exhibit B, Letter dated November 24, 2008 from Jennifer Campbell to Joanne Garner; Exhibit C, Letter dated January 5, 2009 from Jennifer Campbell to Joanne Garner; Exhibit D, Letter dated January 14, 2009 from Jennifer Campbell to Hon. John Tassini, ALJ, with attached Certification of Mailing

WITNESS LIST

FOR THE PETITIONER:

Joanne H. Garner, pro se

FOR THE RESPONDENT:

None

133-09

SOUNDARAM RAMASWAMI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner was hired by the Board as Supervisor, Testing and Assessment, in February 2004. Prior to her hiring, the Board amended the job description for the position to read that New Jersey certification was "preferred", but not mandatory. In July 2007, petitioner was notified that she was being terminated from her employment for lack of appropriate certification. Petitioner contends that she was employed in a non-teaching position, that she was tenured, and that it was a violation of the school laws to terminate her without bringing charges against her. Respondent Board maintains that petitioner was a teaching staff member; that without an appropriate certificate, she was subject to termination of her contract and removal from her position; and that petitioner did not attain tenure because she did not hold the necessary certificate.

The ALJ found, *inter alia,* that: the petitioner was a teaching staff member within the meaning of *N.J.S.A.* 18A:1-1, and as such was required to hold a valid and appropriate certificate for her position in accordance with *N.J.S.A.* 18A:26-2 and *N.J.A.C.* 6A9-5.1(a); petitioner did not meet the requirements for tenure under *N.J.S.A.* 18A:28-5 and did not attain tenure because she did not hold the appropriate certificate; petitioner's contract ceased and terminated when respondent received written notice that petitioner was not the holder of an appropriate certificate for her position; and respondent properly removed petitioner from her position pursuant to *N.J.A.C.* 6A:9-5.1(c) because she did not have the mandated certificate. Accordingly, the ALJ concluded that the petition must be dismissed.

Upon thorough and independent review, 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.

May 1, 2009

OAL DKT. NO. EDU 11776-07
AGENCY DKT. NO. 296-10/07

SOUNDARAM RAMASWAMI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner's exceptions and the Board of Education's reply, both duly filed pursuant to *N.J.A.C.* 1:1-18.4.

In her exceptions, petitioner reiterates the arguments of her OAL briefs and contends that the Administrative Law Judge (ALJ) erred in concluding that she performed as a supervisor within the meaning of *N.J.A.C.* 6A:9-12.3(c) and thus was required to possess the appropriate certificate, and that the Board was not equitably estopped from denying she is tenured in her position; the ALJ also erred, petitioner asserts, in ignoring her argument that – even if she is assumed, *arguendo*, to be nontenured – she still had an enforceable one-year contract entitling her to employment through June 1, 2008. (Petitioner's Exceptions at 1-19) According to petitioner, the ALJ: 1) selected one or two job duties and concluded from these that petitioner provided guidance to instructional personnel within the meaning of the referenced certification rule, while ignoring the fact that petitioner's position was a unique one centered on assisting and training staff in the understanding and use of test data (*Id.* at 12-13); 2) rejected her more than ten unrefuted reasons why the Board should be estopped from denying her tenure, ignoring that the facts presented met the standards for estoppel outlined in prevailing case law (*Id.* at 13-14); and 3) neither considered nor decided her contractual argument in the Initial Decision, notwithstanding that it was identified as an issue to be addressed (*Id.* at 17).

In reply, the Board counters that: 1) petitioner's training of teachers was for the express purpose of enabling them to identify student strengths and weaknesses and provide them with strategies to modify their instruction accordingly – a responsibility requiring knowledge of both test data and curriculum, and one clearly falling within the purview of a supervisor of instruction (Board's Reply at 9-10); 2) petitioner had primary responsibility for possession of appropriate certification and cannot, pursuant to established decisional law, claim retroactive acquisition of tenure based on the Board's improper action in assigning her to a position for which she was not certified (*Id.* at 16-17); and 3) petitioner cannot claim contractual entitlement to a full year's salary where the Board had no alternative but to dismiss her upon realizing that she did not hold the appropriate certification for her position, and where it provided notice of termination immediately upon such realization (*Id.* at 18-20).[1]

Upon review, the Commissioner finds the ALJ to have fully and fairly analyzed the issues in this matter in light of the operative facts and positions of the parties, correctly concluding that petitioner could neither obtain tenure nor continue in her contracted employment because she was serving in a position requiring a certificate which she did not possess. The Commissioner further concurs, for the reasons stated by the ALJ, that the Board should not be estopped from asserting the position's certification requirement or denying that petitioner had acquired tenure.[2]

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is dismissed.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 5/01/09

Date of Mailing: 5/01/09

[1] On the first of these issues, the Board substantially reiterates the arguments of its brief in support of summary decision.

[2] Contrary to petitioner's assertion, the ALJ did address her contractual claim in the Initial Decision (at 16).

[3] 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 11776-07
AGENCY DKT. NO. 296-10/07

SOUNDARAM RAMASWAMI, PH.D.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

CITY OF PLAINFIELD, UNION COUNTY,

Respondent.

Arnold Shep Cohen, Esq., for petitioner
(Oxfeld Cohen, attorneys)

Raymond L. Hamlin, Esq., for respondent
(Hunt, Hamlin & Ridley, attorneys)

Record Closed: October 3, 2008 Decided: February 11, 2009

BEFORE **RICHARD McGILL**, ALJ:

The Board of Education of the City of Plainfield (respondent) terminated the employment of Soundaram Ramaswami (petitioner), because she was a teaching staff member without a valid and appropriate certificate for her position as Supervisor of Testing/Evaluation and Assessment. Petitioner denies that she was a teaching staff

member, and she contends that respondent's action violated her tenure and contractual rights.

PROCEDURAL HISTORY

Petitioner filed her petition on October 12, 2007, invoking the authority of the Commissioner of Education to hear and determine controversies arising under the school laws pursuant to N.J.S.A. 18A:6-9. Respondent filed an answer on October 30, 2007, and the matter was transmitted to the Office of Administrative Law on November 9, 2007, for determination as a contested case.

The matter was scheduled for hearing on July 29 and 30, 2008, at the Office of Administrative Law in Newark, New Jersey. On July 28, 2008, respondent filed a motion for summary decision. Nonetheless, the matter was not adjourned, and the hearing was conducted as scheduled on July 29 and 30, 2008. Subsequent to the hearing, the parties submitted additional papers in regard to the motion and briefs. The record closed upon receipt of the last post-hearing submission on October 3, 2008.

ISSUES

Respondent maintains that petitioner was a teaching staff member and that without an appropriate certificate she was subject to termination of her contract and removal from her position. Further, petitioner did not attain tenure because she did not hold the necessary certificate.

Petitioner maintains that she was not required to have a certificate because she was not a teaching staff member and that respondent is estopped from claiming that she needed a certificate. Further, petitioner contends that she had an enforceable contract as a supervisor. Additionally, petitioner maintains that she had tenure in her position and that respondent is estopped from denying that she had tenure. Finally,

petitioner contends that as a tenured employee, she cannot be removed except on charges.

In view of the positions of the parties, the first issue is whether petitioner was a teaching staff member within the meaning of N.J.S.A. 18A:1-1. If petitioner was not a teaching staff member, she would not be subject to removal for lack of a certificate, and she would have an enforceable one-year contract. The second issue is whether petitioner has attained tenure in the position of Supervisor of Testing/Evaluation and Assessment. The third issue is whether respondent is estopped from claiming that petitioner needs a certificate or from denying that petitioner attained tenure.

Respondent's motion for summary decision did not address the issues related to equitable estoppel. Additionally, papers from both parties refer to evidence presented at the hearing. Under the circumstances, the motion would not be dispositive of the matter and cannot be decided separately from the hearing. Therefore, the motion will be treated as moot.

FACTS

Petitioner testified on her own behalf, and she also called two witnesses. One witness was Angelina Chiaravalotti, who was hired by respondent for the position of Chief of Staff in December 2003. In February 2006, Ms. Chiaravalotti added the title of Acting Human Resources Director. The other witness was Dr. Paula Howard, who was employed by respondent as its Superintendent from September 26, 2003, to June 8, 2007. The testimony of these witnesses focused on the time frame from late 2003 to August 1, 2007.

Respondent called two witnesses in this proceeding. One witness was Peter E. Carter, who served as respondent's Interim Superintendent of Schools from June 11, 2007, to December 22, 2007. His testimony related to the period from June to August 1, 2007. Respondent's second witness was Dr. Garnell Bailey, who is employed by

respondent as its Assistant Superintendent for Administrative Services. Her testimony focused on May 2008 at which time she was the Interim Superintendent of Schools. At that time, petitioner's position as Supervisor of Curriculum and Instruction/Testing and Assessment was eliminated.

Except for the two-month period from June to August 1, 2007, respondent's witnesses testified concerning a different time frame from those of petitioner, and with respect to the overlapping portion, there was no dispute as to the underlying facts. The witnesses differed as to whether petitioner achieved tenure in her position, but otherwise, there was no significant conflict in their testimony. All witnesses were credible, and their testimony is accepted as true. With respect to petitioner's actual job duties, petitioner was the most knowledgeable witness, and accordingly, the most weight is given to her testimony. The testimony concerning tenure will be summarized separately.

A. Findings

Based upon the evidence presented at the hearing, I **FIND** as follows: Dr. Paula Howard was employed by respondent as its Superintendent from September 26, 2003, to June 8, 2007. Dr. Howard was previously employed by the Newark School District as an Assistant Superintendent from January 31, 2000, to September 25, 2003. Dr. Howard knew petitioner, who was in charge of testing and evaluation in Newark with the title of Research Scientist. In Plainfield, Dr. Howard made recommendations as to personnel to respondent, but she could not employ anyone without respondent's approval.

On October 10, 2003, respondent placed an advertisement in the Star-Ledger stating that applications were being accepted for the position of "Supervisor of Curriculum & Instruction/Assessment and Evaluation." The qualifications required New Jersey certification as supervisor and principal and five years successful experience in the field of public education, including assisting teachers and administrators in school

reform. Part of the job goal was to assist school staff in understanding and using data for program improvement. The deadline for filing an application was October 22, 2003.

Petitioner saw the advertisement in the Star-Ledger and decided to apply even though she did not hold any New Jersey certificate. Petitioner reasoned that she would not be called for an interview if she was not eligible.

Petitioner's letter dated October 22, 2003, was received on October 24, 2003, with a copy of her resume. In her letter, petitioner stated that she was applying for the position of "Supervisor of Test Assessment and Evaluation." Petitioner stated that she held various positions with the Newark Public Schools and at the time was the Research Scientist I/Interim Head of the Office of Planning, Evaluation and Testing. According to petitioner's letter, she had worked closely with school administrators, teaching staff, parents and many central office personnel to interpret the test results and to develop and implement program changes.

As reflected in petitioner's resume, petitioner worked for the Newark School District from 1991 to 2003. One of the positions that she held was Testing Supervisor. Petitioner's resume did not indicate that she held any New Jersey certificate. In fact, petitioner did not hold any New Jersey certificate.

Dr. Howard was having difficulty filling the position of Supervisor of Testing and Assessment. Petitioner's qualifications were far superior to the other applicants except that she did not have a New Jersey certificate. On November 18, 2003, the job description for Supervisor of Curriculum and Instruction, Testing and Assessment was amended such that the qualifications stated in part "New Jersey Certificate as Supervisor and principal preferred."

The job goal was to "coordinate and manage the district's testing and evaluation program, and to assist school staff in understanding and using data for program improvement." The responsibilities included a list of twelve items such as "Develop and

coordinate district-wide programs and schedules for local and state annual group testing, including supervision of the in-house test scoring program and equipment;" "Analyzes and displays test results and student performance indicators at the school and district levels, aggregating and disaggregating data as needed for use in program improvement;" "Designs and coordinates efforts to conduct formative and summative evaluations of school and district goals related to effectiveness and efficiency and instructional improvement programs;" and "Provides training for school staff and parents on interpreting data on student performance and behavior."

Dr. Howard knew petitioner from the Newark School District but did not ask her to apply. Dr. Howard had discussions concerning petitioner's situation with the County Office. Dr. Glenn Tilou of the County Office advised Dr. Howard that as long as petitioner was not working with students or evaluating teachers, petitioner could be hired without a New Jersey certificate.

After receiving this advice, Dr. Howard interviewed petitioner and recommended hiring her. During the interview, petitioner mentioned that she did not have a certificate, but there was no response. An offer was made to petitioner in December 2003, and petitioner was hired in February 2004 as the Supervisor of Testing and Evaluation.

Dr. Howard also recommended that respondent hire Angelina Chiaravalloti, who was Dr. Howard's assistant in Newark. Dr. Howard, Ms. Chiaravalloti and petitioner knew each other from the Newark School District. Ms. Chiaravalloti was hired in December 2003, and in February 2006, she added the position of Acting Director of Human Resources.

Petitioner's duties as the Supervisor of Testing and Evaluation are set forth in the job description. Petitioner was responsible for all testing activity for the school district including the testing process and security. Petitioner did not administer the test to students herself but rather handed the materials to the test coordinator. Petitioner then collected the test results from the coordinator.

Once the testing was complete, petitioner analyzed the data and sent the results to the State Department of Education. Petitioner placed the data in formats that would be useful to administrators, teachers and students. Petitioner had no contact with students. Petitioner did not evaluate teachers, and she had no direct supervisory authority over the teachers. But petitioner provided training to the teachers and other staff as to how to interpret and understand the test data. This would enable the teachers to identify students' strengths and weaknesses. Petitioner provided the teachers with strategies so that they could modify their instruction to improve the students' education. Petitioner had to have knowledge as to both testing and the school curriculum to perform her duties. Petitioner reported to Lilly Sipp, who was the Director of Curriculum and Instruction.

There were various discussions or communications in regard to the topics of a New Jersey certificate and tenure with respect to petitioner. As mentioned above, the job qualifications were amended to state that New Jersey certification as a supervisor and principal was preferred. In her interview, petitioner mentioned that she did not hold any New Jersey certificate, but she did not receive a response. While filling out the application, petitioner spoke with a clerical worker who was processing the papers. The clerical worker told petitioner that she would receive tenure after three years and a day. Petitioner acknowledged that she did not mention that she did not have a certificate. Shortly after petitioner was hired in February 2004, a form entitled "New Employment Documents Check Off" was completed for petitioner. For an item listed as "Certifications/Credentials," there is no entry. Prior to July 2007, no one told petitioner that she needed a New Jersey certificate to hold her position.

Petitioner also had discussions with representatives of her union, the Plainfield Association of School Administrators (PASA). Petitioner was told by the union president and various principals that she would obtain tenure after three years and a day. As acknowledged by petitioner, these individuals did not know that she did not hold a

certificate. Further, petitioner was never told by her supervisor or by Dr. Howard that she was in a tenurable position.

By letter dated July 20, 2006, Ms. Chiaravalloti informed petitioner that a reduction in force (RIF) notice had been rescinded. Ms. Chiaravelloti further stated that upon petitioner's return, accrual toward tenure would continue uninterrupted.

Ms. Chiaravalloti dealt with the Union County Superintendent in regard to certifications. By 2006, Dr. Carmen Centuolo had replaced Dr. Tilou. The County Office sent a chart described as a matrix to respondent to be completed with information concerning the certificates, or lack thereof, for various individuals. On a matrix returned to the County Office in August 2006, petitioner's name was on the list with the following comment: "Position does not require certification - Supervisor of Testing and Evaluation (Analyzes Data etc.)." This entry was never challenged, and Ms. Chiaravalloti never discussed petitioner with Dr. Centuolo. No express approval of the form was received from the County Office. This type of form was submitted every year.

As explained by Dr. Howard, respondent had a huge problem with respect to certificates. Dr. Howard and Dr. Centuolo reviewed 300 employees and their job descriptions. One type of problem was whether a particular employee needed a certificate. Dr. Howard's view was that this determination depended on the employee's job responsibilities. Her understanding was that if any employee's job responsibilities did not require him to work with children or evaluate teachers, then the employee did not need a certificate. In her view, individuals with titles such as Director of Technology and Director of Family School Support Services were administrators, but they were not required to have certificates. Ms. Chiaravalloti had the same understanding. According to Dr. Howard, individuals in these positions are still employed despite the fact that they do not have certificates.

Petitioner was treated in the same way. Her name was on the matrix, but petitioner was not put on the list of individuals who had to be terminated from their positions. Dr. Howard resigned from her position by letter dated June 5, 2007.

On June 18, 2007, Director of Curriculum and Instruction Lilly Sipp completed an Administrative Performance Appraisal of petitioner in the position of Supervisor of Research, Testing and Evaluation. The appraisal, which is very favorable, refers to petitioner as "Tenured." Prior to seeing the appraisal, petitioner went on a four-week vacation and returned on July 16 or 17, 2007.

Peter E. Carter became respondent's Interim Superintendent of Schools on June 11, 2007. Interim Superintendent Carter had previous experience as the superintendent in several other school districts. For respondent's meeting on June 19, 2007, Interim Superintendent Carter recommended that respondent approve the appointment of various individuals described as "non-tenured Non-Instructional 12-month Administrators" for the 2007-2008 school year effective July 1, 2007. Petitioner was among these individuals, some of whom did not hold any certificate. Having just been hired himself, Interim Superintendent Carter began investigating the status of each of these individuals, but he had not gotten to petitioner. Respondent approved the appointments at that meeting.

Upon returning from vacation, petitioner reviewed various e-mails, the appraisal and the agenda for the meeting on June 19, 2007. Petitioner was concerned when she saw her name on a list of non-tenured individuals. Her salary for the 2007-2008 school year was listed as $121,000.

On July 17, 2007, County Superintendent Centuolo sent a memo to Interim Superintendent Carter with a copy to petitioner and referred therein to a request by petitioner for a letter from the County Superintendent stating that the Ph.D. held by petitioner took precedence over any certification requirements. County Superintendent Centuolo further stated the matrix report indicated that petitioner did not hold any

educational certificate and that therefore petitioner could not be employed as a professional staff member by any New Jersey public school district.

Interim Superintendent Carter took the memo as a directive from the County Superintendent to terminate petitioner. By letter dated July 18, 2007, Interim Superintendent Carter advised petitioner that she was suspended without pay from the position of Supervisor of Testing/Evaluation and Assessment effective July 18, 2007. By letter dated August 1, 2007, Interim Superintendent Carter advised petitioner that at a special meeting on July 31, 2007, respondent had voted to terminate her employment effective July 18, 2007, for lack of New Jersey certification. The letter further stated that this action was ordered by the Union County Superintendent of Schools in a communiqué dated July 17, 2007. Ms. Chiaravalloti resigned effective July 31, 2007.

As of May 2008, Garnell Bailey was respondent's Interim Superintendent of Schools. Pursuant to her recommendation and with the approval of the County Superintendent, the position of Supervisor of Curriculum and Instruction/Testing and Assessment was abolished by respondent's resolution adopted at a meeting on May 5, 2008. The duties of the position were dispersed among vice principals, all of whom had appropriate certificates. Petitioner's position remained vacant after her termination.

B. Summary of Testimony

Each witness gave some testimony in regard to the question whether petitioner had attained tenure. Dr. Howard testified that only a statute confers tenure. Statutes confer tenure on individuals in various positions such as teaching staff members, superintendents, secretaries and janitors. Other positions such as security personnel, bus aides and teacher aides do not receive tenure.

Dr. Howard further testified that petitioner was in a tenured position because she was part of the PASA bargaining unit. Petitioner attained tenure after three years and a day in her position. Petitioner did not need a certificate, because she did not evaluate

teachers or work directly with students. Similarly, Ms. Chiaravalloti testified that it was her understanding that petitioner accrued tenure due to the fact that she was a member of PASA.

Petitioner testified that she was tenured in the Newark School District as a Civil Service employee. Further, petitioner testified that she believed that she was tenured in Plainfield.

Interim Superintendent Carter testified that an employee of a school district can attain tenure by working as a teaching staff member for three years and a day. Petitioner was in a tenurable position with respondent, but her Ph.D. did not satisfy the requirement of a certificate. Assistant Superintendent Bailey testified that an administrative certificate was required because petitioner was in an instructional position.

LAW AND ANALYSIS

a. Positions of the Parties

Respondent terminated petitioner's employment as a supervisor effective July 18, 2007, due to lack of New Jersey certification on the basis of N.J.A.C. 6A:9-5.1(a) and (c). These sections provide in pertinent part as follows:

> (a) 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.
>
> . . . .
>
> (c) The employing district shall remove from the position any teaching staff member who fails to maintain the mandated ... certificate .....

The referenced statute, N.J.S.A. 18A:26-2, provides in pertinent part as follows:

> No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in such public schools and of such other certificate, if any, as may be required by law.

Respondent contends that in accordance with these provisions, petitioner was required to hold an appropriate certificate. In fact, petitioner did not hold any New Jersey certificate. Respondent maintains that therefore it was required to remove petitioner from her position as Supervisor of Testing/Evaluation and Assessment in accordance with N.J.A.C. 6A:9-5.1(c).

Petitioner advances several arguments against respondent's reasoning. First, petitioner contends that she was not a teaching staff member. If petitioner's contention is correct, then none of the above-cited statutory or regulatory provisions would be applicable to her.

Second, petitioner maintains that she has an enforceable contract for the one-year period from July 1, 2007, to June 30, 2008, as a non-instructional employee, and she seeks enforcement thereof. In response to this argument, respondent maintains that in accordance with N.J.A.C. 6A:9-5.2(d) any contract of a teaching staff member shall cease and terminate whenever the employing board of education receives written notice from the county superintendent, or otherwise ascertains, that such person is not the holder of any appropriate certificate. The applicability of this regulation also turns on whether petitioner is a teaching staff member. As noted above, petitioner maintains that respondent is estopped from asserting that she is required to hold an appropriate certificate.

Third, petitioner contends that she holds tenure in the position of Supervisor of Testing and Assessment and that therefore she cannot be dismissed except upon charges pursuant to N.J.S.A. 18A:28-5. Petitioner relies on the doctrine of equitable estoppel to preclude respondent from asserting that she does not have tenure.

In view of the positions of the parties, the first issue relates to the applicability of N.J.A.C. 6A:9-5.1(a) and (c) and N.J.A.C. 6A:9-5.2(d) to petitioner and is whether petitioner was a teaching staff member. The second issue is whether petitioner attained tenure in the position of Supervisor of Testing and Assessment. The third issue is whether the doctrine of equitable estoppel should be applied to preclude respondent from asserting that petitioner needed a New Jersey certificate or from denying that petitioner held tenure in the position of Supervisor of Testing and Assessment.

b. General Principles

The general principles concerning certificates and tenure provide the starting point for evaluation of these issues. The Board of Examiners issues educational certificates in three categories: instructional, administrative and educational services. N.J.A.C. 6A:9-2.1; N.J.A.C. 6A:9-5.2(a). Within each category of certificates, there are also 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. Board of Educ., 131 N.J. 626, 633 (1993). Endorsements for instructional certificates typically range from subject areas, e.g., art, English or mathematics, to specific grade level specialization, e.g., elementary education. N.J.A.C. 6A:9-9.2. Endorsements for educational services certificates include fields such as school psychologist, school social worker and speech-language specialist. N.J.A.C. 6A:9-13.1 to -13.21. Endorsements for administrative certificates include positions such as principal and supervisor. N.J.A.C. 6A:9-12.3.

Tenure is a status created by statute. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 72 (1982). Various statutes confer tenure on qualifying individuals, e.g. teaching staff members, N.J.S.A. 18A:28-5; school nurses, ibid.; secretaries, assistant secretaries and business managers, N.J.S.A. 18A:17-2; and janitorial employees, N.J.S.A. 18A:17-3. The only statute that could possibly be applicable to petitioner is N.J.S.A. 18A:28.5, which pertains to teaching staff members.

The Tenure Act, N.J.S.A. 18A:28-1 to -18, 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 Ed., 90 N.J. at 73. The Tenure Act should be construed liberally to further its purpose of shielding teaching staff who quality for its protection. Id., at 74. An employee of a board of education is entitled to tenure as a teaching staff member if (1) he works in a position for which a certificate is required; (2) he holds the appropriate certificate; and (3) he has served the requisite period of time. Ibid.; N.J.S.A. 18A:28-5. Tenure is attained in a specific position. Nelson v. Board of Educ. of Tp. of Old Bridge, 48 N.J. 358, 366 (1997).

c. Teaching Staff Member

The first issue in this proceeding is whether petitioner was a teaching staff member while employed by respondent. "Teaching staff member" is defined in N.J.S.A. 18A:1-1 as follows:

> "Teaching staff member" means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners and includes a school nurse and a school athletic trainer.

More succinctly, a "teaching staff member" holds a position of such character that the qualifications therefor require him to hold an appropriate certificate. One source for the qualifications for the position is the job description. It is also necessary to look at the actual work done. Quinlan v. Bd. of Ed. of North Bergen Tp., 73 N.J. Super. 40, 47-48 (App. Div. 1962).

In view of petitioner's title, the starting point is the definition of "supervisor." The applicable regulation, N.J.A.C. 6A:9-12.3(c), provides in pertinent part as follows: "supervisor shall be defined as any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel."

With respect to the job description, petitioner points to the fact that it states that New Jersey certification as a supervisor or principal is preferred. This language would indicate that a certificate as a supervisor or principal is not a requirement for the job. But the job duties include functions that may fairly be described as continuing guidance to instructional personnel within the meaning of N.J.A.C. 6A:9-12.3(c). One job goal was to assist school staff in understanding and using data for program improvement. Another job responsibility was to provide training for school staff on interpreting test data.

Consistent with the job description, petitioner did in fact provide training to the teachers and other staff as to how to interpret and understand the test data. This enabled the teachers to identify students' strengths and weaknesses. Additionally, petitioner provided the teachers with strategies so that they could modify their instruction to improve students' education. Petitioner used the product of her effort analyzing test results for program improvement and to train instructional personnel with a view to better performance by students on tests. Petitioner needed knowledge as to both testing and the school curriculum to perform her duties. These functions constitute continuing guidance within the meaning of N.J.A.C. 6A:9-12.3(c).

Petitioner points to the matrix as an indication that petitioner's position was viewed for several years as one that did not require a certificate. In this regard, it is noteworthy that at the time that petitioner was hired, Dr. Howard believed that any person who did not work directly with children or evaluate teachers could be hired without a certificate. But it is evident that Dr. Howard's view is considerably narrower that the scope of the definition of supervisor in N.J.A.C. 6A:9-12.3(c). This means that the original requirement of a certificate as a supervisor or principal for the position of Supervisor of Curriculum and Instruction, Testing and Assessment was correct and that the change to "preferred" was not consistent with the pertinent regulation.

It follows from the above that petitioner's position was of such character that the qualifications therefor required her to hold an appropriate certificate. Therefore, I **CONCLUDE** that petitioner was a teaching staff member within the meaning of N.J.S.A. 18A:1-1.

Several consequences would follow from this conclusion. First, petitioner meets one of the statutory requirements for tenure in that she worked in a position for which a certificate was required. It is undisputed, however, that petitioner does not hold the appropriate certificate. It would follow that petitioner does not meet the statutory requirements for tenure. Further, petitioner would fail to meet the requirements of N.J.S.A. 18A:26-2 and N.J.A.C. 6A:9-5.1(a), because she did not have an appropriate certificate; petitioner's contract would cease and terminate pursuant to N.J.A.C. 6A:9-5.2(d); and her removal would be required by N.J.A.C. 6A:9-5.1(c). All of these consequences would follow from petitioner's status as a teaching staff member, unless respondent is estopped from claiming that petitioner needed an appropriate certificate or from denying that petitioner had attained tenure.

d. Equitable Estoppel

In Knorr v. Smeal, 178 N.J. 169 (2003), the New Jersey Supreme Court summarized the principles of equitable estoppel as follows:

> "Estoppel is an equitable doctrine, founded in the fundamental duty of fair dealing imposed by law." ... The doctrine is designed to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment. ... The doctrine is invoked in "the interests of justice, morality and common fairness." ... Estoppel, unlike waiver, requires the reliance of one party on another. ... In short, to establish equitable estoppel, plaintiffs must show that defendant engaged in conduct, either intentionally or under circumstances that induced reliance, and that plaintiffs acted or changed their position to their detriment. [Citations omitted.] [Id., at 178.]

In Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334 (1979), the Court set forth a definition of equitable estoppel that makes the point that the reliance must be in good faith as follows:

> ***the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed *** as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse ***. [Id., at 339.]

It is noteworthy that equitable estoppel is rarely invoked against a governmental entity, particularly when the estoppel would interfere with essential governmental functions. O'Malley v. Department of Energy, 109 N.J. 309, 316 (1987). However, the State Board of Education has stated that the doctrine of equitable estoppel may be applied in this type of dispute under appropriate circumstances. McAneny v. Board of Education of School District of the Chathams, 92 N.J.A.R.2d (EDU) 208, 213. In this context, a teaching staff member's reliance must be reasonable in relation to his primary responsibility to apply for and possess appropriate certification during his employment. Jennings v. Highland Park Bd. of Ed., 1989 S.L.D. 1085, 1101 (St. Bd. of Ed., December 6, 1989). The burden of proof to establish a claim of equitable estoppel is on the party asserting estoppel. Miller v. Miller, 97 N.J. 154, 163 (1984).

Here, petitioner relies on multiple circumstances to support her contention that respondent is estopped from claiming that she needed a New Jersey certificate as follows: (1) petitioner's resume did not show any New Jersey certification; (2) the qualifications for petitioner's position provided that a New Jersey certificate as supervisor or principal was preferred; (3) during an interview with Dr. Howard, petitioner mentioned that she did not have a New Jersey certificate, but she received no response; (4) at the beginning of petitioner's employment, she completed a form on February 9, 2004, and made no entry on a line for certificates; (5) no one told petitioner that she needed a certificate; and (6) on a matrix used by respondent and the County Office in 2006 to show the certification status with respect to various employees, an entry which stated that petitioner's position did not require a certificate went unchallenged. With respect to tenure, petitioner relies on various discussions or communications as follows: (1) a discussion with a clerical worker indicated that petitioner would receive tenure after three years and a day; (2) discussions with members of PASA indicated that petitioner would receive tenure; (3) in a letter dated July 20, 2006, Ms. Chiaravalloti advised petitioner that a reduction in force (RIF) had been rescinded and that petitioner would continue to accrue tenure; and (4) an Administrative Performance Appraisal dated June 18, 2007, referred to petitioner as "Tenured."

With respect to a New Jersey certificate, the sixth item was a matrix used by respondent and the County Office to show the certification status of various employees. However the matrix may reflect on other issues, it was not a representation made to petitioner by respondent, which is the opposing party in this matter, and therefore does not support a claim of equitable estoppel. In fact, there is no indication that petitioner was even aware of this matrix. With respect to the other items, it is accepted that petitioner did not claim to have a New Jersey certificate, that the job qualifications provided only that a New Jersey certificate as a supervisor or principal was preferred, that petitioner mentioned during the job interview that she did not have a New Jersey certificate and received no response, and that no one told petitioner that she had to

have a certificate. Undoubtedly, respondent's representatives knew that petitioner did not have a certificate and hired her nonetheless.

One difficulty with petitioner's contention is the salient fact that petitioner knew that prior to an amendment effective November 18, 2003, the qualifications for her position called for a New Jersey certificate as a supervisor or principal. It seems evident that the purpose of the amendment was to make petitioner eligible for the position. Under the circumstances, petitioner had a clear reason to question whether a certificate was required for her position. In view of this change to make the qualifications for the position fit her, petitioner could not reasonably and in good faith rely on any representations, silence or action by respondent's representatives to satisfy her primary responsibility to apply for and possess appropriate certification for her employment. Moreover, petitioner has not demonstrated any real detriment to herself by accepting the position in Plainfield.

Petitioner's contention with respect to tenure is less persuasive. Petitioner mentioned a statement by a clerk in respondent's Human Resources section to the effect that petitioner would receive tenure in three years and a day. But it is evident that the clerical worker was not in a position of authority, and it is not established that she was aware that petitioner did not hold a New Jersey certificate. Under the circumstances, petitioner has not established that she could reasonably rely on this statement.

Some of the representations upon which petitioner claims to rely were made by members of PASA, which was her union. The difficulty with these representations is that they were not made by respondent, which is the opposing party in this case. In addition, petitioner acknowledged that these individuals were not aware that she did not hold a New Jersey certificate. Under the circumstances, these representations do not support a claim of equitable estoppel.

There was also an Administrative Performance Appraisal dated June 18, 2007, that referred to petitioner as "Tenured." Petitioner was on vacation for the following four weeks, and shortly after she returned, petitioner received the appraisal on or about July 17, 2007. By letter dated July 18, 2007, Interim Superintendent Carter advised petitioner that she was suspended without pay from the position of Supervisor of Testing/Evaluation and Assessment. There is no evidence that petitioner took any action, or refrained from doing so, during this one-day period. Under the circumstances, petitioner has not established that she placed any reliance on the word "Tenured" in the appraisal dated June 18, 2007.

This leaves the letter dated July 20, 2006, from Ms. Chiaravalloti stating that petitioner would continue to accrue tenure. Standing alone, this letter is a slender reed at best and is not something that petitioner could reasonably rely upon to satisfy her primary responsibility to have the appropriate certificate for her employment. It follows that these representations do not support a claim of equitable estoppel.

Under the circumstances, petitioner has failed to establish a claim of equitable estoppel with respect to tenure or the need for a New Jersey certificate. Therefore, I **CONCLUDE** that respondent should not be estopped from claiming that petitioner needed a New Jersey certificate or from denying that petitioner had tenure.

e. Conclusion

In view of the inapplicability of the doctrine of equitable estoppel and the analysis set forth above, I **CONCLUDE** as follows: (1) as a teaching staff member, petitioner was required to hold a valid and appropriate certificate for her position in accordance with N.J.S.A. 18A:26-2 and N.J.A.C. 6A:9-5.1(a); (2) petitioner did not meet the statutory requirements for tenure under N.J.S.A. 18A:28-5 or any other statute and did not attain tenure in the position of Supervisor of Testing/Evaluation and Assessment, because she did not hold the appropriate certificate; (3) petitioner's contract ceased and terminated pursuant to N.J.A.C. 6A:9-5.2(d), when respondent received written notice

that petitioner was not the holder of an appropriate certificate for her position; and (4) respondent properly removed petitioner from her position pursuant to N.J.A.C. 6A:9-5.1(c), because she did not have the mandated certificate. Therefore, I **FURTHER CONCLUDE** that petitioner's contentions are without merit and that the petition in this matter must be dismissed.

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. 11, 2009
DATE

RICHARD McGILL, ALJ

Date Received at Agency: 2/11/09

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 13 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

WITNESS LIST

For petitioner:

Angelina Chiaravalloti
Soundaram Ramaswami
Dr. Paula Howard

For respondent:

Dr. Garnell Bailey
Dr. Peter E. Carter

EXHIBIT LIST

P-1	Chart described as a "matrix" and entitled "Plainfield Public Schools" with list of employees and certifications	Evidence
P-2	Job Description for Supervisor of Curriculum and Instruction, Testing and Assessment	Evidence
P-3	Letter dated July 20, 2006, from Angelina Chiaravalloti to Soundaram Ramaswami	Evidence
P-4	Item T. entitled "Appointment of 12-Month Non-Instructional Administrators - for 2007-2008 School Year" from Board Agenda dated June 19, 2007	Evidence

P-5	Administrative Performance Appraisal of petitioner dated June 18, 2007	Evidence
P-6	New Employment Documents Check Off dated February 9, 2004	Evidence
P-7	Letter dated July 18, 2007, from Peter E. Carter to Dr. Soundaram Ramaswami	Evidence
P-8	Letter dated August 1, 2007, from Peter E. Carter to Dr. Soundaram Ramaswami	Evidence
P-9	Memorandum dated July 17, 2007, from Carmen Centuolo to Peter E. Carter	Evidence
R-1	Job announcement dated October 10, 2003	Evidence
R-2	Letter dated October 22, 2003, from Soundaram Ramaswami to Director of Human Resources, Plainfield Public Schools, with attached resume	Evidence
R-3	Candidate Interview Evaluation Forms (eight pages)	Evidence
R-4	Application of Soundaram Ramaswami dated December 18, 2003	Evidence
R-5	Certified Resolution from May 5, 2008, Business Meeting of the Plainfield Board of Education	Evidence

135-09

OAL DKT. NO. EDU 1341-09
AGENCY DKT. NO. 382-12/08

M.A.G. on behalf of minor children, M.M.G. and J.M.G.,	:	
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 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 with the following proviso. Paragraph #5 of the settlement agreement required that $2500 be paid to respondent "no later than March 31, 2009," a date that has passed. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same. The Commissioner therefore adopts the Initial Decision as the final decision in this case, providing that the parties have already effectuated the settlement terms, or have agreed upon a mutually satisfactory alternate date for payment to respondent of the $2500.

Accordingly, the matter is hereby dismissed, with prejudice, subject to compliance with the terms of the settlement agreement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 5/04/09

Date of Mailing: 5/04/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01341-09

AGENCY DKT. NO. 382-12/08

M.A.G., ON BEHALF OF MINOR CHILDREN, M.M.G. AND J.M.G.,

Petitioners,

v.

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

Respondent.

Nelson C. Monteiro, Esq., for petitioners

Marvin Lehman, Esq., for respondent

Record Closed: March 24, 2009 Decided: March 24, 2009

BEFORE **IMRE KARASZEGI, JR.,** ALJ:

On January 21, 2009, this 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 and 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 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.

March 24, 2009
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 3-26-09

Mailed to Parties:

MAR 26 2009
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

id

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Attorney for: Respondent

2009 MAR 24 A 6:54

M.A.G., on Behalf of Minor Children, M.M.G. & J.M.G.

Appellant

v.

Board of Education of the City of Elizabeth

Respondent

RESIDENCY APPEAL
NEW JERSEY DEPARTMENT OF EDUCATION

AGENCY DOCKET NO: 382-12/08

SETTLEMENT AGREEMENT

THIS MATTER having been filed as an appeal with the Department of Education by M.A.G., on behalf of the minor children, M.M.G. and J.M.G., pro se and this matter having been forwarded to the Administrative Law Court (Honorable Imre Karaszegi) under the above referenced docket number; and M.A.G., on behalf of the minor children, M.M.G. and J.M.G. having retained Nelson Monteiro, Esq. to represent him; and Marvin Lehman, Esq. representing the Board of Education of the City of Elizabeth; and the parties having agreed to settle all issues in this matter.

THEREFORE, the parties have agreed to settle their dispute as follows:

1. M.A.G., on behalf of the minor children, M.M.G. and J.M.G. agree to withdraw their appeal; and

2. M.A.G., on behalf of the minor children, M.M.G. and J.M.G. shall remove the two children from the Elizabeth schools as of March 9, 2009; and
3. The Board of Education of the City of Elizabeth agrees not to pursue any claims for reimbursement against M.A.G., on behalf of the minor children, M.M.G. and J.M.G.M.M.G for the minor children attending the Elizabeth schools.
4. M.A.G., on behalf of the minor children, M.M.G. and J.M.G and the Board of Education of the City of Elizabeth agree that there is no admission of wrongdoing by either of them in the entering into of this agreement; and
5. M.A.G., on behalf of the minor children, M.M.G. and J.M.G. agrees to reimburse the Board of Education of the City of Elizabeth the sum of $2,500.00 no later than March 31, 2009 as and for its costs in this matter. In the event that this money is not paid by March 31, 2009, it is agreed and understood that the Board of Education is entitled to a judgment for the full amount due for educating the minor children listed in this appeal for 2007, 2008 and 2009 school years. A judgment shall be entered upon the submission of an affidavit setting forth the amount due, including attorney fees, investigator fees and costs ; and
6. Other than the reimbursement of costs set forth in paragraph 5 above, each party shall be responsible for their own attorney fees and costs; and
7. M.A.G., on behalf of the minor children, M.M.G. and J.M.G. and the Board of Education of the City of Elizabeth agree to execute releases to each other as part of this settlement; and

8. M.A.G., on behalf of the minor children, M.M.G. and J.M.G. agrees that the children shall not be registered in the Elizabeth Public Schools for the September 2009 term; and

9. This is a full and complete settlement between the parties resolving all of the claims and/or defenses that were or could have been raised in this cause of action including any cross claims, third party complaints, or any other rights whatsoever. All claims, including but not limited to complaints, counterclaims, cross claims, third party claims, and the like, which were made or could have been made by or between the parties are dismissed with prejudice subject to the terms of this agreement.

10. Upon the filing of this agreement, the appeal of M.A.G., on behalf of the minor children, M.M.G. and J.M.G. is withdrawn with prejudice.

Nelson Monteiro, Esq.
Attorney for M.A.G., on behalf of the minor children, M.M.G. and J.M.G.

Date: March , 2009

Marvin Lehman, Esq.
Attorney for the Board of Education of the City of Elizabeth

Date: March 17, 2009

BOARD OF EDUCATION OF THE BOROUGH OF MAGNOLIA, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY AND A.D. AND T.D., on behalf of minor children, C.V., H.L., J.D., J.D. AND C.D.,	:	
RESPONDENT.	:	
AND	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
PETITIONER,	:	
V.	:	
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FUNDING, BOARD OF EDUCATION OF THE BOROUGH OF MAGNOLIA, CAMDEN COUNTY, AND BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,	:	
RESPONDENTS.	:	

SYNOPSIS

These two consolidated matters involve the district of origin and current domicile of the D family, which at various relevant times resided in the Borough of Magnolia, the Township of Moorestown, and the Township of Deptford. The three school districts disagree as to which district is responsible for the costs of providing a free public education to the D family children, who have been homeless since sometime in 2003 when they lost their home in Magnolia.

The ALJ stated that the two issues to be decided were: 1) whether Magnolia filed its petition of appeal from the initial determination that it was the district of residence responsible for the educational costs of the D children in a timely manner, pursuant to *N.J.A.C.* 6A:23-5.2, and if not, whether *N.J.A.C.* 6A:23-5.2

may be relaxed in accordance with *N.J.A.C.* 6A:3-1.16, and 2) whether the D family is currently homeless or domiciled in Deptford township. The ALJ found that Magnolia's petition – filed 105 days after the initial determination that it was the district of residence – was untimely, and consequently concluded that Magnolia was the district of origin of the D children; Magnolia was therefore ordered to reimburse Moorestown and Deptford Boards of Education for the costs they incurred in educating the D children through January 5, 2005. The ALJ further concluded that Deptford Township has, since January 5, 2005 and continuing to the present, been the D children's district of residence; the Deptford Township Board of Education is therefore responsible for providing the children with a free public education until such time as the family establishes a fixed place of residence in another school district.

Upon full and careful consideration, the Commissioner concurred with the ALJ's determinations, 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 5, 2009

140-09

OAL DKT. NOS. EDU 994-07 AND EDU 8783-07
AGENCY DKT. NOS. 439-11/06 AND 246-8/07
(CONSOLIDATED)

BOARD OF EDUCATION OF THE BOROUGH OF MAGNOLIA, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY AND A.D. AND T.D., on behalf of minor children, C.V., H.L., J.D., J.D. AND C.D.,	:	
RESPONDENT.	:	
AND	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,	:	DECISION
PETITIONER,	:	
V.	:	
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FUNDING, BOARD OF EDUCATION OF THE BOROUGH OF MAGNOLIA, CAMDEN COUNTY, AND BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of both Magnolia Borough and Deptford Township Boards of Education, and reply to these from Moorestown Township Board of Education – filed in accordance with *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her determination herein.

The exceptions of the Boards essentially recast and reiterate their arguments advanced before the Administrative Law Judge (ALJ) below which the Commissioner finds were fully considered and addressed in the Initial Decision and, consequently, will not be revisited here.

Upon full review and consideration of the entire record, the Commissioner agrees with the ALJ that: 1) the Magnolia Board of Education's appeal of the County Superintendents' determination that it was the district of origin during the D family's period of homelessness,[1] was untimely – pursuant to *N.J.A.C.* 6A:23-5.2(d) – and consequently its petition in this regard must be dismissed[2]; 2) Magnolia is, therefore, the D children's district of origin up to January 5, 2005 and is responsible for reimbursing the Moorestown and Deptford Township Boards of Education for the costs they expended in educating the D children during this period; and 3) since January 5, 2005 the Deptford Township Board of Education has been and continues to be the district of residence for the D children and, as such, was and continues to be responsible for providing them with a free public education from that point until such time as the family establishes a fixed residence in another school district.

Accordingly, the recommended decision of the OAL is adopted – for the reasons well stated therein – as the final decision in this matter.

IT IS SO ORDERED.[3]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/05/09

Date of Mailing: 5/05/09

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[1] Specifically, subsequent to their departure from Magnolia in 2003 up to January 5, 2005.

[2] It is noted that the relaxation rule found at *N.J.A.C.* 6A:3-1.16 is restricted to the rules set forth in Chapter 3; however, even applying general principles of equity, the Commissioner finds – for the reasons expressed by the ALJ – that Magnolia has advanced no compelling reason to justify excusing it from the 30-day filing requirement of *N.J.A.C.* 6A:23-5.2(d).

[3] 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

SUMMARY DECISION

CONSOLIDATED

OAL DKT. NOS. EDU 994-07 and EDU 8783-07

AGENCY DKT. NOS. 439-11/06 and 246-8/07

BOARD OF EDUCATION OF THE BOROUGH OF MAGNOLIA, CAMDEN COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY AND A.D. AND T.D. o/b/o C.V., H.L., J.D., J.D. and C.D.,[1]

Respondents,

and

[1] A.D. and T.D. state that the dispute pertains to seven of their eight children – H.L., J.D., J.D., C.V., A.C.D., R.D. and C.D. – not five as represented in the petition. The dispute may be attributable to the fact that as of the date of his deposition – February 14, 2008 – two more of A.D.'s children had attained school age.

BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF SCHOOL FUNDING, BOARD OF EDUCATION OF THE BOROUGH OF MAGNOLIA, CAMDEN COUNTY, AND BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,

Respondents.

Gary Wodlinger, Esq., for Board of Education of the Borough of Magnolia (Lipman, Antonelli, Batt, Dunlap, Wodlinger & Gilson, attorneys)

Joseph F. Betley, Esq., for Board of Education of the Township of Deptford (Capehart & Scatchard, P.A., attorneys)

Arthur F. Risden, Esq., for Board of Education of the Township of Moorestown (Comegno Law Group, P.C., attorneys)

Jennifer L. Campbell, Deputy Attorney General, for New Jersey Department of Education (Anne Milgram, Attorney General of New Jersey, attorney)

A.D. and T.D., respondents, pro se

Record Closed: February 19, 2009 Decided: March 27, 2009

BEFORE **ISRAEL DUBIN,** ALJ:

These two consolidated matters concern the district of origin and current domicile of the D. family which, at various times relevant to these proceedings, resided in the Borough of Magnolia in Camden County, the Township of Moorestown in Burlington County, and the Township of Deptford in Gloucester County. The material facts do not appear to be in dispute.

A.D., his wife, T.D., and their then seven children, five of whom were of school age and enrolled as students in the Magnolia School District, resided in Magnolia until sometime in 2003 when they lost their home.[2] With no place to go, the D.'s were first contacted by the Division of Youth and Family Services and then referred to the Camden County Board of Social Services, which placed the family in a succession of motels for the next several months.[3]

In February 2004, with the aid of a security deposit provided by the Camden County Board of Social Services, A.D. rented a house from an uncle by marriage on N. Church Street in Moorestown and enrolled his children in the township's school district. As far as he and the uncle were concerned, the house was his "for as long as [I] wanted to live there," T:34-3 to 4, and paid the rent of $1,000 per month. However, since the school district would not enroll the children without formal proof of residency, he signed a five-year lease. At the time, he had "no plans to go anywhere else and . . . wasn't interested in making plans to go anywhere else." Id. at 8 to 9.

In or about July 2004, his uncle got divorced and, suffering from a terminal disease, asked T.D. to leave because "[h]e wanted to die in his own house." T:42-16 to 17. That September, the uncle filed an action in Superior Court, Special Civil Part, and had the family evicted. A.D. obtained a hardship stay and when it expired, DYFS and the Burlington County Board of Social Services placed the family in a Burlington County

[2] There is some dispute over whether the family's home was condemned, lost to foreclosure, or perhaps a combination of both. Regardless of the cause, the parties agree that the family did not move of its own volition and, for at least some period of time, was rendered homeless.

[3] During his deposition, A.D. testified that he couldn't "remember any dates," but believed the family had lived in a motel for about "six or seven" months after living in Magnolia for "three or four" years.

motel, where it remained through the middle of December. At that time the family was moved to transitional housing in Mount Holly for the rest of the year. Throughout this period of time, the children remained enrolled in the Moorestown schools.

In January 2005, following the publication of a front page article about the family's plight in the *Courier Post* newspaper, the D'Anastasio Corporation offered A.D. the use of a five bedroom home on a ten acre plot they were developing in Deptford Township, rent free. According to A.D., he was told: "This is your home, just treat it like home. You can do whatever you need to do. You can raise your family." T:62-2 to 5. The only things he was responsible for were utilities, although D'Anastasio ultimately decided to pay for the natural gas because, "they're good people, man." T:64-20.

The family moved into their new home on January 5, 2005. At that time, the D'Anastasio Corporation began a fundraising drive and tried to raise enough money to pay for the house free and clear. If, in the interim, the company found a buyer for the home, it would move the family into a different home in the development and apply the funds to the purchase of that house. As of February 14, 2008, the date of A.D.'s deposition, the family was still residing in the home even though the corporation had not yet raised enough money to pay for it.[4] As A.D. recalled, he was told that "this is a nine inning ball game and we're only [i]n inning number three, so don't worry about it." T:71-15 to 16.

In any event, the children were enrolled in the Deptford Township School District on January 11, 2005. Deptford classified the children as homeless from Burlington County and Moorestown continued to provide them with a free public education for the balance of the 2004-2005 school year. This remained the status quo through the 2005-2006 school year.

By letter dated May 1, 2006, Moorestown advised Deptford that its own internal investigation had disclosed that the D. family had never established permanent residence within its geographical boundaries and that Deptford should therefore make

[4] Upon information and belief, the family continues to reside in this house.

all future tuition arrangements with Magnolia, the true district of origin. Deptford disagreed and on May 4, 2006, forwarded a copy of Moorestown's letter to the State Department of Education, Gloucester County Office, with a request for guidance. In the meantime, by letter dated May 11, 2006, Deptford advised Magnolia of its own determination that Magnolia was the district of record and therefore responsible for the children's' total tuition of $59,573. Deptford also informed Magnolia that the Burlington and Gloucester County Supervisors of Special Education agreed with this decision.[5]

Magnolia protested this determination in a May 18, 2006 letter to Deptford, noting that Moorestown had not challenged Deptford's initial determination that it, Moorestown, was the district of origin and therefore responsible for the children's tuition for the 2004-2005 school year. Magnolia also took exception to the process by which Deptford had obtained the county supervisors' guidance, claiming that it had not received notice in accordance with N.J.A.C. 6A:17-1.1, et seq. and had therefore been deprived of the opportunity to participate. Deptford, in turn, requested the intervention of the Burlington, Camden and Gloucester County Offices of the Department of Education on May 30, 2006.

By letter dated August 31, 2006, the Gloucester County Superintendent advised the superintendents of the Deptford Township and Magnolia Borough School Districts that the three county offices of education had collaboratively determined that Magnolia had been "the last district of regular attendance." In reaching this determination, the county offices found that:

> With assistance from Camden County Human Services, the family moved to Moorestown where they stayed briefly until they were displaced by a fire.[6] Since that time they have stayed in Deptford by virtue of the benevolence of a real estate development firm. Thus Magnolia Borough would be considered the district of origin for these students since that is the district they last resided in and were enrolled in as students. Periodic interviews with the parents regarding their family status and intent suggest that they continue to be

[5] The record does not include any correspondence that may have been sent by either or both of the County Supervisors of Special Education.

[6] Neither the transcript of A.D.'s deposition testimony, nor any of the other documents in the record, include any references to there having been a fire at the house in Moorestown.

> incapable of establishing a fixed permanent residence through independent, self-sufficient means, despite the length of time that has elapsed since they lived in Magnolia. Thus it is determined that Magnolia continues to be the district responsible for the provision of educational services to these children under the provisions of N.J.A.C. 6:24-1.1 et seq.
>
> [Gloucester County Superintendent's Letter dated August 31, 2006.]

Based upon this determination, on October 4, 2006, Deptford forwarded tuition contracts to Magnolia for signature. Shortly after that, in a letter to Magnolia dated October 13, 2006, the Gloucester County Superintendent clarified the process followed by the three county offices of education in making their determination as follows:

> Please be advised that the determination of homelessness and the assignment of "district of origin" status to Magnolia for the students from the D. family currently staying in Deptford was made after consultation and collaboration among the Gloucester, Burlington and Camden County Offices of Education staffs. The joint determination was reflected in my letter of August 31, 2006 to the principal parties.
>
> Attached are copies of correspondence received in my office regarding this matter. I would encourage you to contact the Camden County Office of Education for additional information and to review this matter. I would like to reiterate that you may file an appeal to the decision with the Commissioner of Education.
>
> [Gloucester County Superintendent's Letter dated October 13, 2006.]

On November 27, 2006, Magnolia filed a petition with the Commissioner of Education contesting the superintendents' determination as to the D. children's district of origin and domicile, naming the three county superintendents and Deptford as defendants. By letter dated November 29, 2006, the Department of Education advised Magnolia that in accordance with N.J.A.C. 6A:17-2.8 and N.J.A.C. 6A:23-5.2, its appeal on the issues of homelessness and district of origin had to be filed in the first instance with the Division of Finance. The Department of Education further advised Magnolia that

although the issue of domicile was properly before the Commissioner, the names of the parents, A.D. and T.D., had to be substituted for those of the county superintendents.

As instructed, on December 14, 2006, Magnolia filed its appeal from the county superintendents' determination as to the D. children's district of origin with the Division of Finance. It also filed an amended petition on the issue of the D. family's domicile with the Commissioner. On February 5, 2007, Deptford filed its answer to the amended petition and a counterclaim against Magnolia. The counterclaim alleged that Magnolia was the district of origin and, as such, was responsible for the costs of educating the D. children for the 2005-2006 and 2006-2007 school years.

On May 17, 2007, Deptford filed a third party petition requesting that Moorestown be joined in the action as a necessary third party and ordered to reimburse Deptford for the costs of educating the D. children for the 2005-2006 and 2006-2007 school years. Moorestown filed its answer and a counterclaim against Magnolia on June 11, 2007. The counterclaim sought reimbursement from Deptford of all costs associated with the education of the D. children paid by Moorestown to Deptford while they were enrolled in the Deptford School District. Deptford's third party petition, Moorestown's answer and counterclaim, and Deptford's answer to the counterclaim were improvidently accepted and filed as supplemental pleadings in this matter.[7]

On August 7, 2007, Assistant Commissioner of Education Katherine Atwood, Division of Finance, issued a decision reversing the county superintendents' determination regarding the D. children's district of origin. The assistant commissioner based her decision on the following findings of fact:

[7] The Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1, et seq., do not recognize third party practice. Therefore, in addition to its counterclaim against Magnolia, Deptford should have been advised to file a petition with the Commissioner naming Moorestown as a respondent, which in turn would have been consolidated with the present matter. In the alternative, Moorestown could have been notified that the determination of the matter brought by Magnolia against A.D. and T.D. and Deptford was likely to "substantially, specifically, and directly" affect Moorestown's interests and been invited to intervene. N.J.A.C. 1:1-16.1. In any event, Moorestown did not object to the third party petition, and might well have consented to being brought in as an intervenor. Still, since all claims against Moorestown are being dismissed for reasons to be explained later in this decision, corrective measures need not be taken.

- The D.'s resided in Magnolia Borough until the end of 2003 when they lost their home.
- The Camden County Board of Social Services then temporarily placed the family in motels.
- In early 2004, the family secured rental subsidies and a security deposit for a house in Moorestown.
- In February 2004, the family moved to a house on N. Church Street in Moorestown.
- Following a dispute with the landlord, a judge allowed the family to remain at the Moorestown residence until December 15, 2004.
- The Burlington County Board of Social Services subsequently temporarily placed the family in a motel until the end of 2004, followed by several days in a house owned by Transitional Housing Services.
- The D'Anastasio Corporation offered the family the use of a two-story, five bedroom house on Boundary Road in Deptford Township and the family moved into the house on January 5, 2005.
- The Deptford School District registered the D. children and determined the family to be homeless from Moorestown.
- Moorestown accepted the homeless determination and paid for the children's educational costs.
- In a letter dated May 1, 2006 to the Deptford School District, the Moorestown School District disputed that it was the family's last district of residence before becoming homeless.
- The Deptford School District, in a letter to the Gloucester County Office of Education, asked the county office to review the status of the family.
- The Gloucester County Office of Education, in a letter dated August 31, 2006, ruled that the D. family was homeless and that the family's last residence before becoming homeless was in Magnolia, making that district responsible for the D. children's educational costs.

Based upon these facts, and in accordance with N.J.S.A. 18A:7B-12c, N.J.S.A. 18A:38-1(d), N.J.A.C. 6A:23-5.2g and N.J.A.C. 6A:23-5.3, the Assistant Commissioner determined that:

- The D. family was homeless from the time of their eviction from the Magnolia residence until February 1, 2004, when they moved into a residence located in Moorestown.
- The Magnolia School District is responsible for the D. children's educational costs until February 1, 2004.
- After their eviction from the Moorestown residence around December 15, 2004, the family was again temporarily homeless until January 5, 2005 when they moved into a residence in Deptford.
- The Moorestown School District is responsible for the D. children's educational costs from February 1, 2004 until January 5, 2005.

- The Deptford School District is responsible for the D. children's educational costs beginning on January 5, 2005 and continuing for as long as the family resides in the district.

On August 31, 2007, Deptford filed a petition of appeal challenging the decision by the Division of Finance,[8] naming the Division, Magnolia and Moorestown as respondents. The petition sought reversal of the Division's August 7, 2007 decision regarding the D. family's homelessness, school district of origin and apportionment of educational costs; adoption of the three county superintendents' collective decision of August 31, 2005; a finding that either Magnolia or Moorestown was the district of origin; a finding that Magnolia and/or Moorestown are/is responsible for the D. children's educational costs; and an order directing Magnolia and/or Moorestown to reimburse it for all such costs.

On September 10, 2007, Moorestown filed a petition of cross appeal requesting rejection of the Assistant Commissioner's August 7, 2007 decision as time barred and/or reversal insofar as it held Moorestown responsible for the D. children's educational costs from February 1, 2004 through January 5, 2005; adoption of the county superintendents' August 31, 2006 determination as the final determination in this matter; a finding that Magnolia or Deptford is the D. children's school district of origin; a finding that Magnolia and/or Deptford are/is responsible for the D. children's educational costs, and an order directing Magnolia and/or Deptford to reimburse Moorestown for all such costs. It also filed a motion to dismiss in lieu of answer to Deptford's petition of appeal. In so doing, Moorestown alleged that Magnolia and Deptford had failed to appeal the county superintendents' decision to the Division of Finance within 30 days as required by N.J.A.C. 6A:23-5.2(d). The Department of Education and Magnolia filed their answers to the petition of cross appeal on September 20 and 25, 2007, respectively.

On September 28, 2007, Deptford filed an amended petition of appeal, and on October 10, 2007, a motion for summary decision joining in Moorestown's request to have Magnolia's petition of appeal dismissed as time barred. On April 30, 2008,

[8] The petition listed the Office of School Funding, not the Division of Finance, as the nominal respondent.

Magnolia responded by filing a motion for summary decision seeking affirmance of the decision rendered by the Division of Finance on August 7, 2007, and a finding that the D. family is not homeless, but domiciled in Deptford.

Moorestown also filed a motion for summary decision on April 30, 2008, requesting dismissal of Magnolia's petition of appeal as untimely; a finding that the August 7, 2007 determination of the Division of Finance was therefore moot; and reinstatement of the August 31, 2006, letter decision issued by Gloucester County Superintendent H. Mark Stanwood, Ed.D. On May 7, 2008, Deptford followed by filing a supplemental motion for summary decision requesting dismissal of Magnolia's petition of appeal as untimely; a finding that the D. family has not established a fixed permanent residence through self sufficient means since moving to Deptford and therefore remains homeless; and a determination that Moorestown or, in the alternative, Magnolia, is the D. children's district of origin.

On May 13, 2008, the Department of Education submitted a "position statement" responding to the parties' respective motions. Following a brief recitation of the procedural history, the Department made the following determination:

> Pursuant to N.J.A.C. 6A:17-2.8 and N.J.A.C. 6A:23-5.2, a school district disputing the county superintendent's determination with respect to school district of origin may appeal to the Department of Education by submitting a written notification of the dispute to the Division of Finance within 30 days of the receipt of the final notice that a child was determined to be a resident of the district for purposes of State funding.
>
> In the instant case, Magnolia failed to timely file a notification of dispute. In that regard, Magnolia filed a petition of appeal with the Commissioner of Education on November 22, 2006, some fifty-three days after the filing deadline established by N.J.A.C. 6A:17-2.8 and N.J.A.C. 6A:23-5.2. At the Direction of the Director of the Bureau of Controversies and Disputes, Magnolia pursued its challenge of the County Superintendents' determination with the Division of Finance on December 14, 2006.

> Generally, the Division of Finance rejects untimely appeals as a matter of course. However, the untimeliness of Magnolia's December 14, 2006 filing was inadvertently overlooked. Based upon the foregoing, it is the Division's position that Magnolia's appeal should have been rejected as untimely, and the August 7, 2007 determination of Assistant Commissioner Katherine Attwood was issued in error.

The two issues to be decided are (1) whether Magnolia filed its petition of appeal from the county superintendents' determination as to the D. children's district of origin in a timely manner and, if not, whether N.J.A.C. 6A:23-5.2 may be relaxed in accordance with N.J.A.C. 6A:3-1.16; and (2) whether the D. family is domiciled in Deptford Township.

The parties have filed cross-motions for Summary Decision, which 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." In order to defeat a motion for summary decision, 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 & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In fact, 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 America, 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,' [citation omitted], the trial court should not hesitate to grant summary judgment." Id. at 540.

A careful reading of the record discloses that the material facts giving rise to this matter are not in dispute. Therefore, pursuant to N.J.A.C. 1:12.5(b) and Brill v. Guardian Life Insurance Co. of America, supra, 142 N.J. 520 (1995), I find that this matter is ripe for Summary Decision.

N.J.A.C. 6A:17-2.8(b) provides that "[a] district disputing the county superintendent's determination may appeal to the Department of Education pursuant to N.J.A.C. 6A:23-5.2(d), (e) and (f)." More particularly, subsection (d) states:

> A district board of education contesting the Department's determination of district of residence shall submit a written notification that a dispute exists to the Assistant Commissioner, Division of Finance, within 30 days of the receipt of a final notice that a child is determined to be a resident of the district for the purpose of State funding. . . .

Magnolia does not dispute that its December 14, 2006 appeal to the Division of Finance was filed more than 30 days after it received the county superintendents' determination that it was the D. children's district of origin. In fact, it was filed 105 days after the county superintendents issued their determination on August 31, 2006. And even if one deems Dr. Stanwood's supplemental letter of October 13, 2006 as the county superintendents' final determination, the appeal was still filed 62 days out of time.

Additionally, even if one were to give Magnolia the benefit of the doubt and deem the initial filing of the petition with the Commissioner on November 27, 2006, as being in substantial compliance with the rule, the petition would be found to have been filed 88 days after the county superintendents' determination of August 31, and 45 days after the supplemental letter of October 13, both well outside the thirty day window. Consequently, there can be no doubt and I therefore find that Magnolia's petition of appeal was untimely.

Still, Magnolia argues that under N.J.A.C. 6A:3-1.16, the Commissioner is authorized to, and should, relax N.J.A.C. 6A:23-5.2(d) because strict adherence to the 30-day filing requirement will result in injustice. Among other things, Magnolia argues

that the delay could not be avoided because its initial counsel had to recuse himself and the Board could not meet and appoint special counsel until after the thirty days had passed.

Much the same argument was made in Bd. of Educ. of the Twp. of Springfield v. N.J. Dept. of Educ., et als., EDU 5987-02, Initial Decision (August 21, 2003), adopted, Comm'r (October 2, 2003) <http://lawlibrary.rutgers.edu/oal/search.html>. In Springfield, the Point Pleasant Board of Education appealed the County Superintendent's determination 84 days after it had been made and attributed the delay to the "Christmas-New Year's break" and counsel having been out on medical leave for 6 weeks. In his well-reasoned decision, the Hon. Stephen G. Weiss, ALJ, ruled against Springfield, stating:

> It would be poor precedent for me to conclude that since one particular attorney might have been out unavailable to put together an appeal in a timely fashion, this relieves the client of the burden of the rule to the detriment of the person in whose favor the rule is sought to be enforced.
>
> [Ibid.]

As in Springfield, Magnolia has failed to provide any compelling reason justifying its failure to file the petition of appeal within the allotted 30 days. This is particularly true given the fact that there was a delay of 105 days. But even if the delay was only 45 days, or 15 days after the expiration of the 30-day period, as Judge Weiss also stated: "If missing a 30-day deadline by 54 days is excusable, why have a time limit at all?"

Magnolia has also argued that the Division of Finance "waived the filing requirement by accepting and ruling on the district of origin for the D family." However, research has failed to disclose any regulations authorizing the Division to waive such a procedural requirement. And a careful reading of the Department of Education's May 13, 2008 position statement reveals that waiver wasn't even on the Division's radar. To the contrary, as Deputy Attorney General Jennifer Campbell wrote on behalf of the Department:

> Generally, the Division of Finance rejects untimely appeals as a matter of course. However, the untimeliness of Magnolia's December 14, 2006 filing was inadvertently overlooked. Based upon the foregoing, it is the Division's position that Magnolia's appeal should have been rejected as untimely and the August 7, 2007 determination of Assistant Commissioner Katherine Attwood was issued in error.
>
> [Position Statement, May 13, 2008 (emphasis supplied).]

Similarly, Magnolia has also opposed Moorestown's motion to dismiss, arguing that Moorestown should be barred from raising the issue of the timeliness of Magnolia's appeal to the Division of Finance based on the doctrine of laches. Given my finding that Magnolia's petition was untimely and, as discussed earlier, Moorestown was improvidently joined as a "third party," this issue need not be addressed. Still, it bears noting that Moorestown was not originally copied on Magnolia's appeal to either the Commissioner or the Division of Finance, and first received notice of Magnolia's appeal after the Division rendered its determination on August 7, 2007. Therefore, the delay cannot be attributed to Moorestown's "neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done." Lavin v. Hackensack Bd. of Educ., 90 N.J. 145 (1982). Magnolia's argument is without merit.

Although Magnolia's petition of appeal from the county superintendents' determination concerning the D. children's district of origin was not filed with the Division of Finance in a timely manner, that portion of the petition originally filed with the Commissioner seeking a determination as to the children's domicile remains ripe for review. The same is true of that portion of Deptford's petition seeking a determination of the same issue.

Public schooling must be provided free of charge to persons over the age of five and under the age of twenty who are domiciled within a particular school district. N.J.S.A. 18A:38-1(a). "The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of

moving . . . ." In the Matter of Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991). Minors lack the capacity to choose their own domicile, so their domicile is that of their parent or guardian. In the context of Title 18A, the Commissioner of Education has held that special factors must exist to warrant departure from the traditional rule that a child's domicile is that of the child's parent(s). C.N. v. South Orange Bd. of Educ., 96 N.J.A.R. 2d 913.

N.J.S.A. 18A:38-1 also sets forth conditions under which a free public education shall be provided to a child even though that child may not be domiciled in a particular school district. Specifically, the statute provides that:

> 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 domiciled within the district for the purposes of this section.
>
> [N.J.S.A. 18A:38-1(d) (emphasis added).]

As the Hon. Jeff Masin, ALJ, noted, the statutory scheme "recognizes that after a time the facts 'on the ground' must govern." Delaware Twp. Bd. of Ed. V. NJ Dept. of Ed., OAL Docket No. EDU-08011-05 <http://lawlibrary.rutgers.edu/oal/search.html>. In other words, one must look at the length of time a family that is alleged to be homeless has resided in one location.

In a nutshell, Deptford's position is that despite the length of time the D. family has resided in the school district, it has been and remains in a state of "eternal homelessness." By way of explanation, Deptford has pointed out that the D'Anastasio Corporation's initial offer to provide a home "was made on a *temporary* basis in order to provide *temporary* shelter for the family while they searched for a permanent residence." Deptford Brief, February 9, 2009, pg. 2 (emphasis in original). Characterizing the offer as a "gesture of charity" to a family in "dire need" during the Christmas holidays, Deptford maintains that the house at 921 Boundary Road is temporary housing, and the fact that the family remains there, four years later, does not

change the temporary nature of the housing. The house is to remain their temporary abode until permanent housing is found, no matter how long the search for such housing takes. In other words, the D. family could end up being "eternally homeless."

Oft times, persons who are temporarily residing in a district are deemed homeless. In fact, N.J.S.A. 18A:7B-12(c) provides that one is homeless if he or she temporarily lacks a fixed, regular and adequate residence. However, in this particular case, A.D. has always viewed 921 Boundary Road in Deptford Township, as his family's fixed place of residence. When the family first moved in on January 5, 2005, he did not see it merely as a temporary shelter or a haven available to him for the moment. It was a place he saw as regular and adequate for him and his family as a fixed place to live with a sense of permanency. Given the representations he received from D'Anastasio when he first moved in and the four years that have since passed, it is abundantly clear and I therefore find that the D. family is anything but homeless and that Deptford Township is their district of residence.

Based on the foregoing, I conclude that the Magnolia Board of Education failed to comply with N.J.A.C. 6A:23-5.2(d) and that its appeal should be dismissed. Consequently, I also conclude that it is the D. children's district of origin and, as such, must reimburse the Moorestown and Deptford Township Boards of Education for the costs they incurred educating the D. children through January 5, 2005. I further conclude that Deptford Township has since January 5, 2005 been, and continues to be the D. children's district of residence and, as such, has been and shall continue to be responsible for providing these children with a free public education until such time, if any, that the family establishes a fixed place of residence in another school district. 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.

March 27, 2009
DATE

ISRAEL D. DUBIN, ALJ

Date Received at Agency:

March 27, 2009

APR 1 2009

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

APPENDIX

EXHIBIT LIST

Joint Exhibit:

J-1 Transcript of Deposition of A.D.

141-09EL

141-09

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

May 5, 2009

Jeffrey S. Wilson, Esq.
50 West Ridgewood Avenue
Ridgewood, NJ 07450

Jane Gallina Mecca, Esq.
Fogarty & Hara, Esqs.
16-00 Route 208 South
Fair Lawn, NJ 07410

Dear Counsel:

I have reviewed the petition of appeal and application for emergent relief filed in the matter entitled *The Bennett Company, Inc. v. Board of Education of the Borough of Upper Saddle River, Bergen County*, Agency Dkt. No. 91-5/09, transferred to the Commissioner of Education on May 4, 2009 by order of the Superior Court. In its papers, petitioner contests the decision of the Board of Education to re-bid its roof replacement/solar panel project, and seeks an order temporarily restraining the Board from re-bidding the project during the pendency of the appeal, and from executing any contracts or pursuing any work in connection with it.

Upon such review, I conclude that – given the nature and history of this matter and the relief sought in the emergent application – the interests of justice would best be served by preserving the *status quo* for a few days until an administrative hearing can be held, particularly in light of the fact that the court saw fit to impose temporary restraints upon hearing petitioner's application and dissolved them only in response to a motion of the Board based on jurisdictional grounds.

Accordingly, I hereby ENJOIN the Board from re-bidding the disputed roof replacement/solar panel project, and from executing any contracts or pursuing any work in connection with it, *pending the results of an expedited hearing at the Office of Administrative Law on petitioner's application for emergent relief.* I further advise the parties that such application, together with the underlying petition on the merits, will be transmitted forthwith to the OAL on an emergent basis pursuant to *N.J.A.C.* 1:1-12.6. Finally, I stress that the within order is intended *solely* to preserve petitioner's ability to be heard on the emergent application without the subject of its appeal becoming moot during its pendency, that it is *not* a determination on merits of the motion, and that it is effective *only* until the Commissioner's final ruling on the application for emergent relief.

Sincerely,

Lucille E. Davy
Commissioner

VIA FAX AND REGULAR MAIL
c: Executive County Superintendent
Clerk, OAL

142-09

OAL DKT. NO EDU 1343-09
(EDU 9963-07 ON REMAND)
AGENCY DKT. NO. 234-8/07

IN THE MATTER OF THE TENURE	:	
HEARING OF JEREMIAS RONQUILLO,	:	
SCHOOL DISTRICT OF THE CITY	:	COMMISSIONER OF EDUCATION
OF PASSAIC, PASSAIC COUNTY.	:	DECISION
	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge that the proposed settlement is consistent with established standards governing settlement of tenure matters.* *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 5/05/09

Date of Mailing: 5/05/09

* Although the Initial Decision repeatedly refers to respondent's date of resignation as December 31, 2008, in fact the effective date of the resignation is December 31, 2007.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01343-09

AGENCY DKT. NO. 234-8/07

IN THE MATTER OF THE TENURE HEARING OF JEREMIAS RONQUILLO, SCHOOL DISTRICT OF THE CITY OF PASSAIC, PASSAIC COUNTY.

Joel M. Miklacki, Esq., for petitioner Passaic Board of Education

Christopher Farella, Esq., for respondent Jeremias Ronquillo (Stahl, Farella & Sarokin, attorneys)

Record Closed: April 7 , 2009 Decided: April 7, 2009

BEFORE **JEFFREY A. GERSON,** ALJ:

STATEMENT OF THE CASE

This matter involves tenure charges of conduct unbecoming a Director of Maintenance Facilities certified by the Passaic Board of Education (the "Board") against respondent, Jeremias Ronquillo ("Ronquillo") a tenured facilities manager with the Passaic school system, pursuant to the provisions of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq.

PROCEDURAL HISTORY

Ronquillo was suspended with pay in or about April of 2006 while the Board investigated certain allegations regarding his work performance. On or about August 2, 2007, the Board filed tenure charges against Ronquillo and suspended him without pay based on various issues, most of which included job performance and handling of the department. More specifically, the Board charged that over a period of time, Ronquillo was alleged to have removed and converted Board property for his personal use, insubordination in several instances (including failing to follow the instructions of the Superintendent of Schools), creating a hostile work environment for those who complained about his actions by retaliating against them, and that he took certain actions that exposed the Board to grievances by the union representing the custodial workers under Ronquillo's supervision and caused unnecessary overtime expenditures that allegedly benefited some employees but not others. Ronquillo filed a lengthy answer to the charges vigorously denying each and every allegation and both sides engaged in far reaching discovery.

In or about June 2008, just prior to the commencement of the trial in this matter, the parties resolved the issues and executed a settlement agreement (J-1). The Board passed a resolution accepting the settlement (J-2) and as part of the conditions of the settlement, Ronquillo officially resigned effective December 31, 2008 (J-3).

A hearing was held on November 19, 2008 to address the standards set forth in In Re Cardonick 1990 S.L.D. 842, 846. The hearing consisted of stipulated facts and the testimony of Ronquillo.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Cardonick requires that tenure charges may be withdrawn or settled only with the Commissioner's approval, based upon several factors. Specifically, Cardonick requires that a proposed settlement must: 1) be accompanied by documentation as to the nature of the charges; 2) include an explanation of the circumstances justifying settlement; 3)

evidence the consent of both the charged and the charging parties; 4) indicate that the charged party entered into the agreement with a full understanding of his or her rights; 5) demonstrate that the agreement is in the public interest; and 6) indicate, where the charged party is a teaching staff member, that he or she 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 action against the staff member's certificate. These factors are discussed below.

The nature of the charges were presented and largely consisted of work performance and management issues, including claims by the Board that excessive and unnecessary overtime was authorized by Ronquillo and that Ronquillo made certain staff and employee changes unilaterally which exposed the Board to grievances by the union. Ronquillo vociferously denied the charges and filed a lengthy response to them, together with voluminous supporting documentation.

After a full review of the facts and circumstances of the settlement, both parties provided proof of knowing and voluntary consent to its terms. This was particularly evidenced by the Board's resolution (J-2) agreeing to the settlement and Ronquillo's in-court testimony.

The reasons justifying the settlement were overwhelming. The Board and Ronquillo were in agreement that this would be a hard fought trial that would have consumed at least three weeks and possibly more of trial time. The list of witnesses from the Board included over fifty people, some of whom were past employees and administrators who would have to be transported to the hearing at the Board's expense. In addition, a large number of the witnesses were present employees and administrators who would have to attend the trial for lengths of time and whose positions with the Board would have to be covered by others during the time in which they were absent, again at considerable Board expense. There was also evidence that some of these employees would either request or need independent counsel (at the Board's expense) to appear. Finally, the superintendent would have to be present for all of the trial days and be subject to prolonged examination and cross-examination.

Moreover, the settlement amounted to exactly what Ronquillo would have received had he resigned his position on December 31, 2008. In other words, the Board has agreed to pay Ronquillo exactly what it would have been contractually obligated to pay Ronquillo had he retired. Ronquillo testified that he paid his own legal fees and did not seek or receive any amount of monies over and above the amount the Board would have paid him had he left on his own accord on December 31, 2008.

The Board attorney demonstrated that the settlement was in the public's best interest. First, the expense to the Board to further litigate the matter was prohibitive. Second, administrators, principals and other school employees would be distracted from their positions (to the detriment of the school district) to attend trial. Third, Ronquillo waived any and all federal, state, administrative or other claims that he may have had against the Board, its employees and agents for the time he was employed with the Board. Fourth, as stated above, the settlement was nothing more than what was contractually owed to Ronquillo had he resigned on December 31, 2008. Finally, since Ronquillo has secured employment elsewhere and is not seeking to return to work for the Board, the necessity to remove him has been obviated.

As for the final factor, the settlement does not provide for any restriction of access to information or records deemed public by law or result in misrepresentation of the reason for the employee's separation from service. Ronquillo understands that inquiries regarding his employment with the Board and any actions taken by it must at a minimum comport with the requirements of New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1 et seq., which states that the following employment information shall be public:

> An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, date of separation and the reason therefor; and the amount and type of any pension received ***."

N.J.S.A. 47:1A-10. Ronquillo additionally understands that the tenure charges and related case documents, unless sealed for good cause shown, are also a matter of public record. As stated above, Ronquillo is not interested in any further employment for the Board and has in fact found gainful employment elsewhere. His intention was to clear his name and obtain what was due to him, which this settlement achieves.[1]

ORDER

Therefore, I **FIND** and **CONCLUDE** that, based upon the above analysis, the foregoing settlement fully satisfies the Cardonick factors. The charges are hereby **DISMISSED** and the matter is marked as **SETTLED.**

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

[1] Since Ronquillo is not a teaching staff member, there is no need to find whether notice was provided to him regarding the Commissioner's duty to refer the tenure determination to the State Board of Examiners.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 7, 2008
DATE

JEFFREY A. GERSON, A.L.J.

Date Received at Agency: 4-9-09

Mailed to Parties:

APR 9 2009
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sej

51

SETTLEMENT AGREEMENT AND RELEASE

THIS AGREEMENT is made between the **PASSAIC BOARD OF EDUCATION, PASSAIC COUNTY,** individually and collectively, its elected representatives, officers, members, servants, employees, successors, agents, insurers or attorneys, all in both their official and individual capacities (hereinafter collectively referred to as "the Board") with administrative offices located at 101 Passaic Avenue, Passaic, New Jersey 07055 and **Jeremias Ronquillo,** any and all of his executors, administrators, successors, assigns, agents and representatives, residing at 21A Pinebrook Road, Chestnut Ridge Vill, Monsey, NY 10952, hereinafter referred to as "Ronquillo" or the "Employee"). This agreement constitutes the complete and final settlement of any and all disputes arising from or relating to Mr. Ronquillo's employment by the Board and any claims or actions he has brought or could have brought against the Board.

W I T N E S S E T H:

WHEREAS, Employee is employed with the Board, and

WHEREAS, Employee and the Board desire to resolve all outstanding issues with respect to any disciplinary action contemplated and the mutual decision for Employee to resign from his position with the Board.

NOW, THEREFORE, in consideration for the premises and conditions set forth herein, the Board and Ronquillo agree as follows:

1. TERMS.

a. The tenure charges set forth in the Statement of Charges dated on or about August 2, 2007 and referred to the Office of Administrative Law under docket number EDUTH 09963-2007N are withdrawn.

b. The Board agrees to accept the resignation of Mr. Ronquillo, effective as of December 31, 2007 with prejudice.

c. The Board agrees to pay Mr. Ronquillo the sum of $32,812.80, representing full pay from the date of the filed tenure charges, August 2, 2007, through December 31, 2007. The Board further agrees to pay Mr. Ronquillo the sum of $16,250.00, representing the maximum cash-in value of Mr. Ronquillo's accumulated sick days. The Board agrees to pay Mr. Ronquillo the sum of $13,125.12, representing 32 vacation days (10 unused vacation days for 2004-2005 and 22 unused vacation days for 2005-2006). The days are paid at the rate of $410.16 per day, based on Mr. Ronquillo's annual salary of $98,440.52.

d. Mr. Ronquillo shall receive $62,187.92, subject to normal withholdings and deductions. The Board will report the salary payment to the taxing

authorities via an IRS Form 1099. Mr. Ronquillo expressly acknowledges and agrees that he and his heirs, executors, administrators, successors and assigns, and not the Board, will be responsible for any such taxes, liabilities, payments or costs, interests and penalties. Mr. Ronquillo agrees to indemnify and hold harmless the Board to the full extent of any such taxes, liabilities, payments, costs, interest or penalties which may be assessed against the Board in connection with any payment made to or on behalf of Mr. Ronquillo hereunder.

e. The check will be sent to Mr. Ronquillo's Counsel after this Agreement is executed and filed with the Office of Administrative Law and approved of by the Commissioner of Education.

f. Mr. Ronquillo agrees to waive all monetary claims against the Board including, but not limited to, attorneys' fees with respect to this matter.

g. Mr. Ronquillo, for the consideration given by the Board as set forth above, which he acknowledges is adequate and satisfactory to him, hereby commits as follows:

i. Mr. Ronquillo irrevocably and unconditionally remises, releases, waives and forever discharges the Board from any and all manner of liabilities, actions, causes of action, contracts, agreements, promises, claims and demands of any kind or nature whatsoever, in law or equity, whether known or unknown, which Mr. Ronquillo has ever had or now has against the Board including, but not limited to, claims arising out of or relating to or arising from or in connection with his employment with the Board, compensation and/or benefits with the Board and the Administrative Action. Mr. Ronquillo further understands and agrees that this Agreement shall act as a complete bar to any claim, complaints, grievances, disputes, demand or action of any kind whatsoever which could be or could have been brought by him and which seeks personal, equitable or monetary relief for him against the District, including, but not limited to: breach of express or implied contract; fraud; discrimination; retaliation; wages; benefits; other compensation; misrepresentation; defamation; liability in negligence or tort; and claims of any kind which may be brought in any court of law or equity or an administrative agency; claims for arbitration in any forum; the U.S. Constitution, as amended; the Constitution of the State of New Jersey; any municipal ordinance; and/or the following:

1. Any claim, cause of action, demand or complaint arising out of or under Title VII of the U.S. Civil Rights Act of 1964, as amended or the Civil Rights Act of 1991, as amended, which, among other things, prohibits discrimination in employment on account of a person's race, color, religion, sex or national origin;
2. Any claim, cause of action, demand or complaint arising out of or under the U.S. Americans with Disabilities Act of 1990, which, among other things,

prohibits discrimination in employment on account of a person's disability or handicap;

3. Any claim, cause of action, demand or complaint arising out of or under the U.S. Age Discrimination in Employment Act, which, among other things, prohibited discrimination in employment on account of a person's age;
4. Any claim, cause of action, demand or complaint arising out of or under the U.S. Employment Retirement Income Security Act ("ERISA"), which among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute;
5. Any claim, cause of action, demand or complaint arising out of or under the U.S. Fair Labor Standards Act;
6. Any claim, cause of action, demand or complaint arising out of or under the United States Family and Medical Leave Act, which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition, and any claim, cause of action, demand or complaint arising under the New Jersey Family Leave Act.
7. Any claim, cause of action, demand or complaint arising out of or under the National Labor Relations Act;
8. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination, which among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affections or sexual orientation, familiar status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces or the United States;
9. Any claim, cause of action, demand or complaint arising out of or under the Immigration Reform Control Act;
10. Any claim, cause of action, demand or complaint arising out of or under the Occupational Safety & Health Act;
11. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other

things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age;

12. Any claim, cause of action, demand or complaint arising out of or under the Family & Medical Leave Act of 1993;
13. Any claim, cause of action, demand or complaint arising out of or under the Equal Pay Act;
14. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Minimum Wage Law;
15. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Conscientious Employee Protection Act;
16. Any claim, cause of action, demand or complaint arising out of or under the Equal Pay Law for New Jersey;
17. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Worker Health & Safety Act;
18. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Department of Personnel; Sections 1981 through 1988 of Title 42 of the United States Code;
19. Any claim, cause of action, demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which, among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities;
20. Any claim, cause of action, demand or complaint arising out of or under any anti-retaliation provision of any statute or law; and any other federal, state or local law, regulation or ordinance relating to employment; related torts; any other federal, state or local, civil or human rights law or any other local, state or federal law, regulation or ordinance, any, provision of any federal or state constitution, any public policy, contract, tort or common law, or any losses, injuries or damages (including back pay, front pay, liquidated, compensatory or punitive damages, attorney's fees and litigation costs);
21. Any common law claims for negligence, assault, battery, infliction of emotional distress and any and all other common law claims arising out of this litigation;
22. Any employment discrimination; employee benefits; collective bargaining agreement; and the termination of

employment and any other claim arising from or relating to Mr. Ronquillo's employment.

ii. Mr. Ronquillo understands that he is not releasing any claims he may have to enforce the provisions of this Agreement. This release covers both claims that Mr. Ronquillo knows about and those he may not know about, except for claims (i) that may arise after the date Mr. Ronquillo executes this Agreement or (ii) for a breach of this Agreement. Mr. Ronquillo further agrees not to file a lawsuit, administrative claim, grievance or demand for arbitration to assert any of the claims he has given up, released or waived.

iii. If Mr. Ronquillo violates this Complete Release by filing any claim, charge or complaint as prohibited in this subparagraph, Mr. Ronquillo agrees to pay all costs and expenses or defending against the suit incurred by Board, including reasonable attorney's fees.

2. COMPLETE RELEASE.

a. Mr. Ronquillo agrees that he will not talk about, discuss or consult with, advise, counsel or otherwise cooperate with or assist any employees or former employees of the Board in the pursuit of any legal or administrative action(s) against the Board, including, but not limited to, any action(s) in connection with any matters relating to his employment or the termination of his employment, unless compelled to do so by court order or lawful subpoena. Mr. Ronquillo further agrees that he will not participate, directly or indirectly, as a party, witness or otherwise, in any action at law, proceeding in equity or in any administrative proceeding in which the Board or Board personnel are Parties, unless compelled to do so by force of law with respect to the issuses raised in the subject litigation.

b. Mr. Ronquillo acknowledges and agrees that other than the consideration provided for herein, he is not entitled to and will not receive any additional compensation or benefits of any kind from the Board and that no representations have been made to him regarding any such additional compensation or benefits. Nothing in this Agreement is intended to or should be construed to affect Mr. Ronquillo's receipt of the benefits in which he is vested or to which he is entitled under the Board's current pension, disability and/or other vested plans or policies.

c. Except to the extent this Agreement is required to be made public by the New Jersey Open Public Meetings Act, Mr. Ronquillo agrees to maintain the confidentiality of, and refrain from disclosing, making public, or discussing in any way whatsoever, the terms and conditions of this Agreement. Notwithstanding the foregoing, it is understood that as the sole exception to this Confidentiality Provision, Mr. Ronquillo may discuss or disclose this Agreement (i) with his immediate family; (ii) with his attorney(s) or tax advisor(s); and (iii) in response to inquiries from any governmental, regulatory or self-regulatory body or agency with jurisdiction over the activities of Mr. Ronquillo or the Board.

d. Both Parties agree that they shall not issue any communication, written, verbal or otherwise, that disparages, criticizes or otherwise reflects adversely upon the other or which encourages any adverse action, arising out of the subject matter of the within litigation, provided that Both Parties are permitted to testify truthfully under oath pursuant to a subpoena.

e. This Agreement is not and shall not in any way be deemed to constitute an admission or evidence of any wrongdoing or liability on the part of the Board, nor of any violation of any federal, state or local statute, rule, regulation or principle of common law or equity. Rather, this Agreement constitutes the good faith settlement and release of disputed claims, and it is acknowledged and agreed by the Parties that this Agreement is being entered into by the Parties solely to avoid the burden, expense, delay and uncertainties of further litigation and to fully and finally resolve, settle and dismiss with prejudice, any and all claims of any kind whatsoever, whether known or unknown, which Mr. Ronquillo has ever had or now has against the Board arising out of or relating to his employment with the Board, his compensation and benefits with the Board.

f. When asked by prospective employers about Mr. Ronquillo's employment with the Board and separation thereof, the Board agrees that it, or any employee of it, will only disclose Mr. Ronquillo's dates of employment or last job title, unless authorized in writing by Mr. Ronquillo to furnish specific additional information.

g. The Board agrees that upon execution of this Agreement and effective resignation of Mr. Ronquillo, it will not institute, file or voluntarily participate in any action against Mr. Ronquillo.

3. MODIFICATION.

This Agreement may not be changed orally and no modification, amendment or waiver of any provision contained in this Agreement, or any future representation, promise or condition in connection with the subject matter of this Agreement shall be binding upon any party hereto unless made in writing and signed by such party.

4. ENTIRE AGREEMENT.

This Agreement contains the entire agreement and complete settlement between the Parties and supersedes any and all previous agreements of any kind whatsoever between them, whether written or oral. All prior and contemporaneous discussions and negotiations have been and are merged and integrated into, and are superseded by, this Agreement. This is an integrated document.

52

June 30, 2008

Resolution to Accept Settlement Agreement and Release Concerning the Tenure Charges for Jeremais Ronquillo

WHEREIN, the condition in the settlement resignation accepted December 31, 2007 and,

WHEREIN, the compensation to be provided for him based in full through that date of resignation including any time he would be entitled to by way of benefits under the Collective Bargaining Unit sick time, personal days, vacation days and salary through that date

A motion to accept the above resolution was made by Mrs. Robinson and seconded by Mr. Ybarra.

On roll call vote #12, the motion carried 7-0-2, as follows: Vice President Van Rensalier, Dr. Blanco, Mr. Delgado, Mr. Diaz, Mrs. Robinson, Mr. Ybarra and President Capuana voted yes. Mr. Santiago and Mr. Sinnung abstained.

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
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#143-09

PAUL STRASZEWSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured teacher, contends that the Board violated *N.J.S.A.* 18A:30-2.1 when it failed to pay him a stipend he had previously received as chairperson of his department, and by charging his sick days for time lost due to a work-related injury which occurred on January 2, 2001. Petitioner contends that he was disabled from undertaking the responsibilities of chairperson because of the work-related accident, and sought payment of the stipend for the 2001-2002 school year. The petitioner filed his appeal on April 22, 2002.

The ALJ found that: the facts in this matter are not in dispute; petitioner did not return to work after the January 2, 2001 work-related accident; petitioner received his full pay and stipend as department chair through the end of the 2000-2001 school year; petitioner was not reappointed to the position of department chair for the 2001-2002 school year; petitioner received his full pay but no stipend for the 2001-2002 school year through the anniversary of his accident; the 90-day notice period therefore commenced with the first paycheck in the 2001-2002 school year; and petitioner's appeal was filed on April 22, 2002. The ALJ concluded that the instant appeal was untimely filed, and dismissed the petition.

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.

May 5, 2009

OAL DKT. NO. EDU 2945-02
AGENCY DKT. NO. 119-4/02

PAUL STRASZEWSKI,	:	
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 (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon her considered review, the Commissioner concurs with the Administrative Law Judge – for the reasons comprehensively set forth on pages 3-5 of her decision – that this matter is appropriately dismissed due to the untimeliness of its filing.

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

IT IS SO ORDERED.*

Julie E Day

COMMISSIONER OF EDUCATION

Date of Decision: 5/05/09

Date of Mailing: 5/06/09

* 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 2945-02

AGENCY DKT. NO. 119-4/02

PAUL STRASZEWSKI,

Petitioner,

v.

BOARD OF EDUCATION OF
THE TOWNSHIP OF HAMILTON,
MERCER COUNTY,

Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

William R. Burns, Esq., for respondent (Destribats, Campbell, DeSantis, Magee & O'Donnell, attorneys)

Record Closed: February 18, 2009 Decided: April 6, 2009

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, a tenured teaching employee, was injured on January 2, 2001, allegedly during the course of employment when he fell on ice, snow and water runoff in the walkway at his place of employment. He filed a verified petition on April 22, 2002, alleging that the respondent violated N.J.S.A. 18A:30-2.1, by not paying his full pay,

specifically, a stipend as Chairperson of his Department and by taking away a number of his sick days between the day of the injury and one year thereafter.[1] 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, and with a request that the assigned Administrative Law Judge consider the timeliness of the petition and the Commissioner's refraining from exercising jurisdiction over the matter until a Division of Workers Compensation determination was made, pursuant to Verneret v. Board of Education of Elizabeth, 95 N.J.A.R. 2d. (EDU) 134. The matter was placed on the inactive list on May 1, 2003, and remained there until October 31, 2007, when the parties reported the workers compensation matter as concluded. It was then scheduled for a hearing on March 10, 2008, but the parties reported a settlement. However, the parties were not able to reach an agreement and ultimately submitted the matter on motion. Counsel addressed the issue of the timeliness of the petition, at my request, in a supplemental filing. The record closed on February 18, 2009, upon receipt of the final brief on that issue.

FACTUAL DISCUSSION

The following is undisputed and shall constitute **FINDINGS OF FACT.** The petitioner was a tenured employee of the Hamilton Township Board of Education. On or about January 2, 2001, petitioner reported he was injured during the course of his employment when he fell on ice, snow and water runoff in the walkway at his place of employ. The petitioner did not return to work after the alleged January 2, 2001, incident. He filed a workers compensation action. Initially he was charged sick days because his absence from employment was not deemed by the respondent to be the result of an accident arising out of or in the course of his employment. Pursuant to N.J.S.A. 18A:30-2.1, the petitioner subsequently received his salary and was not charged any sick days for his absences resulting from the incident.

[1] The issue of sick days has been reported as resolved and the only issue remaining, which was pled is the stipend as Department Chairperson. It should be noted that petitioner has contended but not pled, within the verified petition, remuneration for printing jobs he could have performed but for the injury. Since petitioner never pled that within the verified petition, it shall not be considered.

Petitioner had been appointed as the Industrial Arts Chairperson for the 2000-2001 school year and received a stipend of 5.79% of his regular teaching salary. Department chairpersons are appointed on a year-to-year basis pursuant to Article 25:1 of the collective bargaining agreement between the Hamilton Township Education Association, of which the petitioner was a member, and the Board. Article 25:1 provides:

> All extra duty personnel, coaches, department chairpersons, curriculum consultants and work-experience coordinators shall be appointed on a year-to-year basis with no tenure in the position, nor rights to reappointment.

Petitioner was paid his full salary and stipend as Department chairperson through the end of the 2000-2001 school year. He was not reappointed as department chairperson for the 2001-2002 school year. He was paid his full salary through January 2, 2002, the anniversary of the accident. He seeks the stipend for the 2001-2002 school year through January 2, 2002, contending he was disabled from undertaking those responsibilities due to the work related accident. Petitioner had been the chairperson of his department for over 15 years.

He filed the verified petition, claiming he is entitled to the Department Chairperson stipend for the 2001-2002 school year through January 2, 2002, on April 22, 2002.

LEGAL ANALYSIS

The issue presented is whether petitioner filed the verified petition within the 90 days period of limitation pursuant to the law at the time, which provided:

> The petitioner shall file a petition no later than the 90th day from the date of the 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. 6:24-1.2(c)].[2]

For reasons set forth below, I find the petition to have been filed beyond the time frame provided by the then prevailing law as contemplated in Verneret v. Board of Education of the City of Elizabeth, 95 N.J.A.R. 2d (EDU) 134. Petitioner received his full pay and stipend as Department Chairperson through the end of the 2000-2001 school year. He was not reappointed Department Chairperson for the 2001-2002 school year. From the beginning of the 2001-2002 school year through the anniversary of his accident, January 2, 2002, petitioner received his full pay but no stipend. Thus, the 90 day period of time commenced from the first paycheck he received in the 2001-2002 school year, the notice pursuant to the then applicable regulation, N.J.A.C. 6:24-1.2 (c). No formal notice by the board is required. (Since petitioner was not appointed Department Chairperson for 2001-2002 there would be no reason for the Board to send any notice that he would not receive a stipend.) The first paycheck in the 2001-2002 school year constituted "other action by the district board of education" which was sufficient to commence the 90-day period of time. As the State Board noted in Verneret, the petition must be filed with the Commissioner "within 90 day of the district board's action which has the effect of denying such benefits to petitioner." Id., at 135. Even if one were to accept the petitioner's argument that true notice to him was the annual payroll letter dated December 21, 2001, the petition was still filed beyond the 90-day limit and is therefore time barred. His assertion that he acted in good faith by addressing the "discrepancy" with the Board in a memorandum one month later[3] and that it was not until his receipt of the Board's March 22, 2002, letter,[4] that he realized there was a controversy or dispute, is not persuasive. As the Commissioner noted in Caiamillo v.

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[2] This section has been re-written at N.J.A.C. 6A:3-1.3(i)(1), effective September 5, 2006. In addition to the above language, the regulation also provides:

> 1. 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.

[3] See exhibit A to petitioner's January 16, 2009, submission.
[4] See exhibit B to petitioner's January 16, 2009, submission.

Board of Education of the Borough of Ridgewood, "the event which triggers the limitations period is the petitioner's receipt of adequate notice of the Board's action, i.e., notice that is 'sufficient to inform an individual of some fact that he has a right to know and that the communicating party has a duty to communicate.'" 2005 N.J. AGENT LEXIS 1236, citing Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 587 (1993).

DECISION AND ORDER

Based on the foregoing, the petition 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.

April 6, 2009
DATE

ANA C. VISCOMI, ALJ

Date Received at Agency:

4/6/09

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 9 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

APPENDIX

LIST OF WITNESSES

For the petitioner:

None

For the respondent:

None

LIST OF EXHIBITS

Submitted on briefs.

For the petitioner:

January 16, 2009

For the respondent:

February 13, 2009

144-09E

144-09

OAL DKT. NO. EDU 4223-09
AGENCY DKT. NO. 65-4/09

A.D. on behalf of minor child, D.O.,	
PETITIONER,	
V.	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT, CUMBERLAND COUNTY,	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	

The record of this emergent matter – which included a CD of the digital recording of the hearing conducted at the Office of Administrative Law (OAL) on April 28, 2009 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Preliminarily, it is noted that the Commissioner was advised for the first time in the ALJ's recommended decision that minor child, D.O., has a 504 Plan. As disciplinary issues for students with 504 Plans are outside the jurisdictional purview of the Commissioner – falling instead under the Office of Special Education – the Director of the Office of Controversies and Disputes initiated a conference call with the parties to ascertain whether petitioner wished to re-file this matter with the Office of Special Education or, instead, wished to waive petitioner's 504 rights and have the matter decided by the Commissioner. Petitioner orally advised – and confirmed by letter dated May 5, 2009 – that he chose to waive D.O.'s 504 rights and requested that the matter be decided by the Commissioner.

Upon full review, the Commissioner adopts the recommended Order granting emergent relief in this matter as she concurs with the ALJ, for the reasons clearly stated in his decision, that the petitioner has satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby granted. This matter shall proceed to plenary hearing on its merits – scheduled for May 14, 2009 – as directed by the ALJ.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/05/09 Faxed 5/05/09

Date of Mailing: 5/05/09

* 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 GRANTING
EMERGENT RELIEF
OAL DKT. NO. EDU 4223-09
AGENCY DKT. NO. 65-4/09

A.D., o/b/o D.O.,
Petitioner,
v.
BOARD OF EDUCATION OF
THE CUMBERLAND REGIONAL
SCHOOL DISTRICT,
CUMBERLAND COUNTY,
Respondent.

Arthur J. Marchand, Esq., for petitioner

Robert Malestein, Esq., for respondent

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

This matter comes before the Court on petitioner's motion for emergent relief. The facts are as follows.

On or about December 12, 2008, petitioner's son D.O. became embroiled in at fight with another student during gym class at respondent Board of Education's (Board) school. During the melee, he struck a teacher. The petitioner alleges D.O's action was

accidental. The respondent contends otherwise. For purposes of this application, this issue need not be resolved.

The Board conducted a disciplinary hearing on January 7, 2009. On January 9, 2009, the Board issued a decision assigning D.O. to the district's in-house Alternative School. For reasons unspecified, D.O.'s placement was delayed until early February. D.O. received homebound instruction for the balance of January.

D.O. attended the Alternative School for two days, then refused to return. D.O. was placed on homebound instruction for February and most of March. At some point in late March or early April, the Board withdrew homebound services. Petitioner then filed her appeal. She now seeks the continuation of homebound services pendente lite, until the matter can come to trial.

The Board took the position that D.O.'s current situation is a self-created hardship. It asserted that it was within its discretion to assign D.O. to the Alternative School, and that D.O.'s present situation is a self-created hardship. The Board urged that D.O. be forced to return to school. The Board admitted that it has brought no truancy complaint against D.O.'s parents for allowing him to remain out of school.

Petitioner argued that D.O. was harassed at the Alternative School. He refused to attend there because he was embarrassed and fearful. D.O. suffers from Muscular Dystrophy. He is not classified, but has a 504 plan. Petitioner asserted that D.O. is not being educated, and the failure of the Board to educate him will result in irreparable harm.

Petitioner carries the burden in seeking emergent relief. The standard is set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), necessary for the awarding of this relief. See also, Princeton Ins. Co. v. 349 Associates, L.L.C., 147 N.J. 337, 340(1997). Crowe requires a showing of **each** of the four specific criteria:

1. The relief must not be granted except when necessary to prevent irreparable harm, or harm for which there is no adequate legal remedy;

2. Relief should not be granted when the legal right underlying the applicant's claim is unsettled;

3. The applicant for relief must make a preliminary showing of a reasonable probability of ultimate success on the merits; and

4. The relative hardship to the parties in granting or denying relief must be considered. Id. at 132-34.

In this case, I am satisfied that D.O. will suffer irreparable harm if some interim relief is not afforded him. The New Jersey State Constitution guarantees each child a thorough and efficient education. His legal right to such an education is well settled.

At present, not only is D.O. not receiving a thorough and efficient education, he is receiving no education. The Board argued that D.O. has created this problem by refusing to attend the Alternative School. But D.O. is fourteen years old. He lacks the capacity to make such a decision, and his education cannot be impaired by his juvenile conduct. If D.O. is not attending school, the Board's remedy is to bring a truancy action against his parents. The Board has not done so.

Seven weeks remain in the school year. D.O.'s loss of seven weeks' education far outweighs the minimal cost the Board will absorb in providing homebound education.

Until the matter is adjudicated, the Board must provide homebound instruction to D.O.

ORDER

I **ORDER** that respondent provide D.O. with homebound instruction until a Final Decision has been issued in this case.

I further **ORDER** that this matter shall be scheduled for a plenary hearing on **May 14, 2009,** at **9:30 a.m.** at the Office of Administrative Law, 1601 Atlantic Avenue, Suite 601, Atlantic City, New Jersey.

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 (title of agency head) does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

4/29/09
DATE

BRUCE M. GORMAN, ALJ

/sd

145-09

GEORGE CHILMONIK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a math teacher in the respondent Board's district – challenged the Board's decision to withhold his increment for the 2008-2009 school year following an incident of alleged unbecoming behavior toward a student.

The ALJ found that: the within matter concerns the withholding of a salary increment for disciplinary purposes as opposed to substandard work; pursuant to a collective bargaining agreement, petitioner is barred from appealing the Board's decision before the Commissioner. Accordingly, the ALJ dismissed the petition for lack of jurisdiction.

Upon independent review of the record, 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.

May 6, 2009

OAL DKT. NO. EDU 13765-08
AGENCY DKT. NO. 297-10/08

GEORGE CHILMONIK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN 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 review, the Commissioner concurs with the Administrative Law Judge that the Board's motion to dismiss is appropriately granted as the Commissioner lacks subject matter jurisdiction to adjudicate the within controversy.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/06/09

Date of Mailing: 5/06/09

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 13765-08
AGENCY DKT. NO. 297-10/08

GEORGE CHILMONIK,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF PHILLIPSBURG, WARREN COUNTY,
Respondent.

William Nossen, Esq., for Petitioner (Law Offices of Alan L. Zegas, attorneys)

Lester E. Taylor, Esq., for Respondent (Florio, Perrucci, Steinhardt & Fader, attorneys)

Record Closed: April 1, 2009 Decided: April 8, 2009

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

This matter was opened to the court by Respondent represented by Florio, Perrucci, Steinhardt & Fader, LLC, Lester E. Taylor, Esq. appearing. Petitioner being represented by counsel, Law Offices of Alan L. Zegas, William Nossen Esq., appearing and the court having reviewed the papers submitted in support of Petitioner's motion to dismiss and there being no response to the motion, I hereby grant the Board's motion to dismiss this petition of appeal without prejudice based on the fact that, pursuant to the

papers filed herein, the matter here concerns the withholding of a salary increment for disciplinary purposes as oppose substandard work performance. Pursuant to a collective bargaining agreement, Petitioner is barred from appealing the Board's decision in this matter to the Commissioner and may only avail himself of the grievance procedures set forth in the parties' collective bargaining agreement. Accordingly, I hereby dismiss this petition since the Commissioner lacks the subject matter jurisdiction to resolve this 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.

April 8, 2009
DATE

Maria M. LaFiandra
MARIA M. LA FIANDRA, ALJ

Date Received at Agency:

April 8, 2009

Mailed to Parties:

APR 9 2009
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

146-09

146-09M

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

May 6, 2009

Jeffrey S. Wilson, Esq.
50 West Ridgewood Avenue
Ridgewood, NJ 07450

Jane Gallina Mecca, Esq.
Fogarty & Hara, Esqs.
16-00 Route 208 South
Fair Lawn, NJ 07410

Dear Counsel:

With respect to the matter entitled *The Bennett Company, Inc. v. Board of Education of the Borough of Upper Saddle River, Bergen County*, Agency Dkt. No. 91-5/09, OAK Dkt. No. EDU 5274-09, I have reviewed the Board of Education's objection to my May 5, 2009 order issuing short-term restraints pending emergent hearing at the Office of Administrative Law (OAL) – which I am deeming a motion for reconsideration pursuant to *N.J.A.C.* 6A:3-1.15(b) – together with petitioner's response thereto.

Upon such review, I find no basis to disturb my prior determination and reiterate that the Board may take no further action with respect to the re-bidding or execution of the disputed roof replacement/solar panel project, pending the results of an expedited hearing at the Office of Administrative Law on petitioner's application for emergent relief. I further reiterate that my prior determination is intended *solely* to preserve petitioner's ability to be heard at the OAL on the emergent application without the subject of the appeal becoming moot during its pendency,* that it is *not* a determination on merits of the application, and that it is effective *only* until the Commissioner's final ruling on the OAL's recommended order with respect to emergent relief.

Sincerely,

Lucille E. Davy
Commissioner

VIA FAX AND REGULAR MAIL
c: Executive County Superintendent
Clerk, OAL

* I have been apprised that the referenced OAL hearing is scheduled for tomorrow afternoon at 1:30 p.m.

147-09

OAL DKT. NO. EDU 3535-08
AGENCY DKT. NO. 392-12/07

BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE AND THE BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY AND L.D.,	:	DECISION
RESPONDENTS.	:	

The record of this matter, the parties' 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 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.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/07/09

Date of Mailing: 5/07/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.EDU 03535-08

Agency Docket No.392-12/07

BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK, BERGEN COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE AND THE BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY AND L.D.,

Respondent.

Rosa Elfant Rickett, Esq. appearing on behalf of Cliffside Park Board of Education (Fogarty & Hara, attorneys)

Jennifer L. Campbell, Deputy Attorney General, appearing on behalf of the Department of Education (Anne Milgram Attorney General of New Jersey)

Joanne Butler, Esq. appearing on behalf of Hackensack Board of Education (Schenck, Price, Smith & King)

Martin Asatrian, Esq. appearing on behalf of L.D. (Strasser, Asatrian, Asatrian & Syme)

Record Closed: April 14, 2009 Decided: April 14, 2009

BEFORE **JOANN LaSALA CANDIDO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 17, 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. A telephone pre-hearing was conducted on June 4, 2008 at which time a hearing was scheduled for August 13, 2008. On the date of the hearing the parties reached settlement. On April 14, 2009 the undersigned received the fully executed settlement and Board Resolution which is attached hereto.

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

Having reviewed the contents of the attached Stipulation of Settlement, and Release, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

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

I **CONCLUDE** that this 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 14, 2009
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: 4-16-09

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 16 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
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Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for Respondent
Hackensack Board of Education

Cliffside Park Board of Education, Petitioner, v. State of New Jersey, Department of Education, Division of Finance, Hackensack Board of Education, and L.D., o/b/o L.D. Respondents.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW Agency Ref. No. 392-12/07 OAL Docket No. EDUOT 03535-2008N **STIPULATION OF SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between the Cliffside Park Board of Education, the Hackensack Board of Education, and Lisa DeChristofaro, individually and on behalf of her son, L.D.

WHEREAS, Lisa DeChristofaro and her son L.D. resided in a home in Cliffside Park; and

WHEREAS, while living in Cliffside Park, L.D., attended school in the Cliffside Park School District; and

WHEREAS, in July 2007, Lisa DeChristofaro attempted to enroll her son, L.D., in Hackensack Schools; and

WHEREAS, the Hackensack Board of Education considered Lisa DeChristofaro to be homeless rather than domiciled in Hackensack; and

WHEREAS, the Cliffside Park Board of Education appealed Hackensack's homelessness determination to the Bergen County Superintendent of Schools; and

WHEREAS, the Bergen County Superintendent determined that Lisa DeChristofaro and her son, L.D., were homeless; and

WHEREAS, the Cliffside Park Board of Education filed the above-captioned Petition of Appeal with the Commissioner of Education challenging the County Superintendent's determination that Lisa DeChristofaro and her son, L.D., are homeless; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows:

1. Lisa DeChristofaro and L.D. shall be deemed domiciled in Hackensack for the purposes of N.J.S.A. 18A:38-1 as of July 1, 2008, and the education of L.D. shall be the responsibility of the Hackensack Board of Education as of July 1, 2008 for so long as Lisa DeChristofaro and L.D. remain domiciled in Hackensack.

2. In the event Lisa DeChristofaro and L.D. become homeless from their domicile in Hackensack established in Paragraph 1 above, after the date of this agreement, Hackensack shall be deemed the district of origin for the purposes of N.J.A.C. 6A:17-2.4, subject to the provisions of Paragraphs 3 and 4 below.

3. In the event that Lisa DeChristofaro and L.D. change their domicile from Hackensack to another municipality, the municipality in which they become domiciled shall be responsible for the education of L.D. in accordance with the provisions of N.J.S.A. 18A:38-1.

4. In the event Lisa DeChristofaro and L.D. become homeless from the post-Hackensack domicile, which domicile was established in accordance with Paragraph 3 above, the municipality of subsequent domicile shall be deemed the district of origin for the purposes of N.J.A.C. 6A:17-2.4.

5. Each of the parties named herein hereby release each other, individually and collectively, the agents, servants and employees of each party, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, arising under or relating in any way to the responsibility for the education of Lisa DeChristofaro's son, L.D., prior to July 1, 2008, now and forever, except to enforce the terms of this Agreement.

6. The Cliffside Park Board of Education, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal of its Petition of Appeal, with prejudice, as against all parties in this matter.

7. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

8. All terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

9. This Agreement is an agreement which is to be construed in accordance with the laws of the State of New Jersey.

10. This Agreement contains the entire agreement between the parties and no other representations, whether verbal or in writing, shall be binding upon them.

11. This Agreement shall be incorporated into an Initial Decision by the Honorable JoAnn LaSala Candido, which shall be subject to approval and adoption by the Commissioner of Education.

** The remainder of this page intentionally left blank **

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, c
set forth their hands and seal as of the date(s) set forth below.

FOR THE CLIFFSIDE PARKBOARD OF EDUCATION

2/11/09
2/3/09

By: Date:

FOR THE HACKENSACK BOARD OF EDUCATION

By: Date:

LISA DECHRISTOFARO

Lisa DeChristofaro 01/29/09

Lisa DeChristofaro Date:

Sworn and subscribed before me
by Lisa DeChristofaro this 29th day
of January, 2009

Notary Public

00991805

Connie Barrera
Notary Public
State New Jersey
My Commission Expires 9/2014

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR THE CLIFFSIDE PARKBOARD OF EDUCATION

By: _____ Date: _____

FOR THE HACKENSACK BOARD OF EDUCATION

By: Carolyn Hayes 3/17/09 Date:

LISA DECHRISTOFARO

Lisa DeChristofaro _____ Date: _____

Sworn and subscribed before me
by Lisa DeChristofaro this __ day
of _____, 2008

_____
Notary Public

00991805

HACKENSACK PUBLIC SCHOOLS
HACKENSACK, NEW JERSEY

RESOLUTION

RESOLVE, to approve the settlement, Office of Administrative Law Docket No. EDUOT 03535-2008N, Cliffside Board of Education v. State of New Jersey, Hackensack Board of Education, et al.

Moved by: F. Albolino
Seconded by: T. Pierce
Action taken: 7-0
Date: March 4, 2009

I hereby certify that the following is a true and correct copy of minutes passed at the meeting of the Hackensack Board of Education held on March 4, 2009.

Joseph M .Cappello, ED. D., Interim Business Administrator/ Board Secretary

RESOLUTION

WHEREAS, the Cliffside Park Board of Education filed a Petition against the Hackensack School District to determine the residency of a student whose name is on file at the Board offices resided in Cliffside Park; and

WHEREAS, the parties have determined to resolve the dispute without the need to resort to additional litigation under the terms set forth in the Stipulation of Settlement attached hereto as Exhibit A;

NOW THEREFORE, IT IS HEREBY RESOLVED AS FOLLOWS:

1. The Board hereby authorizes settlement of the claim against the Hackensack School District under the terms set forth in the Stipulation of Settlement attached hereto as Exhibit A.

2. The Board President and Board Secretary/School Business Administrator are hereby authorized and directed to execute the attached Stipulation of Settlement and any other documents necessary to effectuate said Stipulation of Settlement.

ROLL CALL VOTE:

AYES: 7

NAYS: 0

ABSTENTIONS: 0

CERTIFICATION

I hereby certify that the within Resolution was adopted by the Cliffside Park Board of Education by a majority vote at its duly authorized meeting on October 22, 2008.

TONI ANN NEBBIA
Board Secretary/School Business Administrator

DATED: Oct. 22, 2008

148-09

OAL DKT. NO. EDU 4451-06
AGENCY DKT. NO. 183-5/06

OPAL PEART,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

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

Upon such 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.

Grace E. Dury

COMMISSIONER OF EDUCATION

Date of Decision: 5/07/09

Date of Mailing: 5/07/09



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4451-06
AGENCY DKT. NO. 183-5/06

OPAL PEART,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HOWELL, MONMOUTH COUNTY,

Respondent.

Marcie L. Mackolin, Esq., for petitioner (Chamlin, Rosen, Uliano & Witherington, attorneys)

Bruce Padula, Esq., for respondent (Scarinci & Hollenbeck, attorneys)

Record Closed: April 21, 2009 Decided: April 24, 2009

BEFORE **JOSEPH F. MARTONE**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 21, 2006, 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. At the time of transmittal, there was an appeal pending before the Division of Worker's Compensation and a request was made for the administrative law judge assigned to the case to consider timeliness of the petition and

for the Commissioner to refrain from exercising jurisdiction until a determination is made before the Division of Worker's Compensation. Several status telephone conferences were scheduled thereafter and at the request of counsel, the matter was placed on the inactive list on November 6, 2006, and August 10, 2007, pending the workers' compensation case. In January 2008, the compensation claim was resolved and petitioner's attorney requested the matter be scheduled for hearing and a conference call was scheduled. During the conference call, the Board attorney advised that the Board of Education offered to credit to petitioner all sick leave days not covered by the workers' compensation claim and petitioner's counsel was to discuss this proposal with her client. A hearing date, in the meantime, was scheduled for March 9, 2009, in the event settlement was not possible.

Prior to the hearing date, the parties advised that an agreement had been reached and the Board approved the settlement. On April 21, 2009, an executed Separation Agreement/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 the petitioner's signature and the execution thereof by the Board President and the submission of a certified and sealed copy of the minutes of the Board of Education approving the settlement as required by N.J.A.C. 6A:3-1.13(d).

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 24, 2009
DATE

JOSEPH F. MARTONE, ALJ

Date Received at Agency:

2009

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mph

2009 APR 21 A 8:
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this ___ day of February, 2009 between Opal Peart (hereinafter referred to as "Peart" or "Employee") and the Howell Board of Education (hereinafter referred to as "Board").

WHEREAS, Peart is a tenured teaching staff member employed by the Board; and

WHEREAS, on or about January 24, 2006, Peart allegedly suffered a work-related injury; and

WHEREAS, Peart was absent from work from January 25, 2006 until May 26, 2006 and utilized sick leave from February 16, 2006 to May 26, 2006; and

WHEREAS, the Workers Compensation Court determined that her injury was work-related; and

WHEREAS, N.J.S.A. 18A:30-2 provides that no sick days shall be deducted from Board employees who suffer an injury during the course of their employment; and

WHEREAS, Peart filed a petition entitled Peart v. Howell Board of Education, before the Commissioner of Education, Docket Number EDUOR 04451-2006S, Agency Reference Number 183-5-06 (hereinafter referred to as "the Petition"); and

WHEREAS, the Board and Peart wish to amicably resolve this matter.

NOW, THEREFORE, in consideration of the mutual promises and agreements set forth herein, the parties agree as follows:

Correct LB

1. The Board shall credit Peart with fifty-one and one half (51.5) sick days in full and final satisfaction of any and all claims she may have against the Board. Peart shall file a Stipulation of Dismissal concerning the Petition within five (5) days of the date of this agreement.

2. **COMPLETE RELEASE AND COVENANT NOT TO SUE.** Peart hereby releases and forever discharges any and all claims which she may have against the Board arising out of her employment, including, but not limited to, claims arising under (1) the Constitution of the United States, (2) the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq., (3) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) et seq., (4) the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981 et seq., (5) the Rehabilitation Act of 1973, 29 U.S.C. § 791 et seq., (6) the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., (7) the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq., (8) the Family Leave Act, N.J.S.A. 34:11B-1 et seq., (9) the Constitution of the State of New Jersey, (10) the New Jersey

Law Against Discrimination, N.J.S.A. 10:5-1 et seq., (11) the Conscientious Employee Protection Act, N.J.S.A. 35:19-1 et seq., (12) any expressed or implied contract between the parties, (13) all regulations promulgated pursuant to any of the aforementioned laws, (14) any other Federal, State, County, local or Board common law, statutes, ordinances, resolutions and regulations not mentioned above, and (15) any employment manual or handbook or personnel policies. This release specifically does not include or waive any claims pursued in workers compensation claim petition number 2006-28132 and any entitlements thereto. Peart has been provided 21 days to review this Agreement, which she may waive and has seven (7) days to revoke her acceptance of this Agreement. Any such revocation must be in writing;

3. **NON-ADMISSION OF LIABILITY.** This Agreement is executed and all consideration is given in final settlement of disputed claims, and shall not be construed as an admission of any allegation or of liability by the Board, by whom any such obligation or liability is expressly denied;

4. **INDEMNIFICATION.** If Peart violates this Agreement in any way, Peart will pay in addition to all other remedies allowed by law or this Agreement, all costs and expenses incurred by the other party as a result of such violation, including reasonable attorneys' fees;

5. **CONSULTATION WITH ATTORNEY.** Peart 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;

6. **COMPLETE AGREEMENT.** This Agreement contains the entire agreement between Peart and the Board, and each of them, with respect to the subject matter and supersedes all prior agreements or understandings dealing with the same subject matter. There is no agreement on the part of Board to do anything other than as is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey;

7. **MODIFICATION.** No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged;

8. **SEVERABILITY.** Should any provision of this Agreement be declared or determined by any court 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 not to be a part of this Agreement; and

9. The Parties expressly agree that this Agreement shall not be precedent setting in any other action or grievance, formal or informal between the Board and any of its employees or unions.

THE UNDERSIGNED STATE THAT THEY HAVE CAREFULLY READ THE FOREGOING RELEASE AND SETTLEMENT AGREEMENT, KNOW THE CONTENTS THEREOF, HAVE HAD THE OPPORTUNITY TO DISCUSS THOSE CONTENTS WITH COUNSEL OR OTHER PERSONAL ADVISOR OF THEIR CHOOSING, FREELY AND VOLUNTARILY CONSENT TO ALL TERMS AND CONDITIONS THEREOF AND SIGN THE SAME AS THEIR OWN FREE ACT.

Opal M. Peart 3/3/09

Opal Peart Date

THE HOWELL BOARD OF EDUCATION

Mary Cineton 3/2/09

By: President Date

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW
2009 MAR 21 A 8:11

POST OFFICE BOX 579
ADMINISTRATION BUILDING
200 SQUANKUM/YELLOWBROOK ROAD
HOWELL, N.J. 07731
www.howell.k12.nj.us

HOWELL TOWNSHIP PUBLIC SCHOOLS

PROUD OF OUR SCHOOLS - CONCERNED FOR OUR CHILDREN

HERBERT C. MASSA
Assistant Superintendent/
Board Secretary

(732) 751-2480
EXT. 3801
FAX (732) 938-3964
EMAIL hmassa@howell.k12.nj.us

STIPULATION OF SETTLEMENT CERTIFICATION
REGULAR BOARD OF EDUCATION MEETING
MARCH 18, 2009

This is to certify that the following is a true and accurate excerpt from the minutes of the Howell Township Board of Education Regular Meeting held on March 18, 2009:

A-5. Approve Stipulation of Settlement between the Howell Township Board of Education and Opal Peart, Grade 2 Teacher at Taunton School for payment for 51.5 sick days.

MOTION TO APPROVE ITEM #A-5: Dr. Levine SECOND: Mr. Moscato VOTE: 8-0
Ayes: Mr. Antonaccio, Mrs. Blood, Dr. Levine, Mr. Moscato, Mrs. Rosenberg, Mr. Tanala, Mrs. Cerretani and Mrs. Roses
Nays: 0
Absent: Mr. Flaherty left the meeting at 11:30 p.m.

SEAL

HCM/rs
04/06/09

/Herbert C. Massa

HERBERT C. MASSA
Assistant Superintendent/Board Secretary

149-09

OAL DKT. NOS. EDU 5073-07 AND EDU 12540-07 (CONSOLIDATED)
AGENCY DKT. NOS. 96-4/07 AND 360-4/07

IN THE MATTER OF THE TENURE HEARING OF LOURDES LEON, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of these consolidated matters, the parties' proposed Settlement Agreement, and the Initial Decision of 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 (ALJ) that – with qualification as set forth below – 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. Specifically, the Commissioner concurs that – in view of the fact that respondent has accepted "full responsibility" for her actions as addressed in two appended reprimands[1] and "will not dispute or litigate same" and has, furthermore, agreed to resign from employment with the district at the end of the current school year – no useful purpose would be served by directing the continuance of protracted tenure proceedings, necessitating multiple days of hearing, significant expenditure of funds and serious disruption to the district's educational program through the absences of numerous students and staff. The Commissioner further concurs that the *Cardonick* standard is satisfied by respondent's stated understanding, through testimony on the day she

[1] The Commissioner notes that one of the referenced reprimands is dated March 15, 2007, notwithstanding that both the Settlement Agreement (Term 4) and the Initial Decision (at 3) give the date of both as March 14, 2007.

signed the Settlement Agreement, that the Commissioner may refer this matter to the State Board of Examiners for possible action against respondent's certificate notwithstanding the provisions of Terms 7 and 8 of the agreement.[2]

The Commissioner most emphatically does *not* concur, however, with the view of the parties and the ALJ that referral to the Board of Examiners is not warranted in this instance. Respondent – a certified principal – has been charged with, and agreed not to dispute engaging in, conduct including: manipulation of student attendance records so as to conceal the absences and tardiness of favored students (Reprimand of March 14, 2007); derogatory comments to and about staff, including remarks about medical condition and sexual orientation; harassment and unfair, inappropriate or unreasonable treatment of employees; engaging in crotch grabbing when giving directives and/or making derogatory comments; and giving the "middle finger" to school employees (Reprimand of March 15, 2007). Notwithstanding that it may be prudent to discontinue tenure proceedings under the circumstances, the Commissioner cannot countenance such behavior or allow it to occur with impunity – as will effectively be the case if respondent is simply allowed to resign in good standing[3] from her present position without consideration by

---

[2] As the ALJ implicitly understood, these terms can be of no force or effect beyond expressing the opinion or desire of the parties – since no tenure charge involving a teaching staff member may be settled in a manner that forecloses the Commissioner of Education from referring it to the Board of Examiners, or relieves the district board of education of its obligation to cooperate with any inquiry or action that body may choose to initiate.

[3] In this regard, the Commissioner reminds the parties that any disclosure of information regarding respondent's employment with the district must comport with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, stating, in pertinent part, that the following employment information shall be public:

> An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, *date of separation and the reason therefor;* and the amount and type of any pension received ***. (emphasis added) *N.J.S.A.* 47:1A-10

The Commissioner further reminds the parties that the filing of tenure charges, tenure charge documents, and any record of or determination related to these, are also a matter of public record. See *Williams v. The Board of Educ. of the Atlantic City Public Schools et al.,* 329 *N.J. Super.* 308 (App. Div. 2000); see also *N.J.A.C.* 1:1-14.1(a).

the State Board of Examiners, pursuant to *N.J.A.C.* 6A:9-17.1 et seq., of her continuing fitness to serve as a teaching staff member in New Jersey public schools.

Accordingly, with qualification as noted above, 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 for action against respondent's certification as it deems appropriate.

IT IS SO ORDERED.[4]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/07/09

Date of Mailing: 5/07/09

[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
SETTLEMENT
OAL DKT. NOS. EDU 05073-07
& EDU 12540-07
AGENCY DKT. NOS. 96-4/07 &
360-11/07
CONSOLIDATED

IN THE MATTER OF THE TENURE HEARING OF LOURDES LEON, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.

Karen A. Murray, Esq., for petitioner (The Murray Law Firm, attorneys)

Wayne J. Oppito, Esq., for respondent

Record Closed: March 25, 2009 Decided: April 7, 2009

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

On April 20, 2007, Department of Education, Bureau of Controversies and Disputes, referred a set of tenure charges to the Office of Administrative Law under N.J.S.A. 18A:6-16. The Director of the Bureau determined that the charges, if true, were sufficient to warrant dismissal or reduction in salary. The charges allege conduct unbecoming a public employee and specify that Leon, a tenured principal at Donald Stewart Early Childhood Education Center, School, No. 51, ordered a secretary to

falsify or improperly record the absences or lateness of several students in direct contravention of the school district's attendance policy and in violation of her ethical duty to preserve and protect student records. Additional charges specify discriminatory treatment of students as well as verbal abuse and public humiliation of staff.

On April 26, 2007, the OAL received the charges under Agency Docket. No. 96-4/07 and assigned them Docket No. EDU 5073-07. The case was then assigned to me for a hearing under N.J.S.A. 52:14B-10.1. During the initial telephone conference, the parties acknowledged that the case would require at least twelve days of hearings because it would require the testimony of many witnesses and the consideration of voluminous documents. In fact, the parties spent one entire day just marking documents for identification.

On December 4, 2007, the Department referred a second set of tenure charges to the OAL under N.J.S.A. 18A:6-16. The director again determined that the charges, which matched the first set of charges but for a different school year, were sufficient to warrant dismissal or reduction in salary.

On December 21, 2007, the OAL received the second set of charges under Agency Docket No. 360-11/07 and assigned them OAL Docket No. EDU 12540-07. The case was then assigned to me for a hearing under N.J.S.A. 52:14B-10.1.

During the next telephone conference, the parties acknowledged that the second case would require at least another twelve days of hearings because it would require the testimony of additional witnesses and the consideration of additional documents. Given the additional expenses this second set of charges would engender, the parties renewed their settlement efforts, and at the conclusion of discovery took stock: They reviewed the facts and decided that the expense and uncertainty of litigation militated against a full hearing. As a result, they resolved to reach a global settlement that would address their respective positions satisfactorily. The attached settlement agreement is the fruit of that labor.

Having reviewed the settlement the parties reached and the testimony Leon provided on the day she signed the agreement, I **FIND** that that the settlement agreement acknowledges the continued disruption to the educational programs in the school district that the litigation would have caused by the absence of administrators, teachers, and students who would have had to have testified at the hearings. I also **FIND** that it acknowledges the substantial costs that the Board, an Abbott District, would have had to incur for all those days of hearing.

In addition, I **FIND** that the settlement agreement requires the resignation of Leon, effective June 30, 2009, and represents that the correction of the student records has already occurred. Moreover, I **FIND** that Leon, in signing the settlement, agrees to accept full responsibility for her actions, which are addressed in the attached reprimands, dated March 14, 2007, and will not dispute them.

As a result, I **FIND** that the Board, by the terms of the settlement agreement, accepts her resignation in good standing, withdraws its charges, and posits that the case need not be referred to the State Board of Examiners. Nevertheless, I **FIND** that Leon entered into the settlement agreement with a full understanding of her rights, including the understanding that the Commissioner may still refer the case to the State Board of Examiners for a possible revocation of her certificate.

Given these findings, I **CONCLUDE** that the circumstances justify settlement and that the settlement is in the public interest as N.J.S.A. 6A:3-5.6 dictates. I also **CONCLUDE** that the settlement is voluntary, consistent with the law, and disposes all of the issues in controversy as N.J.A.C. 1:1-19.1 requires. Finally, I **CONCLUDE** that the circumstances do not warrant referral to the State Board of Examiners under N.J.S.A. 6A:3-5.6(d) and **RECOMMEND** that the Commissioner not refer it.

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

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

4/7/09
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

4-13-09

Mailed to Parties:

APR 1 3 2009
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

THE MURRAY LAW FIRM, LLC.
149 Avenue at the Common, Suite 201
Shrewsbury, New Jersey 07702
(732) 389-1010
Attorneys for the Elizabeth Board of Education

IN THE MATTER OF THE TENURE HEARING OF LOURDES LEON	**DOCKET Nos. EDUTH 05073-2007N AGENCY DKT. NO. 96-4/07 and EDUTH 12540-2007N AGENCY DKT. NO 360-11/07** **SETTLEMENT AGREEMENT**

This Agreement is made this 25th day of March, 2009, by and between Lourdes Leon (hereinafter "Leon"), who resides at 25 Country Club Lane, Elizabeth, New Jersey 07207 and the Board of Education, with its principal offices located at 500 North Broad Street, Elizabeth, New Jersey 07207 (hereinafter the "Board").

WITNESSETH:

WHEREAS, Leon is currently employed as a tenured Administrator, and,

WHEREAS, Leon and the Board are parties to three (3) proceedings; In the Matter of the Tenure Hearing of Lourdes Leon, OAL Dkt. No. EDUTH 05073-2007N; Agency Ref. No. 96-4/07, In the Matter of the Tenure Hearing of Lourdes Leon, OAL Dkt. No. EDUTH 12540-2007N; Agency Ref. No. 360-11/07 and Lourdes Leon v. Elizabeth Board of Education, EEOC Charge No. 524-2007-01283.

WHEREAS, after discovery and a review of the facts, and taking into account the uncertainty of litigation and the significant expense of litigation, especially for the Board, an Abbott District, the parties have decided that their respective positions can best be addressed through a global Settlement Agreement; and

WHEREAS, the terms of settlement take into account the public interest, in view of the fact that litigation of these three (3) above-referenced cases have caused and will continue to cause disruption to the educational programs in the Elizabeth School District due to the absence of administrators, teachers, and students who have and will hereinafter have to testify at hearings and further, that the parties, specifically the Board, which is an Abbott District, have incurred and will continue to incur substantial financial costs in order to continue these cases;

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed that:

1. Upon approval of this Agreement by the Commissioner of Education, the Board shall hereby withdraw the charges in OAL Docket. No. EDUTH 05073-2007N, Agency Docket. No. 96-4/07; and OAL Docket. No. EDUTH 12540-2007N, Agency Dkt. No. 360-11/07. Leon shall withdraw EEOC Charge No. 524-2007-01283.

2. Leon shall sign and an submit an irrevocable letter of resignation from all employment with the Board, effective at the close of business on June 30, 2009. The resignation shall be conditioned upon the Board's approval by resolution and compliance with this Agreement and the Commissioner's approval of this Agreement.

3. The Board agrees that the gross amount withheld from Leon, pursuant to N.J.S.A. 18A: 6-14, shall be restored to her. This amount shall be paid to Leon, less customary and usual payroll deductions for State and Federal income taxes and pension contributions.

4. Leon, as building Principal, agrees to accept full responsibility for the actions addressed in the March 14, 2007 reprimands* and will not dispute or litigate same. In accepting responsibility as the building principal, Leon asserts no intentional policy violations on her part. It is the Board's position that Leon's acceptance of responsibility is sufficient justification for

* tenure charge #1, exhibits IDD and IEE

withdrawal of the charges, especially in view of Leon's resignation. Further, the Board states that they have corrected the student records at issue. The Board is agreeable to allowing Leon to resign in good standing.

5. In consideration of the above and except for acts specified in this Agreement, Leon agrees for herself and her heirs, successors and assigns, to release irrevocably and unconditionally, and discharges the Board, its members past, present and future; welfare and/or pension plans; trustees, officers, supervisors, employees, students, and agents of the Board (Releasees"), past present and future; of and from any debts, obligations, claims, demands, judgments, claims for attorneys' fees, claims for contributions and/or in tort, contract, by statute, or on any other basis, whether in law or in equity, which he, or her estate, might otherwise have or have had in connection with any of the issues in the aforementioned cases. This release includes but is not limited to claims under Title VII of the Civil Rights Act of 1964, The Civil Rights Act of 1866, The Civil Rights Act of 1991, The Age Discrimination in Employment Act of 1967, The Americans with Disabilities Act of 1990, The Employment Retirement Income Security Act of 1974, The Vietnam Era Veterans Readjustment Assistance Act of 1974, The New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Employer-Employee Relations Act, the Workers' Compensation Act, and all Federal, State, and Local law claims, whether statutory or common law, for defamation, libel, tortious interference, wrongful discharge, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis, or any other claim arising out of or related to her employment upon her initial hire up through the approval of this Agreement. Leon also agrees that she shall not file or re-file any claim in any court of law.

6. The parties acknowledge that this Settlement Agreement shall be submitted to the Office of Administrative Law and to the Commissioner of Education for review and approval, and that the terms of the Agreement are expressly made subject to and contingent upon such review and approval by each of said agencies. In the event that either the Office of Administrative Law and/or Commissioner of Education disapproves and/or rejects any of the terms contained herein, this Settlement Agreement shall be null and void and shall not be evidential or used by any party in any proceeding involving any party to this Settlement Agreement. In addition, each of the parties shall return to the same positions which they held prior to this Settlement Agreement, and all rights are reserved in that event.

7. Leon acknowledges that, notwithstanding the parties entry into this Settlement Agreement, she has been made aware that the Commissioner of Education may nonetheless refer the matter to the New Jersey State Board of Examiners for such action regarding her certificates as it deems appropriate. However, upon approval of this Settlement by the Commissioner of Education, the Commissioner will have determined that by virtue of Leon's resignation in good standing and the Board's withdrawal of the charges and this Settlement Agreement, referral to the State Board of Examiners is not warranted and the issue of Leon's certificates will not be forwarded to the State Board of Examiners for a separate determination.

8. The Board agrees that with the approval of this Settlement Agreement by the Commissioner of Education, and Leon's resignation in good standing, the school district and the chief school administrator have no requirement nor shall they, refer this matter to the State Board of Examiners, pursuant to N.J.A.C. 6A: 9-17.4 or any other statute or regulation.

9. The parties expressly agree that they shall act in good faith to ensure implementation of this Settlement Agreement. The parties mutually agree to refrain from retaliation, in any manner, against the other party (or, their families, members, agents and employees). The parties further mutually agree not to make any derogatory comments, statements or misrepresentations about the other (or, their families, members, agents and employees). The parties agree not to discuss the terms of this Agreement with anyone other than their respective attorneys.

10. The parties acknowledge that each has had the opportunity to consult with an attorney or a representative of their own choosing prior to the signing this Settlement Agreement and that each signs this Settlement Agreement freely and voluntarily and without coercion or duress. The parties further acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations.

11. This Settlement Agreement shall be subject to the laws of the State of New Jersey.

12. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Settlement Agreement and bind the Board to its terms. The Board has approved a resolution accepting this Agreement. Upon ratification of this Agreement, the Board authorizes its President and Secretary to execute the same on its behalf.

13. All terms in this Settlement Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

14. This Agreement incorporates and settles all claims and disputes which may exist between Leon and the Board arising from her employment or otherwise.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Wayne J Oppito
Witness
Dated: 3/25/09

Lourdes Leon
Dated: 3-25-09

Board Secretary/Business Administrator
Dated:

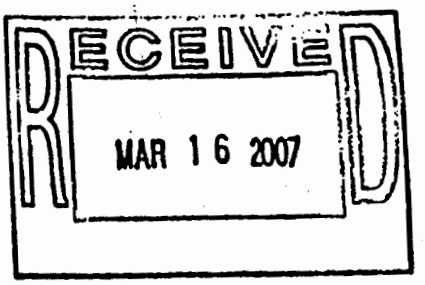
Board ~~President~~ ATTORNEY
Dated: 3/25/09

ELIZABETH PUBLIC SCHOOLS

THINK•LEARN•ACHIEVE•CARE

Jennifer Barrett
Assistant Superintendent of Schools

March 15, 2007



Via Regular and Certified Mail, R.R.R.
Lourdes León
25 Country Club Lane
Elizabeth, New Jersey 07208

RE: Reprimand - Interactions/Complaints from Employees at Donald Stewart Early Childhood Education Center, School No. 51

Dear Ms. León:

Please be advised that a number of employees who are currently assigned and formerly were assigned to School No. 51 have made formal complaints regarding your behavior towards them. These employees have alleged that you have engaged in derogatory actions and comments, harassment and favoritism in violation of the Board's policies and procedures.

The following is a summary of the major alleged behaviors and actions that were investigated in this matter:

1) Derogatory comments made by you to administrative employees regarding staff members;
2) Derogatory comments made by you to an employee regarding the wearing of sneakers due to injury;
3) Derogatory comments made by you regarding an employee's sexual orientation;
4) Publicly reprimanding employees, which includes derogatory comments made by you;
5) Harassing employees for communicating with the Elizabeth Education Association;
6) Ostracizing administrative employees for not sharing your opinions regarding staff members;
7) Unreasonably refusing a Vice-Principal's participation in School No. 51's administrative duties in favor of other employees;
8) Unreasonably instructing secretarial and administrative employees to not perform duties and remain at their desks and/or in their offices until instructed otherwise;
9) Unreasonably instructing a Secretary not to speak to other staff members and/or visitors until instructed to do so;
10) Restricting an African-American Secretary to address African-American parents and guests only and not parents and guests of non-African-American descent;
11) Causing a teacher to relinquish his/her supervisory role in the Before and After Care Program to more favored teachers;
12) Allowing a teacher to be harassed by another staff member who warned that teacher, "to leave the school because he is talking about her daughter" (referring to you as the daughter);
13) Engaging in crotch grabbing in the presence of administrative and staff employees when giving directives and/or making derogatory comments; and
14) Giving middle finger to administrative employees at School No. 51.

An investigation of these allegations has been conducted and it has been determined that the allegations of these employees are credible. It has also been determined that you have violated Board Policy No. 2224 Nondiscrimination/Affirmative Action, Board Policy No. 4211.1 Nondiscrimination/Affirmative Action and the District's Pledge of Ethics. These policies prohibit the harassment of employees; favoritism of certain employees over other employees; disparaging remarks regarding an employee's sexual orientation and disparaging remarks regarding an employee's medical devices and/or disabilities. These policies also prevent retaliatory action against employees for filing grievances and complaints regarding such actions.

Accordingly, this letter will serve as a written reprimand regarding the above-listed employee complaints concerning your comments and behavior. Your treatment of staff members and vice-principals at School No. 51 is unacceptable and will not be tolerated. As Principal, you are charged with handling staffing matters with the utmost professionalism. These allegations indicate that you have not done so at School No. 51. Your actions and words exert a direct impact upon the work and learning environment at School No. 51. Such negative treatment of staff is detrimental to School No. 51 and the District. Although it is the staff who were the direct recipients of such negative treatment, it is the students who will suffer the most because their learning environment has been compromised due to the depressed morale and unnecessary stress that has been placed upon School No. 51's staff and administration because of your comments and actions.

Please be advised that this letter is to serve as a formal, written notice that any and all discriminatory and derogatory comments, behavior and actions must cease immediately. All of the above referenced matters as well as the attendance records allegations are being reviewed for further disciplinary action.

A copy of this letter will be placed in your personnel file.

Sincerely yours,

Jennifer Barrett

Jennifer Barrett,
Assistant Superintendent of Schools

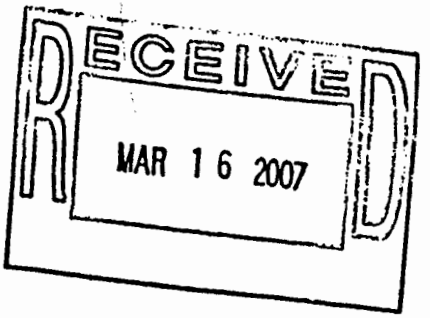
cc: Pablo Muñoz, Superintendent. of Schools
Aida Garcia, Assistant Superintendent. for Human Resources
Kirk Nelson, Esquire
Karen A. Murray, Esq.
Vito Nufrio, President - Elizabeth Principals and Supervisors Association
Richard P. Rinaldo, Esq.

500 North Broad Street, Elizabeth, New Jersey 07207 · Ph: 908.436.5021 · Fax: 908.436-5029
Email: barretje@elizabeth.k12.nj.us · Website: www.elizabeth.k12.nj.us

ELIZABETH PUBLIC SCHOOLS

THINK•LEARN•ACHIEVE•CARE

Jennifer Barrett
Assistant Superintendent for Schools



March 14, 2007

Via Regular and Certified Mail, R.R.R.
Lourdes León
25 Country Club Lane
Elizabeth, New Jersey 07208

RE: Reprimand - Failure to Record Students' Attendance/Altering of Student Attendance Records

Dear Ms. León:

Please be advised the Board has been advised of numerous discrepancies regarding the student attendance records at School No. 51. An investigation of this matter was conducted. It has been determined that you have instructed a Secretary at School No. 51 to not record various students' attendance records to reflect these students' absences and tardiness. Your directives to not record and/or alter students' attendance records violate the Board's general attendance policies; the attendance policy in effect at School No. 51 and the State of New Jersey Department of Education's attendance reporting requirements. In addition, your directive to not record and/or alter student attendance records constitutes bias of some students in favor of other students and in violation of the Board's policy against favoritism.

As the Principal of School No. 51, you issued multiple documents regarding School No. 51's attendance policy. These documents required that all parents acknowledge School No. 51's attendance policy and advised that a student's enrollment at School No. 51 will be forfeited in the event that the student incurs excessive absences and/or is excessively late to school. Our investigation revealed that you instructed a Secretary to not record the absences and tardiness of six (6) particular students. The teachers of these students advised you that there were discrepancies between their attendance records and the attendance records that were kept in School No. 51's Main Office. You continued your directive despite numerous complaints from teachers regarding their students' inaccurate attendance records.

Accordingly, this letter will serve as a written reprimand regarding your directive to not record and/or alter students' attendance records. As Principal of School No. 51, you are personally charged with ensuring that all records and documentation at School No. 51 are recorded in accordance with all applicable policies and procedures. In addition, altering student attendance records is also a violation of your ethical duty to ensure that enrollment at School No. 51 occurs in compliance with the District's lottery system.

ELIZABETH PUBLIC SCHOOLS

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Please be advised that this letter is to serve as formal, written notice that all directives that prohibit School No. 51's staff from accurately recording student attendance and any directives that require staff to alter students' attendance records to eliminate absences and lateness must cease immediately. Due to the severity of your actions, it will be recommended to the Board that your salary increment for the 2007-2008 academic year be withheld.

Hopefully, this will resolve this matter and that no such incidents occur in the future. A copy of this letter will be placed in your personnel file.

Please contact my office if you have any questions.

Sincerely yours,

Jennifer Barrett

Jennifer Barrett,
Assistant Superintendent of Schools

cc: Pablo Muñoz, Supt. of Schools
Aida Garcia, Asst. Supt. for H.R.
Rafael Fajardo, President - Elizabeth Board of Education
Vito Nufrio, President - Elizabeth Principals and Supervisors Association
Rose Carreto, President - Elizabeth Education Association
Eunice Couselo, Supervisor of Labor Relations
Robert Stigliano, Investigator
Kirk Nelson, Esquire
Karen A. Murray, Esquire
Richard P. Rinaldo, Esquire

Office of the Assistant Superintendent for Schools

500 North Broad Street, Elizabeth, New Jersey 07207 • Ph: 908.436. 5021 • Fax: 908.436. 5029
Email: barretje@elizabeth.k12.nj.us • Website: www.elizabeth.k12.nj.us

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Lourdes Leon (Leon) have discussed a resolution of Office of Administrative Law cases, In the Matter of the Tenure Hearing of Lourdes Leon, (OAL Docket No. EDUTH 05073-2007N; Agency Reference # 96-4/07; OAL Docket No. 12540-2007N; Agency Reference # 360-11/07) and Lourdes Leon v. Elizabeth Board of Education, EEOC Charge No. 524-2007-01283; and

WHEREAS, in the interest of cost efficiency and in lieu of extensive litigation and multiple hearings, the parties have agreed to settle these cases; and

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts and approves the terms of the Confidential Settlement Agreement which shall be filed in the Office of the School Business Administrator/Board Secretary, subject to its full execution by all parties.

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD MARCH 19, 2009

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

08-201

THE MURRAY LAW FIRM, LLC.
149 Avenue at the Common, Suite 201
Shrewsbury, New Jersey 07702
(732) 389-1010
Attorneys for the Elizabeth Board of Education

IN THE MATTER OF THE TENURE HEARING OF LOURDES LEON	**DOCKET Nos. EDUTH 05073-2007N AGENCY DKT. NO. 96-4/07 and EDUTH 12540-2007N AGENCY DKT. NO 360-11/07** **SETTLEMENT AGREEMENT**

This Agreement is made this 25th day of March, 2009, by and between Lourdes Leon (hereinafter "Leon"), who resides at 25 Country Club Lane, Elizabeth, New Jersey 07207 and the Board of Education, with its principal offices located at 500 North Broad Street, Elizabeth, New Jersey 07207 (hereinafter the "Board").

WITNESSETH:

WHEREAS, Leon is currently employed as a tenured Administrator, and,

WHEREAS, Leon and the Board are parties to three (3) proceedings; In the Matter of the Tenure Hearing of Lourdes Leon, OAL Dkt. No. EDUTH 05073-2007N; Agency Ref. No. 96-4/07, In the Matter of the Tenure Hearing of Lourdes Leon, OAL Dkt. No. EDUTH 12540-2007N; Agency Ref. No. 360-11/07 and Lourdes Leon v. Elizabeth Board of Education, EEOC Charge No. 524-2007-01283.

WHEREAS, after discovery and a review of the facts, and taking into account the uncertainty of litigation and the significant expense of litigation, especially for the Board, an Abbott District, the parties have decided that their respective positions can best be addressed through a global Settlement Agreement; and

WHEREAS, the terms of settlement take into account the public interest, in view of the fact that litigation of these three (3) above-referenced cases have caused and will continue to cause disruption to the educational programs in the Elizabeth School District due to the absence of administrators, teachers, and students who have and will hereinafter have to testify at hearings and further, that the parties, specifically the Board, which is an Abbott District, have incurred and will continue to incur substantial financial costs in order to continue these cases;

NOW, THEREFORE, in consideration of the mutual promises of the parties and in exchange for the consideration more particularly noted below, it is hereby agreed that:

1. Upon approval of this Agreement by the Commissioner of Education, the Board shall hereby withdraw the charges in OAL Docket. No. EDUTH 05073-2007N, Agency Docket. No. 96-4/07; and OAL Docket. No. EDUTH 12540-2007N, Agency Dkt. No. 360-11/07. Leon shall withdraw EEOC Charge No. 524-2007-01283.

2. Leon shall sign and an submit an irrevocable letter of resignation from all employment with the Board, effective at the close of business on June 30, 2009. The resignation shall be conditioned upon the Board's approval by resolution and compliance with this Agreement and the Commissioner's approval of this Agreement.

3. The Board agrees that the gross amount withheld from Leon, pursuant to N.J.S.A. 18A: 6-14, shall be restored to her. This amount shall be paid to Leon, less customary and usual payroll deductions for State and Federal income taxes and pension contributions.

4. Leon, as building Principal, agrees to accept full responsibility for the actions addressed in the March 14, 2007 reprimands* and will not dispute or litigate same. In accepting responsibility as the building principal, Leon asserts no intentional policy violations on her part. It is the Board's position that Leon's acceptance of responsibility is sufficient justification for

* tenure charge #1, exhibits IDD and IEE

withdrawal of the charges, especially in view of Leon's resignation. Further, the Board states that they have corrected the student records at issue. The Board is agreeable to allowing Leon to resign in good standing.

5. In consideration of the above and except for acts specified in this Agreement, Leon agrees for herself and her heirs, successors and assigns, to release irrevocably and unconditionally, and discharges the Board, its members past, present and future; welfare and/or pension plans; trustees, officers, supervisors, employees, students, and agents of the Board (Releasees"), past present and future; of and from any debts, obligations, claims, demands, judgments, claims for attorneys' fees, claims for contributions and/or in tort, contract, by statute, or on any other basis, whether in law or in equity, which he, or her estate, might otherwise have or have had in connection with any of the issues in the aforementioned cases. This release includes but is not limited to claims under Title VII of the Civil Rights Act of 1964, The Civil Rights Act of 1866, The Civil Rights Act of 1991, The Age Discrimination in Employment Act of 1967, The Americans with Disabilities Act of 1990, The Employment Retirement Income Security Act of 1974, The Vietnam Era Veterans Readjustment Assistance Act of 1974, The New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, the New Jersey Employer-Employee Relations Act, the Workers' Compensation Act, and all Federal, State, and Local law claims, whether statutory or common law, for defamation, libel, tortious interference, wrongful discharge, harassment, or for discrimination on the basis of race, color, sex, religion, national origin, age, handicap or disability, sexual orientation, veteran's status, or marital status or on any other prohibited basis, or any other claim arising out of or related to her employment upon her initial hire up through the approval of this Agreement. Leon also agrees that she shall not file or re-file any claim in any court of law.

6. The parties acknowledge that this Settlement Agreement shall be submitted to the Office of Administrative Law and to the Commissioner of Education for review and approval, and that the terms of the Agreement are expressly made subject to and contingent upon such review and approval by each of said agencies. In the event that either the Office of Administrative Law and/or Commissioner of Education disapproves and/or rejects any of the terms contained herein, this Settlement Agreement shall be null and void and shall not be evidential or used by any party in any proceeding involving any party to this Settlement Agreement. In addition, each of the parties shall return to the same positions which they held prior to this Settlement Agreement, and all rights are reserved in that event.

7. Leon acknowledges that, notwithstanding the parties entry into this Settlement Agreement, she has been made aware that the Commissioner of Education may nonetheless refer the matter to the New Jersey State Board of Examiners for such action regarding her certificates as it deems appropriate. However, upon approval of this Settlement by the Commissioner of Education, the Commissioner will have determined that by virtue of Leon's resignation in good standing and the Board's withdrawal of the charges and this Settlement Agreement, referral to the State Board of Examiners is not warranted and the issue of Leon's certificates will not be forwarded to the State Board of Examiners for a separate determination.

8. The Board agrees that with the approval of this Settlement Agreement by the Commissioner of Education, and Leon's resignation in good standing, the school district and the chief school administrator have no requirement nor shall they, refer this matter to the State Board of Examiners, pursuant to N.J.A.C. 6A: 9-17.4 or any other statute or regulation.

9. The parties expressly agree that they shall act in good faith to ensure implementation of this Settlement Agreement. The parties mutually agree to refrain from retaliation, in any manner, against the other party (or, their families, members, agents and employees). The parties further mutually agree not to make any derogatory comments, statements or misrepresentations about the other (or, their families, members, agents and employees). The parties agree not to discuss the terms of this Agreement with anyone other than their respective attorneys.

10. The parties acknowledge that each has had the opportunity to consult with an attorney or a representative of their own choosing prior to the signing this Settlement Agreement and that each signs this Settlement Agreement freely and voluntarily and without coercion or duress. The parties further acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations.

11. This Settlement Agreement shall be subject to the laws of the State of New Jersey.

12. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Settlement Agreement and bind the Board to its terms. The Board has approved a resolution accepting this Agreement. Upon ratification of this Agreement, the Board authorizes its President and Secretary to execute the same on its behalf.

13. All terms in this Settlement Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

14. This Agreement incorporates and settles all claims and disputes which may exist between Leon and the Board arising from her employment or otherwise.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

Wayne J Oppito
Witness
Dated: 3/25/09

Lourdes Leon
Dated: 3-25-09

Board Secretary/Business Administrator
Dated:

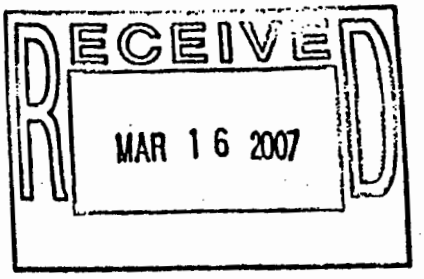
Board ~~President~~ ATTORNEY
Dated: 3/25/09

ELIZABETH PUBLIC SCHOOLS

THINK•LEARN•ACHIEVE•CARE

Jennifer Barrett
Assistant Superintendent of Schools

March 15, 2007



Via Regular and Certified Mail, R.R.R.
Lourdes León
25 Country Club Lane
Elizabeth, New Jersey 07208

RE: Reprimand - Interactions/Complaints from Employees at Donald Stewart Early Childhood Education Center, School No. 51

Dear Ms. León:

Please be advised that a number of employees who are currently assigned and formerly were assigned to School No. 51 have made formal complaints regarding your behavior towards them. These employees have alleged that you have engaged in derogatory actions and comments, harassment and favoritism in violation of the Board's policies and procedures.

The following is a summary of the major alleged behaviors and actions that were investigated in this matter:

1) Derogatory comments made by you to administrative employees regarding staff members;
2) Derogatory comments made by you to an employee regarding the wearing of sneakers due to injury;
3) Derogatory comments made by you regarding an employee's sexual orientation;
4) Publicly reprimanding employees, which includes derogatory comments made by you;
5) Harassing employees for communicating with the Elizabeth Education Association;
6) Ostracizing administrative employees for not sharing your opinions regarding staff members;
7) Unreasonably refusing a Vice-Principal's participation in School No. 51's administrative duties in favor of other employees;
8) Unreasonably instructing secretarial and administrative employees to not perform duties and remain at their desks and/or in their offices until instructed otherwise;
9) Unreasonably instructing a Secretary not to speak to other staff members and/or visitors until instructed to do so;
10) Restricting an African-American Secretary to address African-American parents and guests only and not parents and guests of non-African-American descent;
11) Causing a teacher to relinquish his/her supervisory role in the Before and After Care Program to more favored teachers;
12) Allowing a teacher to be harassed by another staff member who warned that teacher, "to leave the school because he is talking about her daughter" (referring to you as the daughter);
13) Engaging in crotch grabbing in the presence of administrative and staff employees when giving directives and/or making derogatory comments; and
14) Giving middle finger to administrative employees at School No. 51.

An investigation of these allegations has been conducted and it has been determined that the allegations of these employees are credible. It has also been determined that you have violated Board Policy No. 2224 Nondiscrimination/Affirmative Action, Board Policy No. 4211.1 Nondiscrimination/Affirmative Action and the District's Pledge of Ethics. These policies prohibit the harassment of employees; favoritism of certain employees over other employees; disparaging remarks regarding an employee's sexual orientation and disparaging remarks regarding an employee's medical devices and/or disabilities. These policies also prevent retaliatory action against employees for filing grievances and complaints regarding such actions.

Accordingly, this letter will serve as a written reprimand regarding the above-listed employee complaints concerning your comments and behavior. Your treatment of staff members and vice-principals at School No. 51 is unacceptable and will not be tolerated. As Principal, you are charged with handling staffing matters with the utmost professionalism. These allegations indicate that you have not done so at School No. 51. Your actions and words exert a direct impact upon the work and learning environment at School No. 51. Such negative treatment of staff is detrimental to School No. 51 and the District. Although it is the staff who were the direct recipients of such negative treatment, it is the students who will suffer the most because their learning environment has been compromised due to the depressed morale and unnecessary stress that has been placed upon School No. 51's staff and administration because of your comments and actions.

Please be advised that this letter is to serve as a formal, written notice that any and all discriminatory and derogatory comments, behavior and actions must cease immediately. All of the above referenced matters as well as the attendance records allegations are being reviewed for further disciplinary action.

A copy of this letter will be placed in your personnel file.

Sincerely yours,

Jennifer Barrett

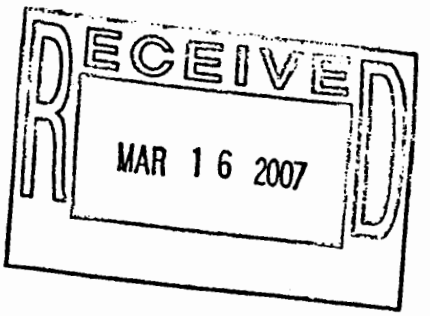
Jennifer Barrett,
Assistant Superintendent of Schools

cc: Pablo Muñoz, Superintendent. of Schools
Aida Garcia, Assistant Superintendent. for Human Resources
Kirk Nelson, Esquire
Karen A. Murray, Esq.
Vito Nufrio, President - Elizabeth Principals and Supervisors Association
Richard P. Rinaldo, Esq.

ELIZABETH PUBLIC SCHOOLS

THINK•LEARN•ACHIEVE•CARE

Jennifer Barrett
Assistant Superintendent for Schools



March 14, 2007

Via Regular and Certified Mail, R.R.R.
Lourdes León
25 Country Club Lane
Elizabeth, New Jersey 07208

RE: Reprimand - Failure to Record Students' Attendance/Altering of Student Attendance Records

Dear Ms. León:

Please be advised the Board has been advised of numerous discrepancies regarding the student attendance records at School No. 51. An investigation of this matter was conducted. It has been determined that you have instructed a Secretary at School No. 51 to not record various students' attendance records to reflect these students' absences and tardiness. Your directives to not record and/or alter students' attendance records violate the Board's general attendance policies; the attendance policy in effect at School No. 51 and the State of New Jersey Department of Education's attendance reporting requirements. In addition, your directive to not record and/or alter student attendance records constitutes bias of some students in favor of other students and in violation of the Board's policy against favoritism.

As the Principal of School No. 51, you issued multiple documents regarding School No. 51's attendance policy. These documents required that all parents acknowledge School No. 51's attendance policy and advised that a student's enrollment at School No. 51 will be forfeited in the event that the student incurs excessive absences and/or is excessively late to school. Our investigation revealed that you instructed a Secretary to not record the absences and tardiness of six (6) particular students. The teachers of these students advised you that there were discrepancies between their attendance records and the attendance records that were kept in School No. 51's Main Office. You continued your directive despite numerous complaints from teachers regarding their students' inaccurate attendance records.

Accordingly, this letter will serve as a written reprimand regarding your directive to not record and/or alter students' attendance records. As Principal of School No. 51, you are personally charged with ensuring that all records and documentation at School No. 51 are recorded in accordance with all applicable policies and procedures. In addition, altering student attendance records is also a violation of your ethical duty to ensure that enrollment at School No. 51 occurs in compliance with the District's lottery system.

ELIZABETH PUBLIC SCHOOLS

THINK•LEARN•ACHIEVE•CARE

Please be advised that this letter is to serve as formal, written notice that all directives that prohibit School No. 51's staff from accurately recording student attendance and any directives that require staff to alter students' attendance records to eliminate absences and lateness must cease immediately. Due to the severity of your actions, it will be recommended to the Board that your salary increment for the 2007-2008 academic year be withheld.

Hopefully, this will resolve this matter and that no such incidents occur in the future. A copy of this letter will be placed in your personnel file.

Please contact my office if you have any questions.

Sincerely yours,

Jennifer Barrett

Jennifer Barrett,
Assistant Superintendent of Schools

cc: Pablo Muñoz, Supt. of Schools
Aida Garcia, Asst. Supt. for H.R.
Rafael Fajardo, President - Elizabeth Board of Education
Vito Nufrio, President - Elizabeth Principals and Supervisors Association
Rose Carreto, President - Elizabeth Education Association
Eunice Couselo, Supervisor of Labor Relations
Robert Stigliano, Investigator
Kirk Nelson, Esquire
Karen A. Murray, Esquire
Richard P. Rinaldo, Esquire

Office of the Assistant Superintendent for Schools

500 North Broad Street, Elizabeth, New Jersey 07207 • Ph: 908.436. 5021 • Fax: 908.436. 5029
Email: barretje@elizabeth.k12.nj.us • Website: www.elizabeth.k12.nj.us

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Lourdes Leon (Leon) have discussed a resolution of Office of Administrative Law cases, In the Matter of the Tenure Hearing of Lourdes Leon, (OAL Docket No. EDUTH 05073-2007N; Agency Reference # 96-4/07; OAL Docket No. 12540-2007N; Agency Reference # 360-11/07) and Lourdes Leon v. Elizabeth Board of Education, EEOC Charge No. 524-2007-01283; and

WHEREAS, in the interest of cost efficiency and in lieu of extensive litigation and multiple hearings, the parties have agreed to settle these cases; and

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts and approves the terms of the Confidential Settlement Agreement which shall be filed in the Office of the School Business Administrator/Board Secretary, subject to its full execution by all parties.

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD MARCH 19, 2009

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

150-09M

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

May 8, 2009

Allan P. Dzwilewski, Esq.
Schwartz, Simon, Edelstein, Celso & Kessler
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, NJ 07962

Stephen E. Klausner, Esq.
63 East High Street
P.O. Box 1012
Somerville, NJ 08876

Re: Board of Education of the South Hunterdon Regional School District
Request for Declaratory Judgment

Dear Counsel:

I have reviewed the Petition for Declaratory Ruling entitled *Board of Education of the South Hunterdon Regional School District, Hunterdon County v. Joanne Bruno*, Agency Dkt. No. 73-4/09, and the related petition entitled *Joanne Bruno v. Board of Education of the South Hunterdon Regional School District, Hunterdon County,* Agency Dkt. No. 89-5/09.

Upon such review, I have determined to exercise my discretion to decline the request for declaratory judgment, pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1. The above referenced two matters shall proceed in tandem as petitions of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq.*, with the recommendation that they be consolidated.

Accordingly, petitioner's request for declaratory ruling is declined. Both matters shall be transmitted to the Office of Administrative Law upon receipt of the respective answers thereto.

Sincerely,

Lucille E. Davy
Commissioner

c: Board Secretary
County Superintendent

152-09

OAL DKT. NO. EDU 12709-07
AGENCY DKT. NO. 347-11/07

CHARLES E. MITCHELL, SR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms with the following *proviso.* The second term of the settlement agreement required that the settlement amount be paid to respondent "by October 31, 2008," a date that has passed. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same. The Commissioner therefore adopts the Initial Decision as the final decision in this case, providing that the parties have already effectuated the settlement terms, or have agreed upon a mutually satisfactory alternate date for payment to respondent of the $2700 settlement amount.

Accordingly, the matter is hereby dismissed, with prejudice, subject to compliance with the terms of the settlement agreement.

IT IS SO ORDERED.

Lucille Wag
COMMISSIONER OF EDUCATION

Date of Decision: 5/13/09

Date of Mailing: 5/13/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12709-07
AGENCY DOCKET NO. 347-11/07

CHARLES E. MITCHELL, SR.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF ORANGE, ESSEX COUNTY,
Respondent.

Robert Schwartz, Esq. for petitioner

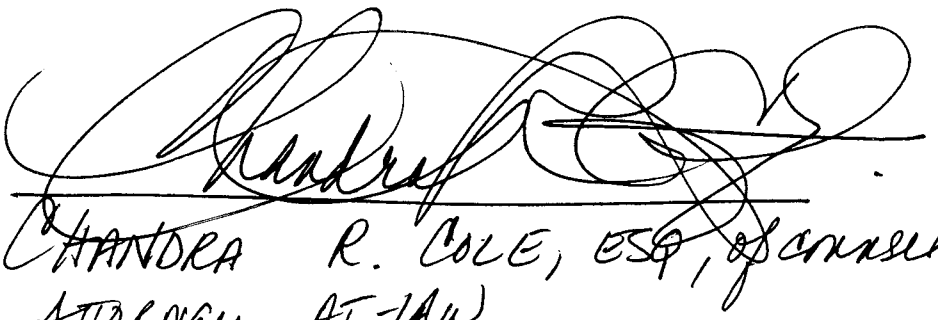
Melvin C. Randall, Esq., for respondent (Love & Randall)

Record Closed: March 25, 2009 Decided: March 26, 2009

BEFORE **JOANN LaSALA CANDIDO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on December 27, 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.

A telephone conference was conducted on January 25, 2008 at which time a hearing was scheduled for June 17, 2008. The June 17, 2008 hearing was adjourned due to a pending motion for summary decision. The matter was rescheduled to



CHANDRA R. COLE, ESQ., of counsel Lowe+Randall, Esqs.
ATTORNEY-AT-LAW
ORANGE BOARD OF EDUCATION



at Law.
Charles Mitchell

154-09

#154-09

OAL DKT. NO. EDU 703-09
AGENCY DKT. NO. 10-1/09

B.N. on behalf of minor children, A.D. and N.S.:

PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER 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.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/18/09

Date of Mailing: 5/19/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT

OAL DKT. NO. EDU 703-09

AGENCY DKT. NO. 10-1/09

B.N. on behalf of minor children,
A.D. AND N.S.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,
Respondent.

B.N. on behalf of minor children **A.D.** and **N.S.**, petitioners, pro se

William R. Burns, Esq., appearing for respondent (Destribates, Campbell, DeSantis, Magee & Staub, attorneys)

Record Closed: April 16, 2009 Decided: April 22, 2009

BEFORE **DENNIS P. BLAKE**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 6, 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. A hearing was scheduled for April 16, 2009. Prior to the hearing the parties conferred, and agreed to a settlement and prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

EXHIBITS

Jointly Submitted

J-1 Settlement Agreement

IN MATTER OF
BN O/B/O A.D. & N.S.

-1-

EDU
00703-2009S

→ BRENDA NELSON & NADIRAH DONALDSON hereby agree to pay the sum of $8000.00 to HAMILTON TOWNSHP BOARD of EDUCATION. The payments are to commence JUNE 15, 2009. The minimum monthly payment shall be $200.00 due on the 15th of EACH month. The BALANCE MUST BE PAID IN FULL by JUNE 1st 2012.

Failure to make timely payments will result in a DEFAULT JUDGMENT entered AGAINST BRENDA NELSON & NADIRAH DONALDSON. They are jointly & severally LIABLE for SAID OBLIGATION.

Nothing in this agreement guarantees either A.D. &/or N.S. enrollment in Hamilton Township Schools. A.D. & N.S. must meet all statutory requirements for enrollment. The parties consent to an in home inspection by the HTBE Annually (Once a year)

voluntarily. Ms. Donaldson, Ms. Nelson, & HTBE agree to ~~to~~ to withdrawal All Claims & Counter Claims. Said pleadings to be Dismissed.

D.B. BLAKE OAL JUDGE — 4/16/09 DATE

William R. Burns — 4/16/2009 DATE
William R. Burns
HTBE Attorney

Michael Gilbert — 4/16/09
Michael Gilbert HTBE

Brenda Nelson — 4/16/09 DATE
Brenda Nelson

Nadirah Donaldson — 4/16/09 DATE
Nadirah Donaldson

-Placed on the Record Before

155-09

JAMES A. HENSEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VOORHEES, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the Board's decision not to renew his annual contract as a maintenance mechanic, contending that the Board failed to provide him with adequate and timely notice of his non-renewal. The petitioner filed a motion for summary decision; subsequently, the Board filed a cross-motion for summary decision.

The ALJ found, *inter alia,* that: the material facts are not in dispute, and the matter is ripe for summary decision; *N.J.S.A.* 18A:27-10, and the May 15 notice of nonrenewal deadline contained therein, does not apply to employees in nontenurable positions; petitioner received notice of nonrenewal in a timely manner pursuant to his annual contract and the contract between the Board and the Voorhees Township Education Association (CNA); and petitioner's last evaluation – which concluded with a statement from his supervisor that clearly indicated he was recommending non-renewal of petitioner's contract – constituted, pursuant to the CNA, notice of "any action which may possibly result in his....future dismissal or non-renewal of contract." Accordingly, the ALJ concluded that petitioner's appeal should be dismissed.

Upon careful and independent review of the record, the Commissioner concurred with the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. 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 18, 2009

OAL DKT. NO. EDU 6545-08
AGENCY DKT. NO. 230-8/08

JAMES A. HENSEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF VOORHEES, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Initial Decision of the Office of Administrative Law and the parties' exceptions have been reviewed. For the reasons set forth therein, the Commissioner adopts the Initial Decision as the final decision in this case.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/18/09

Date of Mailing: 5/18/09

* 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
SUMMARY DECISION
OAL DKT. NO. EDU 6545-08
AGENCY DKT. NO. 230-8/08

JAMES A. HENSEL,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF VOORHEES, CAMDEN COUNTY,
Respondent.

Mark Cimino, Esq., appearing for petitioner

Howard S. Mendelson, Esq., appearing for respondent (Davis & Mendelson, LLC, attorneys)

Record Closed: February 25, 2009 Decided: April 3, 2009

BEFORE **ISRAEL D. DUBIN**, ALJ:

James A. Hensel appeals the Voorhees Township Board of Education's decision not to renew his contract as a maintenance mechanic, arguing that the Board failed to provide him with adequate and timely notice of his nonrenewal. Hensel filed his petition of appeal on August 4, 2008, the Board filed its answer on August 14, 2008 and the

matter was transmitted to the Office of Administrative Law for hearing as a contested case on August 27, 2008.

Hensel filed a motion for summary decision on September 18, 2008, and the Board filed a cross-motion for summary decision on October 20, 2008. The parties' joint stipulation of facts was received on December 18, 2008, and the record was closed upon receipt of Hensel's supplemental brief on February 25, 2009.

The following facts, as stipulated by the parties, are undisputed:

1. James A. Hensel was employed as a maintenance mechanic for the 2007-2008 school year by the Voorhees Township Board of Education pursuant to an annual employment contract which, by its terms, expired on June 30, 2008. The contract (Joint Exhibit A[1]) also provided, "It is hereby agreed by the parties thereto that this contract may at any time be terminated by either party giving to the other party two (2) weeks' notice, in writing, of such intention."
2. Mr. Hensel's employment was also governed by the terms of the "Agreement between Voorhees Township Board of Education and Voorhees Township Education Association, July 1, 2005 through June 30, 2008" (Joint Exhibit B). In accordance with this agreement, "[t]he Superintendent will, no later than June 1 of each work year, give written notice to each (maintenance) employee with regard to their employment or non-employment for the year beginning the following July."
3. Mr. Hensel's annual employment contract also provides for its termination by the Board ". . . in the event of misconduct, insubordination or unauthorized absence of (Hensel)."
4. Mr. Hensel received annual evaluations of his job performance (Joint Exhibit C) which, in accordance with the CNA, would under certain circumstances constitute notice ". . . of any action which may possibly result in [Hensel's] future dismissal or non-renewal of contract."

[1] The joint exhibits designated by letters of the alphabet are those attached to the stipulation of facts.

5. By letter dated May 29, 2008, (Joint Exhibit D), Superintendent of Schools Raymond J. Brosel, Jr., notified Mr. Hensel that his employment contract would not be renewed for the 2008-2009 school year.
6. By letter to Superintendent Brosel dated June 4, 2008 (Joint Exhibit E), Mr. Hensel requested the reasons for the non-renewal of his contract and notified Brosel that he wanted to exercise his right to appear before the Board.
7. By letter dated June 10, 2008 (Joint Exhibit F), the Board notified Mr. Hensel, that he could appear before the Board, "with or without counsel," on June 17, 2008. The Board also asserted that there was "no requirement that a superintendent and/or Board of Education articulate reasons for the non-renewal of an annual employment contract with its maintenance employees."
8. By letter dated June 17, 2008 (Joint Exhibit G), Mr. Hensel advised the Board that he would appear at the meeting that evening and requested that the appearance and "any discussions regarding this matter" be held in open session.
9. Mr. Hensel, accompanied by counsel, appeared before the Board during open session on June 17, 2008.[2]
10. By letter dated June 25, 2008 (Joint Exhibit H), the Board provided Mr. Hensel with copies of his annual evaluations and the superintendent's reason for recommending that the contract not be renewed. Specifically, the Board advised Mr. Hensel that although a Superintendent was not required to articulate reasons for his decision to recommend that a maintenance employee's contract not be renewed, he'd had ample notice of the problems with his job performance and, therefore, should not have been surprised by the non-renewal.

[2] Mr. Hensel disputes the Board's contention that he was given the superintendent's reason for recommending that his contract not be renewed; i.e. that the contract was expiring and could be terminated "without cause." In the interest of obviating the necessity of a hearing and having the matter decided summarily, the parties agreed to disagree on this point, while reserving their right to present evidence on this point in the event the cross-motions for summary decision were denied and a hearing became necessary.

11. By letter dated July 2, 2008 (Joint Exhibit I), Mr. Hensel notified the Board that having reviewed the documentation and "been informed of the reasons for non-renewal," he was renewing his request for an informal appearance before the Board in open session.
12. By letter dated July 17, 2008 (Exhibit J), the Board advised Mr. Hensel that his evaluations were not the "reasons for non-renewal" and reiterated that his contract had not been terminated for cause; "he simply was not provided with the opportunity for reemployment in accordance with a subsequent annual employment contract." The Board also advised Mr. Hensel that his request to make a second informal appearance before the Board "is neither contemplated under applicable law and/or otherwise warranted in the instant case."
13. Mr. Hensel filed his petition of appeal on August 4, 2008, and the Board filed its answer on August 14, 2008.

After careful review of the record, I am satisfied that the material facts giving rise to this matter are not in dispute. Therefore, in accordance with N.J.A.C. 1:12.5 and Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995), I find that this matter is ripe for summary disposition.

N.J.S.A. 18A:27-4.1 provides that a local board of education may renew the contract of a nontenured employee only upon the recommendation of the chief school administrator and that a nontenured employee who is not recommended for renewal shall be deemed nonrenewed. Through its incorporation by reference of N.J.S.A. 18A:27-10, the statute requires that a written offer of a new contract of employment or notice of nonrenewal must be given by no later than May 15. A board's failure to give timely notice of nonrenewal shall result in the board being deemed to have offered the employee continued employment for the following school year. N.J.S.A. 18A:27-11. Here, the threshold issue is whether the May 15 deadline governs the notice given to employees other than nontenured teaching staff members.

The answer may be found in that part of N.J.S.A. 18A:27-4.1 indicating that the chief school administrator must "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)." N.J.S.A. 18A:27-4.1(b) (emphasis added). The pertinent part of N.J.S.A. 18A:27-10, in turn, provides that a "*nontenured teaching staff member* continuously employed by a board of education since the preceding September" (emphasis added), must receive either a contract offer or notice of nonrenewal by no later than May 15 of the concluding school year.

As a general rule, legislative intent is to be gleaned from the words used in a statute, and they are to be given their ordinary and well understood meaning in the absence of an explicit indication to the contrary and then, only if ambiguity exists is it necessary to go beyond the words of the statute itself. Here, a plain language interpretation of the phrase "where applicable" in N.J.S.A. 18A:27-4.1(b) indicates the Legislature's intention that employees governed by N.J.S.A. 18A:27-10, i.e. nontenured teaching staff members, shall be treated differently than other employees when their contracts of employment are about to expire and will not be renewed. There can be no other explanation for the insertion of that phrase, since it is followed by reference to a statute that is, in its title and by its own terms, applicable only to teaching staff members.[3]

The Hon. Lillard Law, ALJ, reached much the same conclusion in Scelba v. Board of Education of the Township of Jackson, Ocean County, EDU 10340-98, Initial Decision (October 22, 1999), adopted Comm'r (December 10, 1999), aff'd State Board of Education (April 5, 2000) < http://lawlibrary.rutgers.edu/oal/search.html. > Scelba, a tenured teacher, also held the position of varsity golf coach, a part-time nontenurable position. Following several disagreements with the athletic director over the direction of the program, he was not offered a contract for another school year even though he had held that position for over twenty years. He appealed, claiming that the Board had failed to provide him with the requisite notice until June 17, well after the May 15 deadline.

In dismissing Scelba's petition, Judge Law held that the terms of N.J.S.A. 18A:27-10 do not apply to contracts for part-time seasonal coaching positions because coaches do not fit the definition of "teaching staff member." The Commissioner agreed, holding that N.J.S.A. 18A:27-10 "appear[s] to apply to *potentially tenurable* staff members serving a probationary period prior to the acquisition of tenure." Scelba, Final Decision, supra (emphasis in original). See also Brown v. City of Camden Board of Education, EDU 8563-03, Initial Decision (June 28, 2005), adopted Comm'r (July 25, 2005) < http://lawlibrary.rutgers.edu/oal/search.html > (N.J.S.A. 18A:27-10 held not to apply to school district's public information officer). Maintenance mechanics in the Voorhees School District are not potentially tenurable staff members and are not, therefore, entitled to the protections afforded by N.J.S.A. 18A:27-10.

Ordinarily, "the mere existence of a statute or regulation relating to a given term or condition of employment does not automatically preclude negotiate[ed alternatives]," Wright v. Board of Education of the City of East Orange, Essex County, 99 N.J. 112, 119 (1985) (citing In the Matter of Local 195, IFPTE, AFL-CIO v. State, 88 N.J. 393, 403-04 (1982). Rather, "[n]egotiation is preempted only if the 'statutory or regulatory provisions . . . speak in the imperative and leave nothing to the discretion of the public employer.'" Ibid. (quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 82 n. 7 (1978). Although N.J.S.A. 18:27-4.1 provides all school district employees with certain general protections, N.J.S.A. 18A:27-10 and its May 15 deadline does not apply to employees in nontenurable positions. Therefore, the parties were free to negotiate their own deadline by which a maintenance mechanic had to receive notice of nonrenewal.

Article 7, Section D, Paragraph 1 of the CNA (Joint Exhibit 1) provides that "[t]he superintendent will, no later than June 1st of each work year, give written notice to each (maintenance) employee with regard to their employment or non-employment for the year beginning the following July." Superintendent of Schools Raymond J. Brosel, Jr.'s letter notifying Hensel that his employment contract would not be renewed for the 2008-2009 school year was dated May 29, 2008. Therefore, Hensel received notice of nonrenewal in a timely manner.

[3] The title or heading of N.J.S.A. 18A:27-10 is "Nontenured teaching staff member; offer of employment

N.J.S.A. 18A:27-4.1(b) also provides that an employee whose contract is not renewed is entitled to a written statement of reasons for the nonrenewal and to an informal appearance before the board. As to the former, Hensel claims he did not receive the written statement of the reasons for his nonrenewal either before or during his June 17, 2008 informal appearance before the Board and was therefore deprived of the opportunity to prepare a rebuttal designed to convince the Board to renew his contract. In fact, he claims that it was not until June 25, 2008, one week after his June 17 appearance, that he received such the written statement. And even then, he was informed only that "there is no requirement that a superintendent and/or Board of Education articulate reasons for the non-renewal of an annual employment contract with its maintenance employees."

As the Commissioner held in regards to teaching staff members, although a nontenured teacher may be entitled to a statement of reasons for the board's decision not to reemploy him, "the requirement that it provide such reasons does not limit its broad discretion in deciding whether to retain non-tenured teachers." Guerriero v. Board of Education of the Borough of Glen Rock Board of Education, EDU 6240-84, aff'd A-3316-85T6 (App. Div. 1986). Moreover, "although a Board *should* provide a nonrenewed teacher with the *true* reasons for its decisions, if it fails to do so, there is 'no authority to impose a penalty for a board's failure to provide accurate reasons unless it is established that the real reasons for the board's action [are] in violation of constitutional or legislatively conferred rights.'" Sheridan v. Board of Education of the Borough of Pitman, et als., EDU 8068-03, adopted Comm'r (December 1, 2004) < http://lawlibrary.rutgers.edu/oal/search.html > (citations omitted) (emphasis in original). Here, even assuming the statement of reasons is insufficient or inaccurate, Hensel has made no such showing.

And even if the Board failed to provide a reason in its June 10, 2008 letter, the fact remains that Hensel had constructive if not actual notice of the Superintendent's probable recommendation and the reasons for it well in advance of that date. In his evaluation of Hensel's performance dated May 14, 2008, Clark Mathes, the Director of

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for next succeeding year or notice of termination before May 15."

Buildings and Grounds, indicated that Hensel had failed to provide him with timely and accurate information; continued to arrive on the job without proper supplies or tools; had not kept up with industry standards and code changes; pulled other custodians or maintenance men in to help him without prior authorization; failed to exercise good judgment; and generally failed to improve his job performance. Mr. Mathes's conclusion: "At this time, I am recommending non-renewal of Mr. Hensel's contract."

Given the nature of this evaluation, Hensel should have known what the Superintendent's recommendation was going to be and begun preparing a response. In fact, in accordance with the CNA, the evaluation constituted notice "of any action which may possibly result in his . . . future dismissal or non-renewal of contract." Then, in a letter dated June 25, 2008, the Board responded to his professed surprise over the recommendation by pointing out that he'd "had ample notice as to the problems experienced with his job performance and, as such, should not be able to argue that he was in any [way] surprised by the non-renewal of his contract." Therefore, even though the Board repeatedly declined to provide Hensel with the reasons for his nonrenewal, at the end of the day "there is 'no authority to impose a penalty for a board's failure to provide accurate reasons unless it is established that the real reasons for the board's action [are] in violation of constitutional or legislatively conferred rights.'" Sheridan v. Board of Education of the Borough of Pitman, et als., supra. And this Hensel has failed to do.

Finally, Hensel has also claimed that once he was provided with the reasons for his nonrenewal, he should have been given a second informal appearance before the board to better argue his position. However, as stated above, Hensel had at least constructive if not actual notice of the problems with his job performance long before his first informal appearance, and there is little or nothing he could have said during a second appearance that he did not say or could have said during the first. What is more, he has failed to provide any authority establishing a nonrenewed employee's right to a second appearance before the Board.

Based upon the foregoing, I find that the Voorhees Township Board of Education's nonrenewal of James A. Hensel's contract as a maintenance mechanic was perfected in a timely manner and was otherwise in accordance with the requirements of N.J.S.A. 18A:27-4.1(b). I therefore conclude that Hensel's petition should be and is hereby dismissed. 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.

April 3, 2009
DATE

ISRAEL D. DUBIN, ALJ

Date Received at Agency:

APR 7 2009

DATE

April 3, 2009
Mailed to Parties:

CHIEF
OFFICE OF ADMINISTRATIVE LAW

IDD/cmo

APPENDIX

EXHIBITS

Joint Exhibits:

J-1 Joint Stipulation of Facts with attached exhibits

156-09

156-09A

SCHOOL ETHICS COMMISSION DKT. NO. C24-07
COMMISSIONER OF EDUCATION APPEAL
DKT. NO. 13-11/08A

NATHALIE EVE YAFET,	:	
COMPLAINANT-RESPONDENT,	:	
V.	:	COMMISSIONER OF EDUCATION
ELBERT SMITH, HILLSIDE BOARD OF EDUCATION, UNION COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the School Ethics Commission on October 28, 2008

For the Respondent-Appellant, Elbert Smith, Allan C. Roth, Esq.

For the Complainant-Respondent, Philip E. Stern, Esq.

Upon a comprehensive consideration of the record and the parties' submissions on appeal, the Commissioner affirms the decision of the School Ethics Commission that the appellant violated the Code of Ethics for School Board Members. More specifically, the Commissioner concurs that the evidence supports the charges of violations of *N.J.S.A.* 18A: 12-24.1 (d), (e), (i) and (j). Further, the Commission adopts the penalty recommended to be imposed upon respondent.

In his appellate brief, respondent characterizes his conduct – particularly his multiple memoranda to the Hillside Board of Education – as innocent advisements to the Board and the district superintendent of "information he was provided." The correspondence generated by respondent and the testimony produced at the Commission hearing, however, do not support

that characterization. The record shows recurrent actions by respondent that arrogated the superintendent's managerial and supervisory responsibilities.

Respondent claims, on appeal, that he did not become directly involved in administrative activities, which would be a violation of *N.J.S.A.* 18A:12-24.1(d) The thrust of the argument appears to be that his activities were not equal to the interference perpetrated by board members in certain cases adjudicated by the Commission in the past. The Commissioner agrees with the School Ethics Commission, however, that respondent's actions did cross the line between proper board activity and school administration.

For example, Superintendent Dr. Raymond Bandlow appropriately managed the senior prank incident by interviewing his staff, consulting with the police and informing the board of education – in writing. Nonetheless, respondent took it upon himself to speak with the police chief and send memoranda to the board which contained incorrect information about administrative procedures to be followed with respect to the incident. This was appropriately viewed by the Commission as an attempt by respondent to "administer the schools."

It is undisputed that respondent sent three memoranda to the Board of Education without the knowledge of the district superintendent, which memoranda heavily criticized high school principal EvaMarie Raleigh, among other things. The tone and substance of the correspondence went beyond the simple dissemination of information. The correspondence also reveals respondent's willingness to circumvent the superintendent and serve as a direct conduit of employee complaints to the Board of Education.

Dr. Bandlow, the District Superintendent, testified that the respondent's actions allowed employees to bypass him and improperly take their issues directly to the Hillside Board. That undermined both the superintendent and other school administrators – who articulated same

to Bandlow. According to Bandlow, respondent's actions also poisoned the atmosphere in which Principal Raleigh worked, impairing her ability to make progress in her newly acquired position, and affected Bandlow's ability to supervise her. The foregoing behavior violated respondent's duty under *N.J.S.A.* 18A:12-24.1(i) to protect and support school personnel in the performance of their duties.

The Commission found Bandlow's testimony to be credible, which determination the Commissioner may not disturb 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 evidence. *See, e.g., 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). *See also, Cesare v. Cesare,* 154 *N.J.* 394, 412 (1998) (deference is especially appropriate when the evidence is largely testimonial; the trier of fact observes the witnesses, and can better evaluate their veracity than a reviewing body). Nothing in the record persuades the Commissioner that the School Ethics Commission's credibility determination was unsupportable.

Contrary to respondent's contentions in his appellate brief that his actions did not violate *N.J.S.A.* 18A:12-24.1(e) by compromising the board of education, respondent's dissemination of employee complaints to the Board before the complaints were investigated and evaluated – or even received – by the superintendent undermined the board's ability to impartially consider the matters prematurely brought to their attention by respondent. Ironically, although respondent states in his appellate papers that it is his responsibility to advise the district superintendent of complaints brought to his attention, he was greatly deficient in executing that responsibility – violating *N.J.S.A.* 18A:12-24.1(j), which requires board members to refer all complaints to the chief school administrative officer. As the Commission noted, "there was

nothing [in the record] to show that the superintendent's administrative solutions had failed...." (Commission's Decision at 14) Consequently, there was no reason for respondent to usurp the superintendent's responsibilities – unilaterally or otherwise.

In reviewing appeals from decisions of the School Ethics Commission, the Commissioner's task is to ascertain whether the decision is supported by sufficient credible evidence in the record. The Commission's decision will not be disturbed unless the appellant can demonstrate that it's determination was arbitrary, capricious, inconsistent with the facts, or contrary to law. *N.J.A.C.* 6A:4-4.1(a). In this case, the respondent has not met that burden, and the Commissioner sees no reason to overturn the Commissions findings or legal conclusions.

As to the penalty recommended by the Commission to be imposed upon respondent, the Commissioner rejects the contention that a lenient sanction is warranted on the grounds that his conduct was unmotivated by self-interest. Respondent repeatedly wrote directly to the board of education disparaging the individual who supervised his wife. While he protested that he was not micromanaging or passing judgment on Principal Raleigh, his writings reveal that he was. Even if respondent's wife's view of Raleigh had nothing to do with his actions, he nonetheless projected the appearance of bias and impropriety.

In the cases respondent cites to suggest that censure is a more appropriate penalty, *e.g. In the Matter of Matilda Touw,* 97 *N.J.A.R.* 2d (EDU) 343, and *In the Matter of Harrison,* 96 *N.J.A.R.* 2d (EDU) 553, the respondents' transgressions were not as extensive and had less of an impact upon the district than those of respondent in the present case. Consequently, the Commissioner finds them unhelpful in evaluating the penalty to be imposed. Equally unhelpful is the case cited by complainant in which a board member was removed after unilaterally usurping the district superintendent's authority to appoint staff, and violating the Open Public

Meetings Act by attempting to unilaterally pull agenda items on the afternoon of a regularly scheduled public board of education meeting.

The Commissioner finds no reason to disturb the Commission's recommended penalty of a six-month suspension; Consequently, she adopts same as an appropriate sanction under the circumstances of this case.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/15/09

Date of Mailing: 5/18/09

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

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

October 28, 2008

Philip E. Stern, Esq.
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Allan C. Roth, Esq.
Ruderman & Glickman
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SUBJECT: **Yafet v. Smith, Hillside Board of Education**
School Ethics Commission, Docket #C24-07

Dear Mr. Stern and Mr. Roth:

Enclosed please find the decision of the School Ethics Commission in the above-captioned matter adopted at the Commission's meeting on October 27, 2008. The Commission found that the respondent violated the School Ethics Act and recommended a penalty as set forth in the decision. The respondent is referred to the decision for specific instructions regarding the filing of: 1) exceptions to the recommended sanction; 2) an appeal of the Commission's finding of violation; or 3) both exceptions to the recommended sanction together with an appeal of the finding of violation.

Sincerely,

Joanne Boyle, Executive Director
School Ethics Commission

JB/MET/correspondence/C24-07 decision cvr ltr
Enclosure
c: Kathleen Duncan

NATHALIE EVE YAFET,	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**Docket No. C24-07**
ELBERT SMITH	:	
HILLSIDE BOARD OF EDUCATION	:	**DECISION**
UNION COUNTY	:	
	:	

PROCEDURAL HISTORY

This matter arises from a complaint filed on May 18, 2007 by Nathalie Eve Yafet alleging that Elbert Smith, a member of the Hillside Board of Education (Board) violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. The complainant specifically alleges that the respondent violated N.J.S.A. 18A:12-24.1(c), (d), (e), (g), (i) and (j) of the Code of Ethics for School Board Members.

Through his attorney, Allan Roth, Esquire, and after receiving an extension of time in which to file an answer, the respondent filed a Motion to Dismiss the Complaint. Through her attorney, Philip E. Stern, Esquire, and after receiving an extension of time in which to file a response, the complainant filed a response to the Motion to Dismiss. The Commission considered the complaint, the Motion to Dismiss and the complainant's responses at its October 30, 2007 meeting, at which time the Commission voted to grant the respondent's Motion to Dismiss the complainant's allegation that the respondent violated N.J.S.A. 18A:12-24.1(g) and to deny the respondent's Motion to Dismiss the complainant's allegations that the respondent violated N.J.S.A. 18A:12-24.1(c), (d), (e), (i) and (j) of the Code of Ethics for School Board Members. The Commission provided the respondent with 20 days in which to file an answer to the remaining allegations. After receiving an extension of time in which to file, the respondent, through his attorney, filed an answer to the complaint.

The parties were invited to appear at the Commission's September 23, 2008 meeting to present testimony. The complainant and her attorney attended the hearing and Dr. Raymond Bandlow, former Superintendent of Schools, testified for the complainant. The respondent and his attorney also attended the hearing and the respondent and his witness, Robert Quinlan, Chief of Police, presented testimony. At its public meeting on September 23, 2007, the Commission found that the respondent violated N.J.S.A. 18A:12-24.1(d), (e), (i) and (j), but that the complainant did not factually prove that the respondent violated N.J.S.A. 18A:12-24.1(c). The Commission tabled the determination of a penalty recommendation. At its October 27, 2008 meeting the Commission voted to recommend that the Commissioner of Education suspend the respondent for six months and it adopted this written decision.

THE PLEADINGS [1]

The complainant states that the respondent's wife, Mrs. Nancy Maloney-Smith, is employed as a physical education teacher at the high school and reports to Mrs. Raleigh. The complainant alleges that, after Memorial Day 2006, the respondent emailed all Board members regarding the senior prank incident. The complainant excerpts from the email wherein the respondent states, in part "Where was the leadership in the high school? To prevent this from happening... where was the adult supervision from any department? Whether it was from the principal's office... vice principal's office... security... classroom teachers... et al?" (Complaint at paragraph 1) The complainant alleges that this conduct violates N.J.S.A. 18A:12-24.1(c), (d), (e), (i), and (j). (Id., at paragraph 1)

The complainant alleges that on June 9, 2006, the respondent met with Chief of Police, Robert Quinlan. The complainant asserts that the discussion centered on Mrs. Raleigh's handling of the senior prank incident. (Id. at paragraph 2) The complainant next alleges that the respondent delivered a letter dated June 9, 2006 to the homes of eight board members. The complainant excerpts from the June 9th letter wherein the respondent states, in part "Whenever there is any problem that occurs in a school setting and the administrators in charge are not able to effectively cope with the situation ...." (Id., at paragraph 2) The complainant alleges that this conduct violates N.J.S.A. 18A:12-24.1(c), (d), (e), (i), and (j). (Id., at paragraph 2)

The complainant further alleges that the respondent delivered a letter dated September 17, 2006 to the homes of eight board members. Therein, the respondent states, "I have a number of concerns about the way Mrs. EvaMarie Raleigh has been doing her job as principal of the Hillside High School." The complainant alleges that this letter refers to "administrative tenure" and states that the board needs to determine its next course of action. (Id., at paragraph 3) The complainant alleges that this conduct violates N.J.S.A. 18A:12-24.1(c), (d), (e), (i), and (j). (Id., at paragraph 3)

Finally, the complainant alleges that the respondent delivered a letter dated March 18, 2007 to the homes of eight board members. According to the complainant, the March 18th letter states, in part, "I have a number of concerns about the way Mrs. EvaMarie Raleigh is doing her job as principal of the Hillside High School." The complainant asserts that the letter cautions the board to be careful about granting administrative tenure. (Id., at paragraph 4) The complainant alleges that this conduct violates N.J.S.A. 18A:12-24.1(c), (d), (e), (i), and (j). (Id., at paragraph 4)

[1] The allegations listed do not include those that were dismissed by the Commission at its October 30, 2007 meeting.

Attached to the complaint were the following Exhibits:

A. Copy of a May 30, 2006 email from Mrs. Raleigh to Superintendent, Dr. Raymond Bandlow, with a copy to Ralph Rotando regarding the respondent's letter to the Board about the senior prank with a reply to each of the respondent's contentions. A copy of a May 26, 2006 confidential memorandum from Dr. Bandlow to the Board with a copy to the Board attorney and the business administrator regarding 1) Change in special education class at Calvin Coolidge; 2) Incident at Hillside High School; and 3) Senior class prank;
B. Copy of a June 9, 2006 letter to the Board from the respondent regarding his discussion with the Hillside Chief of Police with a copy of N.J.A.C. 6A:16-1.1 et seq. attached;
C. Copy of a September 17, 2006 confidential memorandum to the Board from the respondent regarding his concerns with Mrs. Raleigh; and
D. Copy of a March 18, 2007 confidential memorandum from the respondent to the Board regarding his concerns with ongoing or recent issues related to the High School.

The respondent denies that he violated N.J.S.A. 18A:12-24.1(c), (d), (e), (i) and (j). (Answer at paragraph 4) The respondent acknowledges that he emailed all of the Board members sometime after May 26, 2006 to give them notice of his concerns regarding safety and security issues which had occurred at the school in connection with the senior prank on May 26, 2006. (Id., at paragraph 5a) The respondent indicates that he shared these concerns for further vetting and discussion in the proper forum. (Id., at paragraph 5a) The respondent does not deny that he went to the Hillside Police Department to inquire about the senior prank incident to determine if a police report was issued. (Id., at paragraph 5b) The respondent did, however, acknowledge that he spoke with the Chief of Police on the phone to inquire as to the events of May 26, 2006, but he denied that he attempted to direct or influence the Chief of Police to file a police report. The respondent acknowledges that he sent a letter dated June 9, 2006 to eight board members' homes and to the superintendent, but claims that he wrote the letter "...in an effort to give notice of the information he had received from the Chief of Police and to indicate that a formal school incident report would be forthcoming." (Id., at paragraph 5b) The letter also included a copy of N.J.A.C. 6A:16-1.1 et seq.

The respondent acknowledges that he sent correspondence dated September 17, 2006, but maintains that he did so in order to inform the other Board members of information he and three other Board members had received in a letter from a high school teacher regarding the teacher's concerns about the high school. (Id., at paragraph 5c) The respondent specifies that, after receipt of the letter from the teacher, he spoke with the superintendent regarding the issues raised in the letter, and he then sent a confidential memorandum to the Board members dated September 17, 2006 because he believed that the entire Board should be aware of the information. (Id., at paragraph 5c) The respondent acknowledges that he sent correspondence dated March 18, 2007, but indicates that he did so in order to inform the other Board members of information he had

discussed with the superintendent regarding multiple incidents which had occurred at the high school. (Id., at paragraph 5d) The respondent maintains that he sent the September and the March correspondence in order to inform the Board members of information that may have directly of indirectly impacted any decisions that the Board would have made as a collective body. (Id., at paragraphs 5c and 5d)

EVIDENCE

Dr. Bandlow testified that he is now the Superintendent of Fort Lee School District, but was with the Hillside School District (District) for 7 ½ years. He testified that in May 2006 he received an email from the respondent regarding a high school senior prank incident that occurred in late spring when students, during lunch, got in their cars and drove around the District's track. He testified that the high school administration stopped it quickly. Dr. Bandlow then identified Exhibit A from the complaint, the respondent's May 30, 2006 email, and said that he forwarded the email to the principal who inserted her responses, which are in parenthesis. This was marked as Exhibit C1. Dr. Bandlow testified that he was aware, from others, that the respondent was dissatisfied with the principal and was speaking to other people who also were not happy with the principal. He testified that the respondent was encouraging those other people to go to Dr. Bandlow with their complaints. Dr. Bandlow testified that the respondent never went to him with the complaints, but went to other administrators who then came to him. Those administrators were concerned because they had supervisory responsibility and because the complaints were undermining the principal. Dr. Bandlow testified that the respondent's email about the senior prank incident did not arise out of Board discussions or any prior discussions with him. He testified that he discussed the senior prank and the respondent's email with the principal and he was satisfied that the administration had dealt with the incident because they were on the track within minutes and the senior prank incident was stopped as soon as it started. Dr. Bandlow testified that he did not talk with the respondent about the email; he did advise the Board about the incident in a confidential memorandum dated May 26, 2006.

Dr. Bandlow testified that the police responded to the incident and refused the principal's request to issue warnings. He testified that he discussed the incident with the Chief of Police who said that it was a harmless senior prank and, since no one was hurt and there was no damage, there would be no police report. Dr. Bandlow identified a copy of a June 6, 2006 letter from the Hillside Chief of Police, which was entered into the record and marked as Exhibit C5.

Dr. Bandlow identified Exhibit B from the complaint as the June 9, 2006 letter to the Board from the respondent regarding his discussion with the Hillside Chief of Police with a copy of N.J.A.C. 6A:16-1.1 et seq. attached. This was marked as Exhibit C2. He testified that the respondent did not provide him with a copy of the June 9, 2006 letter, but that he received a copy from other Board members who called him to ask if he had seen the letter. Dr. Bandlow was very upset when he saw the letter; he thought the matter was behind them and did not deserve this kind of attention. Dr. Bandlow was also concerned that it went to Board members because it was critical of the administration and

the respondent did not contact him or give him a copy. Dr. Bandlow stated that he then spoke with the respondent after a committee meeting and he told the respondent that he was concerned that, by writing letter, the respondent was causing potential trouble for himself and Board, and he was undermining the principal who was new and following a long-time principal. Dr. Bandlow asked the respondent not to write letters like this because he was influencing opinions and affecting how Dr. Bandlow could deal with the situation. When Dr. Bandlow spoke with the respondent about the letter, the respondent said little except that he disagreed with Dr. Bandlow. Dr. Bandlow confirmed that the Board had never authorized the respondent to meet with the Chief of Police and that no police report was ever issued as a result of the senior prank incident.

Dr. Bandlow identified Exhibit C from the complaint, a September 17, 2006 confidential memorandum to the Board from the respondent regarding his concerns with the principal. This was marked as Exhibit C3. Dr. Bandlow confirmed that he was not copied on this memorandum, but received a copy when Board members called him to ask if he had received a copy. Dr. Bandlow claimed that the letter was prompted by a letter that was written by teacher to the Board about the principal. The teacher was unhappy with the principal and wrote a long letter to Board members with complaints and an accusation that there was not good leadership at the High School. Dr. Bandlow was copied on the teacher's letter. Dr. Bandlow stated that, after he received the respondent's September 17, 2006 letter, he was disappointed because the respondent did not discuss his concerns with Dr. Bandlow. He testified that he learned of the impact of the respondent's letter from other administrators who were concerned that the principal was being undermined by the teachers who were encouraged by the respondent. Dr. Bandlow did not discuss his concerns about the letter with the respondent because he did not think that sitting down would help. He consulted with the Board attorney and asked him to talk to the Board. The Board attorney spoke with the full Board about conflicts of interest and the Code of Ethics.

Dr. Bandlow identified Exhibit D from the complaint, a March 18, 2007 confidential memorandum from the respondent to the Board regarding the respondent's concerns with issues related to the High School. This was marked as Exhibit C4. Dr. Bandlow testified that the respondent did not copy him on the letter; he received a copy of the letter from other Board members. Dr. Bandlow stated that he believed that teachers were getting the impression that they did not have to worry about the principal or do what she said because they were getting support from the respondent. He testified that the respondent did not consult him about the letter.

Dr. Bandlow confirmed that he did not recommend the principal's reappointment because she had worked for the District for 2½ years and he had concerns about her performance. He testified about how the respondent's actions impacted the principal. He felt that the principal did not have a fair chance to improve herself due to undermining and the encouragement of criticism, which poisoned the atmosphere making it difficult for the principal to make any changes. Dr. Bandlow confirmed that he believed that the principal did not have the support from the people she needed and he knew that he did not have five votes for her reappointment.

On cross examination, Dr. Bandlow claimed that the respondent was President of a non-functioning PTA with only a couple of members. Dr. Bandlow could not recall if the June 9, 2006 letter came before or after his conversation with the Chief of Police. Dr. Bandlow testified that, in his conversation with the respondent about the June 9th letter, he told the respondent that he had gone "way over the line." He stated that he spoke with the respondent before going to the Board and he felt he had a good working relationship with the respondent. He averred that the respondent became angry about Dr. Bandlow having the letter and said he disagreed with Dr. Bandlow about the significance of the events. When questioned about the administrative code requirement for reporting violence and vandalism attached to Exhibit C, Dr. Bandlow testified that he did not remember if the respondent said anything specifically about reporting the senior prank incident. Dr. Bandlow stated that the incident was not something that should be on the report because there was no damage, no vandalism and no ticket was issued; it was just a harmless prank. Dr. Bandlow stated that he had the Board attorney speak generally with the Board about interfering with the supervision of administrators. Dr. Bandlow confirmed that the respondent did not vote on the principal's reappointment.

Robert Quinlan, the Hillside Chief of Police testified that he had been employed by Hillside for 5 ½ years and had known the respondent for 10-15 years. He testified that he spoke to the respondent in June of 2006, but did not believe he met with the respondent. He confirmed that the topic of the conversation was the senior prank incident at the high school. Referring to his June 5, 2006 letter to the principal, he stated that he had a conversation with principal and possibly with Dr. Bandlow. The witness noted that it struck him as a minor incident. The witness confirmed that the respondent never instructed him to take any action, but only inquired about incident.

The respondent testified that he has been a Board member for 8 ½ years. He confirmed that his wife works at the high school and he was on the interview committee and voted to bring her on the Board, but he did not vote for her reappointment; he recused himself. The respondent claimed that his intent when talking with the Chief of Police was to determine if the senior prank incident merited a report because of the Violence and Vandalism reporting requirements. The respondent stated that he spoke with Dr. Bandlow on several occasions about his general concerns with the high school; they had a good rapport. The respondent stated that he wrote the June 9, 2006 letter because he was concerned about the safety of students and a number of people in the community had complained to him because nothing was done. He also wanted Board members to know. He averred that he made no motions before the Board and asked for no actions. He stated that he did not send a copy of the June 9th letter to Dr. Bandlow because of Dr. Bandlow's history with the incident. He had spoken with Dr. Bandlow about this issue and he attempted or wanted to downplay the matter or not bring it to the full Board's attention. The respondent intended to speak to Dr. Bandlow about the letter. The respondent testified that he did not ask the Board to take action nor did he ask Dr. Bandlow to take action against principal.

The respondent stated that he sent the September 17, 2006 memorandum because it seemed that there were a number of incidents that were given short shrift or not appropriately handled by the administration and he wanted to communicate with the Board. The respondent did not copy Dr. Bandlow on the letter, but intended to speak to him about it. The respondent testified that he had spoken with Dr. Bandlow in passing about events at High School and Dr. Bandlow responded that he would take care of it.

The respondent claimed that Dr. Bandlow told him twice that he was running afoul of ethics violations because of micro-management and Dr. Bandlow asked the respondent to cease and desist. He stated that Dr. Bandlow first spoke with him about the June 9th letter and told him that he was "going down a slippery slope" and asked the respondent to stop sending letters. The respondent averred that he was not certain what Dr. Bandlow was speaking about, but he stopped micro-managing. He stated that he did not speak with the Chief of Police after the June 9th letter. The respondent maintained that, the second time Dr. Bandlow spoke with him was around the time of the September 17, 2006 letter.

The respondent testified that he did not talk to any teachers about activities in the high school. He further stated that he was at the high school because he was President of the PTA and he had three children in the school. The respondent confirmed that he sent the March 18, 2007 letter to the Board to reiterate the ongoing difficulties at the high school with the school climate and morale. He stated that, "in my travels" in the high school, people would come up to him and tell him about what was going on. He spoke with Dr. Bandlow about the complaints. The respondent testified that he never spoke to Board attorney about the letters he sent. In his meeting with Dr. Bandlow about the senior prank incident, the respondent stated that he disagreed with Dr. Bandlow about the significance of the incident.

In response to a question from a Commission member, the respondent confirmed that he never received a report from the police and he learned about the police department's view of the incident from Dr. Bandlow. He also stated that he sent the other letters after Dr. Bandlow had asked him not to because he believed there was a potential for physical harm. In response to a question regarding the incident in the halls referenced in the March 18th letter, the respondent claimed that a student had told him about the incident and his wife verified it. He also confirmed that if the incidents had been raised in closed session he would have recused himself because they involved a family member, but he felt that it was okay to inform other Board members about the incidents. The respondent testified that the information in the March 18th letter was only informational.

In response to a question from a Commission member, the respondent stated that he had a lot of opportunities to speak with Dr. Bandlow and, when he saw that Dr. Bandlow was not addressing the matter with open disclosure to the Board, the respondent decided to write to the entire Board. When asked by a Commission member if he spoke to Dr. Bandlow before he wrote the three letters to the Board, he responded that he could not recall, but thought that he may have spoken to Dr. Bandlow before he wrote maybe two of the three letters. The respondent maintained that he did not bring the matters to a

Board meeting because he felt there was no need to since Dr. Bandlow said he would take care of the problems. When Dr. Bandlow said that he would take care of a matter, the respondent testified he didn't pursue further; but when he heard it was not taken care of, he then advised the Board. The respondent stated that he did not copy Dr. Bandlow on the letters because he believed that Dr. Bandlow was not addressing the problem. The respondent claimed that he did not believe that he was micro-managing and felt that Dr. Bandlow was overly concerned about this and in error. When asked by a Commission member if Dr. Bandlow's evaluation reflected the respondent's opinion, he replied yes, but that in some areas Dr. Bandlow did an outstanding job. The respondent confirmed that his wife, a physical education teacher, was upset about the senior prank. In response to a question from a Commission member, the respondent confirmed that he had attended board member training. The respondent also confirmed that he received a copy of the June 5, 2006 letter from the Chief of Police in his June 2006 Board packet.

MOTION TO DISMISS

Pursuant to N.J.A.C. 6A:28-6.9(c), upon completion of the complainant's case, and prior to the respondent's testimony, as set forth above, the respondent moved to dismiss the complaint.[2] After hearing arguments from counsel, the Commission asked the parties to leave the room so that it could deliberate. It is the complainant's burden to factually establish violation(s) of the Code of Ethics for School Board Members. In considering a motion to dismiss, the Commission considers the facts in the light most favorable to the non-moving party. The question before the Commission was whether the complainant alleged facts and provided testimony which, if true, could support a finding that the respondent violated N.J.S.A. 18A:12-24.1(c), (d), (e), (i) and (j) of the Code of Ethics for School Board Members. The Commission determined that, if the facts set forth in the complaint and the testimony were proven, these facts could support a violation of N.J.S.A. 18A:12-24.1(c), (d), (e), (i) and (j). Thus, the Commission denied the respondent's motion.

FINDINGS OF FACT

As the trier of fact in this matter, the Commission had the opportunity to observe the demeanor of the witnesses and to judge their credibility. As such, the Commission found Dr. Bandlow to be a credible witness who offered consistent testimony which was not weakened by cross-examination. Whereas, the Commission found the respondent's testimony was inconsistent with the June 9th, September 17th and March 18th correspondence he sent to the Board. Insofar as the respondent's testimony conflicted with the testimony of Dr. Bandlow, the Commission found Dr. Bandlow's testimony to be more credible. Thus, following are the facts based on the pleadings, testimony and documents on the record.

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[2] N.J.A.C. 6A:28-6.9(c) provides that all hearings shall be conducted in accordance with the rules of the OAL. Such rules permit a party to make an oral motion during a hearing and to state the grounds for the motion. N.J.A.C. 1:1-12.1(a)1 and 2.

1. At all times relevant to the complaint, the respondent was a member of the Board and his wife was employed in the District as a physical education teacher reporting to Principal EvaMarie Raleigh.

2. At all times relevant to the complaint, Dr. Bandlow was superintendent of the District.

3. At all times relevant to the complaint, Ms. Raleigh was employed by the District as principal of the high school.

4. On or about May 26, 2006, a "senior prank" took place at the high school, at which time a group of students drove their cars around the track in the back of the school.

5. On or about May 26, 2006, the respondent emailed all of the Board and Dr. Bandlow about the May 26, 2006 senior prank incident. The respondent related his safety concerns and stated in part: "Where was the leadership in the high school? To prevent this from happening... where was the adult supervision from any department? Whether it was from the principal's office... vice principal's office... security... classroom teachers... et al?" (Exhibit C1)

6. On May 30, 2006, the principal emailed Dr. Bandlow, which email included an excerpt of the respondent's email about the senior prank incident. The principal inserted her responses to the respondent's concerns in parenthesis throughout the excerpt of the respondent's email. (Exhibit C1)

7. On May 26, 2006, through a confidential memo to the Board, Dr. Bandlow informed the Board about the senior prank incident. (Exhibit A)

8. Dr. Bandlow spoke with the principal about the senior prank incident and was satisfied that the administration had responded appropriately because they were on the track within minutes and the incident was stopped as soon as it started.

9. The police responded to the senior prank incident and refused the principal's request to issue warning tickets to the students who drove their cars around the track.

10. The Chief of Police spoke with Dr. Bandlow and the principal about the senior prank incident. The Chief of Police thought that it was a harmless prank since no one was hurt and there was no damage. A police report regarding the incident was never filed.

11. The respondent spoke with the Chief of Police regarding the senior prank incident. The respondent did not pressure the Chief to file a police report.

12. On June 5, 2006 the Chief of Police wrote a letter to the principal regarding the senior prank incident and he stated, "Because there was no property damage and no crime(s) committed, there were no police reports filed in connection with the incident."

13. The respondent received a copy of the June 5, 2006 letter from the Chief of Police in his June 2006 Board packet.

14. The respondent sent a letter dated June 9, 2006 to all Board members regarding his conversation with the Chief of Police wherein he elaborated on the established formal procedure for the filing of a police report. In the letter, he indicated that "an objective Police Report is dispatched to the police department with a hard copy forwarded to the school superintendent. The Superintendent will then submit the Police Incident Report to the authorities at the State Department of Education in Trenton." (Exhibit C2) Attached to the letter was a copy of N.J.A.C. 6A:16-1.1 et seq. The respondent did not provide a copy of the June 9, 2006 letter to Dr. Bandlow because when he had spoken with Dr. Bandlow about the incident, Dr. Bandlow downplayed the incident and did not want to bring it to the attention of the full Board.

15. Dr. Bandlow obtained a copy of the respondent's June 9, 2006 letter from a Board member. Dr. Bandlow "thought that the matter was behind us and did not deserve this kind of attention."

16. Upon receipt of the letter and after a Board committee meeting, Dr. Bandlow spoke with the respondent and told the respondent that he was concerned that the respondent was causing potential trouble for the Board and undermining the principal. Dr. Bandlow told the respondent that he had gone way over the line. He then asked the respondent to refrain from writing any such letters because the letters were affecting how he could deal with the situation.

17. The respondent sent a confidential memo dated September 17, 2006 to five Board members regarding information he and three other board members had received from a teacher who was unhappy with the principal. In the letter he states, "As everyone on the Board knows...I have a number of concerns about the way Mrs. EvaMarie Raleigh has been doing her job as principal at Hillside High School." (Exhibit C3 page 1) The respondent then listed his concerns with what happened in connection with the music entertainer who performed at the high school, the senior prank incident and the concerns raised by the teacher in the teacher's letter to certain Board members. The respondent went on to state, "...from an administrative tenure perspective concomitant with the fact that... we as a school board need to examine in greater detail what's going on at the high school and... as a point of discussion... as per specific aforementioned concerns that pertain to Ms. Raleigh..." (Exhibit C3 page 2) The respondent ends the letter indicating that, "it is not meant to pass

judgment... it is merely intended as an FYI to let you know what I know." (Exhibit C/C3 page 2)

18. The respondent sent the September 17th letter because there were a number of incidents that were not properly handled by the administration and he wanted to communicate with the Board.

19. Dr. Bandlow was not copied on the respondent's September 17, 2006 confidential memo, but was given a copy of it from a Board member.

20. Dr. Bandlow learned of the impact of the respondent's letter from administrators who were concerned that the principal was being undermined by the teachers who were being encouraged by the respondent.

21. Dr. Bandlow did not discuss his concerns about the respondent's letter with the respondent; rather he spoke with the Board attorney who then spoke with the full Board about conflicts of interest.

22. The respondent sent a confidential memorandum dated March 18, 2007 to Board members regarding the school climate, principal performance district wide and the performance of Ms. Raleigh. (Exhibit C4) In the letter, the respondent wrote, "...I have a number of concerns about the way Ms. EvaMarie Raleigh is doing her job at Hillside High School." He indicates that employees repeatedly brought to his attention that they are in a hostile working environment and are publicly humiliated by Ms. Raleigh. He shares his concerns regarding a breach in security during HSPA testing and Ms. Raleigh's oversight of the situation. He raises his concerns about Ms. Raleigh's involvement with a cell phone incident involving a female student. He states, "I am not making aspersions... I am just saying very loud and clear... given all the problems we have had over recent years (despite the great gains we have made with less money to work with) we... as a board had better be very careful who we grant administrative tenure to." (Exhibit C4)

23. Dr. Bandlow was not copied on the respondent's March 18, 2007 letter.

24. Dr. Bandlow did not recommend the principal's reappointment because he had concerns about her performance and felt that she did not have a fair chance to improve herself because of the Board encouraging criticism which poisoned the atmosphere making it difficult for the principal to make any changes. He also knew that he did not have 5 votes for her reappointment.

25. The respondent did not vote on the reappointment of the principal.

ANALYSIS

The Commission initially notes that, pursuant to N.J.S.A. 18A:12-29, the complainant bears the burden of factually proving any violations of the Code of Ethics for School Board Members. The complainant contends that the respondent violated N.J.S.A. 18A:12-24.1(c), which provides:

> I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

The complainant provided no evidence to factually establish that the respondent's actions constituted Board action. The respondent's actions in sending the email and all of the correspondence to the Board were not within the scope of the respondent's duties and responsibilities as a Board member. As noted below, the respondent's action in sending the email and the correspondence constituted private action. Previously, in Marc Sovelove v. Paul Breda, C49-05 (September 26, 2006), the Commission found that a Board member's action cannot be both board action and private action. The Commission stated that if the board member's action is found to be board action it cannot be private action. (Id., at page 4) Conversely, if a board member's action is found to be private action it cannot constitute board action. The Commission finds that the complainant did not factually establish that the respondent failed to confine his board action to policy making, planning, and appraisal or that he failed to help frame policies and plans only after the board has consulted those who will be affected by them. Therefore, the Commission dismisses the allegation that the respondent violated N.J.S.A. 18A:12-24.1(c).

The complainant contends that the respondent violated N.J.S.A. 18A:12-24.1(d), which provides:

> I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

The respondent testified that he sent the June 9th letter because the superintendent had downplayed the senior prank incident and the respondent wanted to bring the incident to the full attention of the Board. In the June 9th letter, the respondent elaborated on the formal procedure for the filing of a police report and indicated that a report would be forthcoming. Meanwhile, the superintendent had informed the Board about the senior prank incident in a May 26, 2006 confidential memo; he had reviewed the administration's response and found that the response was appropriate; he had spoken with the Chief of Police who thought it was a harmless prank and a police report was never filed. The superintendent had managed the situation and thought that it did not deserve the attention that the respondent was giving it. Here, by sending the June 9th letter to the Board, the respondent was second guessing the superintendent and attempting to take on the superintendent's responsibility of reporting the senior prank

incident to the Board and indicating that a formal school incident report would be forthcoming. Once the respondent was provided with a copy of the June 5, 2006 letter from the Chief of Police, questions as to the handling of the senior prank incident should have ceased. Yet, the respondent continued to send correspondence regarding an incident that had been resolved by the superintendent. Furthermore, in his subsequent correspondence dated September 17, 2006 and March 18, 2007, the respondent provided the Board with information that was evaluative of the high school principal. The superintendent testified that these letters were affecting how he administered the district. Pursuant to N.J.A.C. 6A:28-7.1 to "administer the schools" means, in part, that a board member "...has become directly involved in activities or functions that are the responsibility of school personnel..." The Commission finds that the respondent became directly involved in functions that are the responsibility of the superintendent when he sent the June 9th, September 17th and March 18th correspondence to members of the Board. Therefore, the Commission finds that the respondent violated N.J.S.A. 18A:12-24.1(d) when he attempted to administer the schools.

The complainant also contends that the respondent violated N.J.S.A. 18A:12-24.1(e), which provides:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

Pursuant to N.J.A.C. 6A:28-7.1 "private action means, in part, action taken by a board member "...that is beyond the scope of the duties and responsibilities..." of a member of the board. Here, it was not the duty or responsibility of the respondent as a board member to continually update the Board about situations occurring in the high school; this was the responsibility of the superintendent. In sending the correspondence to the Board, the respondent was taking private action. The respondent's private actions could have compromised the Board because those actions were interfering with the superintendent in the proper discharge of his duties and undermining the principal. The superintendent testified that due to the respondent's undermining and the encouragement of criticism, he felt that the principal did not have a fair chance to improve herself; the atmosphere was poisoned making it difficult for the principal to make any changes. Therefore, the Commission finds that the respondent violated N.J.S.A. 18A:12-24.1(e) when he took private action by sending the three letters that may have compromised the Board.

The complainant further alleges that the respondent violated N.J.S.A. 18A:12-24.1(i), which provides:

> I will support and protect school personnel in proper performance of their duties.

The evidence shows that the respondent was not supporting and protecting either the superintendent or the principal in the proper performance of their duties. The

correspondence dated September 17, 2006 and March 18, 2008 was highly critical of the principal and raised questions about granting the principal tenure. The superintendent testified that the respondent's letters were undermining the principal and affecting how he could deal with the situation. Therefore, the Commission finds that the respondent violated N.J.S.A. 18A:12-24.1(i) when he failed to support and protect the superintendent and the principal in the proper performance of their duties.

Finally, the complainant alleges that the respondent violated N.J.S.A. 18A:12-24.1(j), which provides:

> I will refer all complaints to the chief school administrative officer and will act on the complaints at public meetings only after failure of an administrative solution.

The respondent admitted in his testimony that he did not provide the superintendent with a copy of the three letters because he did not like the way the superintendent managed the situations which were raised in the letters. There was nothing to show that the superintendent's administrative solutions had failed; the respondent merely disagreed with those solutions. While there was conflicting testimony as to whether the respondent went to the superintendent with his complaints prior to sending the correspondence, the Commission finds the superintendent's testimony more credible. The superintendent testified that the respondent never went to him regarding his complaints, but went to other administrators who took those complaints to the superintendent. Therefore, the Commission finds that the respondent violated N.J.S.A. 18A:12-24.1(j) when he failed to refer his complaints to the superintendent and acted on his complaints at times other than public meetings because he disagreed with the superintendent's administrative solution.

DECISION

The Commission finds that the complainant has established that the respondent violated N.J.S.A. 18A:12-24.1(d), (e), (i) and (j) of the Code of Ethics for School Board Members. The Commission dismisses the allegation that the respondent violated N.J.S.A. 18A:12-24.1(c).

PENALTY

The Commission recommends that the Commissioner impose a penalty of suspension for six months. In so doing, the Commission finds the respondent's claims, both in his correspondence and his testimony, that he was merely providing the Board information to be disingenuous. The correspondence shows that the respondent was clearly trying to influence the Board about a matter where he had a conflict of interest because the high school principal supervised his wife. Despite this, the respondent continued to move forward, even after the superintendent had asked him not to write any more letters.

The Commission notes that the respondent has been found in violation of multiple provisions of the Code of Ethics for School Board Members. In considering the penalty, the Commission finds instructive I/M/O Rose L. Funches, C09-05 & C10-05 (September 27, 2005)[3] (The Commission recommended removal and the Commissioner concurred due to flagrant violations of multiple provisions of the Code of Ethics for School Board Members.), and I/M/O Rudolph McCullers, C06-05 & C12-05 (September 27, 2005)[4] (The Commission would have recommended removal for extensive violations of the Act except the respondent was no longer a board member.). Similar to this matter, the board members in those matters were found to have violated multiple provisions of the Act. However, in those matters the board members violated the Act on more occasions and through a variety of actions. The Commission finds that the respondent's actions do not rise to the level of the actions taken by the board members in Funches and McCullers. However, the Commission finds that the respondent's actions merit more than a censure. Here, all of the respondent's offending conduct centered around matters where he had a clear conflict of interest due to his wife's employment in the District. Furthermore, he had notice from the superintendent that he was "way over the line," yet he continued with his conduct. Therefore, as noted above, the Commission recommends that the Commissioner impose a penalty of suspension for six months.

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.

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[3] In Funches, the board member was found in violation of the various provisions of the Act for failing to disclose information on her financial disclosure statement, for co-signing checks made out to her husband that had not been approved by the Board, for voting to approve the bid of a maintenance company in which her husband and son were employed, and for voting on bill lists that included payments to her husband's company.

[4] In McCullers, the board member was found in violation of the Act when, including other actions, he dismissed the board secretary without the recommendation of the superintendent and without board approval, he contacted the board secretary directly about a scheduling mix-up, he went into the schools and intervened in a dispute between two students, he signed checks made out to himself without board approval, he hired a business administrator without board approval, he hired a maintenance professional without soliciting bids and without board approval, he acted as a purchasing agent and he hired a maintenance company without board approval.

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.

Paul C. Garbarini/jb

Paul C. Garbarini
Chairperson

Mailing Date: October 28, 2008

Resolution Adopting Decision – C24-07

Whereas, the School Ethics Commission has considered the pleadings, the testimony and the documents submitted in support thereof; and

Whereas, at its September 23, 2008 meeting, the Commission found that Dr. Elbert Smith violated N.J.S.A. 18A:12-24.1(c), (d), (e), (i) and (j) of the School Ethics Act; and

Whereas, at its October 27, 2008 meeting, the Commission voted to recommend to the Commissioner of Education that Dr. Smith be suspended for six months; and

Whereas, the Commission has reviewed the proposed decision of its staff; and

Whereas, the Commission agrees with the proposed decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision. The Commission directs its staff to notify all parties to this action of its decision herein.

Paul C. Garbarini/jb
Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on October 27, 2008.

Joanne Boyle
Executive Director

158-09

WENDY WACHTEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a teacher in the Montgomery Township School District since September 1997, challenged her salary guide placement upon return from an approved maternity leave in December 2005, and sought to be reinstated to a higher step on the salary guide, with retroactive pay and other relief. The respondent Board filed a motion for summary decision, arguing that the petitioner should have brought her dispute to arbitration through the grievance procedure set forth in the district's collective bargaining agreement, and not before the Commissioner.

The ALJ found, *inter alia,* that: there is no dispute that petitioner was placed on the salary steps in accordance with the collective bargaining agreement; respondent is correct that this matter should have been grieved by the petitioner under the collective bargaining agreement; the Commissioner lacks jurisdiction to hear this matter; and petitioner's argument that *N.J.S.A.* 18A:6-10 empowers the Commissioner to hear this dispute is without merit. The ALJ granted respondent's motion for summary decision, and dismissed the petition.

Upon careful and independent review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter for the reasons clearly 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 20, 2009

OAL DKT. NO. EDU 4221-08
AGENCY DKT. NO. 101-4/08

WENDY WACHTEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties. For the reasons set forth therein, the Commissioner adopts the Initial Decision as the final decision in this case.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/20/09

Date of Mailing: 5/20/09

* 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 4221-08
AGENCY DKT. NO. 101-4/08

WENDY WACHTEL,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY,
Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Derlys M. Gutierrez, Esq., for respondent (Adams, Stern, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: April 3, 2009 Decided: April 6, 2009

BEFORE **DOUGLAS H. HURD**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Wendy Wachtel, has been a teacher in the Montgomery Township School District since September 1997. On March 30, 2008, petitioner filed a petition with the Commissioner of Education seeking to be reinstated to her appropriate step on the salary guide, with retroactive pay, consequential damages and other relief. On May

8, 2008, respondent, the Montgomery Township Board of Education, filed an Answer and Affirmative Defenses requesting that the Petition be dismissed in its entirety. The Department of Education transferred the matter to the Office of Administrative Law, where it was filed on May 19, 2008.

The matter was scheduled for a hearing on January 30, 2009. The parties then advised that the matter could be decided on the papers and that a hearing was not necessary. On February 6, 2009, respondent filed a motion for summary decision. Petitioner filed a response and the record closed on April 3, 2009, with the filing of respondent's reply brief.

FINDINGS OF FACT

There is no dispute as to the facts of this matter.

Petitioner has been a teacher in the Montgomery Township School District since September 1997 and she continues in that capacity. Her step placements during her years of service are as follows:

School Year	Step
• 1997-98	1
• 1998-99	2
• 1999-00	3
• 2000-01	4
• 2001-02	5
• 2002-03	6
• 2003-04	6-7
• 2004-05	7-8 [maternity leave: 11/04 to 6/05 and 9/05 to 12/05]
• 2005-06	6-7

For the years 2003 through 2009, the Board and the Montgomery Township Education Association ("Association") entered into two collective bargaining agreements that contracted the steps on the salary guides. As a result of the consolidation of steps, petitioner was placed on consolidated step 6-7 for the 2003-04 school year. At the beginning of the 2004-05 school year, petitioner was placed to the next consolidated step at 7-8. She then took maternity leave during that school year and worked only two months. She began her maternity leave in November 2004 and returned to work in December 2005 of the 2005-06 school year. She missed one year of work and service. Since she only worked two months in the 2004-05 school year, she was not entitled to move ahead on the salary guide.

Upon her return to work in December 2005, she was supposed to remain on the same step. However, her step did not remain the same because the salary guides were further contracted pursuant to the collective bargaining agreement. What had been step 7-8, now became two steps: step 6-7 and step 7-8. Petitioner was placed on the 6-7 step following her return for the reasons provided on page 38 of the collective bargaining agreement which, in part, provides: "In the event that a staff member does not qualify for an increment advancement in the upcoming year, he/she will be placed one step lower on the guide than the chart indicates for the upcoming year...." Exhibit B to respondent's brief.

There is no dispute that petitioner has been placed on the steps in accordance with the collective bargaining agreement. There is no allegation that the collective bargaining agreement has been violated.

LEGAL ANALYSIS

In its summary decision motion, respondent argues that the Commissioner of Education is without jurisdiction to hear this matter. Respondent cites the 2006-2009 collective bargaining agreement. Exhibit C. Specifically, respondent points to the grievance procedure set forth at pgs. 2-3, which states its application when a member claims "that there has been to him/her ... a misinterpretation, misapplication, or violation of any of the provisions of this Agreement." Respondent argues that petitioner should

have brought her dispute to arbitration through the grievance procedure, and not before the Commissioner.

Petitioner does not dispute that the Board correctly applied the salary guide to her situation. She argues that its application is unduly harsh and will diminish her salary over time. She claims that N.J.S.A. 18A:6-10, which disallows a reduction in compensation for tenured staff, empowers the Commissioner to hear this dispute because the application of the salary guide diminishes her salary over time. She also argues that she was not provided with appropriate notice.

I have carefully read the parties briefs and reviewed the exhibits submitted. Respondent is correct in its position that the Commissioner lacks jurisdiction to hear this matter. Petitioner's claim that N.J.S.A. 18A:6-10 is applicable to this matter is incorrect. Petitioner's salary is not being reduced, and thus this statute is not applicable. See Newark Teachers Ass'n v. Board of Ed. of Newark, 108 N.J. Super. 34, (L. 1969), aff'd 57 N.J. 100. Respondent is correct that this matter should have been grieved by petitioner under the collective bargaining agreement. There is no jurisdiction with the Commissioner or Education. See Red Bank Bd. of Ed. v. Warrington, 138 N.J. Super. 564 (App. Div. 1976) (where provision is made for binding arbitration of controversies over contractual terms and conditions of employment, recourse for their resolution must be by that means, and not to Commissioner).

Respondent is also correct that the Board had no obligation to provide petitioner with special notice of what could happen if petitioner took a leave of absence, with respect to the salary guide. Petitioner's argument, that as an equitable matter, the Commissioner should fix the harsh application of the salary guide to her is also without merit. The Commissioner simply does not have jurisdiction. Petitioner's dispute is appropriate to be addressed through the arbitration provisions of the collective bargaining agreement.

ORDER

For the foregoing reasons, I hereby **GRANT** respondent's summary decision motion. Petitioner's claims are hereby **DISMISSED** because they arise from a dispute under the parties' collective bargaining agreement. Alternatively, the petition is hereby **DISMISSED** because the terms of the collective bargaining agreement were applied to petitioner correctly. 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.

April 6, 2009

DATE

DOUGLAS H. HURD, ALJ

Date Received at Agency:

APR 0 2009

DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/jfk

163-09R

163-09

OAL DKT. NO. 8566-08
(EDU 2820-08 ON REMAND)
AGENCY DKT. NO. 102-4/08

IN THE MATTER OF THE TENURE	:	
HEARING OF ALONZO KITTRELS,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION ON REMAND
OF WILLINGBORO, BURLINGTON COUNTY.	:	
	:	

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

Upon such review, the Commissioner is satisfied that the concerns expressed in her decision of August 26, 2008 have now been sufficiently addressed to permit, for the reasons set forth in the Initial Decision, a finding that the proposed settlement comports with established standards governing settlement of tenure matters. *In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; *N.J.A.C.* 6A:3-5.6(a).

Accordingly, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement. A copy of this decision will be forwarded to the State Board of Examiners for such action, if any, as that body deems appropriate.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

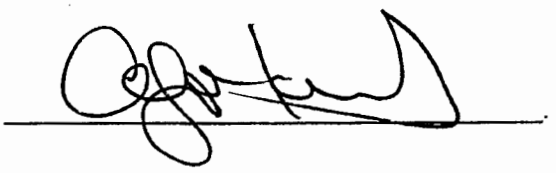
Date of Decision: 5/27/09

Date of Mailing: 5/27/09

IN WITNESS WHEREOF, the parties knowingly and voluntarily executed and delivered this Agreement as of the date set forth below:

Dated:

ALONZO KITTRELS



WILLINGBORO BOARD OF EDUCATION

By: 

Dated:

Ken J. Gordon, Jr.

Date

J-4B
in mail
4-2-08
gg

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OFFICE OF ADMIN. LAW

Szaferman, Lakind, Blumstein & Blader, P.C.
101 Grovers Mill Road
Suite 104
Lawrenceville, New Jersey 08648
(609) 779-6031
Attorneys for the Willingboro Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST ALONZO KITTRELS, WILLINGBORO TOWNSHIP BOARD OF EDUCATION, BURLINGTON COUNTY.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY DOCKET NO. 120-4/08 OAL DOCKET NO. EDU-00099-06S ADMINISTRATIVE ACTION **STIPULATION OF SETTLEMENT**

WHEREAS, the Board of Education of the Township of Willingboro ("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 Willingboro Public School District; and

WHEREAS, Alonzo Kittrels ("Respondent") commenced employment with the Board as its Superintendent of Schools on or about July 1, 2002; and

WHEREAS, on or about March 31, 2008, sworn tenure charges against Respondent, together with a certificate of determination and certificate of service, were certified by the Board to and filed with the Commissioner of Education, and Respondent was simultaneously served with the sworn tenure charges, sworn statement of evidence, certificate of determination and certificate of service, pursuant to N.J.A.C. 6A:3-5.1 *et seq.*; and

WHEREAS, the Department of Education thereafter transmitted the matter to the Office of Administrative Law as a contested case, which was assigned to Administrative Law Judge John R. Futey under Docket No.: EDU-00099-06S, Agency Docket No.: 120-4/08; and

WHEREAS, the parties, wishing to resolve the within matter amicably without the need for further, protracted litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by the Court and the Commissioner of Education;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. Tenure Charges to be Moot/No Further Board Action

This Stipulation is expressly contingent upon and subject to approval by the Commissioner of Education of New Jersey. The Board agrees that upon approval of this Stipulation of Settlement by the Commissioner, the subject tenure charges shall be moot and shall be withdrawn by the Board, and that no further action shall be initiated by the Board regarding the underlying charges. Both parties agree, however, that in the event this agreement 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. Contract Termination

The parties agree as part of their settlement that as a result of the expiration of his contract, Respondent's employment with the Board as Superintendent terminated effective June 30, 2008 pursuant to the terms of his contract. As a result of this contract termination, as of June 30, 2008, Respondent shall have no duties, responsibilities or authority whatsoever as an employee, agent or representative of the Board.

3. Payment

In full and final satisfaction of all claims by respondent relating to his employment contract only, the Board shall pay respondent as follows (in each case less applicable statutory deductions and authorized withholdings):

a. Respondent will receive his final salary and benefits as Superintendent through June 30, 2008 including for the period from April 1, 2008 through and including June 30, 2008. Respondent will be paid salary for this period in the amount of $31,197.40.

b. Respondent shall receive back pay for salary increases he was contractually entitled to in the amount of $12,535.58 which shall be appropriately reported and credited for pension purposes with the Division of Pensions for the 2005-2006, 2006-2007 and the 2007-2008 school years.

c. Respondent shall receive, pursuant to his contract, his accumulated vacation time which represents 36 days of pay in the amount of $20,278.08. The parties recognize that there is pending State legislation which may impact the amount allowable for payment of unused vacation days, and have dealt with this contingency in their settlement of Superior Court and federal District Court litigation between the

parties referenced in Paragraph 5 below. For purposes of this Stipulation, any limitation on the reimbursable amount of accumulated unused vacation days will be controlled by such legislation if applicable.

d. Respondent shall receive, pursuant to his contract, $3,500 per year as pension reimbursement. This represents $10,500 for the three years this has been withheld.

4. Referral to State Board of Examiners

Respondent acknowledges that he has been apprised of the Commissioner's duty to refer tenure matters, pursuant to N.J.A.C. 6A:3-5.6(a)(6), to the State Board of Examiners for possible suspension or revocation of his certificate.

5. Public Interest

The Tenure charges are a part of a protracted series of contested matters by and between the Respondent and the Board of Education for the past three years. These matters include an original set of tenure charges filed in 2005, which were substantially the same as the instant Charges. The original charges were dismissed by the Commissioner on December 14, 2007, following a Superior Court decision finding a fatal violation of the Open Public Meetings Act pertaining to the certification of the original charges. In addition to the current Tenure Charges, the various matters include a claim by Respondent in Superior Court of the State of New Jersey claiming improper non-renewal of his employment contract for an additional three year period, a federal civil rights claim by Respondent against the Board and Board members, and ethics charges by Respondent against several Board members.

The Parties entered into a mediation conducted by the Honorable Peter Ciolino, R.J.S.C. in order to resolve all of the pending matters as a part of a global settlement between the Board of Education and the Respondent. As a result of the mediation, the parties determined that the settlement terms represent a fair compromise of the tenure charges and other outstanding litigation between the parties.

Settlement of the tenure charges is furthermore in the public interest as it avoids the financial, legal and administrative burden which will result from continued litigation of the charges and the other legal actions; and allows the Board and the District to hire a new superintendent and move forward without the threat of the litigation hindering the efforts to provide a quality education for the children of Willingboro.

This Stipulation addresses those matters in the parties' global settlement over which the Commissioner has jurisdiction pursuant to N.J.S.A. 18A:17-20.2. This Stipulation is expressly contingent on the approval by the Board and Respondent

of the global Settlement Agreement and Release as to all other matters in litigation between the parties.

6. Release

In exchange for the mutual promises and consideration set forth in this Stipulation, each party and his or 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 and which could have been raised in the within matter. This Release is in addition to and not in replacement of the Release provisions contained in the parties' global Settlement Agreement and Release.

7. Board Approval

The Board President has been duly authorized by the Board to execute this Agreement on behalf of the Board of Education.

8. Assent to Terms

Respondent hereby acknowledges that he enters into this Agreement with a full understanding of his rights and that he was fully informed of the implications of this Agreement by his legal counsel. Respondent also enters into same without duress and of his own free will and volition.

Respondent acknowledges that he was given the opportunity to fully consider this Stipulation for a period of up to twenty-one (21) days and if he chooses to execute this Agreement before the end of the 21 day period, such early execution is completely voluntary. Respondent further acknowledges that he may revoke his consent to this Stipulation within seven (7) days from the execution of this document by delivering written notification of revocation to the Board's School Business Administrator/Board Secretary. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Respondent will be entitled to none of the consideration described herein.

9. Entire Agreement

This Agreement, together with the global Settlement Agreement and Release, represents the entire understanding of the parties as to the settlement and withdrawal of the tenure charges against Respondent and all other litigation between the parties, and may be modified only in a subsequent written instrument, duly executed by the parties. As set forth above, the parties have entered into a separate global Settlement Agreement and Release fully disposing of all other issues between them in other legal proceedings. No other representations of any kind except as contained in this Agreement and the global Settlement Agreement and Release shall be binding upon the parties.

10. Severability

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then this Agreement shall be void and of no force and effect.

11. Governing Law

This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

12. Separate Counterparts

This Agreement may be signed by the parties in one or more counterparts, each of which shall be deemed an original.

IN WITNESS WHEREOF, the parties have knowingly and voluntarily executed and delivered this Stipulation of Settlement on the dates set forth below.

RESPONDENT

ALONZO KITTRELS

DATED:

WILLINGBORO BOARD OF EDUCATION

By_____
KEN J. GORDON, Jr., President

ATTEST:

By_____
KELVIN L. SMITH, Board Secretary

DATED: 7/21/08

s

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m w.d
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SCHWARTZ SIMON
EDELSTEIN CELSO & KESSLER LLC
44 Whippany Road, Suite 210
P.O. Box 2355
Morristown, NJ 07962
(973) 301-0001
Attorneys for Petitioner

IN THE MATTER OF THE TENURE HEARING OF ALONZO KITTRELS, WILLINGBORO TOWNSHIP BOARD OF EDUCATION, BURLINGTON COUNTY.	BEFORE THE COMMISSIONER OF EDUCATION / OFFICE OF ADMINISTRATIVE LAW OAL Docket. No. EDU 2820-08 Agency Docket No. 102-4/08 **STIPULATION OF FACTS**

The parties in the above-captioned matter hereby stipulate to the following facts in connection with the remand of this matter to the Office of Administrative Law by the Commissioner of Education:

1. The petitioner Board of Education of the Township of Willingboro ("Board") entered into an employment agreement with respondent Alonzo Kittrels ("Kittrels") to serve as its Chief School Administrator for a term commencing July 1, 2003 and ending June 30, 2005. That employment agreement was subsequently renewed for a term of July 1, 2005 through June 30, 2008.

2. On or about December 22, 2005 the Board certified tenure charges against Kittrels to the Commissioner of Education of New Jersey.

3. In response, Kittrels filed an action in the Superior Court of New Jersey in January 2006, captioned *Alonzo Kittrels v. School District of the Township of Willingboro and Jessie Green*, Superior Court of New Jersey, Law Division, Docket No. L-261-06. The four-count complaint alleged that the Board, in certifying the tenure charges, acted in violation of the Open Public

Records Act ("OPRA") and the Open Public Meetings Act ("OPMA"), as well as allegations that the Board member who provided the fifth and deciding vote to certify the Tenure Charges against Kittrels was no longer a *bona fide* resident of Willingboro Township at the time of the action.

4. In July, 2006, Kittrels filed a second lawsuit against the Willingboro Board of Education as well as the thirteen Board members who served from April 2005 until April 2006. A true copy of that complaint is annexed hereto as Exhibit "A". A true copy of the Board's Answer is annexed hereto as Exhibit "B." Initially the lawsuit was filed in New Jersey Superior Court, but the Board through its counsel had the matter removed to Federal District Court, District of New Jersey. The ten-count complaint includes allegations that the Board violated the New Jersey Constitution, various statutory requirements, Kittrels' federal civil rights and the New Jersey Conscientious Employee Protection Act. The allegations also include charges of intentional infliction of emotional distress, breach of contract, tortious interference with contractual rights, breach of the covenant of good faith and fair dealing, and defamation. This lawsuit is currently pending and is part of the litigation covered by the parties' proposed settlement.

5. On or about April 26, 2007, the Superior Court, Burlington County, granted Kittrels' motion for summary judgment in his challenge to the certification of tenure charges, and voided the Board's December 22, 2005 action based on OPMA violations and the non-residency of a Board member. The Commissioner of Education thereafter dismissed the tenure charges. Kittrels still has pending against the Board a claim for attorneys' fees in the Superior Court action in the amount of approximately $15,000, based upon the Superior Court's subsequent ruling on Kittrels' OPRA claim, which was deferred from the summary judgment proceeding.

6. On or about June 11, 2007, the Board held a special meeting during which the Board voted not to renew Kittrels' employment contract upon its expiration, and thereafter provided Kittrels notice of the non-renewal.

7. On or about July 6, 2007, Kittrels filed a third lawsuit in New Jersey Superior Court, Docket No. BUR-L-1883-07, challenging the Board's action to not renew his contract. That complaint again alleged violations of the Open Public Records Act and the Open Public Meetings Act. A true copy of the complaint is annexed hereto as Exhibit "C." A true copy of the Board's Answer is annexed hereto as Exhibit "D." This action is also still pending in Superior Court and is part of the litigation encompassed in the parties' proposed settlement.

8. Kittrels has filed a Motion For Summary Judgment on Count Two of his July 6, 2007 lawsuit. A true copy of Kittrels' Notice of Motion, supporting Brief and Statement of Material Facts is annexed hereto as Exhibit "E." The Motion has for the time being been held in abeyance pending a determination of the outcome of the parties' proposed settlement. Should Kittrels prevail on that Motion or ultimately at trial, the result would be an award of a three-year contract to Kittrels effective July 1, 2008, which would be valued at close to one million dollars, subject to the outcome of pending tenure charges.

9. The Board of Education ultimately again certified tenure charges against Kittrels on March 31, 2008, and suspended Kittrels without pay effective April 1, 2008 pursuant to *N.J.S.A.* 18A:6-14.

10. If the current lawsuit pending in federal Court is not settled, the legal fees alone for each side is estimated to be well into the six figure range. Because of the involvement of fee-shifting statutes in both the federal and State litigation, should Kittrels prevail on the fee-shifting claims the Board would be responsible not only for its own attorneys' fees but also for a significant

portion of Kittrels' attorneys' fees. It is also conceivable that the potential liability to the Board could exceed the legal fees in terms of cost. The parties stipulate that, should Kittrels prevail on a significant portion of his claims in the various pending lawsuits, the potential exposure to the Board is in the millions of dollars.

11. The insurance policy covering Kittrels' federal lawsuit has a one million dollar limit and is also providing coverage for another significant legal action brought against the Board by several former administrators and currently pending in the Superior Court of New Jersey. In addition, certain of Kittrels' claims are the subject of a reservation of rights by the carrier as being outside the scope of insurance coverage. As a result, it is likely that there will be insufficient insurance coverage remaining to cover all attorneys' fees and potential damages in the event of a full trial in the various lawsuits and one or more determinations adverse to the Board. This would expose the Board to direct fiscal liability for a substantial portion of potential damages.

12. The parties engaged in extensive mediation of the various pending lawsuits under the auspices of the late Peter Ciolino, J.S.C. (ret.). Following protracted and difficult negotiations, an agreement was reached on a total settlement payment to Kittrels of $300,000 in exchange for a release of all claims and dismissal of all actions, including the tenure charges. Of the $300,000 proposed settlement, $74,511.06 has been allocated to fulfillment of Kittrels' contractual claims for the balance of his original employment contract. On the remaining balance of $225,488.94, the insurance carrier will pay $60,000 and the Board will pay the remainder of $165,488.94.

The undersigned consent to the form and entry of the foregoing Stipulation of Facts.

Nehmad, Perillo & Davis, P.C. Attorneys for Respondent	Schwartz Simon Edelstein Celso & Kessler LLC Attorneys for Petitioner
By: _____ SALVATORE PERILLO DATED: 2/20/09	By: _____ PAUL H. GREEN DATED: 2/24/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
OAL DKT. NO EDU 8566-08
AGENCY DKT. 102-4/08
ON REMAND FROM
OAL DKT. NO. EDU 2820-08
AGENCY DKT. 102-4/08

IN THE MATTER OF THE TENURE HEARING OF ALONZO KITTRELS, SUPERINTENDENT, WILLINGBORO SCHOOL DISTRICT, BURLINGTON COUNTY.

Paul H. Green, Esq., appearing for petitioner, Willingboro Board of Education, (Schwartz, Simon, Edelstein, Celso and Kessler, LLC, attorneys)

Salvatore Perillo, Esq., appearing for respondent, Alonzo Kittrels, (Nehmad, Perillo & Davis, P.C., attorneys)

Record Closed: April 2, 2009 Decided: April 6, 2009

BEFORE **JOHN R. FUTEY**, ALJ:

This original matter in this case under the docket number of EDU 2820-08 was transmitted to the Office of Administrative Law on April 25, 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. On May 6, 2008 a telephone conference had been scheduled and held in the above captioned matter; after which the case was scheduled for hearing on July 7, 14, 21, and 22. Those dates were adjourned due to the representation of counsel that the matter was completely settled.

The parties subsequently agreed to a settlement and prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1). The agreement was then certified by Rocky L. Peterson, Esq., on behalf of Willingboro along with the signature of Ken J. Gordon, Jr., president of the Willingboro Board and by Mr. Kittrels, respondent. The law firm of Szaferman, Lakind, Blumstein, Blader and Lehman, PC, was responsible for the litigation phase of the tenure matter at that time before the Office of Administrative Law (OAL), but it has since been substituted by the firm of Schwartz, Simon, Edelstein, Celso and Kessler, LLC, attorneys herein, on behalf of the Willingboro Board. An Initial Decision-Settlement was decided on July 10, 2008 and referred back to the Commissioner of Education for final agency determination. Pursuant to the decision by the Commissioner of Education, dated, August 26, 2008, the matter was returned and remanded for further proceedings consistent with the concerns raised by the Commissioner relative to the standards set forth under In re Cardonick, decided by the Commissioner on April 7, 1982, aff'd State Board April 6, 1983, 1990 S.L.D. 842, 846. It was received at the OAL on September 5, 2008.

Thereafter, consistent with the remand order, conferences were conducted with counsel on November 12 and 24 and December 17, 2008, as well as January 27 and 30, and February 6, 17, and 27, 2009. A comprehensive stipulation of facts was received on February 27, 2009 (J-2). A remand brief on behalf of the Willingboro Board was received on March 27, 2009 (J-3). The confirmed settlement agreement and general release (J-4A) and stipulation of settlement (J-4B) were received on April 2, 2009, at which time the hearing record closed.

ANALYSIS

This matter arises from an original employment agreement between the Willingboro Board of Education ("Board") and Respondent Alonso Kittrels ("Kittrels") relative to him serving as its chief school administrator for a term commencing on July 1, 2003 and ending on June 13, 2005, which agreement was subsequently renewed for a term from July 1, 2005 through June 30, 2008. However, thereafter, on about December 22, 2005, the Board certified tenure charges against Kittrels to the Commissioner of Education. Thereafter began a series of civil suits filed by Kittrels against the Board, which are specifically enumerated in the stipulation of facts attached here to at exhibit J-2 and as further encapsulized in the exhibits attached thereto. Those court suits include:

1. Kittrels v.Willingboro, et.al., Superior Court, Law Division, Burlington County, Docket number Bur L-261-06. In this matter the Superior Court granted Kittrels' motion for summary judgment in his challenge to the certification of tenure charges and voided the Willingboro board's action based upon Open Public Meetings Act (OPMA) violations as well as the issue relating to the non-residency of a board member, which resulted in the Commissioner of Education dismissing those tenure charges. (New charges were then filed before the Commissioner of Education and transmitted herein to the Office of Administrative Law for disposition.) However, Kittrels still has a pending claim for attorneys' fees in that Superior Court action in the approximate amount of $15,000.00, which it had deferred determination on from the summary judgment proceeding.

2. Kittrels v. Willingboro, et.al., Superior Court, Law Division, Burlington County, Docket number Bur L-1938-06 which was removed to the Federal district court, District of New Jersey under the matter of Kittrels v. Willinboro, et.al., District Court, NJ, Civil Action NO. 06-cv-3814. This lawsuit is currently pending and is part of the litigation encompassed by the parties' proposed settlement in this manner.

3. Kittrels v. Willingboro, Superior Court, Law Division, Burlington County, Docket No. Bur L-1883-07. In this matter Kittrels challenged the board's action not to renew his

contract and again alleged violations of the Open Public Records Act and the OPMA. That action is still pending in Superior Court and is also part of the litigation encompassed in the parties' proposed settlement.

A review of those matters demonstrates that they all relate to the interactions between Kittrels and the Willingboro board which were the subject of his employment agreement with them and which is the subject of the within tenure removal charge before the Commissioner of Education. The parties maintain that if the current lawsuit in Federal court is not settled, the legal fees alone for each side there will be in the six figure range and, depending upon the outcome of the proceeding, could result in a fee shifting which could further expose the Board to additional major costs, to wit, the attorneys fees on behalf of Kittrels as well as the potential liability of the Board relative to the base allegations by him. This is buttressed by the actual history of this matter in the Superior Court in which the Court has already ruled in favor of Kittrels regarding violations of the OPMA. A second suit there raises, in part, the same issue and it is realistic to assume that a decision there could mirror the previous action. Thus, these actions are intertwined and the settlement clearly embraces the exposures generated therefrom.

In order to address all of the outstanding issues relative to those court complaints, the parties engaged in extensive mediation with the late Peter Ciolino, J.S.C. (ret.) which resulted in a total settlement payment to Kittrels as outlined in the attached settlement agreement in exchange for the release of all claims and a dismissal of all actions, including the tenure charges herein.

After having considered and reviewed the stipulation of facts, the specific pleadings as contained in the exhibits attached thereto, as well as the memorandum of law in support of approval of the settlement, I **FIND** that the parties have amply demonstrated that the record is most sufficient to show that their settlement is consistent with established standards covering tenure matters and the proposed global settlement is significantly less than that which the Board could realistically expect to pay to continue the ongoing litigations in terms of litigation fees, as well as expose it to

enormous, and perhaps financially devastating, liability in the event of any rulings against it, as noted hereinabove. This is further reflected in the representations of counsel with reference to the insurance policy coverage limits of Willingboro, which further adds to the exposure of Willingboro under the circumstances if litigation is to continue. A rejection of this settlement would not serve the public interest in any form whatsoever. At the same time, however, any approval of the settlement is not an endorsement of or absolution of any actions by the Board regarding its hiring practices in the past. Rather, it is a reflection of the realities of the respective legal positions raised by sides in the plethora of litigations generated herein. In that specific regard, I **FIND** that the Board has acted most prudently in attempting to now address the concerns of the public which it serves and has responsibly sought to obtain closure on all of the outstanding litigation. In addition, although it is not a relevant concern regarding settlement of the on-going litigation, a positive result will nonetheless be that the Board will now be able affirmatively move on with a new superintendent of schools in order to advance the educational agenda of Willingboro forthwith without any further encumbrances upon the ability of that newly hired superintendent to serve. The parties have all agreed to execute appropriate documents in order to obtain finality to those outstanding issues and their written representations in that regard bind them accordingly. Thus it serves the public interest to accept the settlement as an entire resolution of those litigations under the settlement advanced in this tenure matter.

In the process, I also **FIND** that the Commissioner of Education has acted prudently and responsibly in seeking to insure the integrity of this global settlement as it impacts upon the citizenry of Willingboro as well as on behalf of the citizens of the State of New Jersey.

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. It further embraces all of the global concerns of outstanding litigation and will allow for finality of them based upon the agreement of the parties.

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 6, 2009
DATE

JOHN R. FUTEY, ALJ

Date Received at Agency:

Mailed to Parties:

APR 9 2009

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/mamf

EXHIBITS

Jointly submitted

J-1 Settlement Agreement

J-2 Stipulation of facts with relevant pleadings attached

J-3 Remand Brief up on behalf of Willingboro Board of Education

J-4 A Copy of settlement agreement and general release

J-4 B Stipulation of settlement signed by the parties

J-4A
in evid
4-2-09

SETTLEMENT AGREEMENT AND GENERAL RELEASE

SETTLEMENT AGREEMENT AND GENERAL RELEASE (the "Agreement"), dated May 2008, by and between ALONZO KITTRELS ("KITTRELS") and BOARD OF EDUCATION BOROUGH OF WILLINGBORO ("BOARD") for the good and sufficient consideration set forth below, as follows:

1. BOARD, when used in this Agreement, shall mean the Board of Education Borough of Willingboro, its Board members, their predecessors and successors; the current and former officers, directors, representatives, employees and agents of all of them, in their individual or official capacities; and the current and former elected or appointed officials, whether in their individual or official capacities.

2. KITTRELS as used herein means Alonzo Kittrels, his heirs, assigns, representatives, successors-in-interest and predecessors-in-interest.

3. As a result of the expiration of his contract KITTRELS employment with the BOARD as Superintendent is terminated effective June 30, 2008 pursuant to the terms of his contract. ("Termination Date"). As a result of this contract termination, as of June 30, 2008, KITTRELS shall have no duties, responsibilities or authority whatsoever as an employee, agent or representative of BOARD.

4. KITTRELS' unconditional compensation, payments and benefits from BOARD shall be as follows (in each case less applicable statutory deductions and authorized withholdings):

a. KITTRELS will receive his final salary and benefits as Superintendent through the Termination Date including for the period from April 1, 2008 through and including June 30, 2008. KITTRELS will be paid salary for this period in the amount of

$31,197.40.

b. KITTRELS shall receive back pay for salary increases he was contractually entitled to in the amount of $12,535.58 which shall be appropriately reported and credited for pension purposes with the Division of Pensions for the 2005-2006, 2006-2007 and the 2007-2008 school years.

c. KITTRELS shall receive, pursuant to his contract, his accumulated vacation time which represents 36 days of pay in the amount of $20,278.08. The parties recognize that there is pending State legislation which may impact the amount allowable for payment of unused vacation days. Should it be determined that the amount allowable by law to be paid for unused vacation days is less than the amount indicated herein ($20,278.08), then Kittrels shall be entitled to the difference between the amount of $20,278.08 and the amount allowed by statute. Said sum shall be payable and made a part of Paragraph 5 below. In no event, however, shall the amount of unused vacation pay payable to Kittrels exceed $20,278.08.

d. KITTRELS shall receive, pursuant to his contract, $3,500 per year as pension reimbursement. This represents $10,500 for the three years this has been withheld.

5. Upon Kittrels' agreement and acceptance of the terms of the Agreement and his waiver of all claims against the Board or members of the Board past and present, he will receive within thirty (30) days of BOARD'S receipt of this Agreement executed by KITTRELS a gross lump sum payout of Two Hundred and Twenty-five thousand four hundred eighty-eight and 94/100 dollars ($225,488.94). The lump sum

payout will be described throughout this Agreement as the Settlement Payment. In the event that the Settlement payments are not paid in a timely fashion and KITTRELS successfully brings an action to enforce this provision, KITTRELS shall be entitled to reasonable attorney's fees.

6. The parties expressly understand and agree that the Settlement Payments are for compensatory damages and do not constitute backpay and include any and all amounts that may be claimed by KITTRELS or on his behalf against the BOARD, and that the said payment shall include all attorneys' fees that may be claimed by KITTRELS or on his behalf. It is the belief and intent of the parties that no part of the amount payable to Kittrels under this Agreement above is compensation for lost earnings, such as salary or benefits but rather is intended to compensate Kittrels for alleged personal injury, including emotional distress.

7. KITTRELS acknowledges that the Settlement Payments constitute additional consideration not otherwise owed to KITTRELS and that KITTRELS is able to receive the SETTLEMENT PAYMENTS only if he signs this Agreement and does not timely revoke his assent to the Agreement, and expressly waives all claims that he has asserted against the Board or past or present members of the Board. KITTRELS further acknowledges that BOARD owes him no wages, bonuses, vacation pay, sick pay, compensatory time or other compensation or payments of any kind or nature except as set forth in this Agreement. Nothing in this Agreement precludes KITTRELS from participating in and/or receiving any and all vested retirement plan benefits that he is eligible for.

8. (a) In consideration of the SETTLEMENT PAYMENTS and the entry into this Agreement by BOARD, and all payments received under Paragraph 4,

KITTRELS hereby releases and forever discharges BOARD, and all of its or their current and former Board members, officers, directors, employees, attorneys, agents, predecessors, successors, assigns, and legal representatives, whether acting as agents for BOARD or in an individual capacity of and from any and all actions or causes of action, suits, debts, claims, complaints, contracts, controversies, agreements, promises, damages, cross-claims, claims for contribution and/or indemnity, claims for costs and/or attorneys' fees, judgments, and demands whatsoever, in law or equity, which KITTRELS ever had, now has, or may have, as of the date of the execution of this Agreement including, but not limited to: (1) all wrongful discharge claims (including claims based on breach of contract or implied contract, breach of the covenant of good faith and fair dealing, constructive discharge or violation of public policy); (2) claims under Title VII of the Civil Rights Act of 1964 as amended (which prohibits discrimination on the basis of color, national origin, race, religion, and sex); (3) claims under the Age Discrimination in Employment Act (which prohibits discrimination against persons 40 years of age or older because of age); (4) claims under the Employee Retirement Income Security Act of 1974; (5) claims under the Older Workers Benefit Protection Act of 1990; (6) claims under the Civil Rights Act of 1866; (7) claims under the New Jersey Law Against Discrimination (which prohibits discrimination on the basis of age, color, handicap, national origin, race, sex, sexual orientation, or marital or familial status); (8) claims under the Americans With Disabilities Act (which prohibits discrimination on the basis of disabilities); (9) claims under the New Jersey Family Leave Act, New Jersey Equal Pay Act, and New Jersey Wage and Hour law; (10) all whistle-blowing claims (including claims under the New Jersey Conscientious Employee Protection Act); (11) claims under any other federal or state statute, common

law, or decisional law, as well as (12) tort claims such as negligent and/or intentional infliction of emotional distress, libel and slander, retaliation, interference in any contract, economic opportunity or prospective economic advantage, or for alleged violation of any federal, state or local law, regulation, ordinance or common-law duty relating to, arising out of, or having any bearing whatsoever on, KITTRELS former employment by the BOARD, including KITTRELS separation thereof.

(b) KITTRELS acknowledges that by signing and not timely revoking his assent to this Agreement, he is releasing the BOARD and all of its current and former members from any and all claims, whether known, suspected, or unknown, that KITTRELS has or has had against the BOARD and all of its current and former members as of the date of the execution of this Agreement, including, but not limited to, claims related in any way to KITTRELS employment by the BOARD or separation thereof.

9. Neither this Agreement, nor the payment of the SETTLEMENT PAYMENTS, shall be construed as an admission by the BOARD of any liability or unlawful or unethical conduct whatsoever.

10. KITTRELS, through his attorney, and the Board through their attorneys, agree to dismiss with prejudice and in writing , and agree to no longer pursue the matters captioned Kittrels v. Board of Education Borough of Willingboro et al. Docket No. BUR-L-1938-06 and/or BUR-L-261-06, Kittrels v. Board of Education Borough of WillinqboroBUR-L-1883-07. Kittrels v. School District of the Township of Willingboro, Burlington Co.. et al, Docket No. 06-cv-3814, Kittrels v. Sarah Holley, Teresa Owens and Kelly Logan, Docket No. L-27-07, and the tenure charges which are pending before the Commissioner of Education by executing a Stipulation and Order of Dismissal with

Prejudice dismissing the balance of the claims contained therein not previously decided by the Court. Notwithstanding any language to the contrary, this Agreement is contingent upon the dismissal of all of the legal actions referred to above by court order and/or approval of the dismissal by the Commissioner of the New Jersey Department of Education.

11. In consideration of KITTRELS resignation, the BOARD all of its or their current and former Board members, officers, directors, employees, attorneys, agents, predecessors, successors, assigns, and legal representatives, whether acting as agents for BOARD or in an individual capacity hereby releases and forever discharges KITTRELS, and of and from any and all actions or causes of action, suits, debts, claims, complaints, contracts, controversies, agreements, promises, damages, cross-claims, claims for contribution and/or indemnity, claims for costs and/or attorneys' fees, judgments, and demands whatsoever, in law or equity, which the BOARD ever had, now has, or may have, as of the date of the execution of this Agreement relating to KITTRELS.

12. KITTRELS acknowledges that he has returned all of the BOARD'S property. The BOARD and KITTRELS shall agree, within ten (10) days of the execution of this Agreement, the personal property belonging to KITTRELS as described in Exhibit "A" annexed hereto still in the Board's possession shall be returned to KITTRELS.

13. This Agreement is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of said state, irrespective of the principles of conflict of law. Any disputes involving the enforcement of this Agreement shall be venued in the Superior Court of New Jersey, Burlington

County, or in the United States District Court for the District of New Jersey, Camden Vicinage.

14. This Agreement shall be binding upon, and shall inure to the benefit of, the Parties and their respective heirs, administrators, executors, representatives, successors and assigns.

15. Kittrels understands that the BOARD may file whatever forms with the appropriate taxing authorities relating to this Agreement it believes are necessary. Kittrels agrees to assume full liability for applicable state, federal and local taxes, if any, that may be required by law to be paid by him with respect to any settlement payment described herein. The BOARD will be responsible for any applicable state, federal and local taxes which would be the BOARD's responsibility as the employer. Kittrels further agrees that in the event that the Internal Revenue Service or any other taxing authority deems any tax, interest, penalties or other amounts to be due from the Board with respect to this settlement, Kittrels will indemnify the Board for any sums the Board may be required to pay.

16. Kittrels certifies and warrants to the Board that he has no outstanding judgments for child support and that an appropriate judgment search has been conducted. Kittrels agrees to provide a copy of said judgment searches to the Board in accordance with the applicable statute as part of the settlement. In the event Kittrels does have outstanding child support judgments, Kittrels hereby agrees that he will satisfy all such outstanding judgments out of the proceeds of this settlement and that he will fully and completely indemnify the Board for any sums the Board may be required to pay, including reasonable attorneys' fees and costs, with respect to any such outstanding

judgments. The payments set forth in this Settlement Agreement and Release will be paid by the Board in the form of one or more checks. Payments shall be made within thirty (30) days of receipt by Richard L. Goldstein, Esq. of Marshall, Dennehey, Warner, Coleman & Goggin and Kelvin Smith, Business Administrator, Willingboro Board of Education of an original of this Confidential Release and Settlement Agreement executed by Kittrels, signed originals of Stipulations of Dismissal with Prejudice ("Stipulation") in the matters Kittrels vs. Board of Education, Borough of Willingboro, et al., Docket No. BUR-L-261-06; Kittrels vs. Board of Education Borough of Willingboro, Docket No. BUR-L-1883-07, and Kittrels vs. School District for the Township of Willingboro, Burlington County, et al., Docket No. 06-cv-3814, a W-9 executed by Kittrels' counsel and a child support ;judgment search for Kittrels as required by the applicable statute.

17. **Dismissal of Action**: Kittrels understands and agrees that counsel for the Board will file with the Superior Court of New Jersey, Burlington County, the executed original of the Stipulation of Dismissal with Prejudice. Kittrels understands and agrees that the terms of the aforesaid dismissal are expressly incorporated by reference within this Release and Settlement Agreement as if fully set forth herein.

18. **No Claims Permitted/Covenant Not To Sue**: Kittrels waives his right to file any charge or complaint on his own behalf and/or to participate as a complainant, a plaintiff, or charging party in any charge or complaint which may be made by any other person or organization on his behalf, with respect to anything which has happened up to the execution of this Agreement before any federal, state or local court or administrative agency against the Board, except if such waiver is prohibited by law. Should any charge or complaint be filed, Kittrels agrees that he will not accept any relief or recovery therefrom. Kittrels confirms that no such charge, complaint or action exists in any forum

or form other than the Complaints bearing Docket No. BUR-L-261-06, Docket No. BUR-L-1883-07 and Docket No. 06-cv-3814 and covenants not to file any charge, complaint or action in any forum or form against the Board based upon anything which is encompassed by the terms of this Agreement. Except as prohibited by law, in the event that any such charge, complaint or action is filed by Kittrels, it shall be dismissed with prejudice upon presentation of this Agreement and Kittrels shall reimburse the Board for the cost, including attorneys' fees of defending any such action.

19. **Non-disparagement**: The BOARD and KITTRELS agree that they shall not disparage each other whether to any current or former employee of the Board, the press, general public, media, or any other business entity or third party. The parties also agree not to authorize any person to make any disparaging statements about the other or to defame them to any person, entity or third party.

20. **No Cooperation/Participation**: Kittrels covenants and agrees that he will not provide information or consulting advice or counsel to, or otherwise cooperate with or assist in any manner, any entity or person, including, but not limited to, any employee or former employee of the Board asserting, or seeking to assert any cause of action, charge for any claim whatsoever against the Board unless compelled to do so by force of law or subpoena, with respect to any matter that is the subject of this action. Kittrels agrees to cooperate with the Board and its attorneys in defense of Salter, et al v. WBOE, Docket No. BUR-L-80-06. Such cooperation shall include meeting with the Board and its attorneys as necessary upon reasonable notice. In the event KITTRELS incurs any out of pocket expenses such as travel costs, the Board will reimburse him for same upon provision by Kittrels of receipts.

21. **Entire Agreement**: This Release and Settlement Agreement

contains the sole and entire agreement between the parties hereto and fully supersedes any and all prior agreements and understandings pertaining to the subject matter hereof. Kittrels represents and acknowledges that, prior to executing this Release and Settlement Agreement, he consulted his attorney, that he had ample time to do so, that he obtained the advice of counsel prior to making the decision to execute the Release and Settlement Agreement and that he had not relied upon any representation or statement not set forth in this Release and Settlement Agreement made by any other party thereto, or their counsel or representatives, with regard to the subject matter of this Release and Settlement Agreement. No other promises or agreements shall be binding unless in writing, signed by Kittrels and/or the parties hereto and expressly stated to represent an amendment to this Release and Settlement Agreement.

22. **Severability**: Kittrels and the BOARD agree that if any court declares any portion of this Release and Settlement Agreement unenforceable, the remaining portions shall be fully enforceable.

23. **Liens**: In accordance with Perreira v. Rediger, 330 N.J. Super. 445 (App. Div. 2000) and all applicable law, Kittrels personally guarantees and warrants that all liens and/or monetary obligations owed, whether public, private or otherwise, for any medical, wage, or other benefits received ;by Kittrels or paid by any third party on Kittrels' behalf have been satisfied and paid off in their entirety by Kittrels and/or an authorized agent out of the funds received pursuant to this Release and Settlement Agreement.

24. **Strict Adherence**: The failure of the parties to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver thereof or deprive that party of the right thereafter to insist upon strict adherence to that term or any other term of the Agreement.

25. **No Assignment**: No party to this Agreement may assign any of its benefits or delegate any of its duties thereunder without the express written consent of all other parties evidenced by a duly authorized and executed written instrument.

26. **No Waiver of Breach**: The waiver of any provision of this Agreement shall not be construed or operate as a waiver of any subsequent breach.

27 **No Future Employment**: Kittrels agrees that he has no right to employment or re-employment with the Board after the requirements of this Release are met. Kittrels further agrees and warrants that he will not apply to, seek out employment with, or remain employed by the Board at any time after June 30, 2008.

28. BY SIGNING THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE, KITTRELS STATES THAT HE:

(A) Has carefully read this Agreement.

(B) Has had an opportunity to consider this Agreement for 21 days and if he chooses to execute this Agreement before the end of the 21 day period, such early execution is completely voluntary. Has discussed the terms of this Agreement with his attorney before signing this Agreement.

(C) Does understand this Agreement will become final and binding in seven (7) days from when it is signed ("Revocation Period") unless he notifies the Board Business Administrator, via letter, return receipt requested, within this Revocation Period. This Agreement will not become effective and enforceable until after the Revocation Period.

(E) Does understand that his acceptance of any of the SETTLEMENT PAYMENTS at any time after the Revocation Period confirms that he did not revoke his assent to this Agreement and, therefore, it is fully

effective and enforceable.

(F) Has agreed that in executing this Agreement, he has not relied and does not rely on any representation or statement made by BOARD, except as contained herein.

(G) Has signed this Agreement voluntarily, without duress or coercion.

(H) Is capable of fully understanding, and does fully understand and agree to, the terms of this Agreement and knows that he is giving up important rights.

29. This Agreement contains the full agreement of the Parties and may not be modified, altered, changed or terminated except upon the express prior written consent of the Parties, which consent must be signed by the Parties or their duly authorized agents.

KITTRELS ACKNOWLEDGES THAT HE HAS HAD AMPLE TIME TO CONSIDER THIS AGREEMENT AND GENERAL RELEASE AND CONFIRMS THAT HE HAS CONSULTED WITH HIS ATTORNEY BEFORE EXECUTING THE AGREEMENT.

HAVING ELECTED TO EXECUTE THIS AGREEMENT AND GENERAL RELEASE, TO FULFILL THE PROMISES SET FORTH HEREIN, AND TO RECEIVE THEREBY THE SETTLEMENT PAYMENTS, KITTRELS FREELY AND KNOWINGLY, AND AFTER DUE CONSIDERATION ENTERS INTO THIS AGREEMENT AND GENERAL RELEASE INTENDING TO WAIVE, SETTLE AND RELEASE ALL CLAIMS HE HAS OR MIGHT HAVE AGAINST THE BOARD.

30. This Agreement may be signed by the parties in one or more Counterparts, each of which shall be deemed an original.

164-09

VIRGINIA BUSH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WARREN COUNTY VOCATIONAL SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured secretary formerly employed by the Board – filed a "Petition for Declaratory Ruling", requesting that the Commissioner construe the provisions of *N.J.S.A.* 18A:6-10 and determine that the respondent acted contrary to the law in terminating her employment, and order respondent to reinstate petitioner to her former position. Petitioner was terminated on December 1, 2007 after she refused to sign employment contracts which were terminable on ten days notice for the 2007-2008 school year, and retroactively for the 2006-2007 school year. She contends that signing the contracts would have been consent to the revocation of her tenure.

The ALJ found, *inter* alia, that: the sole basis for petitioner's termination was her refusal to execute employment contracts for the 2006-2007 and 2007-2008 school years; petitioner did nothing that could be construed as neglect, misbehavior, or other offense within the meaning of the tenure statute for school secretaries; and petitioner failed to mitigate damages. The ALJ concluded that the Board unlawfully terminated the petitioner without just cause.

The Commissioner found that petitioner's refusal to sign employment contracts did not equate to constructive resignation or abandonment of her position so as to give the Board cause to terminate her employment, and therefore adopted that part of the ALJ's decision which concluded that the Board's termination of petitioner – absent the filing of tenure charges – was contrary to law and violative of her tenure rights. The Commissioner found, however, that the petition was erroneously filed as a "Petition for Declaratory Ruling" and inappropriately proceeded as a declaratory ruling even though the principal relief sought was petitioner's reinstatement to her tenured position. Accordingly, the Commissioner determined to amend this matter as a regular petition of appeal, and found that the appropriate remedy as a consequence of a Board's violation of an individual's tenure rights is reinstatement along with back pay and emoluments. The Commissioner ordered the Board to immediately reinstate the petitioner, and award her back pay – less mitigation – and emoluments consistent with 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.

May 27, 2009

OAL DKT. NO. EDU 3807-08
AGENCY DKT. NO. 69-3/08

VIRGINIA BUSH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WARREN COUNTY VOCATIONAL 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. The parties filed no exceptions to the Initial Decision.

Upon full consideration, the Commissioner finds that petitioner's refusal to execute employment contracts with the Board for the 2007-08 school year and, retroactively, that of 2006-07 did not equate to her constructive resignation from or abandonment of her position so as to give the Board cause to terminate her employment. She, therefore, adopts that portion of the Administrative Law Judge's (ALJ) decision which concludes that the Board's dismissal of petitioner from her secretarial position as of December 1, 2007[1] – absent the filing of tenure charges – was contrary to law and violative of her tenure rights. However, the Commissioner rejects that portion of the ALJ's decision which refuses to grant petitioner's requested relief.

In this regard it is noted that the petition in this matter was erroneously filed as a "Petition for Declaratory Ruling", notwithstanding that the principal relief sought therein was petitioner's reinstatement to her tenured position.[2] Although the incorrect categorization of this matter, in light of the relief sought, should have been remedied by the agency prior to transmittal to the OAL – or by the ALJ

[1] Petitioner was paid through December 14, 2007 and received health benefits through April 1, 2008.
[2] Pursuant to *N.J.A.C.* 6A:3-2.1(a)1, a petition for declaratory ruling "may not seek consequential relief beyond a declaration as to the meaning of the statute or rule…".

when he was advised in post-hearing submissions that the fundamental relief sought by petitioner was reinstatement and damages and he was, therefore, requested to amend the pleadings, *sua sponte*, to allow such recovery – it inappropriately proceeded as a declaratory ruling. Consequently, in light of the obvious intent of the petitioner and the actual nature of her appeal, the Commissioner determines that this matter is amended to a regular petition of appeal to conform to its stated pleadings. This being the case, it is well-established that the appropriate remedy as a consequence of a Board's violation of an individual's tenure rights is reinstatement along with back pay and emoluments. The Commissioner finds and concludes that the instant petitioner is entitled to such relief.[3] [4]

Accordingly, the recommended decision of the OAL is adopted in part and rejected in part as discussed above. It is hereby 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.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 5/27/09

Date of Mailing: 5/27/09

[3] It is specifically noted, however, that petitioner's recovery does not include attorney fees as the Commissioner does not have the plenary authority to make such an award. *See Balsley v. North Hunterdon Bd. of Educ.*, 117 *N.J.* 434, 442, 443 (1990); *State, Dept. of Environ. Protect. v. Ventron Corp.*, 94 *N.J.* 473, 504 (1983).

[4] *N.J.S.A.* 18A:6-30 – discussed by the ALJ in his decision – is not applicable in this matter.

[5] 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 03807-08
AGENCY DKT. NO. 69-3/08

VIRGINIA BUSH,
Petitioner,
v.
BOARD OF EDUCATION OF THE WARREN COUNTY VOCATIONAL SCHOOL DISTRICT, WARREN COUNTY,
Respondent.

Ty Hyderally, Esq., for petitioner

Allan P. Dzwilewski, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, LLC, attorneys)

Record Closed: March 10, 2009 Decided: April 23, 2009

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On March 12, 2008, Virginia Bush petitioned the New Jersey Commissioner of Education for a declaratory ruling that respondent Warren County Technical School District (respondent or District) unlawfully discharged her without just cause in violation of her tenure rights. Respondent answered on March 19, 2008, denying the allegations

of the petition and averring that petitioner failed to perform her duties and effectively resigned by refusing to execute employment contracts required by respondent. The matter was transmitted to the Office of Administrative Law (OAL) on March 26, 2008. A hearing was held January 26, 2009. The parties made post-hearing submissions, the last of which was received March 10, 2009. The record closed that day.

STATEMENT OF THE ISSUES

The issue is whether respondent unlawfully terminated petitioner from a tenured position as an accounts payable secretary with the District, and if so, whether petitioner is entitled to relief beyond a declaration of her rights.

STATEMENT OF FACTS

Based on the testimony and documents adduced at the hearing as well as a Stipulation of Facts executed by counsels for the parties on January 23, 2009, I **FIND**:

Petitioner Bush was employed by respondent District as an administrative secretary and then as a general administrative secretary from August 1, 1990, through November 30, 2007. Her duties included secretarial tasks for the superintendent of schools, assisting accounts payable and payroll personnel, as well as secretarial duties in connection with health benefits, file maintenance, telephone messages, newspaper advertising, and other assignments from the board secretary/school business administrator. After becoming a full-time secretary in 1991, petitioner's annual compensation increased regularly from $14,300 to $48,747.80 at the time of her termination.

Petitioner achieved tenure on August 1, 1993. Thereafter, each year, the District furnished Bush with a salary notice and acknowledged that she was tenured. The last such salary notice dated May 13, 2005, covered school year 2005-2006. However, on November 8, 2007, the District presented her with an employment contract for 2007-

2008 as well as a retroactive contract for 2006-2007. Both contracts stated that either party can terminate them by giving ten business days written notice. Exhibits P-1, P-2.

In an undated memo, petitioner advised the interim board secretary/school business administrator that she had not signed either contract due to alleged discrepancies in the job description and, more to the point, the termination provision which could be interpreted as affording respondent power to terminate her without cause, which would violate her rights as a tenured employee. P-3.

By letter dated November 26, 2007, counsel for respondent advised petitioner that the subject contracts must be returned signed by a date certain. Failure to comply would constitute the ten-day termination notice. P-4. By letter dated November 30, 2007, respondent's counsel issued petitioner a notice of termination effective December 10, 2007, since she failed to execute and return the employment contracts. P-5. Petitioner actually ceased work for the District November 30, 2007, and was paid through December 14, 2007. The District paid her health benefits through April 1, 2008.

Respondent's interrogatory responses stated that petitioner's job description was accounts payable secretary. Moreover, respondent asserted that petitioner's qualifications or work performance are not at issue. Further, respondent asserted that petitioner's tenure status was as a "secretary." P-6, P-7.

Petitioner testified at the OAL hearing corroborating the Stipulation of Facts and authenticating her 2007 time sheets. P-8. She acknowledged that the employment contracts purportedly were required by the District's auditors. After her termination, she neither sought employment nor applied for unemployment insurance benefits (UIB). However, her husband was employed and they were able to live on his income as reflected in his earnings statements which she authenticated. P-9, P-10. She stated that she was uninterested in a different job, but rather sought reinstatement to her former position with the District.

Respondent presented no witnesses.

FINDINGS OF FACT

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

Respondent terminated petitioner from her tenured position as a secretary without cause in violation of her tenure rights. I further **FIND** that petitioner failed to mitigate damages by either finding alternative employment or applying for UIB.

LEGAL AUTHORITY AND ANALYSIS

Generally, tenure is a status afforded to, for example, a teacher, upon completion of a trial period thus affording protection from summary dismissal without sufficient cause or economic reasons. Tenure denotes relinquishment of the employer's unfettered power to terminate the employee. Black's Law Dictionary 1024 (6th ed 1991). In New Jersey, tenure is governed by The Tenure Act N.J.S.A. 18A:28-1 et seq. A tenured employee shall not be dismissed or reduced in compensation except for inefficiency, incapacity or conduct unbecoming such a teaching staff member or other just cause. Id. at § 5. Tenure in any of the administrative or supervisory positions shall accrue only by employment in that administrative or supervisory position. Ibid.

The right to tenure is statutory, and the Act should be liberally construed to achieve its beneficent ends. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, (1982).

School district secretaries who have served for three consecutive calendar years shall hold employment under tenure during good behavior and efficiency and shall not be removed except for neglect, misbehavior or other offense. N.J.S.A. 18A:17-2.

Tenure rights may not be waived by an employee while keeping his position. Lange v. Bd. of Educ. of Borough of Audubon, 26 N.J. Super. 83 (App. Div. 1953). However, there is authority for the proposition that tenure may be waived. Kearney v.

Bd. of Educ., EDU 5881-03, Initial Decision (July 28, 2005), <http://lawlibrary.rutgers.edu/oal/search.html> (citing O'Toole v. Forestal, 211 N.J. Super. 394 (App. Div. 1986)).

No person tenured in a public school system shall be dismissed during good behavior and efficiency, except for inefficiency, incapacity, unbecoming conduct or other just cause after a hearing upon written charges. N.J.S.A. 18A:6-10. Any public school system employee illegally dismissed shall be entitled to compensation for the period covered by the illegal dismissal or suspension if such shall be finally determined to have been without good cause. N.J.S.A. 18A:6-30. However, such person shall be required to apply therefore with the board by whom that person was employed within thirty days after such determination. Ibid.

Hearings under the tenured employees' hearing law shall be referred to the OAL and adjudicated under the Administrative Procedure Act. N.J.S.A. 52:14B-10.1.

An agency upon request may make a declaratory ruling with respect to the applicability of any law administered by that agency. N.J.S.A. 52:14B-8. The petition shall reflect the adverse positions of the parties but "may not seek consequential relief beyond the declaration as to the meaning of the statute or rule, and may not be based on underlying facts which are future, contingent, uncertain or disputed." N.J.A.C. 6A:3-2.1.

It is settled that illegally terminated tenured employees have an obligation to mitigate damages. Mullen v. Jefferson Twp. Bd. of Educ., 81 N.J. Super. 151 (App. Div. 1963); W. Orange Supplemental Instructor's Assoc. v. Bd. of Educ. of W. Orange, 92 N.J.A.R.2d 287.

DISCUSSION

It is beyond cavil that petitioner was a District-tenured employee in the position of secretary. As such, she could not be removed without having committed misconduct as

defined by statute. There is insufficient authority for the proposition that a party may or may not waive tenure rights. In this case, petitioner entertained the reasonable apprehension that if she executed the employment contracts in question, that she would indeed be waiving valuable tenure rights and could be terminated. At the time she did not have counsel and was not otherwise disabused of this notion. There is no allegation that she engaged in any misconduct or was otherwise remiss in her duties. Rather, the sole basis for her termination was her refusal to execute the apparently non-negotiable employment contracts. This matter may not have become contested if the subject contracts were amended to include a statement that nothing therein could be construed as a waiver of tenure. The tribunal views the uneven bargaining position of the parties to have exacerbated what can only be described as the District's truculent position. Petitioner refused to execute the contracts which facially left her vulnerable. She did nothing that could be construed as neglect, misbehavior, or other offense within the meaning of the tenure statute for school secretaries. In short, there was no just cause for petitioner's dismissal.

This proceeding is subject to N.J.S.A. 18A:6-10. As such, this Initial Decision does not prescribe consequential relief except to note that such relief may be granted by the Board upon application therefor within thirty days of the final determination of this matter. The tribunal also observes that if petitioner is awarded reinstatement, it would be to the tenured title of secretary rather than as secretary within any particular department. Finally, the tribunal notes that petitioner failed to mitigate damages which she was obliged to do.

CONCLUSION

Based on the foregoing findings of fact and legal authority, I **CONCLUDE** that the District unlawfully terminated petitioner without just cause.

DISPOSITION AND ORDER

Based on the foregoing findings of fact and conclusion of law, I **DECLARE** that petitioner, a tenured District employee, was terminated contrary to law.

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

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

4/23/09
DATE

JAMES A. GERAGHTY, ALJ

Date Received at Agency:

April 23, 2009

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

db

APPENDIX

WITNESSES

For Petitioner:

Virginia Bush, the petitioner

For Respondent:

No witnesses

EXHIBITS

For Petitioner:

P-1 2006-2007 employment contract
P-2 2007-2008 employment contract
P-3 Bush memo to interim board secretary
P-4 Attorney letter to Bush demanding that she sign contracts
P-5 Termination notice
P-6 Petitioner's interrogatories
P-7 Interrogatory responses
P-8 Bush 2007 attendance record
P-9 Edgar Bush 2008 earnings statements
P-9 No document
P-10 Health Cost Comparison

For Respondent:

R-1 District memo to Bush acknowledging employment 2007-2008

165-09

#165-09E

OAL DKT. NO. EDU 5274-09
AGENCY DKT. NO. 91-5/09

THE BENNETT COMPANY, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF UPPER SADDLE RIVER, BERGEN COUNTY,	:	DECISION ON
RESPONDENT.	:	APPLICATION FOR EMERGENT RELIEF

The record of this emergent matter – which included a CD of the digital recording of the hearing conducted at the Office of Administrative Law (OAL) on May 7, 2009 – along with the recommended Order of the Administrative Law Judge (ALJ)[1] have been reviewed.

Upon such review, the Commissioner adopts the recommended order denying emergent relief as she concurs with the ALJ's determination that petitioner has not satisfied its 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), most notably, that it has a likelihood of prevailing on the underlying merits of the matter or that a balancing of the equities and interests of the parties inures to its favor.

Accordingly, the instant application for emergent relief is hereby denied. This matter is being returned to the OAL for such further action as may be necessary to bring it to conclusion.

IT IS SO ORDERED.[2]

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 5/28/09
Date of Mailing: 5/28/09

[1] It is noted that the recommended Order of the OAL was received by the Agency on May 21, 2009, followed by the CD on May 27, 2009.

[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
33 Washington Street
Newark, New Jersey 07102
(973) 648-6066
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Richard McGill
Administrative Law Judge

May 20, 2009

Lucille Davy
Commissioner
Department of Education
100 Riverview Plaza, 4th Floor
P.O. Box 500
Trenton, NJ 08625-0500

Re: The Bennett Company, Inc. v. Board of Education
of the Borough of Upper Saddle River, Bergen County
OAL Dkt. No. EDU 5274-09
Agency Dkt. No. 91-5/09

Dear Commissioner

Enclosed please find a copy of an order entered regarding an application for emergency relief in the above-mentioned matter. Pursuant to N.J.A.C. 1:1-12.6(j), this order will become effective in forty-five (45) days from the date of its entry unless, for good cause shown under N.J.A.C. 1:1-18.8(e), the time period is extended by the joint action of the Director of the Office of Administrative Law and the agency head.

Very truly yours,

Richard McGill
Administrative Law Judge

RM/cml
Enclosure
C: Jeffrey S. Wilson, Esq.
Jane Gallina Mecca, Esq.
Robert J. Giordano, ALJ

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 5274-09
AGENCY DKT. NO. 91-5/09

THE BENNETT COMPANY, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF UPPER SADDLE RIVER, BERGEN COUNTY,

Respondent.

Jeffrey S. Wilson, Esq., for petitioner

Jane Gallina Mecca, Esq., for respondent
(Fogarty & Hara, attorneys)

BEFORE **RICHARD McGILL**, ALJ:

The dispute in this matter concerns a determination by the Board of Education of the Borough of Upper Saddle River ("respondent") to reject all bids and rebid a construction project designated "Roof Replacement and Solar Panels at Cavallini Middle School" (hereinafter the "Project") pursuant to the Public School Contracts Law, N.J.S.A. 18A:18A-1 to -59. The complaining party in this matter is The Bennett Company, Inc. ("petitioner"), which submitted the low bid for the Project.

In a Verified Petition that was originally filed with the Superior Court of New Jersey and subsequently transferred to the Commissioner of Education, petitioner alleges that the determination to reject all bids and rebid the Project was arbitrary and capricious. As the emergent relief, petitioner requests an order temporarily restraining respondent from rebidding the Project. Ultimately, petitioner seeks a determination permanently restraining and enjoining respondent from rebidding the Project and further declaring that petitioner is the lowest responsible bidder for the Project and as a result is entitled to award of the contract.

In conjunction with the transfer to the Commissioner of Education, petitioner filed a motion for emergent relief on May 5, 2009. On the same date, the Commissioner of Education enjoined respondent from rebidding the Project pending an expedited hearing at the Office of Administrative Law on petitioner's application for emergent relief.

The matter was transmitted to the Office of Administrative Law on May 5, 2009, for determination as a contested case. Oral argument in regard to petitioner's motion for emergent relief was conducted on May 7, 2009, at the Office of Administrative Law in Newark, New Jersey.

Petitioner filed its motion for emergent relief pursuant to N.J.A.C. 6A:3-1.6(a). As set forth in N.J.A.C. 6A:3-1.6.(b), the factors to consider in regard to an application for emergent relief are as follows:

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 first consideration is whether petitioner will suffer irreparable harm if the requested relief is not granted. Harm is considered to be irreparable if it cannot be remedied by money damages. Injunctive relief is generally viewed as the only effective means to safeguard the policy objectives of public bidding statutes. Dispomatic Corp. v. Mayor & Council of Kearny, 162 N.J. Super. 489, 495-96 (Ch. Div. 1978).

Petitioner argues that the danger of irreparable harm is evident since no action for money damages would be permitted against respondent. If the Project is rebid and a contractor other than petitioner is awarded the contract, any economic gain that petitioner could derive as the successful bidder would be lost. Moreover, since petitioner's bid is now a matter of public record, it can be used as a starting point by subsequent bidders, placing petitioner at an extreme disadvantage. This circumstance would tend to undermine the common standard of competition which is essential for public bidding.

Respondent maintains that petitioner will suffer no irreparable harm for three reasons. First, petitioner has suffered no injury as it is not entitled to an award of the contract in question. Second, the Public School Contracts Law is designed to benefit the public and not the bidders, and third, petitioner's harm is not imminent.

Respondent's arguments largely implicate the third consideration under the standard for emergent relief, i.e., petitioner's likelihood of success on the merits, and should not be considered in regard to this factor. As petitioner argues, no action for damages would be available in regard to any action taken by virtue of the Public School Contracts Law. N.J.S.A. 18A:18A-46. Moreover, there are numerous reported cases which recognized irreparable harm in this type of situation, e.g., Statewide Hi-way v.

Dept. of Transp., 283 N.J. Super. 223 (App. Div. 1995). It follows that petitioner satisfies the first condition for emergent relief.

The second consideration is whether the legal right underlying petitioner's claim is settled. Respondent argues that petitioner has failed to establish a legal right justifying the requested relief. In essence, respondent contends that petitioner's claim lacks merit.

It is well settled that a determination by a public contracting entity to reject all bids may be overturned when such action is arbitrary and capricious. Bodies by Lembo v. Middlesex Cty., 286 N.J. Super. 298, 309 (App. Div. 1996). Once the bids have been opened, rejection of all bids should occur only for cogent and compelling reasons. Marvec Const. v. Bellville Tp., 254 N.J. Super. 282, 288 (Law Div. 1992). A bidder has standing to challenge a determination by a public contracting entity, albeit only to protect the public interest. M.A. Stephen Const. Co., Inc. v. Borough of Rumson, 125 N.J. Super. 67, 74 (App. Div. 1973). It follows that petitioner satisfies the second condition for emergent relief.

The third consideration is whether petitioner has a likelihood of prevailing on the merits of the underlying claim. Evaluation of this consideration requires an understanding of the principles underlying statutes governing bidding on public contracts. In Meadowbrook Carting Co. v. Island Heights Borough, 138 N.J. 307 (1994), our Supreme Court set forth these principles as follows:

> The competitive-bidding process is incorporated in the Local Public Contracts Law. N.J.S.A. 40A:11-3 and -4 require that municipalities and counties advertise for bids on public contracts that exceed the statutory threshold amount. The purpose of the Local Public Contracts Law is to "secure for the public the benefits of unfettered competition." Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 410, 341 A.2d 327 (1975); *see also* Township of River Vale v. R.J. Longo Constr. Co., 127 N.J.Super. 207, 215, 316 A.2d 737 (Law Div. 1974) (stating that purpose of competitive bidding for local public contracts is not protection of individual interests

of bidders, but rather advancement of public interest in securing most economical result by inviting competition in which all bidders are placed on equal basis). The statutes authorizing competitive bidding accomplish that purpose by promoting competition on an equal footing and guarding against "favoritism, improvidence, extravagance and corruption." Township of Hillside v. Sternin, 25 N.J. 317, 322, 136 A.2d 265 (1957); see also L. Pucillo & Sons, Inc. v. Mayor of New Milford, 73 N.J. 349, 356, 375 A.2d 602 (1977) (L. Pucillo) (stating that purpose of act is " 'to guard against favoritism, improvidence, extravagance and corruption' ") (quoting Terminal Constr. Corp., supra, 67 N.J. at 410, 341 A.2d 327).

Accordingly, the statutory rule in New Jersey is that publicly advertised contracts must be awarded to "the lowest responsible bidder." N.J.S.A. 40A:11-6.1; see also Hillside, supra, 25 N.J. at 323, 326, 136 A.2d 265 (construing predecessor to Local Public Contracts Law). This Court has interpreted that requirement to mean that the contract must be awarded not simply to the lowest bidder, but rather to the lowest bidder that complies with the substantive and procedural requirements in the bid advertisements and specifications. Hillside, supra, 25 N.J. at 324, 136 A.2d 265 ("The significance of the expression 'lowest bidder' is not restricted to the amount of the bid; it means also that the bid conforms with the specifications."); *see* also William A. Carey & Co. v. Borough of Fair Lawn, 37 N.J. Super. 159, 165, 117 A.2d 140 (App. Div. 1955) ("The lowest bidder, within the contemplation of the statute [the predecessor of N.J.S.A. 40A:11-1 to -49][ ] is the one whose bid is not only the lowest for the work to be done but also conforms to the requirements of the notice to bidders.").

Strict compliance is required, and a municipality generally is without discretion to accept a defective bid. See L. Pucillo, supra, 73 N.J. at 356, 375 A.2d 602; 426 Bloomfield Ave. Corp. v. City of Newark, 262 N.J. Super. 384, 387, 621 A.2d 59 (App. Div. 1993). "The long-standing judicial policy in construing cases governed by the Local Public Contracts Law * * * has been to curtail the discretion of local authorities by demanding strict compliance with public bidding guidelines." L. Pucillo, supra, 73 N.J. at 356, 375 A.2d 602. This Court has adopted that approach largely as a prophylactic measure. Ibid. As Justice Francis observed in Hillside, supra, "In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way." 25 N.J. at 326, 136 A.2d 265.

As a result, all bids must comply with the terms imposed, and any material departure invalidates a nonconforming bid as well as any

contract based upon it. Id. at 323, 136 A.2d 265. "It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived." Terminal Constr. Corp., supra, 67 N.J. at 411, 341 A.2d 327 (citing Hillside, supra, 25 N.J. at 324, 136 A.2d 265). However, minor or inconsequential discrepancies and technical omissions can be the subject of waiver. Ibid; Hillside, supra, 25 N.J. at 324, 136 *A*.2d 265. That limitation on the doctrine of strict compliance was acknowledged in Terminal Construction Corp., supra:

> Essentially this distinction between conditions that may or may not be waived stems from a recognition that there are certain requirements often incorporated in bidding specifications [that] by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding. In sharp contrast, advertised conditions whose waiver is capable of becoming a vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance, or likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding, or which are capable of affecting the ability of the contracting unit to make bid comparisons, are the kind of conditions [that] may not under any circumstances be waived. [67 N.J. at 412, 341 A.2d 327.]

[Id. at 313-15.]

Respondent maintains that petitioner's bid contained a material defect in that it did not include a list of subcontractors for the specialty trades for which classification is required as set forth in the bidding specifications. Likewise, the other three bidders failed to list all specialty trades for which classification is required. The result is that none of the bidders is in compliance with the specifications as to all of the trades involved in the Project. Respondent attributes this circumstance to confusion caused by the specifications. Respondent would resolve and correct this situation by rebidding the Project.

Petitioner cites case law and the pertinent statute, N.J.S.A. 18A:18A-22, for the valid reasons for rejecting all bids. According to petitioner, apparent confusion among bidders is not among the valid reasons for rejecting all bids. Moreover, petitioner maintains that it was not confused as to the specifications and that they did not require a listing of all specialty trades for which classification is required. Further, none of the valid reasons for rejecting all bids is applicable to this case. Petitioner maintains that

the decision to reject all bids shows extreme favoritism towards the other bidders and bias against petitioner.

A bid must comply with the terms set forth in the specifications, and any material departure invalidates the nonconforming bid. Meadowbrook Carting Company v. Island Heights Borough, 138 N.J. at 314. Strict compliance is required, and a municipality generally is without discretion to accept a defective bid. Ibid. It is well established that a specification to list subcontractors is a material requirement that cannot be waived. Star of Sea v. Lucas Bros., 370 N.J. Super. 60 (App. Div. 2004); Advance Inc. v. Montgomery Tp., 351 N.J. Super. 160 (App. Div. 2002); Gaglioti Contracting v. Hoboken, 307 N.J. Super. 421 (App. Div. 1997); Stano v. Soldo Constr. Co., 187 N.J. Super. 524 (App. Div. 1983).

The question is whether the bidding specifications in this case required the identification of subcontractors including specialty trades. The Notice to Bidders contains the following language: "Where the bidder intends to subcontract any portion of the project to one or more of the major trades ... and for all specialty trades for which classification is required, the subcontractor(s) shall be classified to perform the work and the bidder shall submit the requisite documentation pertaining to the subcontractor(s) in accordance with paragraph A above." A section entitled "Preparation of Bids" lists specific items to be provided for subcontractors in all specialty trades for which classification is required. These items would unquestionably identify the subcontractors in the specialty trades. The Form of Proposal contains a section entitled "Subcontractors" and begins as follows:

> Identify each major subcontractor for each of the major trades and the specialty trade(s) indicated below. By indicating the subcontractors below, the Contractor certifies that if awarded the bid, the Subcontractors listed below will be awarded subcontracts provided they are approved by the Architect. All prequalification documentation required for the Bidder shall also be submitted for each Subcontractor for each of the major trades and the specialty trade(s).

These provisions of the bid specifications for the Project clearly require the bidder to identify subcontractors for specialty trades. Nonetheless, petitioner marked "N/A" at the locations for specialty trades. For the reasons set forth Star of Sea v. Lucas Bros., et al., supra, failure to identify the subcontractors is a material, non-waivable defect in petitioner's bid. It is evident from the language in the Notice to Bidders that respondent wanted to know all the subcontractors to ensure that the work would be performed by qualified entities. Petitioner's omission prevented respondent from doing so.

Despite the clarity of the language, two other bidders did not list any specialty trades. The fourth bidder listed one specialty trade but did not have the necessary electrical subcontractor. Under the circumstances, respondent's inference that there was confusion among the bidders appears to be accurate. At a minimum, respondent did not have the discretion to accept any of the bids, because all of them failed to meet the specifications. Therefore, respondent's decision to reject all bids and rebid the Project was not arbitrary and capricious. It follows that petitioner does not satisfy the third condition for emergent relief.

In regard to the equities and interest of the parties, petitioner seeks the financial benefit of the contract. On the other hand, respondent simply does not have the discretion to accept petitioner's bid or any of the others. Under the circumstances, the only available course of action for respondent is to reject all bids and rebid the Project.

In view of the above, 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 (45) days following the entry of this order. If the Commissioner 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.

May 29 2009
DATE

RICHARD McGILL, ALJ

166-09

#166-09

IN THE MATTER OF THE TENURE	:	
HEARING OF CLAUDIA ASHE-GILKES,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
EAST ORANGE, ESSEX COUNTY.	:	
	:	

SYNOPSIS

The Board certified tenure charges of inefficiency against respondent – a tenured teacher – for alleged inefficiencies that involved her: interactions with students and other staff members; teaching skills, lesson plans, and classroom management; failure to submit records and reports in a timely manner; and failure to report to school and classroom or duty assignments on time. The Board sought dismissal of respondent from her tenured employment.

The ALJ found that: the Board carried its burden of proving the tenure charges of inefficiency against respondent; and that respondent had failed to resolve her deficiencies despite the district's repeated efforts over several years – including the 90-day period required by law prior to certifying charges of inefficiency – to encourage professional improvement and more efficient performance. The ALJ ordered respondent dismissed from her tenured teaching position as of the date of her suspension.

The Commissioner adopted the Initial Decision as the final decision in this matter, but modified the ALJ's recommended penalty to reflect dismissal from respondent's tenured employment, pursuant to *N.J.S.A.* 18A:6-14, as of the filing date of the Commissioner's decision. The Commissioner additionally forwarded the decision 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.

May 28, 2009

OAL DKT. NO. EDU 7135-08
AGENCY DKT. NO. 127-5/08

IN THE MATTER OF THE TENURE	:	
HEARING OF CLAUDIA ASHE-GILKES,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
EAST ORANGE, ESSEX COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have respondent's exceptions and the Board of Education's reply, both duly filed pursuant to *N.J.A.C.* 1:1-18.4.

In her exceptions, respondent recasts and reiterates the arguments of her post-hearing brief, urging the Commissioner to reject the Initial Decision because it "perpetrates a gross miscarriage of justice, is arbitrary and capricious, and is not based on substantial evidence in the record." (Petitioner's Exceptions at 1, 3-38; quotation at 1) Specifically, respondent contends that the Administrative Law Judge (ALJ) erred by: shifting the burden of proof to respondent with respect to the Board's charge of failure to report to work on time, expecting respondent to prove her timely arrival rather than the Board to prove her lateness;[1] deeming Acting Principal Leslie Shults to be a credible witness, when the record shows her testimony to be inconsistent, biased and characterized by poor recall;[2] combining certain charges so as to gloss over weaknesses in their individual proofs and fashion from them a directive to "improve attendance" that appears nowhere in respondent's modified Performance Improvement Plan (PIP);[3] finding that the Board rendered positive assistance to respondent and evaluated her progress appropriately during the 90-day

[1] Exception II at 3-7, incorporating arguments of post-hearing brief at 39-43.

[2] Exception III at 7-11, reiterating arguments of post-hearing brief at 57-61.

[3] Exception X at 22-24, incorporating arguments of post-hearing brief at 36 and, by reference to Exception I, 39-43.

improvement period, when the record shows that her assigned evaluator neith er performed the required evaluations nor rendered meaningful assistance;[4] and concluding – in the absence of sufficient credible evidence – that the Board had met its burden of proof with respect to charges of failure to focus students' attention on task,[5] failure to demonstrate proficiency in content areas,[6] failure to teach in accord with approved lesson plans,[7] failure to implement lessons in accord with required program,[8] failure to efficiently and effectively manage instructional time,[9] failure to correct inappropriate student behavior without disturbing educational process,[10] failure to act sufficiently on suggestions for improvement,[11] failure to contribute to positive school climate,[12] and failure to provide students with clear explanations of subject matter.[13] Respondent also asserts that the ALJ – after having (wrongly) concluded that charges were proven so as to warrant loss of tenured employment – incorrectly ordered forfeiture of respondent's position as of the date of her suspension, despite the provisions of *N.J.S.A.* 18A:6-14 to the contrary and the fact that respondent has not been charged with – let alone convicted of – any crime or offense that would render the forfeiture statute (*N.J.S.A.* 2C:51-2)[14] applicable to this matter. (*Id.* at 2)

In reply – except as to its agreement that the penalty in this matter is controlled by the tenure laws rather than the forfeiture statute[15] – the Board counters each of respondent's contentions

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[4] Exception XIV at 31-38, reiterating arguments of post-hearing brief at 3-12.

[5] Exception IV at 12-15, reiterating arguments of post-hearing brief at 20-23.

[6] Exception V at 15-17, reiterating arguments of post-hearing brief at 25-26.

[7] Exception VI at 17-18, reiterating arguments of post-hearing brief at 28-29.

[8] Exception VII at 18-20, reiterating arguments of post-hearing brief at 30-31.

[9] Exception VIII at 20-21, reiterating arguments of post-hearing brief at 31-32.

[10] Exception IX at 21-22, reiterating arguments of post-hearing brief at 35-36.

[11] Exception XI at 24-25, reiterating arguments of post-hearing brief at 36-38.

[12] Exception XII at 26-28, reiterating arguments of post-hearing brief at 45-46.

[13] Exception XIII at 28-30, incorporating arguments of post-hearing brief at 47-49.

[14] Inadvertently cited by respondent as *N.J.S.A.* 2C:52-1.

[15] Reply Exceptions at 1.

with references to applicable testimony and evidence as set forth by the ALJ or drawn from its own post-hearing brief. (Board's Reply at 1-19) Specifically, the Board rejects any notion that the ALJ shifted the burden of proof with respect to the charge of lateness, asserting that respondent's chronic tardiness and resulting discipline were well documented over the years and that several instances of lateness during the 90-day improvement period were undisputed. (*Id.* at 1-2) It further rejects any suggestion that Acting Principal Shults was not a credible witness, noting the consistency of her testimony with both the documentary evidence and the testimony of Principal Henry Hamilton, and observing that the ALJ had ample opportunity to observe Shults's demeanor over the three days of hearing at which she testified. (*Id.* at 3-5) With respect to the ALJ's having combined certain charges for determination, the Board posits that respondent suffered no prejudice thereby, since the ALJ clearly recognized that the Board had not actually charged respondent with excessive absenteeism and expressly stated that respondent's absenteeism record could not factor into any ultimate conclusions in this matter. (*Id.* at 12-13, referencing Initial Decision at 28, note 3) Finally, with respect to respondent's claims that the Board failed to prove specific charges and properly implement the 90-day improvement period, the Board points to testimony and evidence indicating otherwise and endorses the conclusions reached by the ALJ. (*Id.* at 5-12, 13-16, 16-19)

Upon review, the Commissioner determines to adopt the Initial Decision in all respects save the basis and manner of respondent's dismissal from tenured employment.

Initially, the Commissioner finds the ALJ to have carefully considered the voluminous testimony, evidence and argument in this matter, and based thereon, to have made: 1) findings of fact that are amply supported by the record; and 2) conclusions of fact and law that are both appropriate and fully explained in light of the parties' respective positions – expressed both at the OAL and on exception – as to burden of proof, witness credibility, and weight of evidence. Consequently, the Commissioner concurs with the ALJ that the Board has met its burden of establishing that respondent was provided with an opportunity to improve as required by law, but has

remained an inefficient employee whose dismissal from tenured employment in the district is warranted under all of the circumstances.

The Commissioner cannot, however, adopt the ALJ's recommended order that respondent's tenured position be forfeited as of the date of her suspension upon certification of tenure charges. As recognized by both respondent and the Board, the applicable statute in tenure matters (*N.J.S.A.* 18A:6-14) clearly requires that the charged party's employment will continue through determination of the charges, with no provision for retroactive dismissal if the charges are ultimately sustained.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL – sustaining the Board's charge of inefficiency – is adopted as the final decision in this matter, with modification as set forth above. Respondent is hereby dismissed from her tenured employment as a teaching staff member in the East Orange School District as of the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners pursuant to *N.J.A.C.* 6A:9-17-6(a)1 for action as it deems appropriate.

IT IS SO ORDERED.[16]

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/28/09
Date of Mailing: 5/28/09

[16] 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 07135-08
AGENCY DKT. NO. 127-5/08

IN THE MATTER OF THE TENURE HEARING OF CLAUDIA ASHE-GILKES, SCHOOL DISTRICT OF THE CITY OF EAST ORANGE, ESSEX COUNTY.

John G. Geppert, Jr., Esq., for petitioner School District of the City of East Orange (Schwartz, Simon, Edelstein Celso & Kessler, attorneys)

Mary J. Hammer, Esq., for respondent Claudia Ashe-Gilkes (Bucceri and Pincus, attorneys)

Record Closed: December 1, 2008 Decided: January 12, 2009

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

STATEMENT OF THE CASE

The School District of the City of East Orange (District) terminated tenured teacher Claudia Ashe-Gilkes for inefficiency. 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 containing thirty allegations that generally involved her interaction with and control over students; her

interaction with other staff members; her teaching skills; her failure to follow or properly prepare lesson plans; her failure to submit records and reports on time; and failure to report to school and all classroom and/or duty assignments on time. The issues are whether Ashe-Gilkes had been an inefficient teacher since 2004 and whether she had resolved all alleged inefficiencies during her ninety-day improvement period.

PROCEDURAL HISTORY

The District served Ashe-Gilkes with Notice of Inefficiency Tenure Charges on November 30, 2007, along with a Modified Performance Improvement Plan. Following the conclusion of a ninety-day probationary period, the District certified charges against Ashe-Gilkes to the Bureau of Controversies and Disputes of the Department of Education (Commissioner) on May 8, 2008. Upon the receipt of Ashe-Gilkes's Answer on May 23, 2008, the Director of the Bureau of Controversies and Disputes referred the tenure charges to the Office of Administrative Law (OAL) on May 30, 2008, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

I established a discovery and hearing schedule in accordance with N.J.S.A. 52:14B-10.1. The hearing commenced on September 15, 2008, and continued on September 16, September 22, September 23 and September 25, 2008. The record closed on December 1, 2008, after the receipt of transcripts and post-hearing briefs.[1]

FACTUAL DISCUSSION

Background

Ashe-Gilkes began employment with the District as a teacher on April 1, 1992.

Henry Hamilton has been a principal in the District for thirty-six years, much of which has been at the Houston Academy. His duties include the observation and evaluation of staff including Ashe-Gilkes. The observations lead to an assessment of

[1] Although timely ordered, the receipt of the transcripts was delayed due to a misrepresentation by the transcription agency.

the climate of a class and instructional techniques. He hired Ashe-Gilkes in 1995 over the objection of an administrator as a grade 1-2 math teacher. Hamilton evaluated Ashe-Gilkes every year. He recalled that, from 1995 to 2001, she had a "pretty good record." From then on Hamilton observed a "whole attitude change" with regard to classroom management, ability to communicate lessons in an efficient and effective manner, attendance and lateness. He testified that he would meet with her and give her compliments where deserved and recommendations where warranted. She would promise to improve but did not do so.

The District has its school administrators use a Teacher Evaluation (EV)/Observation (OB) form for teachers that breaks down a teacher's performance into the following categories: teaching strategies or techniques; knowledge of content; planning and preparation; classroom management; development of student attitude; professional/personal qualities; school/community relations; and attendance/punctuality. More specific characteristics are listed under each category. The observer rates each characteristic "satisfactory (S)," "needs improvement (NI)," "unsatisfactory (U)," and "not observed (NO)." The evaluations also may generate Performance Improvement Plans (PIP). From September 1997 through 2002, Hamilton rated Ashe-Gilkes's performance for the most part as satisfactory in each specific category except for that relating to punctuality. He rated her punctuality as unsatisfactory in every period except for one S and one NI.

The District based its conclusion that Ashe-Gilkes inefficiently performed her duties in part on written semi-annual EV's and periodic OB's and PIP's from the 2002-2003 to 2006-2007 school years from Principal Hamilton, where he rated her performance NI or U in various categories. In 2007-2008, Hamilton was on medical leave. Acting Principal Leslie Shults, although she did not issue the formal OB/EV forms used by Hamilton, observed and evaluated Ashe-Gilkes in 2007-2008, including during her ninety-day probation period. Hamilton and Shults both testified in support of their written criticisms.

2002-2003 to 2006-2007 School Years

With the exception of a claim that someone other than Ashe-Gilkes wrote her name on the teacher arrival-time late book on certain occasions and that she never refused to sign the late book, Ashe-Gilkes does not specifically dispute the bona-fides of the observations, evaluations and criticisms by Hamilton for the 2002-2003 through the 2006-2007 school years. Her written responses to some of Hamilton's interactions with her primarily took issue with his alleged rudeness and his alleged failure to treat all staff equally. She, instead, contends that the District failed to render positive assistance to her during her ninety-day probation period in 2007-2008 and also failed to measure her improvement by a synthesis of observations. She also contends that the District has not carried its burden of proof regarding the charges it brought.

Based on Ashe-Gilkes's performance in each preceding year, the District withheld her salary increment and adjustment increase for 2004-2005, 2005-2006, and 2007-2008. Hamilton testified that the reason he did not recommend withholding her increment in 2006-2007 was because he was trying to be a compassionate person and used the increase as a motivation technique to encourage her and to let her know that he was supportive of her.

Hamilton appeared as a wholly credible witness objectively describing his several years of interaction with Ashe-Gilkes as her principal and primary evaluator. He did not demonstrate a non-fact-based motive for his criticisms of her. His observations and evaluations were not totally negative. They acknowledged satisfactory performance in many areas and improvement where warranted. I **FIND** the following **FACTS** regarding the teaching performance of Ashe Gilkes for the school years 2002-2003 through 2006-2007.

1. Failure to focus pupil's attention on task

- OB November 5, 2003—NI with comment, "It was difficult to follow your lesson due to many interruptions." Hamilton observed that too many children were not focused.
- EV November 30, 2003—NI with comment, "The focus of some lessons are tarnished by many student interruptions."
- EV March 30, 2004—NI with comment, "Continue to find motivating tasks that will keep students focused on activity." Hamilton testified that the students "were just not on task."
- OB March 22, 2005, and March 29, 2005—NI. Hamilton observed that there was too much on the chalkboard and it was congested.
- EV March 30, 2005—NI.
- OB November 8, 2006—NI with comment, "It is expected that you will give a clear objective orally and in written form on the chalkboard or artifact."
- EV November 30, 2006—NI with comment, "More students need to be engaged on a regular basis. You may want to refrain from sitting and walk around the classroom."
- OB March 13, 2007—U with comment, "A number of students were restless which caused them not to be focused." Hamilton testified that the lack of focus had been a problem area for years, which reflected a problem in the instructional program on the part of the teacher.
- EV March 30, 2007—U. Hamilton believed that Ashe-Gilkes needed to use different techniques to get the children to focus.

2. Failure to employ a variety of methods/materials

- OB March 22, 2005—NI observing, "Your set did not present an objective and was not motivating. Also, much work is on the board that is outdated."

- EV March 30, 2005—NI observing, "It is expected that an objective is presented orally and on the chalkboard as part of your set."

3. Failure to demonstrate proficiency in content areas

- OB November 5, 2003, and EV November 30, 2003—NI observing "It is evident that your rituals and routines are not in order, you are expected to make improvement in this area," and "The America's Choice rituals and routines are not in place. Continue to seek support from America's Choice leaders."
- OB March 13, 2007, and EV March 30, 2007—NI observing "There is a need to follow the Sonday Program as outlined in the book." [2] The coordinator of the Sonday Program complained to Hamilton that Ashe-Gilkes should not be teaching the program because she did not follow the format.

4. Failure to submit all Sonday testing data to coordinator and administration in a timely manner

- OB October 27, 2003, and EV November 30, 2003—U for not submitting required records, reports or documents in a timely manner.
- EV March 30, 2004—U and EV November 30, 2004—NI.
- OB March 22, 2005—U and OB March 29, 2005-NI.
- EV March 30, 2005—U followed by an April 28, 2005, Hamilton memo stating, "I have previously informed you to devote more time to your planning in an effort to complete and submit required documentation in a timely manner. Your disregard for the office requests for information has been a problem this year."

[2] The Sonday Program is a reading program designed around phonetics and uses phonemes, reading, writing, fluency and spelling to improve a student's ability to produce the correct sounds and pronounce words correctly.

5. Failure to teach all lessons in accordance with lesson plans approved by the administration and failure to implement lessons in accordance with Sonday program

- OB October 27, 2003, OB November 3, 2003, and EV November 30, 2003—U with notations, "You failed to have lesson plans today except for math. Comprehensive lesson plans are expected on a regular basis;" "You failed this school year to submit lesson plans for review."
- EV March 30, 2004—NI with notation, "You failed to submit completed lesson plans recently. Also, there is a need to write more comprehensive lesson plans that should include: behavioral objective, CCCS reference #/standard, time and date, procedures, independent/guided seatwork, summary, teacher's guide pages, homework."
- OB March 29, 2005, and EV March 30, 2005—U with comments, "Your lesson plans from March 15 to March 31, 2005, involved geometry and measurement. You taught and reviewed fractions. You did not follow your plans." "You are expected to submit updated lesson plans on a regular basis - this also includes your emergency plans."
- OB November 8, 2006—U adding, "Your lesson plans did not match lesson. Also, the written objectives did not match plans." Ashe-Gilkes was, however, rated S on the ensuing November 30, 2006, EV.
- OB March 13, 2007—NI with comment, "Lesson plans failed to indicate Sonday level. The plans did not reflect what was taught today." Again she received an S on the March 30, 2007, EV for planning and preparation but received an NI for proficiency by not following the Sonday phonics program as outlined.

6. Failure to manage all instructional time in an effective and efficient manner

- OB November 5, 2003—U with comment, "You wasted time this morning by being late and providing your mini-lesson at 9:05 – school

starts at 8:10 a.m. You spent time addressing room issues, but not working with students."

- EV November 30, 2003—NI with notation, "There is a need to make better use of time by interacting with students more during small group time." It was suggested that she develop a more positive method to interact with students, which will provide greater time-on-task.
- EV March 30, 2004—NI.
- OB March 22, 2005—U with comment, "There is a need to make better use of time. You administered a quiz this morning and allowed students to sit too long after completion."
- OB March 29, 2005, and EV March 30, 2005—NI noting, "You spent too long in the explanation section of your lesson. It is recommended that you review the America's Choice math model" and "It is recommended that you make better use of your time."
- OB November 8, 2006, and EV November 30, 2006—NI with comments, "It took too long to effectively involve students in classroom routines. It is evident that rituals and routines are not in place" and "Continue to seek ways to make better use of time."
- OB March 13, 2007, and EV March 30, 2007—NI adding, "Continue to make better use of time by seeking ways to better involve students in classroom routines" and "There is a need to make better use of time by greater student control in the classroom. Routines should be in place on a regular basis." Hamilton testified that this continued to be a deficiency.

7. Failure to keep records which are accurate and accessible

- OB October 27, 2003—NI.
- OB November 5, 2003—U with comment, "Plans not complete."
- EV November 30, 2003—NI.
- EV March 30, 2004—NI noting, "Improvement is needed with keeping and submitting documentation when required."

- Memorandum March 3, 2005, where Hamilton describes a parent conference at which Ashe-Gilkes was unable to produce her parent-contact log and had no classroom grades for homework, quizzes or chapter tests.
- OB March 22, 2005—U, OB March 29, 2005—NI and EV March 30, 2005—NI noting that she needed to improve in maintaining an appropriate assessment record, developing an organized parent-contact log and submitting updated lesson and emergency plans on a regular basis.
- Memorandum April 28, 2005. Hamilton complained that Ashe-Gilkes failed to submit completed report cards to the office for his review and, when he questioned her, she advised that they were not yet ready. He stated, "I have previously informed you to devote more time to your planning in an effort to complete and submit required documentation in a timely manner. Your disregard for the office requests for information has been a problem this year. In conclusion, I am appalled that you took away valuable instruction time to complete the report cards that are expected to be completed at an earlier time. Also, some students went home without receiving their report cards . . . . I will continue to monitor expected improvement in this area."

8. Failure to demonstrate ability to correct inappropriate student behavior without disturbing the instructional process

- OB March 25, 2003, and EV March 30, 2003—NI with comments, "Much time is lost because of disruption of students"; "You need to establish classroom control to promote more time on task"; "There is a need to develop more positive methods to interact with students. This will reduce the number of negative actions between teacher and student. Additionally, it will provide greater on-time task. It is expected that you will follow school procedures when interacting with a difficult student."

- OB November 5, 2003, and EV November 30, 2003—NI noting, "Students are not behaving as expected which results in less 'time-on-task.'"
- EV March 30, 2004—NI with comment, that although there is some improvement in classroom management " . . . a few of your students are not following school and classroom rules" and "The poor behavior of your students in-and-out of class has had a negative effect on the school's climate. Staff members frequently complain about your students."
- Memorandum February 4, 2005. "You are having difficulty with certain students that do not have problems with other teachers . . . . Your students on many occasions are loud as they walk through the halls with you . . . . Often you do not follow proper procedures for referring students to time-out room. Specifically, you send several students out together without the proper paperwork describing their infractions. This creates a problem in the halls as these students roam in a group unsupervised."
- OB March 22, 2005, and OB March 29, 2005, and EV March 30, 2005—NI with notations, "Students often do not respond to you in a positive manner. There is a need for you to treat your students in a more friendly manner" and "There is a need to improve your classroom management skills. You have sent out of your class more students than any other teacher of your experience in the school. It is expected that you will participate in an in-service program related to classroom management."
- Memorandum April 7, 2005, memorializing a discussion between Assistant Principal Marjorie Baskerville and Ashe-Gilkes where Ashe-Gilkes was criticized for sending her students out of her classroom without proper documentation of their problems. Baskerville set forth the proper procedures to be followed. She offered herself and Hamilton to discuss Ashe-Gilkes's complaint that school administrators did nothing about students' misbehavior.

- EV November 30, 2006—NI with comment "You must continue to work on effective classroom management through . . . correcting inappropriate behaviors (responses) without disturbing the learning process" and "Your attitude at times conveys a negative impression. Students will mirror the attitude of the teacher – work on projecting a positive attitude which will carry over to the students."
- OB March 13, 2007, and EV March 30, 2007—NI noting, "There is a need to develop strategies that will help students to become more cooperative during your instructional period" and "Students in your classroom often are exhibiting behavior problems. Students must be made to recognize that no student has the right to interfere with the learning opportunities of others" and " . . . there must be minimum disruptions in the classroom."

9. Failure to submit all required records and/or documents in a timely manner

- OB October 27, 2003, and EV November 30, 2003—U with comments, "You failed to submit requested documentation" and "You failed this school year to submit lesson plans for review."
- EV March 30, 2004—U with instruction, "There is a need to submit require [sic] documentation in a timely manner; especially as it relates to the America's Choice program."
- EV November 30, 2004—NI with comment, "You were late submitting your Principal's Book of the Month."
- OB March 22, 2005—U noting, "You have not improved with providing a greater sample of grades to support final grades."
- OB March 29, 2005—NI with comment, "There is a need to have available and current evaluation documentation. The excuse given that you do not have enough time is unacceptable."
- EV March 30, 2005—U with indication that she needs to improve submitting lesson plans on a regular basis.

- Memorandum April 28, 2005. Hamilton repeats that her disregard for requests for information has been a problem.

10. Failure to report to meetings and school on time, failure to maintain a satisfactory attendance record and failure to improve same

Hamilton testified that, over a long period of time, he considered Ashe-Gilkes's attendance and punctuality to be unacceptable and that she would promise to improve but failed to do so. She and other teachers were required to be on duty by 7:50 a.m. The procedure at the Houston Academy required each teacher to sign an attendance book in the office upon arrival each morning. At 7:50 a.m. that book would be removed, and any teacher arriving thereafter was required to sign a different staff late book and indicate the time of arrival. If a teacher is late, other staff must cover her assignment. Hamilton testified that on six occasions Ashe-Gilkes refused or failed to sign the late book. For evaluation purposes the District has a policy whereby a teacher is rated unsatisfactory if absent four or more days by November 30, five or more days by January 15 and/or seven or more days by March 15 or March 30.

- EV March 30, 2003—ten tardies (U) and nineteen absences (U) with comment, "You had to be out a considerable amount of time. It has had a negative impact on the educational program for your students. Continue to strive for a satisfactory attendance record."
- OB October 27, 2003—eight tardies (U) noting, "Last year's PIP indicated a need to improve your attendance and tardiness. Unfortunately, you continue to be tardy to school meetings and picking up your students from a special."
- OB November 5, 2003—15 tardies (U) with comment, "Your lateness to school, class, and staff meetings has had an adverse effect on the school's program." The accompanying PIP stated, "You have failed to make an improvement in your arrival time to school, class and staff meetings. You have been reminded of this problem often. Your lateness has had a negative effect on the instructional program. For example, this morning you arrived at 8:10 to your class without signing

in. You returned at 8:20 a.m. and presented your lesson at 8:30 a.m. You are expected to be present at 7:50 a.m. It is expected that you will now cooperate by being on time on a regular basis."

- EV November 30, 2003—fifteen tardies (U) and four absences (NI) with comment, "Your lateness continues to be rated as unsatisfactory. You are expected to make immediate improvement in this area." The PIP indicated, "there is a need to improve your lateness record which has been unacceptable for many years. This has reduced the effectiveness of your instructional program. It is expected you will be on time to school, receiving your students from specials and prompt to staff meetings. Please note that if improvement is not noted, your principal will recommend to the Board of Education to take some adverse action against you."
- Memorandum February 12, 2004, advising that Ashe-Gilkes arrived at 8:13. Hamilton indicated that, "Again, you were late this morning. Your principal had to leave his assignment to supervise your students. You have not made an improvement in this area as indicated in the previous evaluation."
- EV March 30, 2004—twenty tardies (U); ten and one-half absences (U) noting, "Your attendance for the year to date is unsatisfactory. It has had a negative effect on the learning program. Again, it is expected that you strive for an acceptable attendance record." Personal Improvement Plan – "There is a need to improve your attendance. There was some improvement after the last evaluation. However, recently it has been unsatisfactory; we have discussed this matter for years because you continue to arrive to school late. This has had a negative effect on the progress of students and our school climate. Your reactions for years to these concerns center around the fact that you have personal issues that prevent you from being here on time. I am requesting that you resolve your personal issues and arrive to school in a timely manner. If an improvement is not noted during April

and May, I will recommend to the Board of Education to take adverse action."

- EV May 14, 2004—thirty-eight tardies (U) and ten and one-half absences (U) and accompanying memorandum May 14, 2004, memorializing that, "We met today to discuss your lack of cooperation with me by being late to school on ten occasions since your March 30, 2000 for evaluation. The high number of thirty-eight tardies for the year is considered unacceptable because it has a negative effect on your students' learning. Please note that we have reviewed the item in your March 30, 2000, Professional Improvement Plan that I would recommend to the Board to take adverse action against you if an improvement is not made by May. Therefore, I am now making the recommendation that the East Orange Board of Education take adverse action against you. Please note that you refused to sign your revised March 30, 2004, evaluation and the addendum document to your March 30, 2004, for evaluation. Finally, it is still expected that you arrive to school and meetings in a timely manner."
- Memorandum June 7, 2004, noting that Ashe-Gilkes was forty minutes late for a staff meeting and continued to report late to the playground for morning exercises. "The above is an example of your continuous indifference to my many recommendations that you enhance your program by being punctual to school and staff meetings."
- The District concluded that Ashe-Gilkes's overall performance for 2003-2004 was deficient and that her salary increment and salary increase would be withheld and that she would be placed on probation for the 2004-2005 school year for the reasons stated in Hamilton's May 14, 2004, memorandum.
- Attendance record for the 2003-2004 school year revealed twelve and one-half days absent. The Attendance Policy Guideline of the District provides that seven or more absences by March 30 is unsatisfactory.
- EV November 30, 2004—two tardies (S) and fourteen absences (U) with comment "You have made an improvement with arriving to school

in a timely manner. However, I am concerned with the many days absent due to a number of reasons. It is expected that you will strive for a satisfactory attendance record."

- Memorandum February 4, 2005, stating, "Escort your students to and from the lunchroom and special classes in a timely manner. It is often that you are late or fail to pick up your students from the playground."
- OB March 29, 2005—"It is expected that you will follow school procedures for escorting your students to various areas and receiving your students in the playground in a timely manner."
- EV March 30, 2005—two tardies (S) and twenty-one and one-half absences noting "Continue to strive for a satisfactory attendance record. Students did not make good progress during your absence," and "It would be helpful if you receive your students from special classes and the lunch program in a timely manner."
- As a result of the March 30, 2005, evaluation (including many NI's in addition to the U for attendance), the Board again denied Ashe-Gilkes an employment increment and adjustment increase and placed her on employment probation for the 2005-2006 year.
- EV November 30, 2005—zero tardies (S).
- Ashe-Gilkes's attendance record for the 2005-2006 school year included twenty-four absences, well beyond the unsatisfactory standard of seven by March 30 of each year.
- Memorandum October 25, 2006, where Hamilton criticized Ashe-Gilkes for failing to report to her teaching assignment at 1:14 p.m., as he observed her eating in the staff lounge at 1:23 p.m. even though he had previously announced that all lunches were to be completed by 1:11. He reminded her that, "Again, you are expected to report to your teaching assignment in a timely manner."
- OB November 8, 2006—"There is a need to be punctual and visual on the playground in a timely manner."
- EV November 30, 2006—seven tardies (U); three absences (NI) with comment, "There is a need to improve your tardiness record. Also, it is

expected you will report to the playground in a consistent and timely manner."

- OB March 13, 2007—twenty four tardies (U) and five absences (U) noting, "We discussed today your need to arrive to school in a timely manner. Also, you have been reminded five times or more to sign in the late book. This is unacceptable." The PIP reiterated the observation that her tardiness has a negative effect on the learning process and that Hamilton, once again would recommend that the Board of Education take adverse action her.
- Memoranda of March 19 and March 21, 2007, from Hamilton noting that Ashe-Gilkes walked into the office fifteen minutes late, failed to sign the late book and left the office while ignoring his reminder to sign the book. He followed her into the hallway, reminded her of the sign-in policy and advised that she had disregarded the policy on six different occasions. The memorandum further memorialized that Ashe-Gilkes refused to sign-in despite two additional orders to do so. Hamilton, in this memorandum, reiterated that that in the previous week she was late and started to walk away when reminded by him to sign the late book and only relented when he insisted that she cooperate. He also referred to a March 5, 2007, memorandum citing a failure to sign-in on four other occasions and a fifth occurrence the following week. Finally, he recalled another situation in November where she again did not sign-in claiming that she left her vehicle at the same time as another teacher who arrived on time and only entered the office later because her legs were shorter. In this memorandum Hamilton advised Ashe-Gilkes that her disrespect for school policy and insubordinate acts were unacceptable, unprofessional and disappointing. He also advised her that she had been tardy seven times during her first evaluation period in that school year and eighteen times during the second period for an unsatisfactory total of twenty-five. Hamilton also noted that her punctuality record followed an unsatisfactory attendance

record for 2003-2004 and 2004-2005, when the Board of Education took adverse action against her.

- EV March 30, 2007—twenty-five tardies (U) and seven absences (U) with the comment "Your excessive tardiness has had a negative effect on the learning program. Also, you have failed to sign in on six different occasions. It is expected that a significant improvement be made in this area."
- As a result of the March 30, 2007, evaluation, the Board again denied Ashe-Gilkes an employment increment and adjustment increase and placed her on employment probation for the 2007-2008 year.
- Memorandum June 12, 2007, from Hamilton memorializing that, since her March 30, 2007, evaluation, Ashe-Gilkes had been tardy on thirteen occasions for a total of thirty-eight.
- Ashe-Gilkes had sixteen absences during the 2006-2007 school year.

11. Failure to act on and respond to suggestions for improvement in performance, actions and behavior

- OB October 27, 2003—U.
- OB November 5, 2003—U with comment, "Last year's PIP indicated the need to improve your lateness to school. To date you have failed to make an improvement."
- EV November 30, 2003—(no rating) but noted, "You have not followed the recommendation in your Spring PIP that you improve your lateness to school. In fact, this has been a problem for many years."
- EV March 30, 2004—U commenting that there had been some improvement in arriving on time but then resumed late habit without acceptable responses.
- EV May 14, 2004—no rating but PIP note, "You have not been cooperative with me by being late ten more times between the March 30, 2004 evaluation to May 14, 2004. This has had a negative effect on your students' progress. I have had to leave my responsibilities to

cover your class on a number of occasions due to your tardiness. I have discussed this with you frequently the importance of being on time but often you reacted in an unprofessional manner."

- EV November 30, 2004—S with comment that she had made an improvement with arriving on time but that there was concern about absenteeism.
- OB March 22, 2005—U with comment in PIP, "Often do not respond in an appropriate manner when given helpful suggestions. It is expected that changes in this area be made immediately."
- OB March 29, 2005, and EV March 30, 2005—U with explanations, "You have had difficulty accepting constructive criticism from your principal. You have become very defensive and feel very threatened by these remarks. It is expected that you change your negative attitude immediately. There is a need to be more polite and cooperative staff member."
- Memorandum April 28, 2005, from Hamilton for failure to respond to directive regarding report cards.
- EV November 30, 2006—U with comment, "You have failed to follow my recommendations as it pertains to signing-in each morning and reporting to the playground in a timely manner."
- OB March 13, 2007—U with notation, "There is a need to better cooperate with administration. You have failed to sign in the late book on six different occasions after being reminded of school policy."
- Memorandum March 19, 2007, from Hamilton regarding insubordination and excessive tardiness.
- EV March 30, 2007—U with comment, "Is a need for you to follow suggestions to you to increase your performance. You fail to accept constructive criticism."
- Memorandum June 12, 2007, from Hamilton stating, "You continue to be an uncooperative staff member by not carrying out your responsibilities as presented" and warns of possible adverse action.

12. Failure to act and behave in a manner that contributed to a positive school climate

- OB October 27, 2003—NI
- OB November 5, 2003—NI with comment, "Your lateness to school results in other staff members having to cover your class. Again, this involves less learning time for students."
- EV March 30, 2004—NI with elaboration, "The poor behavior of your students in-and-out of class has had a negative effect on the school's climate. Staff members frequently complain about your students. Your late arrival with receiving your students after lunch does not help. As mentioned, your lateness to school sets a negative tone at the start of the day for your students."
- Memorandum February 4, 2005. Hamilton advised Ashe-Gilkes that, if she would improve on several of his concerns, it would help the school to have a more positive learning environment. He criticized her for often being late or failing to pick her students up from the playground, allowing students to be loud when walking through the halls, seldom being by her door when students travel through the hall, not following procedures in referring students to the time-out room, resulting in students roaming in an unsupervised group.
- OB March 22, 2005—U stating, "There is a need to be more polite and cooperative staff member. You often do not respond in an appropriate manner when given helpful suggestions. It is expected that changes in this area be made immediately."
- OB March 29, 2005—U with comment, "there is a need to be more cooperative and supportive staff member. You have had difficulty accepting constructive criticism from your principal. You have become very defensive and feel very threatened by these remarks."
- EV March 30, 2005—S but with comment, "There is a need for you to interact in a more pleasant manner" and "there is a need for you to

make greater improvement with treating students, parents and administration in a pleasant manner."

- OB November 8, 2006—NI indicating a need to develop a more positive attitude toward helpful suggestions. "Often you are argumentative when a suggestion or reprimand is given."
- EV November 30, 2006—NI with comment, "Your attitude at times conveys a negative impression. Students will mirror the attitude of the teacher - work on projecting a positive attitude which will carry over to the students."
- OB March 13, 2007—U with notation, "Mrs. Ashe-Gilkes needs to devote more time to developing effective working relationships with principal. Her failure to cooperate has created an environment of frustration and resentment."
- Memoranda of March 19, 2007, and March 21, 2007. Hamilton memorialized as acts of insubordination where Ashe-Gilkes refused to sign the late book in the office even though directed to do so by Hamilton. He characterized her conduct as unacceptable, unprofessional and disappointing.
- EV March 30, 2007—U with comment, "It is expected that you will be more polite and cooperative with administration."

13. Failure to provide students with a clear explanation of the subject matter

- OB November 5, 2003—NI with comment, "It was difficult to follow your lesson plan due to many interruptions."
- EV November 30, 2003—NI noting, "The focus of some lessons are tarnished by many interruptions."
- OB March 22, 2005, OB March 29, 2005, and EV March 30, 2005—NI with comments, "your set did not present an objective and was not motivating" and "your chalkboard is too congested to use appropriately when teaching."

2007-2008 School Year

On November 30, 2007, Shults issued a Modified PIP to Ashe-Gilkes listing many areas where she needed to improve. She prepared it with Assistant Superintendent Dr. King based on a review of past observations and evaluations. The document also stated,

> A review of your overall performance shows that there continues to be areas where your performance is either in need of improvement or unsatisfactory. Each of your final evaluations for the past few years has included a Professional Improvement Plan that was designed to help you improve your overall performance and eliminate deficiencies; however, your overall performance is still not consistently satisfactory in all of the areas of your assigned duties and responsibilities.
>
> The purpose of this Modified Professional Improvement Plan is to provide you with written information and notice about the areas that are considered to be deficient, to provide you with ninety (90) days to correct the areas of identified deficiencies, to inform you of the expectation that you must take the actions necessary to correct the deficiencies and to inform you that administration will assist you by providing time, guidance and resources that we consider necessary to help you improve. It is also expected that you will act on and implement the suggestions that are provided by administrators and/or supervisors and that you will do so in a manner that is timely and effective.

The modified PIP provided to Ashe-Gilkes by Shults on November 30, 2007, delineated thirty-one performance areas where Ashe-Gilkes was expected to improve during her probationary period. Shults testified that, during the ninety days following her issuance of the Modified PIP to Ashe-Gilkes, she observed Ashe-Gilkes's in-class performance once or twice a week occasionally taking notes; she conducted formal observations on December 19, 2007, and January 8, 2008; and she provided assistance to Ashe-Gilkes, including meeting with her and providing written information to her. Although she did not use the standard OB/EV forms previously used by Hamilton, the District contends that the November 30, 2007, Modified PIP and the March 26, 2008, Notice of Unresolved Deficiencies constituted written evaluations of

Ashe-Gilkes. The March 26, 2008, document listed eighteen of the thirty-one performance areas where Shults concluded that Ashe-Gilkes remained deficient after the ninety-day probationary period, some of which are combined below for discussion purposes. In the in-class observations, Shults was looking at student behavior, what was placed on the board for behavioral objectives, lesson plans and overall class management. I reject Ashe-Gilkes's claim that the paucity of written observations reflects an inadequate effort by the District to assist Ashe-Gilkes in correcting her deficiencies. There is ample credible evidence that Shults discussed her continuing concerns with Ashe-Gilkes in addition to creating written memoranda and forms. For instance, they discussed the issues Shults memorialized in her handwritten notes of a January 8, 2008, observation.

Ashe-Gilkes argued that Shults was not a credible witness because she did not use the formal OB/EV forms in 2007 and 2008 and did not support her claim of twice-weekly observations with written reports in most instances. She also suggested a bias by Shults, referring to the testimony of Shults that there had been some past encounters between the two of them where Shults claimed to have been intimidated and threatened by an argumentative attitude of Ashe-Gilkes. In some instances, Shults's recall of certain events was imprecise. Nevertheless, I considered Shults to be a credible witness. The choice of accepting or rejecting the witness's testimony or credibility rests with the finder of facts. Freud v. Davis, 64 N.J. Super. 242, 246 (App. Div. 1960). In addition, for testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Her testimony and her reports met those requirements. She was professional, and her assessments of Ashe-Gilkes's performance were measured. They did not reflect a vendetta, prejudice or bias against Ashe-Gilkes. See State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952), certif. denied, 10 N.J. 316 (1952). To the contrary, they were consistent with many of the

several years of repeated criticisms by Principal Hamilton. Her final assessment of Ashe-Gilkes's performance reflected her recognition that a number of the deficiencies cited in November 2007, had been eliminated. In some instances, her testimony was vague and not sufficiently specific to support some of the ultimate findings against Ashe-Gilkes. However, I did not consider such weaknesses in the testimony to be indicative of an incredible witness.

1. Failure to focus pupils' attention on task

On December 19, 2007, Shults observed much private talking during a lesson rather than listening to the teacher. Two students were eating pretzels, as was Ashe-Gilkes, contrary to school policy. On January 8, 2008, she observed one student watching television rather than focusing on the Sonday lesson being taught by Ashe-Gilkes. The television was present in the media room where Ashe-Gilkes taught her Sonday class. Ashe-Gilkes tried to dispute Shults's contention that there was no reason for the television to be on by suggesting that there was a substitute music teacher in the media that day showing a video to another class. Even if this were so, Ashe-Gilkes had an obligation to keep her students focused on her lesson. During a later period that day, Shults observed much student conversation and fooling around. In class visits after their January 31, 2008, meeting, Shults continued to observe students not paying attention. The lack of student control had often been criticized by Hamilton

I **FIND** that Ashe-Gilkes did not resolve the deficiency of her failure to focus pupils on task during her probationary period.

2. Failure to employ a variety of methods/materials and failure to become proficient in the use and application of instructional technology

Shults indicated to Ashe-Gilkes after her January 8, 2008, observation that she requested a change of routines in the media room to reflect Sonday. At their January 31, 2008, conference, memorialized in the memorandum of February 19, 2008, Shults expressed a need for improvement in using various methods and materials. She recommended that she use the overhead projector, Achieve 3000 and other phonic-

related websites. In that regard she testified that she never saw technology such as a computer and overhead projector in Ashe-Gilkes's classroom. Ashe-Gilkes's subsequent lesson plans, however, indicate she scheduled the use of an overhead projector and computer software on approximately seven times in February and March. There is no indication that Shults observed her classes on those days even though she had an opportunity to see the lesson plans in advance. Moreover, in the earlier Hamilton evaluations, she consistently was rated satisfactory in these areas with one exception of March 30, 2005. Under these circumstances, there is insufficient evidence upon which to find that Ashe-Gilkes did not resolve these two alleged deficiencies.

3. Failure to demonstrate proficiency in content areas by presenting all instructional content in a manner that is accurate and complete.

Shults noted in a December 19, 2007, observation that Ashe-Gilkes used no rituals/routines and again on January 8, 2008, that she requested that Ashe-Gilkes change routines to reflect Sonday. There was no new lesson in each lesson observed, even though the Sonday administrators had advised all teachers that the success of that program required a review of previous lessons and the presentation of a new lesson each day. Hamilton specifically advised Ashe-Gilkes in his March 30, 2007, that she was not following the Sonday format. Shults's February 19, 2008, memorandum again reiterated a need to improve the dissemination of rituals and routines.

I **FIND** that Ashe-Gilkes did not resolve the deficiency of her failure to demonstrate proficiency in content areas.

4. Failure to submit all Sonday testing data to coordinator and administration in a timely manner

This deficiency was set forth in the November 30, 2007, PIP and the March 26, 2008, list of unresolved deficiencies. Shults's hearsay testimony that Ashe-Gilkes was periodically late in handing in forms and tests to the Sonday coordinator was accepted subject to the residuum rule. However, the District never presented any competent evidence of such late submissions during the probationary period for the hearsay to

corroborate. Under these circumstances, there is insufficient evidence upon which to find that Ashe-Gilkes did not resolve this deficiency.

5. Failure to teach all lessons in accordance with lesson plans approved by the administration and failure to implement lessons in accordance with Sonday program.

On October 7, 2007, Shults commented that Ashe-Gilkes was using the wrong form, and she provided guidance with respect to Ashe-Gilkes's lesson book. The November 30, 2007, Modified PIP directed her to teach all lessons in accordance with the lesson plans that have been approved by the administration. Nevertheless, the lesson plan reviews of December 10, 2007, and January 3, January 11, February 13, and February 26, 2008, repeatedly criticized the failure to specify objectives for the subject area in behavioral terms within the lesson plan. Shults and Ashe-Gilkes discussed this issue because Ashe-Gilkes was not writing her objectives in a proper format. The failure to specify behavioral objectives was a continuation of a deficiency Hamilton had pointed out in previous evaluations.

Shults observed on December 19, 2007, much private talking and eating, including the teacher during a lesson. Ashe-Gilkes read aloud over voices. There were no rituals, routines, rewards and consequences. Shults continued to observe lesson-plan deficiencies on January 8, 15, and 30, 2008, and February 13 and 26, 2008. Shults criticized the failure to follow the Sonday program as scripted, and observed that there was no new lesson in either lesson she observed. On January 31, 2008, they discussed the need for the appropriate posting of rituals and routines for Sonday in the media room where Ashe-Gilkes taught, and Ashe-Gilkes did make that adjustment.

Shults testified that she would observe Ashe-Gilkes not following the complete script required in the Sonday program. There were times when she did not do a new lesson by introducing a new sound as was required by the program. Obviously, Shults could only react to the lessons she observed and not those she did not observe. Shults credibly recalled this deviation from the Sonday program during her observations.

I **FIND** that Shults did not resolve the deficiencies of failure to teach all lessons in accordance with lesson plans approved by the administration and to implement lessons in accordance with Sonday program.

6. Failure to manage all instructional time in an effective and efficient manner

The observations of December 17 and 19, 2007, and January 8, 2008, indicated that Ashe-Gilkes's students were not receiving a complete instructional period of forty minutes because she was late in picking them up; there was much private talking and eating; and a situation of a student watching television during a lesson, which also included much talking. In their January 31, 2008, discussion Shults gave Ashe-Gilkes examples of methods and materials to use and examples of activities that would result in improved test scores. This issue is essentially no different than that involving the need to focus pupils' attention on task and does not constitute an independent deficiency based on one instance of failing to pick her students up on time in the afternoon.

7. Failure to keep records which are accurate and accessible and to submit them in a timely manner.

Although Shults's October 7, 2007, lesson plan evaluation noted that Ashe-Gilkes was using the wrong form, there was no indication that she continued to use the wrong firm after the issuance of the Modified PIP on November 30, 2007. Although the observations of December 10, 2007, January 5, 15, February 16 and February 26, 2008, as well as Shults's testimony, reflect a failure to specify objectives in her lesson plans, that criticism is redundant with that of failure to teach all lessons in accordance with lesson plans approved by the administration discussed above and does not constitute a separate and distinct deficiency. Shults was unclear in her testimony about Ashe-Gilkes being late in her lesson plan submissions. She testified that the plans were supposed to be submitted each Friday but were acceptable if submitted the following Monday. Although she testified that Ashe-Gilkes was periodically late and that her practice was to send a letter if they were not received by Tuesday, the District produced no such letters directed to Ashe-Gilkes. Moreover, none of the lesson-plan critiques

prepared by Shults for Ashe-Gilkes noted that they were submitted late. One is unable to glean from the receipt dates on those forms whether the plans were submitted late or early for a given week. Under these circumstances, there is insufficient evidence to establish that Ashe-Gilkes submitted her lesson plans late.

8. Failure to demonstrate ability to correct inappropriate student behavior without disturbing the instructional process

I disagree with the assertion of Ashe-Gilkes that there was no criticism of her conduct in this area during the 2007-2008 school year. Shults noted in December 2007, that there was much private talking and eating by students and that Ashe-Gilkes had to read aloud over the voices of the students. When Shults discussed her observation with Ashe-Gilkes, Ashe-Gilkes did not have a recollection of the student talking. Shults observed, on January 8, 2008, much conversation by students and that one was watching television. Even if the television was part of another class in the media center, there was no indication that Ashe-Gilkes attempted to redirect the attention of her student. In their January 31, 2008, conference, Shults suggested strategies to help students develop appropriate behaviors including calling parents, utilizing student homework planners, and using nonverbal cues by intruding on a student's space. Such suggestions reflected that a problem area persisted.

I **FIND** that Shults did not resolve the deficiency related to an ability to correct inappropriate student behavior without disturbing the instructional process.

9. Failure to report to meetings and school on time, failure to maintain a satisfactory attendance record and failure to improve same

These items have a sufficient commonality to warrant a single discussion.

Shults issued a memorandum to Ashe-Gilkes on November 14, 2007, advising that, "as of today, November 14, you have been absent 7 days. I am quite concerned about the number of days you have missed thus far this school year. Your absences impact on the educational program of Houston Academy." She also directed her to meet with her to discuss the number of and reasons for the absences and their impact

on the educational program. By the time she received the November 30, 2007, Modified PIP directing that she must report to school on time every day and improve her attendance, she had taken eight and one-half sick days.

Ashe-Gilkes took eight and one-half sick days prior to the issuance of the Modified PIP, two and one-half additional sick days during her ninety-day probationary period and was absent a total of nineteen and one-half days during the 2007-2008 school year.[3]

On December 17, 2007, Shults advised Ashe-Gilkes that she observed her picking up her eighth grade class at 1:20 p.m. although the class was scheduled to begin at 1:14 p.m. Shults did not claim that Ashe-Gilkes did not have an excuse. Although Shults did not have a specific recollection or record of times and dates, she testified credibly that Ashe-Gilkes was late for some of the leadership team meetings.

Ashe-Gilkes complained to Hamilton in April 2007 contending that someone other than she was signing her name in the late book in the school office. After the District produced late sign-in sheets for 2007 and 2008, Ashe-Gilkes testified that a forged signature appeared periodically in the late-book sheets, and she did not sign the late book on February 8, March 14, March 19, April 4, April 9, and April 25, 2007. She also disputed her signatures in the late book during the 2007-2008 school year for November 2, December 7, December 19, and December 30, 2007, and for January 28, 2008. She was also unsure of the signatures on some other dates. Hamilton testified that the signatures appeared to be those of Ashe-Gilkes although he was not a handwriting expert.

Significantly, however, except for a claim that she came in one-half minute behind a teacher on November 6, 2006, who was allowed to sign the regular sheet, and her refusal to sign the late book on March 19, 2007, because she was on time, Ashe-Gilkes never denied that she was tardy on any of the other times indicated by the

[3] Although Ashe-Gilkes's attendance record was unsatisfactory under the District's guidelines of seven or more days in a school year for every school year since 2002-2003, excessive absenteeism was not among the thirty disciplinary charges of inefficiency filed by the District. This absenteeism record therefore does not factor into any ultimate conclusions of law.

District before or during her ninety-day probation period. Notwithstanding that the testimony of Ashe-Gilkes was erratic with regard to which late-book entries appeared to be her signatures and which were not; again, she never denied that she was late on those days. The District presented sufficient evidence of Ashe-Gilkes's tardiness. I reject Ashe-Gilkes's suggestion that a negative inference should be drawn from the failure of the District to produce the on-time sign-in sheets for the dates in question. To the contrary, any negative inference is drawn against Ashe-Gilkes who could have demanded the production of the on-time sheets just as she demanded and received the late sheets. If she had indeed been on time on the dates she claimed her signature was forged on the late sheets, her real signature should have appeared on the on-time sheets. Absent her denial to being tardy on those dates, there was no purpose to produce the on-time sheets.

I **FIND** that Ashe-Gilkes was tardy fourteen times out of fifty-three school days during her ninety-day probationary period[4] or twenty-six percent of the time. She did not resolve this deficiency.

10. Failure to act on and respond to suggestions for improvement in performance, actions and behavior

Shults reprimanded Ashe-Gilkes on December 14, 2007, for leaving early and not signing-out consistent with the previous problem of not signing the late book when arriving at work. She persisted in submitting inappropriate lesson plans despite guidance as to what was expected. Her tardiness continued despite years of suggestions that such behavior was inappropriate and needed improvement.

I **FIND** that Ashe-Gilkes did not resolve the deficiency of failing to respond to suggestions for improvement in performance, actions and behavior.

[4] She was absent on two days during the probationary period.

11. Failure to act and behave in a manner that contributed to a positive school climate

This issue is really a composite of other events already discussed. Consistent with comments made by Hamilton in earlier evaluations, Ashe-Gilkes's chronic lateness would cause others to have to cover her responsibilities. Conducting classes while students were talking, eating or watching television undermined a positive school climate.

Shults testified generally that Ashe-Gilkes would be threatening, argumentative and intimidating when she would make suggestions to her. She gave as an example a heated discussion they had in the hallway one day, which continued in the nurse's office. From Shults's testimony, it appeared that this situation occurred in 2006 or early 2007 and not during the probationary period. She also criticized Ashe-Gilkes's demeanor where she would use a strong voice and point her finger and threaten to complain to the assistant superintendent. Again, Shults failed to provide a time frame.

In Shults's memorandum of February 19, 2008, memorializing her conference with Ashe-Gilkes on January 31, 2008, she suggested "that discussion between administration and personnel be held solely to those individuals, that you act in a cordial/professional manner regardless of one's personal feelings." This conference occurred in response to a January 11, 2008, Ashe-Gilkes letter to Shults asking for suggestions in relation to the November 30, 2007, Modified PIP in various areas such as behaving in a manner so as to contribute to a positive school climate. Shults characterized this meeting as positive, cordial and devoid of any of the intimidating behavior she had encountered in past years. Indeed, Shults never described any situations that occurred during the probationary period that would support a lack of improvement of the demeanor of Ashe-Gilkes toward her. Shults did credibly testify, however, that her comment at their meeting reflected that Ashe-Gilkes was inappropriately discussing their private probation-related conversations with other staff members, who were then relating those discussions to Shults, suggesting that Shults was personally going after Ashe-Gilkes.

I **FIND** that, through her classroom deficiencies, continued tardiness and discussion of her status with other staff members, she failed to resolve the deficiency related to behaving in a manner that contributed to a positive school climate.

12. Failure to provide students with a clear explanation of the subject matter

Again this deficiency is consistent with the observations of children talking, eating and watching television during lessons as well as Shults's observations where no new teaching material was being presented. At their January 31, 2008, conference, Shults discussed examples of methods and materials, such as modeling and metacognition, and activities that would result in improvement in test scores. Such methods should have been already in place by a teacher with the experience Ashe-Gilkes had. On March 4, 2008, Ashe-Gilkes was standing by the library door during class time, and she was not monitoring the sounds made by the students for accuracy.

I **FIND** that Ashe-Gilkes did not resolve her failure to provide students with a clear explanation of the subject matter.

LEGAL ANALYSIS AND CONCLUSIONS

The District has brought tenure charges against Ashe-Gilkes alleging inefficiency. Under N.J.S.A. 18A:6-10, tenured teaching staff members may be dismissed for inefficiency, incapacity, unbecoming conduct, or other just cause. Where, as here, the charge is inefficiency, the District shall inform the employee with specificity of the allegations and that, unless such inefficiencies are corrected within a minimal ninety-day period, it intends to certify those charges of inefficiency with the Commissioner. N.J.A.C. 6A:3-5.1(c)(1) and (3). The District must also provide a modification of the individual professional improvement plan to the employee at the commencement of the ninety-day probation period to assure that such plan addresses the specific charges of inefficiency. N.J.A.C. 6A:3-5.1(c)(4).

The purpose of these special rules, where the charge is inefficiency, is to consider whether the conduct could be remedied during the probationary period. As the Commissioner and State Board of Education has 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).]

The District bears the burden of proving the charges upon which it relied by a preponderance of the competent, relevant and credible evidence. N.J.S.A. 11A:2-21; N.J.A.C. 4A:2-1.4(a); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., L. and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

The statutory status of a tenured employee may not be lightly removed. Tenure protects teachers from arbitrary dismissal for "unfounded, flimsy or political reasons." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982). It is designed to aid in the establishment of "a competent and efficient school system" by affording teachers a

measure of security in the ranks they hold after years of service. Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949).

After carefully considering all of the competent credible evidence, Ashe-Gilkes's record during her tenure, and her performance during her ninety-day improvement period, I **CONCLUDE** that the District has met its burden of establishing that Ashe-Gilkes was an inefficient employee who did not resolve all of her deficiencies. There was no indication that she lacked the ability or capacity to remedy her deficiencies. She simply failed to do so. This conclusion is drawn from a total impression resulting from consideration of observations and evaluations made over a substantial period of time.

As indicated in the above **FINDINGS of FACT**, the District did not meet its burden of proving that certain of the deficiencies delineated in its March 26, 2008, Notice of Unresolved Deficiencies were not resolved by Ashe-Gilkes during the ninety-day improvement period. However, the District did prove that Ashe-Gilkes failed to resolve several important deficiencies that are critical to a successful and efficient teaching process. They included a failure to focus pupils' attention on task and provide them with a clear explanation of the subject matter; a failure to demonstrate proficiency in content areas by presenting all instructional content in a manner that is accurate and complete, particularly in the teaching of the Sonday program; a failure to demonstrate an ability to correct inappropriate student behavior without disturbing the instructional process; and failure to behave in a manner that contributed to a positive school climate.

An inability to maintain classroom decorum and discipline certainly defines an inefficient teacher. See In re Zielenski, 1977 S.L.D. 786; In re Starego, 1966 S.L.D. 271, aff'd, State Bd. (Feb. 5, 1969); Green Brook Sch. Dist. v. Fodor, 1984 S.L.D. 269, aff'd, State Bd., 1984 S.L.D. 297. Such is also the case where a teacher is unable to teach a prescribed curriculum. See Passaic Twp. Bd. of Educ. v. Gordon, 1989 S.L.D. 1749.

The District did not act precipitously or prematurely in filing the tenure charges. To the contrary, it exercised considerable restraint by identifying over several years areas of performance that were unacceptable or in need of improvement. It repeatedly

attempted to encourage professional improvement and a more efficient performance by Ashe-Gilkes by exercising measures short of tenure charges. Hamilton regularly provided her with observations, evaluations, Professional Improvement Plans, memoranda and conferences all intended to assist her to improve. Ashe-Gilkes was clearly aware of the District's assessment of her deficiencies through the withholding of her salary increments during three of the four years prior to the filing of the charges. Although Shults did not follow the formal OB/EV forms used by Hamilton during the 2007-2008 school year, she provided Ashe-Gilkes with adequate positive assistance to overcome her deficiencies through both oral and written criticisms and suggestions. More formal attention to Ashe-Gilkes was not warranted in view of the long-standing attempts of Hamilton to advise Ashe-Gilkes of her inefficiencies and to suggest methods of improvement. The Modified PIP was comprehensive and consistent with her history of negative evaluations. Ashe-Gilkes was not ignored during her ninety-day period. See Rowley v. Bd. of Educ. of Manalapan-Englishtown Reg'l Sch. Dist., 205 N.J. Super. 65, 72 (App. Div. 1985).

Ashe-Gilkes's claim is unpersuasive that the District failed to render positive assistance to her during the ninety-day improvement period and failed to measure her improvement by a synthesis of observations. The analysis of former Administrative Law Judge and Appellate Division Judge Steven Lefelt in Fodor, supra, regarding a Board's obligations during the ninety-day period is instructive.

> 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.
>
> [Fodor, supra, 1984 S.L.D. at 284.]

Judge Lefelt accepted the district's response to the ninety-day period. As here, the charges were specific and a long period of corrective action preceded the ninety-day period. Similarly, specific suggestions to overcome the teacher's inefficiencies had been made to him before and during the period. Efforts to improve Ashe-Gilkes's performance did not suddenly arise for the first time within the ninety-day improvement

period. They were the culmination of several years of efforts to encourage Ashe-Gilkes to improve.

No starker illustration of Ashe-Gilkes's inefficiency is her record of tardiness, an area that she surely had the ability to control and improve upon. 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 tardy in preparing for her student responsibilities 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. An occasional late arrival is unanticipated, unavoidable and usually beyond one's control. Persistent tardiness is, however, inexcusable and reflects irresponsibility. Hamilton, over a course of years, constantly rated Ashe-Gilkes unsatisfactory in the area of punctuality, repeatedly advised her of the need to improve and elicited commitments from her to improve. Her records reflected ten school-year tardies by March 30, 2003, and thirty-eight school-year tardies by May 14, 2004. Notably, Ashe-Gilkes demonstrated that she had the ability to control her punctuality in that she had only two school-year tardies by March 30, 2005, and no school-year tardies by March 30, 2006, as a result of the District withholding her increments. Unfortunately, her bad performance regarding punctuality returned with seven school-year tardies by November 30, 2006, twenty-five school-year tardies by March 30, 2007, and thirty-eight school-year tardies by June 12, 2007.

Hamilton once again rated Ashe-Gilkes "unsatisfactory" for punctuality on March 30, 2007, advised that the excessive tardiness has had a negative effect on the learning program and expected that significant improvement would be made in that area. The November 30, 2007, Modified PIP issued to Ashe-Gilkes by Shults directed that, "You must report to school on time, every day." Ashe-Gilkes needed no further positive assistance or suggestions to overcome this deficiency. She simply had to report to work on time. Incomprehensively, Ashe-Gilkes totally ignored these warnings and directives and proceeded to be late for school on fourteen occasions during her ninety-day improvement period. If a teacher took her job seriously and was sincerely

concerned about maintaining her tenured position, knowing from clear warnings that her behavior and performance would be microscopically scrutinized, she would have surely adjusted her schedule to make sure that she reported to school punctually virtually every day. Ashe-Gilkes had the ability to control and resolve this issue but chose not to do so and instead reported late twenty-six percent of her school days during the improvement period.

The tenure statute does not require the ultimate penalty of dismissal in every instance of proven inefficiency. As indicated above, the District acknowledged that Ashe-Gilkes had resolved some of the deficiencies set forth in the November 30, 2007, Modified PIP. Moreover, it failed to sustain its burden of proof with regard to some of the remaining deficiencies it contended had not been resolved by March 26, 2008. However, the several proven unresolved deficiencies go to the fundamental core of an efficient and effective teaching environment. I have carefully considered the nature and gravity of the charges singularly and in combination with one another, any extenuating or aggravating circumstances, and the effect on the maintenance of discipline and the proper administration of the school system. I have also considered the fact that the basis for the charges did not spring only from recent performance deficiencies and reflected much more than occasional lapses. The tenure charges followed the culmination of several years of extensive efforts, albeit unsuccessful, on behalf of her school's administrators to encourage her to improve her performance. Lesser measures to encourage her to cure her deficiencies, such as repeated increment withholdings, have proven unsuccessful. Finally, her abysmal failure-to or disinterest-in resolving her problem with punctuality and/or her failure to recognize the gravity of such a deficiency suggests that any penalty short of dismissal would be fruitless. Ashe-Gilkes was afforded an opportunity to demonstrate that she was still capable of effective teaching. See Rowley, supra, 205 N.J. Super. at 73. Her inefficiencies, however, are permanent and render her unfit to discharge her duties and functions as a teacher in the District. Under all of the circumstances, I **CONCLUDE** that Ashe-Gilkes's designation as an inefficient teacher warrants her dismissal.

ORDER

I **ORDER** that Claudia Ashe-Gilkes's tenure position as a teaching staff member in the School District of the City of East Orange, Essex County be forfeited as of the date of her suspension.

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

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

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

January 13, 2009
DATE

JESSE H. STRAUSS, ALJ

Date Received at Agency: 1/12/09

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 13 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

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APPENDIX

LIST OF WITNESSES

For Petitioner

Henry Hamilton

Leslie Shults

Thelma Patrick

For Respondent

Claudia Ashe-Gilkes

Maria Clingan

Janet Johnson-Franklin

LIST OF EXHIBITS IN EVIDENCE

For Petitioner

P-1 Observation, March 25, 2003

P-2 Evaluation, March 30, 2003

P-3 Observation, October 27, 2003

P-4 Observation, November 5, 2003

P-5 Evaluation, November 30, 2003

P-6 Hamilton (HH)/Ashe-Gilkes (AG) – Late, February 12, 2004

P-7 Evaluation with PIP, March 30, 2004

P-8 HH/AG – Memo, May 14, 2004

P-9 Evaluation, May 14, 2004

P-10 HH/AG – Late for staff, meeting and playground, June 7, 2004

P-11 Attendance 2003-2004

P-12 Memorandum regarding performance probation, July 6, 2004

P-13 LW/AG – Withheld Increment, June 30, 2004

P-14 Evaluation with PIP, November 30, 2004

P-15 HH/AG Late – Fail to follow procedures, February 4, 2005

P-16 HH/AG – February 16 Meeting, March 30, 2005

P-17 Observation, March 22, 2005

P-18 Observation (From Personnel), March 29, 2005

P-19 Evaluation, March 30, 2005

P-20 HH/AG – Failed to respond to directive, April 28, 2005

P-21 Attendance, 2004-2005

P-22 LW/AG – Reappoint without Employment Increment Increases And Adjustment 312 (2005-2006), June 29, 2005

P-23 HH/AG – Failure to follow Directions, October 25, 2006

P-24 Observation, November 8, 2006

P-25 Evaluation, November 30, 2006

P-26 Observation, March 13, 2007

P-27 HH/AG - Insubordination and Excessive Tardiness, March 19, 2007

P-28 HH/AG – Meeting Discussion – Recommend Adverse Action, March 21, 2007

P-29 Evaluation, March 30, 2007

P-30 Attendance, 2006-2007

P-31 Contract Renewal w/o salary adjustment notification, May 03, 2007

P-32 HH/AG – Response to your correspondence, June 12, 2007

P-33 Leslie Shults (LS)/AG – Plan Books, October 7, 2007

P-34 LS/AG – Absences, November 14, 2007

P-35 Modified PIP

P-36 Acknowledgment of Service, November 30, 2007

P-37 LS/AG – Plan Book, December 10, 2007

P-38 LS/AG – Sign Out, December 14, 2007

P-39 LS/AG – Class Pick-up, December 17, 2007

P-40 LS – Notes/Observation, December 19, 2007

P-41 LS/AG – Plan Book, January 5, 2008

P-42 LS – Notes/Observation, January 8, 2008

P-43 LS/AG – Classroom observation, January 8, 2008

P-44 LS/AG – Plan Book, January 15, 2008

P-45 LS/AG – CCCIS # Plan Book, January 30, 2008

P-46 LS/AG – Plan Book, February 16, 2008

P-47 LS/AG – Needs Improvement (Meeting), February 19, 2008

P-48 LS/AG – Objectives (Plan Book), February 26, 2008

P-49 LS/AG – Notice of Unresolved Deficiencies, March 26, 2008
P-50 Attendance, 2007-2008
P-51 CC/AG – Withheld Increment, June 5, 2008
P-52 Job Description
P-53 HH/AG, April 27, 2004
P-54 HH/AG, March 5 2007
P-55 HH/AG, November 6, 2006
P-56 MB/AG, April7, 2005
P-57 Evaluation Attendance Policy, January 3, 2000
P-58 Staff Late Sign-In, December 6, 2007, etc.
P-59 Staff Late Sign-In, December 12, 2007, etc.
P-60 Staff Late Sign-In – (a-f), January 10, 2008, etc.
P-61 LS/AG, March 4, 2008
P-62 Substitute teachers 2007-2008, January 8, 2008, and Williams's schedule (three pages)

For Respondent

R-1 Evaluation, March 30, 1998
R-2 Evaluation, November 30, 1999
R-3 Evaluation, March 30, 2000
R-4 Evaluation, November 30, 2000
R-5 Evaluation, March 30, 2001
R-6 Evaluation, November 30, 2001
R-7 Evaluation, March 30, 2002
R-8 Evaluation, November 30, 2002
R-9 Evaluation, November 30, 2005
R-10 Evaluation, March 30, 2006
R-11 Evaluation Rebuttal, January 22, 2004
R-12 Evaluation Rebuttal, June 14, 2004
R-13 Evaluation Conference, April 1, 2005
R-14 Attendance, 2005-2006
R-15 LS/AG, (not legible)

R-16 LS/AG, April 7, 2008
R-17 AG/LS, March 12, 2008
R-18 LS/AG, April 28, 2008
R-19 RP, AG and MM/HH, January 27, 2005
R-20 AG/HH, February 3, 2005
R-21 AG/HH, May 22, 2005
R-22 AG/HH, June 24, 2005
R-23 AG/LS, March 9, 2006
R-24 A G/HH, April 30, 2007
R-25 AG/HH, February 11, 2008
R-26 AG/HH, May 1 2007
R-27 HH/AG, May 14, 2004
R-28 AG/HH, June 6, 2007
R-29 AG/HH, November 17, 2006
R-30 AG/HH, November 17, 2006
R-31 AG/LS, January 11, 2008
R-32 Lesson Plans, September 24, 2007
R-33 Lesson Plans, December 10, 2007
R-34 Lesson Plans, February 4, 2008
R-35 Lesson Plans, March 24, 2008
R-36 Lesson Plans, April 2, 2008
R-37 Professional development certificates
R-38 Display of student work of respondent's students
R-39 Vocabulary lists
R-40 Photos of respondent's fifth-grade classroom
R-41 Sonday routines
R-42 Photos of respondent's students using computers
R-43 Photos of respondent's 2007-2008 classroom (the Media Center)
R-44 Professional development documentation
R-45 Kappa Delta Pi certificate
R-46 Who's Who Among America's Teachers, 2005-2006
R-47 Letter from Who's Who Among America's Teachers - 2006-2007
R-48 Late Sign-In Sheet, March 19, 2007, to March 21, 2007

R-49 Staff Attendance Improvement Plan

R-50 Memo from Dr. King, August 29, 2000

R-51 Memo from Dr. King, August, 2008

R-52 Late Sign-In Sheet, March 6, 2007, to March 9, 2007

R-53 Late Sign-In Sheet, April 3, 2007, to April 6, 2007

R-54 Late Sign-In Sheet, April 13, 2007, to April 25, 2007

R-55 Late Sign-In Sheet, November 1, 2007, to November 12, 2007

R-56 Late Sign-In Sheet, December 20, 2007, to January 4, 2008

R-57 Late Sign-In Sheet, September 18, 2006, to September 27, 2006

R-58 Late Sign-In Sheet, January 25, 2007, to February 2, 2007

R-59 Late Sign-In Sheet, February 2, 2007, to February 9, 2007

R-60 Late Sign-In Sheet, March 9, 2007, to March 14, 2007

R-61 Late Sign-In Sheet, April 6, 2007, to April 11, 2007

R-62 Late Sign-In Sheet, March 18, 2008, to March 25, 2008

R-63 Late Sign-In Sheet, April 28, 2008, to May 2, 2008

167-09

#167-09E

OAL DKT. NO. EDU 4425-09
AGENCY DKT. NO. 93-5/09

DELORA HILL,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS AND DEPARTMENT OF EDUCATION, KATZENBACH SCHOOL FOR THE DEAF,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter – which included a CD of the digital recording of the hearing conducted at the Office of Administrative Law (OAL) – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon full review, the Commissioner adopts the recommended Order granting emergent relief in this matter as she concurs with the ALJ, for the reasons clearly stated in her decision, that the petitioner has satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby granted. This matter shall proceed to plenary hearing on its merits – scheduled for August 5, 7, 17, 18 and 19, 2009 – as directed by the ALJ.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/28/09

Date of Mailing: 5/28/09

* 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 GRANTING
EMERGENT RELIEF
OAL DKT. NO. EDU 4425-09
AGENCY DKT. NO. 93-5/09

DELORA HILL,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMININERS AND DEPARTMENT OF EDUCATION, KATZENBACH SCHOOL FOR THE DEAF,
Respondents.

Walter R. Bliss, Jr., Esq., for petitioner

Bryant Lawrence Horsley, Jr., Deputy Attorney General, for respondents (Anne Milgram, Attorney General of New Jersey, attorney)

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

Petitioner seeks by way of interim relief,[1] pursuant to N.J.A.C. 6A:3-1.6, the return to her position as an instructor 2 in American Sign Language (hereinafter "ASL") at the Katzenbach School and the extension, renewal or granting anew of the

[1] Counsel was instructed to re-file the pleadings by May 26, 2009, as they had been previously filed by a non-attorney.

provisional certification as may be required to permit her to resume her teaching duties pending the outcome of this appeal.

The following facts, relevant to this petition, are undisputed. Petitioner is trained as an instructor of ASL. She is a graduate of the Katzenbach School and also graduated from Gallaudet University with a B.A. in ASL. While teaching at Katzenbach in March 2005, she obtained a Certificate of Eligibility from the Department of Education qualifying her to seek employment as a Teacher of ASL through the alternate route to teacher certification. In 2007, she received a one year Provisional Certificate which expired in July 2008. During the final phase of her certification, petitioner was supposed to be evaluated three times during the 2007-2008 school year in accordance with the requirements of N.J.A.C. 6A:9-8.6. However, contrary to the regulatory requirement, the three evaluations were not performed on a timely basis and respondent Katzenbach's principal caused them to be "back-dated." Also contrary to the requirement of N.J.A.C. 6A:9-8.6(c), petitioner's assigned mentor, Kim Arrigo, performed the first two formative evaluations. The final evaluation was performed by Principal Linda Hayward on or about June 18, 2008. She gave petitioner a "disapproved" recommendation as to the awarding of a standard certification.

Petitioner appealed from that recommendation to the Board of Examiners pursuant to N.J.A.C. 6A:9-17.18(a). Respondent Katzenbach filed a reply. The Board decided the appeal on the papers, in accordance with N.J.A.C. 6A: 9-17.18(a)(3), determining no further fact finding was necessary. By letter dated October 17, 2008, Board Secretary Robert Higgins, advised the Board granted petitioner's "appeal so as to permit her to participate in a provisional teacher program for one additional year." In the meantime, by letter dated August 19, 2008, Katzenbach Superintendent Dennis Russell had advised petitioner that as she did not possess a valid teaching certificate he was suspending her with pay effective immediately. Based upon the Board's ruling, petitioner's prior counsel requested her reinstatement as a provisional teacher for an additional year. Thereafter the Board clarified to the petitioner that it had no authority to

compel Katzenbach to reinstate her and that it provided her the opportunity to seek further employment as a provisional teaching staff member.

On December 23, 2008, Katzenbach issued a Preliminary Notice of Disciplinary Action seeking petitioner's removal based on the fact that the provisional certification had expired. Petitioner appealed the removal and ultimately, filed this petition pursuant to N.J.A.C. 6A:4-2.1(a)1, 6A:3-1.1 and 6A:3-1.6, in accordance with the Commissioner's decision of April 13, 2009.

In her petition seeking emergent relief, petitioner asserts she meets the criteria set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) and codified at N.J.A.C. 6A:3-1.6(b) because the Board has already reversed the disapproval recommendation and issued a provisional certification which will expire in July 2009; there is still a vacancy for an ASL teacher at Katzenbach, the only school for the deaf in the state; and the only reason Katzenbach sought her removal as indicated in the PNDA was because her provisional certification had expired. She asserts that she will suffer irreparable harm if emergent relief is not granted because Katzenbach is the only school for the deaf in the state and pragmatically, her ability to teach ASL in the school setting, is severely restricted. She further asserts that she has a likelihood of prevailing on the merits and the legal right underlying her claim is settled because the Board of Examiners has already ruled in her favor by reversing the certification recommendation based on her appeal filed pursuant to N.J.A.C. 6A:9-17.18(a). Finally, she asserts that when the equities and interests of the parties are balanced she will suffer greater harm than the respondent if the relief is not granted because of the limited opportunities to teach ASL in a school and her daily harm of being unemployed and without benefits.

Respondent asserts that petitioner has not proven irreparable harm since monetary damages can be awarded if petitioner is ultimately successful in her petition. Additionally, whether or not petitioner will be issued a standard certificate is unsettled and therefore not only is the legal right underlying her claim unsettled, she is not entitled

to a standard certificate for failure to comply with N.J.A.C. 6A:9-8.8, so she is unlikely to prevail on the merits.

In order to be entitled to emergent relief, petitioner must meet all the criteria set forth at N.J.A.C. 6A:3-1.6(b) as the requirements are read in the conjunctive and not the disjunctive. I **FIND** that the petitioner has met all of the criteria for essentially the reasons she has set forth in her petition and as further indicated herein. She successfully appealed her "disapproved" recommendation pursuant to N.J.A.C. 6A:9-17.18(a) and the Board, determining it needed no further fact finding, reversed the certification recommendation of "disapproved" given by principal Hayward. Katzenbach's PNDA and the suspension were based upon the expiration of the certification expiration only and the Board issued an extension of one year to the provisional teaching certification set to expire in July 2009. Once the disapproved recommendation was reversed and the provisional certification extension of one year granted, the only basis that Katzenbach indicated to be the reason for the suspension and PNDA ceased to exist. While the irreparable harm does not result from the loss of employment and benefits as asserted by the petitioner, although I am not minimizing the impact on her and her family by such a loss, the irreparable harm results because of the unique avocation she has chosen, i.e., to become a certified teacher of ASL, and the limited opportunity to achieve that is at the Katzenbach School for the Deaf.

Based on the foregoing, I am **GRANTING** petitioner's application for **EMERGENT RELIEF** and hereby **ORDER** petitioner be reinstated to her position as Instructor 2 of ASL at the Katzenbach School and that her provisional teacher's certificate be extended pending the outcome of this appeal.

The hearing in this matter is hereby scheduled for August 5, 7, 17, 18 and 19, 2009, at 9:00 a.m. Respondent's counsel is instructed to file an answer to the petition within fourteen days.

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.

May 26, 2009
DATE

ANA C. VISCOMI, ALJ

/jfk

168-09

OAL DKT. NO EDU 1124-06
AGENCY DKT. NO. 351-12/05

JANET LAUFER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon 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.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/29/09

Date of Mailing: 5/29/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01124-06

AGENCY DKT. NO. 351-12/05

JANET LAUFER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

Respondent.

Alfred F. Maurice, Esq., for petitioner (Springstead & Maurice, attorneys)

Mark A. Tabakin, Esq., for respondent (Weiner Lesniak, attorneys)

Record Closed: April 15, 2009 Decided: April 15, 2009

BEFORE **MUMTAZ BARI-BROWN,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on January 6, 2006, 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 hearing was scheduled on April 24, 2008. Prior to the date of hearing the parties settled the matter. The attached Settlement Agreement and Board Resolution were submitted on April 15, 2009, 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.

April 15, 2009
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency: 4-17-09

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 17 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

da

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made and entered into between the **Board of Education of the City of Englewood** (the "Board") and **Janet Laufer** (Laufer or Petitioner), collectively, "the Parties".

WHEREAS, Petitioner filed a Petition of Appeal with the Commissioner of Education under Agency Reference Number: 351-12/05 and O.A.L. Docket Numbers: EDUOR 01124-2006N, claiming improper withholding of employment and adjustment increments for the 2004-2005 and 2005-2006 school years.

WHEREAS, The Board has filed an Answer to the petition denying Petitioner's claims that resulted in the matters being referred to the O.A.L. for disposition as a contested case where it was listed for trial.

WHEREAS, Petitioner retired on December 31,2005 and qualified for a pension with the New Jersey Division of Pensions, Teachers Pension and Annuity Fund. The Board certified Petitioner's final salary to the Division of Pensions. Said final certification did not include adjustments for the payment set forth in this agreement or any subsequent payments that were or should have been made to Petitioner as the result of retroactive pay increases awarded to staff as the result of contract settlements with the Englewood Teachers Association for the period prior to Petitioner's retirement.

WHEREAS, the Board and Petitioner, now mutually agree to settle the matters and allegations in dispute; and

WHEREAS, all parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable consideration, the parties hereby agree as follows:

1. The **"Board"**, as used herein, shall at all times mean the Board of Education of the City of Englewood, its affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, and successors, whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.

2. **"Petitioner"**, as used herein, shall mean Janet Laufer and her successors-in-interest, heirs, administrators and assignees.

3. In consideration of the mutual promises set forth herein and for other valuable consideration, within thirty (30) business days of the Board's receipt of an executed copy of this Settlement Agreement, the Board shall pay to the Petitioner the sum of $7,051.99. less appropriate tax with-holding and pension contributions applicable to the period. As Petitioner is retired, there will be no other withholdings from her pay. The parties acknowledge and agree that said payment is in full and complete settlement of Petitioner's claims to salary and pension credits for the period between July 1, 2004 and December 31, 2005 including the underpayment resulting from retroactive salary adjustment arising out of the settlement with the Englewood Teachers Association for the same period. The Board paid petitioner $2,014.99 on January 20, 2006 for services performed or retroactive pay for 2005. Said monies were not calculated for pension purposes because they were paid after Petitioner's retirement date. The Board will re-

certify Petitioner's final salary to include the amount paid hereunder and the $2015 paid in 2006.

4. In addition to the payment described inn paragraph 3, above, the Board shall notify the Division of Pensions of said payment and re-certify Petitioner's final salary to the Division of Pensions for calendar years in question so that she receives pension credit for said payment.

5. This Settlement Agreement is contingent on and subject to approval and ratification by the Board.

6. This Settlement Agreement contains the full agreement of the Board and the Laufer as respects the resolution of the issues raised in the above-referenced Petition of Appeal before the Commissioner of Education.

7. Petitioner will withdraw the Petition of Appeal under the above docket numbers, with prejudice, upon the receipt of a fully executed settlement agreement and Resolution executed by the Board and payment as described in this agreement. This agreement shall not be construed or interpreted as a settlement or waiver of any rights or claims of the Petitioner other than those described in the petitions of appeal set forth above. Specifically reserved are all other rights and claims relating to Petitioner's employment including, but not limited to, Workers Compensation claims, claims under the NJLAD or similar claims, specifically, **Laufer v Englewood Public School District Ber-L-6580-07.** If any term, provision or condition of this Settlement Agreement is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Settlement Agreement other than the consideration set forth in paragraphs 3, 4 and 5.

8. This Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.

9. The parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions that are necessary or appropriate to effect the terms of this settlement agreement.

10. This Settlement Agreement may be executed in counterparts, each of which shall be deemed to be an original copy, but all of which together shall be deemed one and the same instrument.

11. This Settlement Agreement contains the entire Agreement between the Petitioner and the Board with regard to the matters set forth in it. It shall be binding upon and inure to the benefit of their officials, officers, directors, representatives, employees, associates, partners, agents, servants and successors in interest and enforceable in any court of competent jurisdiction.

12. This Settlement Agreement shall become effective immediately following approval by the

Dated: November , 2008

WITNESS:

_____

WITNESS:

Isabella A. Stolowsky

Dated: November 18, 2008

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD

BY: _____

By: Mark Tabakin
Mark Tabakin
Board Atty, on behalf of the Englewood BOE

Janet D. Laufer
JANET LAUFER

169-09

OAL DKT. NO. EDU 9972-07
AGENCY DKT. NO. 233-8/07

L-S. E. on behalf of minor child, A.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF TRUSTEES OF THE QUEEN CITY ACADEMY CHARTER SCHOOL, UNION COUNTY AND CHAR STANKO, DIRECTOR,	:	DECISION
RESPONDENTS.	:	

The record in this matter, the proposed Settlement Agreement, 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. The petition is hereby dismissed, subject to compliance with the settlement terms.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 5/29/09

Date of Mailing: 5/29/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09972-07

AGENCY REF. NO. 233-8/07

L-S.E., on behalf of minor child, A.E.,
Petitioner,

v.

BOARD OF TRUSTEES OF THE QUEEN CITY ACADEMY CHARTER SCHOOL, UNION COUNTY UNION COUNTY AND CHAR STANKO, DIRECTOR,

Defendants.

Renee Anthony, Esq., for petitioners

Patricia Bombelyn, Esq., for respondent (Perez & Bombelyn, P.C., attorneys)

Record Closed: April 14, 2009 Decided: April 14, 2009

BEFORE **J. HOWARD SOLOMON**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 4, 2007 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 and board resolution 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.

4/15/09
DATE

J. Howard Solomon
J. HOWARD SOLOMON, ALJ

Date Received at Agency: 4-16-09

Mailed to Parties: Laura Sudies
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 16 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

db

JAMES & LASHONA ENSLEY, on behalf of A.E., Petitioners, v. BOARD OF TRUSTEES OF THE QUEEN CITY ACADEMY CHARTER SCHOOL & DR. CHAR STANKO, (former) ACADEMIC DIRECTOR.	Before The Commissioner of Education of the State of New Jersey Settlement Agreement Docket Number: 09972-2007

This Agreement, made this 23 day of March, 2009, by and between petitioners, James and LaShona Ensley, on behalf of their child, A.E. (hereinafter "petitioners") and respondents, The Queen City Academy Charter School and (former) Academic Director Dr. Char Stanko (hereinafter "respondents").

WHEREAS, A.E. attended The Queen City Academy Charter School in the 2006-07 school year; and

WHEREAS, a disciplinary hearing was conducted on May 22, 2007 as a result of an incident which took place on May 8, 2007; and

WHEREAS, the petitioners file a timely appeal of the discipline, which controversy was docketed in the Office of Administrative Law under docket number 09972-2007 ; and

WHEREAS, both parties feel that it would be in their best interest to make a complete and final settlement between themselves; and

WHEREAS, the parties voluntarily waive their right to court determination of case issues and acknowledge that the settlement terms set forth in this Agreement represent a compromise of differences to arrive at a final solution; and

WHEREAS, the parties have each had the individual advice of separate counsel of their choosing, and they are each entering into this Agreement voluntarily; and

Encl. J-1

WHEREAS, each of the parties has fully read and fully understands the terms, conditions and provisions of this Agreement and believes them to be fair, adequate, and reasonable, and each of them freely and voluntarily accepts such terms, conditions and provisions; and

NOW THEREFORE, in consideration of the mutual covenants, promises and agreements hereinafter set forth, it is understood and agreed, subject to the approval of the Commissioner of Education of the State of New Jersey, as follows:

1. Both parties will cooperate in a joint application to be made pursuant to N.J.A.C. 6A:32-7.8 for removal of the record of expulsion of May 22, 2007, contained in A.E.'s school record maintained by The Queen City Academy Charter School.

2. The petitioners' petition for appeal is hereby dismissed with prejudice.

3. In the event of denial of the joint application made by the parties to remove the record of expulsion contained in A.E.'s record, the petitioners understand that petition for appeal may not be restored.

4. Subject to the provisions for this Agreement, each party has released and discharged, and by this Agreement, does for himself or herself, and his or her child A.E., and his or her legal heirs, representatives, executors, administrators, and assigns, release and discharge the other of and from all cause of action, claims, rights or demands whatsoever in law or in equity, in which either of the parties ever had or now has against the other.

5. The foregoing agreement is subject to ratification by resolution of The Board of Trustees of The Queen City Academy Charter School at its next regularly scheduled Board meeting on April 8, 2009.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year written below their respective names.

JAMES ENSLEY
Petitioner on behalf of A.E. 3/23/09

LASHONYA ENSLEY
Petitioner on behalf of A.E. 3/23/09

RENEE ANTHONY, ESQ. 3/23/09
Attorney for Petitioners

Dr. CHAR STANKO 3/23/09
(former) Academic Director
The Queen City Academy
Charter School

PATRICIA BOMBELYN, ESQ.
Attorney for
The Queen City Academy 3/23/09
Charter School

The Queen City Academy Charter School
815 West 7th Street
Plainfield, New Jersey 07063
Phone 908.753.4700 Fax 908.753.4816
www.queencity.edu

RaShawn M. Adams
Chief Academic Officer/Director

Board of Trustees Resolution

At the Board of Trustees Regular Meeting of April 1, 2009, the Board of Trustees of the Queen City Academy Charter School resolved the following:

Be it resolved that the Queen City Academy Charter School Board of trustees, hereby resolves:

To approve the terms of the proposed settlement that was negotiated prior to the start of the hearing before Judge Solomon, of The Office of Administrative Law, on March 23, 2009, concerning the appeal of the student disciplinary determination of the Board which was made on May 22, 2007. (Docket Number: 09972-2007).

Signed: _____ Dated: 4/1/09
Julie Jerome, Board President

Signed: _____ Dated: 04/01/09
Philip J. Acosta, Board Secretary

170-09

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF MELISSA VAN PELT, GRAY CHARTER SCHOOL, NEWARK, ESSEX COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In September 2007, 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 unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 for resigning her position as an eighth grade teacher on one weeks' notice, and contrary to the terms of her employment contract. The respondent contended that the aforementioned statute is not applicable to charter schools. The petitioning charter school filed a motion for summary decision.

The ALJ found that: *N.J.S.A.* 18A:26-10 applies to teaching staff members in charter schools; and *N.J.S.A.* 18A:26-10 prohibits a teaching staff member from ceasing to perform her duties contrary to the provisions of her contract with the charter school. The ALJ concluded that respondent ceased to perform her duties before the expiration of the term of her employment contrary to *N.J.S.A.* 18A:26-10, and that respondent's teaching certificate should be suspended for a period of one year.

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, summary decision is granted to petitioner, and respondent's certificate is suspended for a period of one year from the date of the filing of this decision – a copy of which has been 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.

May 29, 2009

OAL DKT. NO. EDU 11556-07
AGENCY DKT. NO. 291-10/07

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF MELISSA VAN PELT, GRAY CHARTER SCHOOL, NEWARK, ESSEX COUNTY.	COMMISSIONER OF EDUCATION DECISION

The record of this matter, the Initial Decision of the Office of Administrative Law, and respondent's exceptions have been reviewed. For the reasons set forth therein, the Commissioner adopts the Initial Decision as the final decision in this case.

Respondent's suggestion that her employment by a charter school rendered her exempt from the provisions of *N.J.S.A.* 18A:26-10 is rejected. The Commissioner has previously ruled – on an interlocutory motion filed in this case – that respondent, as a charter school employee, is subject to the sanctions set forth in that statute,[1] which states in pertinent part:

> 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 or, in the case of an approved private school for the disabled, the board of directors of the school, 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.

Respondent did not perform the duties to which she had contractually bound herself. She did not have the consent of the petitioning charter school's administrator to leave service on a few days notice and, under the circumstances of this case, could not have reasonably believed that she would receive such consent. In sum, charter schools are public schools and, as a charter school employee, respondent's contractual responsibilities and her duty to the students were in no way

[1] *See, IMO Suspension of the Teaching Certificate of Melissa Van Pelt, Gray Charter School, Newark, Essex County,* et al., Commissioner Decision on Motion for Interlocutory Appeal, Decision #297-08 (July 9, 2008).

distinguishable from the responsibilities and duties of teachers in the traditional public schools of the Newark school district.

Further, the Commissioner has consistently explained, in decisions implicating *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8, that the underlying purpose of those statutory provisions is deterrence of the disruption of services that occurs when teachers abruptly resign. *See, e.g. Victoria Carrelle v. Board of Education of the Township of Bloomfield, Essex County*, OAL Dkt. No. EDU 1852-03, Agency Dkt. No. 6-1/03, Commissioner Decision No. 49-04, February 9, 2004, at 10-11, which states, in pertinent part:

> Notice . . . is intended to protect both parties. Certainly the Board would not countenance a teacher who is perhaps offered a better paying position elsewhere . . . to disappear . . . thereby rendering no service to the children of the district with resulting disruption and detriment to the educational process. The Board would certainly expect the teacher to be on duty for the sixty days to better enable the Board to find an adequate replacement for the teacher while protecting the educative process for the children.

Thus, to distinguish between teachers of charter schools and traditional public schools in the application of *N.J.S.A.* 18A:26-10 would create a false dichotomy and cannot be assumed to have been the intent of the legislature.

The Commissioner also rejects the argument presented in respondent's exceptions – *i.e.,* that the absence of a 60-day notice-of-termination clause in respondent's employment contract affects the nature of the sanction respondent should receive for leaving petitioner in the lurch. It is well-grounded in education law that determination of the sufficiency of a term of notice pursuant to this statute is dictated by the terms of the parties' employment contract and any resignation or termination must be in accordance with the terms of such agreement. *See Ralph Boguszewski v. Board of Education of the Borough of Woodcliff Lake, Bergen County,*

1979 *S.L.D.* 727, *aff'd* State Board 1980 *S.L.D.* 1477. Here, petitioner's contract contained a provision which stipulated that respondent could not terminate her employment without petitioner's consent – which was not given in this case. Thus, respondent was in violation of the contract and subject to sanction.

Second, the circumstances warrant a maximum sanction. Respondent faxed her resignation letter to the school administrator only two days before staff training was to commence for the 2007-2008 school year and one week before school was to begin. The result was disruption significant enough to warrant the suspension of respondent's teaching certificate for a full year. *See, e.g. Board of Education of the Borough of Alpine, Bergen County v. Leonid Yuz,* EDU 1116-06, Initial Decision (July 17, 2008) at 8, adopted by Commissioner, September 23, 2008, http://lawlibrary.rutgers.edu/oal/html/initial/edu01116-06_1.html :

> Generally, the Commissioner has imposed the full one-year suspension of a teaching certificate for leaving a district without adequate notice. *E.g., Green v. School District. of Mount Holly*, OAL Dkt. No. EDU 0773-02, Initial Decision Sept. 5, 2002, adopted by Commissioner, Decision No. 380-02, Oct. 25, 2002; *In re Suspension of the Teaching Certificate of Savino*, OAL Dkt. No. EDU 11688-04, Initial Decision July 28, 2005, modified by Commissioner, Decision No. 308-05, Aug. 30, 2005, affirmed by State Bd. of Ed. Feb. 3, 2006; *In re Suspension of the Teaching Certificate of Montalbano*, OAL Dkt. No. EDU 3588-00, Initial Decision April 24, 2001, adopted by Commissioner, Decision No. 186-01, June 11, 2001; *Penns Grove-Carneys Point v. Leinen*, 94 *N.J.A.R.*2d (EDU) 405 (Comm'r May 4, 1994); *Dumont Bd. of Educ. V. Zweig*, 1988 *S.L.D.* 904 (March 30, 1988), modified 1988 *S.L.D.* 914 (Comm'r May 16, 1988).

Nor does the record reveal mitigating circumstances that would justify a lesser sanction. Respondent's resignation does not appear to have been driven by illness or other such exigent circumstances. Her resignation letter explained that she had "decided to pursue other career opportunities," and it is undisputed that she accepted employment and served in the

Woodbridge public school district for the 2007-2008 school year. Thus, the Commissioner finds it unnecessary to remand this matter, as respondent suggests, for further proceedings relating to respondent's reasons for her unprofessional conduct.

In light of the foregoing, the Initial Decision recommending the imposition of a year's suspension of respondent's teaching certificate is adopted, and the New Jersey Department of Education, State Board of Examiners shall be so advised.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 5/29/09

Date of Mailing: 5/29/09

* 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 11556-07
AGENCY DKT. NO. 291-10/07

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF MELISSA VAN PELT, GRAY CHARTER SCHOOL, NEWARK, ESSEX COUNTY.

Cherie L. Adams, Esq., for Gray Charter School
(Adams, Stern, Gutierrez & Lattiboudere, attorneys)

Nancy I. Oxfeld, Esq., and **Randi Doner April**, Esq.,
for Melissa Van Pelt
(Oxfeld Cohen, Attorneys)

Record Closed: April 7, 2009 Decided: April 14, 2009

BEFORE **RICHARD McGILL**, ALJ:

Gray Charter School (petitioner) seeks the suspension of the teaching certificate of Melissa Van Pelt (respondent) for unprofessional conduct based upon a resignation without sufficient notice. Respondent maintains that the statutes upon which petitioner relies are not applicable to her as an employee of a charter school and that any suspension is discretionary in nature. Petitioner now moves for summary decision.

PROCEDURAL HISTORY

At the request of petitioner, the Commissioner of Education issued an Order to Show Cause on September 27, 2007, ordering respondent to show cause why her teaching certificate should not be suspended for unprofessional conduct pursuant to N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8. Respondent filed an Answer on October 19, 2007, and the matter was transmitted to the Office of Administrative Law on October 26, 2007, for determination as a contested case.

Respondent's main contention in this proceeding is that N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 are not applicable to charter schools. In the same general time frame, six similar matters were transmitted to the Office of Administrative Law raising the issue of the applicability of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 to charter schools.[1] By Order dated March 31, 2008, the seven matters were consolidated for the limited purpose of determining the applicability of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 to charter schools.

Three teachers filed a motion to dismiss based on the contention that N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 do not apply to charter schools. In an Order dated June 6, 2008, the determination was made that these statutes, N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8, are applicable to charter schools. However, one statute, N.J.S.A. 18A:18-8, relates to teachers who have tenure. The determination was that this statute is not applicable to teachers who do not have tenure. Five of the seven teachers in the consolidated proceeding including respondent herein did not have tenure. Accordingly, the Order to Show Cause was dismissed as to those five teachers including respondent.

[1]The other matters are as follows: In the Matter of the Suspension of the Teaching Certificate of Nadira Raghunandan, Gray Charter School, Essex County, OAL Dkt. No. EDU 11437-07, Agency Dkt. No. 292-10/07; In the Matter of the Suspension of the Teaching Certificate of Claude Gentil, Gray Charter School, Essex County, OAL Dkt. No. EDU 11745-07, Agency Dkt. No. 298-10/07; In the Matter of the Suspension of the Teaching Certificate of Tyarra Hunter, Gray Charter School, Essex County, OAL Dkt. No. EDU 11956-07, Agency Dkt. No. 293-10/07; In the Matter of the Suspension of the Teaching Certificate of Danielle Ponti, Gray Charter School, Essex County, OAL Dkt. No. EDU 11971-07, Agency Dkt. No. 294-10/07; In the Matter of the Suspension of the Teaching Certificate of Taheerah Jackson, Gray Charter School, Newark, Essex County, OAL Dkt. No. EDU 11972-07, Agency Dkt. No. 300-10/07; and In the Matter of the Suspension of the Teaching Certificate of Jenelle Stokes, Gray Charter School, Essex County, OAL Dkt. No. EDU 12569-07, Agency Dkt. No. 332-10/07.

One or more parties sought interlocutory review of the Order dated June 6, 2008. By Decision on Motion for Interlocutory Review dated July 9, 2008, the Commissioner of Education affirmed the Order dated June 6, 2008. Thereafter, by Order dated August 14, 2008, the seven matters were severed for each to proceed separately.

This matter was scheduled for hearing on February 26, 2009. On January 27, 2009, petitioner filed a motion for summary decision. After respondent submitted a response to the motion and petitioner filed a reply, the hearing was adjourned for consideration of the motion for summary decision.

MOTION FOR SUMMARY DECISION

A. Legal Standard for Summary Decision

A motion for summary decision should be granted where there is no genuine issue as to any material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). The same standard is applied in the courts of this State pursuant to *R.* 4:46-2. Summary judgment "is designed to provide a prompt, businesslike and inexpensive method" to dispose of actions which do not present any genuine issue of material fact. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). The movant must show that there is no genuine issue of material fact, and all inferences of doubt are drawn against the movant. Id. at 74-75. However, excessive caution which would undercut the purposes of a motion for summary judgment should be avoided. Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 65 (1980). Thus, if the opposing party offers only facts which are immaterial or insubstantial in nature, these circumstances should not defeat a motion for summary judgment. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. at 75. Although the pleadings may raise a factual issue, summary judgment procedure pierces the allegations in the pleadings, where the other papers show the absence of any genuine issue of material fact. Ibid.

In determining whether there exists a genuine issue as to a material fact, the judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995).

B. Facts

A review of the pleadings and the other papers submitted in regard to the motion indicates that there is no genuine issue as to any material fact. Based upon the papers submitted, I **FIND** as follows:

1. Miss Verna Gray is the Executive Director of the Gray Charter School.

2. Respondent was an eighth grade teacher at Gray Charter School during the 2006-2007 school year.

3. On or about May 4, 2007, respondent executed an employment agreement to teach eighth grade at the Gray Charter School for the 2007-2008 school year beginning in August 2007 and ending in June 2008.

4. On August 13, 2007, respondent tendered a letter of resignation approximately one week before school opened.

5. The employment agreement between petitioner and respondent contains a section entitled "Termination." This section provides that the agreement may terminate upon written agreement of both parties. The agreement does not contain a sixty-day notice clause.

6. Respondent was employed by the Woodbridge Township School District for the 2007-2008 school year.

C. Law and Analysis

As noted above, the determination has been made in regard to a motion to dismiss that N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 apply to teaching staff members at charter schools. The portion of the petition based on N.J.S.A. 18A:28-8, which applies to tenured teachers, was dismissed, because respondent does not have tenure.

The applicable statute 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 or, in the case of an approved private school for the disabled, the board of directors of the school, 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.

In the context of this case, this statute prohibits a teaching staff member from ceasing to perform his duties without the consent of the charter school. Here, respondent entered into an employment agreement for a term set to expire on June 30, 2008. Nonetheless, respondent submitted a letter of resignation dated August 13, 2007. This date was approximately one week before the beginning of the school year. Under the circumstances, I **CONCLUDE** that respondent ceased to perform her duties before the expiration of the term of her employment contrary to N.J.S.A. 18A:26-10.

Petitioner seeks a suspension of respondent's teaching certificate for a period of one year and cites multiple cases in which such action was taken. According to petitioner, this matter should be handled in the same manner as in the cited cases.

Respondent points to the word "may" in the portion of N.J.S.A. 18A:26-10 that refers to a suspension for a period not exceeding one year. Based thereon, respondent argues that a suspension under N.J.S.A. 18A:26-10 is discretionary rather than mandatory. With respect to the cases cited by petitioner, respondent argues that they are distinguishable in that each one involved a contract that mandated sixty days notice to the board of education.

The prior precedent has been summed up as follows: "Generally, the Commissioner has imposed the full one-year suspension of a teaching certificate for leaving a district without adequate notice. (Citations omitted). In rare circumstances in which the Commissioner has seen fit to lessen the suspension period, it was for compelling reasons. (Citation omitted.)" Board of Education of Borough of Alpine v. Leonid Yuz, EDU 1116-06, Initial Decision (July 17, 2008), adopted, Commissioner of Education (September 23, 2008), http://lawlibrary.rutgers.edu/oal/search.shtml.

Here, the timing of respondent's resignation was particularly problematic in that it occurred one week before the beginning of the school year. In addition, respondent offered no mitigating circumstances with respect to the length of the suspension. The absence of a sixty-day notice provision in respondent's contract is of no significance in this situation. Therefore, I **CONCLUDE** that respondent's teaching certificate should be suspended for a period of one year.

Accordingly, it is **ORDERED** that:

1. Petitioner's motion for summary decision is granted.

2. Respondent's teaching certificate 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.

April 14, 2009

DATE

RICHARD McGILL, ALJ

Date Received at Agency: 4/14/09

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 15 2009

DATE

OFFICE OF ADMINISTRATIVE LAW

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171-09

#171-09

IN THE MATTER OF THE TENURE	:	
HEARING OF LISA WEAVER,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON,	:	
PASSAIC COUNTY.	:	
	:	

SYNOPSIS

Petitioner certified five tenure charges against respondent Lisa Weaver – a tenured secretary in the district – for alleged neglect, misbehavior, insubordination, conduct unbecoming, and other just cause relating to her handling of unemployment compensation matters after a stipend she had been paid for this work was eliminated. The respondent denied the allegations. Petitioner sought termination of respondent's employment.

The ALJ found that: the Board failed to carry its burden of proving two of the tenure charges, but did prove that respondent exhibited unbecoming conduct by 1) disposing of unemployment documents, 2) exhibiting a lack of candor during the investigation, and 3) failing to answer the general counsel's telephone as part of her work responsibilities; respondent further displayed neglect of duty by discarding documents, as well as insubordination and neglect of duty for failing to answer the telephone; respondent's conduct in unilaterally adopting a practice of discarding unemployment compensation documents – without taking steps to confirm whether this action should be taken – constitutes unbecoming conduct, though her lack of training and supervision in this area are mitigating factors for penalty purposes; and dismissal from employment is an unduly harsh penalty under the circumstances presented. The ALJ concluded that forfeiture of the pay withheld during Weaver's suspension period, and the loss of any salary increment to which she would have been entitled in the 2008-09 school year, constitutes appropriate discipline under the circumstances.

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

June 1, 2009

OAL DKT. NO. EDU 7558-08
AGENCY DKT NO. 159-6/08

IN THE MATTER OF THE TENURE	:	
HEARING OF LISA WEAVER,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON,	:	
PASSAIC COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The District sought and received an extension of time within which to file exceptions to the Initial Decision. Such exceptions were filed in accordance with the extended timeline and these – along with replies thereto on behalf of Ms. Weaver – were fully considered by the Commissioner in reaching her determination herein.

On exception, the District renews arguments advanced below in objection to certain of the Administrative Law Judge's (ALJ) conclusions: 1) Citing to selected hearing testimony, it contends that the ALJ erred in concluding that respondent did not cease or reduce her work on unemployment compensation matters subsequent to the elimination of the stipend for this work (District's Exceptions at 2-4); 2) It maintains the ALJ erroneously concluded that Judith Granick's testimony was not credible while accepting that of respondent as credible (*Id.* at 5-7); 3) Presenting a number of prior school law decisions, it charges that the ALJ mistakenly found that respondent's actions in this matter did not warrant her removal from her tenured position (*Id.* at 7-11). As it is determined that these issues were considered, and the

ALJ's conclusion on each of them was fully explained in her Initial Decision, the District's reiteration of its arguments will not be revisited here.

Upon a comprehensive review of the record of this matter – which included transcripts of the hearing conducted by the OAL on September 16, 17, 19 and October 28, 2008 – and finding the District's exceptions unpersuasive – the Commissioner determines to adopt the ALJ's recommended decision.

Initially, the Commissioner recognizes that in this, as in all tenure matters, the petitioner (District) bears the burden of proving each of its charges against respondent by a preponderance of the competent, relevant and credible evidence. The Commissioner has given full consideration to all evidentiary proofs which comprise the record and is cognizant of the fact that of particular importance was 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 finds that the ALJ's Initial Decision presents a recitation of the relevant testimony and a concomitant analysis of the evidence – which details her credibility determinations, the weight she ascribed to such evidence and her resultant factual findings – on each of the charges against respondent. The Commissioner finds these to be well-grounded in the record, thereby providing no cause whatsoever for alteration of her determinations.

The Commissioner, therefore, concurs with the ALJ – for the reasons clearly explicated in her decision – that the District's allegations of neglect, misbehavior, insubordination, unbecoming conduct and/or other just cause against respondent have been established on Charge Two – discarding documents concerning employees' unemployment compensation claims; Charge Three – providing false information in connection with the investigation regarding her unemployment work; and Charge Four – failing to answer general counsel's telephone. The Commissioner, however, further agrees that the District has failed to sustain its burden of proof on Charge One – which alleges that respondent substantially decreased her unemployment work after her stipend was eliminated and this charge is, therefore, dismissed. Similarly dismissed is Charge Five which is not a stand alone charge but rather simply a demand for respondent's removal from her position based on the truthfulness of the other four certified charges.

Turning to the appropriate penalty to be imposed in this matter, the Commissioner is mindful that she is required to consider respondent's prior record in the District, the nature and gravity of her offenses under all the circumstances involved, and any evidence as to provocation, extenuation or aggravation, and must consider any harm or injurious effect which her conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer*, 93 *N.J. Super.* 421-22 (App. Div. 1967). Initially in this regard, the Commissioner finds and concludes that the proven charges against respondent are, without question, serious in nature. As aptly noted by the ALJ:

> ...as a confidential secretary, Weaver is held to a high standard of conduct, including upholding an image of utmost confidence and trust. *See Weisel v. Hooks*, 277 *N.J. Super.* 78, 86 (Ch. Div. 1994) (recognizing that a confidential secretary is "a position of trust" and one who serves in such position "is privy to the most critical policymaking decisions and has access and exposure to

> policymakers as well"). Weaver engaged in conduct that was incompatible with the high degree of dependability expected of one who serves in that position. Weaver was insubordinate by failing to answer general counsel's telephone after being directed to do so, and Weaver neglected her duties since she was one of the secretaries assigned to that task. This conduct, coupled with Weaver's lack of candor during the investigation, further constitutes unbecoming conduct that deviated from the standard of proper conduct expected of public employees. The most serious infraction relates to Weaver's handling of the unemployment documents. Weaver's conduct in unilaterally adopting a practice of discarding the unemployment compensation documents, without taking any steps to confirm whether this action should be taken, fell significantly short of the conduct expected from a professional confidential secretary. Weaver' conduct was inappropriate, irresponsible and misguided. Weaver failed to exercise good judgment and to act in a responsible manner. Based on Weaver's education and vast experience as a secretary, Weaver reasonably should have known that original documents of this nature should not be simply discarded, and her failure to question Granick or her other supervisors concerning whether she should dispose of the documents rises to unbecoming conduct. Although I find that Weaver's lack of training and supervision in this area are mitigating factors for penalty purposes, this does not serve to excuse Weaver's dereliction. Indeed, according to her job description, Weaver's duties included the responsibility to "[m]aintain an efficient and well organized electronic and paper data collection and filing systems, including confidential files." P-2 By discarding the documents, Weaver violated one of the explicit responsibilities of her position. (Initial Decision at 38)

However, while not intending to diminish the seriousness and inappropriateness of respondent's conduct, the Commissioner is nonetheless persuaded – as was the ALJ – that consideration of the totality of the circumstances presented in this matter leads to the conclusion that respondent's removal from her tenured position would be an unduly harsh penalty here. Most particularly:

> Weaver's actions cannot be said to be premeditated, cruel or vicious. *Fulcomer, supra*, 93 *N.J. Super.* at 421. Rather, her actions bespeak of extremely poor judgment. Although Weaver's conduct is inexcusable and unbecoming, the evidence does not support that she willfully destroyed documents that the District was required to retain or that she intended to cause the District

> harm. The undisputed evidence discloses that the District did not train Weaver or provide her with any direction with regard to the unemployment work. No policy or protocol concerning how this work should be accomplished, including how the documents should be maintained, was ever given to Weaver. And, none of the witnesses who testified were apparently responsible for supervising her work in this area to ensure that it was properly done in accordance with some type of protocol. Weaver was not provided with notice of any deficiency with regard to this work so as to afford her the opportunity to correct any mistakes. Further, the record does not demonstrate that Weaver's actions had an injurious effect on the proper administration of the school system, and that the discarded documents could not have been obtained from the Unemployment Office or other sources if needed. In addition, Weaver has been employed as a confidential secretary for approximately seventeen years and, as far as the record reveals, has an unblemished and exemplary employment record during her career. She has received positive evaluations and glowing comments by her supervisors, who considered her a valuable employee. While the District emphasizes its lack of trust in Weaver stemming from her actions, the record supports that Weaver has demonstrated her capacity to be an effective confidential secretary in matters where appropriate supervision and direction were provided and the charged conduct represents an aberration in an otherwise successful career. (Initial Decision at 40)

In light of the above, the Commissioner finds that the ALJ's recommended penalty of forfeiture of the salary withheld during respondent's initial 120-day suspension subsequent to the certification of the instant tenure charges, along with the loss of any salary increment that she would have otherwise been entitled to during the 2008-09 school year, should be a sufficient penalty to impress upon respondent the impropriety of her actions and to adequately convey the message that such behavior will not be tolerated.

Accordingly, the recommended decision of the OAL is adopted – for the reasons well expressed therein – as the final decision in this matter. It is hereby ordered that respondent shall forfeit all salary and benefits which otherwise would have been due her during her initial

120-day suspension, and shall suffer the loss of any salary increment(s) to which she might have been entitled to during the 2008-09 school year.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/01/09

Date of Mailing: 6/01/09

* 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 7558-08
AGENCY DKT. NO. 159-6/08

IN THE MATTER OF THE TENURE HEARING OF LISA WEAVER, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.

Joanne L. Butler, Esq., appearing for petitioner Paterson State-Operated School District (Schenck, Price, Smith and King, attorneys)

Gail Oxfeld Kanef, Esq., appearing for respondent Lisa Weaver (Oxfeld Cohen, attorneys)

Record Closed: March 5, 2009 Decided: April 20, 2009

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The State-Operated School District of the City of Paterson (the District) brings tenure charges against Lisa Weaver, a tenured secretary. The District alleges that Weaver's conduct, as detailed in the tenure charges, constitutes neglect, misbehavior, insubordination, unbecoming conduct and/or other just cause warranting the termination

of her employment. Weaver denies the allegations. The Department of Education transmitted the matter to the Office of Administrative Law for a hearing. The hearing commenced on September 16, 2008, and continued on September 17 and 19, 2008. On October 10, 2008, the District filed a motion for leave to present the testimony of a rebuttal witness by video conference. I issued an Order granting the District's motion, and the hearing continued with the video-conference testimony of Judi Granick in Woodbridge, New Jersey. The record closed upon receipt of the parties' briefs and transcripts of the hearing.

FINDINGS OF FACT

Certain facts surrounding this matter are not significantly disputed. Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following preliminary **FACTS**:

Lisa Weaver has been employed as a confidential secretary with the District's Labor Relations Office since December 1991. Weaver holds an executive secretarial diploma from Dover Business College and currently attends Montclair State University, where she has nearly completed her degree in justice studies with a minor in paralegal studies. Prior to commencing employment with the District, Weaver worked for approximately one and a half years as a litigation secretary with a law firm; approximately two years as a senior secretary who provided secretarial support for three vice presidents at Valley National Bank; approximately five years as a legal secretary with the Passaic County Prosecutor's Office; and approximately one year as a senior legal secretary in the legal/corporate law department of Allied Signal. Weaver performed various job functions in connection with that employment, including, among others, case management for RTC/FDIC files; file maintenance for banking litigation and foreclosures; filing; answering correspondence; and preparing and filing forms with the United States Patent Office. See P-16; P-17.

During the relevant period, Weaver worked as the confidential secretary to the District's Labor Relations Officer (LRO). Judi Granick held the position of LRO from in or around January to December 2000, after which she became the director of personnel until her retirement on October 1, 2002. Michael Krause succeeded Granick as the LRO, and served in that position from December 2000 to June 2005. Carol Smeltzer, Esq., became the LRO in January 2006, and currently serves in that position. Eileen Shafer succeeded Granick as director of personnel, and held that position from September 2002 to 2005, when she became the assistant superintendent for personnel services.

Weaver's duties as a confidential secretary to the LRO entailed typing support and other related duties for the LRO including, among others, reviewing incoming documents, composing correspondence, creating and maintaining grievance files as needed and duplicating/distributing confidential and other materials. See P-17. In her position as a confidential secretary, Weaver had access to a number of documents containing confidential and sensitive information such as matters relating to labor relations, personnel, special education and vendor contracts.

Since at least 2000, part of Weaver's duties included responsibility for certain tasks regarding unemployment compensation matters. In connection therewith, Weaver interacted and communicated with the State Unemployment Office in response to requests for information and verification of information concerning employees who applied for unemployment. Weaver received and processed approximately six different documents relating to this work. She received and completed separation from employment forms and wage information verification forms, which she returned to the State Unemployment Office. Weaver was also responsible for reviewing a quarterly report list and identifying by a notation on the list which individuals were or were not employed by the District and/or eligible for unemployment. Following her review of this list, Weaver would give the list to Rosa Dipini with the District's Payroll Department for processing payment to the Unemployment Office. Weaver regularly received "Fact Finding Record for School Employees" forms and "Notice of Determination" forms. See P-11. She further received notices in the mail that a telephone conference was scheduled for a certain date and time. Weaver participated in these telephone

conferences with a hearing examiner and the applicant, during which Weaver was asked information concerning the separation from employment form that she had completed and other questions. The hearing examiner would advise Weaver at the end of the telephone conference that she would be receiving documentation in the mail, after which Weaver would receive a Notice of Determination that explicitly referenced the unemployment "appeal tribunal." See P-11.

Weaver received a $1,500 stipend for her unemployment-related work during the 2002-2003, 2003-2004 and 2004-2005 school years. Shafer was one of the signatories who initially approved Weaver for a stipend regarding this work in November 2002. P-1. Weaver had previously requested Granick to approve a stipend for the unemployment work, but Granick denied it, believing that the responsibility did not take a sufficient amount of time and could be performed as part of Weaver's regular job duties. In 2005, then Interim State District Superintendent Dr. Dennis Clancy undertook a review of job descriptions and responsibilities. This review culminated in various job descriptions being changed to include responsibilities that were performed during the normal work day and did not warrant a separate stipend. Weaver's position was one of the positions impacted by this review. Effective June 22, 2005, Weaver's job description as a "Confidential Secretary (Labor Relations Office)" was changed to specifically include "organize and perform unemployment approval/disapproval work" as a job function and responsibility of the position. See P-2. Weaver received her last stipend for the unemployment work in June 2005. See P-3.

Subsequent to the development of the new job description, Krause discussed with Weaver that she no longer would be receiving the stipend because that job function was now incorporated as part of her expected duties. Krause described that Weaver was "very upset" and "agitated" upon learning that the stipend was eliminated. Weaver admitted that she was "very upset" about losing the stipend, she "thought it was unfair" and she mentioned the stipend elimination many times to her later supervisor, Smeltzer. On or about August 8, 2005, Weaver forwarded correspondence to then State District Superintendent Dr. Michael Glascoe, objecting to the elimination of her stipend and requesting that it "be reinstated for the 2005-2006 school year and every year thereafter until these duties are assigned to another employee." P-4. By correspondence dated

August 22, 2005, Glascoe notified Weaver that, "[a]fter an in-depth review of your job responsibilities and duties, I have concluded that the task regarding District employees seeking unemployment should be in your job description" and, therefore, "at this time, this responsibility is part of your job description and does not warrant additional compensation." P-5. Weaver did not file a grievance related to the decision to eliminate her stipend.

On or about November 1, 2007, Mark Tabenkin, Esq. commenced employment as the District's in-house general counsel. The District had utilized in-house counsel on and off for a period of years. Prior to Tabenkin's arrival, the law firm of Schenck, Price, Smith and King served as general counsel and had placed an attorney on-site in the Legal Department for a period of time. In anticipation of Tabenkin's arrival, Glascoe convened a meeting to discuss how Tabenkin's work would be divided until such time as a decision was made concerning whether or not he would have his own secretary. The meeting participants included Glascoe; the deputy superintendent (Dr. Michael Rush); Shafer; Smeltzer; the Risk Management officer (Laurie Maloney); the Risk Management investigator (Vince Mingione) and secretary (Petra Efflius); and Weaver. At the meeting, Glascoe explained that Weaver and Efflius would both work for Tabenkin, in addition to Weaver's current assignment in Labor Relations and Efflius's assignment in Risk Management, and they were to divide the secretarial duties until such time as a final decision was reached about hiring a secretary for Tabenkin.

Approximately two weeks after Tabenkin commenced employment as general counsel, he received on November 15, 2007, an envelope in the mail from the Superior Court of New Jersey, Appellate Division. The envelope contained a "Notice of Docketing" for a case against the Board of Review and the Paterson Board of Education involving an unemployment decision. See P-14. On November 16, 2007, Tabenkin sent an e-mail to several individuals regarding this notice. In the e-mail, Tabenkin indicated his belief that the matter could be handled in-house, inquired as to who had previously handled these matters, and stated the need for the file. Following a discussion between Shafer and Smeltzer regarding the handling of unemployment appeals, Smeltzer contacted Weaver by telephone on November 16, 2007. At the time,

Weaver was at her home recuperating from surgery. Tabenkin later met with Weaver regarding the unemployment appeal on November 28, 2007.

Subsequently, Glascoe called a meeting with Weaver regarding her handling of unemployment matters. Rush, Shafer, Tabenkin and Smeltzer attended this meeting. Effective November 30, 2007, Weaver was transferred from her confidential secretary position in the Labor Relations Office to an administrative secretary position in the Superintendent's Office, Weaver's salary was frozen and she was placed on the administrative secretary guide. See P-10. On May 30, 2008, Glascoe certified the sworn tenure charges filed against Weaver and suspended her without pay.

Weaver received positive evaluations from her supervisors prior to the conduct in issue. In an evaluation dated June 26, 2007, Smeltzer described Weaver as "a very competent confidential secretary," who "is willing to take on additional tasks and responsibility and assists in all areas of this office." Smeltzer rated Weaver's performance in various areas as either outstanding, commendable, satisfactory, needs improvement or unsatisfactory. In the twenty-eight applicable categories, Smeltzer rated Weaver as commendable in eight areas and outstanding in the rest. P-13. In an evaluation dated March/April 2005, Krause rated Weaver as outstanding, commendable or satisfactory in each of the applicable areas. P-15.

THE TENURE CHARGES

The District brings five tenure charges against Weaver. The first three charges relate to Weaver's handling of the unemployment compensation work and her conduct in connection with the investigation concerning that work. The fourth charge stems from Weaver's alleged failure to answer general counsel's telephone. The fifth charge does not include any new substantive allegations but, instead, incorporates the other allegations by reference and asserts that Weaver's conduct, "when viewed as a whole, constitutes neglect, misbehavior, insubordination, unbecoming conduct and/or other just cause for termination."

Apart from the evidence that forms the foundation of the above Findings of Fact, a summary of other testimony and documentary evidence relating to each of the four substantive tenure charges follows, along with my assessment of this evidence. In view of the divergent accounts offered as to various matters, it is necessary for me to 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). "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself," in that "[i]t must be such as the common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950). 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." Id. at 521-22; see D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997). 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. 1952), 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).

Prior to addressing the specific charges, a summary of additional evidence addressing Weaver's unemployment compensation work is warranted. The undisputed evidence reveals that Krause, Shafer and Smeltzer did not assign this work to Weaver,

provide her with any training related to the work, or supervise the work that she was performing in this area.

In this regard, Krause testified that Weaver was already performing the unemployment work when he became the LRO. Krause stated that Weaver was assigned this work at some point before he became the LRO and articulated his belief that the Business Department made this assignment prior to Granick's arrival. At times, Krause observed correspondence from the State on the desk and discussed with Weaver that she was doing this job and that the letters were requests for information from the State Unemployment Office concerning the status of individuals who had left employment with the District. Krause never read any of the letters. Krause also observed Weaver on a number of occasions participating in telephone calls with the Unemployment Office regarding requests for information. Weaver approached Krause on occasion when she was unable to obtain information from the computer system. Weaver used the computer to ascertain the reasons why individuals had left the District, and provided this information to the Unemployment Office. Krause described that the unemployment work was not actually part of the Labor Relations Department and was never within his labor-relations role. Krause understood that someone other than him was supposed to be overseeing Weaver's unemployment work and ensuring that it was done according to some protocol. Krause did not specifically review Weaver's unemployment work and never provided her with any training or protocols with regard to the unemployment work that she was performing. Weaver never discussed with Krause that she felt as though she did not know what she was supposed to be doing with regard to that work, and never complained to Krause that she was not trained on how to perform the work.

Shafer testified that, although she was aware that Weaver was performing some function related to unemployment claims when she served as the Director of Personnel, those unemployment claims were not within Shafer's responsibility. Shafer stated that she did not assign the unemployment function to Weaver, she was not sure who assigned Weaver to handle the unemployment matters, and Weaver did not inform Shafer specifically what tasks had been assigned to her. Shafer did not provide Weaver with any training with regard to that unemployment function and did not check Weaver's

unemployment work when Shafer served as Director of Personnel and Assistant Superintendent of Personnel.

Smeltzer testified that she did not provide Weaver with any training regarding the handling of unemployment matters, including training concerning what Weaver should do with any particular document that came into the office. Smeltzer had no knowledge as to whether anyone had trained Weaver in this area before Smeltzer became the LRO.

Weaver testified that when Krause first came to the District, she specifically asked Krause if he would be supervising her with regard to the unemployment matters, and Krause informed Weaver, "it's not me." Krause never provided Weaver with any training or direction with regard to the unemployment matters; he never asked her to explain what she did concerning those matters; and he did not inform Weaver who her supervisor was concerning that work. Weaver described that she had no discussions with Krause regarding the unemployment work that she was performing, except for times when she had questions, such as what an employee did or the reason for an employee's separation. Weaver testified that when Smeltzer became her supervisor, Smeltzer never discussed Weaver's unemployment work with her; she never asked Weaver to explain what she was doing with regard to this work; and she never told Weaver that she wanted the work done in a certain way or in a manner different than the way that Weaver was already doing it. According to Weaver, apart from a discussion in or around 2006, regarding her involvement in the billing process for unemployment, the only time anyone in the District asked her to explain exactly what she did concerning the unemployment work was at the meeting with the superintendent in November 2007. During the earlier discussion Weaver was not asked to specifically explain how she handled the various unemployment documents, and after that discussion Weaver was not provided any type of training nor informed that she had to change how she was handling the unemployment claims or that she was doing anything incorrect.

Inasmuch as substantially consistent testimony was presented with regard to the nature of involvement by Krause, Shafer and Smeltzer in Weaver's unemployment-related work, I accept the above testimony by the various witnesses, which I found to be credible, as **FACT**, except that I afford no weight to Krause's stated belief as to when and by whom the work was assigned to Weaver. Simply put, it was apparent from Krause's testimony, which I found to be candid and credible, that he had no actual knowledge concerning the details surrounding the assignment of the work to Weaver.

Divergent testimony was presented, however, with regard to Granick's role in the assignment of this work.

Granick testified that Weaver was working in the Labor Relations Office before Granick started. Granick described that she was "absolutely not" at any time assigned to perform any work regarding unemployment claims, she did not have any responsibility for unemployment, and this work was not part of Granick's job responsibilities. Granick denied that she assigned or delegated any unemployment claim work to anyone, and denied that she assigned that work to Weaver. According to Granick, as far as she knew, Weaver was doing that work before Granick came to the District. Granick clarified the language in her memorandum to Shafer to reflect that she was not the LRO when Weaver was first assigned responsibility for unemployment. Granick testified that no one informed her that they had assigned this work to Weaver and Granick assumed that Weaver had it previously. She further assumed that either the Legal Department or the Business Office assigned the work to Weaver. Granick described Weaver's unemployment work as including writing on a long form that listed individuals who had applied for unemployment whether they were eligible or not eligible for unemployment. Granick denied that she ever received that list, that she gave the form to Weaver or that she approved the form before Weaver sent it out. Granick did not train Weaver concerning what she should do with that form; she did not ask Weaver to provide a step-by-step description of what she did with regard to the form; and she never asked Weaver who her supervisor was with regard to the unemployment matters. Granick stated that, at times, Weaver had questions about individuals on the list and their eligibility, and on a couple of occasions Granick contacted the Payroll or Personnel Offices for information about the individual's status and conveyed to Weaver whether

Granick thought the individual was eligible. Granick recalled Weaver receiving a telephone call from the Unemployment Office once or twice, and recalled one telephone call that Weaver handled in which an individual was disputing the District's decision. Granick did not recall ever receiving a document called a Notice of Determination from Unemployment or a Notice of Docketing from the Superior Court.

Alicia Walton has served as the District's payroll supervisor for sixteen years. Walton explained that at one point her department processed the unemployment claims, which entailed reporting weekly wages to unemployment, reviewing a quarterly list of employees to determine their eligibility and ultimately paying the bill for the unemployment claims. Walton testified that during the period when Granick was Weaver's supervisor, Granick instructed Walton to provide the unemployment work to Weaver. The tasks Granick told Walton to give to Weaver consisted of the verification of salary and the review of the quarterly list. Walton's department continued to pay the bill. Walton described that her department then gave the unemployment forms that came in to Weaver, who was given access to the payroll system. Walton did not discuss with Weaver the work that she would be doing. Weaver would contact Walton if she had any questions, such as an employee's salary, and would review the quarterly list and give it to Rosa Dipini for processing. Walton's department never handled unemployment appeals or telephone hearings. Dipini, who works for Walton, testified that Granick, not Weaver, told Dipini how to pay the unemployment bills.

Weaver testified that in 2000, when Granick was the LRO and her direct supervisor, Granick assigned extra duties to Weaver, along with an administrative secretary in the Labor Relations Department (Liz Rosa), related to unemployment matters. At that time, Granick told Weaver that she would have to complete the separation from employment forms that came in and submit them to unemployment. Granick did not provide any information to Weaver concerning how to complete this form, and Weaver contacted unemployment to learn how to complete it. Weaver described that, after realizing that she required access to the payroll system in order to acquire the information necessary to complete the form, Weaver spoke to Walton, who in turn spoke to Granick, after which Weaver received permission to access payroll information on the computer. According to Weaver, at a later point in time, Granick

instructed Weaver that she had to verify information in a quarterly report, and Weaver began to receive the quarterly reports, which she reviewed and forwarded to the Payroll Department for payment. Weaver described that, at a later point when Granick was still her supervisor, Weaver received an additional form from Unemployment requesting verification of wage information, and telephone calls from Unemployment came in requesting verification of information concerning particular employees. Weaver testified that she asked Granick about the form, and Granick instructed her to just fill it out and to answer the telephone calls. Weaver later began to receive the telephone conference notices from Unemployment during the period when Krause was her supervisor. Weaver described that no one told her to handle the telephone conferences, but the notices and conference calls came to her, she had routinely received telephone calls from various individuals with Unemployment, and Weaver believed that the conferences were an extension of the work that she was already performing.

In evaluating the evidence, I found Weaver's testimony that Granick initially assigned the unemployment work to her to be detailed, credible and persuasive. Weaver's rendition as to how she first became involved in the work was corroborated by Walton, who testified for the District and has no apparent stake in the outcome of this proceeding. Granick's testimony to the contrary is, in my view, overborne by the testimony offered by Weaver and Walton. Indeed, various witnesses described Granick's alleged involvement in connection with the payment of an unemployment bill(s). Although the payment issue fell within the realm of payroll's responsibility, not Weaver's, this evidence further undermined the strength of Granick's recollection that she had no responsibility or involvement in unemployment matters. Having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, and in addition to the testimony previously adopted as **FACT** as set forth above, I **FIND** the following additional **FACTS**:

Granick assigned Weaver the responsibility for the unemployment-related work in 2000. This work initially entailed the completion of a separation from employment form. Weaver later received additional forms and telephone calls from Unemployment, which Granick directed her to handle. Granick did not train or instruct Weaver as to how to

perform her unemployment duties. Granick did not supervise Weaver's unemployment work or ask her to provide a step-by-step description of the unemployment work that she was performing. On a few occasions, Weaver asked Granick questions about a particular employee and Granick would contact Payroll or Personnel for information, which she would then convey to Weaver. Weaver received additional forms from Unemployment after Krause became her supervisor, including the telephone conference notices.

CHARGE ONE

Charge One alleges in pertinent part that "[u]pon receiving notice that she would no longer be receiving a stipend, Weaver declared to one or more colleagues that she would no longer perform the unemployment compensation duties required of her" and, "[i]n fact, Weaver substantially decreased her work on unemployment compensation matters thus resulting in an increase in the unemployment compensation charges incurred by the District." The District charges that this conduct by Weaver constitutes neglect, misbehavior, insubordination, unbecoming conduct and/or other just cause for dismissal.

The Testimony

Rosa Dipini has worked for the District for twenty-nine years and has held the position of assistant payroll supervisor for approximately ten years. Dipini testified that, in or around the time when Weaver's stipend was eliminated (i.e., 2005), Weaver commented to Dipini that she was not going to do the unemployment work anymore because her stipend was taken away. Dipini described that she wondered who would be doing the work, and Weaver gave her no response. Dipini discussed this conversation with her supervisor (Walton), and later submitted a memorandum to Shafer dated February 29, 2008. In the memorandum, Dipini stated that, "around the time . . . Weaver's stipend was taken away from her she made a comment to . . . [Dipini] that she would no longer be responsible for processing Unemployment Claims"; when Dipini asked "Weaver who would be providing . . . [her] with this information in the future

she advised . . . [Dipini] that she would no longer perform these duties"; and "[s]ince that time, bills have been forwarded to . . . [Dipini] without review." P-12.

Dipini testified that not every list was forwarded to her without review by Weaver, and Dipini understood that at times Weaver did not receive the lists that she was supposed to review. Dipini described that she would call Weaver on occasion to ask whether Weaver had received the list and Weaver would reply that she had not. On these occasions, Weaver did not state that she was not reviewing the list, but that she had not received it. Dipini testified that in situations when she received a list that did not contain anything documented by Weaver, Dipini would notify Weaver and send the list back to Weaver, who would then review the list and return it to Dipini. According to Dipini, whenever she received the list first and gave it to Weaver, Weaver reviewed it and sent it back, and Weaver gave Dipini the list when she had it. Dipini was not aware of any list that Weaver said she was not reviewing. After Weaver's comment regarding the stipend, Weaver provided Dipini with the list containing her notations next to any individual who was still employed as she had done before the comment. Dipini described that she did not always receive mail that she was supposed to receive; sometimes her mail went to others, and sometimes she received mail that did not belong to her. Similarly, Tabenkin stated that at times he received mail that did not belong to him.

Walton testified that a few years before Weaver's November 2007 transfer, Dipini informed her that Weaver stopped doing the review of the list. According to Walton, Dipini relayed that she "got the bill back from Lisa and she's not going to review it." Walton did not recall whether after this comment Dipini told her that, from that point forward, Weaver continued not to review the bills/lists or whether Walton had reviewed any of the lists. Walton did not report that Weaver was not doing a review of the bills/lists to Weaver's supervisor.

Shafer testified that Dipini informed her that, after Weaver's stipend was eliminated, Weaver told Dipini that she was not going to process the unemployment claims anymore, and Dipini provided Shafer with the February 29, 2008, memorandum regarding this conversation. Shafer stated her understanding that Weaver was still

doing the unemployment work after August 2005. Weaver never notified Shafer that she was not doing that work. Shafer acknowledged that, based on the Notice of Determination dated in July 2007 (P-11), it was reasonable to conclude that someone from the District provided information to Unemployment that lead to the denial of the claim, but added that this information could have been from the claimant. Shafer acknowledged that she had no documents at the hearing that linked Weaver to any charges to the District relating to unemployment.

Krause testified that after learning that her stipend was eliminated, Weaver did not inform him that she was no longer going to be doing the unemployment work. As previously detailed, Krause also described the work he observed Weaver performing when he served as the LRO. Smeltzer stated that she had no evidence that Weaver was not engaging in the telephone conferences with the hearing examiner or communicating with the State about unemployment during the period that Smeltzer served as the LRO.

At the hearing, the District also presented testimony regarding unopened mail that was allegedly found in January and August 2008. Tabenkin testified that in January 2008, Vincent Mingione, who had been assigned to Weaver's former work station, found approximately ten to fifteen sealed envelopes from the State or local Unemployment Office in a file cabinet behind the work station. Mingione was assigned to this area in January 2008, and his desk was moved to the location where Weaver's desk used to be. Tabenkin described that, because it was relatively soon after Weaver's transfer in late November 2007, he directed that the envelopes be opened and forwarded to Risk Management Supervisor Maloney, who was then handling the unemployment matters. Tabenkin did not look at the documents after the envelopes were opened.

Tabenkin testified that in August 2008 his new secretary (Saba Mekbeb) found a group of unopened envelopes postmarked around July 2007 in a file cabinet located a few feet from the secretary's desk. Smeltzer testified that she received an e-mail from Tabenkin indicating that their secretary had found a bunch of unopened documents in Weaver's former file cabinet, which were dated or postmarked around July 16, 2007. Smeltzer and Shafer testified that Smeltzer opened the envelopes in Shafer's presence.

Two of the approximate five envelopes found contained unemployment-related documents, and both of those envelopes were postmarked July 16, 2007. P-11. Smeltzer described that she was out of the office on maternity leave during the period depicted on the envelopes, but communicated nearly daily with Weaver and had created a plan before her leave addressing how she would receive her mail weekly. Smeltzer learned that Weaver had been out of the office for at least half of the week depicted on the envelopes, but articulated her belief that, even if Weaver was not in the office on a particular day, she still would open Smeltzer's mail when she returned.

Weaver testified that she did not change how she handled the unemployment matters after her stipend was eliminated. Weaver did not stop work on the unemployment matters and did not do less work because she no longer received a stipend. According to Weaver, she never forwarded a quarterly report or bill that she received to Payroll without reviewing it. Similar to Dipini and Tabenkin, Weaver described that she regularly received mail that did not belong to her and received mail from other staff that should have been directed to her. Weaver indicated that she was still working in the District in May 2008, and no one approached her about unopened mail claimed to have been found in her cabinet in January 2008. Weaver first learned of this issue during the OAL hearing. Weaver further described that her desk had been replaced with a different desk approximately two weeks after her transfer, the cabinets around her former desk were not locked, and she was on vacation July 18, 19, 20 and 23, 2007.

Analysis of the Evidence

In evaluating the evidence presented, I initially afford no weight to the evidence regarding the alleged unopened mail found in the area of Weaver's former work station. Although I found Tabenkin and Smeltzer to be credible witnesses, the individuals who actually found that mail did not testify, and the mail found in January 2008 was not introduced. Further, according to the testimony, the initial envelopes were found more than one month after Weaver's transfer and, although Weaver was then still working in the District, no one notified her of this allegation so as to provide her an opportunity to respond or investigate it. The later handful of envelopes was found several months

after Weaver was suspended. The record also reveals that Weaver was not in the office for the majority of the week of July 16, 2007, her desk was moved around January 2008, other employees were working in her former work station, mail was misdirected on occasion and the cabinets in the area were apparently not locked. In short, the evidence falls short of demonstrating, by a preponderance of credible, competent evidence, that no one besides Weaver had access to the mail or the file cabinets so as to raise a reasonable inference that Weaver actually received the mail and was the employee who put the unopened mail in the cabinet. Weaver further testified that the file cabinet in which the documents were alleged to have been found contained many other documents and, thus, insufficient evidence exists that Weaver reasonably would have discovered this mail had someone else put the documents in the cabinet. And, only two of the envelopes found in August 2008 involved unemployment matters. Moreover, although I permitted the District to introduce this evidence, the tenure charges do not allege that Weaver failed to perform her general secretarial duties or failed to open the mail but, rather, that she substantially decreased her work on the unemployment matters after losing her stipend.

Although I **FIND** that Weaver made the described comment to Dipini, the District's proofs fail to establish, by a preponderance of credible, competent evidence, that Weaver then substantially decreased her work on the unemployment compensation matters. Dipini's testimony does not support the assertion that Weaver's unemployment work deteriorated after she lost the stipend. No other witness offered testimony, based on first-hand knowledge, that Weaver decreased her work on these matters. Clearly, the testimony relaying alleged advice by Dipini is hearsay and insufficient to support any ultimate finding of fact absent corroborating evidence, which is lacking in this case. The record is further bereft of evidence that Weaver's unemployment work somehow resulted in an increase in the unemployment compensation charges incurred by the District.

CHARGES TWO AND THREE

Charge Two alleges in pertinent part that after Tabenkin received the unemployment compensation appeal in the mail, Smeltzer called Weaver, who was then on sick leave due to scheduled surgery, and, "[i]n response to the [LRO's] inquiry, Weaver stated that nobody handled appeals of unemployment compensation cases, and that Weaver simply threw the appeal papers away." It further alleges that, after Weaver returned from sick leave on or about November 27, 2007, and in response to general counsel's inquiry "about the existence of papers from the Division of Unemployment" relative to the unemployment compensation appeal he received, "Weaver stated that she simply threw away all papers received from Unemployment Compensation because they were so voluminous." The District charges that Weaver's conduct in throwing away official documents concerning employees' unemployment compensation claims constitutes neglect, misbehavior, insubordination, unbecoming conduct and/or other just cause for termination.

Charge Three alleges that "[a]fter the District became aware that Weaver admitted to destroying all paperwork relative to unemployment compensation claims, it caused an investigation to be conducted"; as part of that investigation Weaver was summoned to the meeting with the State District Superintendent on or about November 28, 2007; and at this meeting "Weaver stated that her previous supervisors, including Judi Granick and Michael Krause, had specifically instructed her to discard all papers concerning unemployment compensation claims because there was no place to store them." It is further alleged that "Weaver's statement that she had been instructed to discard papers concerning unemployment compensation claims was false," and Weaver's action in providing false information in connection with the District's investigation into her actions constitutes neglect, misbehavior, insubordination, unbecoming conduct and/or other just cause for termination.

The Testimony

The November 16, 2007, Telephone Call

Smeltzer testified that, during her telephone conversation with Weaver on November 16, 2007, she initially asked Weaver how she felt and how her surgery went, and Weaver sounded good. Smeltzer indicated that at no time did Weaver advise her that she was unable to talk, that she did not feel well, that she did not know or could not remember anything, or that she was under the influence of any drugs from the surgery. Tabenkin testified that he heard Smeltzer calling Weaver from his office, and asking Weaver how she was feeling. Weaver admits that, during the conversation, Smeltzer asked how she was doing and Weaver told Smeltzer that she was doing okay.

Smeltzer testified that she asked Weaver "who represents the District in these Appellate Division matters at the unemployment?" Weaver first responded, "nobody does," and after Smeltzer replied "nobody does," Weaver then said that she did. Smeltzer described that she became confused because she thought that this would be an attorney's function, so she said, "you do?" Weaver then stated "no, I handle the appeals at the lower levels when it's the telephone inquires about unemployment decisions." According to Smeltzer, she then asked who handles the appeals to the Appellate Division and Weaver answered "nobody does." Smeltzer testified that she was "shocked" and walked into Tabenkin's office, where she held out her Blackberry so that Tabenkin could hear the conversation. Tabenkin testified that Smeltzer asked Weaver in his presence who handles cases for the District in the Appellate Division, and Weaver replied "nobody." Smeltzer and Tabenkin described that Smeltzer asked Weaver whether she had received these Notices of Docketing in the past, Weaver replied that she had, and, in response to Smeltzer's inquiry as to whether Weaver filed any papers on behalf of the District, Weaver replied "no." When Smeltzer asked how the cases are decided if no one represents the District, Weaver replied that the District loses the ones it is supposed to lose and wins the ones it is supposed to win. Smeltzer and Tabenkin testified that Smeltzer then asked Weaver what she did with the Notices of Docketing that she received, and Weaver answered that she threw them away.

Smeltzer then asked, "you throw them away?" Weaver replied "yes, I never received training on how to handle unemployment compensation claims." Smeltzer informed Shafer of the incident and authored a memorandum to her on November 16, 2007. See P-6.

Tabenkin testified that the Notice of Docketing he received arrived in an envelope from the Appellate Division. He described that the mailroom opens up the envelope, writes "legal" on it, reseals the envelope and delivers it to Tabenkin as part of his mail. Tabenkin explained that mail marked "legal" or "law" by the mailroom would be forwarded to him. Tabenkin stated his understanding that, prior to his arrival, any mail marked "legal" would have been given to Smeltzer or Maloney, who are both attorneys; and documents in envelopes depicting unemployment or workers' compensation would be delivered without being opened. Tabenkin agreed that one of the levels of appeal relating to unemployment is the appeals tribunal and another level is the Appellate Division.

Weaver did not dispute that she made the statements detailed by Smeltzer and Tabenkin. Weaver explained, however, that she was at home recovering from surgery that she had the previous day and was on pain medication that made her "groggy." Weaver also described how she did not entirely understand the questions being asked, including her belief that Smeltzer was referring to the telephone conferences that Weaver handled through Unemployment, after which she would receive a determination from the appeals tribunal, and her advice that she threw those documents away. Weaver did not have a copy of the Notice of Docketing that Smeltzer was referring to at the time of the conversation. Weaver indicated that all of the answers she gave were based on her knowledge of what she thought she was doing. Weaver testified that during the period she worked on unemployment matters, she had never seen a document like the Notice of Docketing and she "absolutely" did not receive those types of notices before, which she first received through discovery. Weaver described that this notice is a legal document that would go to the Legal Department and, even when the District did not have in-house attorney, Weaver did not receive mail marked "legal" by the mailroom; she assumed the legal secretary in the area would receive such mail. According to Weaver, in the eight years that she handled unemployment matters, no

one ever approached her to ask questions about any unemployment case that they were handling on behalf of the District, and no outside or in-house attorney ever contacted her and asked for unemployment documents.

The November 28, 2007, Meeting with Tabenkin

Tabenkin testified that he asked Weaver at the November 28, 2007, meeting whether any paperwork existed regarding the particular unemployment appeal referenced in the Appellate Division's notice, which he did not present to Weaver. Tabenkin described that Weaver used her computer, after which she advised Tabenkin that the individual was a substitute and, therefore, would not be entitled to unemployment compensation. Tabenkin informed Weaver that, while he agreed with her analysis, Tabenkin needed paperwork in order to prepare an appendix for the Appellate Division. According to Tabenkin, Weaver told him that she did not have that paperwork and, in response to his inquiry as to why she did not have the paperwork, Weaver replied that she threw the paperwork away. Weaver reported that she had retained paperwork when she started doing the unemployment work, but the amount of paper proved to be so voluminous that at some point she decided to throw the paperwork away. Weaver did not inform Tabenkin that someone had directed her to throw the documents away. Tabenkin authored a memorandum to the file immediately after the meeting, a copy of which he provided to Shafer. P-7.

Weaver testified that Tabenkin did not show her the Notice of Docketing that he had received at the meeting. Tabenkin asked whether Weaver had unemployment information relating to the individual involved in that appeal. According to Weaver, she responded that she did not have that information, she did not keep the documents received from Unemployment such as the determinations, and she would shred them. Weaver described that Tabenkin then proceeded to explain how the process should be done for the Appellate Division, which Weaver testified that she was not familiar with. According to Weaver, Tabenkin asked how long she kept the documents, Weaver responded that she did not have a set time and, in response to Tabenkin's inquiry as to whether the District had a retention policy, Weaver stated that she did not know and no one told her about it if the District had one.

The Meeting with the State Superintendent

Smeltzer testified that Glascoe asked Weaver at the meeting to describe the process that she used for handling unemployment compensation matters from start to finish, and asked whether she had thrown away unemployment documents. According to Smeltzer, Weaver replied that she had "shred" documents that she no longer needed; she said that all of her supervisors knew that she was shredding the unemployment documents, and she specifically mentioned Granick and Krause. Smeltzer stated that in response to Rush's inquiry regarding whether Smeltzer knew that she was shredding unemployment documents, Weaver first replied "yes" and, after Smeltzer said "Lisa you know that's not true," Weaver changed her answer to state that Smeltzer knew she shredded duplicates and triplicates of documents. Smeltzer described that Weaver reported that, because there was a lack of storage space, Granick and Krause had told her to get rid of or to shred the documents when she was done with them, and also indicated that a lot of the documents she came across contained confidential information such as employee's Social Security numbers.

Tabenkin testified that the Superintendent questioned Weaver about the destruction of documents received from Unemployment, and Weaver stated that she had been instructed to throw the documents away. Tabenkin believed that Weaver referred to Granick and Krause.

According to Shafer, the Superintendent asked Weaver a series of questions regarding unemployment, including questions regarding her previous statements to Smeltzer that she threw those documents away. Shafer described that Weaver responded that her previous supervisor, which would have been Granick and Krause, told her to shred the documents.

Weaver testified that the Superintendent questioned her as to exactly how she handled the unemployment files, and Weaver explained how she handled them and said that she would shred and throw out the documents once she was done processing them. Weaver stated that she did not specify what documents she shred and threw out,

but told the Superintendent the ones she handled. According to Weaver, in response to the Superintendent's inquiry concerning who told her to do it that way, Weaver replied that Granick told Weaver that, "because we didn't have storage space, that [Weaver] . . . couldn't keep them lying all around, . . . [Weaver] had to get rid of them, and . . . [Weaver], in turn, . . . shredded the documents and . . . threw them out, threw out the shredded stuff." Weaver denied stating that Krause instructed her to shred the documents. Weaver testified that she mentioned Krause, as well as Granick, in response to an inquiry regarding the identity of her supervisors.

The Unemployment Documents

Shafer testified that she contacted Granick and Krause after the meeting concerning the information conveyed by Weaver. Shafer spoke to Granick in the presence of Smeltzer. Shafer and Smeltzer offered consistent testimony that Granick relayed that she had never directed Weaver to shred or throw away any documents regarding unemployment. Granick sent an e-mail confirming the communication, which states in part: "[u]nder no circumstances . . . did I instruct Lisa to shred documents" "nor did we ever have a shredder!!" P-9. Shafer testified that she also spoke to Krause, who reported that he never directed Weaver to shred any unemployment documents. Krause later confirmed in a memorandum to Shafer that "[a]t no time during the period in which I served as . . . [LRO] . . . was shredding of any document, including any unemployment document, authorized by my office" and "[a]t no time did I authorize Mrs. Weaver to shred Unemployment documents or any document, nor was I aware that she might have been doing so." P-8. Krause further indicated in the memorandum that "there was no shredding machine available to the Office of Labor Relations during most of that period of time."

Granick testified that the filing of documents unrelated to the unemployment work was one of the job responsibilities that Weaver performed for Granick. Granick described that Weaver already had a filing system in place before Granick became the LRO, and Granick saw no need to make any major changes because she and Weaver were able to locate what they needed. Granick indicated that, at times, she thought Weaver was behind in the filing and Granick spoke to her about whether or not she was

doing the filing. Granick stated that the documents were not piling up because there was no place to put them, but because Weaver was not filing. Granick testified that she did not "think" she ever discussed with Weaver the filing of unemployment documents. Granick indicated they never had a discussion about whether documents relating to unemployment should or should not be thrown away, and she "absolutely" did not instruct Weaver to shred documents. Granick described that legal or important matters were never thrown away, and Granick never observed a shredder or any shredded documents when she served as the LRO.

Krause testified that at no time did he ever direct Weaver to shred or throw away documents related to unemployment. Krause never directed Weaver to throw away, shred or otherwise discard any original documents and he did not authorize the shredding of any documents from the Labor Relations Office. Krause described that the only documents that might be thrown away would have been duplicates of documents that the Labor Relations Office produced and, other than that, documents were to be filed and put away in the appropriate place. Weaver never discussed with Krause that Granick had directed her to throw away or shred documents related to unemployment, and neither his office nor Weaver's office had a shredder. Krause described that a shredder was brought into the area when he was the LRO and set up outside his door. A part-time employee was shredding documents, and Krause assumed that the employee was working for the Legal Department and was authorized to shred documents for that department. Krause stated that, when he was the LRO, documents pertaining to grievances, negotiations and other aspects of his position that he accessed on a regular basis were located in file cabinets in his office, and he believed that material was also in a file cabinet in front of Weaver's desk. He described the various file cabinets in the area of Weaver's work space, including a two-drawer cabinet behind her desk that was ordered when Krause served as the LRO. Krause did not discuss with Weaver what she should keep in that filing cabinet or in the one he believed was located by the door. Krause testified that the District had a procedure in place regarding documents that did not need to be immediately accessed, which he learned from Weaver. He described that the documents were placed in brown file boxes, the boxes were closed and labeled, and someone would pick them up and bring them to various central storage locations. Krause was not sure whether he and Weaver

utilized that storage procedure when he was the LRO. He could not recall a specific occasion when they boxed documents/files and sent them to storage. He did recall on occasion having to request a document, and said that Weaver would call to obtain the document.

Smeltzer testified that Weaver never informed her that she was throwing away or shredding unemployment documents. Smeltzer never directed Weaver to throw out or shred any documents. Smeltzer would permit her to discard a document if there were multiple copies.

Tabenkin testified that many confidential and sensitive documents pass through the offices of general counsel and Labor Relations; there is a need to ensure that documents are filed away in an appropriate manner; and such documents cannot be floating around, misfiled or, even worse, discarded. Tabenkin testified as to the need to trust that an employee will handle these confidential and sensitive documents appropriately, maintain files appropriately, and not take it upon himself or herself to simply dispose of documents. Tabenkin's stated that whatever trust he would have hoped to repose in Weaver was destroyed by her actions.

Weaver testified that there came a point in time when the paperwork regarding unemployment began to pile up on her desk. According to Weaver, approximately seven to eight months after she began doing the unemployment work, Granick told Weaver, "you can't just leave those documents there. They're all over the place." Weaver relayed that, after she stated that the documents were the ones that she processed already, Granick replied, "well, you can't just leave them out there on your desk and all around your area. You have to get rid of them." Weaver testified that she then started to shred the Notices of Determination that she received and threw out the shreds. Weaver shredded the documents because they contained Social Security numbers. According to Weaver, during the period that she worked as a confidential secretary in the Labor Relations Office, she always had access to a shredder; a shredder was situated in the closet assigned to the department and one was near her desk. Weaver indicated that she had also observed other staff working for the Risk Management or Labor Relations Departments shredding documents; a procedure

existed where one could call to have documents shredded; and she had never sent file boxes to central storage for the Labor Relations Office.

According to Weaver, the only documents that she shred were the telephone conference notices and the Notices of Determination. The other forms Weaver completed were returned to Unemployment, and she gave the quarterly report to the Payroll Department. Weaver acknowledged that she did not make copies of any of the forms that she sent back to Unemployment, but stated that she was not instructed that she must retain a copy. Weaver described that she kept the paperwork for a period of time before she shredded it. She kept the telephone conference notices until the conference call was held and she retained the Notices of Determination for a couple of days. Weaver shredded and discarded these documents for approximately six or seven years, including when she worked for Krause. Krause never instructed Weaver to shred any documents. Weaver acknowledged that shredding did not come up during the course of her conversation with Granick. Weaver further acknowledged that she never asked anyone about throwing away, shredding or disposing of the unemployment documents after Granick's comment. Weaver acknowledged that she did not inform Krause or Smeltzer that she was shedding documents and did not ask the District's attorney if she should be shredding them. Weaver testified that during the period that she was performing the unemployment work, no outside or in-house attorney ever contacted her and asked for documents related to unemployment. Weaver stated that if someone had a question about an employee's unemployment, she could look up the information on the computer or she could call Unemployment to obtain the information. Information concerning whether an individual was receiving unemployment and the amount of unemployment received could be obtained from the quarterly report in the Payroll Department. Weaver described the training and supervision that she had received in connection with her prior employment. Weaver also stated that she created and maintained the grievance files for the LRO after her first boss told her how she wanted it done and exactly what to do.

Analysis of the Evidence

In evaluating the evidence presented, I found the testimony of Smeltzer, Tabenkin and Shafer to be credible with regard to the events that occurred during the telephone conversation and meetings with Weaver. The witnesses offered substantially consistent accounts as to various material facts, which are further supported by documentation authored nearly contemporaneous with the events. However, I also found Weaver's rendition as to certain facts probable under the circumstances and not directly controverted by the District's evidence. Based upon a review of the evidence presented, and having had the opportunity to assess the credibility of the witnesses who testified, I **FIND** the following additional relevant **FACTS**:

There is no dispute that Weaver did not retain copies of the documents that she returned to Unemployment and that she discarded other unemployment-related documents. I **FIND** that Weaver discarded the telephone conference notices and the Notices of Determination that she received from Unemployment. Apart from statements made during the telephone conversation, which are later addressed, the evidence fails to establish that Weaver disposed of any other documents. I **FIND** that Weaver returned the other forms that she completed to Unemployment or the Payroll Department. I **FIND** that Weaver did not retain copies of those forms, but that the evidence does not establish that she was specifically directed to do so.

I found probable Weaver's account that, after the unemployment paperwork began to accumulate on her desk, Granick commented that she could not leave all the documents on her desk and had "to get rid of them." Granick acknowledged that she at times spoke to Weaver about the need to file and presented equivocal testimony as to whether she discussed the filing of unemployment documents. However, I **FIND** that Granick did not specifically direct Weaver to throw away or shred the documents. I **FIND** that, to the extent Weaver literally interpreted Granick's comment to mean that she should discard the documents, Weaver's conduct was unreasonable and defies common sense, particularly in light of her vast experience as a legal secretary. I **FIND** that Granick, Krause and Smeltzer did not direct or authorize Weaver to shred or

otherwise discard any documents other than duplicate copies. I **FIND** that Weaver did not inform Granick, Krause and Smeltzer that she was discarding the unemployment documents and these individuals had no knowledge that Weaver was engaging in this conduct. I **FIND** that Weaver never asked anyone whether she should be throwing away or shredding the unemployment documents after Granick's comment. I **FIND** that the evidence does not support that there was a lack of storage space for the documents, and the District also had a procedure in place for the storage of documents that did not need to be immediately accessed at various central locations. Although the evidence falls short of establishing that Weaver had sent documents to central storage when she worked for the Labor Relations Office, I **FIND** that Weaver was aware of this procedure and had called on Krause's behalf to request a document from storage. Varying accounts were offered as to whether a shedder was located in the area of Weaver's work station. While Krause's testimony corroborated that a shedder was in the area for a short period of time, all of the witnesses except for Weaver denied that a shedder existed. Whether Weaver shredded the documents or simply threw them out is immaterial to the resolution of the charges. I **FIND** that both the shredding of documents and the disposal of original documents was not a regular or sanctioned practice of the Labor Relations Office.

With regard to the telephone conversation on November 16, 2007, I **FIND** that Weaver made the statements as detailed by Smeltzer and Tabenkin. However, I also found probable Weaver's testimony that she was on medication at the time, and her explanation concerning why she gave the answers she did was reasonable. In contrast to Tabenkin and Smeltzer, Weaver is a secretary and not an attorney. Her apparent lack of understanding or confusion concerning the matters discussed is supported by her responses to the various questions. Although I do not doubt the credibility of Smeltzer's and Tabenkin's account that Weaver said that she had received Notices of Docketing in the past, the undisputed evidence discloses that Weaver did not have a copy of the document when she made this statement. I further found persuasive Weaver's testimony that she had never received a Notice of Docketing from the Appellate Division during the period that she handled the unemployment work. Weaver's account is consistent with Tabenkin's description that mail marked "legal" or

"law" is directed to him or the Law Department. Smeltzer also recognized the legal nature of the document in her memorandum to Shafer, which explained that she contacted Weaver to ascertain what "firm" handled these matters. Beyond this, the record is bereft of any other evidence to support a reasonable inference that Notices of Docketing from the Appellate Division related to unemployment matters were directed to Weaver's attention or that Weaver had responsibility for handling these cases, which logically would be handled by an attorney. Further lacking is any evidence that Weaver had, in fact, received such notices in the past and/or that she threw away those notices. In sum, I find insufficient evidence that Weaver ever received a Notice of Docketing from the Appellate Division that she discarded during the period that she handled the unemployment work.

I accept as **FACT** Tabenkin's account of the events that occurred during his meeting with Weaver on November 28, 2007. Specifically, I **FIND** the following **FACTS**: At the meeting on November 28, 2007, Tabenkin asked Weaver whether any paperwork existed regarding the particular unemployment appeal referenced in the Appellate Division's notice, which Tabenkin did not present to Weaver. In response, Weaver used her computer, after which she advised Tabenkin that the individual was a substitute and, therefore, would not be entitled to unemployment compensation. Tabenkin informed Weaver that, while he agreed with her analysis, he needed paperwork in order to prepare an appendix for the Appellate Division. Weaver informed Tabenkin she did not have that paperwork and, in response to his inquiry as to why she did not have the paperwork, Weaver replied that she threw the paperwork away. Weaver reported that she had retained paperwork when she started doing the unemployment work, but the amount of the paper proved to be so voluminous that at some point she decided to throw the paperwork away. Weaver did not inform Tabenkin during this meeting that someone had directed her to throw the documents away.

With regard to the later meeting with the State Superintendent, the evidence preponderates in favor of Smeltzer's rendition of the meeting. Specifically, I **FIND** the following **FACTS**: Glascoe asked Weaver at the meeting to describe the process that she used for handling unemployment compensation matters from start to finish, and

whether she had thrown away unemployment documents. Weaver stated that she had "shred" documents that she no longer needed, that all of her supervisors knew that she was shredding the unemployment documents, and specifically mentioned Granick and Krause. In response to Rush's inquiry regarding whether Smeltzer knew that she was shredding unemployment documents, Weaver first replied "yes" and, after Smeltzer said "Lisa you know that's not true," Weaver changed her answer to state that Smeltzer knew she shredded duplicates and triplicates of documents Weaver reported that, because there was a lack of storage space, Granick and Krause had told her to get rid of or to shred the documents when she was done with them, and also indicated that a lot of the documents contained confidential information such as employee's Social Security numbers. I further **FIND** that Weaver exhibited a lack of candor during the meeting, since neither Granick nor Krause knew that she was shredding or discarding the unemployment documents and did not direct her to take this action.

CHARGE FOUR

Charge Four alleges in pertinent part that "[o]n November 2, 2007, Weaver stated to the general counsel that she would not answer telephone calls for him"; "[i]n the course of subsequent discussion, Weaver stated that she no longer was paid a stipend to handle unemployment compensation cases, and therefore she would not answer telephone calls for the General Counsel"; and, "[i]n fact, Weaver failed to answer any telephone calls for the General Counsel between November 1, 2007 and the beginning of her sick leave on or about November 14, 2007." The District charges that Weaver's stated refusal to answer telephone calls for the general counsel constitutes neglect, misbehavior, insubordination, unbecoming conduct and/or other just cause for termination.

The Testimony

Smeltzer testified that, at the meeting Glascoe convened before Tabenkin started, Glascoe discussed that the shared responsibilities by Weaver and the other secretary included typing and answering the telephone. Although Shafer did not recall

whether there was a specific discussion relating to the telephone at the meeting, she recalled that a discussion transpired with Weaver at that time regarding what her responsibilities would be, Weaver did not object to doing general counsel's work, and Weaver told the meeting attendees that she would be able to handle the work of Risk Management, Labor Relations and general counsel if need be.

Tabenkin testified that Weaver told him out of the blue in the afternoon of November 2, 2007, "I'm not answering your phone." Tabenkin described that he was sort of taken aback by the comment, but since this was his first day in the office, and his first day working in the public sector, he determined to not make an issue of it. Tabenkin testified that after Weaver commented that she was not going to answer his telephone, she did not answer his telephone. Tabenkin described that he initially received very few telephone calls. He indicated that, as an "example," on November 2, 2007, his telephone rang several times; he let it ring once, twice, three times; he believed he heard the telephone ring at Weaver's desk; and, when Tabenkin observed that Weaver did not move to pick up the telephone, Tabenkin picked up the telephone on his desk and answered it himself. Tabenkin stated that Weaver's desk was located thirty-seven inches from the doorframe of his office, and from his desk he could see Weaver sitting at her desk by slightly turning his head. Tabenkin never raised the telephone issue with Weaver between November 2 and the date when Weaver went on sick leave, and did not issue any warning memorandum to her.

Weaver testified that there was no discussion at the meeting with Glascoe concerning answering Tabenkin's telephone, but, instead, the discussion concerned typing. Weaver denied that anyone specifically told her that she would be answering Tabenkin's telephone or that Tabenkin asked her to answer his telephone. Weaver denied informing Tabenkin that she would not answer his telephone. Weaver did not dispute that she did not answer Tabenkin's telephone on November 2, 2007, but asserted that Tabenkin's telephone was not hooked up to her phone line and Tabenkin was sitting at his desk when the telephone was ringing. Weaver testified that no one informed her after November 2, 2007, that she should have answered Tabenkin's telephone.

Analysis of the Evidence

In judging the evidence presented, I found Weaver's rendition overborne by the testimony of Smeltzer and Tabenkin. I found these witnesses to be credible as to the relevant facts and their testimony persuasive and believable. Having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following additional **FACTS**:

One of the shared responsibilities discussed at the meeting with Glascoe involved answering Tabenkin's telephone. Weaver, along with the other secretary, was responsible for answering Tabenkin's telephone. During the afternoon of November 2, 2007, Weaver told Tabenkin that she was not answering his telephone. Weaver failed to answer Tabenkin's telephone on November 2, 2007. I found Weaver's uncorroborated claim that she did not answer Tabenkin's telephone on November 2, 2007, because his telephone was not hooked up to her line improbable and undermined by the evidence concerning Weaver's comment earlier that day. It is further improbable that, had this been the case, Weaver would not have addressed the telephone issue with Tabenkin or someone else after she heard his telephone ringing. Although Tabenkin testified that Weaver did not answer his telephone after making the comment on November 2, 2007, he further testified that he initially received very few telephone calls and did not detail any other specific instance when Weaver was at her desk and did not answer his telephone. In other words, there is insufficient evidence demonstrating, by a preponderance of the evidence, that after the incident on November 2, 2007, and before Weaver went on sick leave on or about November 14, 2007, there was any other occasion when Tabenkin's telephone rang, Weaver was at her desk, the telephone was not first picked up by the other secretary and Weaver failed to answer his telephone. Further lacking is any evidence to support the allegation that, "[i]n the course of subsequent discussion, Weaver stated that she no longer was paid a stipend to handle unemployment compensation cases, and therefore she would not answer telephone calls for the General Counsel."

LEGAL DISCUSSION AND CONCLUSIONS

The legislative design of the statutory tenure provisions is "to aid in the establishment of a competent and efficient school system" by affording teachers and other school employees "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 school employees from arbitrary dismissal for "'unfounded, flimsy or political reasons.'" Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982) (citation omitted).

In furtherance of this objective, a tenured secretary of a board of education shall not be dismissed, suspended or reduced in compensation "except for neglect, misbehavior, or other offense," and in the manner prescribed by the provisions of N.J.S.A. 18A:6-9 et seq. N.J.S.A. 18A:17-2. In turn, N.J.S.A. 18A:6-10 addresses the dismissal and reduction in compensation of tenured school employees and provides that such employees shall not be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause," and then only after compliance with the litany of procedural safeguards engrafted in the Tenure Employees Hearing Law.

The District bears the burden of proving the charges against Weaver by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). This forum has the duty to decide in favor of the party on whose side the weight of the evidence preponderates, and according to a reasonable probability of truth. Jackson v. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

In the within matter, the District charges Weaver with neglect, misbehavior, insubordination, unbecoming conduct and/or other just cause which, the District urges, warrant the termination of her employment. The charges are predicated on Weaver's alleged conduct in substantially decreasing her unemployment work after her stipend was eliminated (Charge One), throwing away documents concerning employees' unemployment compensation claims (Charge Two), providing false information in connection with the investigation regarding her unemployment work (Charge Three) and failing to answer general counsel's telephone (Charge Four).

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 Atl. 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, but may be based simply upon a violation of the implicit standard of good behavior. Emmons, supra, 63 N.J. Super. at 140; see also City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955).

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 (1957). The concept of "just cause" is not narrowly interpreted to encompass only intentional conduct. In re Cirangle, 1981 S.L.D. 1405, 1409 (App. Div. 1981), certif. denied, 87 N.J. 347 (1981). 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 Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), certif. denied, 65 N.J. 292 (1974); see In re Motley, 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>. Neglect of duty and insubordination constitute "just cause" for disciplinary action. Ibid. Neglect of duty is founded on an employee's omission or failure to perform a duty required by the

employee's position and includes official misconduct or misdoing as well as negligence. Clyburn v. Twp. of Irvington, CSV 7597-97, Initial Decision (September 10, 2001), adopted, Merit Sys. Bd. (December 27, 2001), <http://lawlibrary.rutgers.edu/oal/search.html>. In general, insubordination involves an employee's refusal or failure to follow an order or instructions of a supervisor. See Eaddy v. Dep't. of Transp., 208 N.J. Super. 156, 158-59 (App. Div. 1986). "It is a fundamental principle of the workplace . . . that when an employee is given an order by a supervisor that order will be followed." Osle v. Mid-State Corr. Facility, CSV 6289-01, Merit Sys. Bd. (April 1, 2003), <http://lawlibrary.rutgersedu/oal/search.html>. "It is not for a public employee to second guess a superior's order and refuse to obey that order because it would result in . . . a result which the subordinate does not concur in," and "[a] public employee who intentionally disobeys a proper order does so at his or her own risk." Headen v. E. Jersey State Prison and Dep't of Corr., 94 N.J.A.R.2d (CSV) 623, 627.

Judged against the above standards, and based upon the aforesaid findings of fact, I **CONCLUDE** that the District has failed to shoulder its burden of proving Charge One by a preponderance of the credible evidence. Although the evidence establishes that Weaver complained to a coworker about doing the unemployment work after her stipend was eliminated, this, without more, does not rise to the level of conduct constituting just cause for disciplinary action. According, Charge One is **DISMISSED**. I **CONCLUDE** that Charge Five should also be **DISMISSED** since it is simply a demand for termination based on the truthfulness of the other certified charges and is not an independent charge.

Turning to Charges Two, Three and Four, I **CONCLUDE** that the District has proven, by a preponderance of credible evidence, that Weaver exhibited unbecoming conduct by virtue of her actions in (1) disposing of the unemployment documents, (2) exhibiting a lack of candor during the investigation and (3) failing to answer general counsel's telephone. I further **CONCLUDE** that Weaver's conduct in discarding the documents and not answering the telephone also constitutes neglect of duty, and the

later infraction amounts to insubordination, which provide other just cause for disciplinary action.

Succinctly stated, as a confidential secretary, Weaver is held to a high standard of conduct, including upholding an image of utmost confidence and trust. See Weisel v. Hooks, 277 N.J. Super. 78, 86 (Ch. Div. 1994) (recognizing that a confidential secretary is "a position of trust" and one who serves in such position "is privy to the most critical policymaking decisions and has access and exposure to policymakers as well"). Weaver engaged in conduct that was incompatible with the high degree of dependability expected of one who serves in that position. Weaver was insubordinate by failing to answer general counsel's telephone after being directed to do so, and Weaver neglected her duties since she was one of the secretaries assigned to that task. This conduct, coupled with Weaver's lack of candor during the investigation, further constitutes unbecoming conduct that deviated from the standard of proper conduct expected of public employees. The most serious infraction relates to Weaver's handling of the unemployment documents. Weaver's conduct in unilaterally adopting a practice of discarding the unemployment compensation documents, without taking any steps to confirm whether this action should be taken, fell significantly short of the conduct expected from a professional confidential secretary. Weaver's conduct was inappropriate, irresponsible and misguided. Weaver failed to exercise good judgment and to act in a responsible manner. Based on Weaver's education and vast experience as a secretary, Weaver reasonably should have known that original documents of this nature should not be simply discarded, and her failure to question Granick or her other supervisors concerning whether she should dispose of the documents rises to unbecoming conduct. Although I find that Weaver's lack of training and supervision in this area are mitigating factors for penalty purposes, this does not serve to excuse Weaver's dereliction. Indeed, according to her job description, Weaver's duties included the responsibility to "[m]aintain an efficient and well organized electronic and paper data collection and filing systems, including confidential files." P-2. By discarding the documents, Weaver violated one of the explicit responsibilities of her position. Simply put, I do not embrace Weaver's argument that dismissal of the charges is warranted because the District is essentially charging her with inefficiency and failed to provide her with a ninety-day improvement plan. Further, although the record does not

include any policy or procedure relating to the handling of employment documents or the retention of documents generally, the evidence does not support that the District had knowledge of or implicitly accepted the practice unilaterally developed by Weaver to dispose of the unemployment documents. Contrast In re Kenny, EDU 1217-03, Comm'r (January 23, 2004), <http://lawlibrary.rutgers.edu/oal/search.html>.

The only remaining issue concerns the appropriate discipline warranted under the circumstances. Relevant factors to be considered in the equation of whether dismissal or something less is appropriate include the nature and gravity of the offense, any extenuating or aggravating circumstances, and the harm or injurious effect that the conduct may have had on the proper administration of the school system. In re Fulcomer, 93 N.J. Super. 404, 422 (App. Div. 1967). The determination of whether a specific act or omission constitutes cause for removal requires an evaluation of the conduct in terms of its relationship to the nature of the position itself, and an appraisal of the actual or potential impairment of the public interest that may be expected to result from the conduct in question. Golaine v. Cardinale, 142 N.J. Super. 385, 397 (Law Div. 1976), aff'd, 163 N.J. Super. 453 (App. Div. 1978), certif. denied, 79 N.J. 497 (1979); Sch. Dist. of the Twp. of Parsippany-Troy Hills v. Hess, 97 N.J.A.R.2d (EDU) 34, 44-45. Unfitness for a position in a school system may be demonstrated by a single incident, if sufficiently flagrant, but is "best evidenced by a series of incidents." Redcay v. State Bd. of Educ., 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E. & A. 1944). In general, when the dereliction charged does not involve such a serious infraction that in and of itself warrants removal, dismissal is reserved for cases where there has been a series of incidents accompanied by prior warnings or counseling. See In re Cowan, 224 N.J. Super. 737 (App. Div. 1988).

Weaver's failure to answer the telephone, while inappropriate, does not in itself warrant the imposition of severe discipline. The gravity of Weaver's other infractions is unquestionably serious in nature. However, without diminishing the seriousness and inappropriateness of Weaver's conduct, I am persuaded that dismissal is an unduly harsh penalty to impose under the circumstances presented. In balancing the relevant factors, there are several extenuating factors in Weaver's favor.

Weaver's actions cannot be said to be premeditated, cruel or vicious. Fulcomer, supra, 93 N.J. Super. at 421. Rather, her actions bespeak of extremely poor judgment. Although Weaver's conduct is inexcusable and unbecoming, the evidence does not support that she willfully destroyed documents that the District was required to retain or that she intended to cause the District harm. The undisputed evidence discloses that the District did not train Weaver or provide her with any direction with regard to the unemployment work. No policy or protocol concerning how this work should be accomplished, including how the documents should be maintained, was ever given to Weaver. And, none of the witnesses who testified were apparently responsible for supervising her work in this area to ensure that it was properly done in accordance with some type of protocol. Weaver was not provided with notice of any deficiency with regard to this work so as to afford her the opportunity to correct any mistakes. Further, the record does not demonstrate that Weaver's actions had an injurious effect on the proper administration of the school system, and that the discarded documents could not have been obtained from the Unemployment Office or other sources if needed. In addition, Weaver has been employed as a confidential secretary for approximately seventeen years and, as far as the record reveals, has an unblemished and exemplary employment record during her career. She has received positive evaluations and glowing comments by her supervisors, who considered her a valuable employee. While the District emphasizes its lack of trust in Weaver stemming from her actions, the record supports that Weaver has demonstrated her capacity to be an effective confidential secretary in matters where appropriate supervision and direction were provided and the charged conduct represents an aberration in an otherwise successful career.

The cases cited by the District do not support a contrary result and involve infractions of a significantly more egregious nature. See e.g., In re Herrmann, 192 N.J. 19 (2007) (termination of DYFS worker who waived cigarette lighter in the face of a five-year-old child in a room that contained oxygen tanks); In re Valdes, EDU 3620-01, Initial Decision (May 15, 2003), adopted, Comm'r (June 24, 2003), aff'd, State Bd. of Educ. (August 4, 2004), aff'd, App. Div. (January 22, 2007), <http://lawlibrary.rutgers.edu/oal/search.html> (dismissal of tenured school custodian for, among other infractions, unbecoming conduct, insubordination to his superiors,

abuse of sick leave, hurling unsubstantiated charges of discrimination toward staff members, corrupt behavior and lying); In re Marrero, EDU 1341-97, Initial Decision (October 12, 1999), adopted, Comm'r (December 3, 1999), aff'd, State Bd. of Educ. (May 5, 2000), <http://lawlibrary.rutgers.edu/oal/search.html> (dismissal of tenured secretary for unbecoming conduct involving converting school money collected for her own personal use); Hess, supra, 97 N.J.A.R.2d (EDU) 34 (dismissal of guidance counselor for inappropriate comments and communications with female students); In re Horowitz, 93 N.J.A.R.2d (EDU) 232 (termination of superintendent's employment for various infractions, including allowing payment of invoice to vendor when no contract existed). Equally unavailing is the District's reliance on In the Matter of O'Brien, CSV 8223-00, Merit System Board (April 9, 2003), <http://lawlibrary.rutgers.edu/oal/search.html>, which addressed the limited issue of whether the appointing authority's disciplinary action seeking removal was moot in light of the appellant's resignation as part of a plea agreement for a disorderly person's offense of tampering with public records.

Based upon a consideration of the totality of the circumstances, including consideration of Weaver's years of exemplary service, the lack of any disciplinary record coupled with the mitigating evidence presented, I **CONCLUDE** that the particular circumstances in this case do not warrant the termination of Weaver's employment. This is not to suggest that Weaver's actions should be treated lightly. The circumstances warrant a penalty severe enough to impress upon Weaver the gravity of her derelictions and that such conduct will not be tolerated. I **CONCLUDE** that a forfeiture of the pay withheld during Weaver's suspension period, along with the loss of any salary increment that she would have been entitled to in the 2008-2009 school year, constitutes a sufficient and reasonable discipline under the circumstances.

ORDER

I **ORDER** that respondent shall forfeit all salary and benefits that otherwise would have accrued during the first 120 days of her suspension. I further **ORDER** that

respondent shall lose any salary increment that she would have been entitled to in the 2008-2009 school year.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, 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 20, 2009
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: April 20, 2009

Mailed to Parties: Laura Pardes
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 21 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

sej/jb

APPENDIX

List of Witnesses

For Petitioner:

Eileen Shafer
Rosa Dipini
Alicia Walton
Carol Smeltzer
Michael Krause
Mark Tabenkin
Judi Granick

For Respondent:

Lisa Weaver

List of Exhibits in Evidence

For Petitioner:

P-1	Personnel Transaction Request and Personnel Action Form
P-2	Job Description (six pages)
P-3	Personnel Transaction Request and Personnel Action Form
P-4	Memorandum from Lisa Weaver to Dr. Michael Glascoe, dated August 8, 2005
P-5	Memorandum from Dr. Michael Glascoe to Lisa Weaver, dated August 22, 2005
P-6	Memorandum from Carol R. Smeltzer, Esq., to Eileen Shafer, dated November 16, 2007

P-7 Memorandum from Mark S. Tabenkin, Esq., to File, dated November 28, 2007

P-8 Memorandum from Michael P. Krause to Eileen Shafer, dated December 4, 2007

P-9 E-mail from Judi Granick to Eileen Shafer, dated December 4, 2007

P-10 Personnel Transaction Request and Personnel Action Form and letter from Luis M. Rojas, Jr., to Lisa Weaver, dated November 30, 2007 (two pages)

P-11 Correspondence and envelopes (five pages)

P-12 Letter from Rosa Dipini to Ms. Shafer, dated February 29, 2008

P-13 Evaluation dated June 26, 2007 (three pages)

P-14 Notice of Docketing, Notice of Appeal and Decision of the Board of Review (three pages)

P-15 Evaluation with evaluation date of March 31, 2005 (three pages)

P-16 Resume of Lisa M. Weaver

P-17 Resume of Lisa M. Weaver (two pages)

P-18 Analysis of Academic Progress, Montclair State University (four pages)

P-19 Syllabus, Law Office Management and Technology course (five pages)

For Respondent:

None

Hearing Dates

September 16, 17, 19 and October 28, 2008

#173-09

OAL DKT. NO. EDU 9234-08
AGENCY DKT. NO. 185-7/08

W.R. and J.R. on behalf of minor child D.R.	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following observation. Sections 1 through 7 of the Agreement appear to refer to 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 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.

Lucille Davy
COMMISSIONER OF EDUCATION

Date of Decision: 6/02/09

Date of Mailing: 6/03/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09234-08

AGENCY DKT. NO. 185-7/08

W.R. AND J.R. ON BEHALF OF MINOR CHILD D.R.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,

Respondent.

Elizabeth Athos, Esq., for petitioners

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

Record Closed: April 23, 2009 Decided: April 23, 2009

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on July 28, 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.

A hearing was scheduled on October 27, 2008. Prior to the date of hearing the parties settled the matter. The attached Settlement Agreement and Board Resolution were submitted on April 23, 2009, 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 (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.

4/23/09
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 4-28-09

Mailed to Parties:
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 28 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

tbj

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for Respondent
Teaneck Board of Education

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2008 DEC 15 A 8:50

W.R. and J.R., o/b/o D.R.,

Petitioner,

v.

Teaneck Board of Education,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
Agency Ref. No. 185-7/08

OAL Docket No. EDUOS 09234-2008N

STIPULATION OF SETTLEMENT AND RELEASE

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioners Walter Russ and Janice Russ, individually and on behalf of their son, D.R., and the Respondent Teaneck Board of Education.

WHEREAS, Walter Russ, Janice Russ, and their son, D.R., are domiciled in Teaneck; and

WHEREAS, in February, 2008, D.R., a student attending Teaneck High School (hereinafter "THS") engaged in behaviors which resulted in a short-term suspension from THS with a recommendation for a long term suspension;

WHEREAS, the Respondent Teaneck Board of Education conducted a long term suspension hearing on March 27, 2008, and concluded that D.R. had violated the code of conduct and that his actions warranted long term suspension from THS;

WHEREAS, Petitioners appealed that decision to the Commissioner of Education; and

WHEREAS, D.R. has demonstrated an appreciation of the seriousness of his offense, as indicated in the counseling report of The Youth Success Network dated August 27, 2008 and the psychological report of Gordon Presley, Psy.D. dated March 10, 2008; and

WHEREAS, Dr. Thomas Schreiber conducted a psychiatric evaluation of D.R. in September, 2008, and issued a report in October, 2008, concluding that there is no indication that D.R. suffers from a specific psychiatric illness or that, from a psychiatric point of view, he is dangerous to himself or others, if he returns to THS; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows:

1. D.R. shall issue a verbal apology to the THS Principal, Angela Davis.

2. D.R.'s suspension shall terminate early and D.R. shall be permitted to return to THS as of November 3, 2008.

3. Following his return to THS, D.R. must consistently avail himself of the services offered by the Forum.

4. Initially upon his return to THS, D.R. will participate in weekly counseling with the school psychologist, social worker, or guidance counselor, as determined by the Principal; as the school year progresses, the frequency of counseling may decrease as determined by the Principal.

5. Following his return to THS, D.R. must successfully complete all academic courses.

6. Following his return to THS, D.R. will remain on social probation for a period of six (6) months, during which his participation in extra-curricular activities, including athletics, will be subject to D.R.'s request to the Principal and the Principal's permission, which permission will not be unreasonably withheld. Any such participation in extra-curricular activities requires that D.R. leave the school premises not more than fifteen (15) minutes after the end of the activity.

7. Following his return to THS, D.R. will not engage in any behavior or activity which would warrant discipline by the THS administration or other representatives of the School District or the involvement of local law enforcement officials. If D.R. does engage in such behavior, his parents will be immediately notified. A Board hearing may be recommended, if warranted in accordance with the School District's code of conduct.

8. Petitioners Walter Russ, Janice Russ, individually and on behalf of their son, D.R., hereby release Respondent, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, arising under or relating 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 to enforce the terms of this Agreement.

9. Petitioners, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of their Petition of Appeal in this matter.

10. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

11. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

13. This Agreement shall be incorporated into an Initial Decision by the Honorable Barry Moscowitz, which shall be subject to approval and adoption by the Commissioner of Education.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR D.R.

Walter Russ Date:

FOR D.R.

Janice Russ 10-29-08

Janice Russ Date:

FOR THE TEANECK BOARD OF EDUCATION

By: Date:

10. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

11. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

13. This Agreement shall be incorporated into an Initial Decision by the Honorable Barry Moscowitz, which shall be subject to approval and adoption by the Commissioner of Education.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR D.R.

_____

Walter Russ Date:

FOR D.R.

_____

Janice Russ Date:

FOR THE TEANECK BOARD OF EDUCATION

By: _____ Date: 11/19/08

{00994243;1 /JLB }

EXTRACT FROM THE MINUTES OF A MEETING OF THE
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK,
BERGEN COUNTY, N.J. AS RECORDED IN THE
OFFICIAL MINUTE BOOK

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2009 APR 23 A 8:12

The Board of Education of the Township of Teaneck in the County of Bergen, New Jersey, convened in public session Wednesday, April 15, 2009, at 8:07 p.m. in the 3rd Floor Student Center at Teaneck High School, 100 Elizabeth Avenue, Teaneck, New Jersey.

The following members of the Teaneck Board of Education were present:

Mr. Jack Aaker, Mrs. Margaret Angeli, Mr. Joseph Cliffe, Dr. David Diuguid, Mrs. Margot Embree Fisher, Mrs. Gervonn Rice, Mr. Sebastian Rodriguez, Dr. Ardie Walser and Dr. Henry Pruitt.

The following members were absent:

Board Operation Motion #23
On a motion moved by Mr. Aaker and seconded by Dr. Diuguid, the Board, by unanimous roll call vote of the members' present, authorized the Superintendent to accept a resolution as per below:

> WHEREAS, the Board is a Respondent in a contested case pending before the Office of Administrative Law, bearing docket number EDUOS 09234-2008N; and
>
> WHEREAS, the parties wish to amicably resolve this action without further proceedings; and
>
> NOW, THEREFORE, BE IT RESOLVED THAT the Board of Education ratifies and authorizes settlement of the contested case bearing docket number EDUOS 09234-2008N in accordance with the terms presented to the Board.

ROLL CALL: AYES: 9-0
NAYS: 0

STATE OF NEW JERSEY)
COUNTY OF BERGEN)

I, Sean Gately, Secretary of the Board of Education of the Township of Teaneck, in the County of Bergen, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Teaneck Board of Education duly called and held on Wednesday, April 15, 2009, has been compared by me with the original minutes as officially recorded in my office in the minute book of said Teaneck 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 Teaneck Board of Education this 17th day of April, 2009.

SEAL

Sean Gately
Board Secretary

174-09

OAL DKT. NO EDU 10449-08
AGENCY DKT. NO. 342-11/08

IN THE MATTER OF THE TENURE	:	
HEARING OF EILEEN DANIELS,	:	
SCHOOL DISTRICT OF THE CITY OF	:	COMMISSIONER OF EDUCATION
VINELAND, CUMBERLAND COUNTY.	:	DECISION
	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846.

Accordingly, the settlement is hereby approved and the tenure matter dismissed, subject to compliance with the terms of the settlement. A copy of this decision shall be forwarded to the State Board of Examiners.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 6/2/09
Date of Mailing: 6/3/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10449-08
AGENCY DKT. NO. 342-11/08

IN THE MATTER OF THE TENURE HEARING OF EILEEN DANIELS, SCHOOL DISTRICT OF THE CITY OF VINELAND, CUMBERLAND COUNTY.

Harold Shapiro, Esq., for petitioner (Shapiro and Shapiro, attorneys)

Joseph D. O'Neill, Esq., for respondent (O'Neill & Coant, attorneys)

Record Closed: April 16, 2009 Decided: April 23, 2009

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

This matter was transmitted to the Office of Administrative Law on November 25, 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 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.

4/23/09
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency:
APR 28 2009

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

SETTLEMENT AGREEMENT

WHEREAS, EILEEN DANIELS (hereinafter "DANIELS") has been employed by the VINELAND BOARD OF EDUCATION (hereinafter "BOARD") as a tenured teaching staff member pursuant to *N.J.S.A.* 18A:28-5; and

WHEREAS, DANIELS and BOARD mutually desire to terminate amicably DANIELS' employment and/or affiliation with BOARD, and to settle and terminate any and all disputes between them by executing this SETTLEMENT AGREEMENT;

IT IS HEREBY AGREED by and between DANIELS and BOARD, as follows:

1. The BOARD and DANIELS agree that the BOARD prepared and filed tenure charges ("Tenure Charges") based on charges of unbecoming conduct, inefficiency, and other just cause against DANIELS pursuant to N.J.S.A. 18A:6-10 et seq. and that said charges were certified by the Board to the Commissioner of Education on November 14, 2008 and are pending under Agency Docket No. 342-11/08 and OAL Docket No. EDUTH 10449-2008S, as more specifically delineated in Exhibit A which is a copy of the Charge and DANIELS' Response.

2. BOARD and DANIELS represent that each desires to enter into this SETTLEMENT AGREEMENT to fully and finally settle and resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which the BOARD may have against DANIELS.

3. The BOARD acknowledges and agrees that this SETTLEMENT AGREEMENT shall cause the BOARD to voluntarily dismiss, waive and withdraw any and all administrative actions of any kind against DANIELS and the BOARD has agreed to request that the Commissioner of Education approve the BOARD'S voluntary dismissal of the tenure charges with prejudice.

4. (a) DANIELS agrees that upon signing this Settlement Agreement and by signing her ~~resignation~~ retirement letter which is attached hereto as Exhibit B, she is irrevocably, as of the date of this SETTLEMENT AGREEMENT, ~~resigning her~~ retiring from employment with the BOARD, which shall become effective August 31, 2009, with DANIELS to be placed on administrative leave without pay but with her health insurance benefits to be paid by the BOARD from the date of this SETTLEMENT AGREEMENT through August 31, 2009.

(b) As a result of the tenure charges being certified on November 14, 2008, DANIELS pay was stopped as of November 14, 2008. The BOARD and DANIELS, to avoid the litigation of the contested tenure matter before an Administrative Law Judge and specifically, the BOARD, in exchange for DANIELS' ~~resignation~~ retirement pursuant to paragraph 4(a) above, agrees to place DANIELS on unpaid administrative leave of absence until August 31, 2009, with the BOARD to pay DANIELS' health insurance benefits through August 31, 2009.

5. DANIELS, for the consideration given by the BOARD as set forth herein, which she acknowledges is adequate and satisfactory to her, hereby commits as follows: DANIELS irrevocably and unconditionally remises, releases, waives and forever discharges the BOARD from any and all manner of liabilities, actions, causes of action, contracts, agreements, promises, claims and demands of any kind or nature whatsoever, in law or equity, whether known or unknown, which DANIELS has ever had or now has against the BOARD in connection with her employment with the BOARD, the resignation of her employment, compensation and/or benefits with the BOARD and the charges. DANIELS further understands and agrees that this SETTLEMENT AGREEMENT shall act as a complete bar to any claim, demand or action of any kind whatsoever which could be or could have been brought by her and which seeks personal, equitable and monetary relief for her against the BOARD, including but not limited to: any claims of wrongful discharge,

breach of express or implied contract, fraud, discrimination, liability in negligence or tort, and any claims of any kind which may be brought in any court of law or equity or an administrative agency; claims for arbitration in any forum; the U.S. Constitution, as amended; the Constitution of the State of New Jersey; Title VII of the U.S. Civil Rights Act of 1964, as amended; the U.S. Age Discrimination in Employment Act; the U.S. Employment Retirement Income Security Act; the U.S. Fair Labor Standards Act; the United States Family and Medical Leave Act; the New Jersey Family Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Department of Personnel; and any other federal, state or local law, regulation or ordinance relating to employment; related torts; and employment discrimination, employee benefits, and collective bargaining agreement; and the termination of employment; and any other claim arising from or relating to DANIELS' employment. Notwithstanding the preceding sentence, DANIELS shall be permitted to pursue and shall not be deemed to have waived any claims for workers compensation benefits and may name and continue to name the BOARD as respondent in any workers compensation petition. DANIELS, as well as the BOARD, understands that she/it is not releasing any claim she/it may have to enforce the provisions of this SETTLEMENT AGREEMENT. This release covers both claims that DANIELS knows about and those she may now know about, except for claims (i) that may arise after the date DANIELS executes this Agreement; (ii) for a breach of this Agreement; or (iii) with respect to any benefits in which DANIELS has a vested interest under the terms and conditions of any of the Board's employee benefit plans. DANIELS further agrees not to file a lawsuit or administrative claim or demand for arbitration to assert any of the claims she has given up, released or waived. Any substantial or material breach of this Agreement shall entitle the non-breaching party to an injunction or any action at law or equity to remedy the breach and an award of

reasonable attorneys' fees, other professional fees, costs and expenses incurred to remedy and defend against said breach.

6. The BOARD agrees to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges, Agency Docket No. 342-11/08, OAL Docket No. EDUTH 10449-2008S, with prejudice in light of DANIELS' ~~resignation~~ retirement and the consideration given in the form of unpaid administrative leave of absence with health benefits paid through August 31, 2009 by the BOARD, granted to her by the BOARD. In executing this Agreement, DANIELS understands the ultimate decision with regard to the resolution of the tenure charges lies with the Commissioner of Education and in the event that the New Jersey Commissioner of Education rejects the settlement between the BOARD and DANIELS, then this agreement is completely null and void and the tenure charges currently pending will continue to be processed. Attached as Exhibit C is DANIELS Affidavit evidencing that she has been counseled in every respect and knows that the Board of Examiners can act independently of this SETTLEMENT AGREEMENT.

7. With respect to any inquiries directed to the Vineland School Board regarding DANIELS' status, the BOARD shall have the responsibility to comport with the requirements of New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1 et seq.

8. This SETTLEMENT AGREEMENT is not and shall not in any way be deemed to constitute an admission or evidence of any wrongdoing or liability on the part of the BOARD or DANIELS. Rather, this SETTLEMENT AGREEMENT constitutes the good faith settlement and release of disputed claims, and it is acknowledged and agreed by the Parties that this SETTLEMENT AGREEMENT is being entered into by the Parties solely to avoid the burden, expense, delay and uncertainties of further litigation and to fully and finally resolve, settle and dismiss with prejudice, any and all claims of any kind whatsoever,

whether known or unknown, which the BOARD or DANIELS has ever had or now has against each other arising out of or relating to DANIELS' employment with the BOARD.

9. This SETTLEMENT AGREEMENT may not be changed orally and no modification, amendment or waiver of any provision contained in this SETTLEMENT AGREEMENT, or any future representation, promise or condition in connection with the subject matter of this SETTLEMENT AGREEMENT, shall be binding upon any party hereto unless made in writing and signed by such party and subject to approval by the BOARD.

10. This SETTLEMENT AGREEMENT contains the entire agreement and complete settlement between the Parties and supersedes any and all previous agreements of any kind whatsoever between them, whether written or oral. All prior and contemporaneous discussions and negotiations have been and are merged and integrated into, and are superseded by this SETTLEMENT AGREEMENT. This is an integrated document.

11. In the event that any provision of this SETTLEMENT AGREEMENT or the application thereof should be held to be void, voidable, unlawful or, for any reason, unenforceable, the remaining provisions shall remain in full force and effect and to that end, the provisions of this SETTLEMENT AGREEMENT are declared to be severable.

12. This SETTLEMENT AGREEMENT is made and entered into, and shall be subject to, governed by and interpreted in accordance with the laws of the State of New Jersey and shall be fully enforceable in the courts of that state, without regard to principles of conflict of laws. The parties agree that any suit, action or other legal proceeding arising out of this SETTLEMENT AGREEMENT shall be brought in the Superior Court for the State of New Jersey, County of Cumberland.

13. DANIELS' agrees that she shall be responsible for her own attorney's fees and costs incurred in connection with any matter mentioned in this SETTLEMENT AGREEMENT.

14. In executing this SETTLEMENT AGREEMENT DANIELS has had an opportunity to speak to her attorney and has relied upon the legal advice of her attorney as to the terms of this SETTLEMENT AGREEMENT, which have been completely read by her and explained by her attorney, and those terms are fully understood and voluntarily accepted.

15. This SETTLEMENT AGREEMENT shall not be executed in counterparts and shall be enforceable only if executed by DANIELS and the BOARD.

16. This SETTLEMENT AGREEMENT shall become effective immediately following the execution by DANIELS, approval by the BOARD and execution on behalf of the BOARD.

WHEREFORE, intending to be legally bound hereby, DANIELS and BOARD execute the foregoing SETTLEMENT AGREEMENT this 22nd day of January, 2009. 4/3/09

WITNESS:

April A. Carter

Eileen M. Daniels

WITNESS:

EILEEN DANIELS

Kevin J. Franchetta

KEVIN J. FRANCHETTA, CPA
ASSISTANT SUPERINTENDENT
FOR BUSINESS/BOARD SECRETARY

Frank N. Giordano

FRANK N. GIORDANO, BOARD
PRESIDENT

Daniel B. Laurie 4/3/09
Associate Solicitor
on behalf of the
Maryland Board of
Education

SHAPIRO & SHAPIRO, P.A.
1063 East Landis Avenue
P.O. Box 787
Vineland, New Jersey 08362
(856) 691-6800
Attorney for Vineland School District

RECEIVED
ASST SUPERINTENDENT
BUSINESS

In the Matter of Dismissal Charge :
Against Eileen Daniels, :
Vineland School District : **CHARGE OF SUSPENSION PURSUANT TO**
: **N.J.S.A. 18A:6-10 ET. SEQ.**

I, Charles D. Ottinger, Superintendent, Vineland Public Schools, being duly sworn, according to law, upon my oath, depose and say:

Pursuant to N.J.S.A. 18A:6-10 et. seq. the Vineland School District charges Eileen Daniels with unbecoming conduct, inefficiency and other just cause for dismissal and demands the dismissal of Eileen Daniels, a tenured fifth grade teacher at Durand School.

Said charge of unbecoming conduct, inefficiency and other just cause is summarized as set forth below and is more fully documented, by way of written statement of evidence under oath, in the Maryann Greenfield, Executive Director of Personnel, Vineland Public Schools, filed sly herewith and incorporated by reference herein.

CHARGE

> Eileen Daniels, a tenured fifth grade teacher at Durand School, engaged in unbecoming conduct and was inefficient in her duties and responsibilities as a teacher, the result of which is that her dismissal is required. Daniels failed to fulfill her professional responsibilities as an Examiner during the NJ ASK testing in her fifth grade classroom on May 5 and 6, 2008. Daniels failed to properly administer the testing and allowed the security of the testing process to be breached. Daniels' violations of NJ ASK testing procedure were multiple and serious. As such,

Exhibit A

Daniels' conduct was unbecoming and inefficient and created just cause for the discipline charged.

The conduct of Eileen Daniels, as set forth hereinabove and as summarized hereinbelow, constituted unbecoming conduct, inefficiency and other just cause for dismissal, pursuant to N.J.S.A. 18A:6-10(b).

CHARLES D. OTTINGER

Sworn and subscribed to before
me this 20 day of Aug., 2008.

JEANNE C. TRUCANO
Notary Public of New Jersey
My Commission Expires May 11, 2013

Law Offices
NED P. ROGOVOY, ESQUIRE, L.L.C.
782 South Brewster Road, Unit A-6
Vineland, New Jersey 08361
(856) 205-9701
Attorney for Eileen Daniels

In the Matter of Dismissal Charge
Against Eileen Daniels,
Vineland School District

AGENCY DKT. NO.

EILEEN DANIELS' RESPONSE
TO TENURE CHARGES

Eileen Daniels' actions as related to her role in administering the NJ ASK test did not jeopardize the integrity of the test and were not sufficiently egregious as to cause her tenure to be taken.

Her record as a teacher speaks to her genuine professionalism and ability. She intends, with the help of counsel, to defend.

CERTIFICATION

I hereby certify that the foregoing statements made by me are true and correct to the best of my knowledge and belief. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: October 5, 2008

EILEEN DANIELS

Witness:
Ned Rogovoy

EILEEN DANIELS
1301 S. LINCOLN AVENUE, APT. 706
VINELAND, N.J. 08361

April 3 ~~January~~ , 2009

Kevin Franchetta, CPA, Assistant Superintendent
For Business/Board Secretary
Members of the Vineland Board of Education
625 Plum Street
Vineland, NJ 08360-3796

RE: ~~Resignation~~ Retirement Effective August 31, 2009

Dear Mr. Franchetta:

Please be advised that I am ~~resigning~~ retiring from my position as teaching staff member in the Vineland Public Schools effective August 31, 2009. I am requesting that the Board approve my being placed on administrative leave without pay from the date of this letter through August 31, 2009. I understand that while on such administrative leave without pay my health insurance benefits shall be paid by the Vineland Board of Education.

Thank you.

Very truly yours,

Eileen M Daniels

EILEEN DANIELS

EXHIBIT B

IN THE MATTER OF THE TENURE HEARING OF EILEEN DANIELS,
SCHOOL DISTRICT OF THE CITY OF VINELAND, CUMBERLAND COUNTY
AGENCY DOCKET NO. 342-11/08
OAL DOCKET NO. EDUTH 10449-2008S

AFFIDAVIT OF EILEEN DANIELS

STATE OF NEW JERSEY)
ss.:
COUNTY OF CUMBERLAND)

EILEEN DANIELS, of full age, being duly sworn according to law upon her oath, deposes and says:

1. I have reviewed the Settlement Agreement and all of its ramifications, including the fact that the Board of Examiners will independently review the facts surrounding the tenure charges and have the right to bring an Order to Show Cause to suspend or revoke my license.

2. Additionally, I was advised that I could have continued with the trial and had the judge make a determination as to whether or not the Board of Education had, by a preponderance of evidence, proved "charges of unbecoming conduct", "inefficiency," and "other just cause" pursuant to thc facts when applied to existing law.

3. I have entered into the Settlement Agreement freely and voluntarily and no one has forced or coerced me to retire, but I have done so at my own free will, knowing the perils and in some cases, benefits, that I will or could derive.

EILEEN DANIELS

Sworn and subscribed to before
me this 3rd day of April,
2009.

Attorney at Law

EXHIBIT C

SHAPIRO & SHAPIRO
ATTORNEYS AT LAW
A PROFESSIONAL ASSOCIATION
1063 EAST LANDIS AVENUE
P.O. BOX 787
VINELAND, NEW JERSEY 08362-0787
TELEPHONE
856-691-6800
FAX 856-794-3326
E-mail: shap1@prodigy.net

HAROLD B. SHAPIRO
CERTIFIED CRIMINAL TRIAL ATTORNEY
LOUIS CHARLES SHAPIRO
CERTIFIED CRIMINAL TRIAL ATTORNEY
LL.M. IN TRIAL ADVOCACY
(ALSO ADMITTED IN PA)

SAMUEL L. SHAPIRO
ATTORNEY AT LAW
COUNSELOR AT LAW
1940 (ADMITTED TO NJ BAR) - 1996

April 13, 2009

RECEIVED
2009 APR 16 A 10:45
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Honorable Bruce M. Gorman, A.L.J.
Office of Administrative Law
1601 Atlantic Avenue
Atlantic City, N.J. 08401

RE: Vineland Board of Education v. Eileen Daniels
OAL Docket No.: EDUTH 10449-2008S
Agency Ref. No.: 342-11/08

Dear Judge Gorman:

Enclosed please find original Resolution (attached to which as Exhibit A is Settlement Agreement executed and placed upon the record before Your Honor on April 3, 2009) as approved by the Vineland Board of Education on April 8, 2009.

Respectfully yours,

Harold B. Shapiro

HBS:asc
cc: Joseph D. O'Neill, Esquire **VIA FAX**
Charles D. Ottinger, Superintendent **VIA FAX**
Kevin J. Franchetta, Asst. Superintendent for Business/Board Secretary **VIA FAX**
Maryann Greenfield, Executive Director of Personnel (all with enclosures) **VIA FAX**

VIA REGULAR MAIL

RESOLUTION
OF THE VINELAND BOARD OF EDUCATION

WHEREAS, the Vineland Board of Education has filed tenure charges against Eileen Daniels for conduct unbecoming, inefficiency, and other just cause; and

WHEREAS, on the day scheduled for trial, the parties through counsel advised the Administrative Law Judge that a resolution of the charges had been reached; and

WHEREAS, there are extensive documents, proofs and trial days possible for this matter to proceed; and

RECEIVED
2009 APR 16 A 10:45
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

WHEREAS, the parties have conferred;

NOW, THEREFORE, BE IT RESOLVED, as follows:

The Vineland Board of Education hereby determines that it is in its best interest and the best interests of the public to agree to the Settlement Agreement attached hereto as Exhibit A which Settlement Agreement includes the retirement of Eileen Daniels from employment in the School District of the City of Vineland and which Settlement Agreement resolves the tenure charge;

BE IT FURTHER RESOLVED the Vineland Board of Education determines that this is in the best interests of the public to resolve this matter for the reasons set forth as follows:

1. Attached hereto is the comprehensive Settlement Agreement (Exhibit A) prepared and executed by the parties which sets forth in particular the documentation as to the nature of the charges, an explanation of the circumstances justifying the settlement, evidence of the consent of both the charged and charging parties, evidence that the charged party entered into the Settlement Agreement with full understanding of her rights and proof that the staff member has been advised of the Commissioner's duty to refer tenure charges resulting in the loss of position to the State Board

of Examiners for possible action against the staff member's certificate.

2. The retirement of the charged party shall be in compliance with the New Jersey Open Public Records Act, N.J.S.A. 47:1A-et seq. wherein employment information of the charged party shall be made public including the individual's name, title, position, salary, payroll record, length of service, date of retirement and reason therefor and the amount and type of any pension received.

3. It is anticipated that trial in this matter could consume three full days.

4. The anticipated trial would result in substantial financial expense to the Vineland Board of Education both with respect to attorney's fees and loss of staff time.

5. It is anticipated that the loss of work days for the Superintendent of Schools, the Principal and Vice-Principal of Durand School, the Executive Director of Personnel, and approximately five (5) additional certificated professional staff involved in this case would amount to approximately twenty (20) days in lost work time for school personnel, including time spent at trial and in witness preparation.

6. The Vineland Board of Education, if the settlement were not to occur, may be responsible to resume paying salary beyond the length of time for the anticipated hearing and at substantial additional expense to the Board of Education.

7. Due to the complicated and involved nature of this tenure hearing and due to the uncertainties of litigation, the Vineland Board of Education determines that it is in its best interest to approve the Settlement Agreement which will bring finality to this matter and eliminate possible continued litigation and expense, as well as risk of outcome.

8. It has been reported by the Principal of Durand School that certain teaching staff members feel uncomfortable with Eileen Daniels as a result of her conduct which gave rise to the tenure

charges and have expressed concerns regarding Eileen Daniels.

9. Certain staff members have described a lack of cooperation by Eileen Daniels toward them and a desire on their part not to have to work with her.

10. Both the Vineland Board of Education and its Administration feel that they could do better for the public and the students of Vineland with the retirement of Eileen Daniels and the securing of another staff member in her place.

BE IT FURTHER RESOLVED, that the President of the Board of Education is hereby authorized to execute the Settlement Agreement attached as Exhibit A on behalf of the Vineland Board of Education.

The foregoing resolution was moved by Mr. Spinelli; and seconded by Mr. Fanucci.

ROLL CALL VOTE

NAME	AYES	NOES
Allan Bernardini	X	
Brian DeWinne	X	
Robert Evans	X	
Anthony Fanucci	X	
Ronald J. Franceschini, Jr.	X	
Frank Giordano	X	
Diamaris Rios	X	
Paul F. Spinelli	X	
Thomas Ulrich	X	

CERTIFICATION

I, Kevin J. Franchetta, Asst. Superintendent for Business/Board Secretary of the Vineland Board of Education, herewith certify that the foregoing Resolution was approved by the Vineland Board of Education in a roll call vote as herein set forth in executive session, at the regular meeting of the Vineland Board of Education held on April 8, 2009.

Dated: April 8, 2009

Kevin J. Franchetta

KEVIN J. FRANCHETTA,
Asst. Superintendent for Business/Board Secretary

ACTION

GIORDANO	BERNARDINI	DE WINNE	EVANS	FANUCCI	FRANCESCHINI	RIOS	SPINELLI	ULRICH
				2			1	

18. The Board approve the Resolution authorizing the settlement agreement for the employee whose name is on file with the Secretary of the Board.

All Members voted "yes." (9-0-0)

SETTLEMENT AGREEMENT

WHEREAS, EILEEN DANIELS (hereinafter "DANIELS") has been employed by the VINELAND BOARD OF EDUCATION (hereinafter "BOARD") as a tenured teaching staff member pursuant to N.J.S.A. 18A:28-5; and

WHEREAS, DANIELS and BOARD mutually desire to terminate amicably DANIELS' employment and/or affiliation with BOARD, and to settle and terminate any and all disputes between them by executing this SETTLEMENT AGREEMENT;

IT IS HEREBY AGREED by and between DANIELS and BOARD, as follows:

1. The BOARD and DANIELS agree that the BOARD prepared and filed tenure charges ("Tenure Charges") based on charges of unbecoming conduct, inefficiency, and other just cause against DANIELS pursuant to N.J.S.A. 18A:6-10 et seq. and that said charges were certified by the Board to the Commissioner of Education on November 14, 2008 and are pending under Agency Docket No. 342-11/08 and OAL Docket No. EDUTH 10449-2008S, as more specifically delineated in Exhibit A which is a copy of the Charge and DANIELS' Response.

2. BOARD and DANIELS represent that each desires to enter into this SETTLEMENT AGREEMENT to fully and finally settle and resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which the BOARD may have against DANIELS.

3. The BOARD acknowledges and agrees that this SETTLEMENT AGREEMENT shall cause the BOARD to voluntarily dismiss, waive and withdraw any and all administrative actions of any kind against DANIELS and the BOARD has agreed to request that the Commissioner of Education approve the BOARD'S voluntary dismissal of the tenure charges with prejudice.

EXHIBIT A to Resolution of the Vineland Board of Education

4. (a) DANIELS agrees that upon signing this Settlement Agreement and by signing her ~~resignation~~ retirement letter which is attached hereto as Exhibit B, she is irrevocably, as of the date of this SETTLEMENT AGREEMENT, ~~resigning her~~ retiring from employment with the BOARD, which shall become effective August 31, 2009, with DANIELS to be placed on administrative leave without pay but with her health insurance benefits to be paid by the BOARD from the date of this SETTLEMENT AGREEMENT through August 31, 2009.

(b) As a result of the tenure charges being certified on November 14, 2008, DANIELS pay was stopped as of November 14, 2008. The BOARD and DANIELS, to avoid the litigation of the contested tenure matter before an Administrative Law Judge and specifically, the BOARD, in exchange for DANIELS' ~~resignation~~ retirement pursuant to paragraph 4(a) above, agrees to place DANIELS on unpaid administrative leave of absence until August 31, 2009, with the BOARD to pay DANIELS' health insurance benefits through August 31, 2009.

5. DANIELS, for the consideration given by the BOARD as set forth herein, which she acknowledges is adequate and satisfactory to her, hereby commits as follows: DANIELS irrevocably and unconditionally remises, releases, waives and forever discharges the BOARD from any and all manner of liabilities, actions, causes of action, contracts, agreements, promises, claims and demands of any kind or nature whatsoever, in law or equity, whether known or unknown, which DANIELS has ever had or now has against the BOARD in connection with her employment with the BOARD, the resignation of her employment, compensation and/or benefits with the BOARD and the charges. DANIELS further understands and agrees that this SETTLEMENT AGREEMENT shall act as a complete bar to any claim, demand or action of any kind whatsoever which could be or could have been brought by her and which seeks personal, equitable and monetary relief for her against the BOARD, including but not limited to: any claims of wrongful discharge,

breach of express or implied contract, fraud, discrimination, liability in negligence or tort, and any claims of any kind which may be brought in any court of law or equity or an administrative agency; claims for arbitration in any forum; the U.S. Constitution, as amended; the Constitution of the State of New Jersey; Title VII of the U.S. Civil Rights Act of 1964, as amended; the U.S. Age Discrimination in Employment Act; the U.S. Employment Retirement Income Security Act; the U.S. Fair Labor Standards Act; the United States Family and Medical Leave Act; the New Jersey Family Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Department of Personnel; and any other federal, state or local law, regulation or ordinance relating to employment; related torts; and employment discrimination, employee benefits, and collective bargaining agreement; and the termination of employment; and any other claim arising from or relating to DANIELS' employment. Notwithstanding the preceding sentence, DANIELS shall be permitted to pursue and shall not be deemed to have waived any claims for workers compensation benefits and may name and continue to name the BOARD as respondent in any workers compensation petition. DANIELS, as well as the BOARD, understands that she/it is not releasing any claim she/it may have to enforce the provisions of this SETTLEMENT AGREEMENT. This release covers both claims that DANIELS knows about and those she may now know about, except for claims (i) that may arise after the date DANIELS executes this Agreement; (ii) for a breach of this Agreement; or (iii) with respect to any benefits in which DANIELS has a vested interest under the terms and conditions of any of the Board's employee benefit plans. DANIELS further agrees not to file a lawsuit or administrative claim or demand for arbitration to assert any of the claims she has given up, released or waived. Any substantial or material breach of this Agreement shall entitle the non-breaching party to an injunction or any action at law or equity to remedy the breach and an award of

reasonable attorneys' fees, other professional fees, costs and expenses incurred to remedy and defend against said breach.

6. The BOARD agrees to request that the Commissioner of Education approve the Board's voluntary dismissal of the tenure charges, Agency Docket No. 342-11/08, OAL Docket No. EDUTH 10449-2008S, with prejudice in light of DANIELS' resignation and the consideration given in the form of unpaid administrative leave of absence with health benefits paid through August 31, 2009 by the BOARD, granted to her by the BOARD. In executing this Agreement, DANIELS understands the ultimate decision with regard to the resolution of the tenure charges lies with the Commissioner of Education and in the event that the New Jersey Commissioner of Education rejects the settlement between the BOARD and DANIELS, then this agreement is completely null and void and the tenure charges currently pending will continue to be processed. Attached as Exhibit C is DANIELS Affidavit evidencing that she has been counseled in every respect and knows that the Board of Examiners can act independently of this SETTLEMENT AGREEMENT.

7. With respect to any inquiries directed to the Vineland School Board regarding DANIELS' status, the BOARD shall have the responsibility to comport with the requirements of New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1 et seq.

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whether known or unknown, which the BOARD or DANIELS has ever had or now has against each other arising out of or relating to DANIELS' employment with the BOARD.

9. This SETTLEMENT AGREEMENT may not be changed orally and no modification, amendment or waiver of any provision contained in this SETTLEMENT AGREEMENT, or any future representation, promise or condition in connection with the subject matter of this SETTLEMENT AGREEMENT, shall be binding upon any party hereto unless made in writing and signed by such party and subject to approval by the BOARD.

10. This SETTLEMENT AGREEMENT contains the entire agreement and complete settlement between the Parties and supersedes any and all previous agreements of any kind whatsoever between them, whether written or oral. All prior and contemporaneous discussions and negotiations have been and are merged and integrated into, and are superseded by this SETTLEMENT AGREEMENT. This is an integrated document.

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12. This SETTLEMENT AGREEMENT is made and entered into, and shall be subject to, governed by and interpreted in accordance with the laws of the State of New Jersey and shall be fully enforceable in the courts of that state, without regard to principles of conflict of laws. The parties agree that any suit, action or other legal proceeding arising out of this SETTLEMENT AGREEMENT shall be brought in the Superior Court for the State of New Jersey, County of Cumberland.

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14. In executing this SETTLEMENT AGREEMENT DANIELS has had an opportunity to speak to her attorney and has relied upon the legal advice of her attorney as to the terms of this SETTLEMENT AGREEMENT, which have been completely read by her and explained by her attorney, and those terms are fully understood and voluntarily accepted.

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16. This SETTLEMENT AGREEMENT shall become effective immediately following the execution by DANIELS, approval by the BOARD and execution on behalf of the BOARD.

WHEREFORE, intending to be legally bound hereby, DANIELS and BOARD execute the foregoing SETTLEMENT AGREEMENT this 22nd day of January, 2009. 4/3/09

WITNESS:

April S. Carter

Eileen M. Daniels

WITNESS:

EILEEN DANIELS

Kevin J. Franchetta

KEVIN J. FRANCHETTA, CPA
ASSISTANT SUPERINTENDENT
FOR BUSINESS/BOARD SECRETARY

Frank N. Giordano

FRANK N. GIORDANO, BOARD
PRESIDENT

Approved for form
on behalf of the
Vineland Board of
Education

4/3/09

SHAPIRO & SHAPIRO, P.A.
1063 East Landis Avenue
P.O. Box 787
Vineland, New Jersey 08362
(856) 691-6800
Attorney for Vineland School District

RECEIVED
ASST. SUPERINTENDENT
BUSINESS

In the Matter of Dismissal Charge Against Eileen Daniels, Vineland School District	**CHARGE OF SUSPENSION PURSUANT TO N.J.S.A. 18A:6-10 ET. SEQ.**

I, Charles D. Ottinger, Superintendent, Vineland Public Schools, being duly sworn, according to law, upon my oath, depose and say:

Pursuant to N.J.S.A. 18A:6-10 et. seq. the Vineland School District charges Eileen Daniels with unbecoming conduct, inefficiency and other just cause for dismissal and demands the dismissal of Eileen Daniels, a tenured fifth grade teacher at Durand School.

Said charge of unbecoming conduct, inefficiency and other just cause is summarized as set forth below and is more fully documented, by way of written statement of evidence under oath, in the Maryann Greenfield, Executive Director of Personnel, Vineland Public Schools, filed herewith and incorporated by reference herein.

CHARGE

Eileen Daniels, a tenured fifth grade teacher at Durand School, engaged in unbecoming conduct and was inefficient in her duties and responsibilities as a teacher, the result of which is that her dismissal is required. Daniels failed to fulfill her professional responsibilities as an Examiner during the NJ ASK testing in her fifth grade classroom on May 5 and 6, 2008. Daniels failed to properly administer the testing and allowed the security of the testing process to be breached. Daniels' violations of NJ ASK testing procedure were multiple and serious. As such,

Exhibit A

Daniels' conduct was unbecoming and inefficient and created just cause for the discipline charged.

The conduct of Eileen Daniels, as set forth hereinabove and as summarized hereinbelow, constituted unbecoming conduct, inefficiency and other just cause for dismissal, pursuant to N.J.S.A. 18A:6-10(b).

CHARLES D. OTTINGER

Sworn and subscribed to before
me this 20 day of Aug., 2008.

JEANNE C. TRUCANO
Notary Public of New Jersey
Commission Expires May 11, 2013

Law Offices
NED P. ROGOVOY, ESQUIRE, L.L.C.
782 South Brewster Road, Unit A-6
Vineland, New Jersey 08361
(856) 205-9701
Attorney for Eileen Daniels

In the Matter of Dismissal Charge
Against Eileen Daniels,
Vineland School District

AGENCY DKT. NO.

EILEEN DANIELS' RESPONSE
TO TENURE CHARGES

Eileen Daniels' actions as related to her role in administering the NJ ASK test did not jeopardize the integrity of the test and were not sufficiently egregious as to cause her tenure to be taken.

Her record as a teacher speaks to her genuine professionalism and ability. She intends, with the help of counsel, to defend.

CERTIFICATION

I hereby certify that the foregoing statements made by me are true and correct to the best of my knowledge and belief. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: October 5, 2008

EILEEN DANIELS

Witness:
Ned Rogovoy

EILEEN DANIELS
1301 S. LINCOLN AVENUE, APT. 706
VINELAND, N.J. 08361

April 3 ~~January~~ , 2009

Kevin Franchetta, CPA, Assistant Superintendent
For Business/Board Secretary
Members of the Vineland Board of Education
625 Plum Street
Vineland, NJ 08360-3796

RE: Retirement ~~Resignation~~ Effective August 31, 2009

Dear Mr. Franchetta:

Please be advised that I am ~~resigning~~ retiring from my position as teaching staff member in the Vineland Public Schools effective August 31, 2009. I am requesting that the Board approve my being placed on administrative leave without pay from the date of this letter through August 31, 2009. I understand that while on such administrative leave without pay my health insurance benefits shall be paid by the Vineland Board of Education.

Thank you.

Very truly yours,

Eileen M Daniels

EILEEN DANIELS

EXHIBIT B

IN THE MATTER OF THE TENURE HEARING OF EILEEN DANIELS,
SCHOOL DISTRICT OF THE CITY OF VINELAND, CUMBERLAND COUNTY
AGENCY DOCKET NO. 342-11/08
OAL DOCKET NO. EDUTH 10449-2008S

AFFIDAVIT OF EILEEN DANIELS

STATE OF NEW JERSEY)
ss.:
COUNTY OF CUMBERLAND)

EILEEN DANIELS, of full age, being duly sworn according to law upon her oath, deposes and says:

1. I have reviewed the Settlement Agreement and all of its ramifications, including the fact that the Board of Examiners will independently review the facts surrounding the tenure charges and have the right to bring an Order to Show Cause to suspend or revoke my license.

2. Additionally, I was advised that I could have continued with the trial and had the judge make a determination as to whether or not the Board of Education had, by a preponderance of evidence, proved "charges of unbecoming conduct", "inefficiency," and "other just cause" pursuant to the facts when applied to existing law.

3. I have entered into the Settlement Agreement freely and voluntarily and no one has forced or coerced me to retire, but I have done so at my own free will, knowing the perils and in some cases, benefits, that I will or could derive.

EILEEN DANIELS

Sworn and subscribed to before
me this 3rd day of April,
2009.

Attorney at Law
NJ

EXHIBIT C

177-09

OAL DKT. NO. EDU 10348-08
(EDU 6271-08 on remand)
AGENCY DKT. NO. 187-6/08

L.K. on behalf of minor children, A.K. and J.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the "Stipulation of Settlement" (Settlement), the respondent Board's resolution authorizing the 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 terms of the Settlement and adopts the Initial Decision as the final decision in this case, with the following modifications:

Item #1 of the Settlement recites that it would become effective upon execution by all of the parties. In addition, Item #2 of the Settlement directs that petitioner pay respondent "$2,000 in 10 (ten) installments of two hundred dollars per month" commencing in December 2008 and concluding in October 2009. That provision contemplated action by petitioner six months before consideration by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have been effectuating the Settlement terms, or have agreed upon a mutually satisfactory alternative plan for payment to respondent of the $2,000. Accordingly, the Settlement – modified as described above – is adopted as the final decision and the matter is dismissed, with prejudice, subject to compliance with the Settlement's terms.

IT IS SO ORDERED.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/08/09

Date of Mailing: 6/08/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10348-08
AGENCY DKT. NO. 187-6/08
(ON REMAND EDU 6271-08)

L.K., ON BEHALF OF MINOR CHILDREN, A.K. AND J.K. V. BOARD OF EDUCATION OF THE WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, SOMERSET COUNTY

Robert J. Jeney, Jr., Esq., for petitioner, L.K. (Jeney, Jeney & O'Connor, attorneys)

Athina Lekas Cornell, Esq., for respondent, Board of Education of the Watchung Hills Regional High School District (Lindabury, McCormick, Estabrook & Cooper, attorneys)

Record Closed: May 4, 2009 Decided: May 4, 2009

BEFORE **LAURA SANDERS**, CHIEF ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on November 14, 2008, on remand from OAL Docket Number EDU 6271-08, 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. The parties have also submitted the Board of Education's minutes of December 15, 2008, accepting the settlement.

I have reviewed the record, the terms of settlement, and the submitted documentation 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 should be noted that the settlement agreement was received on January 14, 2009. However, I was seeking clarification on the settled monetary amount for the tuition. After several telephone calls and promise of a letter clarifying the tuition amount, and not having received a reply to date, I have decided to close the record today, May 4, 2009.

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

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

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

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

5/4/09
DATE

LAURA SANDERS, CHIEF ALJ

Date Received at Agency: MAY 5 2009

Date Mailed to Parties:

/caa

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

2009 JAN 14 A 11:29

L.K. o/b/o A.K. & J.K..,	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	OAL DOCKET NO.: EDU 06271-2009S
vs.	
WATCHUNG HILLS REGIONAL BOARD OF EDUCATION, SOMERSET COUNTY	**STIPULATION OF SETTLEMENT**
Respondent.	

This Stipulation of Settlement (the "Stipulation") is entered by and between Leslie Knight ("Ms. Knight") and the Watchung Hills Regional Board of Education ("Board") (collectively, the "Parties" and individually, a "Party").

WHEREAS, on or about June 2, 2008 the Board notified Ms. Knight that A.K. and J.K. were not entitled to receive a free education in Watchung Hills ("Notice of Decision");

WHEREAS, on or about June 26, 2008, Ms. Knight filed a Residency Appeal (the "Residency Appeal") with the State of New Jersey Commissioner of Education (the "Commissioner");

WHEREAS, on or about July 21, 2008, the Board filed an Answer to the Residency Appeal and a Counterclaim seeking tuition for the attendance by A.K. and J.K. in the Watchung Hills Regional High Schools (the "Counterclaim"); and

WHEREAS, the Parties have settled the Residency Appeal and Counterclaim under the terms and conditions set forth in this Stipulation; and

WHEREAS, on October 21, 2008, Ms. Knight withdrew the within matter with prejudice.

NOW THEREFORE, in consideration of the following terms and conditions, and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. The Effective Date of this Stipulation is the date upon which it is fully executed by the Parties.

2. In consideration of this Stipulation, Ms. Knight shall pay to the Board the sum of $2,000.00, in 10 (ten) installments of two-hundred dollars per month commencing on ~~November~~ December ___, 2008 and concluding ~~September~~ October ___, 2009.

3. Upon receipt of full payment, parties waive any and all further claims, rights and liabilities asserted in or arising from the Residency Appeal and the Counterclaim, including any and all claims for tuition, education, special education, related services, transportation, therapy, compensatory education, money damages, civil liability, and any other equitable or legal relief.

4. Nothing in this Stipulation shall constitute any admission or acknowledgment of liability by the Parties.

5. In the event Ms. Knight fails to fully reimburse the Board the monies referenced in paragraph 2, the Board reserves its right to recover full tuition from Ms. Knight

6. No provision of this Stipulation may be amended except by a written instrument executed by the Parties.

7. Each person signing this Stipulation hereby represents and warrants that he or she has been duly authorized and has the requisite authority to enter into this Stipulation on behalf of the Party on whose behalf they so sign.

8. In executing this Stipulation, the Parties have not relied upon any representation or statement, other than as specifically stated in this Stipulation.

9. The Parties have relied entirely upon their own judgment, beliefs and interest and, where applicable, the advice of their own counsel (for whose expense each shall be solely responsible) and they each have had a reasonable period of time to consider this Stipulation.

10. This Stipulation was the product of negotiations between the Parties and any rule of construction requiring that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Stipulation.

11. This Stipulation shall be binding only upon, and only inure to the benefit of, the Parties and their respective successors and assigns.

12. This Stipulation shall be governed and construed in accordance with the laws of the State of New Jersey.

13. If, during the term of this Stipulation, a specific clause of the Stipulation is determined to be illegal or in violation of Federal or State law, the remainder of this Stipulation shall not be affected and shall remain in full force and effect.

14. This Stipulation sets for the entire agreement between the Parties and fully supersedes any and all prior agreements and understandings, written or oral, between the Parties pertaining to the subject matter hereof.

15. The Parties shall execute and deliver all such further instruments and take all such further actions as may be reasonably necessary or appropriate to carry out this Stipulation.

16. This Stipulation may be executed in one or more counterparts, including by facsimile, each of which shall be deemed an original, but all of which together constitute one and the same instrument.

LESLIE KNIGHT

By: _____
Leslie Knight

Dated: ~~November~~ December 4, 2008

WATCHUNG HILLS REGIONAL BOARD OF EDUCATION

By: _____

Dated: November _____, 2008

Timothy Stys
School Business Adm.

WHRHS BOARD OF EDUCATION MINUTES OF DECEMBER 15, 2008

A. ADMINISTRATION

Motion by Mr. Fallon, seconded by Mr. Binder that the following resolution numbers A1 – A11, minus numbers A3.b and A11 be passed on a roll call vote:

A2 RESOLVED, the Board of Education accepts the Stipulation of Settlement between WHRHS and L.K. regarding the issue of residency for A.K. and J.K. **LK Stipulation of Settlement**

The above motion passed with Mr. Binder, Mr. Fallon, Mr. Falzarano, Mrs. Mandell, Mr. Pepe, Dr. Seelig and Dr. Yaged voting in the affirmative.

I certify that the above resolution is a true and correct copy of a resolution approved by the Watchung Hills Regional High School Board of Education on 12/15/08

Timothy M. Stys, CPA
Board Secretary/ School Business Administrator

178-09

178-09

OAL DKT. NO. EDU 584-09
AGENCY DKT. NO. 383-12/08

M.L., on behalf of minor child, K.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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 hereby approves the withdrawal and dismisses this matter with prejudice.

IT IS SO ORDERED.*

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/08/09

Date of Mailing: 6/08/09

* 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

WITHDRAWAL

OAL. DKT. NO. EDU 584-09

AGENCY DKT. NO. 383-12/08

M.L., ON BEHALF OF MINOR CHILD, K.K.,

Petitioner,

v.

BOARD OF EDUCATION OF THE EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY,

Respondent.

M.L., petitioner, pro se

David H. Coates, Esq., for respondent (Turp, Coates, Essl & Driggers, attorneys)

Record Closed: May 6, 2009 Decided: May 6, 2009

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

On December 31, 2008, petitioner filed a pro se residency appeal pursuant to N.J.S.A. 18A:38-1. By letter dated January 9, 2008, respondent's counsel advised M. Kathleen Duncan, Director of the Bureau of Controversies and Disputes, of his firm's

appearance in this matter. By letter dated January 21, 2009, and noted as a "second and final notice," Director Duncan provided counsel an additional ten days from receipt of the notice to file an answer, and indicated that failure to file an answer would result in each count in the petition to be deemed admitted. By letter dated February 12, 2009, respondent's counsel advised that the "district would not be filing any papers" and that "the student in question will soon turn 18 and the district's remedy lies elsewhere."

The matter was then transmitted to the Office of Administrative Law on February 19, 2009, 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. A pre-hearing conference was conducted on April 7, 2009, wherein the procedural posture of the case, in consideration of the failure to file an answer, was discussed. Counsel advised at that time that the district directed no response be filed as it intended to reverse its finding of ineligibility for both the time period prior to February 20, 2009, the date by which K.K. turned 18 years old, and thereafter. In that regard, counsel submitted correspondence dated April 15, 2009, indicated that the board of education "is not making any claim for the time period prior to February 20, 2009," (C-1), and petitioner withdrew her petition by memorandum dated May 6, 2009. (C-2).

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 6, 2009
DATE

ANA C. VISCOMI, ALJ

Date Received at Agency: MAY 11 2009

Date Mailed to Parties: MAY 11 2009

/jfk

LAW OFFICES

TURP, COATES, ESSL AND DRIGGERS

A PROFESSIONAL CORPORATION

170 SOUTH MAIN STREET

P. O. BOX 191

HIGHTSTOWN, NEW JERSEY 08520

TELEPHONE (609) 448-0016

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DONALD S. DRIGGERS
DAVID H. COATES
LEONARD J. COATES
LELAND P. HUTCHINSON

JAMES S. TURP
(1945-1980)
HENRY G. P. COATES
(1945-2001)
KARL G. ESSL
(1956-1990)

2009 APR 17 P 2:46
OFFICE OF ADMIN LAW

April 15, 2009

The Honorable Ana C. Viscomi
Administrative Law Judge, State of New Jersey
9 Quakerbridge Plaza
P. O. Box 049
Trenton, New Jersey 08625-0049

Re: **M.L. O/B/O K.K. v BOE OF THE EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY; OAL DKT. NO. EDU 584-09**

Dear Judge Viscomi:

Please be advised that the Board of Education of the East Windsor Regional School District, referenced in the above matter, is not making any claim for the time period prior to February 20, 2009 regarding this student.

Respectfully,

TURP, COATES, ESSL & DRIGGERS

David H. Coates

DHC:lcs
cc: Ronald S. Bolandi, Superintendent
William Popovich, Supervisor
Maria Leggett

C-1

MEMORANDUM

2009 MAY -6 A 10: 02
OFFICE OF ADMIN LAW

TO: THE HONORABLE ANA C. VISCOMI

FAX: 609-588-6574

FROM: MARIA M. LEGGETT

SUBJECT: M.L. O/B/O BOE OF THE EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY; OAL DKT. NO. EDU 584-09

DATE: 5/6/2009

CC: DAVID H. COATES

FAX: 609-448-0127

Please be advised I am withdrawing my request for a hearing in this matter.

Thank you,

Maria M. Leggett

C-2

179-09

#179-09R

L.C., on behalf of minor child, O.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her son, O.C., a student in respondent's school district. The respondent Board contends that O.C. is not eligible for a free public education in the district based on surveillance and information showing that petitioner is not a resident of North Plainfield. The petitioner failed to appear for a scheduled hearing on July 16, 2008, and the OAL returned the file to the Commissioner's Office of Controversies and Disputes. Subsequently, the petitioner provided explanation for her failure to appear, and the matter was remanded to OAL, where the matter was heard in April 2009.

The ALJ found that: it is not disputed that the petitioner moved from an address on Jefferson Avenue in North Plainfield in June 2007; petitioner did not meet her burden to prove that she continued to reside in North Plainfield after the move; and the results of the school district's surveillance were credible. The ALJ concluded that petitioner failed to prove that O.C. was entitled to a free public education in North Plainfield schools; petitioner is therefore liable to the District for tuition totaling $22,810.84 for the period of O.C.'s ineligible attendance.

Upon independent review and consideration of the record, the Commissioner adopted the Initial Decision as the final decision in this matter. Petitioner is ordered to pay respondent tuition in the amount of $22,810.84.

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 8, 2009

OAL DKT. NO. EDU 10241-08
(EDU 4192-08 ON REMAND)
AGENCY DKT. NO. 95-4/08

L.C. on behalf of minor child O.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. For the reasons set forth therein, the Commissioner adopts the Initial Decision as the final decision in this case.

Petitioner's exceptions have also been thoroughly reviewed and considered. Pursuant to *N.J.A.C.* 1:1-18.4(b), petitioner set forth the specific findings of fact by the Administrative Law Judge (ALJ) with which she disagrees and the factual findings that she would have the Commissioner reach. However, petitioner's proposed factual findings are unsupported by the evidence in the record. Nor may petitioner now present evidence that was not before the ALJ. *N.J.A.C.* 1:1-18.4 (c). The petition is accordingly dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/08/09

Date of Mailing: 6/08/09

* 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 10241-08
(ON REMAND EDU 4192-08)
AGENCY DKT. NO. 95-4/08

L.C., ON BEHALF OF MINOR CHILD,
O.C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,
Respondent.

L.C., petitioner, pro se

Dennis McKeever, Esq., for respondent (Lindabury, McCormick & Estabrook, attorneys)

Record Closed: April 24, 2009 Decided: April 30, 2009

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

STATEMENT OF THE CASE

L.C., mother of O.C. (petitioner), challenges the determination made by the North Plainfield Board of Education (District) that she did not reside in North Plainfield.

PROCEDURAL HISTORY

On March 6, 2008, the District notified the petitioner that her child was being disenrolled based on non-residency. On April 2, 2008, petitioner appealed the decision. On May 19, 2008, the case was transmitted to the Office of Administrative Law (OAL). On July 16, 2008, the matter was scheduled in the OAL, Trenton (Hamilton Township). The petitioner failed to appear and the case was remanded by the Commissioner. On April 24, 2009, the case was heard and the record closed on that date.

STATEMENT OF FACTS

Some of the facts are not in dispute. O.C. is the son of L.C. (petitioner) and O.C. (father). Before June 2007, they resided at 319 Jefferson Avenue in North Plainfield. In June 2007, the District suspected that O.C. was no longer living in the District and began an investigation.

Carol Villani

Carol Villani has been employed by the District as a secretary for the assistant superintendent of schools for 20 years. Her duties include handling registration and residency applications, issues, and investigation for the district, and insuring that every student attending North Plainfield schools resides in the District. She became familiar with the petitioner when the school received a complaint that the student was not residing in North Plainfield. Based on this complaint, she assigned Carl Gaebel to investigate the situation.

On June 14, 2007, June 16, 2007, and June 17, 2007, Mr. Gaebel went to 319 Jefferson Avenue and found no one home during all three visits. On June 17, 2007, a neighbor advised him that the family had moved (R-1).

On September 5, 2007, the father of O.C. applied for the free and reduced meal program based on the address of 162 Farragut Road in North Plainfield (R-30). The application was denied due to income (R-31). For proof of income, the father provided a document from the Division of Unemployment with an address of 77 Parkside Road in Plainfield (R-2).

Between September 26, 2007 and October 6, 2007, Residency Investigator S.J. Lester went to 319 Jefferson Avenue and found no one home during seven visits. On October 6, 2007, the second floor tenant advised him that the family had moved to 77 Parkside Road in Plainfield (R-32).

On December 3, 2007 and December 4, 2007, Investigator Lester conducted surveillances outside the 162 Farragut Road address. No student matching O.C.'s description left the house, despite O.C. being present in school on those days (R-8). He concluded that O.C. did not reside at the address.

Letters sent to the family at 319 Jefferson Avenue in North Plainfield were returned by the Post Office marked do not forward, but listed an address of 1330 South Avenue, Plainfield (R-25). After becoming aware of the 1330 South Avenue forwarding address, Ms. Villani ordered another residency investigation. On July 2, 2008, Mr. Gaebel spoke to the father who said he was living at 1330 South Avenue, Apt B-6, Plainfield, and that his wife lives at 162 Farragut Road, North Plainfield (R-28). On July 5, 2008, Mr. Gaebel interviewed Glen Braxton, the superintendent for the apartments located at 1330 South Avenue, Plainfield. Mr. Braxton told him that L.C. and O.C. reside in Apartment B-6 on the second floor of the building with their children (R-29).

Ms. Villani requested proof from the petitioners that they were residing at 162 Farragut Road, North Plainfield. The petitioners have never provided any

documentation that they were living at that address. She concluded that the petitioner and her family do not reside in North Plainfield.

Carl Gaebel

Carl Gaebel is employed by the North Plainfield Board of Education as a residence and attendance officer and was assigned to investigate the residency of O.C. On June 14, 2007, June 16, 2007, and June 17, 2007, he went to 319 Jefferson Avenue, North Plainfield. No one was home during all three visits. A neighbor advised him that the family had moved (R-1).

Between November 11, 2007 and November 24, 2007, he went to 77 Parkside Road five times and no one was home. On November 24, 2007, he spoke to petitioner's adult daughter who stated that her parents did not live with her (R-33).

On July 2, 2008, he spoke to the father who said he was living at 1330 South Avenue, Apt B-6, Plainfield, and that his wife lives at 162 Farragut Road, North Plainfield (R-28). He did not believe the father.

On July 5, 2008, he interviewed Glen Braxton, the superintendent for the apartments located at 1330 South Avenue. Mr. Braxton told him that L.C. and O.C. reside in Apartment B-6 on the second floor of the building with their children, including O.C. (R-29).

Marilyn Birnbaum

Marilyn Birnbaum has been the superintendent in North Plainfield. On January 4, 2007, she wrote to the petitioner to request proof of residency (R-9). On February 11, 2008, she advised petitioner that a residency hearing was going to be scheduled (R-10). The hearing took place on March 5, 2008.

She reviewed three free and reduced meal application forms filled by the petitioner dated September 5, 2007 (R-30), September 5, 2008 (R-35), and October 22, 2008 (R-36). The three applications list different social security numbers and phone numbers for the petitioner.

The phone number on the September 5, 2007 application was listed to L.C. at 77 Parkside Road, Plainfield (R-3). The phone number on the September 5, 2008 application was registered to Katty Morfa in Newark, New Jersey (R-21). The phone number on the October 22, 2008 application was registered to the father at South Avenue in Plainfield (R-34).

The District is seeking reimbursement of tuition, which is calculated at a rate of $1,273.38 per month. As of the date of the hearing, O.C. attended school in North Plainfield from June 2007 until the date of hearing while allegedly living in another town. She was not sure if O.C. attended summer school. If there was no summer school, the reimbursement would be for 22 months for a total of $22,810.84.

L.C. (Petitioner)

Petitioner testified that she moved from 319 Jefferson Avenue in June 2007 to the North Plainfield Hotel. Her testimony was unclear as to how long she lived there. She testified that they lived there when the Board hearing took place in March 2008. She did not want to reveal where she lived for personal reasons.

On October 7, 2007, she brought a notarized letter to the District signed by her cousin that she was living with her cousin at 162 Farragut Road. However, she did not have a copy of the letter, and neither did the District.

She was separated from her husband, who lived at 1330 South Avenue. Petitioner's undated letter asserts that 77 Parkside Road, Plainfield was her parents' address, and "we used that address after we left 319 Jefferson Avenue" (P-1).

FINDING OF FACTS

It is not disputed that the petitioner moved from 319 Jefferson Avenue in June 2007. It is also not disputed that the father of O.C. resided at South Avenue in Plainfield. At issue is where she resided thereafter.

The surveillance from December 3, 2007 and December 4, 2007, revealed petitioner was not living at 162 Farragut Road. Petitioner did not disagree. She claimed she was living at the North Plainfield Hotel. However, there is no evidence that she ever disclosed this address to the District. She also wrote that she used the 77 Parkside Road, Plainfield address.

Petitioner's testimony was unclear that she ever lived at 162 Farragut Avenue. She testified she lived at the North Plainfield Hotel until at least March 2008.

Based upon the evidence submitted, I do not find that the petitioner was living at 162 Farragut Avenue. She did not bring in her cousin to testify that she lived with her, and petitioner declined the opportunity to have her cousin come in to testify on another date. I **FIND** the results of the surveillance to be credible, and the petitioner admitted that she was not living there during the surveillance. Petitioner has not submitted any corroborating documentation that she was living at the Farragut address after she moved.

Petitioner alleged that she was living at the North Plainfield Hotel after she moved from Jefferson Avenue. However, there has been no corroboration of her living at that address. There is no evidence that she ever told anyone from the District that she was living at that address. Evidence has been submitted that the petitioner either used to or has been living at 162 Farragut Avenue, 133 South Avenue and 77 Parkside Road, but no evidence or documentation has been submitted that she lived at the North Plainfield Hotel. Therefore I do not find that the petitioner lived at the North Plainfield Hotel.

Therefore, I **FIND** that L.C. and O.C. were not living in the North Plainfield school district.

CONCLUSIONS OF LAW

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.

It is undisputed that the petitioner moved from 319 Jefferson Avenue in North Plainfield. She did not meet her burden of proof that she continued to reside in North Plainfield after the move. She did not provide any documentation to the District that she resided in North Plainfield, and did not supply any documentation during the hearing.

Based upon the circumstances surrounding this matter, I **CONCLUDE** that the petitioner failed to carry her burden of proof that O.C. was entitled to a free public education in the Township of North Plainfield during the relevant time periods. Accordingly, I **CONCLUDE** that L.C. is liable to the District for the tuition prorated to the period of O.C.'s ineligible attendance and the District may immediately remove O.C. from the District schools pursuant to N.J.S.A. 18A:38-b(2).

In this case, the District seeks tuition for O.C.'s attendance in the North Plainfield School District for 22 months. Tuition is calculated at a rate of $1,273.38 per month. The total amount owed the District is $22,810.84.

I **FIND** that these amounts are consistent with the Board-approved school calendars for the school years in question and they are further consistent with its estimated tuition rates for these years. Therefore, I **CONCLUDE** that petitioner owes the District the total tuition of $22,810.84 for the ineligible attendance of O.C. since June 2007.

DECISION AND ORDER

It is, therefore, **ORDERED** that L.C. pay respondent tuition in the total amount of $22,810.84 for unauthorized attendance in the District schools for the periods stated above. It is further **ORDERED** that, without proof of current domicile/residency, O.C. may be excluded from further attending the North Plainfield public schools, at the discretion of the District, unless tuition is paid for this continued attendance.

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

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

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

April 30, 2009
DATE

Donald J. Stein
DONALD J. STEIN, ALJ

Date Received at Agency:

MAY 1 2009

DATE

April 30, 2009
Mailed to Parties

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cmo

APPENDIX
EXHIBITS

For Petitioner:

P-1 Undated letter

For Respondent:

R-1 Residency Investigation Report, dated June 17, 2007
R-2 Unemployment Report
R-3 Reverse Telephone Search (908-412-9040)
R-4 Letter from District, dated November 5, 2007
R-5 Return envelope from Post Office
R-6 Letter from District, dated November 19, 2007
R-7 Return envelope from Post Office
R-8 Residency Investigation Report, dated December 4, 2007
R-9 Letter from District, dated January 4, 2008
R-10 Letter from District, dated February 11, 2008
R-11 Letter from District, dated February 21, 2008
R-12 Certified return receipt
R-13 Envelope marked unclaimed
R-14 Letter from District, dated March 6, 2008
R-15 Certified return receipt
R-16 Envelope marked unclaimed
R-17 Letter from District, dated April 3, 2008
R-18 Federal Express Update
R-19 Return envelope from Post Office
R-20 Appeal
R-21 Reverse Telephone Search (908-251-2370)
R-22 Reverse Telephone Search (908-561-7286)
R-23 Return envelope from Post Office

R-24 Return envelope from Post Office

R-25 Return envelope from Post Office

R-26 Not admitted

R-26a Not admitted

R-27 Letter from attorney for District

R-28 Residency Investigation Report, dated July 2, 2008

R-29 Residency Investigation Report, dated July 5, 2008

R-30 Meal Application, dated September 5, 2007

R-31 Letter to Petitioner, dated October 12, 2007

R-32 Investigation Report, dated October 7, 2007

R-33 Investigation Report, dated November 24, 2007

R-34 White page Telephone Listing

R-35 Meal Application, dated September 5, 2008

R-36 Meal Application, dated October 22, 2008

WITNESSES

For Petitioner:

L.C., parent of minor child, O.C.

For Respondent:

Carol Villani

Carl Gaebel

Marilyn Birnbaum

#180-09

180-09

OAL DKT. NO. EDU 11141-08
AGENCY DKT. NO. 198-7/08

FRANCES RUSSO-BARON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/08/09

Date of Mailing: 6/08/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11141-08

AGENCY DKT. NO. 198-7/08

FRANCES RUSSO-BARON,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,

Respondent.

Brian Miller Adams, Esq., for petitioner
(Canellis & Adams, attorneys)

Toni Belfored Damiano, Esq., for respondent

Record Closed: April 30, 2009 Decided: May 1, 2009

BEFORE **IMRE KARASZEGI,** ALJ:

On September 12, 2008, this 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.

May 1, 2009
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 5-6-09

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 6 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

id

SETTLEMENT AGREEMENT

WHEREAS, Frances Russo-Baron has filed a Petition with the Commissioner of Education (OAL Docket No. EDUOR 11141-2008N) alleging a violation of her tenure arising out of her transfer for the 2008/2009 school year from the position of Language Arts Department Head at Garfield High School to Teacher of 7th and 8th Grade Communication Arts at Garfield Middle School;

WHEREAS, the Garfield Board of Education filed an Answer to the Petition through their legal counsel denying any violation of Petitioner's tenure rights and alleging said transfer was a legitimate exercise of the Board's managerial prerogative;

WHEREAS, in the interest of promoting harmonious relations between the Petitioner, the Board of Education and Garfield Federation of Teachers the parties have settled the matter;

NOW THEREFORE, intending to be legally bound the parties agree as follows:

1. For the remainder of the 2008/2009 school year, Petitioner, Frances Russo-Baron, shall remain as Teacher of 7th and 8th Grade Communication Arts at the Garfield Middle School. For the 2008/2009 school year, Frances Russo-Baron shall continue to receive the additional compensation paid to Department Heads at Garfield High School as set forth in the Collective Bargaining Agreement between the Garfield Federation and the Board of Education.

2. For the 2009/2010 school year, Frances Russo-Baron will, consistent with her tenure rights, be transferred back to the position of Language Arts Department Head at Garfield High School. Her schedule and class assignment will be consistent with that of all other Department Heads at Garfield High School which is not anticipated to exceed three teaching periods. In the event of extraordinary circumstances additional teaching periods may be assigned upon prior notice to the Garfield Federation of Teachers.

3. Said settlement resolves all claims arising out of the matter of Frances Russo-Baron v. Garfield Board of Education pending before the Commissioner of Education under OAL Docket No. EDUOR 1141-2008N.

4. Nothing herein shall be deemed or construed as an admission by either party.

5. This Agreement is made and entered into in the State of New Jersey and shall in all aspects be interpreted, enforced and governed under the laws of New Jersey.

6. This Agreement constitutes the full and complete agreement between the parties and may only be amended by a writing signed by all parties.

The parties' signatures below represent their understanding and acceptance of the terms of this Settlement Agreement on this 10th day of March, 2009.

Brian Miller Adams, Esq.
Attorney for Frances Russo-Baron

Toni Belford Damiano, Esq.
Attorney for Garfield Board of Education

Frances Russo-Baron

Nicholas L. Perrapato
Superintendent, Garfield Public Schools

Damiano Law Offices

51 East Main Street
Little Falls, New Jersey 07424

Tel (973) 890-1199
Fax (973) 890-1966

*TONI BELFORD DAMIANO***
*STEVEN M. SEGALAS**
JOSEPH V. MACERI

***Also PA and D.C. Bars*
**Also NY Bar*

NICOLE A. CASCIOLA+
ALLEN J. SCAZAFABO, JR.+

+Also PA Bar

April 30, 2009

VIA TELEFAX (973-648-2358)
Honorable Imre Karaszegi, Jr., ALJ
New Jersey Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Frances Russo-Baron v. Garfield Board of Education

Dear Judge Karaszegi:

As per your request, enclosed please find a copy of the Resolution regarding the above referenced matter.

I trust you will find same in order and remain,

Respectfully yours,
DAMIANO LAW OFFICES

TONI BELFORD DAMIANO, ESQ.

TBD:rd
Enclosure
cc: Dr. Dennis Frohnapfel, Board Secretary/Business Administrator
Mr. Nicholas Perrapato, Superintendent
Mr. Raymond Hryczyk, Assistant Superintendent
Mr. Gerald Wich, Board President
Mr. Edward Puzio, VP, GBOE

Apr 30 2009 14:33 DAMIANO LAW OFFICES 9738901966 p.1

GARFIELD BOARD OF EDUCATION - Sine die Meeting - April 28, 2009

04-436-09 **Be It Resolved,** that the Garfield Board of Education, upon the recommendation of the Superintendent of Schools, Assistant Superintendent, and Business Administrator/Board Secretary, approves the ***Settlement Agreement*** which resolves all claims arising out of the matter of *Frances Russo-Baron v. Garfield Board of Education* pending before the Commissioner of Education under OAL Docket No. EDUOR 1141-2008N.

MOTION: Mr. Benanti	SECOND: Mr. Damato		
	YES	NO	ABSTAIN
Mrs. Aloia (Rosemarie)	X		
Mr. Damato (Anthony)	X		
Ms. Visotcky (Lou Ann)			
Dr. Conte (Kenneth)	X		
Mr. Benanti (Salvatore)	X		
Mr. Hicks (Heath)			
Mr. DeMarco (Anthony)			
Mr. Puzio (Edward)	X		
Mr. Wich (Gerard)	X		

I, Dennis R. Frohnapfel, Ed.D., Secretary of the Garfield Board of Education, hereby certify that the foregoing is a true copy of a motion duly adopted by said Board at a Regular Meeting held on April 28, 2009.

IN WITNESS WHEREOF, I have set my hand and the seal of the Garfield Board of Education, April 29, 2009.

Dennis R. Frohnapfel, Ed.D., Secretary
Garfield Board of Education

183-09E

183-09

OAL DKT. NO. EDU 5757-09
AGENCY DKT. NO. 104-5/09

PRITCHARD INDUSTRIES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY AND GSA SERVICES GROUP, INC.,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The Administrative Law Judge's (ALJ) Order, noting that the emergent aspect of the within matter has been withdrawn by the petitioner, has been received from the Office of Administrative Law. Upon her review, the Commissioner approves the withdrawal and adopts such order as the final decision in this emergent matter.

Accordingly, this case shall move forward, consistent with the recommendation of the ALJ, to a plenary hearing on the merits scheduled for Wednesday, June 10, 2009.

IT IS SO ORDERED.*

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 06/09/10

Date of Mailing: 06/10/09
& Faxed

* 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
33 Washington Street
Newark NJ 07102
Tel No. (973) 648-6033
Fax No. (973) 648-6124

JESSE H. STRAUSS
Administrative Law Judge

June 8, 2009

Via Fax and E-mail ONLY

Fax#(609)-292-4333
M. Kathleen Duncan
Department of Education
Bureau of Controversies and Disputes
100 Riverview Plaza, Route 29
P.O.Box 500
Trenton, N.J. 08625-0500

Collins@njcounsel.com
Patrick Collins, Esq.
Franzblau & Dratch
354 Eisenhower Parkway, Plaza One
P.O.Box 472
Livingston, N.J. 07039

dmckeever@lindabury.com
Dennis Mckeever, Esq.
Lindabury, McCormick, Estabrook & Cooper
53 Cardinal Drive
P.O.Box 2369
Westfield, N.J. 07091

Fax# (216)-583-0481
Bob Gerber
GSA Services Group, Inc.
2528 Quakertown Road
Pennsburg, PA 18073

RE: Pritchard Industries, Inc. v. BOE of the Township of Wyckoff, Bergen Count and GSA Service Group, Inc.,
OAL DKT. NO. EDU 05757-09
AGENCY DKT. NO. 104-5/09

Dear Parties:

Enclosed please find a copy of an Emergency Order entered regarding an application for emergency relief in the above captioned matter.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

EMERGENT RELIEF ORDER
OAL DKT. NO. EDU 05757-09
AGENCY DKT. NO. 104-5/09

PRITCHARD INDUSTRIES, INC.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TWP. OF WYCKOFF, BERGEN COUNTY, AND GSA SERVICES GROUP, INC.,
Respondents.

Patrick T. Collins, Esq., for petitioner (Franzblau, Dratch, attorneys)

Dennis McKeever, Esq., for respondent Wyckoff Twp. Board of Education (Lindabury McCormick Estabrook & Cooper, attorneys)

No appearance, for respondent GSA Services Group Inc.

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

STATEMENT OF THE CASE

Petitioner Pritchard Industries challenges the rejection of its bid for custodial and maintenance services for the period of July 1, 2009, through June 30, 2011, by the respondent Board of Education of the Twp. of Wyckoff and seeks to enjoin the performance of this contract awarded to GSA Services Group, Inc.

PROCEDURAL HISTORY

On May 27, 2009, petitioner filed its petition with the Commissioner seeking emergent relief. On June 2, 2009, 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), 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 emergent relief on June 8, 2009, at which time the petitioner agreed to forego the application for emergent relief, and all parties present agreed to proceed before me on June 10, 2009, in a plenary hearing. The parties further agreed that no discovery was necessary before proceeding with the plenary hearing.

ORDER

It is hereby **ORDERED** that petitioner's application for emergent relief be considered **WITHDRAWN** and that the matter proceed as a plenary hearing on Wednesday, June 10, 2009, at 9:00 a.m. before me at the Office of Administrative Law, 33 Washington Street, Newark, New Jersey 07102.

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.

6/8/09
DATE

JESSE H. STRAUSS, ALJ

id

A hearing scheduled for June 10, 2009 at 9:00 a.m.

Very truly yours,

JESSE H. STRAUSS
Administrative Law Judge

id
Encl.

c: Judge Robert J. Giordano

OAL DKT. NO. EDU 2213-07
AGENCY DKT. NO. 50-2/07

BOARD OF EDUCATION OF THE BOROUGH OF NEWFIELD, GLOUCESTER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	SUPPLEMENTAL DECISION
RESPONDENT.	:	

On January 27, 2009 the Office of Administrative Law sent to the Commissioner its recommendation for approval of a settlement between the boards of education of the Borough of Newfield and the Buena Regional School District, which settlement would effectuate a severance of their sending-receiving relationship. By way of a decision dated March 11, 2009, the Commissioner directed that, pursuant to *N.J.A.C.* 6A:3-6.1(b), the two districts give public notice of the proposed severance at their respective next regular board meetings. The boards were to advise the public that the Commissioner of Education would accept public comment for a twenty-day period after such notice was given, and instruct the public how to effectuate the submission of such comment.

Reports to the Commissioner indicate that on March 31, 2009 and April 2, 2009, respectively, the Buena Regional and Newfield boards of education gave the public notice of the proposed school district severance agreement and advised of the procedures available to convey comment to the Commissioner of Education. During the twenty-day comment period

the Commissioner received comments from private citizens, legislators and the Borough of Newfield. All were in favor of severance. Reply comments were received from both school districts.

As set forth in the Commissioner's original decision dated March 11, 2009, the parties have satisfied the statutory criteria[1] requisite to effectuating the termination of a sending-receiving relationship, including the production of a thorough feasibility study. The parties having now also satisfied the requirements of *N.J.A.C.* 6A:3-6.1(b), and no objections to the proposed severance having been filed, the Commissioner approves the parties' settlement, stipulating the terms and timing of the transition.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/11/09

Date of Mailing: 6/11/09

[1] The party proposing the severance must provide the Commissioner with a thorough feasibility study which addresses the likely educational, financial and demographic effects on all participating districts. The other party to the sending-receiving relationship may respond. After consideration of the circumstances, the Commissioner must make an equitable determination. *N.J.S.A.* 18A:38-13.

186-09

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
GREGORY ORBAN, STATE-OPERATED SCHOOL :
DISTRICT OF THE CITY OF NEWARK, :
ESSEX COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In December 2008, an Order to Show Cause was served upon respondent – a non-tenured 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, after he resigned his position as a sixth grade math teacher without notice on September 15th, after one week in the classroom. The respondent contended that he did not possess the appropriate personality traits to effectively manage a sixth grade classroom, and that continuing to teach would be detrimental to his health. The petitioning District filed a motion for summary decision.

The ALJ found that: there are no material facts in dispute, and the matter is ripe for summary decision; respondent is guilty of unprofessional conduct within the meaning of *N.J.S.A.* 18A:26-10 for abruptly resigning his position without notice; the District did not waive the notice provision contained in respondent's contract, nor did it otherwise consent to his resignation; and there are no compelling circumstances in the record to mitigate against the maximum penalty of a full year suspension of respondent's teaching certificate. Accordingly, the ALJ concluded that respondent's teaching certificate should be suspended for a period of one year.

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, summary decision is granted to petitioner, and respondent's certificate is suspended for a period of one year from the date of the filing of this decision – a copy of which has been 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.

June 11, 2009

186-09

OAL DKT. NO. EDU 6120-08
AGENCY DKT. NO. 167-6/08

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
GREGORY ORBAN, STATE-OPERATED SCHOOL :
DISTRICT OF THE CITY OF NEWARK, :
ESSEX COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties. For the reasons set forth therein, the Commissioner adopts the Initial Decision as the final decision in this case. A copy of this decision shall be forwarded to the State Board of Examiners for the purpose of effectuating this order.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/11/09
Date of Mailing: 6/11/09

* 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 3070-09
AGENCY DKT. NO. 379-12/08

IN THE MATTER OF TEACHING CERTIFICATE OF GREGORY ORBAN, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY.

Arsen Zartarian, Esq., for State-Operated School District of City of Newark (The Newark School District)

Gregory Orban, pro se

Record Closed: May 4, 2009 Decided: May 13, 2009

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the State Operated School District of the City of Newark ("the District"), seeks an order suspending respondent's teaching certificate for a period of one year. The District contends that respondent resigned from his elementary teaching position without notice. Respondent contends that his actions were necessitated by personal circumstances and were in the best interest of the school district and his students, and that his certificate should not be suspended as a result.

On December 9, 2008, at the request of the District, the Commissioner of Education ("the Commissioner") entered an Order directing respondent to show cause why his teaching certificate should not be suspended for unprofessional conduct, pursuant to N.J.S.A. 18A: 26-10. An answer was filed by respondent on February 2, 2009. On February 26, 2009 the Commissioner transmitted this matter to the Office of Administrative Law for hearing as a contested case.

I conferred with the parties via telephone on March 26, 2009 and it appeared that there were no factual disputes which necessitated a plenary hearing. The District filed a brief and supporting certification on April 30, 2009. Respondent filed a letter in opposition on May 4, 2009. The District, through counsel, advised that it did not wish to reply further to respondent's opposition. Accordingly, the record closed on May 4, 2009.

FINDINGS OF FACT

Based on the correspondence, pleadings, certifications and exhibits submitted by the parties, I **FIND** the following facts:

On August 21, 2008, respondent executed a contract of employment with the District, agreeing to serve as an elementary teacher for the 2008-2009 school year. Respondent's term of employment was from September 2, 2008 to June 30, 2009. The employment contract specified that it could be terminated by either party on thirty days written notice. The contract expressly stated that resignation by respondent on less than the requisite thirty days notice would be deemed unprofessional conduct and a breach of contract, and could result in the entry of an order by the Commissioner suspending respondent's teacher certificate in accordance with N.J.S.A. 18A:26-10.

Respondent was assigned to teach sixth grade math at the Peshine Avenue School, and his classroom responsibilities commenced on September 8, 2008, the first day of the 2008-2009 school year. By letter dated September 15, 2008 respondent

tendered his resignation, effective immediately. He did not return to his duties after September 15, 2008. Respondent's September 15, 2008 letter indicates that he felt that he did "not possess the proper personality traits to effectively run (manage) a 6th grade class." He states in his resignation letter that if he continued to teach, his health would suffer. The District at no time waived the notice provision contained in respondent's contract, nor did it otherwise consent to respondent's resignation.

Respondent is fifty years old and was new to the teaching profession, when he accepted a position with the District. Previously, he had worked for nearly thirty years in the business sector. He knew that being a novice teacher in an urban district would be challenging, but when he signed his contract of employment with the District, he felt he was up to the challenge. However, he was quickly overwhelmed by his new position. He notes in his answer to the petition that the orientation process "left [his] head spinning." He states that he "felt like a pin ball" as he moved from school to school to attend teachers' meetings. He believed that his classroom was in disarray and that it was difficult to obtain proper equipment. Petitioner spent his own money to provide supplies for his students. He made copies of handouts for the first day of school at his own expense. He was "burned out" even before his students arrived for the first day of school. Once the students did arrive, he began to have concerns about his classroom management skills. Respondent was physically exhausted by the end of his second week of employment at Peshine School and states that he lost twenty pounds as a result.

According to respondent, events in his personal life heightened his stress and contributed to his decision to abruptly resign. His brother was receiving cancer treatment; his brother-in-law was in the midst of a divorce and moved into respondent's home; and his aunt was terminally ill. Respondent quickly saw that he was not up to the challenge of teaching and he decided to leave his position before his students had bonded with him.

The certification of Elementary Principal Wanda Brooks-Long details the disruption to Peshine School caused by respondent's abrupt resignation. Ms. Brooks-Long stated that she was forced to assign a teacher to his class whom she had intended to use as a math tutor for middle school at-risk students. This reassigned teacher had spent the prior summer preparing for his new role as a tutor. The intent behind using tutors for the middle grades was to provide targeted assistance to African American male students and special education students whose test results were a precipitating factor in Peshine School's failure to meet Federal No Child Left Behind Annual Yearly Progress (AYP) requirements during the 2007-2008 assessment cycle. Accordingly, respondent's actions not only negatively impacted the continuity of instruction for the students in his own classroom, but likewise adversely affected other students at Peshine School. Respondent offered no proofs to rebut Ms. Brooks-Long's description of the disruption created by his actions, simply stating that he "cannot imagine" that his departure would so severely impact school operations. Respondent concedes, however, that Ms. Brooks-Long has a difficult job and that he "added to her stress."

Ms. Brooks-Long notes in her certification that she offered a myriad of supports to petitioner, including a mentor, coaching, in-class assistance and staff development. When respondent tendered his letter of resignation she encouraged him to stay. Ms. Brooks-Long and her staff had multiple conversations with respondent regarding the challenges of urban education and they offered to support him in meeting these challenges. Petitioner does not contest the statements made by Ms. Brooks-Long in her certification and indeed states in his letter of resignation that he "cannot say enough about all the support I have received from my fellow teachers."

CONCLUSIONS OF LAW

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. 4:46-2l 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 judgment 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 alleged disputed issue in favor of the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Our courts recognize that "[a]n evidentiary hearing is mandated only when the proposed administrative action is based on disputed adjudicatory facts." Contini v. Board of Educ. of Newark, 286 N.J. Super. 106, 120 (App. Div. 1995), certif. denied 145 N.J. 372 (1996). Here, the certifications and other submissions on record reveal no material factual disputes which necessitate a plenary hearing and I **CONCLUDE** that this matter is ripe for summary decision.

Suspension of Certificate

N.J.S.A. 18A:26-10 provides that "any teaching staff member employed by a board of education who shall, without the consent of the board, cease to perform his duties before 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-Carney's Point Board of Education 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 a case. As a general rule, however, with rare exception, the Commissioner has imposed suspensions for the one year maximum period. Black Horse Pike Regional School District 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 Township 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, 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. Respondent's conduct was grossly unprofessional. He gave the District literally no notice of his resignation, and essentially walked out on his position of employment. Respondent's written submissions in this matter reflect contrition and confirm that he was deeply disappointed in his inability to successfully transition to a career in public education. He offers a less than perfect work environment and personal problems as excuses for his conduct. However, his conduct was inexcusable. It was incumbent on respondent to discuss his workplace and personal concerns with his superiors and to try to work out his difficulties so that he could honor his contract. His colleagues were clearly willing, ready and able to assist him. If, despite such good faith efforts, he found that he absolutely could not continue to teach, it was incumbent on respondent to afford the administration the time needed to smoothly transition his students to a new teacher. Respondent's protestations to the

contrary notwithstanding, walking out on his students was not in their best interest nor was it in the best interest of the other students and staff at Peshine School.

I agree with the District that respondent acted "with nary a concern about the well-being of the... students in need of his assistance, the District's ability to find a suitable replacement on such short notice, or the increased workload for his co-workers." Capshaw, supra. Accordingly, I **CONCLUDE** that respondent 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

It is **ORDERED** that any and all of respondent'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.

May 13, 2009
DATE

ELLEN S. BASS, ALJ

Date Received at Agency:

MAY 14 2009
DATE

5/13/09

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

187-09

OAL DKT. NO. EDU 2879-08
AGENCY DKT. NO. 66-3/08

BOARD OF EDUCATION OF THE TOWNSHIP OF DEERFIELD, CUMBERLAND COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UPPER DEERFIELD, CUMBERLAND COUNTY AND BOARD OF EDUCATION OF THE TOWNSHIP OF HOPEWELL, CUMBERLAND COUNTY,	:	DECISION
RESPONDENTS.	:	

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.

COMMISSIONER OF EDUCATION

Date of Decision: 6/11/09

Date of Mailing: 6/11/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.EDU 2879-08

AGENCY DKT. NO. 66-3/08

BOARD OF EDUCATION OF THE TOWNSHIP OF DEERFIELD, CUMBERLAND COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF UPPER DEERFIELD, CUMBERLAND COUNTY AND BOARD OF EDUCATION OF THE TOWNSHIP OF HOPEWELL, CUMBERLAND COUNTY,

Respondent.

Roger Barbour, Esq., for petitioner (Barbour & Barbour, attorneys)

Frederick A. Jacob, Esq., for respondent, Upper Deerfield Township Board of Education (Jacob & Chiarello, attorneys)

Robert G. Malestein, Esq., for respondent, Hopewell Township (Lipman, Antonelli, Batt, Dunlap, Wodlinger & Gilson, attorneys)

Record Closed: May 6, 2009 Decided: May 8, 2009

BEFORE **DOUGLAS H. HURD**, ALJ:

This matter was transmitted to the Office of Administrative Law on April 29, 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.

At the May 6, 2009 hearing the parties agreed to a settlement and 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.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 8, 2009
DATE

DOUGLAS H. HURD, ALJ

Date Received at Agency:

Date Mailed to Parties:

/jfk

Deerfield v. Upper Deerfield + Hopewell OAL # EDU05-02879-2008S
RE: 66-3/08

Stipulation of Settlement

1) D.S and A.F were domiciled in Upper Deerfield at 1114 Highway 77, Bridgeton between approx. 10/4/2000 and 2/14/2006

2) DS and AF were domiciled in Deerfield at 694 Vineland Ave, Rosenhayn, between approx 2/2006 and 9/2007 when she moved to 56 Bebe Run Rd in the Hopewell School District

3) A.F remained in Hopewell from approx 9/2007 to 6/2008 and incurred $8,522 in educational expenses

4) Deerfield and Upper Deerfield have agreed to equally share in the aforementioned expense of $8,522, without prejudice and w/o implications

Deerfield v. Upper Deerfield + Hopewell OAL # EDU05-02879-2008S
R91= 66-3/08

Stipulation of Settlement

1) D.S and A.F were domiciled in Upper Deerfield at 1114 Highway 77, Bridgeton between approx. 10/4/2000 and 2/14/2006

2) DS and AF were domiciled in Deerfield at 694 Vineland Ave, Rosenhayn, between approx 2/2006 and 9/2007 when she moved to 56 Bebe Run Rd in the Hopewell School District

3) A.F remained in Hopewell from approx 9/2007 to 6/2008 and incurred +8,522 in education expenses

4) Deerfield and Upper Deerfield have agreed to equally share in the aforementioned expense of +8,522, without prejudice and w/o implications

5) A.F. is currently residing at 4 Swallow Dr. in Upper Deerfield, and her education is being paid by Upper Deerfield

5/6/09

Upper Deerfield
Bohd. Zachariasevich
BOHDAN ZACHARIASEVICH

Deerfield BOE
Roger A. Barbour

Hopewell Township BOE
Jane B. Capasso
Jane B. Capasso

189-09

189-09L

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

June 15, 2009

Martin M. Barger, Esq.
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Melissa T. Dutton, DAG
NJ Department of Law & Public Safety
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P.O. Box 112
Trenton, NJ 08625-0112

Cherie L. Adams, Esq.
Adams, Stern, Gutierrez & Lattiboudere, LLC
744 Broad Street
Suite 1600
Newark, NJ 07102

Dear Counsel:

I have reviewed the papers filed in conjunction with petitioner's request for interlocutory review of Administrative Law Judge (ALJ) Ana C. Viscomi's letter order of May 27, 2009 in the matter entitled *Board of Education of the Borough of Tinton Falls, Monmouth County v. Monmouth County Superintendent of Schools and Board of Education of the Township of Colts Neck, Monmouth County*, Agency Dkt. No. 165-6/08, OAL Dkt. No. 6546-08, wherein the ALJ dismissed the Monmouth County Superintendent of Schools as a respondent in this matter,* on grounds that the superintendent was not a genuine party in interest and had no actual stake in the outcome of proceedings.

Upon consideration, I concur with the Deputy Attorney General that petitioner has advanced no compelling basis for review of the ALJ's order at the present juncture, and I accordingly decline to grant petitioner's request pursuant to the discretion granted me by *N.J.A.C.* 1:1-14.10.

Sincerely,

Willa Spicer
Acting Commissioner

VIA FACSIMILE AND REGULAR MAIL

c. Honorable Ana C. Viscomi, ALJ
Clerk, OAL
Marc H. Zitomer, Esq.

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* I note that the Commissioner and Department of Education – although initially named – were subsequently dismissed as respondents by mutual agreement of the parties

190-09 L

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

June 15, 2009

Wayne J. Oppito, Esq.
NJ Principals & Supervisors Association
12 Centre Drive
Monroe Township, New Jersey 08831-1564

Karen A. Murray, Esq.
The Murray Law Firm, LLC
149 Avenue at the Common, Suite 201
Shrewsbury, NJ 07702-4582

Dear Counsel:

I have reviewed the papers filed in conjunction with respondent's request for reconsideration of my May 7, 2009 decision in the tenure proceeding entitled *In the Matter of the Tenure Hearing of Lourdes Leon, Board of Education of the City of Elizabeth, Union County*, Agency Dkt. Nos. 96-4/07 and 360-11/07, OAL Dkt. Nos. EDU 05073-07 and EDU 12540-07 (CONSOLIDATED), Commissioner Decision No. 149-09, wherein I approved settlement of the tenure matter and referred it to the State Board of Examiners for possible action against respondent's certificate.

In her request, respondent contends that the Settlement Agreement on its face precluded me from referring the matter to the Board of Examiners; she further contends that her "acceptance of responsibility" was not an admission of wrongdoing, and that her agreement "not to dispute" two letters of reprimand referred to discontinuance of a pending grievance arbitration seeking to remove these letters from her personnel file, as part of a global settlement ending all present and future litigation between the parties. The Board joins in respondent's request, both parties urging that the intent of the settlement was to permit them to go their separate ways without further costly and disruptive litigation – which would not be accomplished if the matter was, in effect, merely transferred to another forum.

Initially, I note that – as is well-established by longstanding case law and rule – tenure charges against a teaching staff member may be settled only where the charged party is aware of the Commissioner's duty to refer any determination resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate. The settlement agreement at issue herein was approved because the Initial Decision found (at 3) – based on respondent's own testimony[1] – that respondent understood that the Commissioner could still refer this matter to the Board of Examiners, notwithstanding the facial language of the agreement. Moreover, the Initial Decision also found (*Id.*) that respondent "agrees to accept full responsibility for her actions, which are addressed in the attached reprimands, dated March 14, 2007, and will not dispute them." Although Term 4 of the parties' agreement plainly states respondent's position that she committed no "intentional policy violations," it concomitantly posits her acceptance of "full responsibility for the actions addressed" in the referenced reprimands, giving me – for the reasons set forth in my prior decision – more than sufficient basis to refer this matter to the Board of Examiners. Indeed, to have done otherwise would have been an abrogation of my supervisory responsibility over public education and my duty to the students of this State, notwithstanding that it would clearly serve the interests of respondent and the Board.

Now, however – although I stand by my prior decision based on the record then before me – it is evident that respondent does not, in fact, acknowledge my obligation to refer this matter to the State Board of Examiners, and that she denies the actions addressed in the March 2007 reprimands notwithstanding her acceptance of responsibility for them. Under these circumstances, I find that my May 7, 2009 approval of the Settlement Agreement must be VACATED, and that this matter must be REMANDED to the Office of Administrative Law for revision of such agreement consistent with the standards of *Cardonick*,[2] or, if the parties are unwilling or unable to effectuate such revision, for plenary hearing on the merits. Accordingly, I so ORDER.[3]

Sincerely,

Willa Spicer
Acting Commissioner

c: Executive County Superintendent
Clerk, OAL
Hon. Barry Moscowitz, ALJ
Secretary, State Board of Examiners

Mailed 6/16/09

[1] It is noted that the record did not include a transcript of the referenced testimony.

[2] *In re Cardonick,* decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846; see also *N.J.A.C.* 6A:3- 5.6(a).

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

191-09

#191-09E

OAL DKT. NO. EDU 4949-09
AGENCY DKT. NO. 117-6/09

M.L., on behalf of minor child, S.L.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON APPLICATION FOR EMERGENT RELIEF

The record of this emergent matter and the recommended Order of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner concurs with the ultimate conclusion of the Administrative Law Judge (ALJ) that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). However, the Commissioner cannot fully concur with the ALJ's analysis, and, consequently, modifies the OAL order as follows.

Unlike the ALJ, the Commissioner finds that petitioner *has* met the threshold standard of irreparable harm, notwithstanding the fact that attendance at "Senior Fest" activities is a privilege rather than a right, since the opportunity to participate in such events cannot be regained once lost and 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.[1]

[1] The Commissioner is fully cognizant 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 totatlity, 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, 1996; *L.J., on behalf of minor child, S.J. and David Wickham v. Board of Education of the Township of Manchester, Ocean*

However, applicants seeking extraordinary 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, finally, that the balance of interests and equities under the circumstances rests in their favor. In each of these respects, the Commissioner agrees with the ALJ that petitioner herein has not met the requisite burden, so that his application must be denied.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted with modification as set forth above. In that the present decision fully disposes of all issues in dispute between the parties, no further proceedings are necessary and this matter is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[2]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/15/09

Date of Mailing: 6/16/09
& Faxed

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.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DENYING EMERGENT RELIEF
OAL DKT.NO. EDU 4949-09
AGENCY DKT. NO. 117-6/09

M. L. ON BEHALF OF S.L.,
Petitioner,
v.
EWING TOWNSHIP BOARD OF EDUCATION,
Respondent.

M. L., petitioner, pro se

Jeffrey Belz, Esq., for respondent

Record Closed: June 12, 2009 Decided: June 15, 2009

BEFORE **JOHN SCHUSTER III**, ALJ:

STATEMENT OF THE CASE

In this matter M.L. (petitioner) makes emergent relief request for an order permitting his son (S.L.) to participate in senior activities, in particular, Senior Fest on this date at 12:00 p.m.

PROCEDURAL HISTORY

On June 11, 2009, petitioner filed a request for emergent relief which was transmitted to the Office of Administrative Law (OAL) on the same day. The matter was assigned to the undersigned for hearing on June 12, 2009. After testimony was taken and evidence presented the hearing and record was closed.

FINDINGS OF FACT

Respondent states and I so **FIND** that S.L. received four suspensions as penalties for disciplinary behavior. In particular on March 3, 2009 S.L. received a in-school suspension because he was late to class, on March 18, 2009, S.L. received an in-school suspension because of cell phone use, on April 1, 2009, S.L. received an in-school suspension for cell phone use and on May 26, 2009, S.L. received a out-of-school suspension for cell phone use. Respondent states the school's policy as set forth in the Student Agenda Book (R-1) and the Student Handbook (R-2), clearly indicate that after three suspensions, a student's athletic and extra curricular privileges are lost. Respondent also claims that S.L.'s parents appealed this determination to the principal, assistant superintendent and Board of Education and the school's disciplinary penalty was upheld. It argues that there are seven other students in the same situation and in order to maintain the disciplinary integrity at Ewing High School, S.L.'s suspension of privileges must be upheld.

Petitioner's position is that no one disputes that S.L. is an overall good student with no major disciplinary issues. Petitioner also argues that at least one of four suspensions should not have been given for various reasons, including that S.L. was told he was not going to be suspended, that there were extenuating circumstances for use of a cell phone and that S.L.'s due process rights were violated by the District not adhering to its own appeal procedure.

I **FIND** that while petitioner is generally a nice young man, he did have four suspensions. I also **FIND** that an appeal process was applied to the penalty imposed

and the appeals were denied by the school principal, the assistant superintendent and informally by the Board of Education. I also **FIND** that S.L. had four disciplinary suspensions and pursuant to the Student Handbook and the Student Agenda Book, he was then rightfully prohibited from taking part in senior class activities.

LEGAL ANALYSIS

The authority to grant emergency 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:

1. that he will suffer irreparable harm;
2. that his legal right is settled;
3. that material facts are not in dispute;
4. that he has a reasonable probability of success on the merits and;
5. that the hardship to the petitioner out weighs the hardship to the other party.

In this matter petitioner has not demonstrated that S.L. will suffer irreparable harm by his prohibition to attending Senior Fest activities. Those activities constitute a senior class picnic and a yearbook signing. Petitioner has failed to demonstrate that his legal right is settled because attending extra curricular school activities is a privilege and not a right. I **FIND** that there are substantial facts that are in dispute and those facts can not be resolved with out a full evidentiary hearing. I further **FIND** that without a full evidentiary hearing, it is impossible to determine the probability of success on the merits. Finally, the petitioner has not demonstrated that the hardship to S.L. out weighs any hardship to the District. By rebuttal, the District argues that its hardship would be greater because to grant the relief requested would be to undermine the entire disciplinary process of the high school which will have far reaching affect on all students.

For the reasons set forth herein, I **ORDER** petitioner's request for emergent relief be **DENIED.**

This decision on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** 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 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 15, 2009
DATE

JOHN SCHUSTER III, ALJ

/cad

WITNESSES

For Petitioner:

M. L.

For Respondent:

Scott Sheplock

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Student Agenda Book, page 16
R-2 Student Handbook
R-3 Board Policy
R-4 Disciplinary History

192-09

OAL DKT. NO. EDU 1914-04
AGENCY DKT. NO. 463-12/03

BETTY JO MILLIGAN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter. In so doing, however, the Commissioner expressly notes with respect to the term (No. 3) pertaining to confidentiality that: 1) Pursuant to *N.J.A.C.* 1:1-14.1(a), records of all contested case hearings are open for public inspection unless, for good cause shown, the Administrative Law Judge orders sealing of the record, or any part thereof; and 2) the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.* with respect to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms and record of their settlement confidential.

Accordingly, with the proviso set forth above, the Commissioner adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

Date of Decision: 6/15/09

Date of Mailing: 6/16/09

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1914-04

AGENCY DKT. NO. 463-12/03

BETTY JO MILLIGAN,

Petitioner,

v.

BOARD OF EDUCATION OF WEST MILFORD TOWNSHIP, PASSAIC COUNTY,

Respondent.

Nancy I. Oxfeld, Esq., for petitioner

(Oxfeld Cohen, attorneys)

Damian Christian Shammas, Esq., for respondent

(Porzio, Bromberg & Newman, attorneys)

Record Closed: March 26, 2009 Decided: April 28, 2009

BEFORE **RICHARD McGILL**, ALJ:

Betty Jo Milligan filed a petition with the Commissioner of Education alleging that the Board of Education of West Milford Township (respondent) charged her sick days for absences caused by a work-related injury contrary to N.J.S.A. 18A:30-2.1. The

matter was transmitted to the Office of Administrative Law on March 1, 2004, for determination as a contested case.

The matter was placed on the inactive list for an extended period of time pending resolution of a workers' compensation case. Subsequent to completion of the workers' compensation case, the parties to this matter agreed to an amicable resolution and submitted a written Settlement Agreement and Mutual Release. Thereafter, respondent's attorney submitted a copy of respondent's minutes from a meeting on February 24, 2009, approving the settlement agreement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

Apr. 28, 2009
DATE

RICHARD McGILL, ALJ

Date Received at Agency: 4-30-09

Mailed to Parties:

APR 30 2009
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

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SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release ("Agreement") is made and entered into by and between counsel for petitioner, Betty Jo Milligan ("Milligan") and respondent, West Milford Board of Education (the "Board") (collectively "the Parties"), for full settlement of all claims that could have been alleged by or against either party in the above matter.

WITNESSETH:

WHEREAS, on or about December 12, 2003, Milligan filed a Petition before the State of New Jersey Commissioner of Education (the "Commissioner") captioned *Milligan v. Board of Education of West Milford*, OAL Docket No. EDU-01914-04 for reinstatement of alleged back wages and sick pay (the "Petition");

WHEREAS, said Petition was held in abeyance pending resolution of a simultaneously filed Workers' Compensation claim;

WHEREAS, the Petitioner's Workers' Compensation claim was resolved via settlement in the Workers Compensation Court and the stay on the Petition was lifted;

WHEREAS, this matter is currently pending before the Honorable Richard McGill, A.L.J.; and

WHEREAS, the Parties desire to amicably resolve their differences and avoid additional expenses of further litigation in connection with the Petition.

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, it is hereby agreed by and between the Parties as follows:

1. This Agreement shall not be construed as an admission by the Parties of any acts or omissions alleged or those that could have been alleged by any of the Parties, or of any acts or omissions alleged or which could have been alleged against any of the Parties. Each party to this

Agreement specifically denies any liability whatsoever for damages, injuries, or other claims by any other party to this Agreement or those that were alleged or could be claimed by the other party.

In exchange for the valuable consideration set forth herein, the Parties mutually release and give up any and all claims and rights they may have against each other for any damages, injuries, or claims whether known or unknown that could have been alleged by either party in connection with this matter.

As used in this Agreement, the term "Board" means the West Milford Board of Education, its current or former elected or appointed officials, administrators, employees, attorneys, agents, servants, representatives, predecessors and successors, insurance carriers, and all other persons or entities for whom any of the above have been or may be legally responsible. "Milligan" means Betty Jo Milligan. The Parties specifically release the following claims as to each other:

(a) Any and all claims and counterclaims that were brought and/or that could have been brought in the Petition bearing OAL Docket No. EDU-01914-04; and

(b) Any and all available claims for attorneys' fees and expert costs, and any other fees and costs incurred in relation to the Petition bearing OAL Docket No. EDU-01914-04.

2. In total and complete settlement of any and all potential claims referred to in Paragraph no. 1 above, the Board shall credit Milligan with seven (7) sick days for the 2003-2004 school year.

3. The Parties agree that neither they nor their attorneys or representatives shall reveal to anyone, verbally or in writing, other than as may be mutually agreed to in writing, any of the terms of this Agreement. The Parties acknowledge that this confidentiality requirement is

a material term to this Agreement and that violating this Paragraph is a material breach of this Agreement.

4. The Parties agree that this Agreement may not be used to establish precedent in any future proceeding of any type whatsoever and that it shall be inadmissible in any such proceeding, other than a proceeding to enforce or prove the existence of this Agreement. This Agreement is a compromise of disputed claims and shall not be construed as an admission by any party of any of the acts or omissions alleged or those that could have been alleged by any party against another party in this matter.

5. This Agreement contains the entire agreement among the Parties and fully supersedes any and all prior agreements and understandings among the Parties pertaining to the subject matter of this Agreement. The Parties represent and acknowledge that they have not relied upon any representation or statement by any other party, or their counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth in this Agreement. No other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to be a modification of this Agreement. No waiver, modification, or amendment of this Agreement shall be valid or enforceable unless reduced to writing and signed by the party against whom enforcement is sought.

6. The Parties acknowledge that they are fully satisfied with their respective legal representation in this matter and that they have reviewed the terms of this Agreement with their respective counsel.

7. The Parties acknowledge that each party has engaged counsel in connection with the negotiation and completion of this Agreement and, consequently, agree that the normal rule

of construction to the effect that any ambiguities are to be resolved against the drafting party will not be used in the interpretation of this Agreement or any amendment or exhibit hereto.

8. The Parties agree that the Superior Court, State of New Jersey shall have sole exclusive jurisdiction to adjudicate any action to enforce the provisions in this Agreement. Such action shall be brought and venued in the Passaic County Vicinage. The parties agree that all terms to this Agreement are valid and enforceable by the Superior Court of New Jersey.

9. This Agreement is subject to ratification by the Board at its next scheduled meeting, and is without prejudice to any party if the terms are not agreed upon.

PETITIONER

Betty Jo Milligan 10-10-08
Betty Jo Milligan

Dated: 10-10-08

RESPONDENT

Steven Cea
Board Secretary/Business Administrator
West Milford Board of Education

Dated:

Dr. Michelle Fenwick
Board President
West Milford Board of Education

Dated:

193-09

OAL DKT. NO. EDU 12714-07
AGENCY DKT. NO. 326-10/07

JULIE GLAZER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

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

Upon such 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.

Lucille Davy
COMMISSIONER OF EDUCATION

Date of Decision: 6/17/09
Date of Mailing: 6/18/09

* The Initial Decision is incorrectly captioned "In the Matter of the Tenure Hearing of Julie Glazer, Board of Education of the City of Orange, Essex County." For purposes of clarification, the Commissioner notes that this matter has been, from its outset, a dispute regarding petitioner's proper level of salary payment, and that it has at no time involved tenure charges.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12714-07

AGENCY DKT. NO. 326-10/07

IN THE MATTER OF JULIE GLAZER, BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY.

Robert M. Schwartz, Esq., for petitioner

Chandra Cole, Esq., for respondent (Love and Randall, attorneys)

Record Closed: April 20, 2009 Decided: May 8, 2009

BEFORE **IRENE JONES**, ALJ:

On October 25, 2007, petitioner Julie Glazer filed a petition of appeal with the Department of Education contesting her level of compensation paid to her by the respondent, Orange Township Board of Education ("Board"). Petitioner also contended that the Board violated its obligation by not providing her with a written contract in accordance with N.J.S.A. 18A:27-5 and 6. On December 27, 2007, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

Hearing dates were scheduled for March 27, 28, 2008; October 9, 10, 16 & 17, 2008 and December 1, 11, 2008, but were adjourned due to the availability of the parties. A telephone conference was scheduled for December 8, 2008 wherein the parties notified the undersigned that a tentative settlement had been reached. The Settlement Agreement indicating the terms of settlement was signed by the parties and forwarded to the OAL on April 20, 2009. A copy of the Settlement Agreement is attached hereto.

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

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives.

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

I **CONCLUDE** that the agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

5/8/09
DATE

IRENE JONES, ALJ

Date Received at Agency:

MAY 12 2009
DATE

sej

May 12, 2009

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

ROBERT M. SCHWARTZ
ATTORNEY AT LAW
MONROE OFFICE CENTER AT FORSGATE
12 CENTRE DRIVE
MONROE TOWNSHIP, NEW JERSEY 08831
(609) 860-9100
ATTORNEY FOR PETITIONER, JULIE GLAZER

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OFFICE OF ADMIN. LAW
2009 APR 20 A 9:50

JULIE GLAZER, Petitioner,	) BEFORE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
v.	) *OAL Docket No. EDU 12717-2007N*) *Agency Ref. No.: 326-10/07*
THE ORANGE TOWNSHIP BOARD OF EDUCATION, Respondent	) **SETTLEMENT AGREEMENT**

WHEREAS, the petitioner, JULIE GLAZER, (hereafter referred to as "petitioner") filed an appeal before the Commissioner of Education contending that the respondent, Orange Board of Education, (hereinafter referred to as "respondent") failed to compensate her for work performed during the summer of 2007, more specifically relating to the time frame between July 2 and July 10 and July 17 and August 10, 2007 in which petitioner claimed she was owed the sum of $8,562.80, and

WHEREAS, the respondent filed an Answer to the appeal denying petitioner's claim on the basis that petitioner had not been authorized to work the days in question, and

WHEREAS, the matter had been scheduled for a hearing before the Honorable Irene Jones, A.L.J., on December 11, 2008, and

WHEREAS, both parties were prepared to litigate the matter, and

WHEREAS, the parties determined that it was in their respective interest to settle this matter, and

WHEREAS, the parties were able to reach a settlement that constitutes a compromise of both parties' position, and

WHEREAS, the settlement reached is in the public interest in that the compromise agreed to is less costly than if the matter would have proceeded to a hearing in which the petitioner may or may not have been successful in pursuing her claim,

NOW, THEREFORE, the respondent and the petitioner agree to the following:

1. In recognition for the days worked during the summer of 2007, for which petitioner heretofore has not been paid, the respondent agrees to compensate petitioner the sum of $4,500.00.

2. In consideration therefore, the petitioner agrees to withdraw her petition of appeal and release the respondent from any and all claims whatsoever in relation to the subject matter of this dispute.

3. As this is a contested case before the Commissioner of Education, this agreement is subject to the approval of the Commissioner of Education.

4. In this regard, respondent shall forward to petitioner the agreed upon sum of $4,500 within 30 days of the date on which the Commissioner approves this settlement.

Dated: December 22, 2008

Robert M. Schwartz, Esq.
Attorney for Petitioner
Julie Glazer

Chandra R. Cole, Esq.
Attorney for Respondent
Orange Board of Education

194-09

OAL DKT. NO. EDU 4331-08
AGENCY DKT. NO. 123-5/08

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
RONALD MINSKY, ACADEMY CHARTER	:	DECISION
HIGH SCHOOL, MONMOUTH COUNTY.	:	

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

Upon such 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.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/17/09
Date of Mailing: 6/17/09

* In so holding, the Commissioner notes – and concurs with – the Initial Decision's clarification (at 2) of the settlement's proper interpretation with respect to the continuing jurisdiction of the OAL.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4331-08
AGENCY DKT. NO. 123-5/08

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF RONALD MINSKY, SCHOOL DISTRICT OF ACADEMY CHARTER HIGH SCHOOL, MONMOUTH COUNTY

Bonnie M. Wright, Esq., for petitioner, School District of Academy Charter High School (Hanlon Niemann, attorneys)

Stephen B. Hunter, Esq., for respondent, Ronald Minsky (Detzky & Hunter, attorneys)

Record Closed: May 4, 2009 Decided: May 4, 2009

BEFORE **LAURA SANDERS**, CHIEF ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 27, 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 parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. The parties have also submitted a detailed resolution of the Board of Education accepting the settlement.

I have reviewed the record, the terms of settlement, and the submitted documentation 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 should be noted that while the introductory statement would appear to leave some continuing jurisdiction with the OAL, the actual terms of the agreement properly place contract enforcement with the Superior Court for financial relief and allow petitioner to reinstate its complaint against respondent, which would be accomplished with the Commissioner of Education.

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

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

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

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

5/4/09
DATE

Laura Sanders
LAURA SANDERS, CHIEF ALJ

Date Received at Agency: MAY 5 2009

Date Mailed to Parties: MAY 5 2009

/caa

HANLON NIEMANN, P.C.
Juniper Business Plaza
3499 Route 9 North, Suite 1-F
Freehold, New Jersey 07728
Tel: 732-863-9900
Attorneys for Academy Charter
High School

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF RONALD MINSKY, SCHOOL DISTRICT OF ACADEMY CHARTER HIGH SCHOOL, MONMOUTH COUNTY	STATE OF NEW JERSEY COMMISSIONER OF EDUCATION AGENCY DOCKET NO. 123-5/08 STIPULATION OF SETTLEMENT

THE MATTER in difference in the above entitled action having been amicably adjusted by and between the parties, this matter shall be dismissed without prejudice subject to satisfaction by Ronald Minsky of all of the affirmative obligations contained herein. The Office of Administrative Law shall retain jurisdiction over this matter for enforcement purposes:

1. Respondent, Ronald Minsky, acknowledges that he failed to provide 60 days advance written notice of his intention to resign from his position as Special Education Teacher at the Academy Charter High School ("ACHS") as required by N.J.S.A. 18A:28-8 and his signed, written and executed employment contract for the school year 2007-2008.

2. Respondent accepts the imposition of a reprimand from the State of New Jersey, Commissioner of Education for his conduct in failing to give the required written

notice described above and acknowledges that his conduct caused a material disruption to ACHS and the educational progress of students to which he was assigned responsibility.

3. Respondent, Ronald Minsky, will reimburse ACHS the sum of Six Thousand One Hundred Nineteen and 38/100 ($6,119.38) Dollars representing compensation paid to him between October 28, 2007 and December 30, 2007 including, by way of example, salary, medical and other benefits paid to him by ACHS because of the respondent's failure to provide the required notice of resignation. Payment shall be mailed to counsel for ACHS, c/o Fredrick P. Niemann, Esq., within thirty (30) days of March 25, 2009.

4. Respondent will donate the sum of Ten Thousand ($10,000.00) Dollars within sixty (60) days of March 25, 2009 to the Friends of Academy Charter High School, Inc. ("Friends") to be used exclusively for the purposes, goals and objectives of the Friends as stated in their Certificate of Incorporation, By-Laws and other organizational filings.

5. Respondent will cease and desist effective March 25, 2009 from making any and all communications that are critical or otherwise disparaging to ACHS and its officers including, by way of example and not limitation, the Board of Trustees, Management and ACHS Staff in particular the Director of ACHS, Mary Jo McKinley, the student body and co-workers and the operational and educational curriculum as established by ACHS through its Trustees.

6. This Stipulation of Settlement shall be subject to approval by the Board of Trustees at their meeting on Thursday, April 2nd, 2009.

7. Upon execution of this Stipulation of Settlement by the parties and signature by the Administrative Law Judge assigned to hear the petition and the satisfaction of the terms and conditions set forth herein, the complaint of the Petitioner shall be withdrawn.

8. In the event of a breach of Paragraphs 3 and 4 of this Agreement by Respondent, Petitioner is authorized to file a Confession of Judgment and other required documents in order that Petitioner may obtain and docket a New Jersey Superior Court judgment for the outstanding amount against Respondent. Respondent agrees to pay all costs of collection, including reasonable counsel fees and costs.

9. In the event of a breach of the non-economic terms of this Agreement, including Respondent's failure to execute the documents referred to in Paragraph 8 above, then ACHS shall have the right to reinstate its Complaint against the Respondent and the Respondent agrees to waive any Statute of Limitations and allow the cause to continue against the Respondent.

10. Both Petitioner and Respondent agree that except as may be required by law, neither party shall disclose this settlement to unrelated third parties except as to the following individuals or entities:

a. the Board of Trustees of ACHS at its duly scheduled April 2, 2009 Public Meeting.

b. the Director of ACHS shall be authorized to disclose to staff that the Respondent failed to abide by his contract and that a settlement was reached by the parties.

c. should Respondent list Academy Charter High School as a reference for employment, the Petitioner shall respond to inquiries made about his employment as follows:

(1) Petitioner shall not disparage his performance as a teacher while employed by Academy Charter High School and shall limit its response to the dates of employment.

Dated:

ACADEMY CHARTER HIGH SCHOOL
Petitioner

By: Mary Jo McKinley
Name: Mary Jo McKinley
Title: Director

Dated: 4.2.09

HANLON NIEMANN, P.C.
Attorneys for Petitioner

By: _____
FREDRICK P. NIEMANN, ESQ.

Dated:

Respondent

_____
RONALD MINSKY

Dated: 4/13/09

DETZKY & HUNTER, LLC
Attorneys for Respondent

By: _____
STEPHEN B. HUNTER, ESQ.

OFFICE OF ADMINISTRATIVE LAW

Dated:

_____
Honorable Laura Sanders

Dated:

ACADEMY CHARTER HIGH SCHOOL
Petitioner

By:_____
Name:
Title:

Dated:

HANLON NIEMANN, P.C.
Attorneys for Petitioner

By:_____
FREDRICK P. NIEMANN, ESQ.

Dated: 7/17/09

Respondent



RONALD MINSKY

Dated:

DETZKY & HUNTER, LLC
Attorneys for Respondent

By:_____
STEPHEN B. HUNTER, ESQ.

OFFICE OF ADMINISTRATIVE LAW

Dated:

_____
Honorable Laura Sanders

197-09

OAL DKT. NO. EDU 5803-09
AGENCY DKT. NO. 108-6/09

M.N., on behalf of minor child, R.N.,	
PETITIONER,	COMMISSIONER OF EDUCATION
V.	DECISION ON
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	

The record of this emergent matter – which included a CD of the digital recording of the hearing conducted at the Office of Administrative Law (OAL) – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.[1]

Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to satisfy her burden of demonstrating entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Notwithstanding that the Commissioner so concludes, she does so for reasons different than those stated by the ALJ.

Initially, unlike the ALJ, the Commissioner finds that petitioner has met the threshold standard of irreparable harm irrespective of the fact that attending a middle school prom is a privilege rather than a right, since the opportunity to participate cannot be regained

[1] Although the ALJ's Order states that the middle school prom at issue herein is scheduled for June 16, 2009, testimony on the CD recording of the hearing indicates that this dance will actually be held on June 19, 2009.

once lost and 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]

However, applicants seeking extraordinary relief must also 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, finally, that the balance of interests and equities under the circumstances rests in their favor. The Commissioner agrees with the ALJ that the instant petitioner has not met this requisite burden.

Accordingly, the recommended Order of the OAL denying petitioner's emergent relief application is adopted with modification as set forth above. In that the instant decision fully disposes of all issues in dispute between the parties, no further proceedings are necessary and this matter is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 6/16/09
Date of Mailing: 6/18/09

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[2] In so holding, the Commissioner is fully cognizant 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 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 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] 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
DENYING APPLICATION FOR
EMERGENCY RELIEF
OAL DKT. NO. EDU 05803-09
AGENCY DKT. NO. 108-6/09

M.N. ON BEHALF OF R.N.
Petitioner,
STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK,
Respondent.

M.N. appearing on behalf of **R.N.**, pro se

Adam Herman, Esq., for Respondent (Newark Public Schools, attorneys)

BEFORE **WALTER M. BRASWELL**, ALJ:

STATEMENT OF THE CASE

On June 1, 2009, Petitioner, M.N., filed an application for emergent relief on behalf of her son R.N. The application for emergent relief was filed with the Department of Education which transmitted the matter to the Office of Administrative Law (OAL) on June 4, 2009, 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 seeks an Order directing the District to permit her son R.N. to attend the middle school prom on June 16, 2009. An in-person hearing on the application was held by the undersigned on June 8, 2007. The District was represented by counsel. Petitioner proceeded pro se.

FINDINGS

The incident giving rise to this application occurred after respondent's May 22, 2009 determination that R.N. lost his privilege to attend the 8th grade dance by violating a behavior contract based upon his academics and behavior. The evidence presented by respondent demonstrates that R.N.'s daily classroom conduct was poor throughout the entire school year, and despite being counseled by his teachers, and being informed of the consequences of his poor behavior, R.N. failed to correct and improve his behavior. The evidence presented by Respondent demonstrated that R.N. violated the behavior contract, by, among other things, refusing to listen to staff, making noises during tests, using a cell phone in school, cursing at his teacher, playing around during class, leaving class without permission, cutting class, inappropriately touching another student, wrestling with other students during class, and throwing a toy at another student. R.N.'s behavior did not improve during the course of the school year. As such, it is clear that respondent's decision was neither arbitrary nor capricious.

LEGAL DISCUSSION

In order to prevail on an application for emergent relief in a matter such as this, the applicant must prove by a preponderance of credible evidence that:

- the moving party, A.D., will suffer irreparable harm if the requested relief is not granted;
- the legal right underlying the moving party's claim is well settled;
- the moving party has a likelihood of prevailing on the underlying claim; and,

- when the equities and interests of the parties are balanced, the moving party will suffer greater harm than the Respondent if the requested relief is not granted. N.J.A.C. 6A:3-1.6(b).

Petitioner failed to satisfy each of the four prongs and therefore failed to sustain her burden to obtain emergent relief. More specifically, petitioner failed to demonstrate that R.N. will suffer irreparable harm. There was no evidence presented by petitioner which could demonstrate that R.N. would suffer irreparable harm if he was precluded from attending the 8th grade dance. A conclusory statement about the lasting effect of her inability to attend the dance is not enough to stand as evidence of irreparable harm.

Additionally, I **CONCLUDE** that M.N. has not established that the legal right underlying her claim is well settled. She has not demonstrated that a student who has not complied with the District's disciplinary policy has the right to participate in a school dance. It is clear that such participation is a privilege, not a right. From the evidence at the hearing, it is clear that school personnel have met several times with all parents throughout the year to stress the need for compliance with the student code of conduct. The student behavior contract specifically prohibits the use of profanity or obscenity. In addition, it prohibits openly defiant and disrespectful behavior as well as willful and continuous disobedience. There was testimony during the hearing that R.N. has engaged in these inappropriate behaviors throughout the entire school year.

I further **CONCLUDE** that the moving party has not proved that R.N. has any likelihood of prevailing on the merits of the underlying claim and finally I **CONCLUDE** that when the equities and interest of the parties are weighed M.N. has not met the burden of proving that her son, R.N. will suffer greater harm than the District will suffer. Specifically, M.N. has not demonstrated that her interest in going to the prom outweighs the District's interest in maintaining order in its school.

That is, respondent would suffer greater harm than petitioner if the requested relief was granted. Indeed, Respondent presented evidence regarding the rationale and results of the behavior contract. Students are rewarded for following school rules

whereas those who do not lose the ability to participate in a privilege, such as the 8th grade dance. While R.N. may be upset with not being able to attend the 8th grade dance, permitting him to attend the 8th grade dance would send the wrong message to those students who have worked hard and behaved properly during the entire school year and would render the behavior contract worthless.

ORDER

I hereby **ORDER** that Petitioner's application for emergent relief be and hereby is **DENIED**; I further **ORDER** the matter be and hereby is **DISMISSED.**

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 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.

DATE

WALTER M. BRASWELL, ALJ

ljb

APPENDIX

Witnesses:

For Petitioner:

M.N.

For Respondent:

Wanda F. Davis

Exhibits

For Petitioner:

None

For Respondent:

R-1 Student Behavior Contract
R-2 Warning notice, dated April 9, 2009
R-3 Notice to student, dated May 22, 2009
R-4 Correspondence from school-behavior log
R-5 Behavior modification statement of petitioner
R-6 Behavior log from February 26, 2009 to May 28, 2009
R-7 Progress report dated April 1, 2009
R-8 Progress report dated November 26, 2008
R-9 Warning notice from District (not signed) dated April 2, 2009
R-10 Behavioral log for petitioner
R-11 Petitioner's report card
R-12 Petitioner's report card-social moral evaluation

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

FAX TRANSMITTAL

DATE: 6/10/2009

TIME: 12:15

TELECOPIED TO:	**FAX NO.**
Attn: Kathleen Duncan	609-292-4333
Re: EDU 5803-09 (Newton)	

FROM: Latoya Bryant on behalf of Walter Braswell, ALJ

TELEPHONE NUMBER: (973-648-6036

FAX NO.: (Circle One)

NEWARK: **973-648-6124 (Judicial - 7th Floor)**
973-648-2358 (Judicial - 7th Floor)
973-648-6058 (Clerk - 10th Floor)

NUMBER OF PAGES (EXCLUDING COVERSHEET) 5

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE NOTIFY SENDER AT THE TELEPHONE NUMBER LISTED ABOVE. THANK YOU.

199-09

OAL DKT. NO. EDU 13005-08
AGENCY DKT. NO. 218-7/08

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner cannot approve the Settlement Agreement because it is signed on behalf of the Garfield Board of Education by the Board Secretary and Board President, and neither the file nor the agreement includes any indication that the Garfield Board has approved the agreement and designated these officials to sign it on the Board's behalf; nor, in the alternative, is the agreement signed by the Board attorney as the Board's duly authorized representative in litigation.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concern 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.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/09
Date of Mailing: 6/19/09

* 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

SETTLEMENT

OAL DKT. NO.EDU 13005-08

Agency Docket No.218-7/08

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,

Respondent.

Eliyahu S. Scheiman, Esq. appearing on behalf of petitioner (Porzio, Bromberg & Newman)

Toni Belford Damiano, Esq., appearing on behalf of respondent

Record Closed: May 18, 2009 Decided: May 18, 2009

BEFORE **JOANN LaSALA CANDIDO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 23, 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. A hearing was scheduled on March 3, 2009 at which

time the parties reached a settlement. On May 18, 2009, the undersigned received the fully executed Settlement and Board Resolution, which is attached hereto.

Having reviewed the contents of the attached Stipulation of Settlement and Board Resolution, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 15, 2009
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: 5-20-09

Date Mailed to Parties: MAY 20 2009

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Petitioner West Milford Board of Education

RECEIVED
OFFICE OF ADMIN. LAW

WEST MILFORD BOARD OF EDUCATION, Petitioner, v. GARFIELD BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OAL DOCKET NO.: EDUOT 13005-2008 AGENCY REF. NO. 218-7/08 **STIPULATION OF SETTLEMENT AND RELEASE**

TO: Toni Belford Damiano, Esq.
Damiano Law Offices
51 East Main Street
Little Falls, New Jersey 07424

This Settlement Agreement and Mutual Release ("Agreement") is made and entered into by and between petitioner, West Milford Board of Education (the "West Milford Board") and respondent, Garfield Board of Education (the "Garfield Board"), in settlement of the claims set forth in the above-captioned matter.

WITNESSETH:

WHEREAS, on or about July 23, 2008, the West Milford Board filed a Petition of Appeal before the State of New Jersey Commissioner of Education (the "Commissioner"), captioned *West Milford Bd. of Educ. v. Garfield Bd. of Edu.*, OAL Docket No. EDUOT 13005-2008 (the "Petition"), for reimbursement of tuition incurred by the West Milford Board for homeless students that attended school in the West Milford School District, as set forth more fully in the Petition;

WHEREAS, this matter is currently pending before the Honorable JoAnn LaSala Candido, A.L.J.; and

WHEREAS, the parties to this Agreement (the "Parties") desire to amicably resolve their differences and avoid additional expenses of further litigation in connection with the Petition of Appeal.

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, it is hereby agreed by and between the parties hereto as follows:

1. This Agreement shall not be construed as an admission by the Parties of any acts or omissions alleged or those that could have been alleged by any of the Parties, or of any acts or omissions alleged or which could have been alleged against any of the Parties. Each party to this Agreement specifically denies any liability whatsoever for damages, injuries, or other claims by any other party to this Agreement or those that were alleged or could be claimed by any of the other Parties.

In exchange for the valuable consideration set forth herein, the Parties mutually release and give up all claims and rights they may have against each other for damages or injuries arising from the West Milford Board's claims against the Garfield Board for reimbursement of tuition relating to students I.F. and B.B., for the 2000-01 school year, and students AC1, AC2 and AC3, for the 2007-08 school year, as set forth more fully in the Petition.

As used in this Agreement, the term the "West Milford Board" means: the West Milford Board of Education, its current or former elected or appointed officials, administrators, employees, attorneys, agents, servants, representatives, predecessors and successors, insurance carriers, and all other persons or entities for whom any of the above have been or may be legally responsible.

As used in this Agreement, the term the "Garfield Board" means: the Garfield Board of Education, its current or former elected or appointed officials, administrators, employees, attorneys, agents, servants, representatives, predecessors and successors, insurance carriers, and all other persons or entities for whom any of the above have been or may be legally responsible.

The Parties specifically release the following claims as to each other:

> Any and all claims and counterclaims that were brought and that could have been brought in the Petition relating to tuition reimbursement for students I.F. and B.B., for the 2000-01 school year, and students AC1, AC2 and AC3, for the 2007-08 school year, as set forth more fully in the Petition bearing OAL Docket No. EDUOT 13005-2008; and

2. In total and complete settlement of the claims referred to in Paragraph no. 1 above, the Garfield Board shall pay the West Milford Board the sum of ($24,000.00) (the "Settlement Sum"). Payment comprising the settlement sum shall be delivered to Vito Gagliardi, Jr., Esq., Porzio, Bromberg & Newman, P.C., 100 Southgate Parkway, P.O. Box 1997, Morristown, N.J. 07962-1997.

3. The parties agree that neither they nor their attorneys, nor representatives shall reveal to anyone, verbally or in writing, other than as may be mutually agreed to in writing, any of the terms of this Agreement. The Parties acknowledge that this confidentiality requirement is a material term to this Agreement and that violating this Paragraph is a material breach of this Agreement.

4. The parties agree that this Agreement may not be used to establish precedent in any future proceeding of any type whatsoever and that it shall be inadmissible in any such proceeding, other than a proceeding to enforce or prove the existence of this Agreement. This Agreement is a compromise of disputed claims and shall not be construed as an admission by

any party of any of the acts or omissions alleged or those that could have been alleged by any party against another party in this matter.

5. This Agreement contains the entire agreement among the Parties, and fully supersedes any and all prior agreements and understandings among the Parties pertaining to the subject matter of this Agreement. The Parties represent and acknowledge that they have not relied upon any representation or statement by any other party, or their counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth in this Agreement. No other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to be a modification of this Agreement. No waiver, modification, or amendment of this Agreement shall be valid or enforceable unless reduced to writing and signed by the party against whom enforcement is sought.

6. The Parties acknowledge that they are fully satisfied with their respective legal representation in this matter and that they have reviewed the terms of this Agreement with their respective counsel.

7. The Parties acknowledge that each party has engaged counsel in connection with the negotiation and completion of this Agreement, and, consequently, agree that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party will not be used in the interpretation of this Agreement or any amendment or exhibit hereto.

8. The Parties agree that the Superior Court, State of New Jersey, shall have sole exclusive jurisdiction to adjudicate any action to enforce the provisions in this Agreement. The parties agree that all terms to this Agreement are valid and enforceable by the Superior Court of New Jersey. This Agreement shall be governed by, construed, interpreted, and enforced in accordance with the laws of the State of New Jersey.

9. If any of the provisions of this Agreement shall be held by any court to be invalid or unenforceable, such invalidity or unenforceability shall not invalidate or render unenforceable the entire Agreement, but rather the entire 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.

10. This Agreement is subject to ratification by the Parties at their respective, next scheduled Board meetings, and is without prejudice to any party if the terms are not agreed upon.

PETITIONER

Steve J. Cea
Board Secretary/Business Administrator
West Milford Board of Education

Dated: 5/6/09

~~Dr. Michelle Fenwick~~ Tim Foley
Board President
West Milford Board of Education

Dated:

RESPONDENT

Dennis Frohnapfel
Board Secretary/Business Administrator
Garfield Board of Education

Dated: 4/1/09

Gerald Wich
Board President
Garfield Board of Education

Dated: 4/1/09

WEST MILFORD TOWNSHIP
BOARD OF EDUCATION
Office of the Business Administrator/Board Secretary

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of West Milford in the County of Passaic, New Jersey, convened in public session on Tuesday, February 24, 2009, at 9:00 p.m. at the Westbrook School Media Center.

The following members of the Board of Education were present: Mr. Bailey, Dr. Fenwick, Mr. Foley, Mr. Gottlieb, Mr. Murray (arrived 9:25 p.m.), and Mrs. Van Dyk

The following member(s) of the Board of Education was/were absent: Mrs. Babbitt, Mr. Florian, Mrs. Touw

Motion by Mr. Bailey, seconded by Mr. Foley to approve the following agenda item:

The recommendation of the Board to approve a settlement in the matter of the West Milford Board of Education v. the Garfield Board of Education, in an amount to be received by West Milford totaling $24,000, subject to the terms and conditions to be reflected in a duly negotiated settlement agreement.

ROLL CALL:	Mrs. Babbitt	---	Mr. Florian	---	Mr. Murray	*
	Mr. Bailey	Yes	Mr. Foley	Yes	Mrs. Touw	---
	Dr. Fenwick	Yes	Mr. Gottlieb	Yes	Mrs. Van Dyk	Yes

*Absent for Vote

5 yes, 0 no **MOTION PASSED.**

STATE OF NEW JERSEY)
)ss
COUNTY OF PASSAIC)

I, Steven J. Cea, Business Administrator/Board Secretary, of the Township of West Milford, in the County of Passaic, 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 February 24, 2009, has been compared by me with the original minutes as officially recorded in my office in the minute book of said West Milford Township Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract. I witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 25th day of February 2009.

Board Seal

Steven J. Cea
Board Secretary/Business Administrator

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PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Petitioner West Milford Board of Education

WEST MILFORD BOARD OF EDUCATION, Petitioner, v. GARFIELD BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OAL DOCKET NO.: EDUOT 13005-2008 AGENCY REF. NO. 218-7/08 **STIPULATION OF SETTLEMENT AND RELEASE**

TO: Toni Belford Damiano, Esq.
Damiano Law Offices
51 East Main Street
Little Falls, New Jersey 07424

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WITNESSETH:

WHEREAS, on or about July 23, 2008, the West Milford Board filed a Petition of Appeal before the State of New Jersey Commissioner of Education (the "Commissioner"), captioned *West Milford Bd. of Educ. v. Garfield Bd. of Edu.*, OAL Docket No. EDUOT 13005-2008 (the "Petition"), for reimbursement of tuition incurred by the West Milford Board for homeless students that attended school in the West Milford School District, as set forth more fully in the Petition;

WHEREAS, this matter is currently pending before the Honorable JoAnn LaSala Candido, A.L.J.; and

WHEREAS, the parties to this Agreement (the "Parties") desire to amicably resolve their differences and avoid additional expenses of further litigation in connection with the Petition of Appeal.

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, it is hereby agreed by and between the parties hereto as follows:

1. This Agreement shall not be construed as an admission by the Parties of any acts or omissions alleged or those that could have been alleged by any of the Parties, or of any acts or omissions alleged or which could have been alleged against any of the Parties. Each party to this Agreement specifically denies any liability whatsoever for damages, injuries, or other claims by any other party to this Agreement or those that were alleged or could be claimed by any of the other Parties.

In exchange for the valuable consideration set forth herein, the Parties mutually release and give up all claims and rights they may have against each other for damages or injuries arising from the West Milford Board's claims against the Garfield Board for reimbursement of tuition relating to students I.F. and B.B., for the 2000-01 school year, and students AC1, AC2 and AC3, for the 2007-08 school year, as set forth more fully in the Petition.

As used in this Agreement, the term the "West Milford Board" means: the West Milford Board of Education, its current or former elected or appointed officials, administrators, employees, attorneys, agents, servants, representatives, predecessors and successors, insurance carriers, and all other persons or entities for whom any of the above have been or may be legally responsible.

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9. If any of the provisions of this Agreement shall be held by any court to be invalid or unenforceable, such invalidity or unenforceability shall not invalidate or render unenforceable the entire Agreement, but rather the entire 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.

10. This Agreement is subject to ratification by the Parties at their respective, next scheduled Board meetings, and is without prejudice to any party if the terms are not agreed upon.

PETITIONER

Steve J. Cea
Board Secretary/Business Administrator
West Milford Board of Education

Dated: 5/6/09

~~Dr. Michelle Fenwick~~ Tim Foley
Board President
West Milford Board of Education

Dated:

RESPONDENT

Dennis Frohnapfel
Board Secretary/Business Administrator
Garfield Board of Education

Dated: 4/1/09

Gerald Wich
Board President
Garfield Board of Education

Dated: 4/1/09

WEST MILFORD TOWNSHIP
BOARD OF EDUCATION
Office of the Business Administrator/Board Secretary

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of West Milford in the County of Passaic, New Jersey, convened in public session on Tuesday, February 24, 2009, at 9:00 p.m. at the Westbrook School Media Center.

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The following member(s) of the Board of Education was/were absent: Mrs. Babbitt, Mr. Florian, Mrs. Touw

Motion by Mr. Bailey, seconded by Mr. Foley to approve the following agenda item:

The recommendation of the Board to approve a settlement in the matter of the West Milford Board of Education v. the Garfield Board of Education, in an amount to be received by West Milford totaling $24,000, subject to the terms and conditions to be reflected in a duly negotiated settlement agreement.

ROLL CALL:	Mrs. Babbitt	---	Mr. Florian	---	Mr. Murray	*
	Mr. Bailey	Yes	Mr. Foley	Yes	Mrs. Touw	---
	Dr. Fenwick	Yes	Mr. Gottlieb	Yes	Mrs. Van Dyk	Yes

*Absent for Vote

__5__ yes, __0__ no **MOTION PASSED.**

STATE OF NEW JERSEY)
)ss
COUNTY OF PASSAIC)

I, Steven J. Cea, Business Administrator/Board Secretary, of the Township of West Milford, in the County of Passaic, 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 February 24, 2009, has been compared by me with the original minutes as officially recorded in my office in the minute book of said West Milford Township Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract. I witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 25th day of February 2009.

Board Seal

Steven J. Cea
Board Secretary/Business Administrator

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

FAX TRANSMITTAL

DATE: 6/10/2009

TIME: 12:15

TELECOPIED TO:	**FAX NO.**
Attn: Kathleen Duncan	609-292-4333
Re: EDU 5803-09 (Newton)	

FROM: Latoya Bryant on behalf of Walter Braswell, ALJ

TELEPHONE NUMBER: (973-648-6036

FAX NO.: (Circle One)

NEWARK: **973-648-6124 (Judicial - 7th Floor)**
973-648-2358 (Judicial - 7th Floor)
973-648-6058 (Clerk - 10th Floor)

NUMBER OF PAGES (EXCLUDING COVERSHEET) 5

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APPENDIX

Witnesses:

For Petitioner:

M.N.

For Respondent:

Wanda F. Davis

Exhibits

For Petitioner:

None

For Respondent:

R-1 Student Behavior Contract
R-2 Warning notice, dated April 9, 2009
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whereas those who do not lose the ability to participate in a privilege, such as the 8th grade dance. While R.N. may be upset with not being able to attend the 8th grade dance, permitting him to attend the 8th grade dance would send the wrong message to those students who have worked hard and behaved properly during the entire school year and would render the behavior contract worthless.

ORDER

I hereby **ORDER** that Petitioner's application for emergent relief be and hereby is **DENIED**; I further **ORDER** the matter be and hereby is **DISMISSED.**

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 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.

DATE

WALTER M. BRASWELL, ALJ

ljb

- when the equities and interests of the parties are balanced, the moving party will suffer greater harm than the Respondent if the requested relief is not granted. N.J.A.C. 6A:3-1.6(b).

Petitioner failed to satisfy each of the four prongs and therefore failed to sustain her burden to obtain emergent relief. More specifically, petitioner failed to demonstrate that R.N. will suffer irreparable harm. There was no evidence presented by petitioner which could demonstrate that R.N. would suffer irreparable harm if he was precluded from attending the 8th grade dance. A conclusory statement about the lasting effect of her inability to attend the dance is not enough to stand as evidence of irreparable harm.

Additionally, I **CONCLUDE** that M.N. has not established that the legal right underlying her claim is well settled. She has not demonstrated that a student who has not complied with the District's disciplinary policy has the right to participate in a school dance. It is clear that such participation is a privilege, not a right. From the evidence at the hearing, it is clear that school personnel have met several times with all parents throughout the year to stress the need for compliance with the student code of conduct. The student behavior contract specifically prohibits the use of profanity or obscenity. In addition, it prohibits openly defiant and disrespectful behavior as well as willful and continuous disobedience. There was testimony during the hearing that R.N. has engaged in these inappropriate behaviors throughout the entire school year.

I further **CONCLUDE** that the moving party has not proved that R.N. has any likelihood of prevailing on the merits of the underlying claim and finally I **CONCLUDE** that when the equities and interest of the parties are weighed M.N. has not met the burden of proving that her son, R.N. will suffer greater harm than the District will suffer. Specifically, M.N. has not demonstrated that her interest in going to the prom outweighs the District's interest in maintaining order in its school.

That is, respondent would suffer greater harm than petitioner if the requested relief was granted. Indeed, Respondent presented evidence regarding the rationale and results of the behavior contract. Students are rewarded for following school rules

Petitioner seeks an Order directing the District to permit her son R.N. to attend the middle school prom on June 16, 2009. An in-person hearing on the application was held by the undersigned on June 8, 2007. The District was represented by counsel. Petitioner proceeded pro se.

FINDINGS

The incident giving rise to this application occurred after respondent's May 22, 2009 determination that R.N. lost his privilege to attend the 8th grade dance by violating a behavior contract based upon his academics and behavior. The evidence presented by respondent demonstrates that R.N.'s daily classroom conduct was poor throughout the entire school year, and despite being counseled by his teachers, and being informed of the consequences of his poor behavior, R.N. failed to correct and improve his behavior. The evidence presented by Respondent demonstrated that R.N. violated the behavior contract, by, among other things, refusing to listen to staff, making noises during tests, using a cell phone in school, cursing at his teacher, playing around during class, leaving class without permission, cutting class, inappropriately touching another student, wrestling with other students during class, and throwing a toy at another student. R.N.'s behavior did not improve during the course of the school year. As such, it is clear that respondent's decision was neither arbitrary nor capricious.

LEGAL DISCUSSION

In order to prevail on an application for emergent relief in a matter such as this, the applicant must prove by a preponderance of credible evidence that:

- the moving party, A.D., will suffer irreparable harm if the requested relief is not granted;
- the legal right underlying the moving party's claim is well settled;
- the moving party has a likelihood of prevailing on the underlying claim; and,



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING APPLICATION FOR
EMERGENCY RELIEF
OAL DKT. NO. EDU 05803-09
AGENCY DKT. NO. 108-6/09

M.N. ON BEHALF OF R.N.
Petitioner,
STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK,
Respondent.

M.N. appearing on behalf of **R.N.**, pro se

Adam Herman, Esq., for Respondent (Newark Public Schools, attorneys)

BEFORE **WALTER M. BRASWELL**, ALJ:

STATEMENT OF THE CASE

On June 1, 2009, Petitioner, M.N., filed an application for emergent relief on behalf of her son R.N. The application for emergent relief was filed with the Department of Education which transmitted the matter to the Office of Administrative Law (OAL) on June 4, 2009, 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.

199-09

OAL DKT. NO. EDU 13005-08
AGENCY DKT. NO. 218-7/08

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner cannot approve the Settlement Agreement because it is signed on behalf of the Garfield Board of Education by the Board Secretary and Board President, and neither the file nor the agreement includes any indication that the Garfield Board has approved the agreement and designated these officials to sign it on the Board's behalf; nor, in the alternative, is the agreement signed by the Board attorney as the Board's duly authorized representative in litigation.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concern 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.*

COMMISSIONER OF EDUCATION

Date of Decision: 6/18/09

Date of Mailing: 6/19/09

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

200-09

OAL DKT. NO. EDU 8012-09
AGENCY DKT. NO. 123-6/09

MICHAEL BUONASORTE, JR.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

The record of this emergent matter and the recommended Order of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge – for the reasons well and 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).[1]

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted as the final decision in this matter. In that the present decision fully disposes of all issues in dispute between the parties, no further proceedings are necessary and this

[1] In so holding, the Commissioner specifically endorses the ALJ's finding that petitioner has demonstrated irreparable harm notwithstanding 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. The Commissioner agrees that 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, and notes that 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 together, although they are, in fact, two separate factors; 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 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.

matter is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/19/09

Date of Mailing: 6/19/09 Faxed

[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

ORDER-EMERGENT RELIEF

OAL DKT. NO. EDU 8012-09

AGENCY DKT. NO. 123-6/09

MICHAEL BUONASORTE, JR,

Petitioner,

v.

BOARD OF EDUCATION OF THE MAINLAND REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,

Respondent.

Michael Buonasorte, Jr., pro se

Louis Greco, Esq., for respondent

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

STATEMENT OF THE CASE

Petitioner appealed respondent school district's action denying him the privilege of walking with his class during the 2009 graduation ceremony.

PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies received a

petition for emergent relief on or about June 18, 2009. The matter was transmitted to the Office of Administrative Law (OAL) on June 18, 2009, to be heard as an emergent contested case. The Director of the OAL assigned the undersigned to hear this matter pursuant to N.J.S.A. 52:14F-5o.

The matter was scheduled for hearing on June 19, 2009. The hearing proceeded on that date.

SUMMARY OF REVELANT FACTS

Respondent barred petitioner from participating in the graduation ceremony scheduled on June 19, 2009, because he failed his French 2 course. As a result of this failure, petitioner accumulated only twenty-five credits during his senior year. Although petitioner earned enough credits during his four year high school career to graduate, the District maintains a policy that states as follows:

> Additionally, beginning 2006-2007 school year, seniors must pass with credit a minimum of 27.5 credits their senior year in order to participate in graduation. Excessive absences/cuts leading to loss of credit or failure of (a) course(s) could prevent a student from participating at Graduation. This policy has been implemented to ensure continued attendance and academic effort throughout the students senior year.

Petitioner's arguments are appropriately summarized in his request for emergent relief. It provides as follows:

> I am writing this letter to respectably request that I be allowed to participate in the Mainland graduation ceremony. I am being excluded because I have only acquired 25 credits this year. The policy, which is a fairly new policy, requires seniors to have twenty seven and a half credits to walk at graduation. Due to my recent failure in my French class I am short two and a half credits. I would ask that I be allowed to participate in the ceremony to spare my parents the embarrassment and humiliation of me not walking across the field with the rest of my class. My mother has

> been suffering from Non-Hodgkin's Lymphoma since I was a freshman and she has been looking forward to this occasion for a very long time. During my years at Mainland my mother has battled through two rounds of chemo therapy and I am deeply saddened that I have fallen short of the requirements to be allowed to participate. I understand and respect the schools policy of not allowing seniors who begin to slack off at the years end after their acceptance to a college. This not really what has happened to me. I have tried very hard to keep up my grades in French and unfortunately I have fallen short by only two points. My intention after high school is to join the U.S. Navy and I have tried my best not to slack off during the last two semesters. My final grades do not keep me from graduating and I feel that if I could be included in graduation ceremonies that I could avoid bringing the shame and humiliation of being left out on my parents as well as myself. I also believe this would be a factor in my mothers healing process, as to making her feeling happy instead of sad when she is already weakened by her illness. I am hoping that this appeal is granted, because I feel that the harm that will be done if I am excluded is much greater to me that any harm that may arise should I be allowed to walk with my graduation class. I again respectfully ask that I be allowed to participate and have my mother and father be proud of me, rather than have the suffer any further embarrassment.

At trial, petitioner stated he had no excuse for his failure to pass the French 2 class. He tried to pass, but his teacher and he did not see eye to eye. He asked that he be permitted to participate in the graduation ceremony so that his mother could see him walk. He will join the Navy after graduation.

Petitioner's mother testified that he is a good kid and not destructive. She admitted petitioner developed a "senior attitude."

Robert Blake, the high school principal, submitted a certification in opposition to the petition and offered testimony. Blake testified that the purpose of the policy was to forestall "senioritis." The policy forces students to continue to perform their school work through the end of the school year. Blake stated the policy has "turned around the senior year atmosphere." Since its inception, one to three students have run afoul of

the policy each year. No exception has ever been made. To make an exception here would undermine the policy and undo its positive results.

Petitioner argued that if he is not allowed to walk, he will suffer greater harm than the school will if an exception is made.

APPLICABLE LAW

Petitioner carries the burden in seeking emergent relief. The standard is set forth in N.J.A.C. 6A:14-2.7(s)1. Those criteria are:

> Emergent relief may be requested according to N.J.A.C. 1:6A-12.1. Emergent relief may be granted if the administrative law judge determines from the proofs that:
>
> i. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> ii. The legal right underlying the petitioner's claim is settled;
>
> iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> iv. 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); Princeton Ins. Co. v. 349 Associates, L.L.C., 147 N.J. 337, 340 (1997).

The burden not only rests with petitioner to meet the emergent relief standards but petitioner also has the burden of proving unreasonableness for actions that are within the management's prerogative. G.M. v. Roselle Park Borough Board of Education, 95 N.J.A.R. 2d. (EDU) 107, 109. Board decisions 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." Ibid. Local boards of education have reasonable discretion for various managerial matters. For example, the

Commissioner has held that the matters of class assignment, and specifically, the session assignment of kindergarten pupils, constitutes a "management prerogative" of local boards of education, which will not be assumed nor usurped by the Commissioner unless there is " . . . a definite showing that the action of a local board of education was arbitrary, in bad faith, without rational basis, or discriminatory." Paddock v. Demarest Bor. Bd. of Educ., 1974 S.L.D., 435, 440; See also, Kopera v. Bd. of Educ. Tp. Of W. Orange, 60 N.J. Super. 288 (App. Div. 1960).

Petitioner is correct that he will suffer irreparable harm if relief is denied. If relief is not granted, he will lose forever the opportunity to participate in his high school ceremony. Once he graduates from high school, he can never go back. Such a result will be a sad one for petitioner, but the other criteria must be satisfied before such relief can be granted.

The legal right underlying petitioner's claim is well settled. The applicable case law establishes beyond question that participation in 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. Since petitioner has no legal right to participate in the ceremony, petitioner cannot meet that prong of the test. Similarly, petitioner has little likelihood of prevailing on the merits. As stated above, he has no legal right to attend the graduation ceremony. Therefore, he is unlikely to prevail.

Finally, petitioner's interests herein must be balanced against those of the school. The stated purpose of the policy at issue is valid on its face, and petitioner has offered nothing tending to prove that the policy is arbitrary and capricious. Blake testified credibly that the policy has had positive results. Petitioner admitted he was aware of the policy and understood its requirements, yet he nevertheless failed to successfully accumulate the mandated 27.5 credits. Accordingly, the interest of the school in enforcing its policy outweighs the detriment petitioner will suffer from its effect. In the end, petitioner created his own hardship by failing his French class.

For all those reasons, I **ORDER** that petitioner's application for emergent relief be **DENIED.**

ORDER

I **ORDER** that petitioner's emergent application to participate in the graduation ceremony at Mainland High School on June 19, 2009 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.

Bruce M. Gorman

June 19, 2009
DATE

BRUCE M. GORMAN, ALJ

/sd

APPENDIX

Documents In Evidence

For Petitioner:

None

For Respondent:

R-1 Affidavit of Robert Blake (8 pages)

Witnesses

For Petitioner:

Michael Buonasorte, Jr.
Kathleen Mary Buonasorte

For Respondent:

Robert Blake, Principal

201-09

B.A. AND J.H., ON BEHALF OF MINOR CHILD, M.A.A.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	
RESPONDENT,	:	

SYNOPSIS

In August 2007, petitioners sought to enroll M.A.A. in Somerville High School after the sixteen-year-old relocated from Venezuela to live with her mother and stepfather in Somerville. Initially, a guidance counselor from the high school reviewed M.A.A.'s course transcripts from Venezuela, and petitioners were given a schedule showing that M.A.A. would enter high school in September 2007 as a senior. Subsequently, petitioners were notified that the district had determined M.A.A. to be ineligible to enroll as a student based on the fact that she already held a high school diploma from Venezuela. Petitioners argued that M.A.A. was entitled to attend school in the district because she was eligible by age and residency and had not taken all of the courses necessary to graduate with a New Jersey State-endorsed diploma. Petitioners sought, *inter alia*, reversal of the Board's determination, reimbursement of private school tuition, and attorney fees and costs. Both parties filed motions for summary decision.

The ALJ granted summary decision to the petitioners, finding that: the Board's determination not to enroll M.A.A. based solely on the fact that she had already graduated from school in Venezuela – and its contention that it was not qualified to review school records from a foreign high school – was arbitrary, capricious and unreasonable, and additionally constituted discrimination based on national origin.

The Commissioner remanded the matter for further proceedings, rejecting the summary positions taken by each of the parties and holding that the appropriate inquiry was a fact-specific determination of whether the credential held by M.A.A. was equivalent to a New Jersey State-endorsed high school diploma. The Commissioner found the existing record insufficient for this purpose, and directed that, on remand, petitioners must present a full recitation of the facts pertaining to M.A.A. and her Venezuelan education, while the Board must present a thorough assessment of such facts in relation to the goals and requirements for graduation from the New Jersey public schools, with petitioners thereafter bearing the burden – if the Board concludes that M.A.A. is not entitled to a free public education because the credential she holds is equivalent to a New Jersey State-endorsed diploma – of demonstrating by a preponderance of the competent and credible evidence that the Board's assessment was arbitrary, capricious, unreasonable, or otherwise contrary to law.

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

Issued 6/22/09

201-09

OAL DKT. NO. EDU 8740-07
AGENCY DKT. NO. 280-9/07

B.A. AND J.H., ON BEHALF OF MINOR CHILD, M.A.A.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	
RESPONDENT,	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the Board of Education's exceptions and petitioners' reply, both duly filed pursuant to *N.J.A.C.* 1:1-18.4.

In its exceptions, the Board urges rejection of the Initial Decision, contending that it: 1) was not issued within the time frame required by applicable rules of the OAL; 2) ignored the Board's claim that this matter is not appropriate for judicial determination because the child in question had returned to Venezuela and the Board had no idea of her current status – a situation further exacerbated by the delay in issuance of the Initial Decision; 3) wrongly placed on the Board the burden of proving the equivalency of Venezuelan and New Jersey high school educations; and 4) improperly substituted the judgment of the Administrative Law Judge (ALJ) for that of the Board. The Board additionally asserts that the ALJ erred in concluding that the Board had a duty to further educate a pupil from a foreign country who has graduated from high school in her native land and is eligible to attend college, and that the Board's denial of admission to M.A.A. because she held a Venezuelan diploma constituted discrimination based on national origin. (Board's Exceptions at 1-3)

In reply, petitioners counter that: 1) the ALJ's decision is correct for the reasons set forth therein; 2) the delay in issuance of the Initial Decision should be accorded no weight, since it prejudiced no one but petitioners, whose child should by now have graduated from the Board's high school;[1] 3) this matter is certainly ripe for adjudication, since the harm caused by the Board's decision was real and immediate – requiring petitioners to fund a private education – and will, moreover, be felt for years – resounding through everything M.A.A. does and tries to do; 4) the Board misstates the ALJ's conclusions, and further ignores the language of the New Jersey Constitution and statutes; 5) the Board's position has been contradictory, claiming on the one hand that it has neither the duty nor the capacity to establish the equivalency of foreign high school degrees, but arguing on the other that it properly denied admission to M.A.A. because she held the equivalent of a New Jersey high school diploma; 6) the ALJ's findings are clearly supported by law and by sufficient, competent and credible evidence in the record, and are based on appropriate standards of review; and 7) the Board's exceptions should be disregarded because they "do not comply with the requirements of *N.J.A.C.* 1:1-18.4." (Petitioners' Reply at 2-5, quotation at 5)

Upon review and consideration, the Commissioner initially notes that she is compelled by neither statute nor rule to reject an Initial Decision solely because it was not issued within the regulatory time frame established by the OAL, and she declines to do so in this matter because the interests of justice would not be served thereby. Similarly, the Commissioner finds the Board's exceptions to have been timely filed,[2] as well as sufficiently in compliance with *N.J.A.C.* 1:1-18.4 so as not to warrant their exclusion solely on the basis of petitioners'

[1] Petitioner refers to the fact that M.A.A. was initially slated to enter Somerville High School in September 2007 as a 12th grader; see Initial Decision at 1.

[2] Exceptions were due on January 22, 2009, and were filed by fax on that date.

unspecified procedural objection.[3] Finally, although M.A.A. has returned to Venezuela and the circumstances of her possible return to Somerville are not known for certain, the Commissioner finds that the central question in this matter – whether M.A.A. is entitled to attend school in the district until she either reaches age 20 or receives a New Jersey State-endorsed high school diploma – cannot be considered moot, since an affirmative response would enable her to attend Somerville High School during the 2009-10 and possibly the 2010-11 school years, if she so wished and continued to be deemed eligible by age and domicile pursuant to *N.J.S.A.* 18A:38-1.[4] Accordingly, the Commissioner has considered this matter on its merits, taking into account both the Initial Decision and the full record inclusive of the parties' submissions on exception.

Having so considered, however, the Commissioner finds that she must reject the Initial Decision on substantive grounds.

The ALJ has correctly set forth the standard of review governing the decisions of local district boards of education, and her analysis of the merits of petitioners' claim begins with several propositions that are beyond dispute: 1) The New Jersey Constitution requires children between the ages of five and eighteen to be provided with a thorough and efficient system of free public schools; 2) the Legislature has extended to 20 the age up to which students are entitled to attend such schools; 3) the Legislature and State Board of Education have set specific requirements for graduation from high school; and 4) school districts may not discriminate based on national origin. *New Jersey Constitution*, Article VIII, Section IV, paragraph 1; *N.J.S.A.* 18A:38-1; *N.J.A.C.* 6A:8-5.1 (incorporating statutory requirements); *N.J.S.A.* 18A:38-5.1, *N.J.A.C.* 6A:7-1.1 *et seq.* These propositions, however, do not end the inquiry in this matter.

[3] Additionally, the Commissioner notes that – apart from their objection to the issuance date of the Initial Decision – the Board's exceptions essentially reiterate the position the Board has taken from the outset of this proceeding, as set forth by the ALJ (Initial Decision at 4-5).

[4] The Board has not disputed M.A.A.'s eligibility in this regard.

To properly establish the context of petitioners' claim, it is also necessary to consider that: 1) the Legislature and State Board of Education have provided for implementation of the constitutional mandate through a K-12 delivery system, a student's successful progression through which culminates in receipt of a State-endorsed high school diploma, *N.J.S.A.* 18A:7C-1 *et seq.* and *N.J.A.C.* 6A:8-1.1 *et seq.*; 2) a general education student's entitlement to access this system terminates either upon graduation through receipt of a State-endorsed diploma – which in the normal course of events occurs at the end of 12th grade, but may occur sooner or later under certain circumstances – or upon reaching the age of 20 without having so graduated, *N.J.A.C.* 6A:8-5.2(a), *N.J.A.C.* 6A:8-5.2(b)1[5] and *N.J.A.C.* 6A:8-5.2(d); 3) a State-endorsed high diploma – the credential signifying attainment of the skills and knowledge deemed necessary by the State of New Jersey for its students to be successful in their careers and daily lives[6] – can be earned not only by completing the specific course, credit and assessment requirements of *N.J.A.C.* 6A:8-5.1(a), but also by demonstrating academic skills and knowledge equivalent to such requirements through alternative means, specifically, by performing at proficient levels in all areas of the High School Proficiency Assessment (HSPA) and completing 30 general education college credits, *N.J.A.C.* 6A:8-5.2(d), or by achieving the required scores on the General Educational Development (GED) test of the American Council on Education, *N.J.A.C.* 6A:8-5.2(c); *N.J.A.C.* 6:30-1.3; and 4) the law is silent on the status of age-eligible persons, such as M.A.A., who come to live in New Jersey after having received a high school diploma – or a credential that might be found equivalent thereto – from another jurisdiction.

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[5] *N.J.A.C.* 6A:8-5.2(b)2 additionally provides that out-of-school individuals, up to age 20, who have otherwise met all State and local graduation requirements but failed to pass the High School Proficiency Assessment (HSPA) may return to school at scheduled times to take the necessary test.

[6] *N.J.A.C.* 6A:8-1.1, referencing the Core Curriculum Content Standards; see Introduction at http://education.state.nj.us/cccs/?_intro).

In the present matter, petitioners have advanced the argument – effectively adopted by the ALJ in the Initial Decision – that M.A.A. is unequivocally entitled to attend the schools of respondent's district notwithstanding that she has already obtained a credential that could be construed as analogous to a high school diploma, because it is undisputed that she meets applicable statutory age and residency requirements and has not taken all of the specific courses and tests necessary to obtain a New Jersey State-endorsed diploma pursuant to *N.J.A.C.* 6A:8-5.1(a) – which she could readily complete as a 12th grader through the schedule devised by the guidance counselor who initially reviewed her Venezuelan course records.[7]

The Commissioner's endorsement of petitioner's claim on this reasoning alone, however, would effectively mean that any age-eligible person moving to New Jersey after having obtained a high school diploma elsewhere – even another state not having requirements identical to New Jersey's – would be entitled to attend New Jersey public schools until all "missing" tests, courses and credits were completed and a State-endorsed diploma was issued; indeed, the same reasoning could be applied to any New Jersey student seeking a State-endorsed diploma after having already graduated from a nonpublic high school. While the applicable statutes and rules as cited above do not address – nor do they appear to have contemplated – the status of such students, the Legislature and State Board surely cannot have intended that any resident under age 20 who does not hold a New Jersey State-endorsed high school diploma is automatically entitled to attend New Jersey public schools until one is obtained, despite having earned a high school diploma – or a credential determined to be its equivalent – elsewhere.

The Board, on the other hand, has taken an equally categorical stance that M.A.A. is *not* entitled to attend school in the district because she already holds the Venezuelan

[7] This schedule consisted of year-long classes in pre-calculus, health and physical education, English, French I, U.S. History I, U.S. History II and a year-long assignment to study hall, as well as semester-long classes in public speaking and dramatics. (Affidavit of B.A. in support of petitioner's motion for summary decision, Exhibit D)

equivalent of a high school diploma. Here, the Commissioner finds support for the Board's position in the fact that, through its acceptance of alternative measures as set forth above – particularly the GED program, which employs a testing instrument that is not unique to New Jersey – the State has implicitly recognized that means other than course/credit/assessment completion as contemplated by *N.J.A.C.* 6A:8-5.1(a) can legitimately evidence acquisition of an education sufficient to satisfy the statutory and constitutional mandate and warrant issuance of a State-endorsed diploma so as to end a student's entitlement to attend the public schools of a district pursuant to *N.J.A.C.* 6A:8-5.2. *However*, the Commissioner cannot accept the Board's position that the mere existence of M.A.A.'s Venezuelan credential – with no meaningful assessment as to whether it does, in fact, represent an education sufficient to meet the goals embodied in a New Jersey State-endorsed high school diploma – is reason enough to deny her admission to the schools of the district.

The appropriate inquiry in this matter, then, is whether M.A.A.'s possession of the "Bachiller en Ciencias" degree is indicative that she has already received the requisite education. While there is no definitive "formula" for such a determination, nor is there past precedent to offer guidance – this matter being one of first impression and the necessary analysis being inherently fact-specific – the inquiry by its very nature suggests exploration of questions including, for example: Have M.A.A.'s courses provided a sufficient depth and breadth of program? Was she required to demonstrate comparable types of skills and knowledge? Will she be able to pursue post-secondary education at institutions requiring high school graduation as a prerequisite to admission? Will her credential be accepted by an employer as satisfaction of a requirement for high school graduation? Has her education prepared her to participate meaningfully in the common cultural and civic life of our State and nation? Where the answer to such questions is "no," the Commissioner will not permit a local district board of education to

deny a student access to the public schools of the State; however, where the answer is "yes," the Commissioner will not compel a board to enroll a student who has already met the goals of a New Jersey public education and obtained the equivalent of the credential endorsed by the State as the culmination – and terminus – of the New Jersey public school experience.

Unfortunately, the record in this matter – due largely to the summary nature of the parties' positions and the insistence of each that the other bears the entire burden of proof – does not permit resolution of the controlling inquiry, so that further proceedings are necessary to enable the Commissioner to fully and fairly decide this matter. In so holding, the Commissioner recognizes that it is the petitioners who are best able to present the facts specifically related to M.A.A., such as, for example, the nature of the educational system through which she has progressed and the significance of the "Bachiller en Ciencias" degree within it, the specific content and objectives of the courses she has taken, the types and levels of skills evidenced by her possession of the "Bachiller en Ciencias" degree, and her experiences, if any, in seeking entry into higher education, the workforce and the social-cultural-civic life of her community; while it is the Board that is best able, through its expertise as a provider of the thorough and efficient system of education directed by the State Constitution and Legislature, to assess such facts relative to the goals and requirements of a New Jersey State-endorsed high school diploma – including, for example, why the courses identified as necessary for M.A.A. to complete State requirements (see note 7 above) do not preclude a finding of equivalency between the credential she holds and the State diploma.

Consequently, the Commissioner directs that, upon remand of this matter to the OAL, petitioners shall be responsible for bringing to the record a full recitation of the facts pertaining to M.A.A. and her Venezuelan education, while the Board shall be responsible for presenting a thorough assessment of such facts in relation to the goals and requirements for

graduation from the New Jersey public schools, together with opposing facts as it deems appropriate;[8] whereupon – if the Board concludes that M.A.A. is not entitled to a free public education because the credential she holds is, in fact, equivalent to a New Jersey State-endorsed diploma – petitioners shall thereafter bear the burden of demonstrating, by a preponderance of the competent and credible evidence, that the Board's assessment was arbitrary, capricious, unreasonable, or otherwise contrary to law.[9]

Accordingly, for the reasons expressed herein, the Initial Decision is rejected and this matter is remanded to the OAL for further proceedings consistent with the Commissioner's analysis and directives as set forth above.

IT IS SO ORDERED.[10]

COMMISSIONER OF EDUCATION

Date of Decision: 6/22/09
Date of Mailing: 6/22/09

[8] Either party, of course, may proffer expert testimony in addition to any other testimony and evidence.

[9] In this latter regard, the Commissioner expressly rejects any suggestion that the Board's position in this matter constituted discrimination based on national origin, since its result would have been the same for any student who sought entry into the Board's schools in order to fulfill the course/credit/testing requirements of *N.J.A.C.* 6A:8-5.1(a), but was already in possession of a high school diploma or its facial equivalent from another jurisdiction or a nonpublic school. The Commissioner additionally notes that the ultimate burden of proof assigned herein is consistent with the burden upon applicants for enrollment in the schools of a district based on age and domicile/residency as set forth in *N.J.S.A.* 18A:38-1.

[10] 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 8740-07

AGENCY DKT. NO. 280-9/07

B.A. AND J.H. O/B/O
MINOR CHILD, M.A.A.,
Petitioner,

v.

BOARD OF EDUCATION
OF THE BOROUGH OF
SOMERVILLE, SOMERSET
COUNTY,
Respondent.

Francis J. McGovern, Esq., for petitioners (McGovern and Roseman, attorneys)

Michael J. Rogers, Esq., for respondent (McDonald & Rogers, attorneys)

Record Closed: April 14, 2008 Decided: January 8, 2009

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners appeal from the district board of education's decision to refuse to enroll their 16 year old child in the district's schools based upon its determination that

she had had already received a diploma from the school she previously attended in Venezuela. The petition, filed on October 1, 2007, was transmitted to the Office of Administrative Law on October 26, 2007, 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. The matter was then assigned to me on November 16, 2007, and a pre-hearing conference was held on December 6, 2007. The parties attempted to resolve this matter but ultimately submitted it on motion and cross-motion for summary decision.

FACTUAL DISCUSSION

The following is undisputed and shall constitute **FINDINGS OF FACT.**

M.A.A. is the daughter of B.A. and step-daughter of J.H. She was born on December 11, 1990 in Venezuela and attended school there through July 2007. During the summer of 2007, she moved to the United States to live with her mother and step-father, who are domiciled in Somerville, New Jersey. In August of 2007, petitioners sought to enroll M.A.A. in high school. They were advised to provide M.A.A.'s school records from Venezuela. On September 5, 2007, petitioners met with guidance department staff to review M.A.A.'s transcripts and develop a course schedule for her. Part of the records petitioners provided included a certificate representing a "Bachiller en Ciencias" degree from the "U.E. Instituto Educative 'Alejandro de Humboldt'" in Venezuela. The guidance counselor, Sandy Cirello, prepared a schedule for M.A.A. to enter high school in September 2007 as a senior. [1] The petitioners were then provided a typed version of M.A.A.'s schedule which listed her as a 10th grader, a copy of the Somerville High School Handbook, a Guidance Office Directory and a generic letter dated August 20, 2007, from Assistant Principal for Guidance and Special Services Gerald Foley noting the enclosure of a typed schedule and assignment to a guidance counselor.[2] Petitioners believed that M.A.A. was to be enrolled as a senior and sought to change her enrollment and class schedule to reflect that. On September 7, 2007, Foley verbally advised J.H. that it was the district's decision that M.A.A. was ineligible to

[1] See exhibit "D" attached to the affidavit of B.A. filed in support of petitioner's motion for summary decision.
[2] See exhibits "E" through "I" inclusive attached to B.A.'s affidavit.

enroll as a student based on the district's conclusion that the diploma issued to M.A.A. by the school in Venezuela was the equivalent of a high school diploma in New Jersey. J.H. requested a written explanation for this decision and having not received one, he confirmed the conversation in a letter of the same date.[3] Petitioners then retained counsel who communicated with respondent's counsel and requested the district re-consider its decision and if not, to provide a basis for the decision. By letter dated September 13, 2007, counsel advised that the district would not reconsider its position, writing that:

> it is the school district's position that it is not our burden to establish the equivalency vel non of foreign high school degrees when considering applications for admission to our high school. This is an impossible task and one beyond our realm of responsibility. The fact is that she has graduated from high school and has the right to pursue other educational alternatives and opportunities as she sees fit. She is not, however, eligible to attend the Somerville High School as she has already graduated from high school.

That concludes the undisputed facts.

In support of their motion for summary decision, petitioners rely upon the affidavit of B.A. She certifies to the above facts. Additionally, she certifies that the Somerville High School "Program of Studies" for the 2008-2009 school year[4] indicates on page 2 that four years of English and two years of US History are required by New Jersey state law to graduate high school. Although, she was not provided a copy of the "Program of Studies" for the 2007-2008 school year, when the guidance counselor was creating her daughter's schedule, she indicated that M.A.A. was to be enrolled in two history courses so she could complete both in one year.[5] M.A.A. has not taken any U.S. History courses in either Venezuela or the United States. Additionally, the 2008-2009 guide indicates at pages 2, 8 and 11, that all students must pass the High School Proficiency Assessment (HSPA) as a state requirement "to be eligible to receive a

[3] See exhibit "A" to the petition.
[4] See exhibit "N" to B.A.'s affidavit.
[5] See exhibits "D" and "E," respectively, to B.A.'s affidavit.

state-approved diploma." She also obtained a translation of her daughter's Venezuelan school records by a registered public interpreter from Venezuela.[6]

No affidavit in accordance with N.J.A.C. 1:1-12.5(b) was submitted by the respondent in opposition to petitioners' motion. Respondent cross-moved for summary decision.

LEGAL ANALYSIS

Petitioners assert the Somerville Board of Education improperly denied M.A.A. her right to a free education as granted by the New Jersey Constitution, statutes and regulations. M.A.A. was a 16-year-old resident of Somerville Borough at the time the district denied her enrollment.[7] As such, petitioners assert M.A.A. has met the criteria for receiving a free education from the district. N.J. Const. art. VIII, § IV, ¶ 1, N.J.S.A. 18A:38-1. Further, petitioners assert that the district board of education's decision is discriminatory, in contravention of N.J.S.A. 18A:38-5.1 and N.J.A.C. 6A:7-1.3, by denying M.A.A. access to a free education based upon her national origin. Venezuela authorities only certified that M.A.A. complied with education requirements in that country; yet the district has taken the position that the degree conferred by Venezuelan authorities is dispositive with regard to New Jersey educational requirements. The district has also taken the position that it is not within their responsibility to determine whether or not she meets the educational requirements of the state of New Jersey. The district, despite repeated requests, has failed to provide any justification as to how it made the determination that the Venezuela issued diploma met the requirements for a New Jersey high school graduation.

Respondent asserts it had every right and legal basis to deny M.A.A. admission based on her graduation and receipt of a diploma from another high school. Respondent further asserts this matter is now moot based upon M.A.A.'s return to Venezuela and the fact that there are no assurances if she will return to Somerville, enroll in the high school, and if so, what new educational level will she arrive with at the

[6] See exhibit "C" to B.A.'s affidavit.

time of enrollment. The respondent asserts that its decision is entitled to a presumption of reasonableness, lawfulness and good faith and that the petitioners have not met their burden of proving that its action was arbitrary, capricious or unreasonable. Respondent cites the general premise that absent a showing of an arbitrary, capricious or unreasonable decision by the district, it is not the function of the ALJ or the Commissioner to substitute its judgment, even if the tribunal believes the conclusion to be erroneous. Piccoli v Bd. of Educ. of Ramapo Indian Hills Reg. School Dist., OAL DKT. NO. 1839-98 (January 22, 1999), citing Bayshore Sewage Co. v. Dept. of Envir. Protection, 111 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974) Respondent explains its rationale as related to the cost to the taxpayers to educate a high school student, its determination that based upon receipt of a diploma from her Venezuela high school, M.A.A. could enter college right now in the United States, and:

> What is seen from time to time in general is that pupils enter the United States from foreign nations and seek to enter a local high school to acclimate themselves to life here, and to learn or become more proficient in English.

Respondent also relies upon D.O. o/b/o J.O. v. New Milford Bd. of Educ.,[8] to substantiate its decision that it is not obligated to provide an education to M.A.A. In that case, a family with an 18 year old developmentally disabled student with autistic features moved from Ireland to New Jersey and was denied admission to the local high public high school. While Administrative Law Judge Daniel McKeown found in favor of the student, respondent notes that Judge McKeown commented in his decision that a determinative factor was that the student had not received any degree or diploma from the school in Ireland.

In response, petitioners contend that respondent ignores the fact that it initially decided to enroll M.A.A. as a senior and thus the guidance counselor had considered M.A.A.'s transcripts and educational progress in Venezuela compared with the school

[7] It should be noted that after the district denied M.A.A. enrollment, she briefly attended private school and then withdrew from classes. She returned to Venezuela and attended school there with the intent to return to Somerville to complete her education commencing in September 2008.

[8] 2005 NJ Agen Lexis 39

district's Program of Studies when creating her class assignment as a senior and schedule. The guidance counselor compared the transcript and determined what courses M.A.A. needed for a New Jersey diploma. As to the reasons for denial first articulated by the district in its opposition to the summary decision motion, petitioners assert that cost to the taxpayers is not an appropriate standard for enrollment decisions. Similarly, the observation that there is a "tendency" for foreign students to want to attend school in the United States to "acclimate themselves to life here, and to learn to become more proficient in English" is discrimination based upon national origin. Finally, respondent's assertion that M.A.A. could "enter college right now in the United States" with her diploma from Venezuela is similarly unsupported.

Based upon consideration of the undisputed facts, the failure to file an affidavit in opposition to the summary decision motion and the constitutional mandate, as well as the statutory and regulatory requirements of a school district, I am hereby **GRANTING** the petitioners' motion for summary decision and **DENYING** the respondent's cross motion for summary decision. The New Jersey Constitution guarantees that children between the ages of five and eighteen are entitled to a thorough and efficient system of education. N.J. Const. art. VIII, § IV, ¶ 1. The requirements for high school graduation are delineated at N.J.A.C. 6A: 8-5.1. A school district may not discriminate based upon national origin. N.J.S.A. 18A: 38-5.1, N.J.A.C. 6A:7-1.3. As the respondent board of education indicated in its pleadings, as long as its decision is not arbitrary, capricious or unreasonable, its judgment may not be substituted. Parsippany-Troy Hills Educ. Ass'n v. Board of Ed. of Twp. of Parsippany-Troy Hills, 188 N.J. Super. 161, 167 (App. Div.), cert. denied, 94 N.J. 527 (1983) The district board of education's factual determinations must be accepted if supported by substantial credible evidence. Quinlan v. Board of Ed. of North Bergen Twp., 73 N.J.Super. 40 (App. Div. 1962) In order to overturn that decision, there must exist 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). In this matter, the district's initial determination, through a guidance counselor, was to enroll M.A.A. as a high school senior. This determination was made by the district's guidance counselor who appropriately reviewed her records from Venezuela and compared them with the New

Jersey graduation requirements. This was then overturned and the district's reason was two-fold: that M.A.A. already graduated from a Venezuela high school and that the district was not qualified to review school records from a foreign high school and determine placement in its high school. That is not only arbitrary, capricious and unreasonable, it is also discrimination based upon national origin. How can the district rationally argue that the document it reviewed from Venezuela was the equivalency of high school graduation in Venezuela and simultaneously argue that it is not qualified to review transcripts from foreign schools to determine placement in the high school? It is clear that without any difficulty, guidance counselor Sandy Cirello was able to evaluate the transcripts from the Venezuela high school and determine placement for M.A.A. in the district's high school. The district's additional reasons to deny enrollment, raised for the first time in the pleadings for cross-summary decision, are baseless.

Based upon the foregoing discussion, summary decision pursuant to N.J.A.C. 1:1-12.5 is appropriate. The petitioners have met their burden of proof in demonstrating that the respondent's denial of enrollment to M.A.A. in the high school was arbitrary, capricious or unreasonable.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 8, 2009

DATE

ANA C. VISCOMI, ALJ

Date Received at Agency:

1-8-09

JAN 9 2009

Mailed to Parties:

DIRECTOR AJD
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

202-09

#202-09E

OAL DKT. NO. EDU 8017-09
AGENCY DKT. NO. 124-6/09

DAVID DOLL,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE BOROUGH OF PITMAN, GLOUCESTER COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed by the Assistant Commissioner to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34.

Upon such review, the Assistant Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), as codified at *N.J.A.C.* 6A:3-1.6(b).

In so concurring, the Assistant Commissioner clarifies 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 criterion alone would effectively insulate a school district's actions in matters of this type from any meaningful review.[1]

[1] The Assistant Commissioner is fully cognizant 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

Notwithstanding such clarification, however, the fact remains that applicants seeking extraordinary 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, finally, that the balance of interests and equities under the circumstances rests in their favor. In each of these respects, the Assistant Commissioner agrees with the ALJ, for the reasons expressed in the recommended Order, that petitioner has not met the requisite burden, so that his application must be denied.[2]

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted with clarification as set forth above. In that the present decision fully disposes of all issues in dispute between the parties, no further proceedings are necessary and this matter is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[3]

Barbara Gantwerk

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 6/22/09

Date of Mailing: 6/22/09 **Faxed**

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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, 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 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] With respect to the equities in this matter, the Assistant Commissioner additionally notes that the Board has attempted to balance its own interests with those of petitioner by offering him the opportunity to participate in a private ceremony replicating significant aspects of the public ceremony, such as formal presentation of the diploma, wearing of the cap and gown, and posing for photographs.

[3] 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-EMERGENT RELIEF

OAL DKT. NO. EDU 8017-09

AGENCY DKT. NO. 124-6/09

DAVID DOLL,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF PITMAN, GLOUCESTER COUNTY,

Respondent.

David Doll, pro se

Samuel H. Bullock, Esq., for respondent

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE

Petitioner appealed respondent school district's action denying him the privilege of walking with his class during the 2009 graduation ceremony. For reasons discussed below, the relief sought by petitioner is **DENIED**.

PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies received a petition for emergent relief on or about June 19, 2009. The matter was transmitted to the Office of Administrative Law (OAL) on June 19, 2009, to be heard as an emergent contested case. The Director of the OAL assigned the undersigned to hear this matter pursuant to N.J.S.A. 52:14F-5o.

The matter was scheduled for hearing on June 22, 2009. Petitioner was unable to arrange transportation to the hearing and testified via telephone, with the consent of all parties. The hearing proceeded on that date.

SUMMARY OF REVELANT FACTS

Respondent barred petitioner from participating in the graduation ceremony scheduled on June 22, 2009, because he was arrested on May 24, 2009. Petitioner is presently on bail and has not been convicted.

Petitioner's arguments are appropriately summarized in his request for emergent relief. It provides as follows:

> On May 24, 2009 I was arrested[1] and charged by the Pitman Police department. I am now out on bail and the school has therefore taken my right of walking. They are taking it away before and (sic) court proceedings have taken place and before I have been found guilty or innocent. Graduation is on Monday, June 22nd and I have worked hard for this day to walk with my fellow classmates.

Petitioner stated that he is a good student, gets good grades, participates in three sports and has a $100,000 grant that will enable him to receive post-high school educational experience in the area of vocational training. Therefore, he deserves to

[1] Since criminal charges are pending, petitioner was advised of his Fifth Amendment right not to testify as it relates to any of the charges that were pending. Moreover, this ALJ purposely did not place the

participate in the graduation ceremony. Petitioner contends that another student was arrested and convicted and is still able to participate in the graduation ceremony.

Superintendent Tom Schulte testified. The superintendent indicated that the action taken by the Board of Education was not punitive. Rather, the Board of Education engaged in an extensive debate over whether to allow petitioner to participate in the graduation ceremony. There were two areas of concern. The first area was safety. Given the nature of the charges and the smallness of the community, the Board was concerned about petitioner's safety. The District did not want any unrest, retaliation or other confrontation during the ceremony. The Board was concerned about the decorum of the ceremony. Petitioner's arrest, together with any potential unrest or heckling, could devalue or dilute the ceremony. Pitman is a small town. News travels quickly. Out of an abundance of caution and safety, the Board determined that petitioner should not participate in the graduation ceremony.

APPLICABLE LAW

Petitioner carries the burden in seeking emergent relief. The standard is set forth in N.J.A.C. 6A:14-2.7(s)1. Those criteria are:

> Emergent relief may be requested according to N.J.A.C. 1:6A-12.1. Emergent relief may be granted if the administrative law judge determines from the proofs that:
>
> i. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> ii. The legal right underlying the petitioner's claim is settled;
>
> iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> iv. 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.

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specificity of the charges on the record. That said, the charges do involve other members of the community as victims. And, the charges are of a serious nature.

See also Crowe v. DeGioia, 90 N.J. 126 (1982); Princeton Ins. Co. v. 349 Associates, L.L.C., 147 N.J. 337, 340 (1997).

The burden not only rests with petitioner to meet the emergent relief standards but petitioner also has the burden of proving unreasonableness for actions that are within the management's prerogative. G.M. v. Roselle Park Borough Board of Education, 95 N.J.A.R. 2d. (EDU) 107, 109. Board decisions 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." Ibid. Local boards of education have reasonable discretion for various managerial matters. For example, the Commissioner has held that the matters of class assignment, and specifically, the session assignment of kindergarten pupils, constitutes a "management prerogative" of local boards of education, which will not be assumed nor usurped by the Commissioner unless there is " . . . a definite showing that the action of a local board of education was arbitrary, in bad faith, without rational basis, or discriminatory." Paddock v. Demarest Bor. Bd. of Educ., 1974 S.L.D., 435, 440; See also, Kopera v. Bd. of Educ. Tp. Of W. Orange, 60 N.J. Super. 288 (App. Div. 1960).

The legal right underlying petitioner's claim is well settled. The applicable case law establishes beyond question that participation in 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. Since petitioner has no legal right to participate in the ceremony, petitioner cannot meet that prong of the test. Similarly, petitioner has little likelihood of prevailing on the merits. As stated above, he has no legal right to attend the graduation ceremony. Therefore, he is unlikely to prevail.

CONCLUSION

I **CONCLUDE** that petitioner does not meet the elements necessary to be granted emergent relief. Specifically, petitioner does not meet criteria iii, that is the likelihood of prevailing on the merits of the underlying claim. Here, the Board of

Education is exercising its discretion in a reasonable fashion. As indicated, the graduation ceremony is a privilege, not a right. Petitioner's right is the presentation of a diploma, not participation in the ceremony. Petitioner does not have the likelihood of prevailing on the merits of the underlying claim as he has no legal right to the privilege of walking in a graduation ceremony.

I also **CONCLUDE** that the District, in an abundance of caution, properly exercised its managerial discretion.

ORDER

I **ORDER** that petitioner's emergent application to participate in the graduation ceremony in the Borough of Pitman on June 22, 2009 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 22, 2009
DATE

W. TODD MILLER, ALJ

/sd

APPENDIX

Documents In Evidence

For Petitioner:

None

For Respondent:

None

Witnesses

For Petitioner:

David Doll

For Respondent:

Tom Schulte, Superintendent

203-09

OAL DKT. NO. EDU 4952-09
AGENCY DKT. NO. 118-6/09

STEVEN E. TOMLIN, JR. AND DIANE HOGAN,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
BOARD OF EDUCATION OF THE LOWER CAPE MAY REGIONAL SCHOOL DISTRICT, CAPE MAY COUNTY,	:	
RESPONDENT.	:	

The record of this emergent matter and the recommended Order of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge that petitioner has demonstrated entitlement to emergent relief pursuant to *Crowe v. DeGioia, supra,* and *N.J.A.C.* 6A:3-1.6.[1]

[1] In so holding, the Commissioner specifically endorses the ALJ's finding that petitioner has demonstrated irreparable harm notwithstanding 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. The Commissioner agrees that 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, and notes that 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 together, although they are, in fact, two separate factors; 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 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.

Accordingly, the recommended Order of the OAL granting petitioner's application is adopted for the reasons expressed therein, and this matter shall proceed to plenary hearing as set forth by the ALJ.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/22/09

Date of Mailing: 6/23/09

[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
9 Quakerbridge Plaza
P.O. Box 049
Trenton, New Jersey 08625
(609) 588-6524
Fax - (609)588-6574

ISRAEL D. DUBIN
ADMINISTRATIVE LAW JUDGE

June 16, 2009

VIA FACSIMILE
Lucille Davy
Commissioner
Department of Education
100 Riverview Plaza, 4th Floor
P.O. Box 500
Trenton, NJ 08625-0500
Attn: M. Kathleen Duncan, Director of Controversies & Disputes

Re: **Steven E. Tomlin, Jr. and Diane Hogan v. Board of Education of the Lower Cape May Regional School District, Cape May County**
OAL Docket No. EDU 4952-09
Agency Docket No. 118-6/09

Dear Ms. Davy:

Enclosed please find a copy of an order entered regarding an application for emergency relief in the above-captioned matter. Pursuant to N.J.A.C. 1:1-12.6(j), this order will become effective forty-five (45) days from the date of its entry unless, for good cause shown, under N.J.A.C. 1:1-18.8(e), the time period is extended by the joint action of the Director of the Office of Administrative Law and the agency head.

Sincerely,

Israel D. Dubin
Administrative Law Judge

IDD/cmo
Enclosure
c: Steven E. Tomlin, Jr.
Diane Hogan
Peter M. Tourison, Esq.
Clerk's Office – Trenton

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF
OAL DKT. NO. EDU 04952-09
AGENCY DKT. NO. 118-6/09

STEVEN E. TOMLIN, JR.,
AND DIANE HOGAN,
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: June 15, 2009 Decided: June 15, 2009[1]

BEFORE **ISRAEL D. DUBIN**, ALJ:

Petitioners Steven E. Tomlin, Jr., and his mother, Diane Hogan, have filed a Petition of Appeal and Request for Emergent Relief contesting the Lower Cape May Regional School District Board of Education's decision that he did not satisfy the requirements for graduation and therefore could not march in the processional or otherwise participate in graduation ceremonies scheduled for June 15, 2009 at 3:30

[1] An oral decision was rendered following oral argument. This order memorializes the arguments made during and decision rendered at the conclusion of the proceedings.

p.m. Petitioners filed their appeal with the Department of Education, Bureau of Controversies and Disputes, on Friday, June 12, 2009, the matter was transmitted to the Office of Administrative Law for hearing as a contested case later that same day, and oral argument on the request for emergent relief was conducted on June 15, 2009.

The Board has decided that it will not let Steven graduate high school because he received a failing final grade of 57 in 11th grade English, which he was 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.

Steven and his mother are appealing the Board's decision, claiming that it was based on false information, unsupported facts, and certain misleading statements made by his 11th grade English teacher Sean Murphy. Among other things, they contend that Steven received zeroes for certain tests he allegedly did not take and therefore failed on days Mr. Murphy had marked him absent, even though he had been in school, attended class, taken the tests, and passed. They also claim they were denied the opportunity to review his homework assignments and test papers because his class folder was "missing." Steven also claims that Mr. Murphy broke a promise that if he completed his assignments, did not receive any more zeroes and passed the final exam, he would let him pass the course.

The Board has taken the position that unlike a 67 or 68, his final grade of 57 was 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 had received 100s on the tests and homework assignments for which he'd received zeroes, he still would have received a failing final grade. What is more, 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 were well aware that he was in danger of failing the course.

[2] Steven received a passing grade of 70 (D-) in 12th grade English, which he was allowed to take even though he had not passed 11th grade English.

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.

It is important to note that these standards are written in the conjunctive and not the disjunctive. Therefore, a petitioner must satisfy all four prongs in order to obtain the requested relief. And having carefully considered the parties' respective arguments, I am satisfied that Steven and his mother have satisfied all four of these prongs.

Granted, 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 and that the 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 a student may attend is within the sole discretion of the board of education.

Since the denial of attendance at graduation exercises is the denial of a privilege, as opposed to the denial of a right, its enforcement should not give rise to a claim of irreparable harm. However, in this particular case, Steven may well suffer irreparable harm if, after a plenary hearing, it is subsequently determined that he had in fact earned a passing grade. In this regard it should be noted that the Board did not deny that Steven's class folder was missing. Nor did it introduce the school's attendance records

or so much as an affidavit or certification from Mr. Murphy or any other witness addressing Steven's contentions. Therefore, since it may yet be proven that Mr. Murphy made the aforementioned promise to Steven and/or that he did in fact earn a final passing grade, the denial of attendance will, in this case, cause irreparable harm.

Additionally, there is no question that assuming Steven's contentions are proven, the legal right underlying his claim is settled and, at least at this point in the proceedings, Steven has a reasonable likelihood of prevailing on the merits of his claim. Finally, although the Board's interest in not sending "the wrong message" to other students with failing grades is compelling, it is not as great as Steven's interest in marching with his peers and celebrating the graduation from high school he believes he has earned.

On the facts presented, I conclude that petitioners' request for emergent relief should be granted and therefore order the Lower Cape May Regional School District to allow Steven to participate in graduation exercises including the processional, even if he is only to receive an empty envelope. After consultation with the parties concerning the availability of witnesses and other procedural issues, this matter shall be set down for a full hearing on the merits, with discovery to be completed no less than five days before the commencement of the hearing.

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 16, 2009
DATE

ISRAEL D. DUBIN, ALJ

cmo

204-09

#204-09

OAL DKT. NO. EDU 3367-09
AGENCY DKT. NO. 33-2/09

I.G. and I.P., on behalf of minor child, A.G.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX 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.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/22/09

Date of Mailing: 6/24/09



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03367-09

AGENCY DKT. NO. 33-2/09

I.G. O/B/O OF MINOR CHILD A.G.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

I.P. appearing on behalf of his wife, **I.G.,** pro se

Robin T. McMahon, Esq., for respondent (Scarinci Hollenbeck, attorneys)

Record Closed: May 28, 2009 Decided: May 28, 2009

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

Petitioner, I.G., appealed from the determination of the respondent (Board of Education) that she was not a domiciliary of the East Brunswick School District and that accordingly her son, A.G., was not entitled to a public education at school district expense. The Board of Education filed a counterclaim for tuition. On March 18, 2009,

the matter was transmitted to the Office of Administrative Law for hearing as a contested case. A hearing was scheduled for May 7, 2009.

Prior to the hearing date, I received correspondence from I.P., the husband of A.G., advising that due to a health issue his wife would be unable to appear at the hearing, and asking if he could appear in her place. By letter dated April 21, 2009, counsel for the Board of Education raised concerns about this request; specifically that, in the event of a judgment in favor of the Board of Education, the Board have some assurance that such a judgment would be binding on I.G., who is the named petitioner. The Board of Education stated this concern could be ameliorated, in part, if I.P. were named as an additional petitioner. A telephone conference between I.P., counsel for the Board of Education, and me took place on April 27, 2009, at which time I.P. stated that he would consent to being formally named as an additional petitioner. I indicated to the parties that I would preliminarily grant I.P.'s request to appear at hearing, that I was inclined to amend the petition to name I.P. as a party, but would allow the Board of Education the opportunity to place any additional objections on the record at hearing.

At the May 7, 2009 hearing, I.P. and the Board of Education agreed to and prepared a settlement agreement, which is attached and fully incorporated herein. The Board of Education approved the settlement at its meeting of May 14, 2009. The record closed on May 28, 2009, upon my receipt of a copy of a certified Board resolution approving the settlement.

As part of that settlement, it was agreed that the petition would be amended to reflect that both parents, I.G. and I.P., are named petitioners. I **CONCLUDE** that so amending the petition is consistent with the requirements of N.J.A.C. 1:1-6.2(a) and promotes the efficient and expedient resolution of this case.

Accordingly, I **ORDER** that the petition be amended to reflect that both I.G. and I.P. are the named petitioners.

Relative to the settlement between the parties, 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, and the certified Board resolution attached hereto. Additionally, I.P. testified that he understands the terms of the agreement, understands that by entering into the agreement he has waived his right to a hearing, and has entered into the agreement voluntarily.

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 28, 2009

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: June 01, 2009

Mailed to Parties:

JUN 01 2009

DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

A-3
Approval Of Regular Education Settlement – Student #21723

Moved by Mrs. Becker and seconded by Mr. Hughes that the Board of Education approve the following resolution:

WHEREAS, the East Brunswick Public School District has been a party to a dispute concerning the residency of student number 21723; and

WHEREAS, the District and the parents have agreed to settlement of the dispute whereby parents shall pay the District the amount of $4,500.00 as tuition for the 2008-2009 school year.

NOW, THEREFORE, BE IT RESOLVED by the East Brunswick Board of Education that the settlement agreement in this matter be ratified and that the formal agreement shall be maintained on file by the School Business Administrator.

Carried unanimously by roll call vote 6-0-0-0

I HEREBY CERTIFY that the foregoing is a true and exact copy of the motion that was adopted at the Regular Meeting of the East Brunswick Board of Education on Thursday, May 14, 2009.

Bernardo J. Giuliana
School Business Administrator/ Board Secretary

I G on behalf of
A G.

Settlement Agreement

Township of East Brunswick
Board of Education
Middlesex County.

I G + I P, mother and father of student AG, respectively, and the East Brunswick Board of Education (Board or District) agree to resolve all issues between them as follows:

1- I P shall pay the district the sum of #4,500 as tuition for AG's attendance in the District for the 2008-2009 school year, which is AG's senior year.

2- The Board will hold the #4,500 in escrow pending approval of this agreement by the Board and Administrative Law Judge. This agreement is subject to approval by the Board and the Administrative Law Judge. If the Board does not approve this agreement, the District will promptly relase the payment to I.P.

3- This matter shall not be dismissed until the payment due in P-1, if in the form of a check, clears the financial institution. If for any reason the funds are not cleared, the District shall notify the Administrative Law Judge and this matter shall proceed to a plenary hearing as soon as the

office of Administrative Law can accomodate the parties.

4 - The petition is hereby amended to add I.P as a party appellant

5 By signing this agreement I.P represents that he is authorized to enter into this agreement on behalf of his spouse I.G and for A.G.

Dated. May 7, 2009

For Himself, I.G + A.G

Dr. Igor Prusiec

For the East Brunswick Board of Education

Joelle Basaman

Joelle Basaman
Assistant Superintendent

205-09

#205-09

OAL DKT. NO. EDU 5461-09
AGENCY DKT NO. 95-5/09

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

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, including the parties' settlement agreement, has been returned to the Commissioner by the Office of Administrative Law. Because the Department is a party to the matter, pursuant to *N.J.A.C.* 1:1-19.1 (c)2 and (d), the settlement is deemed to be the final agency decision. Accordingly, the matter is dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/22/09
Date of Mailing: 6/24/09

Board of Education of the City of Elizabeth	:	OFFICE OF ADMINISTRATIVE LAW
v.	:	OAL Docket No. EDU 05461-2009N
New Jersey Department Of Education	:	Agency Ref No. 95-5/09
	:	Stipulation of Agreement

Whereas, this matter was initiated by a Verified Petition of Appeal filed by the Board of Education of the City of Elizabeth ("Petitioner" or "district") against the New Jersey Department of Education ("Respondent") appealing the Respondent's April 7, 2009, decision on Petitioner's 2009-2010 Preschool Education Line-item Budget.

And whereas, the parties have reached an agreement to resolve the above-referenced appeal pursuant to the following terms:

1. The Petitioner hereby withdraws its Petition of Appeal of the Respondent's approved amounts of its line-item budget submission for the 2009-2010 school year, subject to the reservation of rights set forth in Paragraph 7 of this Stipulation of Agreement.

2. Petitioner and Respondent agree to meet as soon as possible to discuss Respondent's suggestions and recommendations regarding efficiencies relating to Petitioner's transportation costs.

3. Petitioner agrees to implement Respondent's feasible recommendations and suggestions with regard to the district's transportation of its preschool children.

4. Upon Petitioner's demonstration to the Respondent that it has implemented all feasible recommendations and suggestions under paragraph 3, in the event that the cost for preschool transportation in the district ultimately totals an amount higher than the approved amount of $2,473,268, Respondent agrees to provide funding for the amount in excess of

$2,473,268 after implementation of the suggestions and recommendations. Such amount shall not exceed the difference between the district's total line-item amount approved by the Respondent and the total amount of preschool funding under the School Funding Reform Act ("SFRA").

5. Upon Petitioner's demonstration to the Respondent that it has implemented all feasible recommendations and suggestions under paragraph 3, Petitioner agrees to accept a downward adjustment of its approved amount of $2,473,268 to the actual amount, in the event that the actual amount of transportation costs after implementation of the Respondent's suggestions and recommendations is lower than said approved amount.

6. In the event that Respondent's suggestions and recommendations referred to in Paragraph 3 are not implemented by the Petitioner, the approved transportation funding set forth in Respondent's April 7, 2009 decision will not be modified. In such an event, Petitioner reserves all rights under the school laws.

7. This Stipulation of Agreement resolves all outstanding issues relating to Respondent's 2009-2010 Preschool Line-Item Budget. However, Petitioner reserves any and all rights pursuant to the New Jersey Supreme Court's Abbott v. Burke decision issued on Thursday, May 28, 2009, Docket No., M-969/1372-07.

Richard E. Shapiro, Esq.
Attorney for Petitioner

Melissa T. Dutton, DAG
Attorney for Respondent

Dated: May 28, 2009

206-09

#206-09

OAL DKT. NO. EDU 9747-08
AGENCY DKT. NO. 205-7/08

JEFFREY MARTENS,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	
RESPONDENT.	:	

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

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 6/22/09
Date of Mailing: 6/24/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09747-08
AGENCY DKT. NO. 205-7/08

JEFFREY MARTENS,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Marie-Lauren Fabian, Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

Record Closed: June 4, 2009 Decided: June 5, 2009

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 August 21, 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. As a result of several conferences, the parties settled the matter before the hearing.

On June 4, 2009, the parties submitted the attached copies of a Settlement Agreement and General Release and the Board's Resolution.

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.

June 5, 2009
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency:

6-9-09
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: JUN 9 2009

id

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY, N.J. AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of Parsippany-Troy Hills in the County of Morris, New Jersey, convened at its Regular Meeting on **May 28, 2009** at the Parsippany High School, 309 Baldwin Road, Parsippany, NJ 07054.

The following members of the Board of Education were present:

Dr. Frank Calabria
Mr. Andrew Choffo
Mr. Robert Crawford
Mr. Alan Gordon
Mrs. Debbie Orme
Dr. Louis Valori
Mr. Frank Neglia
Mr. Anthony Mancuso

Absent and Excused: Mr. Michael Strumolo

The following resolution was offered by Mr. Choffo and seconded by Dr. Valori and adopted by the Board of Education:

RESOLUTION OF THE PARSIPPANY-TROY HILLS BOARD OF EDUCATION AUTHORIZING SETTLEMENT OF A LEGAL MATTER

RESOLUTION MARTENS

WHEREAS, on June 5, 2008, the Board voted to withhold Jeffrey Martens' increment for the 2008-2009 school year; and

WHEREAS, on July 14, 2008, Mr. Martens filed a Petition of Appeal in the Office of Administrative Law, challenging that increment withholding; and

WHEREAS, the Board Attorney and the Superintendent have recommended a settlement of this pending litigation; and

WHEREAS, the Board has determined that such a settlement is in the best interest of both parties.

NOW, THEREFORE, BE IT RESOLVED by the Parsippany-Troy Hills Board of Education that it hereby approves the resolution of this matter pursuant to the terms set forth in the Settlement Agreement and Release, a copy of which is on file in the office of the Superintendent, including restoration of Mr. Martens' increment as of January 1, 2010, at which time his annual salary shall be $116,102.00, plus $2,000 longevity.

The resolution was approved by unanimous roll call vote.

STATE OF NEW JERSEY)
)
COUNTY OF MORRIS)

I, Susan Tindal, Assistant Board Secretary of the Board of Education, of the Township of Parsippany-Troy Hills in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on May 28, 2009 has been compared by me with the original minutes as officially recorded in my office in the minute book of said Parsippany-Troy Hills, 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 29th day of May, 2009.

(AFFIX SEAL)

Susan Tindal, RSBS
Assistant Board Secretary

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Respondent, Parsippany-Troy Hills Board of Education

JEFFREY MARTENS, Petitioner, v. PARSIPPANY-TROY HILLS BOARD OF EDUCATION, Respondent.	BEFORE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO.: EDU 09747-08 AGENCY REF. NO.: 205-7/08 CIVIL ACTION **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement and General Release (hereinafter referred to as "this Agreement") is entered into by and between Petitioner, Jeffrey Martens, (hereinafter "Mr. Martens") and Respondent, Parsippany-Troy Hills Board of Education (hereinafter "the Board"). In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, Mr. Martens is a tenured teaching staff member employed by the Board as an Elementary School Principal; and

WHEREAS, on June 5, 2008, at the recommendation of LeRoy Seitz, Superintendent of Schools, the Board voted to withhold Mr. Martens' increment for the 2008-2009 school year; and

WHEREAS, on July 14, 2008, Mr. Martens filed a Petition of Appeal in the Office of Administrative Law, challenging that increment withholding; and

WHEREAS, the parties wish to resolve this dispute without the need for further litigation and believe that this settlement is in the best interest of all concerned.

NOW, THEREFORE, in consideration of the mutual promises of the parties in exchange for the consideration more particularly noted below, it is hereby agreed:

1. The Board agrees to restore Mr. Martens' increment as of January 1, 2010. This will mean that for the period July 1, 2009 through December 31, 2009, Mr. Martens' annual salary will be $111,637 (plus $2,000 longevity) and for the period January 1, 2010 through June 30, 2010, his annual salary will be $116, 102 (plus $2,000 longevity).

2. In exchange for the consideration set forth herein, Mr. Martens releases and gives up any and all claims and rights he may have against the Board for any damages or injuries in connection with his employment with the Board, including any claim for compensatory damages, punitive damages, or any damages or injuries arising out of alleged acts or omissions, whether known or unknown, that have taken place through the date of this Agreement. As used in this Agreement, the term "Board" means: the Parsippany-Troy Hills Board of Education, its current or former elected or appointed officials, administrators, employees, attorneys, agents, servants, representatives, predecessors and successors, insurance carriers, and all other persons or entities for whom any of the above have been or may be legally responsible. Mr. Martens specifically releases the following claims as to the Board:

(a) Any and all claims that were brought and that could have been brought in the Petition of Appeal, bearing Agency Reference No.: 205-7/08 and OAL Docket No.: EDU 09747-08 and any other civil or administrative claims that Mr. Martens could assert now, or in the future, resulting from any action or failure to act occurring prior to the time Mr. Martens signs this Agreement, under any provision of any law, common or statutory, of the United States, New Jersey or any other state, city, county, or locality.

3. The parties agree that this settlement is a compromise of disputed claims and shall not be construed as an admission of fact, law, responsibility, wrongdoing or liability on the part of either party.

4. Both parties have each had independent legal representation. They both fully understand the terms and conditions set forth in this Agreement, as well as their respective rights to litigate the issues in this case with a final decision to be made by the Commissioner of Education as an alternative to settlement. The decision to enter into this Agreement, rather than to avail themselves of the right to litigation has been made of their own free will without duress or coercion.

5. All terms of this Agreement are material and shall be subject to the laws of the State of New Jersey.

6. This Agreement contains the sole and the entire Agreement between the Parties. Mr. Martens represents and acknowledges that he has not relied upon any representation or statement by the Board, or its counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth in this Agreement. No other promises or agreements shall be binding unless in writing, signed by both parties and expressly stated to be a modification of this Agreement.

7. The parties signing below hereby acknowledge that they have been duly authorized to enter into this Agreement. A copy of the Board's resolution is attached

hereto. The Board resolution shall merely reference Mr. Martens' salary and longevity and shall make no reference to alleged performance deficiencies or criticisms of Mr. Martens.

Witness:

Marlene Wendolowski
Marlene Wendolowski, Board Secretary

Print Name: Jon Mintzer
Attorney at Law
State of New Jersey

PARSIPPANY-TROY HILLS
BOARD OF EDUCATION

By: Anthony Mancuso
Anthony Mancuso, Board President

Dated: 5/

Jeffrey Martens

Dated: 5/19/09

207-09

IN THE MATTER OF THE SUSPENSION :

OF THE TEACHING CERTIFICATE OF : COMMISSIONER OF EDUCATION

TYARRA HUNTER, GRAY CHARTER : DECISION

SCHOOL, ESSEX COUNTY. :

:

SYNOPSIS

In September 2007, an Order to Show Cause was served upon respondent – a tenured teacher – requiring her to show cause why her teaching certificate should not be suspended for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8 for resigning her position as an elementary teacher without giving adequate notice.

This petitioner and six other similarly situated individuals charged that *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8 did not apply to teachers in charter schools. By interlocutory order, affirmed by the Commissioner, the ALJ found that these provisions were applicable to charter school teachers. Here the ALJ found that: *N.J.S.A.* 18A:26-10 prohibits a teaching staff member from ceasing to perform her duties contrary to the provisions of her contract with the charter school; and *N.J.S.A.* 18A:28-8 requires that a tenured teaching staff member must give a charter school at least sixty days written notice of intention to relinquish his/her position. The ALJ concluded that: respondent ceased to perform her duties before the expiration of the term of her employment contrary to *N.J.S.A.* 18A:26-10; respondent failed to provide sixty days written notice of her intention to resign contrary to *N.J.S.A.* 18A:28-8: and respondent is therefore guilty of unprofessional conduct warranting a full one-year suspension of her certificate.

Upon independent review of the record, the Commissioner concurred with the ALJ's conclusion that the respondent is guilty of unprofessional conduct pursuant *N.J.S.A.* 18A:28-8, and adopted the Initial Decision as the final decision in this matter. Respondent's certificate is suspended for a period of one year from the date of the filing of this decision – a copy of which has been 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.

Issued 6/22/09

207-09

OAL DKT. NO. EDU 11956-07
AGENCY DKT NO. 293-10/07

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
TYARRA HUNTER, GRAY CHARTER	:	DECISION
SCHOOL, ESSEX COUNTY.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Counsel for Ms. Hunter sought and received an extension of time within which to file exceptions to the Initial Decision and such exceptions were filed in accordance with the modified timeframe. Gray Charter School did not file reply exceptions.

Respondent's exceptions merely recast and reiterate her arguments advanced before the Administrative Law Judge (ALJ) below. In that all of these were presented and comprehensively discussed in the Initial Decision, they will not be revisited here.

Upon a full and independent review of the record – and according due deference to the ALJ's credibility determinations[1] – the Commissioner agrees with his conclusion that respondent, Tyarra Hunter, is guilty of unprofessional conduct – pursuant to *N.J.S.A.* 18A:28-8 – for failure to give proper notice before resigning from her position as a teacher at the

[1] The Commissioner "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).

Gray Charter School.[2] The Commissioner further concurs with the ALJ's recommendation that – as a consequence of such conduct – respondent's teaching certificate be suspended for one year.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons clearly articulated therein. Respondent's teaching certificate is hereby suspended for a period of one year, effective upon the date of this decision. A copy of this decision is being forwarded to the State Board of Examiners for the purpose of effectuating this decision.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 6/22/09

Date of Mailing: 6/23/09

[2] In that the instant respondent has tenure status, the Commissioner does not reach to the ALJ's analysis of this matter under *N.J.S.A.* 18A:26-10 as this companion provision is intended to address differently situated groups of employees, *i.e.*, *non-tenured teaching staff members.*

[3] 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 11956-07
AGENCY DKT. NO. 293-10/07

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF TYARRA HUNTER, GRAY CHARTER SCHOOL, ESSEX COUNTY.

Cherie L. Adams, Esq., for Gray Charter School
(Adams, Stern, Gutierrez & Lattiboudere, attorneys)

Gregory T. Syrek, Esq., for Tyarra Hunter
(Bucceri and Pincus, attorneys)

Record Closed: March 24, 2009 Decided: May 8, 2009

BEFORE **RICHARD McGILL**, ALJ:

Gray Charter School (petitioner) seeks the suspension of the teaching certificate of Tyarra Hunter (respondent) for unprofessional conduct based upon a resignation that did not comply with the applicable statutes, N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8. Respondent maintains that the statutes upon which petitioner relies are not applicable to her as an employee of a charter school and that any suspension is discretionary in nature. Further, under all of the circumstances, it would not be appropriate to suspend her teaching certificate.

PROCEDURAL HISTORY

At the request of petitioner, the Commissioner of Education issued an Order to Show Cause on September 27, 2007, ordering respondent to show cause why her teaching certificate should not be suspended for unprofessional conduct pursuant to N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8. Respondent filed an Answer on November 13, 2007, and the matter was transmitted to the Office of Administrative Law on November 16, 2007, for determination as a contested case.

One of respondent's contentions in this proceeding is that N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 are not applicable to charter schools. In the same general time frame, six similar matters were transmitted to the Office of Administrative Law raising the issue of the applicability of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 to charter schools.[1] By Order dated March 31, 2008, the seven matters were consolidated for the limited purpose of determining the applicability of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 to charter schools.

Three teachers filed a motion to dismiss based on the contention that N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 do not apply to charter schools. In an Order dated June 6, 2008, the determination was made that these statutes, N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8, are applicable to charter schools. However, one statute, N.J.S.A. 18A:28-8, relates to teachers who have tenure. The determination was that this statute is not applicable to teachers who do not have tenure. As a result, the portion of the

[1] The other matters are as follows: In the Matter of the Suspension of the Teaching Certificate of Nadira Raghunandan, Gray Charter School, Essex County, OAL Dkt. No. EDU 11437-07, Agency Dkt. No. 292-10/07; In the Matter of the Suspension of the Teaching Certificate of Claude Gentil, Gray Charter School, Essex County, OAL Dkt. No. EDU 11745-07, Agency Dkt. No. 298-10/07; In the Matter of the Suspension of the Teaching Certificate of Jenelle Stokes, Gray Charter School, Essex County, OAL Dkt. No. EDU 12569-07, Agency Dkt. No. 332-10/07; In the Matter of the Suspension of the Teaching Certificate of Danielle Ponti, Gray Charter School, Essex County, OAL Dkt. No. EDU 11971-07, Agency Dkt. No. 294-10/07; In the Matter of the Suspension of the Teaching Certificate of Taheerah Jackson, Gray Charter School, Newark, Essex County, OAL Dkt. No. EDU 11972-07, Agency Dkt. No. 300-10/07; and In the Matter of the Suspension of the Teaching Certificate of Melissa Van Pelt, Gray Charter School, Essex County, OAL Dkt. No. EDU 11556-07, Agency Dkt. No. 291-10/07.

Order to Show Cause based upon N.J.S.A. 18A:28-8 was dismissed as to several teachers, because they had not achieved tenure. The portion of the Order to Show Cause based on N.J.S.A. 18A:28-8 was not dismissed as to respondent, because she had achieved tenure.

One or more parties sought interlocutory review of the Order dated June 6, 2008. By Decision on Motion for Interlocutory Review dated July 9, 2008, the Commissioner of Education affirmed the Order dated June 6, 2008. Thereafter, by Order dated August 14, 2008, the seven matters were severed for each to proceed separately.

This matter was brought to hearing on February 19, 2009, at the Office of Administrative Law in Newark, New Jersey. The record closed on March 24, 2009, upon receipt of briefs.

ISSUES

With the question of applicability of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 to charter schools having been resolved by motion, the remaining issues are whether respondent engaged in unprofessional conduct within the meaning of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8, whether respondent's teaching certificate should be suspended and, if so, the length of the suspension.

FACTS

A. Stipulated Facts

The parties stipulated as follows:

1. Ms. Verna Gray is the Executive Director of the Gray Charter School and has held that position since 2000.

2. Ms. Hunter is a duly certified Elementary School Teacher in the state of New Jersey.

3. Ms. Hunter began her employment with the Gray Charter School in August of 2002.

4. Ms. Hunter was a tenured teacher at Gray Charter School.

5. On or about May 3, 2007, Ms. Hunter executed an employment agreement for the 2007-2008 school year to commence in August of 2007 and end in June of 2008.

6. Ms. Hunter drafted a letter of resignation which she signed and dated July 31, 2007 and sent regular and certified mail to the Gray Charter School.

7. Teachers were to report to the Gray Charter School on August 14, 2007 to prepare for the school year. Ms. Hunter failed to report for duty that day or any subsequent day during that school year.

B. Undisputed Facts

Other facts are not really in dispute, and I **FIND** as follows:

1. As the Executive Director and Principal, Ms. Gray is responsible for curriculum planning, parent relations and staffing for Gray Charter School. She is responsible for contracts with teaching staff members.

2. Respondent decided to seek other employment and had an interview with the Orange Board of Education in April 2007.

3. Respondent was offered a job by the Orange Board of Education at the end of May 2007. She signed a contract with the Orange Board of Education on or about May 28, 2007.

4. Respondent did not notify Gray Charter School at that time, because she wanted to keep her options open.

5. Gray Charter School closes for July through the first week or two of August each summer.

6. Respondent's first letter of resignation dated July 15, 2007, was sent by certified mail, return receipt requested. It was received at the Post Office serving Gray Charter School on July 18, 2007.

7. Respondent mailed the letter of resignation, re-dated July 31, 2007, again on August 1, 2007.

8. Since she still had not received the return receipt, respondent mailed the letter of resignation again on August 10, 2007.

9. Gray Charter School opened for staff on August 14, 2007.

10. On August 14, 2007, respondent returned a telephone call from Gray Charter School.

11. Respondent's letter of resignation was received by Gray Charter School on August 15, 2007.

12. Gray Charter School was scheduled to open for students on August 21, 2007.

13. Respondent's contract with Gray Charter School contains a provision which states as follows: "Upon the written agreement of both Employee and the School (which agreement may be made by the Executive Director), this agreement shall immediately terminate."

Ms. Gray testified that certain consequences resulted from decisions by five teachers not to report to Gray Charter School for the 2007-2008 school year. It is noted that respondent contends that these consequences could have been avoided by Gray Charter School by remaining open during the summer. But the events in themselves are not in dispute. I **FURTHER FIND** as follows:

14. At that time, Gray Charter School had seventeen classroom teachers and five other teachers.

15. Five teachers with contracts did not report to Gray Charter School to begin the 2007-2008 school year.

16. Gray Charter School was unable to open as scheduled due to a lack of teachers.

17. Ms. Gray had to stop a consultant from traveling from Chicago for training.

18. Other staff members were upset, because they were afraid of losing their jobs.

19. The opening of school was delayed until August 27, 2007.

20. As a result of the lost days, Ms. Gray had to modify the schedule for spring vacation and extend the school year.

21. Gray Charter School incurred additional costs as a result of the changes.

C. Summary of Testimony

The disputed facts in this matter relate to whether respondent knew, or had reason to know, the proper procedure for terminating her employment with Gray Charter School. There is also a question whether respondent knew that Gray Charter School would be closed during the summer.

1. Verna A. Gray

Verna A. Gray has been the Executive Director and Principal of Gray Charter School since September 5, 2000. Ms. Gray held various meetings with staff during the school year. The topic of employees leaving Gray Charter School came up many times, and Ms. Gray explained the procedure. The first step for the employee was to tell Ms. Gray, preferably by April 15. Ms. Gray told the employees that there were other people who wanted to work at Gray Charter School.

Gray Charter School is closed each summer during July and part of August. The employees are aware of this practice.

Ms. Gray knows respondent as a third grade teacher at Gray Charter School. Ms. Gray received no complaints from respondent during her employment with Gray Charter School. Ms. Gray was not told by respondent that she or any other employee was leaving Gray Charter School. Accordingly, Ms. Gray did not agree to terminate respondent's contract.

Approximately two weeks after respondent signed a contract on May 3, 2007, to teach at Gray Charter School during the 2007-2008 school year, respondent asked Ms. Gray if the school would be closed during the summer. Ms. Gray said to respondent

that she knew that the school would be closed and asked why she was inquiring. Respondent said that there was no reason.

Ms. Gray expected respondent to report to Gray Charter School on August 14, 2007. Respondent was one of several teachers who did not report to Gray Charter School on August 14, 2007. Ms. Gray asked her secretary to call respondent. Respondent returned the call and asked whether her letter had been received. Respondent said that she had resigned as had two other teachers.

The mail was held over the summer. Some held mail was received on August 14, 2007, and more on August 15, 2007. There was a program given by a violin teacher starting August 1, but this was not provided by Gray Charter School.

Ms. Gray received respondent's letter of resignation on August 15, 2007. In her letter of resignation dated July 31, 2007, respondent stated in part as follows: "Due to the unforeseen events that took place this past year in my life, I will be relocating and unable to fulfill my duties as a head teacher." Five teachers failed to report on August 14, 2007, and two resigned later.

Ms. Gray testified as to the circumstances under which a former employee left Gray Charter School in a prior year. Pamela Luke was a school social worker at Gray Charter School. Ms. Gray decided to make the position part-time with the annual salary reduced from $54,000 to $25,000 and gave Ms. Luke two weeks to decide whether to accept the change. Ms. Luke did not accept the part-time position and was not offered a contract. Ms. Gray found someone else to be the part-time social worker. Ms. Luke submitted a letter of resignation and was allowed to speak with the staff.

Another employee, Lucy Jackson, submitted a letter of resignation on August 11, 2006, after signing a contract for the 2006-2007 school year, but she offered her services to help with the transition. In addition, the director of the new employer offered

to allow Ms. Jackson to help with the transition. Ms. Gray agreed to Ms. Jackson's resignation and did not ask her to assist with the transition.

2. Maddalena Nuzzo

Maddelena Nuzzo has worked as a secretary at Gray Charter School for seven years. Ms. Nuzzo testified that the school is closed during July and part of August and that staff members were supposed to report on August 14, 2007. The staff members knew this. Nonetheless, five teachers did not report to Gray Charter School on August 14, 2007.

Ms. Gray asked Ms. Nuzzo to call the teachers who did not report to work. Ms. Nuzzo called each of the five teachers and left messages. Only respondent called back. Respondent said that she sent a letter of resignation, and Ms. Nuzzo said that the school had not received it. Respondent stated that she and two other teachers had resigned.

Ms. Nuzzo asked respondent if she wanted to speak with Ms. Gray. Respondent declined and asked Ms. Nuzzo not to mention the conversation to Ms. Gray. Ms. Nuzzo reported the conversation to Ms. Gray.

3. Richard Salles

Richard Salles has been the Vice Principal of Gray Charter School since October 2001. Vice Principal Salles testified that Gray Charter is not open during July and the first few weeks of August. One of his last duties during the school year is to put an appropriate message on the answering machine for the period when the school is closed. According to Vice Principal Salles, the staff is aware that the school will not open during the summer. The topic was specifically discussed at a staff meeting in June.

If a staff member is leaving, the proper procedure is to advise Ms. Gray. The staff member should provide two months' notice. At staff meetings, Ms. Gray mentioned that other teachers wanted to work at Gray Charter School. There was no reference to the consequences of not giving notice.

Vice Principal Salles is Gray Charter School's affirmative action officer. He received no complaint from respondent.

4. Tyarra Hunter

Respondent testified that she is currently employed by the Orange Board of Education and that she started there in September 2007. Previously, respondent was employed by the Gray Charter School as a third grade teacher. Respondent worked there for five years beginning in August 2002.

Respondent decided to look for a new job and had an interview with the Orange Board of Education in April 2007. Respondent received an offer in May 2007 and signed a contract on May 28, 2007. Respondent testified that she was not sure that she was going to take the position so she decided to keep her options open. As a result, she did not advise Gray Charter School that she was leaving. Respondent denied having a conversation with Ms. Gray and asking her whether the school would be open in the summer.

Respondent decided to leave Gray Charter School, because she was not comfortable there for a variety of reasons. For one thing, there were very few staff meetings. For another, respondent was required to perform duties that were not in her contract such as open the school at 6:45 a.m. Respondent was uncomfortable when Ms. Gray said that the kids were acting like "jerks." Respondent was never sure who would be in the next classroom because of the high turnover rate. When the other third grade teacher went on maternity leave, respondent had forty students. Respondent

acknowledged that these situations or incidents occurred over a period of years and that she never raised these concerns with Ms. Gray.

Respondent decided at the beginning of July 2007 that she was leaving Gray Charter School, and she sent various letters as detailed above. Respondent denied knowing that Gray Charter School was closed in July. Respondent thought that thirty days' notice would be sufficient, and she denied any knowledge of a sixty day notice requirement. According to respondent, there is nothing in the contract about a sixty day notice requirement, and it was never mentioned in a staff meeting. Respondent acknowledged that she never tried to telephone Gray Charter School prior to August 14, 2007. Respondent stated that Ms. Nuzzo's testimony that respondent did not ask to speak with Ms. Gray was false. Respondent further stated that just sending a letter was a professional manner in which to resign. Respondent never told anyone at Gray Charter School about her employment with the Orange Board of Education.

5. Pamela Luke

Pamela Luke testified that she was employed by the Gray Charter School from March 2002 to August 2006 as a school social worker. In May 2006, Ms. Gray advised Ms. Luke that her position would be reduced from full-time to part-time and that her annual salary would go from $56,000 to $25,000 without benefits. Initially, Ms. Luke accepted the part-time position. Ms. Luke found a full-time job with a hospital a month or two later and submitted a letter of resignation to Ms. Gray on August 14, 2006. Ms. Luke was allowed to speak with other staff, and there was no legal action. In March 2007, Ms. Luke began employment with another charter school.

6. Khamisi Jackson

Khamisi Jackson testified that she was employed by Gray Charter School as a fourth grade teacher from 2004 to 2006. Ms. Jackson decided to leave Gray Charter School, and she submitted a letter of resignation dated July 14, 2006, by regular mail,

fax and hand-delivery. Mr. Salles was present due to construction in the building and received the letter. Ms. Jackson had signed a contract for the 2006-2007 school year. Mr. Jackson further testified that she did not discuss the situation with Ms. Gray and that there was no discipline. Ms. Jackson acknowledged that she offered to assist with the transition and that she was not aware that the director of her new employer had contacted Gray Charter School.

D. Findings

Petitioner's witnesses were fully credible, and their testimony is accepted as true. It is evident that respondent was not candid and forthright with Ms. Gray. Further, respondent's version of the events conflicted with the testimony of each of petitioner's witnesses. To the extent of the conflict, respondent's version is overborne by the testimony of petitioner's witnesses. Additionally, respondent's testimony concerning her reasons for leaving Gray Charter School is not accepted as true.

Based upon the evidence presented at the hearing, I **FIND** as follows:

1. Ms. Gray held meetings during the school year and told staff members that if they were planning to leave, they should see her.

2. Ms. Gray told staff members that it would not be a problem if they decided to leave, because others wanted to work at Gray Charter School.

3. Ms. Gray advised employees to give sixty days' notice by April 15.

4. Respondent knew the practices and procedures of Gray Charter School as set forth in the above three findings.

5. Respondent knew that Gray Charter School would not be open in July 2007, continuing into August 2007.

6. In April 2007, respondent began to look for another job and had an interview with the Orange Board of Education.

7. Respondent discussed resignation with other teachers.

8. Respondent signed a contract with the Orange Board of Education on May 28, 2007.

9. Respondent did not advise anyone at Gray Charter School of this development because she wanted to keep her options open.

10. Respondent discussed the procedure for resignation with two other teachers.

11. On August 14, 2007, respondent returned the call of Ms. Nuzzo.

12. Respondent did not ask to speak with Ms. Gray, and respondent asked Ms. Nuzzo not to mention the call to Ms. Gray.

13. Ms. Nuzzo advised Ms. Gray of the call.

14. Respondent did not mention that she was employed by the Orange Board of Education.

LAW AND ANALYSIS

One applicable statute 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 or, in the case of an approved private school for the disabled, the board of directors of the school, 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 other applicable statute is N.J.S.A. 18A:28-8, which provides as follows:

> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.

The obvious purpose of these statutes is to provide notice to the school so that a suitable replacement can be hired without adversely impacting students. Penns Grove-Carneys Point Board of Education v. Leinen, 94 N.J.A.R. 2d (EDU) 405, 407. The ultimate objective is to protect the students.

In the context of this case, N.J.S.A. 18A:26-10 prohibits a teaching staff member from ceasing to perform his duties without the consent of the charter school. Here, respondent entered into an employment agreement for a term set to expire on June 30, 2008, and thereafter submitted a letter of resignation dated July 31, 2007. This date was approximately two weeks before the beginning of the school year, and respondent did not have the consent of the charter school. Under the circumstances, I **CONCLUDE** that respondent ceased to perform her duties before the expiration of the term of her employment contrary to N.J.S.A. 18A:26-10.

In accordance with N.J.S.A. 18A:28-8, a tenured teaching staff member must give a charter school at least sixty days written notice of his intention to relinquish his position. Here, respondent was scheduled to report along with other staff on August 14,

2007. Respondent sent a resignation letter dated July 31, 2007, but it could not possibly have provided timely notice. In fact, petitioner received respondent's resignation letter on August 15, 2007, one day after she was scheduled to report to work. Under the circumstances, I **CONCLUDE** that respondent failed to provide sixty days written notice of her intention to relinquish her position with Gray Charter School contrary to N.J.S.A. 18A:28-8.

Petitioner seeks a suspension of respondent's teaching certificate for a period of one year and cites multiple cases in which such action was taken. According to petitioner, this matter should be handled in the same manner as in the cited cases.

Respondent points to the word "may" in the portions of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 that refer to a suspension for a period not exceeding one year. Based thereon, respondent argues that a suspension under N.J.S.A. 18A:26-10 or N.J.S.A. 18A:28-8 is discretionary rather than mandatory.

The prior precedent has been summed up as follows: "Generally, the Commissioner has imposed the full one-year suspension of a teaching certificate for leaving a district without adequate notice. (Citations omitted). In rare circumstances in which the Commissioner has seen fit to lessen the suspension period, it was for compelling reasons. (Citation omitted.)" Board of Education of Borough of Alpine v. Leonid Yuz, EDU 1116-06, Initial Decision (July 17, 2008), adopted, Commissioner of Education (September 23, 2008), http://lawlibrary.rutgers.edu/oal/search.shtml.

Respondent maintains that a suspension is not warranted in view of all of the circumstances. According to respondent, she was operating under the following impressions: (1) she was not aware of the need to provide sixty days' notice of resignation or the sanction potentially resulting from a failure to accomplish same; (2) her employment contract was silent as to a notice requirement for termination or resignation; (3) her employer had made it clear that she did not want individuals in the school who did not wish to work there and that she had many other teachers who

wanted to work there; and (4) no one advised respondent of the requirement of sixty days' notice.

Respondent's impressions as set forth in her brief are not consistent with the actual facts in this matter in several important respects. In addition, respondent fails to mention significant facts that were known to her. First, while the employment contract does not contain an explicit sixty-day notice requirement, there is a provision which expressly addresses termination of the agreement. That provision states that the contract can be terminated upon written agreement between the employee and the school. This means that respondent could have determined the proper procedure simply by reading the contract. Second, the teachers were advised during staff meetings that they should advise Ms. Gray if they were planning to leave Gray Charter School. There is no indication that Gray Charter School would unreasonably refuse to agree to a termination of the contract. Ms. Gray had told the staff that she did not want teachers who did not wish to be at Gray Charter School and that there were other individuals who wanted to work there. Respondent was well aware of this aspect of the situation, as she testified to it herself. Additionally, the teachers were advised of the sixty-day notice requirement at staff meetings.

Respondent blames Gray Charter School for closing and not accepting mail during July and the early part of August. According to respondent, if Gray Charter School had accepted mail during this period of time, a replacement could have been found in a timely manner. One difficulty with this argument is that respondent knew that Gray Charter School would be closed during this period of time. Another difficulty with this argument is that by the beginning of July, it was already too late to give sixty days' notice.

The testimony of Ms. Luke is entitled to little weight as her circumstances were quite different. Ms. Luke's position was substantially reduced with respect to time and compensation, and she was not offered a contract. Under the circumstances, Ms. Gray decided to accept Ms. Luke's resignation. Ms. Jackson's situation was more similar but

only serves to demonstrate that an effort to resign in a professional manner, even if less than perfect, would be acceptable to Ms. Gray.

The fact is that respondent had a signed contract with the Orange Board of Education on May 28, 2007. As of that point, respondent had the opportunity to handle the situation in a professional manner and comply with both N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8. Nonetheless, for her own selfish reasons, i.e., to keep her options open, respondent withheld this information from Ms. Gray. Moreover, respondent waited until July to send her letter of resignation. By that time, it was readily foreseeable that Gray Charter School would not receive the letter of resignation until the first day of school. To compound matters, respondent was aware that two other teachers were resigning from this small school at the same time. Under the circumstances, respondent's actions warrant the full one-year suspension permitted by N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8. Therefore, I **CONCLUDE** that respondent's teaching certificate should be suspended for a period of one year.

Accordingly, it is **ORDERED** that respondent's teaching certificate 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.

May 8, 2009
DATE

Richard McGill
RICHARD McGILL, ALJ

Date Received at Agency: 5/8/09

Mailed to Parties:

5/8/09
DATE

cml
OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

WITNESS LIST

For petitioner:

Tyarra Hunter
Pamela Luke
Khamisi Jackson

For respondent:

Verna A. Gray
Maddalena Nuzzo
Richard Salles

EXHIBIT LIST

J-1	Stipulation of Facts with attachments	Evidence
R-1	Photocopy of domestic return receipt stamped August 15, 2007, for Article Number ending 9255	Evidence
R-2	Photocopy of certified mail receipt dated July 17, 2007, and postal sales receipt	Evidence
R-3	Photocopy of postal mail tracking for item mailed on July 17, 2007	Evidence

R-4	Photocopy of U.S. Postal Service Delivery Confirmation Receipt stamped August 1, 2007, and postal sales receipt	Evidence
R-5	Photocopy of certified mail receipt stamped August 10, 2007, and postal sales receipt	Evidence
R-6	Photocopy of domestic return receipt stamped August 15, 2007, for Article Number ending 4880	Evidence
R-7	Letter dated June 14, 2006, from Pamela Luke to Ms. Gray	Evidence
R-8	Letter dated July 14, 2006, from Khamisi Jackson to Verna Gray	Evidence

208-09

#208-09

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

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her daughter, T.K., is not eligible for a free public education in the Township of West Orange school district. Petitioner contends that she formerly resided in Irvington prior to moving to West Orange in December 2006, and now operates a daycare center out of the Irvington address. The Board asserts that petitioner is not a resident of West Orange, and seeks tuition reimbursement in the amount of $14,068.30.

The ALJ found that: petitioner and her witness gave compelling and credible testimony, and presented evidence showing that T.K. was domiciled in West Orange with her mother during the period in question; petitioner owns a property in Irvington that is used as a business and is no longer her primary residence; and respondent's surveillance results were based on the fact that petitioner brought her child from West Orange to her Irvington daycare center in the early morning hours until her assistant arrived, then drove T.K. back to West Orange for the school day. The ALJ concluded that, based on a preponderance of credible evidence and testimony, petitioner met her burden to demonstrate that T.K. is entitled to a free public education in West Orange schools pursuant to *N.J.S.A.* 18A:38-1(a).

Upon a full and independent review, the Commissioner adopted the Initial Decision as the final decision in this matter, and ordered the Board to continue to admit T.K. into its public school system free of charge unless there is a change in circumstances that would alter her entitlement.

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 22, 2009

#208-09

OAL DKT. NO. EDU 1114-09
AGENCY DKT. NO. 345-11/08

Y.K., on behalf of minor child, T.K.,	:	
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. Exceptions of the respondent Board – filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her determination herein. Petitioner did not file reply exceptions.

The Board's exceptions charge that the Administrative Law Judge's (ALJ) analysis of the facts surrounding petitioner's claim of domicile in West Orange is perfunctory at best. Citing testimony it avers was adduced at hearing by its registrar, Frank Guarneri,[1] along with the reports of its residency investigators, the Board urges that the evidence clearly demonstrates that petitioner did not establish that she is domiciled in West Orange. Additionally, the Board maintains that it is incomprehensible that the ALJ could accept petitioner's incredible story. (Board's Exceptions at 1-2)

Upon full consideration of the record, and recognizing that the ALJ having had the opportunity to assess the credibility of the witnesses who appeared before her and having

[1] It is noted that the record did not contain transcripts of the hearing conducted at the OAL.

made findings of fact based on their testimony (the ALJ specifically notes that both petitioner and her witness, Trevor Layne, "gave compelling and credible testimony." Initial Decision at 4) – and the standard governing the Commissioner's review being clear and unequivocal[2] – the Commissioner concurs with the ALJ that Y.K. has sustained her burden of establishing that she was a domiciliary of West Orange during the period at issue here, thereby entitling her child, T.K., to a free public education in the District's schools.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein. The Board is hereby ordered to continue to admit T.K. into its public school system, free of charge, so long as there is no change in circumstances that would alter her entitlement.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 6/22/09

Date of Mailing: 6/24/09

[2] The Commissioner "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).

[3] 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 01114-09
AGENCY DKT. NO. 345-11/08

Y.K. o/b/o MINOR CHILD, T.K.,
Petitioner,
v.
TOWNSHIP OF WEST ORANGE BOARD OF EDUCATION, ESSEX COUNTY,
Respondent.

Y.K., petitioner, pro se

Stephen J. Christiano, Esq., for respondent

Record Closed: May 4, 2009 Decided: May 18, 2009

BEFORE **JOANN LASALA CANDIDO**, ALJ:

PROCEDURAL HISTORY

On November 18, 2008, petitioner, Y.K., filed a residency appeal on behalf of her child, T.K., a fourth grade student at Washington Elementary School, West Orange. On December 23, 2008, the Township of West Orange Board of Education (BOE or respondent) filed an Answer with the State Department of Education (DOE) seeking

reimbursement from petitioner for the costs of tuition incurred by the attendance of her minor child in the BOE's school district from March 28, 2008, to present. The BOE transmitted this matter to the Office of Administrative Law (OAL) on January 9, 2009, for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. A hearing was held on May 4, 2009, on which date the record closed.

FINDINGS OF FACT

Based upon a 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**:

Y.K. had resided at 29 Vine Avenue in Irvington prior to moving in with Trevor Layne in December 2006. Trevor Layne resides and owns the home at 79 Chestnut Street in West Orange.

Y.K. is the primary caretaker of T.K. Y.K. owns real estate at 29 Vine Avenue in Irvington. The first floor of the home is a daycare that is owned and operated by Y.K. The second floor is leased to a tenant on a yearly basis from January 1, 2009, to January 1, 2010. R-4. The address of Y.K. on the lease reflects the Chestnut Street address.

Y.K. operates the daycare on a twenty-four-hour per day basis. She usually arrives to open the daycare at approximately 5:00 a.m. Y.K. drives her silver van to and from the daycare. There is one other staff member and one "floater." Y.K. takes T.K. with her in the morning and drives her to school when the assistant arrives at the daycare.

Y.K. also provided a driver's license (P-2), 2008 tax return (P-1) and a Sprint billing statement (P-4) reflecting the West Orange address. The W-2's provided reflect her property address of Vine Avenue. P-1. Her homeowners' insurance and

automobile insurance, both with the same provider, reflect the Vine Avenue address. P-3. Layne confirmed Y.K. has been residing with him since December 2006. He also confirmed that he has had problems with someone taking his mail and has had to open a post office box and I so **FIND**.

Frank Guarneri, the district registrar and former investigator for the district, testified on behalf of respondent. He was advised by a student that T.K. did not live in West Orange. Guarneri's investigators submitted a report of the investigation commencing October 1, 2008. R-5. On October 1, 2, 3, 6 and 10, 2008, the investigators never observed T.K. exiting 79 Chestnut Street between the hours of 6:55 a.m. and 8:30 a.m. On October 7, 10, 14, 20 and 21, 2008, T.K. was observed being dropped off in a silver van on Whittlesey Avenue in West Orange (the back entrance of Washington Elementary School) between the hours of 7:30 a.m. and 8:30 a.m. Additionally, T.K. was observed exiting Vine Avenue on October 7, 8, 14, 15, 16, 17 and 22, 2008, between 7:00 a.m. and 7:35 a.m. and entering a silver van before being dropped off at Washington Elementary School. Lastly, the silver van was not observed at Chestnut Street on December 2, 10 and 15, 2008. It was observed on Vine Avenue on March 11, 2009. A different automobile was observed on April 28, 2009, picking up T.K. from Vine Avenue and dropping her off at Washington Elementary School.

The individual cost to the BOE for the period of time for T.K. from March 28, 2008, to the end of the school year (54 days) was $3,504.06. The individual cost to the BOE for the period of time for T.K. for the 2008-2009 school year (148 days) is $10,564.24. R-6. This was calculated upon the daily cost for one student at the rate of $64.89 and $71.38, respectively. The combined total cost for T.K. to attend school in West Orange for two-hundred-two school days is $14,068.30.

LEGAL ANALYSIS AND CONCLUSION

The issue in this appeal is not economic or family hardship as provided for in N.J.S.A. 18A:38-1(b), but whether T.K. was a domiciled student during the two-hundred-two school days she has attended Washington Elementary School in West Orange.

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including individuals who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is the domicile of the parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Bd. of Educ. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001). Thus, a child would routinely attend school in the district where his or her parents live.

Y.K. and Trevor Layne gave compelling and credible testimony. From the testimony provided and the evidence submitted, it has been shown that T.K. was domiciled in West Orange with Y.K. during the time she attended school from March 28, 2008, to present. Petitioner has demonstrated, by a preponderance of the credible evidence, that her child is entitled to a free public education in West Orange. To the contrary, the BOE has not proven that they were not domiciled there. N.J.A.C. 6A:22-3.1(a)(1) provides:

> 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 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.

Thus, domicile is what is regarded as an individual's true and permanent home. In re Jaffe, 74 N.J. 86, 90-91 (1977). 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). Intent is the touchstone of domicile, and the manifestation of a person's intent converts residence from a mere place in which a person lives to a domicile. Benny, supra, 20 N.J. at 251. A person may have multiple residences, but may have only one domicile at a time; as such, the residence may coincide with domicile, but does not alone determine domicile. Ibid.

Based upon the facts adduced, I **CONCLUDE** that T.K. was domiciled in West Orange during the two-hundred and two school days she has attended school in West Orange. Y.K. owns property in Irvington that is used as a business and no longer her primary residence. Both Y.K. and Guarneri's testimony confirm that the child was observed leaving the Irvington address in the morning over the course of several days and driven to West Orange to attend school. Based upon the credible evidence and testimony of Y.K. and Layne, I **CONCLUDE** that petitioner, who lives in West Orange, brought her child to the daycare in the early hours until the assistant arrived and then drove T.K. to West Orange in her silver van. Accordingly, T.K. is entitled to attend schools in West Orange and given a free public education there pursuant to N.J.S.A. 18A:38-1(a).

ORDER

Based on a preponderance of credible evidence, and the testimony adduced, I **CONCLUDE** petitioner met her burden to demonstrate T.K. is entitled to attend the West Orange schools free of charge under N.J.S.A. 18:38(b)(1). The Board's counterclaim for tuition is **DENIED** based on the conclusion reached.

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 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 18, 2009

DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency:

May 18, 2009

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Mailed to Parties: MAY 19 2009

ljb

APPENDIX

WITNESSES

For Petitioner:

Y.K.

Trevor Layne

For Respondent:

Frank Guarneri

EXHIBITS

For Petitioner:

P-1 2008 tax returns

P-2 Valid New Jersey Driver's License

P-3 Liberty Mutual automobile insurance cards

P-4 Sprint statement

For Respondent:

R-1 Board of Education letter dated April 20, 2009

R-2 Board of Education Notice of OAL hearing

R-3 Interrogatories

R-4 Lease Agreement

R-5 Residency investigation report dated October 27, 2008

R-6 Student printouts and tuition costs

#209-09

209-09

OAL DKT. NO. EDU 11972-07
AGENCY DKT NO. 300-10/07

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
TAHEERAH JACKSON, GRAY CHARTER	:	DECISION
SCHOOL, ESSEX COUNTY.	:	
	:	

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, a copy of which is being forwarded to the State Board of Examiners for the purpose of effectuating this decision.

IT IS SO ORDERED

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/22/09

Date of Mailing: 6/24/09

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11972-07

AGENCY DKT. NO. 300-10/07

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF TAHEERAH JACKSON, GRAY CHARTER SCHOOL, NEWARK, ESSEX COUNTY.

Cherie L. Adams, Esq., for Gray Charter School
(Adams Stern Gutierrez & Lattiboudere, attorneys)

Gregory T. Syrek, Esq., for Taheerah Jackson
(Bucceri and Pincus, attorneys)

John E. Croot, Esq., for the Hillside Board of Education
(Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: May 19, 2009 Decided: May 27, 2009

BEFORE **RICHARD McGILL**, ALJ:

At the request of Gray Charter School, the Commissioner of Education issued an order requiring Taheerah Jackson (respondent) to show cause why her teaching certificate should not be suspended for unprofessional conduct pursuant to N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8. The matter was transmitted to the Office of Administrative Law on November 20, 2007, for determination as a contested case. Participant status was granted to respondent's current employer, the Hillside Board of Education.

After the portion of the Order to Show Cause related to N.J.S.A. 18A:28-8 was dismissed, the parties agreed to an amicable resolution of the matter and submitted a written Settlement Agreement. Having reviewed record and the terms of settlement, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

May 27, 2009

DATE

RICHARD McGILL, ALJ

Date Received at Agency: 5-29-09

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAY 29, 2009

DATE

OFFICE OF ADMINISTRATIVE LAW

cml

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2009 MAY 19 P 4: 13

ADAMS STERN GUTIERREZ & LATTIBOUDERE, LLC
744 Broad Street, Suite 1600
Newark, NJ 07102

IN THE MATTER OF THE	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
SUSPENSION OF THE TEACHING	:	ADMINISTRATIVE LAW
CERTIFICATE OF TAHEERAH	:	OAL DKT. NO. EDU 11972-2007
		AGENCY REF. NO. 300-10/07
JACKSON, GRAY CHARTER SCHOOL,:		
NEWARK, NEW JERSEY	:	**SETTLEMENT AGREEMENT**

The parties to the above matter agree as follows; as set forth on the record before the Honorable Richard McGill, ALJ on February 9, 2009:

1. The facts are as stipulated in the joint stipulation of facts executed by counsel for the parties, with attachments.

2. Ms. Jackson failed to complete her duties as a teacher for the Gray Charter School for the 2007-08 school year, resulting in harm to the Gray Charter School.

3. Ms. Jackson did not have the consent of the Gray Charter School to cease duties as teacher for the 2007-08 school year; thus her conduct violated N.J.S.A. 18A:26-10. Ms. Jackson failed to provide adequate notice to Gray Charter of her intent to take another position.

4. The parties agree that a six month suspension of Ms. Jackson's teaching certificate as a result of her violation of N.J.S.A. 18A:16-10 is an appropriate penalty under the facts of this case.

5. The parties agree that entering into this agreement is in the public interest because it will avoid the need for a hearing and possible appeals if the matter was not settled. It also avoids unnecessary disruption of the Charter School and other school districts currently employing individuals who may otherwise be required to testify at a hearing.

6. Ms. Jackson acknowledges that she has been advised that she has the right to consult with an attorney or a representative of her own choosing prior to signing this Agreement, and has done so; and that she signs this Agreement as her own voluntary act and deed, and that she fully understands the duties and obligations enumerated hereunder.

7. The undersigned representative of the Charter School hereby acknowledges that she agrees to the terms and conditions of this Agreement and is authorized to sign this Agreement on behalf of the Charter School and bind it to its terms.

8. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties

9. Both parties acknowledge that their agreement is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approval is not given, this Agreement and all of the stipulations and acknowledgements, whether contained herein or attached hereto, shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement.

10. By entering this Agreement, each parties releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein.. The releases by each party apply to all claims resulting from anything which has happened up to now.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year aforesaid.

WITNESS:

Gregory T. Syrek, Esq.

Taheerah Jackson

WITNESS:

Gray Charter School

By:

ASG&L
ADAMS STERN GUTIERREZ & LATTIBOUDERE, LLC

744 Broad Street, Suite 1600
Newark, NJ 07102
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STATE OF N.J.
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2009 MAY 19 P 4:12

May 18, 2009

VIA REGULAR MAIL
Honorable Richard McGill, ALJ
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: In re Taheerah Jackson: OAL Docket No.: EDU 11972-07

Dear Judge McGill:

Enclosed please find a fully executed settlement agreement in the above referenced matter.

Please feel free to contact my office with any questions or concerns.

Respectfully submitted,

Cherie L Adams

CHERIE L. ADAMS

CLA/eem
Encl.
cc: Gregory T. Syrek, Esq.

ADAMS STERN GUTIERREZ & LATTIBOUDERE, LLC
744 Broad Street, Suite 1600
Newark, New Jersey 07102
(973) 735-2742
Attorneys for Petitioner, Gray Charter School

OFFICE OF ADMINISTRATIVE LAW

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF TAHEERAH JACKSON, GRAY CHARTER SCHOOL, NEWARK, NEW JERSEY	**OAL Docket No.: EDU 11972-07** **STIPULATION OF FACTS**

1. Miss Verna Gray is the Executive Director of the Gray Charter School and has held that position since 2000.

2. Ms. Taheerah Jackson is a duly certified Elementary School Teacher in the state of New Jersey. **(See copy of Ms. Jackson's teaching certificate attached hereto as "Exhibit A").**

3. Ms. Jackson began her employment with the Gray Charter School in October of 2006.

4. Ms. Jackson was under contract with Gray Charter for the 2007-2008 school year as a second grade teacher.

5. On or about May 9, 2007, Ms. Jackson executed an employment agreement for the 2007-2008 school year to commence in August of 2007 and end in June of 2008. **(See copy of Ms. Jackson's employment agreement attached hereto as "Exhibit B").**

6. Ms. Jackson drafted a letter of resignation which contained no date or signature but was sent via priority mail on August 11, 2007 to the Gray Charter School. **(See copy of letter and envelope attached hereto as "Exhibit C").**

7. Ms. Jackson failed to report to the Gray Charter School for duty on August 14, 2007 or any subsequent day during that school year.

The undersigned consent to this stipulation of facts for the purpose of hearing before the Honorable Richard McGill, ALJ.

By: Cherie L. Adams, Esq.
Counsel for Petitioner
Gray Charter School

Dated: 2/6/09

By: Gregory T. Syrek, Esq.
Counsel for Respondent
Taheerah Jackson

Dated: 2/9/09

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Ms. Verna Gray
Gray Charter School
55 Liberty Street
Newark, N.J. 07102

USA FIRST-CLASS FOREVER

Ms. Taheerah Jackson
1852 Manor Drive Apt. C
Union, N.J. 07083

Ms. Verna Gray
Gray Charter School
55 Liberty Street
Newark N.J. 07102

Ms. Verna Gray
Principal
The Gray Charter School

Dear Ms. Gray,

I want to thank you for giving me the opportunity to teach at The Gray Charter School. It has been a pleasure working with you and representing The Gray Charter School. At this current time I have accepted an offer with another school and have decided to tender my resignation. Therefore, I will not be returning for the 2007-2008 school year. This decision has nothing to do with the exceptional opportunity you have provided me here. You and the school have been more than fair with me, and I genuinely appreciate all your support. I wish The Gray Charter School, continued success, and I want to thank you for allowing me to be a part of your team.

Sincerely,

Ms. Taheerah Jackson

FULL-TIME EMPLO' E

Vikpas Jackson
2nd grade Teacher

EMPLOYMENT AGREEMENT

THIS EMPLOYMENT AGREEMENT ("Agreement") dated May 9, 200 7, is between The Gray Charter School, Inc., a New Jersey nonprofit corporation with an address located at 55 Liberty Street, Newark, New Jersey 07102 (the "School"), and the undersigned ("Employee").

WITNESSETH:

WHEREAS, the School operates a charter school in accordance with a charter granted by the New Jersey Department of Education pursuant to the New Jersey Charter School Program Act of 1995; and

WHEREAS, the School desires to employ Employee and Employee desires to be employed by the School;

NOW, THEREFORE, in exchange for the mutual promises herein, and for good and valuable consideration, the parties agree as follows:

1. EMPLOYMENT AND ACCEPTANCE

1.1 Employment by the School. Subject to the provisions of Section 1.2 below, the School hereby employs Employee for the Term of Employment (hereafter referred to as the "Term"), to render full-time services as a Teacher of the School as directed by the School's Executive Director and in accordance with Employee's job description (and including such other duties as may be assigned by the School), the stated policies of the School(each as attached hereto and made a part hereof), and the laws of the State of New Jersey, each as may be amended or modified during the Term. Employee hereby accepts such employment and shall render the services described above in accordance with such standards of professionalism and competence as are required by the School and are customary in the educational field.

1.2 Employment Conditions. The School's employment of Employee and Employee's eligibility to serve in the position described above shall be expressly subject to and contingent upon the School obtaining a satisfactory criminal background investigation report on Employee from the State of New Jersey and, if Employee is to be employed as an instructor or other position requiring certification, employee shall have achieved a passing score on the National Teachers Exam, Praxis or hold appropriate

1.3 Place and Time of Employment. Employee's principal place of employment shall be the School's address set forth above, or such other location to which the school may relocate. Employee's work day shall commence at 7:30 a.m. and end at 4:30 p.m. on each day during the Term. In addition, Employee shall attend all staff meetings called by the School's Executive Director, currently scheduled for the second and fourth Wednesday of each month beginning at 4:45 p.m. Unless otherwise permitted by the School's Executive Director, Employee shall remain on the School's premises at all times during the aforesaid work day.

2. TERM OF EMPLOYMENT. The term of Employee's employment under this Agreement shall commence on August 23, 2007 and shall end on June 30, 2008 (the "Initial School Year"), unless this Agreement is otherwise terminated as provided herein. This Agreement does not automatically renew itself. If the parties wish to enter into another one-year Agreement, they must do so in writing, signed by Employee and the School's Executive Director, which expressly states that this Agreement is being extended for an Additional School Year. The term of such Agreement for an Additional School Year (as hereinafter defined) shall commence on August 23 immediately following the end of the Initial School Year or any Additional School Year and end the following June 30 (each, an "Additional School Year"), unless this Agreement is otherwise terminated as provided herein. The Initial School Year and each Additional School Year are sometimes hereinafter referred to individually as a "School Year" and collectively as the "Term."

3. COMPENSATION

3.1 Salary. As compensation for all services to be rendered pursuant to this Agreement, the School shall pay Employee, during the Term, a base salary of Forty Two Thousand and 00/100 Dollars ($42,000.00) per annum (the "Annual Salary"), payable in accordance with the payroll policies of the School as from time to time in effect, less such deductions as shall be required to be withheld by applicable law and regulations. In the event Employee shall continue in the service of the School after the Initial School Year, Employee may become eligible for increases in compensation, subject to the School's evaluation of Employee's performance and the availability of adequate sources of funding for same and, in all events, further subject to the sole and absolute discretion of the School's Board of Trustees.

3.2 Participation in Employee Benefits. Employee shall be permitted during the Term, if and to the extent eligible, to participate in group life, hospitalization,

disability insurance plan, health program, pension plan, or similar employee benefit plans of the School as may be or become available to other employees considered by the School to be comparable employees, on the same general terms as such other employees.

3.3 Sick and Personal Days. Employee shall be entitled to seven (7) paid sick days and two (2) paid personal days during each School Year. The School does not grant pay in lieu of using Paid Days. Any Paid Days applicable to a School Year must be taken as time off for sickness or for a personal reason (as appropriate to the type of day used). Paid Days not taken during such School Year may not be carried over into the next School Year.

4. TERMINATION

4.1 Termination Upon Agreement. Upon the written agreement of both Employee and the School (which agreement may be made by the Executive Director), this agreement shall immediately terminate.

4.2 Termination Without Notice. The School may discharge the Employee immediately, if it determines, in its sole discretion, that there is cause to immediately terminate this agreement. "Cause" includes, but is not limited to:

(a) the failure to report for work for two (2) or more consecutive days without first notifying the School's Executive Director of Employee's intended absence;

(b) falsification of any information presented in connection with applying for employment, including, but not limited to, any description of the Employee's credentials for the position employed hereunder;

(c) engaging in disruptive conduct while students are present or otherwise while on the School's premises or on its business;

(d) theft;

(e) engaging in or using violent, threatening, intimidating, coercive, or abusive conduct or language;

(f) making or publishing false, vicious, or malicious statements;

(g) violating safety regulations applicable to the School (e.g., leaving students in a classroom or elsewhere on the School's premises without appropriate supervision);

(h) possessing, selling, manufacturing, distributing, or using controlled substances without a medical prescription;

(i) failing or neglecting to perform in a satisfactory fashion the duties required hereunder;

(j) engaging in unlawful conduct;

(k) insubordination, including a failure or refusal to comply with the oral or written policies or directives of the School's Board of Trustees or its Executive Director;

(l) misconduct in connection with the performance of the duties described herein;

(m) the material breach of any obligations under this Agreement;

(n) Employee's inability to perform his or her duties;

(o) Employee's failure to maintain appropriate credentials;

(p) the closing of the School be reason of surrender or termination of its charter;

(q) an employee being placed on probation and again violating any provision of the Policies and Procedures;

(r) engaging in any other conduct which, in the sole discretion of the School's Board of Trustees or Executive Director, would make Employee's continued employment by the School contrary to the best interests of the School.

The School has the sole discretion to determine what constitutes "cause" under this Agreement. The failure to immediately terminate an Employee for one of the reasons described above shall never be deemed a waiver of the School's right to do so.

4.3 Termination Upon Death. If Employee dies during the Term, this Agreement and all obligations of the School to pay the Annual Salary and provide the other benefits described herein shall terminate on the date of Employee's death.

5. MISCELLANEOUS

5.1 Notices. Any notice given pursuant to this Agreement must be in writing and delivered either personally, by facsimile, by express or overnight mail, or by certified mail, return receipt requested and postage prepaid. Notices sent by mail should be sent to the parties at their addresses as set forth in this Agreement, with any notices to the School addressed to the Executive Director. Notice given in one of the ways set forth above will be deemed given when it is actually delivered personally, sent by facsimile, or, if it is mailed, notice will be considered given three (3) days after the date of mailing.

5.2 Invalidity. If any part of this Agreement is determined to be prohibited or unenforceable for any reason, the rest of the Agreement shall continue to remain in full force.

5.3 Entire Agreement: Amendments. This Agreement contains the entire agreement between the parties, with regard to the hiring that is the subject of the Agreement, and supercedes any prior agreements, promises, representations, and understandings, written or oral, with respect thereto. This agreement may be changed only in writing signed by Employee and the School Executive Director, expressly stating that it is changing this Agreement. No matter what anyone may say, no other promises, statements of policy or procedure, or representations, oral or written, express or implied, are binding upon the School.

5.4 Governing Law. This agreement shall be governed by and construed in accordance with the laws of the State of New Jersey applicable to agreements made and to be performed entirely within New Jersey.

5.5 Consent to Jurisdiction. Any legal action, suit, or proceeding relating to this Agreement may be instituted only in a New Jersey court or other tribunal of competent jurisdiction in the State of New Jersey, and the parties consent to such jurisdiction.

5.6 References to "School." References in this Agreement to "School" for the purposes of exercising the School's rights and powers hereunder are to the Executive Director and/or the Board of Trustees.

6. **WHEN AGREEMENT EFFECTIVE.** This Agreement, even after being offered to Employee, becomes effective only when actually signed by both parties.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first above written.

THE GRAY CHARTER SCHOOL

By: Miss N. Gray

Print Name: _____

Title: Executive Director

Employee:

Taheerah Jackson

Print Name: Taheerah Jackson

Address: 228 Oak Street
South Amboy, N.J.
08879

Current address.

1852 Manor Drive
Apt C
Union, NJ 07083

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-3631
560502

640507

The State of New Jersey

Department of Education
State Board of Examiners

Standard Certificate

This is to certify that

TAHEERAH T JACKSON

Issued	Expires	County	District
05/07		65	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

Lucille E. Davy
Commissioner of Education

Robert R. Higgins
Acting Secretary, Board of Examiners

OAL DKT. NO. EDU 8026-09
AGENCY DKT. NO. 128-6/09

ROBERT NABEL,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter and the recommended Order of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner concurs with the ultimate conclusion of the Administrative Law Judge (ALJ) that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). However, the Commissioner cannot fully concur with the ALJ's analysis, and, consequently, modifies the OAL order as follows.

Unlike the ALJ, the Commissioner finds that petitioner *has* met the threshold standard of irreparable harm, notwithstanding the fact that participation in graduation exercises is a privilege rather than a right, since the opportunity to participate in such events cannot be regained once lost and 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.[1]

[1] The Commissioner is fully cognizant 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, 1996; *L.J., on behalf of minor child, S.J. and*

However, as set forth by the ALJ, applicants seeking extraordinary relief must additionally demonstrate that the legal right underlying their claim is settled, that they have a likelihood of success on the merits of their underlying appeal and, finally, that the balance of interests and equities under the circumstances rests in their favor. The Commissioner agrees with the ALJ that petitioner has not met the requisite burden in these respects, so that his application must be denied.[2]

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted with modification as set forth above. In that the present decision fully disposes of all issues in dispute between the parties, no further proceedings are necessary and this matter is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[3]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/24/09
Date of Mailing: 6/25/09

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.

[2] In so holding, the Commissioner notes that the parties did not address the balancing of equities, and declines to adopt the ALJ's finding that such balance favors petitioner and his family.

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

211-09E

OAL DKT. NO. EDU 7277-09
AGENCY DKT. NO. 129-6/09

S.P. on behalf of minor child, A.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision for both the motion for emergent relief and also the underlying controversy alleged in the petition. The matter is hereby dismissed, subject to compliance with the terms of the settlement, and the Clerk of the Office of Administrative Law is requested to return the file pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 6/25/09

Date of Mailing: 6/25/09



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07277-09

AGENCY DOCKET NO. 129-6/09

S.P. ON BEHALF OF MINOR CHILD A.P,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,

Respondent.

S.P. appearing pro se

Richard Salkin, Esq., appearing on behalf of respondent (Hackensack Board of Education)

Record Closed: June 25, 2009 Decided: June 25, 2009

BEFORE **WALTER M. BRASWELL**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on June 24, 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 hearing was conducted on June 25, 2009 at which time the parties prepared and submitted attached settlement indicating the terms thereof, which is attached and fully incorporated herein.

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.

June 25, 2009
DATE

Walter M. Braswell
WALTER M. BRASWELL, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____
ljb

214-09E

214-09

OAL DKT. NO. EDU 4964-09
AGENCY DKT. NO. 121-6/09

M&C INSURANCE AGENCY, INC., MC INTYRE RISK MANAGEMENT, LLC t/a THE MC INTYRE GROUP AND MC COLLUM INSURANCE ABSTRACT AND TITLE AGENCY, INC.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, MICHAEL AZZARA AND ALSTON-CALAF & ASSOCIATES,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

The record of this emergent matter – which included a digital recording of the hearing conducted at the Office of Administrative Law (OAL) on June 18, 2009 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.[1]

Upon such review, the Deputy Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33 – adopts the recommended order denying emergent relief as she concurs with the ALJ, for the reasons clearly articulated 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), most notably, the existence of irreparable harm, that they have a likelihood of prevailing on the underlying merits of the matter or that a balancing of the equities and interests of the parties inures to their favor.

[1] It is noted that petitioners filed exceptions to the ALJ's Order, and the Board of Education of the City of Camden, Alston-Calaf & Associates, and Mr. Azzara each filed reply exceptions. However, because the applicable rule – *N.J.A.C.* 1:1-12.6 – makes no provision for such exceptions, none of these submissions have been considered in the determination of this matter.

Accordingly, the instant application for emergent relief is hereby denied. This matter is being returned to the OAL for a plenary hearing on its merits as contemplated by the ALJ.

IT IS SO ORDERED.[2]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 6/29/09
Date of Mailing: 6/30/09

[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
9 Quakerbridge Plaza
Mercerville, New Jersey 08625
(609) 588-6542

Joseph F. Martone
Administrative Law Assignment Judge

VIA FAX TRANSMISSION

Lucille Davy
Commissioner
Department of Education
100 Riverview Plaza, 4th Floor
P.O. Box 500
Trenton, NJ 08625-0500 (fax: 609-292-4333)
Attn: M. Kathleen Duncan, Director of Controversies & Disputes

RE: M&C Insurance Agency, Inc., McIntyre Risk Management, LLC t/a The McIntyre Group and McCollum Insurance Abstract & Title Agency, Inc. v. Board of Education of the City of Camden, Michael Azzara and Alston-Calaf & Associates
OAL DKT. NO. EDU 4964-09

Dear Commissioner Davy:

Enclosed please find a copy of an order entered regarding an application for emergency relief in the above-captioned matter. Pursuant to N.J.A.C. 1:1-12.6(j), this order will become effective forty-five (45) days from the date of its entry unless, for good cause shown, under N.J.A.C. 1:1-18.8(e), the time period is extended by the joint action of the Director of the Office of Administrative Law and the agency head.

Very truly yours,

Joseph F. Martone
Administrative Law Judge

mph
c: Joseph F. Betley, Esq. (via e-mail)
Matthew Behr, Esq. (via e-mail)
Roy J. Evans, Esq. (via e-mail)
David P. Heim Esq. (via e-mail)
Clerk, OAL Scheduling



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER

DENYING EMERGENT RELIEF

OAL DKT. NO. EDU 4964-09

AGENCY DKT. NO. 121-6/09

M&C INSURANCE AGENCY, INC.,
MC INTYRE RISK MANAGEMENT, LLC
t/a THE MC INTYRE GROUP AND
MC COLLUM INSURANCE ABSTRACT
AND TITLE AGENCY, INC.

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY
OF CAMDEN, MIDDLESEX COUNTY,
MICHAEL AZZARA AND ALSTON-CALAF &
ASSOCIATES,

Respondents.

Joseph F. Betley, Esq., for petitioners (Capehart & Scatchard, attorneys)

Matthew Behr, Esq., for respondent Board of Education (Marshall, Dennehey, Warner, Coleman & Goggin, attorneys)

Roy J. Evans, Esq., for respondent Michael Azzara (Schenck, Price, Smith & King, attorneys)

David P. Heim, Esq., for respondent Alston & Calaf & Associates (Bochetto & Lentz, attorneys)

BEFORE **JOSEPH F. MARTONE**, ALJ:

PROCEDURAL HISTORY

The petitioners in this case filed a verified complaint in lieu of prerogative writs in the Superior Court of New Jersey, Camden County, on May 27, 2009, seeking an order to show cause and temporary restraints and other relief. By an Order entered on June 9, 2009, in that case, the Honorable Francis J. Orlando, Jr., A.J.S.C., denied the motion for temporary restraints without prejudice and transferred the case to the Department of Education for exhaustion of administrative remedies. After its transfer, the Commissioner of Education, transmitted this case to the Office of Administrative Law (OAL) on June 17, 2009, for hearing as a contested case. The Commissioner also determined that the application for emergent relief should be heard and decided by the OAL. N.J.A.C. 1:1-12.6(c). The emergent relief application was scheduled for hearing on June 18, 2009, and at the conclusion of oral argument the record closed with respect to this application.

FACTUAL DISCUSSION

For purposes of deciding the application for emergent relief, the following facts are determined to be undisputed.

On January 29, 2009, the Board of Education issued a Request for Qualifications-Insurance Broker for the position of insurance broker for the school district. The deadline for submitting qualifications was February 26, 2009, and after the submissions were received, a committee of the Board interviewed insurance broker candidates. On May 25, 2009, the Board Finance Committee recommended the

appointment of Alston Calaf & Associates as the insurance broker, and proposed Resolution No. 24 to award the contract was considered by the Board. The Board failed to pass the resolution to appoint the insurance broker as a result of a four-four tie with one abstention, with the result that no action was taken by the Board to fill the position. Following the failed resolution, Michael Azzara, the State Monitor appointed Alston Calaf as the insurance broker pursuant to N.J.S.A. 18A:7A-55(b)(4) in the absence of Board action.

LEGAL DISCUSSION AND ANALYSIS

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.

Other provisions of the same regulation provide that upon determining an application for emergency relief, I am required, forthwith, to issue to the parties, the agency head and the Clerk a written order on the application, and the Clerk is required to file with the agency head any papers in support of or opposition to the application which were not previously filed with the agency and a sound recording of the oral argument on the application. The agency head's review of the judge's order is required to be completed without undue delay but no later than 45 days from entry of the judge's order, unless extended. The review by an agency head shall not delay the scheduling or conduct of hearings in the OAL, unless the presiding judge determines that a postponement is necessary for good cause.

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

As to the first requirement that there be a showing of irreparable harm, counsel for the petitioners represented that the petitioners were not seeking monetary damages

in this case, but only that the respondents engage in a fair and equitable bidding process in awarding this contract. The petitioners' contention is that the bidding process and procedure used by the respondent Board failed to comply with the requirements of the law authorizing the use of "competitive contracting" pursuant to N.J.S.A. 18A:18A-4.3 and failed to meet the other requirements for pursuing bids pursuant to this provision. In addition, the petitioners contend that the respondent Board violated N.J.A.C. 5:34-2.3 by failing to file a certificate with the Board complying with this section. There were no proofs submitted one way or the other concerning this contention. Finally, the petitioners contend that because the respondent Board did not declare its intention to award the contract pursuant to the extraordinary unspecifiable services exception found at N.J.S.A.18A:18A-5(a)(2) and (10) at the time it was seeking bids, it cannot at the time of awarding the contract declare its intention to follow this exception. Petitioners contend that the irreparable harm being suffered by petitioners and the public is the unfairness of the bidding process and the violations of the law.

However, contracts involving insurance, including the purchase of insurance coverage and consultant services, are clearly a statutory exception to the bidding requirements pursuant to the extraordinary unspecifiable services exception found at N.J.S.A.18A:18A-5(a)(2) and (10). The Board's failed resolution #24, attached to the Verified Complaint as Exhibit B, specifically indicated that the contract was being awarded pursuant to N.J.S.A.18A:18A-5(a)(2) and (10).

As I see it, the only way that I will be able to determine whether the award of this contract was unfair or in violation of the law as alleged by the petitioners is by making a determination on the merits. I also have difficulty accepting counsel's representation that the petitioners are only seeking fairness and are not concerned about the income losses they are suffering as a result of the award of the contract to another bidder.

Even if I accept petitioners' arguments that it is only seeking fairness, I **FIND** that the remedy is adequate. If after a full hearing and determination on the merits, it is found that the respondent Board of Education failed to comply with the bidding requirements of the Public Contracts Law, one of the available remedies would be to

order a rebidding in this matter. In any event, in the absence of a full determination as to the validity of the bidding process, I **FIND** that the petitioners have failed to establish the requirement of irreparable harm in this case.

In addition, it has been held, in a different context, that a contractor that failed to submit the lowest bid is not entitled to injunctive relief because there is no showing of irreparable harm if the contractor is unable to prove that it submitted the lowest bid. Thomas P. Carney, Inc. v. Franklin Tp. Bd. of Educ., 365 N.J. Super. 509 (Law Div. 2003).

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 each school district is obligated to comply with the New Jersey Public School Contracts Law, N.J.S.A. 18A:18A-1 to -59. However, the rights underlying the petitioners' claims of violation of the Public School Contracts Law by the respondents is unclear and can only be determined by a full evidentiary hearing or a motion addressing all factual and legal issues. In the absence of such a determination, I **FIND** that petitioners have failed to establish the right to relief in the absence of a full evidentiary hearing or motion showing that the action of respondents violated the Public School Contracts Law.

Requirement to show reasonable probability of prevailing on the merits

The most difficult requirement for the moving party to establish in order to show entitlement to emergency relief is this factor. In order to prevail on their application for emergency relief, the parties requesting the relief must make a preliminary showing of reasonable probability of ultimate success on the merits. If the point of emergency relief is to maintain the parties in substantially the same condition until the final decision as when this matter began, it must be established by the moving parties that they will probably win on the merits. Petitioners must show that respondents' actions in this case

are void as violative of the New Jersey Public School Contracts Law, N.J.S.A. 18A:18A-1 to -59.

I have previously pointed out that contracts involving insurance, including the purchase of insurance coverage and consultant services, are clearly a statutory exception to the bidding requirements pursuant to the extraordinary unspecifiable services exception found at N.J.S.A.18A:18A-5(a)(2) and (10). Proposed resolution #24 of the Board of Education, attached to the Verified Complaint as Exhibit B, specifically indicated that the contract was being awarded pursuant to N.J.S.A.18A:18A-5(a)(2) and (10). Thus, all of the other allegations of violations of the competitive bidding requirements made by the petitioners appear to be irrelevant.

It is because of this, I **FIND** that I am uncertain as to which parties are likely to prevail on the merits in the absence of a full examination of the law and facts. Therefore, I **FIND** that petitioners have failed to show 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. It appears that any hardship which may result will fall upon the respondent school district because the entry of temporary restraints may result in interfering with its ability to obtain insurance coverage, and I so **FIND.**

Conclusion

Based upon the foregoing, I have found that for purposes of deciding this application for emergency relief, petitioners have failed to establish the existence of irreparable harm, that petitioners' have failed to establish that they are likely to prevail on the merits, and that the relative hardship will fall on the respondent school district. In

view of the fact that petitioners have failed to establish these requirements for emergency relief, I **CONCLUDE** that petitioners' request should be **DENIED**.

ORDER

For the reasons stated above, I **ORDER** that petitioners' request for emergency relief is **DENIED**. This case shall be scheduled for further proceedings in order to resolve all legal and factual disputes.

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.

June 18, 2009
DATE

JOSEPH F. MARTONE, ALJ

mph

218-09

OAL DKT. NO. EDU 9753-08
AGENCY DKT. NO. 202-7/08

DEBORAH A. ROBINSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The advisement of petitioner's failure to appear transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – together with the record of this matter, including numerous unanswered requests by OAL and petitioner's counsel for confirmation by petitioner that her appeal should be deemed withdrawn in light of her resignation from employment with the respondent's school district and re-employment elsewhere – have been reviewed. There being no explanation filed by petitioner for her failure to reply to inquiries or appear at the scheduled hearing, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 7/02/09

Date of Mailing: 7/02/09

* 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

FAILURE TO APPEAR

OAL DKT. NO.: EDU 9753-08

DATE OF FAILURE TO APPEAR: 5/29/09

PARTY OR PARTIES WHO DID NOT APPEAR Deborah Robinson

6/10/09
(Date)

Sharon Jeffers
Sharon Jeffers, Secretary

New Jersey is an Equal Opportunity Employer

219-09

L.E.H., on behalf of minor child, Z.H.,	:	
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 daughter, Z.H., a student in respondent's school district. The respondent Board contends that Z.H. is not eligible for a free public education in the district based on information showing that petitioner is not a resident of West Orange. The petitioner failed to appear for a scheduled hearing on May 15, 2009. The Board seeks reimbursal of tuition for the period of Z.H.'s alleged ineligible attendance.

The ALJ found that the petitioner failed to appear and prosecute her appeal of the Board's residency determination; therefore, the ALJ concluded that the Board's determination that Z.H. was not domiciled in West Orange during the 2008-2009 school year should be upheld and the petition dismissed. Furthermore, the ALJ concluded that the Board has demonstrated entitlement to tuition reimbursement in the amount of $10,643, plus $78.84 per day for each day Z.H. continues to attend West Orange schools subsequent to May 15, 2009.

Upon independent review and consideration of the record, the Commissioner found that further proceedings are necessary to determine Z.H.'s eligibility for continued attendance in the Board's district. Accordingly, the matter was remanded to the OAL with a reminder to petitioner that she is expected to comply with applicable procedural rules and bears the burden of proving Z.H.'s entitlement pursuant to *N.J.S.A.* 18A:38-1.

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 2, 2009

219-09

OAL DKT. NO. EDU 3787-09
AGENCY DKT. NO. 41-3/09

L.E.H., on behalf of minor child, Z.H.,	:	
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 petitioner's exceptions and the Board of Education's reply pursuant to *N.J.A.C.* 1:1-18.4.

In her exceptions, petitioner contends that she never received notice of the OAL hearing at which she failed to appear. She additionally asks the Commissioner to reject the OAL's order for payment of tuition and allow Z.H. to finish school in respondent's district – which she has long attended – in light of the fact that she and her family lost their home due to poverty and were forced to move in with family and friends, causing Z.H. to suffer greatly. (Petitioner's Exceptions at 1-2)

In reply, the Board urges adoption of the Initial Decision, contending that it would be unfair to the Board and district taxpayers to remand this matter for hearing – thereby allowing Z.H. to continue attending school in the district – when petitioner has totally failed to prosecute her claim, as evidenced by her nonappearance at scheduled hearings before both the Board and the OAL. The Board further observes that: 1) petitioner received the Initial Decision, which was

mailed to the same address at which she claims not to have received the OAL hearing notice; and 2) according to the Board's information, petitioner has been living in Orange for at least six months and does not even allege she remains domiciled in West Orange. (Board's Reply at 1)

Upon review, because this matter pertains to Z.H.'s ability to obtain the free public education to which she is entitled by law as a New Jersey resident, the Commissioner cannot ignore petitioner's assertion – however incredible the Board may believe it to be – that she did not receive notice of the scheduled OAL hearing, nor the suggestion that Z.H. may be the child of a homeless family and, consequently, entitled to attend school in the Board's district pursuant to *N.J.S.A.* 18A:38-1(f) and *N.J.A.C.* 6A:17-2 (Education of Homeless Children). The Commissioner finds, therefore, that further proceedings are necessary to determine Z.H.'s eligibility for continued attendance in the Board's district.[1]

Accordingly, the Initial Decision is rejected and this matter is remanded to the OAL for further proceedings as set forth above. Petitioner is reminded, however, that in pursuing her claims, she is expected to comply with applicable procedural rules and bears the burden of proving Z.H.'s entitlement pursuant to *N.J.S.A.* 18A:38-1.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 7/02/09
Date of Mailing: 7/02/09

[1] Any dispute concerning the determination of homelessness must first be brought to the Executive County Superintendent of Schools pursuant to *N.J.A.C.* 6A:17-2.8.

[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. NO. EDU 3787-09
AGENCY REF. NO. 43-3/09

L.E.H., ON BEHALF OF MINOR CHILD, Z.H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWHSHIP OF WEST ORANGE, ESSEX COUNTY

Respondent.

L.E.H on behalf of **Z.H.**, pro se (no appearance)

Stephen Christiano, Esq., for respondent

Record Closed: May 15, 2009 Decided: May 19, 2009

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals the determination of the respondent, West Orange Board of Education ("the Board"), that she is not domiciled in its district. The Board seeks to remove petitioner's child, Z.H., from its schools pursuant to N.J.S.A. 18A:38-1(b)(2), and demands tuition reimbursement.

Petitioner filed an appeal with the Department of Education ("the Department") on March 4, 2009, and subsequently filed an additional draft of that appeal with the Department on March 5, 2009. The Board filed an answer on

April 1, 2009. The matter was transmitted to the Office of Administrative Law as a contested case on April 7, 2009. A hearing was scheduled for May 15, 2009, and a Notice of Plenary Hearing, dated April 17, 2009, was sent to the parties advising them of the hearing date. The Notice of Plenary Hearing was sent to petitioner at the address listed in her pro se appeal. Counsel for the Board appeared on May 15, 2009. Petitioner failed to appear.

FINDINGS OF FACT

At hearing, the Board offered a packet of documentary evidence (R-1), and the testimony of its Registrar, Frank Guarneri, in support of its claim to tuition reimbursement. Based on the documentary and testimonial evidence presented to me, I **FIND** the following **FACTS**:

1. Commencing September 3, 2008, Z.H. has attended sixth grade in the West Orange schools.

2. The Board has determined that petitioner is not domiciled in West Orange, and has not been during the entirety of the 2008-2009 school year.

3. As of May 15, 2009, Z.H. had attended school during the 2008-2009 school year for 135 days.

4. The annual per pupil cost for a sixth grade student is $14,192.

5. The daily tuition rate for a sixth grade student is $78.84. This is calculated by dividing the per pupil cost by 180.

6. As of May 15, 2009 the amount of tuition owed to the Board for Z.H.'s period of ineligible attendance is $10,643.40.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Public schools are required to provide a free education to individuals between the ages of five and twenty years who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is that of her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001).

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the Board's decision before the Commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the Commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this section.

Petitioner has failed to appear and prosecute her appeal of the Board's decision. She has failed to advise me of the reason for the nonappearance. Therefore, I **CONCLUDE** that the determination of the Board that Z.H. was not domiciled in West Orange during the 2008-2009 school year should be upheld and the petition of appeal dismissed pursuant to N.J.A.C. 1:1-14.4.

The Board asserts that it is entitled to be reimbursed for tuition for the period of Z.H.'s ineligible enrollment in its schools. Where, as here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a), which provides as follows:

> If in the judgment of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

N.J.S.A. 18A: 38-1(b) likewise requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

In accordance with N.J.A.C. 1:1-14.4(d), I accepted ex parte proofs from the Board relative to its tuition claim. The Board's proofs are convincing and its calculations are consistent with the requirements of N.J.S.A. 18A:38-1(b) and N.J.A.C. 6A:22-6.2(a). Therefore, I **CONCLUDE** that the Board has demonstrated an entitlement to tuition reimbursement in the amount of $10,643, for the period from September 3, 2008 through May 15, 2009, plus $78.84 per day for each day that Z.H. continues to attend the West Orange public schools subsequent to May 15, 2009.

ORDER

Based on the foregoing, I **ORDER** that the petition of appeal be **DISMISSED WITH PREJUDICE**, and that Z.H. be immediately removed from the West Orange public schools. I further **ORDER** that the Board's application for tuition reimbursement is **GRANTED** in the amount of $10,643 plus $78.84 per day for each day that Z.H. attends the West Orange public schools subsequent to May 15, 2009.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 19, 2009

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 5/19/09

Mailed to Parties:

MAY 20 2009

DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

List of Witnesses

For Petitioner

None

For Respondent

Frank Guarneri

Exhibits

For Petitioner

None

For Respondent

R-1 Packet of information from Board of Education

221-09

STRENGTHEN OUR SISTERS, ON BEHALF OF ITS RESIDENTS AND THEIR SCHOOL-AGE CHILDREN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner, Strengthen Our Sisters Domestic Violence Shelter (SOS), a not-for-profit organization that houses the children of its residents and also owns and operates Omni Day School (Omni), which provides before- and after-school care to such children, sought an order compelling the West Milford Board of Education to continue providing transportation – as it had done from approximately 2001 through the 2007-08 school year – between Omni and the Marshall Hill Elementary School (Marshall Hill), which some of SOS's students attend.

The ALJ recommended dismissal of the petition, finding that the Board's discontinuance of transportation between Marshall Hill and Omni was the result of its periodic rotation of bus routes, examination of which led to changes in the interest of cost efficiency, logistics and safety. The ALJ concluded that petitioner had not met its burden of proof in demonstrating that the Board's action was arbitrary and capricious.

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.

July 8, 2009

OAL DKT. NO. EDU 11097-08
AGENCY DKT. NO. 235-8/08

STRENGTHEN OUR SISTERS, ON BEHALF OF ITS RESIDENTS AND THEIR SCHOOL-AGE CHILDREN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, together with petitioner's exceptions and the Board of Education's reply pursuant to *N.J.A.C.* 1:1-18.4.[1]

In its exceptions, petitioner first urges the Commissioner to make several additional findings of fact. (Petitioner's Exceptions at 1-4, incorporating the recitation of its post-hearing summation at 2-7[2]) Petitioner then contends that the Administrative Law Judge (ALJ) applied the wrong standard in deciding this matter, basing her decision on the Board's lack

[1] It is here noted that the record of this matter did not include a transcript of proceedings, and that petitioner submitted, along with its exceptions to the Initial Decision and without objection by the Board, an unofficial copy of the sound recording of the OAL hearing obtained pursuant to *N.J.A.C.* 1:1-14.11(b); that recording, however, was not considered in rendering the within decision, since an unofficial copy of the sound recording of OAL proceedings may not be substituted for the official hearing transcript, and will not be considered if so submitted. *In the Matter of the Tenure Hearing of Ralph McCullough, School District of the City of Trenton, Mercer County*, State Board Dkt. No. 12-06, decided by the State Board of Education, October 4, 2006 and December 6, 2006.

[2] Petitioner's proposed findings are embodied in the post-hearing summation (PHS) as follows: Proposed Finding No. 1 = PHS at 2; Proposed Finding No. 2 = PHS at 4; Proposed Finding No. 3 = PHS at 4; Proposed Finding No. 4 = PHS at 5; Proposed Finding No. 5 = PHS at 6; Proposed Finding No. 6 = PHS at 5-6; Proposed Finding No. 7 = PHS at 1-2; Proposed Finding No. 8 = PHS at 3; Proposed Finding No. 9a = Petitioner's Exhibit 8 (Initial Decision at 3); Proposed Finding No. 10 = PHS at 6; and Proposed Finding No. 11 (misnumbered as No. 12) = PHS at 7. Proposed finding No. 9b does not appear in the PHS and is attributed, on exception, to the testimony of Steven Cea.

of bad faith rather than on an examination of the rational basis for the Board's actions; according to petitioner, had the ALJ analyzed the facts under the proper standard, she would have found the Board's actions to have been patently arbitrary and unreasonable. (*Id.* at 4-5, incorporating the arguments of petitioner's post-hearing summation at 8) Finally, petitioner argues that the ALJ erred in failing to consider the public policy embodied in federal law governing the provision of educational services to children of homeless parents,[3] ignoring the fact that the Board is denying petitioner's children the same accommodation as is extended to others contrary to the law's requirement for equal access and comparable services. (*Id.* at 5-7, incorporating the arguments of petitioner's post-hearing summation at 8-9) Petitioner also renews its request for alternative relief, asking the Commissioner to direct – in the absence of an order directing provision of the requested transportation – that petitioner's children be transferred from Marshall Hill Elementary School (Marshall Hill) to Westbrook Elementary School (Westbrook), from which the Board *does* provide transportation to and from the Omni Day School (Omni). (*Id.* at 7-8, incorporating the request of petitioner's post-hearing summation at 7-8; Petition of Appeal at 4)

In reply, the Board counters that petitioner's proposed additional findings of fact are largely taken out of context and are more in the nature of argument, addressing each in turn with discussions recasting and reiterating the pertinent arguments of its own post-hearing summation. (Board's Reply at 1-6, incorporating post-hearing summation, *passim*) The Board further contends that the ALJ did, in fact, apply the correct standard in deciding this matter – as evidenced by the Initial Decision at 7–9 – and that petitioner is "simply mincing words" in attempting to focus on the ALJ's use of the words "bad faith" in a context where the phrase clearly refers to willful and unreasoning action without regard to circumstances – the very definition of "arbitrary and capricious" suggested by petitioner (*Id.* at 7-8); it additionally

[3] Petitioner references the McKinney-Vento Act, 42 *U.S.C.* §11431 *et seq.*,

reiterates its own prior arguments in support of the conclusions reached by the ALJ. (*Id.* at 8-12, incorporating the arguments of the Board's post-hearing summation at 13-18) In response to petitioner's contentions based on federal law governing educational services for children of homeless parents, the Board reiterates that there is no private right of action under that law, and that – even allowing for consideration of its substantive intent – petitioner here is asking for preferential – not comparable – transportation services for the students residing at its facility. (*Id.* at 13-14, incorporating the arguments of the Board's post-hearing summation at 21-22) Finally, the Board reiterates that – notwithstanding its agreement with the ALJ's conclusions on the merits – this matter is still subject to dismissal for failure to file within 90 days as required by *N.J.A.C.* 6A:3-1.10. (*Id.* at 14-15, referencing prior proceedings as noted in the Initial Decision at 2, note 1) With respect to petitioner's request for alternative relief, the Board notes that Steven Cea – who was *petitioner's* witness – testified that: 1) attendance of petitioner's resident children at Marshall Hill rather than Westbrook stems from a decision made many years ago;[4] 2) when in the past the Board proposed that petitioner's children be reassigned to Westbrook, petitioner's administrators rejected this suggestion, maintaining that they preferred to have the children remain at Marshall Hill; and 3) the district's student population has so changed over the ensuing years that it would not now be feasible to reassign petitioner's students without creating a disparity in the populations of the two schools and requiring re-allocation and transfer of teachers. (*Id.* at 6 and 14, incorporating the arguments of the Board's post-hearing summation at 16)

Upon review, the Commissioner is unpersuaded by petitioner's exceptions and concurs with the recommended findings and conclusions of the ALJ.

[4] The Board's post-hearing summation (at 16) more specifically indicates, based on Cea's testimony, that petitioner's students have attended Marshall Hill since 1993.

Initially, the Commissioner finds that, for the reasons fully set forth in the ALJ's order of November 17, 2008, it would be inappropriate to dismiss this matter solely on the Board's claim of untimely filing. The Commissioner further finds that – contrary to petitioner's contention – the Initial Decision sufficiently incorporates the material facts necessary to decide this matter,[5] and additionally applies the appropriate standard of review, plainly intending the statement that the Board did not act "in bad faith" to mean that the Board's actions were considered, reasonable and within the bounds of its lawful discretion – not merely that such actions were taken without malice or improper motive.

Having so found, the Commissioner must also concur with the ALJ that the Board's discontinuance of transportation between Marshall Hill and Omni as of the 2008-09 school year cannot be held to have been arbitrary, capricious or violative of any law. To the contrary, the decision to discontinue such transportation plainly arose out of the district's customary five-year bus route rotation, after due consideration of costs, logistics and safety factors. The record is clear that the Board did not single out petitioner for disparate treatment, and that it applied to Omni the same established criteria as were applied to all other day care centers within the district – denying all requests that did not meet these criteria and making exceptions for "out-of-zone" centers only if a scheduled bus passed them on its regular route. Nor did the Board deny transportation to children of homeless families or prevent them from having equal access to district services; all of the students in question are being transported between the shelter and school, and they are being treated like every other student in the district with respect to transportation between school and day care.

[5] Although it was unnecessary to do so in this instance, the Commissioner could not in any event make additional findings of fact based on testimony for which no official transcript was provided. *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987) Moreover, the Commissioner notes that petitioner's proposed findings – to the extent that they do not constitute argument and conclusion rather than facts, as correctly observed by the Board – are largely reflected in the ALJ's summations of testimony at 3-6.

Under these circumstances, it is of no moment that petitioner believes the Board could and should have made a different determination, concluding that the cost efficiencies to be achieved by eliminating transportation from Marshall Hill to Omni were relatively insignificant[6] and that an exception could be made to the Board's policy without substantial difficulty, danger or expense simply by altering one of its regular routes to pass by Omni so as to drop off and pick up its students. Although petitioner does not agree with the Board's decision, the fact remains that such decision was reasoned, in accord with uniformly applied Board policy, and consistent with law; indeed, had the Board made the exception requested by petitioner, it would have exposed itself to allegations of arbitrariness and disparate treatment from the other centers denied transportation under the policy and established a dangerous precedent with respect to any such future requests. Nor can the Commissioner find that the Board was unreasonable in rejecting the alternative relief requested by petitioner during the present proceeding, given the difficulties changing school assignments would pose as related by petitioner's own witness.

Accordingly, for the reasons expressed therein and above, the Initial Decision of the OAL is adopted as the final decision in this matter, and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 7/08/09

Date of Mailing: 7/09/09

[6] There is no basis for petitioner's contention that the Board could recover even these minimal costs from the districts of residence of petitioner's students.

[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 11097-08

AGENCY DKT. NO.235-8/08

STRENGTHEN OUR SISTERS,

Petitioner,

v.

WEST MILFORD BOARD OF EDUCATION,

Respondent.

Michaelene Loughlin, Esq., for petitioner (Loughlin and Latimer, attorneys)

Donald T. Okner, Esq., for respondent (Dwyer Connell and Lisbona, attorneys)

Record Closed: April 22, 2009 Decided: May 6, 2009

BEFORE **JOANN LASALA CANDIDO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Strengthen Our Sisters Domestic Violence Shelter (SOS), a not-for-profit organization, owns and operates a domestic violence shelter and Omni Day School (Omni), a child care center, in West Milford, New Jersey. Petitioner filed a petition seeking an order compelling respondent, West Milford Board of Education (Board) to provide transportation to all school-age homeless students residing at SOS between Marshall Hill Elementary School (Marshall Hill) and Omni Day School (Omni).

On August 25, 2008, in lieu of an answer, the Board filed a Motion to Dismiss for failure to advance a cause of action pursuant to N.J.A.C. 6A:3-1.10. The matter was transmitted to the Office of Administrative Law (OAL) on September 9, 2008. On October 15, 2008, the undersigned heard oral argument on the motion, which was denied.

Respondent argued that SOS lacks standing in these proceedings, and therefore, on January 13, 2009, SOS sought to amend the complaint to include itself as a party petitioner, in its own right, in bringing this proceeding. SOS's motion to amend is a result of respondent's position that it lacks standing. Respondent opposed SOS's motion on the grounds that: (1) the proposed amended petition is time-barred, (2) there is no private right of action under the Federal McKinney-Vento Act, 42 U.S.C.A. § 11431 to -§ 11435, and (3) an amended petition will require additional discovery and unnecessary expense to respondent. The undersigned denied respondent's Motion to Dismiss and found SOS to have standing.

Omni provides before and after-school programs, free of charge, for children of the victims of domestic violence who reside at SOS. SOS transports the children to Omni at approximately 6:30 a.m. for before-school care and picks the children up at Omni, which also provides after-school care at approximately 6:30 p.m. For the past seven years, respondent had been providing transportation for students who reside in SOS between the Marshall Hill Elementary School and Omni. On or about April or May 2008, the Board notified Omni that it would no longer provide this transportation,[1] citing rising fuel costs and the small number of children who travel each day to after-school care at Omni. The Board also made the same decision to four other busing requests or other locations in addition to this one. SOS is within the Marshall Hill zone and Omni is within the Westbrook zone.

[1] The Board contends that it orally advised SOS in August 2007 that there would be no transportation services between Marshall Hill and Omni for the 2008-09 school years. However, Ms. Spadaccini, director at Omni denies receiving such notice and the Board provides no documentation supporting its claim. The undersigned entered an Order dated November 17, 2008, finding petitioner's claim to be timely filed. This issue need not be addressed again in this decision.

Currently there are two school-age children from SOS and no children from the community attending Omni. There are nine children from SOS attending Marshall Hill School. Under the new busing routes, the Board will transport children to Omni only from the following schools: Westbrook, Paradise Knolls and Queen of Peace. Further, the Board will transport children from Marshall Hill to the following child care centers: Agape, P.A.L., Children's Castle, and Hillcrest. On or about August 1, 2008, SOS filed a petition seeking an order compelling the Board to provide transportation to and from school to all school-age students residing at SOS between Marshall Hill and Omni.

The matter was heard on March 27, 2009. Post-hearing submissions were received on April 22, 2009, at which time the record closed.

TESTIMONY

The following summarizes the testimony of the witnesses relevant to the issues in this matter:

Ellen Kenny, the director of shelter operations at SOS, testified that among her duties she provides child care at Omni. Kenny described the shelter property as consisting of four buildings, currently with thirty-seven women and children all housed in the main building. Residents reside there between sixty and one-hundred twenty days before being transitioned to permanent housing. There are nine children presently attending Marshall Hill School from SOS. SOS has three vans available for transporting the residents and children when needed.

Jeanne Spadaccini also testified on behalf of SOS. She is the director of Omni. There are ten people on her staff, three of which are full-time. There are currently two children from SOS at Omni who attend Marshall Hill. Courtesy busing had been provided by the Board from Omni to Marshall Hill from 2001 to 2007-2008 school year. Spadaccini received notice from the Board on August 24, 2007, advising that the Board will only be transporting students for the a.m. and p.m. kindergarten classes from Marshall Hill to Omni but no longer for the mid-day classes. P-3. In May 2008, Spadaccini received notice from the Board that children from Omni will be transported to

Paradise Knoll, Westbrook and Queen of Peace schools only and not to Marshall Hill School. P-9.

When busing ended prior to the current school year, Spadaccini had been transporting the children from SOS to Omni in the morning before transporting them back to SOS so that the two children could take the morning school bus to Marshall Hill. The same was done for after-school daycare. She is required to use her personal vehicle that fits up to five passengers. SOS has a thirteen-passenger van and a fifteen-passenger van at its disposal. Currently, Spadaccini transports three children to Omni in the morning and picks up two children at SOS after school and transports them to Omni for daycare. Five additional children who just entered SOS will need transportation in May 2009. The number of children fluctuates at any given time. Spadaccini testified that an alternate route could provide transportation from Omni to proceed to Marshall Hill. P-6 as to map only and P-10 as to route only.

Spadaccini stated that she was not aware of any notice prior to the May 2008 written notice from the Board that busing would no longer be available because the Board continued busing for the previous school year. No children from SOS attended Marshall Hill School and Omni during the 2007-2008 school year. In September 2008, she had observed a school bus passing Omni, which she followed noting that it proceeded directly to Marshall Hill School.

Steven Cea, district business administrator, testified on behalf of SOS. Cea stated that he made the recommendation to the Superintendent of Schools to change the bus route due to costs and logistics. SOS children had been transported to Marshall Hill School in a twelve-passenger vehicle, a distance of less than two miles. Most school vans use diesel fuel, and if not, unleaded is used. He stated that there was a $75,000 deficit for fuel costs in 2008. Bus drivers are paid hourly and therefore the greater the distance they drive, the more their compensation. He mentioned that the budget for 2008-2009 fiscal year was $65,690,985 (P-11), of which $4,786,419 is for student transportation services.

Cea further testified that the Board reviews four factors when receiving a transportation request from a daycare to a Board school; (1) whether the transportation request complies with the passenger capacity of the bus; (2) the request must be for five days per week; (3) the daycare provider must be located within the school boundaries; and (4) the request does not require a change in school. Currently there are eleven students on a twelve-passenger vehicle that transports students from SOS. There is no current route that passes Omni. To change the route to accommodate Omni would be at a cost of $3500 per year. Cea explained in detail the "tiered busing" system that is used by the Board. In September 2000 the Board rotated the tier of schools that had a later start at 9:30 a.m. to start at 8:30 a.m. and vice versa. This rotation was to occur every five years. The change of route in September 2005 came about due to a five-year rotation. Routes were consolidated because of reduced enrollment. The Board permitted courtesy busing for Omni during the 2005-2006 school year because there had been a scheduled bus that transported first grade students to Marshall Hill. The Board continued courtesy busing for Omni through the 2007-2008 school year as an accommodation because Omni did not have enough notice of the termination of that bus route. Cea also opined that the bus seen by Spadaccini in September 2008 that passed by Omni was due to construction of a bridge on Hamburg Turnpike and the driver was unauthorized to take that route. It was corrected when the Board was made aware of the change unilaterally made by the driver.

Cea further testified that it would be extremely difficult for the school bus to make a left-hand turn onto Union Valley Road from Macopin Road when leaving the bus depot. The roadway is narrow at that point and to then turn around in a residential area to pick up children from Omni, which passes SOS, would be unsafe. R-2.

Priscilla Laski testified on behalf of the Board. She is a dispatcher with the Board's transportation department. Laski was a bus driver for the Board prior to becoming a dispatcher. Laski testified that the reason the Board continued courtesy busing to Omni during 2005-2006—despite the change in route—was because there was a special needs child on the bus and the driver passed Omni. The special needs child continued on the bus for part of the 2007-2008 school year and the Board continued picking up the children as a courtesy. The current route for pick up at SOS is

that the bus leaves the depot and makes a left onto Macopin Road and then continues on Macopin to Union Valley Road where it makes a right turn to pick up the children at SOS before continuing to Marshall Hill. A fifty-four-passenger bus could not turn around in the Omni driveway and the twelve-passenger vehicle could only turn around if there were no cars in the private property parking lot. The bus would have to pass Omni and turn around in a residential area.

FINDINGS OF FACT

Based upon a 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**:

1. SOS is a not-for-profit organization founded in 1987 that owns and operates a domestic violence shelter and Omni Day School, a licensed pre-school and daycare center, in West Milford, New Jersey. Children who reside at SOS are provided free daycare services at Omni.

2. From approximately 2001 through the 2007-2008 school year, respondent provided busing to the children at Omni in the morning and returned them to Omni after school.

3. By way of letter dated August 24, 2007, respondent notified Omni that the mid-day transportation of kindergarten students to Omni was to be discontinued. During the 2005-2006 and 2006-2007 school years, there was a school bus that passed Omni and children were able to take the bus.

4. By way of letter dated in May 2008, respondent notified Omni that it would no longer provide transportation between Marshall Hill and Omni due to rising fuel costs and a change in the bus routes.

5. SOS currently transports the resident children to Omni at approximately 6:30 a.m. for before-school care and picks the children up at Omni from after-

school care at approximately 6:30 p.m. There are three children at Omni that attend Marshall Hill School in the morning and two children that attend Omni after school.

6. The Board provides transportation to the students residing at SOS to their respective schools.

7. There are eleven children on the school van that are transported to Marshall Hill School, nine of which are from SOS. SOS is under two miles from Marshall Hill School.

8. Prior to the 2008-2009 school year, the Board provided transportation between Marshall Hill and Omni.

9. Effective September 2008, the Board transports students to Omni only from Westbrook, Paradise Knoll and Queen of Peace.

LEGAL ANALYSIS AND DISCUSSION

Essentially, the dispute involves the application of the Board's courtesy busing policy which extends busing privileges to and from its elementary schools to all school-age children who reside within the school district. However, it has limited that transportation to certain designated child care centers for before- and after-school child care. Specifically, the Board has elected to transport students between SOS and Marshall Hill as a courtesy since there is less than a two mile distance, but denied transportation between Omni and Marshall Hill. Something that had occurred from 2001 to 2007 school years.

Petitioner contends that respondent's courtesy busing plan is arbitrary, capricious and unreasonable as applied. The issue raised here is whether the courtesy busing plan is arbitrary, capricious and unreasonable as applied in this case.

It is a "well established rule that action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 296 (App. Div. 1960). In this regard, in a similar challenge to board action, an ALJ has 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." G.M. v. Roselle Park Borough Bd. of Ed., 95 N.J.A.R.2d (EDU) 107, 109, adopted, Comm'r 95 N.J.A.R.2d (EDU) 110. Additionally, in Brodie v. Board of Education of Saddle Brook Township, 93 N.J.A.R.2d (EDU) 694, adopted, Comm'r 95 N.J.A.R.2d (EDU) 700, then Chief Administrative Law Judge Justice LaVecchia quoted the Commissioner's recitation of the law on this point as follows:

> As long as . . . a board of education . . . acts within the authority conferred on . . . it by Law the courts are without power to, or will not, interfere with, control, or review . . . its action and decisions in matter involving the exercise of discretion, in the absence of clear abuse thereof or error; nor is the wisdom or expediency of an act, or the motive with which it was done, open to judicial inquiry or consideration, where power to do it existed.
>
> [Ibid.]

School boards are granted wide latitude to fashion transportation policies, chart bus routes and designate bus stops. Lemma v. Branchburg Bd. of Educ., EDU 8953-97, Initial Decision (July 22, 1998), adopted, Comm'r (August 28, 1998), <http://lawlibrary.rutgers.edu/oal/search.html>. The Commissioner of Education will not overturn a Board's decision pertaining to the location of school bus stops and will not second guess such exercise of discretion unless it is arbitrary, capricious or unreasonable. Ibid. (upholding the local Board's refusal to change the bus stop); Mandaglio v. Mendham Twp. Bd. of Educ., 1990 S.L.D. 1380, 1384 (upholding uniformly-applied school policy prohibiting the school buses from turning around on dead end streets); J. O'D. v. Peapack Gladstone Bd. of Educ., 1989 S.L.D. 1303, 1313 (upholding appropriateness of the local district's bus stop and rejecting a proposed alternate route as patently dangerous).

Therefore, the appropriate standard of review is whether respondent acted in an arbitrary, capricious and unreasonable manner when re-routing the bus route for purposes of cost efficiency and logistics. Here, petitioner, who has the burden of proof, failed to provide any evidence that respondent acted in bad faith. Mr. Cea's explanation of fuel costs and safety issues which the Board addressed as well as the tier systems falls within the mandate in Lemma.

The route petitioner seeks does not allow the bus to safely make a left turn onto Union Valley Road in order to drive to Omni and then attempt to turn around in a residential area or a private parking lot in order to proceed to Marshall Hill. Furthermore, the Board, in its discretion, continues to transport the children of SOS from their residence to Marshall Hill School. The Board will also transport children from Omni to other schools in the District that are along that designated bus route.

CONCLUSION AND ORDER

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioner has not demonstrated that the Board's refusal to provide an alternative bus route was arbitrary and capricious. Therefore I **ORDER** the petition filed by petitioner be and is hereby **DISMISSED**.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, 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, 2009
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: May 6, 2009

Date Mailed to Parties:

ljb

APPENDIX

WITNESSES

For Petitioner:

Ellen Kenny

Jeanne Spadaccini

Steven Cea

For Respondent:

Priscilla Laski

EXHIBITS

For Petitioner:

P-1 Children of SOS that attend West Milford School

P-2 List of daycare facilities dated June 2001

P-3 Letter to Omni dated August 24, 2007

P-4 Letter to Omni dated May 2008

P-5 Newspaper article not in evidence

P-6 Driving directions as to map only

P-7 Newspaper article Opinion not in evidence

P-8 Daycare centers served for 2008-2009 school year

P-9 Letter to Omni dated March 2, 2009

P-10 Driving directions as to route only

P-11 Legal Notice Township of West Milford

P-12 Homeless Tuition Receipt

For Respondent:

R-1 Daycares available for 2007-2008 school year

R-2 Drawing of map of District

R-3 Bus Stop Change Form

222-09

OAL DKT. NO. EDU 1117-09
(EDU 11198-07 on remand)
AGENCY DKT. NO. 276-9/07

JOSEPH SANTORA,	:	
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/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. The Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case with one comment.

Several of the settlement terms propose actions which, if effectuated, predated 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 already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for effectuation of same. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 7/08/09
Date of Mailing: 7/09/09



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01117-09

AGENCY DKT. NO. 276-9/07

JOSEPH SANTORA,

Petitioner,

v.

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

Respondent.

ON REMAND

OAL DKT. NO. EDU 11198-07

David Nash, Esq., for petitioner

Phillip E. Stern, Esq., for respondent (Adams, Stern, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: May 27, 2009 Decided: May 29, 2009

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

This matter was transmitted to the Office of Administrative Law (OAL) on January 9, 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.

Prior to scheduling a hearing the parties settled the matter. The attached Settlement Agreement and Board Resolution were submitted on May 27, 2009, 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.

May 29, 2009
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency:

6-2-09

Date Mailed to Parties:
JUN 2 2009
dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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SETTLEMENT AGREEMENT/RELEASE

This Settlement Agreement and Release ("Settlement Agreement") is made this day of June, 2008, by and between Joseph Santora ("Dr. Santora"), and the High Point Regional High School Board of Education ("Board").

RECITALS

WHEREAS, Dr. Santora is an employee of the Board, serving as a tenured teaching staff member; and

WHEREAS, the Board and Dr. Santora have engaged in a conflict regarding the Board's decision to withhold Dr. Santora's increment for the 2007-2008 school year; and

WHEREAS, Dr. Santora filed a Petition of Appeal before the Commissioner of Education styled, **Joseph Santora v. High Point Regional High School Board of Education**, Agency Docket No. 276-9/07, OAL Docket No. 11198-2007N("the Litigation"); and

WHEREAS, the Board and Dr. Santora desire to resolve amicably and in good faith all matters and issues arising out of the Litigation;

NOW, THEREFORE, in consideration of the foregoing and in consideration of their respective rights and obligations set forth herein and for other good and sufficient consideration, receipt of which is hereby acknowledged, Dr. Santora and the Board agree as follows:

ARTICLE I
Settlement and Release

1. **Settlement** N Dr. Santora and the Board hereby agree that for the consideration more specifically set forth below, the Litigation will be withdrawn, with prejudice.

2. **Release** N In return for the Board's obligations pursuant to this Settlement Agreement, Dr. Santora hereby releases and discharges any and all of the Board's former and current trustees, officers, employees, agents, contractors, representatives, predecessors, successors and assigns, from liability on or for all claims, demands, causes

of action, damages, costs, expenses, accounts, contracts, agreements, promises, compensation and all other liabilities of any kind or nature whatsoever, direct or indirect, known or unknown, which he may have had arising out of the Litigation.

ARTICLE II
Terms of Settlement

2.1 **Settlement**- Simultaneously upon the execution of this Settlement Agreement, Dr. Santora shall withdraw the Litigation, with prejudice.

2.2 **Consideration** - As consideration for Dr. Santora's Settlement and Release as set forth herein, the Board agrees to the following:

> Dr. Santora agrees to withdraw, with prejudice, any and all challenges to the withholding of his 2007-2008 increment. As a result, Dr. Santora will forever suffer the loss of the value of his 2007-2008 increment. Effective July 1, 2008, however, Dr. Santora shall be returned to the increment level he would have earned had his 2007-2008 school year increment not been withheld.

Dr. Santora expressly acknowledges and represents that he will neither seek nor be entitled to any further consideration from the Board in connection with this Settlement Agreement other than the consideration as detailed in this subsection.

ARTICLE III
Miscellaneous

3.1. **Entire Agreement** N This Settlement Agreement sets forth the entire agreement between the parties with respect to the subject matter hereof and supersedes any and all prior agreements relating thereto. There are no other understandings or

agreements between or among the parties with respect to the subject matter hereof, except as set forth herein, and as set forth in any other documents executed directly or in connection with this Settlement Agreement. No condition or provision of this Settlement Agreement may be modified, waived or revised in any way except in writing executed by all parties and referring specifically to this Settlement Agreement.

3.2. **No Admissions** N Nothing contained in this Settlement Agreement shall be construed to constitute an admission or acknowledgment by any party hereto of any wrongful or improper conduct, nor of any liability to any other party.

3.3 **Binding Effect** N This Settlement Agreement and all rights and duties set forth herein shall be binding upon and inure to the benefit of the parties hereto, as well as their respective successors and assigns.

3.4 **Governing Law and Choice of Forum** N This Settlement Agreement and its interpretation and performance shall be governed by the laws of the State of New Jersey, without giving effect to its conflicts of law rules.

3.5 **Captions** N The captions set forth in this Settlement Agreement are intended solely for the parties' convenience and ease of reference and are not intended to modify, limit, describe or affect in any way the scope, content or intent or this Settlement Agreement.

3.6 **Signature in Counterpart** N This Settlement Agreement may be executed simultaneously in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument.

3.7 **Authorization** N The Board hereby represents and warrants that the undersigned officer of the Board is fully authorized to execute this Settlement Agreement on the Board's behalf.

3.8 **Acknowledgments** N The parties to this Settlement Agreement acknowledge and agree that they have entered into this Settlement Agreement and have executed it without duress or coercion, and have done so with the opportunity to consult counsel. Each party further acknowledges and agrees that no other party has made representations, warranties, promises or agreements not set forth herein and no party

relies in any way upon any representation, warranty, statement of fact or opinion, understanding, disclosure or non-disclosure not set forth herein in entering into this Settlement Agreement and executing it, no party has been induced in any way, except for the consideration, representations, warranties, statements and covenants recited herein, to enter into this Settlement Agreement.

3.9 **Construction and Enforcement** N The terms of this Separation Agreement are the product of negotiations between the parties, and shall be construed without regard to any presumption or other rule requiring construction against the party causing this Settlement Agreement to be drafted.

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement on the date above written.

JOSEPH SANTORA

HIGH POINT REGIONAL HIGH SCHOOL BOARD OF EDUCATION

BY: EDWARD VANDERBERG, PRESIDENT

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

A Regular Meeting of the Board of Education of the High Point Regional High School District was held on Monday, March 16, 2009 at 7:00 P.M. at the High Point Regional High School Cafeteria on Pigeon Hill Road, Wantage, New Jersey.

MEMBERS PRESENT Mr. Edward Vander Berg, President
Mr. Thomas Case
Mr. Joseph Hoffmann
Mr. Garrett Link
Mr. Joseph Luna
Mr. Scott Mearkle
Mr. Charles Musilli, III
Mr. Walter Stumpf Jr.

MEMBERS ABSENT Mr. Harold Rowan, III

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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. Mearkle, duly seconded by Mr. Stumpf, that the Board resolves to authorize its Board President to execute the Settlement Agreement, settling Agency Docket No. 276-9/07. OAL Docket No. 11198-2007N. In so authorizing, the Board re-ratifies its settlement dated October 30, 2008. (Attachment I-1)
The motion unanimously carried by a voice vote.

AYES:	Mr. Edward Vander Berg	Mr. Garrett Link	Mr. Charles Musilli, III
	Mr. Thomas Case	Mr. Joseph Luna	Mr. Walter Stumpf Jr.
	Mr. Joseph Hoffmann	Mr. Scott Mearkle	

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 March 16, 2009 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 31st day of March, 2009.

(AFFIX SEAL)

Linda A. Alvarez
Board Secretary

fw

224-09

PRITCHARD INDUSTRIES, INC.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY, AND GCA SERVICES GROUP, INC.,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner Pritchard Industries (Pritchard) challenged the rejection of its bid by respondent Board for custodial and management services for the period from July 1, 2009 through June 30, 2011, and sought to enjoin the performance of the contract awarded to GCA Services Group. Pritchard had been engaged by the Board prior to bidding to provide personnel to assist in the transition from having custodial and building maintenance services performed by direct employees to outsourcing these services. The Board concluded that although Pritchard's bid was the lowest, it was defective and non-responsive. At issue is whether the alleged omissions and defects in the Pritchard bid were material and non-waivable.

The ALJ found, *inter alia,* that: the alleged non-conformities or deviations in Pritchard's bid were not material and were waivable, as they reflected the reality that Pritchard was already a presence in the Wyckoff district, and was thereby able to accelerate the performance of startup/transition tasks before the contemplated start date; such waivers would not adversely affect the competitive bidding by placing Pritchard in a position of advantage over other bidders; and the Board should be enjoined from awarding the contract to GCA. The ALJ granted Pritchard's petition, ordered that performance of the contract being let by the Board to GCA Services Group be enjoined and restrained; and ordered that the Board award the contract to Pritchard Industries as the lowest responsible bidder, in accordance with *N.J.S.A.* 18A:18A-37.

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.

July 14, 2009

224-09

OAL DKT. NO. EDU 5757-09
AGENCY DKT. NO. 104-5/09

PRITCHARD INDUSTRIES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY AND GCA SERVICES GROUP, INC.,	:	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 such review, the Commissioner concurs with the Administrative Law Judge (ALJ) – for the reasons comprehensively detailed in his decision – that the alleged non-conformities or deviations in Pritchard Industries' bid proposal for the provision of Custodial and Management Services upon which the Board relied to reject its proposal were not material and, therefore, were waivable; that the effect of such waivers would not deprive the Board of its assurance that the contract will be entered into, performed and guaranteed according to its specific requirements; and that the waivers would not have frustrated the policies underlying competitive bidding by placing Pritchard in an advantageous position over other bidders or by otherwise undermining the necessary standard of competition. Consequently, the Commissioner is in full accord with the ALJ's conclusion that Pritchard Industries, as the lowest responsible bidder, should be awarded this contract.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. It is hereby ordered that the performance of the Custodial and Management Services contract awarded to GCA Services Group be enjoined and restrained and that such contract shall instead be awarded to Pritchard Industries, Inc., as the lowest responsible bidder, in accordance with *N.J.S.A.* 18A:18A:37.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/14/09

Date of Mailing: 7/14/09 Faxed

* 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 DECISON
OAL DKT. NO. EDU 05757-09
AGENCY DKT. NO. 104-5/09

PRITCHARD INDUSTRIES, INC.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TWP. OF WYCKOFF, BERGEN COUNTY, AND GCA SERVICES GROUP, INC.,
Respondents.

Patrick T. Collins, Esq., for petitioner (Franzblau, Dratch, attorneys)

Dennis McKeever, Esq., for respondent Wyckoff Twp. Board of Education (Lindabury, McCormick, Estabrook & Cooper, attorneys)

No appearance, for respondent GCA Services Group, Inc.

Record Closed: June 10, 2009 Decided: June 15, 2009

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

STATEMENT OF THE CASE

Petitioner Pritchard Industries (Pritchard) challenges the rejection of its bid for custodial and management services for the period of July 1, 2009, through June 30, 2011, by the respondent Board of Education of the Twp. of Wyckoff (Board) and seeks

to enjoin the performance of this contract awarded to GCA Services Group, Inc. (GCA). The Board concluded that, although the bid submitted by Pritchard was the lowest cost bid, it was defective and non-responsive. The Board instead awarded the project to GCA upon determining that its bid was compliant with the bid specifications and the New Jersey public school contracts law, N.J.S.A. 18A:18A-1 et seq. At issue is whether the alleged omissions from and defects with the Pritchard bid were material and non-waivable.

PROCEDURAL HISTORY

On May 27, 2009, Pritchard filed its petition with the Commissioner seeking emergent relief. On June 2, 2009, 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), 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 emergent relief on June 8, 2009, at which time Pritchard and the Board appeared. No one appeared on behalf of GCA. At that proceeding Pritchard agreed to forego its application for emergent relief, and all parties present agreed to proceed before me on June 10, 2009, in a plenary hearing. The parties further agreed that no discovery was necessary before proceeding with the plenary hearing. I heard the matter on June 10, 2009, at which time the record closed.

FACTUAL DISCUSSION

Both Pritchard and the Board declined to call any witnesses at the hearing. Instead, they stipulated that the facts set forth in the certifications of each party in support of and against the application for emergent relief shall constitute the facts of this case.[1] Accordingly, I **FIND** the following **FACTS.**

[1] Since both parties stipulated to the facts in the certifications and did not avail themselves of the opportunity to call fact witnesses at the hearing, the record closed at the conclusion of the hearing. It is inappropriate to consider any facts Wyckoff sought to provide after the closing of the record, particularly in view of the concern by both parties that this matter be determined in an expedited manner.

The Board had determined to outsource its custodial and building maintenance services. It engaged Pritchard to provide personnel to assist in the process of transition from having those services performed by direct employees to their outsourcing. Since September 2008, Pritchard has had one full-time employee providing such services for the Board along side the Board's direct employees.

On January 1, 2009, the Board appointed Edvocate, Inc. (Edvocate) to study a proposed conversion of custodial and maintenance services to private entities. The Board then published, on April 8, 2008, an Invitation for Bid with specifications for custodial and management services over a two-year period to commence July 1, 2009 (the "Contract"). During the bidding process in April 2009, the Board requested that Pritchard, which already had a presence in the District, provide additional standby custodians. Accordingly, since May 4, 2009, Pritchard has been providing the Board with five full-time custodians who have been performing custodial duties for the Board.

The bid specifications for the Contract included all statutory requirements, and imposed a number of additional requirements on bidders. Relative to this matter, these included the following involving a startup/transition plan and a melding plan:

> 39. Provide evidence and details of a startup/transition plan. The Contractor must submit with their bid response a detailed startup/transition plan from pre-planning June 01, 2009 through September 30, 2009. The plan must detail the additional management resources they will be providing as well as the startup task, implementation date, estimated completion date and who (person and department) is responsible. A responsive and responsible startup/transition plan should have over 75 tasks listed. This plan must be submitted in an Excel format or again GANTT chart and it must be customized to the startup of this contract. All tasks must be sequenced by date starting June 1. Failure to provide the aforementioned startup/transition plan and the detail will cause of the contractor's bid to be non-responsive and thereby not a responsible bidder.
>
> 40. For a Contractor to be considered responsible they must provide a detailed plan how they intend to meld together that District's staff to provide a well run and seamless

operation. Failure to provide the aforementioned plan and the detail will cause the Contractor's bid to be non-responsive and thereby not a responsible bidder. [sic.] The plan must:

a. Detail what steps the Contractor will take to establish good communications between the Supervisor of Buildings and Grounds, the maintenance staff and the Contractor's staff.
b. Detail how the Contractor will develop a good working relationship with the Supervisor of Buildings and Grounds and the District's Principals.
c. Detail how the Contractor's supervisor will interface with the Supervisor of Buildings and Grounds, and the District's maintenance staff? [sic.]
d. Detail how the contractor will work with the Supervisor of Buildings and Grounds and the District's Maintenance Staff to establishing a reporting and collaborative relationship [sic.]
e. Detail how the Contractor will flex its staff hours to assist for snow removal.

The bid specifications additionally include the following provisions that refer to or relate to items 39 and 40:

Pg 2, Para. G—Acceptance of Bids Validity Period: The District reserves the right to accept or reject all or any part of a Bid or any and all Bids who are not responsive or responsible (as defined in N.J.S.A. 18A:18-1 et seq. [sic.], to waive any informality and to award the contract to the company who is the lowest responsive and responsible contractor.

Pg. 4, Para. H(7) Section 5—StartupTransition Plan: describe in detail a plan by which your company will transition from the present contractor to your operations or if you are the present contractor what will be your transition plan to start up the new contract pursuant to Paragraph S4-Startup Transition Plan.

Pg. 15, Para. S(4)—Start-Up/Transition Plan: a successful start up of this contract is essential to its success. For a contractor to be considered to be responsive and responsible the Contractor must submit with their bid response a detailed start up/transition plan from pre-planning June 1, 2009 hrough [sic] September 30, 2009. The plan must detail the additional management/resources they will be providing as well as the start up task, implementation date,

> estimated completion date, and who is responsible. A responsive and responsible start up/transition plan should have over 75 tasks listed. This plan must be submitted in an Excel format or a Gantt chart and it must be customized to the start up of this contract. Failure to provide the aforementioned startup/transition plan and the detail will cause the Contractor's bid to be non-responsive and thereby not a responsible bidder. All start up costs will be amortized on a straight-line basis over a period of four (4) years.
>
> Pg 15, Para. U—Evaluation of Bids: To be a responsible bidder the bidder must conform in all material respects, as decided by the District in its sole discretion, to the terms and conditions, specification, scope of work, legal requirements, and other provisions of this Invitation for Bid. By not doing so the bidder will be non-responsive and will be deemed not a responsible bidder.
>
> Pg. 54, Bid Form D, #17 Section 5—Describe in detail a plan by which your company will transition from the present operation to your operation pursuant to Paragraph S4-Start-Up Transition Plan.

As set forth above, the bid specifications recite the requirement of an acceptable startup/transition plan in five separate sections of the document.

Pritchard submitted a bid for the Contract. As to item No. 39, it provided a startup/transition plan in the format that was requested by the Board, including 110 tasks, the dates during which the tasks be performed and identifying information of the person or people responsible for the performance of each task. Notwithstanding the instructions of the Invitation to Bid for a startup/transition plan from pre-planning June 1, 2009 through September 30, 2009, since Pritchard was already on site in Wyckoff with five active custodians as of May 4, 2009, it was Pritchard's position to commence performance of its transitionary tasks prior to June 1, 2009, and to complete all of those tasks prior to the July 1, 2009, commencement date for the Contract. Therefore, its bid identified the dates on which the 110 tasks it stated it would perform pursuant to the startup/transition plan as being between May 4 and June 29, 2009.

As to item No. 40, Pritchard did not submit with its bid a distinct statement broken down into the five subcategories a. through e. listed in the Invitation to Bid delineating how it intended "to meld together with the District's staff to provide a well run and seamless operation." Its bid response for item No. 40 instead referred to pages 246-

253 of its bid that contained the information in response to item No. 39. Among the 110 tasks listed for the item No. 39 startup/transition plan that support a melding with District staff are: Meet with Wyckoff management to review new specifications; Introduce Pritchard Supervisor to Wyckoff management; Prepare notes for each area for customer opinion; Reevaluate staff with Wyckoff management; Work with Wyckoff management to implement administrative activities; Custodians meet/train with School Head Custodian for bldg specific information; Make recommendations to Wyckoff management for cleaning improvement; Meet with Wyckoff Business Administrator to discuss deficiencies found; Discuss plan to address deficiencies with Head Custodians and Wyckoff Business Administrator; Introduction of crew to School Head Custodians; Supervisor and Custodians walk facility with Head Custodians; and Supervisor and Head Custodians compare notes and make changes where necessary; Additionally, Pritchard's submission provided that its Operation Manager and VP Marketing would meet with the Facility Manager to discuss special requirements, particular client requests and security concerns necessary to perform proper cleaning functions. Although Pritchard's bid submission did not specifically "detail how [it] will flex its staff hours to assist for snow removal," it did provide that it would formulate a plan for additional service due to inclement weather.

At the bid opening of April 30, 2009, Pritchard submitted a bid of $882,659.82 for the first year of the Contract and $892,456.39 for the second year of the Contract for a total of $1,775,116.21 for the combined two years. GCA's bid was $1,813,232.52. Pritchard's bid was $38,116.30 lower than that of GCA.

On May 5, 2009, Pritchard received an e-mail from the Board's counsel informing it that its bid would be rejected for non-conformity with items No. 39 and No. 40. As to item No. 39, the e-mail explained that Pritchard's proposal failed to provide adequate evidence and details of a startup/transition plan. Whereas the Invitation for Bid required a detailed startup/transition plan from preplanning on June 1, 2009, through September 30, 2009, and be sequenced by date starting June 1, "...Pritchard's startup/transition plan failed to include transitioning after the week of June 29, 2009, including the procedures for the first month of the 2009-10 school year (September 2009)." The e-

mail further advised that item No. 40 was also not satisfied, although it did not include any detail of the shortcoming as to item No. 40.

Because of these alleged non-conformities, the Board awarded the Contract to GCA.

ANALYSIS AND LEGAL CONCLUSIONS

Under the public school contracts law, N.J.S.A. 18A:18A-1 to -59 (Act), contracts for the performance of work to be paid out of school funds generally are required to be made only after public advertisement for bids and after the bidding has taken place. N.J.S.A. 18A:18A-4. N.J.S.A. 18A:18A-22 requires that "No bid shall be accepted which does not conform to the specifications furnished therefor." The contract must be awarded to the lowest responsible bidder. N.J.S.A.18A:18A-37. The "lowest responsible bidder" is the one whose response to a request for bids offers the lowest price and is responsive and who is responsible. N.J.S.A. 18A:18A-2(t). "Responsible" means able to complete the contract in accordance with its requirements, including but not limited to requirements pertaining to experience, moral integrity, operating capacity, financial capacity, credit, and workforce, equipments, and facilities available. N.J.S.A. 18A:18A-2(x). "Responsive" means conforming in all material respects to the terms and conditions, specifications, legal requirements and other provisions of the request.N.J.S.A.18A:18A-(y).

Legal principals established under other public bidding statutes are applicable to the public school contracts law because the purpose of all bidding statutes is "to secure competition and 'guard against favoritism, improvidence, extravagance and corruption,' in order to benefit the taxpayers and not the bidders." In re Honeywell Info. Sys., Inc., 145 N.J. Super. 187, 200-01 (App. Div. 1976) certif. denied, 73 N.J. 53 (1977) (quoting Township of Hillside v. Sternin, 25 N.J. 317, 322 (1957)). Therefore, public bidding statutes must be construed with sole reference to the public good and rigidly adhered to by the courts. Statewide Hi-Way Safety, Inc. v. New Jersey Dep't of Transp., 283 N.J. 223, 230 (App. Div. 1995).

Legally acceptable bids cannot materially deviate from the specifications set forth by the contracting agency. Meadowbook Carting Co., Inc., v. Borough of Island Heights, 138 N.J. 307, 314 (1994). While minor or inconsequential discrepancies and technical omissions can be waived, material conditions contained in bidding specifications cannot be waived. Terminal Const. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 411 (1975). New Jersey Courts have developed a two-prong test for determining if a deviation is material: (1) does waiver of such defect deprive the purchaser of its assurance that the contract will be entered into, performed, and guaranteed according to the specified requirements, and (2) does it adversely affect the competitive bidding process by placing a bidder in a position of advantage over other bidders, or by otherwise undermining the necessary common standard of competition. Meadowbrook Carting, supra, 138 N.J. at 315. The Meadowbrook Court aptly cited from Terminal Const. Corp., supra, regarding the limitation on the doctrine of strict compliance for bids:

> Essentially this distinction between conditions that may or may not be waived stems from a recognition that there are certain requirements often incorporated in bidding specifications [that] by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding. In sharp contrast, advertised conditions whose waiver is capable of becoming a vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance, or likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding, or which are capable of affecting the ability of the contracting unit to make bid comparisons, are the kind of conditions [that] may not under any circumstances be waived.
>
> [67 N.J. at 412]

Wyckoff claims that Pritchard's bid proposal contained material, non-waivable defects including an inadequate startup/transition plan and the omission of a melding plan. I disagree and, instead, **CONCLUDE** that the alleged non-conformities or deviations upon which the Board relied to reject Pritchard's bid proposal were not material and were waivable.

There is no doubt that a comprehensive startup/transition plan is important, particularly when there is a sensitive conversion from an in-house direct service to one

provided by outsourcing. Wyckoff accurately describes the process as a culture change. Any bidder should have recognized the importance that the Board attached to the startup/transition plan by virtue of its mention in five separate sections of the Invitation to Bid. Equally important is confidence that the contractor will maintain a satisfactory line of communications with the Board's staff. Nevertheless, these subjects are not in the nature of the requirements recognized in Meadowbrook and Terminal Const. Corp. where a waiver of strict compliance would frustrate the policies underlying competitive bidding. There has been no showing that a waiver of strict compliance with either the startup/transition plan specifications or the melding plan were capable of "becoming a vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance." Terminal Const. Corp. v. Atlantic County Sewerage Auth., supra at 412. In any event, Pritchard fundamentally and sufficiently complied with these two specifications. The lack of strict compliance with the Board's timeline for item No. 39 and the failure to respond to item No. 40 with separate a. through e. entries simply are not material deviations.

With regard to item No. 39, the Board did not take issue with the comprehensiveness of the Pritchard startup/transition plan (indeed Pritchard's plan called for satisfying 110 tasks whereas the Invitation to Bid required only 75 tasks). Instead, the Board's articulated dissatisfaction with the response to item No. 39 was that it required a detailed startup/transition plan from preplanning on June 1, 2009, through September 30, 2009, that would be sequenced by date starting June 1, 2009. Pritchard's startup/transition plan was sequenced between May 4 and June 29, 2009. Technically, this timeline was not in conformity with the Invitation to Bid. However, it reflected the reality that Pritchard already had a substantial presence in the Wyckoff District as of May 4, 2009, and was thereby able to accelerate the performance of startup/transition tasks before the contemplated start date. It makes no sense that Pritchard should be penalized for changing the timeline under these circumstances. This change in no manner would deprive the Board of its assurance that the contract would be entered into, performed, and guaranteed according to the specified requirements of tasks. Nor would it suggest that the tasks would not be completed on time. The Board's expressed concern is misplaced that Pritchard's startup/transition plan failed to include transitioning after the week of June 29, 2009, including procedures

for the first month of the 2009-10 school year. The importance of the transition plan to include the first month of a school year is obvious. The contractor must prove that it can provide the custodial services, not only when the school buildings are in relative repose during the summer recess months, but importantly when students and staff are present. Again, Pritchard was already performing custodial services in May and June 2009 when students and staff were present at the front-end rather than the back-end of the contemplated startup/transition period. Pritchard gave the Board more than requested in startup and transition tasks and proposed to perform them more promptly than the Board required. It is simply illogical to deem Pritchard's startup/transition plan to be out of compliance under these circumstances. Such a conclusion by the Board is an abuse of its discretion. Pritchard's submission was both responsive and responsible.

With regard to item No. 40, Pritchard acknowledges that it did not break down its melding plan into the five lettered subheadings listed in the Invitation to Bid and did not provide a specific detail how it would flex its staff hours to assist for snow removal. However, task 110 in its startup-transition plan provides that Pritchard will "formulate a plan for additional services due to in climate [sic] weather." GCA's snow-situation plan is hardly more detailed. It provides, "a snow removal plan will be developed based on the needs of Wyckoff. Evening custodians will be expected to arrive early during school closures due to snow and assist with removal." Pritchard aptly argues that one cannot provide a specific plan for flexing staff to assist in snow removal in a vacuum without factoring in the speculative timing and amount of snowfall. The response would logically vary if the snowfall occurred during the day, at night, during a weekday or on a weekend. Additionally, Pritchard's lack of greater specificity for a snow removal plan does not trigger the concern of Meadowbrook and Terminal Const. Corp. that it might adversely affect the competitive bidding process by placing a bidder in a position of advantage over other bidders. Pritchard is bound by its overall dollar bid to perform the necessary services for the Board. Pritchard, not the Board, would bear the costs of overtime pay, standby pay, or shift adjustment pay to meet snow removal responsibilities. Under the provision for "Custodial Scope of Work and Services," in the Board's Invitation to Bid to which Pritchard responded, Pritchard accepted the requirement regarding snow removal "as needed" as follows: "Application of snow melt, removal of snow from walkways, steps and entranceways. On days that school is

closed for snow the contractor's staff must be available to work days to do snow removal. ... On days there is a delayed opening the Contractor must bring in some of the evening custodians early to assist in snow removal." GCA did not submit a more compliant or more detailed flex plan than did Pritchard. It merely parroted the words already included in the Board's Invitation to Bid. It is unacceptable and an abuse of discretion to determine that GCA's snow removal plan was compliant and Pritchard's was not simply because one responded specifically under item No. 40 (e) and the other did not.

The Board erroneously characterized as a material deviation from its specifications the fact that Pritchard failed to provide a discreet a. through e. detail in item No. 40 on how it would meld its staff with that of the Board when Pritchard instead embedded such commitments to establish good communications in its startup/transition plan. The Board sought, in essence, an essay from the bidder as to how it would "establish good communications," "develop a good working relationship," "interface," and work with Board employees to "establish a reporting and collaborative relationship." I agree with Pritchard's contention that, as to these items, no real data or information is sought; rather, the bidder is called upon to enthusiastically express its intention to communicate effectively and politely with Board representatives. Information on the commitment to establish these relationships is found within the 110 tasks specified in Pritchard's response to item No. 39. The failure to specifically repeat these generic commitments in the answers to parts a. through e. of item No. 40 is precisely the type of minor or inconsequential discrepancy or technical omission that the Court in Terminal Const. Corp. would waive as a condition that is not material to an invitation to bid. This type of specification, as well as item No. 39, have no place in an analysis of materiality because they defy objective analysis. The purpose of competitive bidding is to avoid favoritism and to ensure that the public gets the best deal. That purpose is frustrated where the bid reviewer relies on subjective rather than objective criteria. Again, the Board's reliance on this inconsequential discrepancy to deny the Contract to Pritchard, as the lowest bidder, was an abuse of discretion. Pritchard acted both responsively and responsibly.

In summary, I **CONCLUDE** that the inconsequential discrepancies or non-conformities with the form of Pritchard's responses to the Invitation to Bid from the Board are waivable. I further **CONCLUDE** that the effect of such waivers would certainly not deprive the Board of its assurance that the Contract will be entered into, performed and guaranteed according to its specific requirements. I also **CONCLUDE** that these waivers would not have adversely affected the competitive bidding by placing Pritchard in a position of advantage over other bidders or by otherwise undermining the necessary standard of competition. Since Pritchard was the lowest bidder, I finally **CONCLUDE** that the Board should be enjoined from awarding the Contract for custodial and management services to GCA and should instead award this contract to Pritchard as the lowest responsible bidder.

ORDER

It is hereby **ORDERED** that the Petition of Pritchard Industries, Inc. be **GRANTED.**

It is further **ORDERED** that the performance of the Custodial and Management Services Contract being let by the Wyckoff Board of Education to GCA Services Group, Inc. be enjoined and restrained.

It is further **ORDERED** that, as Pritchard Industries, Inc. is the lowest responsible bidder for the Custodial and Management Services Contract, the Wyckoff Board of Education shall award said Contract to Pritchard Industries, Inc. in accordance with the provisions of N.J.S.A. 18A:18A-37.

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

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

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 15, 2009
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: 6/15/09

Date Mailed to Parties: 6/15/09

id

APPENDIX

LIST OF WITNESSES

For Petitioner

None

For Respondent

None

LIST OF EXHIBITS IN EVIDENCE

For Petitioner

Certification of Thomas Martin with:

Exhibit A Invitation for Bids for Custodial and Management Services, April 8, 2009.

Exhibit B E-mail Merlino to Stirone, May 5, 2009

Exhibit C Collins to Merlino, May 6, 2009

For Respondent

Certification of Bill Gerichter

Certification of Dennis McKeever with

Exhibit A Transition Plan submitted by GCA

Exhibit B Melding Plan submitted by GCA

225-09

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JENELLE STOKES, GRAY CHARTER SCHOOL, ESSEX COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In October 2007, 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 unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8 for resigning her position as an elementary school teacher on insufficient notice, and contrary to the terms of her employment contract. The respondent contended that her contract had no notice provision, and that no one told her she would be expected to give sixty days notice of her resignation.

The ALJ found that: petitioning charter school's witnesses were fully credible; respondent ceased to perform her duties prior to the expiration of her term of employment without the consent of the charter school, contrary to *N.J.S.A.* 18A:26-10; and under the circumstances here present, respondent's teaching certificate should be suspended for a period of one year.

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 is suspended for a period of one year from the date of the filing of this decision – a copy of which has been 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 15, 2009

225-09

OAL DKT. NO. EDU 12569-07
AGENCY DKT. NO. 332-10/07

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JENELLE STOKES, GRAY CHARTER SCHOOL, ESSEX COUNTY.	:	COMMISSIONER OF EDUCATION
	:	DECISION

Petitioner requests that respondent's teaching certificate be suspended for one year in consequence of her resignation – without petitioner's consent – prior to the completion of her contractual term of employment. Having reviewed the record,[1] the Initial Decision of the Office of Administrative Law (OAL), respondent's exceptions and petitioner's reply exceptions, the Commissioner adopts the Initial Decision for the reasons articulated therein.

Respondent's exceptions repeat the arguments she presented to the Administrative Law Judge (ALJ). As regards her liability, she contends that 1) no one told her that she would be expected to give sixty days notice of her resignation, 2) her contract had no notice provision, and 3) she conferred with a past employee about how to resign. Further, respondent maintains that it was error for the ALJ to assume that the summer closing of the Gray Charter School necessarily meant that mail, *i.e.* her resignation letter, would not be picked up and reviewed.

These contentions lack merit. Respondent's employment contract clearly stated that her resignation required the agreement of both parties to the contract, yet she never discussed the issue of resignation with her employer. Respondent's supervisor, Verna Gray, testified that all employees had been verbally advised at staff meetings of a sixty-day notice requirement for resignations.[2] And respondent's choice to seek resignation advice from a former employee who had resigned after the expiration of her own employment contract – instead of checking with school administrator Gray – did not satisfy respondent's duty to follow contractual resignation procedures.

[1] The record does not include a hearing transcript.
[2] The ALJ found Gray to be credible and the Commissioner finds no basis in the record to pronounce otherwise.

Finally, the record indicates that Gray Charter School employees knew of the school's summer closings. Any assumption by respondent that her resignation letter would be collected and reviewed during the closing period was a risk that she took to her detriment.

In contesting the penalty proposed by the ALJ, respondent maintains that the one-year maximum suspension of her teaching certificate is excessive under the circumstances of this controversy. The Commissioner disagrees.

Respondent knew or should have known that her unexpected resignation would leave the school administrator without sufficient time to find a replacement for her, and would result in significant negative ramifications for the school and the students. The resignation did – in point of fact – contribute to a delay in the school starting date, which necessitated the rescheduling of training and school holidays and negatively impacted the morale of the remaining staff. There is nothing in the record to indicate that respondent's actions were driven by emergent circumstances or hardship. The significant inconvenience of Gray Charter School staff and students could have been avoided by more conscientious behavior on the part of respondent.

Respondent's teaching certificate is suspended for the period of one year. This decision shall be forwarded to the New Jersey State Board of Examiners for the effectuation of the suspension.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 7/15/09

Date of Mailing: 7/15/09

[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 12569-07
AGENCY DKT. NO. 332-10/07

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF JENELLE STOKES, GRAY CHARTER SCHOOL, ESSEX COUNTY.

Cherie L. Adams, Esq., for Gray Charter School
(Adams, Stern, Gutierrez & Lattiboudere, attorneys)

Gregory T. Syrek, Esq., for Jenelle Stokes
(Bucceri and Pincus, attorneys)

Record Closed: March 9, 2009 Decided: June 2, 2009

BEFORE **RICHARD McGILL**, ALJ:

Gray Charter School (petitioner) seeks the suspension of the teaching certificate of Jenelle Stokes (respondent) for unprofessional conduct based upon a resignation that did not comply with applicable statutory requirements. Respondent maintains that the statutes upon which petitioner relies are not applicable to her as an employee of a charter school and that any suspension is discretionary in nature. Further, under all the circumstances, it would not be appropriate to suspend her teaching certificate.

PROCEDURAL HISTORY

At the request of petitioner, the Commissioner of Education issued an Order to Show Cause on October 24, 2007, ordering respondent to show cause why her teaching certificate should not be suspended for unprofessional conduct pursuant to N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8. Respondent filed an Answer on November 28, 2007, and the matter was transmitted to the Office of Administrative Law on December 26, 2007, for determination as a contested case.

One of respondent's contentions in this proceeding is that N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 are not applicable to charter schools. In the same general time frame, six similar matters were transmitted to the Office of Administrative Law raising the issue of the applicability of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 to charter schools.[1] By Order dated March 31, 2008, the seven matters were consolidated for the limited purpose of determining the applicability of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 to charter schools.

Three teachers filed a motion to dismiss based on the contention that N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 do not apply to charter schools. In an Order dated June 6, 2008, the determination was made that these statutes, N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8, are applicable to charter schools. However, one statute, N.J.S.A. 18A:28-8, relates to teachers who have tenure. The determination was that this statute is not applicable to teachers who do not have tenure. At the time, it was believed that five of the seven teachers in the consolidated proceeding did not have tenure. Accordingly, the Order to Show Cause was dismissed as to those five teachers.

[1] The other matters are as follows: In the Matter of the Suspension of the Teaching Certificate of Nadira Raghunandan, Gray Charter School, Essex County, OAL Dkt. No. EDU 11437-07, Agency Dkt. No. 292-10/07; In the Matter of the Suspension of the Teaching Certificate of Claude Gentil, Gray Charter School, Essex County, OAL Dkt. No. EDU 11745-07, Agency Dkt. No. 298-10/07; In the Matter of the Suspension of the Teaching Certificate of Tyarra Hunter, Gray Charter School, Essex County, OAL Dkt. No. EDU 11956-07, Agency Dkt. No. 293-10/07; In the Matter of the Suspension of the Teaching Certificate of Danielle Ponti, Gray Charter School, Essex County, OAL Dkt. No. EDU 11971-07, Agency Dkt. No. 294-10/07; In the Matter of the Suspension of the Teaching Certificate of Taheerah Jackson, Gray Charter School, Newark, Essex County, OAL Dkt. No. EDU 11972-07, Agency Dkt. No. 300-10/07; and In the Matter of the Suspension of the Teaching Certificate of Melissa Van Pelt, Gray Charter School, Essex County, OAL Dkt. No. EDU 11556-07, Agency Dkt. No. 291-10/07.

Respondent was not among those five teachers. Based upon information subsequently provided by petitioner, it now appears that respondent did not have tenure. Therefore, the portion of the Order to Show Cause based upon N.J.S.A. 18A:28-8 will be treated as dismissed as to respondent as well.

One or more parties sought interlocutory review of the Order dated June 6, 2008. By Decision on Motion for Interlocutory Review dated July 9, 2008, the Commissioner of Education affirmed the Order dated June 6, 2008. Thereafter, by Order dated August 14, 2008, the seven matters were severed for each to proceed separately.

The matter was brought to hearing on February 17, 2009, at the Office of Administrative Law in Newark, New Jersey. The record closed on March 9, 2009, upon receipt of briefs.

ISSUES

With the question of applicability of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8, to charter schools having been resolved by motion, the remaining issues are whether respondent engaged in unprofessional conduct within the meaning of N.J.S.A. 18A:26-10, whether respondent's teaching certificate should be suspended and, if so, the length of the suspension.

FACTS

A. Stipulated Facts

The parties stipulated as follows:

1. Miss Verna Gray is the Executive Director of the Gray Charter School and has held that position since 2000.

2. Ms. Jenelle Stokes is a duly certified Elementary School Teacher in the state of New Jersey.

3. Ms. Stokes began her employment with the Gray Charter School in August of 2004.

4. Ms. Stokes was a teacher at Gray Charter under contract with Gray Charter for the 2006-2007 school year as a second grade teacher.

5. On or about May 10, 2007, Jenelle Stokes executed an employment agreement for the 2007-2008 school year to commence in August of 2007 and end in June of 2008.

6. Ms. Stokes drafted a letter of resignation which she signed and dated July 13, 2007 and sent regular and certified mail to the Gray Charter School.

7. Teachers were to report to the Gray Charter School on August 14, 2007 to prepare for the school year. Ms. Stokes failed to report for duty that day or any subsequent day during that school year.

B. Undisputed Facts

Other facts are not really in dispute, and I **FIND** as follows:

1. Respondent began her search for employment in April 2007.

2. Respondent was recommended for a position with the Orange Board of Education in April 2007.

3. Respondent did not mention her efforts to find other employment to Ms. Gray.

4. Gray Charter School closes for July through the first week of August each summer.

5. Respondent received an offer of a position with the Orange Board of Education in July 2007.

6. Respondent accepted the offer.

7. Respondent did not receive a response to her letter dated July 13, 2007.

8. Respondent sent another letter to Gray Charter School in August 2007.

9. In August 2007, respondent signed a contract with the Orange Board of Education.

10. Gray Charter School opened for staff on August 14, 2007.

11. Gray Charter School was scheduled to open for students on August 21, 2007.

12. Respodent's letter was received by Gray Charter School on August 14 or 15, 2007.

13. Respondent did not return a telephone call from Gray Charter School.

14. Respondent's contract contains a provision which states as follows: "Upon the written agreement of both Employee and the School (which agreement may be made by the Executive Director), this agreement shall immediately terminate."

Ms. Gray testified that certain consequences resulted from decisions by five teachers not to report to Gray Charter School for the 2007-2008 school year. It is noted that respondent contends that these consequences could have been avoided by Gray Charter School by remaining open during the summer. But the events in themselves are not in dispute. I **FURTHER FIND** as follows:

15. At that time, Gray Charter School had seventeen classroom teachers and five other teachers.

16. Five teachers with contracts did not report to Gray Charter School to begin the 2007-2008 school year.

17. Gray Charter School was unable to open as scheduled due to a lack of teachers.

18. Ms. Gray had to stop a consultant from traveling from Chicago for training.

19. Other staff members were upset, because they were afraid of losing their jobs.

20. The opening of school was delayed until August 27, 2007.

21. As a result of the lost days, Ms. Gray had to modify the schedule for spring vacation and extend the school year.

22. Gray Charter School incurred additional costs as a result of the changes.

C. Summary of Testimony

The disputed facts in this matter relate to whether respondent knew, or had reason to know, the proper procedure for terminating her employment with Gray Charter School. There is also a question whether respondent knew that Gray Charter School would be closed during the summer.

1. Verna A. Gray

Verna A. Gray has been the Executive Director and Principal of Gray Charter School since September 5, 2000. Ms. Gray held various staff meetings during the school year. Ms. Gray told the staff members that if they were leaving, they should see her. Ms. Gray said that it would not cause a problem, because others wanted the job. Ms. Gray told staff members to advise her by April 15. Ms. Gray also informed staff members that Gray Charter School would not be open during July through the first week of August. The teaching staff members were aware that Gray Charter School does not receive mail in July.

Ms. Gray had no idea that respondent would not be returning to work on August 14, 2007. Respondent never mentioned an offer of employment from the Orange Board of Education, and they never discussed it.

When respondent did not report for duty on August 14, 2007, Ms. Gray had a secretary call respondent, but respondent did not call back. Ms. Gray stood next to the secretary, while she made the call and left a message. The secretary also called another teacher, Tyarra Hunter, who did not report for duty. Ms. Hunter stated that she, respondent and another teacher were resigning.

2. Jenelle Stokes

Respondent testified that she was a second grade teacher at Gray Charter School for three years and that she is now in her second year of employment with the Orange Board of Education. Respondent further testified that she began to look for other employment in April 2007 and that she had an interview with the Orange Board of Education in that month. Respondent acknowledged that she did not discuss any concerns that she had about Gray Charter School or express her intentions to Ms. Gray or Vice Principal Richard Salles. During meetings, Ms. Gray said that she had no problem with a teacher deciding to leave, because plenty of others want to work for Gray Charter School.

Respondent discussed resignation with another teacher, Tyarra Hunter, in April 2007. Respondent also had a discussion with a former employee, Pamela Luke, during July 2007. Ms. Luke advised respondent to give thirty days' notice.

Respondent reviewed her contract with Gray Charter School for the 2007-2008 school year and did not locate any reference to notice. Respondent was not aware of any notice requirement or that Gray Charter School would be closed in July or August. Respondent acknowledged that she did not contact Gray Charter School to offer her services.

3. Pamela Luke

Pamela Luke testified that she was employed by Gray Charter School from March 2003 to August 2006 as a school social worker. In May 2006, Ms. Gray stated that she had to cut costs and that Ms. Luke's annual salary would be reduced from $56,000 to $25,000 without benefits. Ms. Luke continued to work without a contract based upon the view that something was better than nothing at all.

In July 2007, Ms. Luke found another job and handed in her resignation. Ms. Gray allowed Ms. Luke to speak with other teachers and no legal action was taken against her.

4. Richard Salles

Richard Salles is employed by Gray Charter School as a vice principal and assistant director. At the opening meeting with staff, Mr. Salles advised them that he was the affirmative action officer and explained his role. Each employee was given a copy of the harassment policy. Respondent signed an Acknowledgment Form on May 5, 2004. Mr. Salles never received a complaint from respondent about Ms. Gray.

At staff meetings, Ms. Gray explained the procedure if an employee decides to leave Gray Charter School. Ms. Gray told the employees to provide two months' notice.

Gray Charter School was not open in July or the first week of August 2007. Everyone who works at Gray Charter School knows that it is not open during this period of time. An answering machine is in place during this time frame, but the message does not say anything specific about the mail.

D. Findings

Petitioner's witnesses were fully credible, and their testimony is accepted as true. Ms. Luke was credible but her situation was different in that as of July 2006, she evidently did not have a contract.

Respondent claimed that she did not find any provision as to a time frame for notice in her contract. But the fact is that the contract contains an explicit provision for the proper procedure to terminate the contract. Moreover, Ms. Gray explained the proper procedure for individuals who are leaving Gray Charter School at staff meetings. Respondent discussed the situation with another teacher and a former employee, but

she did not go to Ms. Gray, the one person who would surely know the correct procedure. Under the circumstances, respondent could have and should have determined the proper procedure to terminate her employment with Gray Charter School. Additionally, respondent was aware that Gray Charter School would be closed from July into August 2007.

Based upon the evidence presented at the hearing, I **FIND** as follows:

1. Ms. Gray held meetings during the year and told staff members that if they were planning to leave Gray Charter School, they should see her.

2. Ms. Gray told staff members that it would not be a problem if they decided to leave, because others wanted to work for Gray Charter School.

3. Ms. Gray advised employees to provide sixty days' notice.

4. Ms. Gray informed staff members that Gray Charter School would not be open during July and the first week of August.

5. Respondent could have and should have determined the proper procedures to terminate her contract with Gray Charter School.

6. In April 2007, respondent was considering other employment, and she discussed resignation with another teacher.

7. Respondent did not discuss her plans with Ms. Gray.

8. Respondent received and accepted an offer from the Orange Board of Education in July 2007.

9. Respondent discussed the situation with a former employee, Pamela Luke, who advised respondent to give thirty days' notice.

10. Ms. Luke had left Gray Charter School without giving sixty days' notice, but Ms. Luke's contract had already expired at the time.

11. Respondent did not give her notice prior to July 2007, because she wanted to keep open the option to return to Gray Charter School.

LAW AND ANALYSIS

The applicable statute 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 or, in the case of an approved private school for the disabled, the board of directors of the school, 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 obvious 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 Board of Education v. Leinen, 94 N.J.A.R.2d (EDU) 405, 407. The ultimate objective is to protect the students.

In the context of this case, N.J.S.A. 18A:26-10 prohibits a teaching staff member from ceasing to perform his duties without the consent of the charter school. Here, respondent entered into an employment agreement for a term set to expire on June 30, 2008, and thereafter, respondent submitted a letter of resignation dated July 13, 2007. This date was approximately one month before the beginning of the school year, and respondent did not have the consent of the charter school. Under the circumstances, I

CONCLUDE that respondent ceased to perform her duties before the expiration of the term of her employment without the consent of Gray Charter School contrary to N.J.S.A. 18A:26-10.

Petitioner seeks a suspension of respondent's teaching certificate for a period of one year and cites multiple cases in which such action was taken. According to petitioner, this matter should be handled in the same manner as in the cited cases.

Respondent points to the word "may" in the portion of N.J.S.A. 18A:26-10 that refers to a suspension for a period not exceeding one year. Based thereon, respondent argues that a suspension under N.J.S.A. 18A:26-10 is discretionary rather than mandatory.

The prior precedent has been summed up as follows: "Generally, the Commissioner has imposed the full one-year suspension of a teaching certificate for leaving a district without adequate notice. (Citations omitted). In rare circumstances in which the Commissioner has seen fit to lessen the suspension period, it was for compelling reasons. (Citation omitted.)" Board of Education of Borough of Alpine v. Leonid Yuz, EDU 1116-06, Initial Decision (July 17, 2008), adopted, Commissioner of Education (September 23, 2008), http://lawlibrary.rutgers.edu/oal/search.shtml.

Respondent maintains that a suspension is not warranted considering all of the circumstances. According to respondent, at the time that she chose to leave the employment of Gray Charter School, she was operating under the following impressions: (1) she was not aware of the need to provide sixty days' notice of resignation or the sanction potentially resulting from a failure to give notice; (2) her employment contract was silent as to a notice requirement for termination or resignation; (3) her employer had made it clear that she did not want individuals in Gray Charter School who did not want to work there and that she had many other teachers who wanted to work there; and (4) no one advised respondent of the sixty-day notice requirement.

Respondent's impressions as set forth in her brief are not consistent with the actual facts in the matter in several important respects. In addition, respondent fails to mention significant facts that were known to her. First, while the employment contract does not contain an explicit sixty-day notice requirement, there is a provision which expressly addresses termination of the agreement. That provision states that the contract can be terminated upon written agreement with the school. This means that respondent could have determined the proper procedure by reading the contract. Second, the teachers were advised during staff meetings that they should advise Ms. Gray if they were planning to leave Gray Charter School. There is no indication that Gray Charter School would unreasonably refuse to agree to a termination of the contract. In fact, Ms. Gray had told the staff that she did not want teachers who did not want to be at Gray Charter School and that there were other individuals who wanted to work there.

Respondent blames Gray Charter School for closing and not accepting mail during July and the early part of August. According to respondent, if Gray Charter School had accepted mail during this period of time, a replacement could have been found in a timely manner. One difficulty with this argument is that respondent knew that Gray Charter School would be closed during this period of time. Another difficulty is that respondent still did not have an agreement with Gray Charter School to terminate the contract.

Here, respondent went for an interview with the Orange Board of Education in April 2007 and subsequently signed a contract with Gray Charter School in May 2007. Solely to protect her own interests, respondent waited until she received an actual offer in July 2007 before providing any notice to Gray Charter School. In doing so, respondent completely disregarded a provision of the contact which stated that it could be terminated upon written agreement. Further, by July 2007, it was readily foreseeable that Gray Charter School would not receive the letter of resignation until the first day of school. In fact, respondent's unprofessional conduct contributed to a situation where

Gray Charter School was unable to open on schedule. Further, Ms. Gray had to reschedule training, other employees were upset because they were afraid that they might lose their jobs, and Ms. Gray had to revise the spring break schedule and extend the school year. Under the circumstances, I **CONCLUDE** that respondent's teaching certificate should be suspended for a period of one year.

Accordingly, it is **ORDERED** that respondent's teaching certificate 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.

June 3, 2009
DATE

Richard McGill
RICHARD McGILL, ALJ

Date Received at Agency: 6/2/09

Mailed to Parties:

6/2/09
DATE

cml
OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

WITNESS LIST

For petitioner:

Verna A. Gray
Richard Salles

For respondent:

Jenelle Stokes
Pamela Luke

EXHIBIT LIST

J-1	Stipulation of Facts	Evidence
P-1	Acknowledgement Form dated May 5, 2004	Evidence

229-09

IBTIHAJ MARSHALL :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

Petitioner appealed the determination by the Board that she does not satisfy the residency requirements of the district to be enrolled in its schools. Petitioner – who turned 18 in August of 2008 – lived with her mother, Y.M., and siblings in Maplewood until November 2008, when Y.M. relocated to Montclair, at which time petitioner moved in with her aunt, who resided in the upstairs apartment of the house vacated by Y.M. Respondent contends that petitioner is not a resident of Maplewood, but determined that she would be allowed to complete the 2008-2009 school year; however, the Board filed a counterclaim for tuition for the period of petitioner's alleged ineligible attendance.

The ALJ found that: the petitioner has been domiciled in the Board's district since August 2008 – when she turned 18 – and respondent Board's evidence to the contrary was neither germane nor persuasive. Accordingly, the ALJ concluded that the petition should be granted and the respondent's counterclaim dismissed.

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.

July 15, 2009

OAL DKT. NO. EDU 3822-09
AGENCY DKT. NO. 53-3/09

IBTIHAJ MARSHALL	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties. For the reasons set forth therein, the Commissioner adopts the Initial Decision as the final decision in this case.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/15/09

Date of Mailing: 7/15/09

* 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 03822-09
AGENCY DKT. NO. 53-3/09

I.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,

Respondent.

I.M., pro se

Jessica De Konick, Esq., for respondent

Record Closed: May 13, 2009 Decided: June 2, 2009

BEFORE **J. HOWARD SOLOMON,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner I.M. appeals the determination by the Board of Education of the Township of South Orange-Maplewood (respondent or district) that she does not satisfy the residency requirements of the district to be enrolled in its schools. Although petitioner is allowed to complete the current school year, respondent counterclaims for tuition.

The Commissioner of Education forwarded petitioner's appeal as a contested case to the Office of Administrative Law, where it was received on March 18, 2009. The matter was assigned to the undersigned on April 15, 2009, and an expedited hearing was scheduled for May 8, 2009. On May 8, petitioner appeared but requested an adjournment since her witness was not available. Accordingly, the matter was adjourned to Monday, May 11, 2009. On May 11, petitioner again requested an adjournment since her witness was not available until May 13, 2009. The hearing commenced on May 11, 2009, but was continued on May 13, 2009, to allow for the testimony of petitioner's witness, who was available on that date. The record closed on May 13, 2009.

FACTUAL DISCUSSION

The issue in dispute is whether petitioner is a full-time resident of the district.

Petitioner, I.M., eighteen years old whose date of birth is August 10, 1990 (P-1), testified in her own behalf. She stated that she has been a resident of the school district since 2005[1] when she enrolled in the eighth grade. Ever since then she has been residing at a two-family residence owned by M.T., her aunt by marriage,[2] located on Hughes Street in Maplewood (the premises). She is currently in her senior year of high school.

When petitioner first moved into the premises, she lived in the first-floor apartment along with her mother, Y.M., and her siblings. In November 2008, after Y.M. lost her job, she could no longer afford the rent and moved to Montclair. Petitioner, however, remained at the premises, moving in with her aunt, who occupied the second-floor apartment. She described the second-floor apartment as consisting of two levels. The upper level, which used to be the attic, now consists of bedrooms, one of which is occupied by petitioner. The living areas, such as the living room and kitchen, are on the second floor.

[1] The testimony of others showed that the year was actually 2004.

[2] M.T. was married to the brother of petitioner's mother.

Petitioner stated that M.T. prepares food for her own children and her. On occasion, M.T. gives petitioner money for recreation, such as going to the movies. Occasionally, she receives money from her mother for clothing. Her mother also pays for petitioner's cell phone bill, her healthcare needs, and, on occasion, for haircuts, and her mother will pay for her graduation costs, such as transportation to the senior prom and a dress for the prom, which is scheduled in June.

Petitioner walks to school and needs to be in class by 8:25 a.m. However, she is often tardy for her first class. She has had part-time jobs over her school years, such as baby-sitting or working at an ice cream parlor, which have caused her to get to bed late and consequently be late for school.

Y.M., the mother of petitioner, testified in petitioner's behalf. She first moved into the premises in 2004, occupying the first-floor apartment with her children, including petitioner, at a monthly rental of $1,350. She was laid off from her employment in September 2008, and in November 2008 vacated the apartment and moved to Montclair to live in the residence of another family member, where she continues to reside. Since there was no room for petitioner at the Montclair residence, Y.M. asked M.T. if petitioner could remain with her. M.T. agreed and petitioner moved into the second-floor apartment at the premises. Y.M. visits her daughter about two times a week. Y.M. pays M.T. about $15 to $20 per week towards her daughter's food. She mentioned that petitioner baby-sits two or three times per week and earns somewhere between $50 and $75 per week. Y.M., on occasion, pays for petitioner's haircuts, and intends to pay for her prom dress and for transportation to the prom, although neither prom expense has yet been incurred. Y.M. also stated that after graduation, petitioner will remain with M.T. until she starts college in September.

M.T. testified for petitioner. She stated that she is the sole owner of the premises, which is a two-family house. She acknowledged that she is petitioner's aunt and further stated that petitioner, her siblings and Y.M. moved into the first-floor apartment in 2004 when petitioner started the eighth grade. M.T. and her children

occupy the second-floor apartment, which also has an upper floor that used to be the attic but now has four bedrooms.

In November 2008 Y.M. and her children moved out, with the exception of petitioner, who moved into the apartment of M.T. She was given her own bedroom on the third floor. M.T. stated that after Y.M. moved out, her father, C.T., or her uncle, L.T., neither of whom resides at the premises, frequently worked on the first-floor apartment, preparing it for the next tenancy by painting it and performing general repairs. Although her father knew of petitioner's residency, her uncle did not. Neither has an ownership interest in the premises.

M.T. mentioned that Y.M. gives her about $30 each week for petitioner's food. She does not separate out petitioner's food purchases from the rest of her family, but puts the money towards the entire food bill, which averages about $200 per week. Other than shelter and any excess food costs, she does not provide any expenses for petitioner.

No other witnesses testified in behalf of petitioner.

William R. Smith, the investigator for respondent, testified for respondent. He investigates residences of students where residency is an issue. He also investigates truancies. On February 24, 2009, during the afternoon, Mr. Smith went to the residence of petitioner, which he confirmed is a two-family house. While there, he spoke with a male who identified himself as "Mr. T.," who claimed to be the owner of the premises. This man told Mr. Smith that petitioner had moved out.

Mr. Smith returned to the residence again on March 4, 2009, and once again saw "Mr. T.," who reiterated what he had mentioned during the prior visit.

On April 8, 2009, Mr. Smith returned to the residence, and this time met with petitioner. When he arrived, she was upstairs in an apartment and was called by another occupant to come downstairs to meet with Mr. Smith, which she did. She told him that

she resided there and that her bedroom was located on the third floor. Mr. Smith did not enter the premises to confirm her living quarters since he does not usually enter a residence.

Mr. Smith again returned to the premises on May 1, 2009, at 6:42 a.m. and again on May 5, 2009, at 5:20 a.m. In both instances, he noticed vehicles in the driveway and rang the doorbell. No one answered. He reported his findings to Tiffani Barnes, the district registrar.

Tiffani Barnes then testified in behalf of respondent. As part of her duties she verifies the residences of students in the district and employs Mr. Smith to verify these residences. He usually conducts his investigations anywhere between 5:00 a.m. and 6:00 p.m. and frequently goes to a residence involved, but does not enter it.

Ms. Barnes stated that Y.M., petitioner and Y.M.'s other children moved into the district in 2004. In November 2008 the district received a residency request[3] from Columbia High School for Y.M.'s son, who had been receiving home instruction at the premises. In November 2008, when the teacher arrived to give instruction, the first-floor apartment was empty and the home telephone number had been disconnected.

As a result of the findings by the home instructor, notices were mailed to the premises addressed to Y.M., with a copy of each notice given to petitioner, advising that Y.M.'s children were going to be dropped from the rolls of students since they no longer resided in the district. In each instance, Y.M. was given an opportunity to appear at a scheduled meeting of the district board of education to explain petitioner's residency. When she failed to appear, her children were dropped from the rolls. After each meeting date, Y.M. contacted respondent and another meeting was scheduled. Again, neither petitioner nor Y.M. appeared. In early January 2009 Y.M. contacted respondent, explaining that petitioner resided in the district. This claim led to the investigation conducted by Mr. Smith. Ms. Barnes further stated that on February 25, 2009, M.T. contacted respondent and registered petitioner, stating that petitioner resided with her.

[3] This is a request to check on a student's residency.

Ms. Barnes mentioned that in residency cases such as this, respondent examines the attendance records of the student whose residency is in dispute, since typically a record of tardiness indicates that a student resides outside the district. After her review of petitioner's records, she noted that petitioner was frequently late for her first class, which started at 8:25 a.m. Petitioner's attendance records showed excused or unexcused lateness or absence on 88 out of 148 school days. Ms. Barnes acknowledged, however, that tardiness is only an indicator that a student may live outside the district. Respondent relies upon the investigation of its investigator in determining residence.

Ms. Barnes further stated that petitioner has been allowed to complete the current school year in the district since she will be graduating this June. However, the district seeks tuition reimbursement for the months of March through June 2009 in the total amount of $5,044.

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 18A:38-1 states in pertinent part:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> a. Any person who is domiciled within the school district;
>
> 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 . . . ;
>
> . . . .

Our Supreme Court in State v. Benny, 20 N.J. 238, 250 (1955) (citations omitted), a voting case, held that domicile is the place where a person "'has his true, fixed, permanent home, and principal establishment, and to which, whenever he is absent, he has the intention of returning,' or 'the habitation fixed in any place, without any present intention of removing therefrom.'"

Petitioner, whose date of birth is August 10, 1990, was already eighteen years of age when her mother moved to Montclair. Accordingly, N.J.A.C. 6A:22-3.1(a)2 becomes applicable, which provides:

> A student is domiciled in the school district when he or she has reached the age of 18 or is emancipated from the care and custody of a parent or legal guardian and has established a permanent home within the district. A home is permanent when the student intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.

Under the facts presented, I **CONCLUDE** that petitioner has been domiciled in the district since August 10, 2008 when she turned eighteen. She has remained there ever since. Therefore, under N.J.S.A. 18A:38-1a., petitioner "is domiciled within the school district[.]" Ibid.

As an aside, the investigation conducted by respondent, even if it were germane, was not persuasive. Surveillances were not conducted. Furthermore, when the investigator spoke with an individual named "Mr. T." while at the premises in February 2009, that individual, under the facts presented, may have been the uncle of M.T., who knew nothing of petitioner's living arrangements. More importantly, the dialogue the investigator had with "Mr. T." was total hearsay, and therefore is not considered. As to the investigator's early-morning visits at the premises on May 1, 2009, at 6:42 a.m. and May 5, 2009, at 5:20 a.m., it was apparent from the facts presented that the household was still asleep. Petitioner's first class was not until 8:25 a.m. and M.T. did not leave for work until 8:30 a.m. No other evidence was offered by respondent to refute petitioner's domicile.

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that petitioner has been domiciled in the district since she became eighteen on August 10, 2008. Her mother's subsequent move to Montclair did not change petitioner's domicile since she remained living at the premises with her aunt. She intends to remain there indefinitely. There were no proofs offered by respondent to the contrary.

ORDER

Based upon the foregoing, it is **ORDERED** that the petition filed by petitioner be and is hereby **GRANTED** and that the counterclaim filed by respondent be and is hereby **DISMISSED**.

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

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

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

6-2-09
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: June 2, 2009

Date Mailed to Parties: June 2, 2009

db

APPENDIX

Witnesses

For Petitioner:

I.M.

Y.M.

M.T.

For Respondent:

William R. Smith

Tiffani Barnes

Exhibits

For Petitioner:

None

For Respondent:

R-1 Letter from respondent dated January 5, 2009, to Y.M.

R-2 Letter from respondent dated January 13, 2009, to Y.M.

R-3 Letter dated March 2, 2009, addressed to M.T.

R-4 Letter dated March 17, 2009, from respondent dated to M.T.

R-5 Handwritten note dated March 18, 2009

R-6 Letter from respondent dated January 13, 2008, to Y.M. with signature of petitioner acknowledging receipt

R-7 Appeal filed by petitioner dated March 17, 2009

R-8 Resolution 2484 of respondent

R-9 Period attendance form of respondent

R-10 Document showing classes taken by petitioner and her attendance record

230-09

IN THE MATTER OF THE TENURE HEARING OF MICHAEL HARPER, MID-STATE CORRECTIONAL FACILITY, NEW JERSEY STATE DEPARTMENT OF CORRECTIONS.

COMMISSIONER OF EDUCATION
DECISION

SYNOPSIS

Petitioner filed tenure charges of unbecoming conduct and other just cause against respondent, a tenured teacher, and sought to suspend him without pay for a period of 90 days. 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 suspension of the respondent from his tenured position without pay for 90 days. Accordingly, the Commissioner granted summary decision to the petitioner and ordered respondent suspended without pay from his tenured position for 90 days.

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, 2009

AGENCY DKT. NO. 98-5/09

IN THE MATTER OF THE TENURE HEARING OF MICHAEL HARPER, MID-STATE CORRECTIONAL FACILITY, NEW JERSEY STATE DEPARTMENT OF CORRECTIONS.	: : : :	COMMISSIONER OF EDUCATION DECISION

For the Department, Dianne Moratti, DAG

No appearance by or on behalf of Respondent, Michael Harper

This matter was opened before the Commissioner of Education on May 11, 2009, through tenure charges of unbecoming conduct and other just cause certified by the Supervisor of Education of the New Jersey Department of Corrections (Department), together with supporting evidence against Michael Harper (respondent), a tenured teacher in the Department's employ. Petitioner certified these charges to the Commissioner and provided respondent with written notice of such certification via certified mail sent on or about May 6, 2009.

On May 12, 2009, the Commissioner directed respondent – via both certified and regular mail– to file an answer to the charges. 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. However, although respondent received the certified mailing

on May 27, 2009 – as evidenced by his signature on the return receipt ("green card") – and the regular mailing was not returned as undeliverable, no reply was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the Department in this matter indicate that on March 13, 2009, respondent was observed showing an unauthorized movie to his students during class time. On March 16 and March 23, 2009, respondent admitted to same.

Deeming these allegations to be admitted and noting that respondent has failed to respond to the charges certified against him, the Commissioner finds that the Department's charges have been proven and that they warrant respondent's 90-day suspension without pay.

Accordingly, summary decision is hereby granted to the Department, and respondent shall serve a ninety-day suspension without pay.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 7/14/09

Date of Mailing: 7/16/09

[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
DEPARTMENT OF CORRECTIONS

JON S. CORZINE
Governor
In Reply respond to:

☐ ADULT DIAGNOSTIC AND TREATMENT CENTER
8 Production Way, PO Box 190
Avenel NJ 07001

■ ALBERT C WAGNER YOUTH CORRECTIONAL FACILITY
Ward Avenue PO Box 500
Bordentown NJ 08505

☐ BAYSIDE STATE PRISON
Route 47 Delsea Drive
Leesburg NJ 08327

☐ EAST JERSEY STATE PRISON
Lock Box R
Rahway NJ 07065

☐ EDNA MAHAN CORRECTIONAL FACILITY FOR WOMEN
30 County Road 513
PO Box 4004
Clinton, NJ 08809

☐ GARDEN STATE CORRECTIONAL
LITY
3ox 11401
Yardville NJ 08620

☐ STABILIZATION & REINTEGRATION PROGRAM
Bootcamp, Route 72
New Lisbon NJ 08064

☐ MID-STATE CORRECTIONAL FACILITY
PO Box 866
Wrightstown NJ 08662

☐ MOUNTAINVIEW YOUTH CORRECTIONAL FACILITY
PO Box 994
Annandale NJ 08801

☐ NEW JERSEY STATE PRISON
PO Box 861
Trenton NJ 08625

☐ CENTRAL RECEPTION AND ASSIGNMENT FACILITY
PO Box 7450
West Trenton NJ 08625

☐ NORTHERN STATE PRISON
Frontage Road PO Box 2300
Newark NJ 07114

☐ RIVERFRONT STATE PRISON
Delaware & Elm Street PO Box 9104
Camden NJ 08101

☐ SOUTHERN STATE CORRECTIONAL FACILITY
PO Box 150
Delmont NJ 08314

☐ [illegible]TH WOODS STATE PRISON
Burlington Road South
Box 6000
Bridgeton NJ 08302-6000

STATE USE INDUSTRIES – DEPTCOR
163 North Olden Avenue
PO Box 867
Trenton, NJ 08625-0867

GEORGE W. HAYMAN
Commissioner

May 6, 2009

Statement of Charges

I, Cynthia Troiani, Supervisor of Education for the Department of Corrections Albert C. Wagner Facility and Mid-State Correctional Facility, am sanctioning Michael Harper, Teacher I, assigned to the Mid-State Correctional Facility for the charges of Conduct Unbecoming pursuant to NJSA 18A:6-10 and NJAC 6A:3-5.1, NJAC4A:2-2.3 and Human Resource Bulletin 84-17, as amended, C11, C17 and E1; Conduct Unbecoming an Employee, Possession of Contraband on State Property or in State Vehicle and Violation of a rule, regulation, policy, procedure, order, or administrative decision.

Charge One

Human Resources Bulletin (HRB) as amended, 84-17 C11
Conduct unbecoming an employee:

On March 13, 2009, at approximately 9:40AM, Lt. Solarski, of the Midstate Correctional Facility was conducting a routine tour of duty and observed a video being shown to Mr. Harper's GED class during regularly scheduled class time. Upon questioning the students on what they were watching, they revealed the title as "Friday The 13th", the new one.

Following this action, a SID investigator and Administrative staff member went to Mr. Harper's class room to retrieve the video in question. At this time, Mr. Harper admitted he was showing the movie "Friday the 13th, Welcome to Crystal Lake" to his class and tossed the DVD to the SID investigator upon the direct order by the Administrative staff member.

On March 16th, Mr. Harper admitted to the Assistant Supervisor of Education, Kevin Kavanaugh, that he did show the DVD in question to his class and did not request permission to show the movie to his students. The video is not an approved video for the GED curriculum nor is it included in the Mid-State Correctional Facility's Video Library.

Upon further investigation on March 23, when interviewed by SID investigators, Mr. Harper admitted to showing the DVD in the facility without permission. He also provided that the DVD was given to him by another staff member. During the March 23rd interview, Mr. Harper admitted to showing a movie, unrelated to the classroom curriculum, because he was "backed up" with work. Using the movie as a means to fulfill instructional duties is not allowed and deemed conduct unbecoming for the certified teaching professional.

Charge Two

Human Resource Bulletin 84-17 as amended, C17 Possession of contraband on state property or in a state vehicle

On March 23, Mr. Harper admitted in the interview with SID investigators that the DVD was obtained through another staff member. Although Mr. Harper did not physically bring the movie in, he was in possession of the DVD and was observed showing the movie to his students during scheduled class hours. The movie was identified as an illegal copy as confirmed in the investigation. Mr. Harper stated he was unaware that the movie was illegal.

Charge Three

Human Resource Bulletin 84-17 as amended, E1 Violation of a rule, regulation, policy, procedure, order or administrative decision

On March 13th and March 16th and March 23rd, Mr. Harper admitted to SID investigators and his immediate supervisor that he showed an unauthorized DVD to his classroom students without seeking approval from his supervisor and did not comply with the policy as established for using movies for instructional purposes.

STATEMENT of EVIDENCE

Documentary evidence in support of the charges is found in the attached reports. It should be noted that this is the second documented violation of Human Resources HRB 84-17 as amended C17, Possession of contraband on state property or in a state vehicle. The evidence in support of said charges is sufficient to warrant 90 days suspension without pay.

I certify 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.

Cynthia Troiani
Supervisor of Education
Department of Corrections

Sworn and subscribed before me this
7th day of May (month) 2009 (year)

Signature of Notary Public or other person authorized to administer oath of affirmation

Harvey J. Heller
Notary Public
State of New Jersey
My Commission
May 6, 2014

231-09

#231-09

OAL DKT. NO. EDU 3823-09
AGENCY DKT. NO. 59-3/09

J.D. on behalf of minor child, J.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH ORANGE-MAPLEWOOD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, 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 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.

Lucille Edag

COMMISSIONER OF EDUCATION

Date of Decision: 7/15/09

Date of Mailing: 7/16/09



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03823-09

AGENCY DKT. NO. 59-3/09

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

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH ORANGE, MAPLEWOOD, ESSEX COUNTY,

Respondent.

J.D., pro se for petitioner

Jessica de Koninck, Esq., for respondent

Record Closed: June 3, 2009 Decided: June 4, 2009

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

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on April 14, 2009, 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 June 3, 2009.

On the date of the hearing, the parties were able to settle the matter and the parties submitted the attached Settlement Agreement indicating the terms of the agreement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

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 4, 2009
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency:

Date Mailed to Parties: JUN 8 2009

6-8-09
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

EDU-03823-09
Docket # 59-309
I/M/O J.D. O/B/O minor child J.T.
Petitioner

v.
Board of Education South Orange Maplewood

Settlement Agreement

WHEREAS under NJSA 18A: 38-1 et seq a child domiciled with a parent or legal guardian may attend school in the district; and

WHEREAS the petitioner has produced a certified birth certificate reflecting that he is the parent of the minor child J.T.

The parties agree that the child is domiciled in the district and living with a parent and therefore entitled to attend school in the South Orange Maplewood school district

Counsel for Petitioner

Counsel for Respondent

Dated
June 3, 2009

#232-09

OAL DKT. NO. EDU 11805-03
AGENCY DKT. NO. 424-11/03

NANCY LENNON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF VERNON TOWNSHIP, SUSSEX 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.

COMMISSIONER OF EDUCATION

Date of Decision: 7/15/09

Date of Mailing: 7/16/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11805-03

AGENCY DKT. NO. 424-11/03

NANCY LENNON,

Petitioner,

v.

BOARD OF EDUCATION OF VERNON TOWNSHIP, SUSSEX COUNTY,

Respondent.

Mary J. Hammer, Esq., for petitioner (Bucceri & Pincus, attorneys)

James L. Plosia, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: June 8, 2009 Decided: June 9, 2009

BEFORE **IMRE KARASZEGI,** ALJ:

On December 26, 2003, this 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.

June 9, 2009
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 6-11-09

Date Mailed to Parties: JUN 11 2009

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

APRUZZESE, McDERMOTT,
MASTRO & MURPHY P.C.
25 Independence Boulevard
P.O. Box 112
Liberty Corner, New Jersey 07938
(908) 580-1776
Attorneys for Respondent

NANCY LENNON, Petitioner, v. VERNON TOWNSHIP BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL Docket No.: EDU 11805-2003N Agency Ref. No.: 424-11/03 **STIPULATION OF SETTLEMENT**

The parties in the above-captioned matter hereby agree as follows:

1. Within 20 days after the Commissioner of Education has approved this Stipulation of Settlement, the Vernon Township Board of Education ("Board") shall pay to Nancy Lennon ("Lennon") the total sum of $33,452. These monies are being paid to Lennon for settlement of any and all claims Lennon has or might otherwise have against the Board, its agents, servants, employees, officers, and assigns. These monies are being paid to Lennon as back wages during the time that she contends she was to be paid pursuant to N.J.S.A. 18A:30-2.1. All standard payroll deductions shall be made by the Board.

2. The Board shall credit Lennon with 30 sick days.

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A PROFESSIONAL CORPORATION
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3. Lennon shall submit her resignation, which shall be effective December 31, 2010, to the Superintendent within 20 days after the Commissioner approves this Stipulation of Settlement. The Board shall accept the resignation at the next regularly scheduled Board meeting. That resignation will be final, binding, and irrevocable once it has been accepted by the Board. If Lennon does not fulfill her obligation to resign on December 31, 2010, the Board shall file an Order to Show Cause to which Lennon has no defenses and she will be obligated to return the compensation she received as a result of this Stipulation of Settlement as well as the value of the 30 sick days. If Lennon begins collecting retirement benefits from TPAF on January 1, 2011, after having resigned on December 31, 2010, she shall be entitled to participate in the retirement sick leave reimbursement program set forth in the VTEA collective bargaining agreement.

4. Lennon shall make every effort to find other employment prior to December 31, 2010. If she finds such employment, she will submit her immediate resignation which shall be approved by the Board with no penalty for tuition paid for by the Board.

5. Should the Board offer a "separation plan" to its teaching staff members between the date of this Agreement and December 31, 2010, the parties agree that Lennon will be eligible to participate in this program (if she is otherwise eligible under the provisions of that program), despite her having submitted a letter of resignation to the District pursuant to this Stipulation.

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6. Petitioner hereby releases and forever waives any and all claims she has or might have against the Board, its officers, employees, agents, successors and assigns arising out of any aspect of her employment in the Vernon Township School District, with the exception of

workers' compensation claims against the Board which she has not yet asserted, and shall sign a General Release and Waiver at the same time she signs this Stipulation of Settlement. Notwithstanding the foregoing, Lennon does not waive or release her right to seek indemnity pursuant to N.J.S.A. 18A:16-6 and 6.1 in the event of an action being brought against her which is covered by one of those statutes.

7. The parties agree that they have been represented by counsel and enter into this Stipulation of Settlement voluntarily. Neither party admits any wrongdoing whatsoever by executing this document.

8. The parties agree that Lennon shall pay the employee's share of any pension contributions to the Teachers' Pension & Annuity Fund for the compensation provided in this Stipulation of Settlement and that the Board shall not be liable for the employee's share thereof, that Lennon shall not be liable for the employer's share thereof, that the State will contribute the employer's share of pension contributions if it agrees to do so, and that if the State does not contribute the employer's share of pension contributions, the Board shall contribute the employer's share of such contributions.

9. The Board has not provided any tax advice to Lennon regarding whether any compensation agreed to in this stipulation will be taxable either to the federal government or the State of New Jersey.

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10. The parties agree that neither party is responsible for the payment of the other party's attorney's fees in connection with this matter.

11. This Agreement shall be governed by the laws of the State of New Jersey.

12. Upon approval by the Board and full execution of the Stipulation of Settlement, the Board, agrees to submit this Stipulation of Settlement and a copy of the Board's resolution to the Honorable Imre Karaszegi, ALJ within seven (7) days of the signing of this Agreement.

Nancy Lennon

NANCY LENNON

Dated: 5/30/09

VERNON TOWNSHIP BOARD OF EDUCATION

BY: Anthony J. Mauro

Dated: 6/3/09

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GENERAL RELEASE AND WAIVER

I, NANCY LENNON, having agreed to settle all outstanding claims against the VERNON TOWNSHIP BOARD OF EDUCATION ("Board"), hereby provides the following General Release and Waiver ("Release"). The terms of the Release are as follows:

1. I acknowledge and agree that specific consideration for this Release is provided by the provisions of the attached Stipulation of Settlement, which is hereby integrated into this Release.

2. I agree to immediately dismiss with prejudice any claims which I have already brought and which are currently pending against any of the Releasees. "Releasees", as that term is employed herein, shall include the Board, its officers, agents, servants, and employees, and their respective successors and assigns.

3. Without limiting the scope of the foregoing provision in any way, I specifically release all claims relating to or arising out of any aspect of my employment with the Board, including, but not limited to, all claims under The Age Discrimination in Employment Act, 20 U.S.C. § 621, et seq., and specifically § 626, Title VII of the Civil Rights Act, The Civil Rights Act of 1991 and the laws amended thereby, The American with Disabilities Act, The Family and

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This page reviewed by:

Nancy Lennon

Dated: 5/30/09

Medical Leave Act of 1993, The New Jersey Law Against Discrimination, The New Jersey Conscientious Employee Protection Act, The New Jersey Family Leave Act, any contract of employment, express or implied, any provision of the Constitutions 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. This Release shall apply to all known, unknown claims, liens, injuries and damages up to and including the day of the date of the Settlement Agreement. Excluded from the scope of this Release are any worker's compensation claims which I may have (but which have not yet been filed) against the aforementioned Releasees.

4. I hereby execute this Release without being under any duress. I agree that I am not being coerced to sign this Release, and that the decision to provide this Release is being made of my own free will.

5. I acknowledge and agree that the Board may initiate a legal action to enforce the provisions, or any one of them, of this Release.

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This page reviewed by:

Nancy Lenron

Dated: 5/30/09

ACKNOWLEDGEMENT

I HAVE CAREFULLY READ AND FULLY UNDERSTAND THE TERMS AND CONDITIONS OF THIS RELEASE. BY MY SIGNATURE BELOW I DEMONSTRATE MY ACKNOWLEDGEMENT OF AND AGREEMENT TO EACH AND EVERY TERM OF THIS RELEASE. I ACKNOWLEDGE THAT I WAS ACCORDED AN OPPORTUNITY TO TAKE 21 DAYS TO CONSIDER WHETHER TO EXECUTE THIS RELEASE, BUT I HAVE SPECIFICALLY AND KNOWINGLY WAIVED THIS OPPORTUNITY. I ACKNOWLEDGE THAT I HAD THE OPPORTUNITY TO REVIEW THIS RELEASE WITH LEGAL COUNSEL AND/OR ANYONE ELSE OF MY CHOOSING, AND TO DISCUSS WITH EACH SUCH PERSON THE TERMS AND CONDITIONS OF THIS RELEASE AND MY RIGHTS UPON EXECUTION. NO REPRESENTATIONS CONCERNING THE TERMS OR EFFECT OF THIS RELEASE AND NO PROMISES, INDUCEMENTS, AGREEMENTS OR UNDERSTANDINGS OF ANY KIND WERE MADE TO ME OR WITH ME BY THE BOARD OR ITS ATTORNEYS TO CAUSE ME TO AGREE TO THE TERMS OF THIS RELEASE OTHER THAN AS SET FORTH IN THE DOCUMENT. I HAVE VOLUNTARILY SIGNED THIS RELEASE AS MY OWN FREE ACT WITH FULL KNOWLEDGE OF ITS TERMS AND CONDITIONS, WHICH ARE FINAL AND BINDING UPON ME. I UNDERSTAND THAT, FOR A PERIOD OF 7 DAYS FOLLOWING MY EXECUTION OF THIS RELEASE, I MAY REVOKE THIS RELEASE, AND THAT THIS RELEASE WILL NOT BE EFFECTIVE OR ENFORCEABLE UNTIL THE REVOCATION PERIOD HAS EXPIRED.

Nancy Lennon

NANCY LENNON

Dated: 5/30/09

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MASTRO & MURPHY
A PROFESSIONAL CORPORATION
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STATE OF NEW JERSEY :
:SS:
COUNTY OF SUSSEX :

5/30/09

I CERTIFY that on Nancy Lennon 2009, NANCY LENNON personally came before me and acknowledged under oath, to my satisfaction, that she is named in and personally signed this document.

Laura Vieira
A Notary Public of the State of New Jersey

LAURA VIEIRA
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 6/30/2010

\S:\CAP\Vernon Twp BOE\LENNON, NANCY\Release 5-28-09.doc

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Vernon Township Public Schools

539 ROUTE 515, P.O. BOX 99 VERNON, NEW JERSEY 07462-0099
PHONE (973) 764-2900 FAX NO. (973) 764-0033

Barbara Linkenheimer
Assistant Superintendent

Anthony J. Macerino
Superintendent of Schools

Steven A. Kepnes
Business Administrator/Board Secretary

RECD JUN 18 P 2:51
OFFICE OF ADMIN LAW

May 18, 2009

Upon the recommendation of the Superintendent the board approved the stipulation of settlement with **Mrs. Nancy Lennon**; OAL Docket No.: EDUOA 11805-2003.

Motion by Mr. Sparta, seconded by Mr. DeYoung and carried on a unanimous roll call vote.

AYES: 8 NOES: 0 ABSENT: 1

Present: Mrs. Auberger, Mr. Castellana, Mr. DeYoung, Mr. Gilson, Mr. Hughes, Mr. McGowan, Mr. Sparta, Mr. Whidden.

****

STATE OF NEW JERSEY
COUNTY OF SUSSEX

Steven A. Kepnes being first duly sworn on oath, deposes and says:

That deponent is Secretary of the Board of Education of the Township of Vernon, in the County and State aforesaid; and that the above extract from the minutes of a meeting of the Board of Education of the Vernon Township School District, held on May 14, 2009 at the Vernon Township Board Office at 7:30 PM, has been compared by deponent with the original minutes of said meeting recorded in full in the official minute book of said board, and is a true copy thereof of the whole of said original so far as the same relates to the subject matters referred to in said extract.

Subscribed and sworn to
before me this 18th day
of May 2009.

Steven A. Kepnes

Barbara Wyble

BARBARA J. WYBLE
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires June 5, 2011

233-09

OAL DKT. NO. EDU 12530-07
AGENCY DKT. NO. 355-11/07

Z.A., on behalf of minor child, J.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SADDLE RIVER, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

On April 23, 2008, a final agency decision was rendered in this matter, wherein the Commissioner ordered that petitioner, Zoe Ajjahnon, be assessed tuition in the amount of $22,625.66, plus $58.75 per diem for each day of attendance after March 5, 2008, to compensate the Saddle River Board of Education for her child J.K.'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 this assessment – which then totaled $26,973.16, due to 74 days of additional attendance by J.K. – on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10; the Board further advised that Zoe Ajjahnon uses an alias and requested that the judgment against her be entered in the name of "Zoe Ajjahnon, also known as Joan Green." Petitioner offered no reasons why the judgment against her should not be so docketed, although given an opportunity by this agency to do so.*

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Zoe Ajjahnon, also known as Joan Green, is now subject to entry of a judgment by the court in the amount of $26,973.16, with interest to accrue as provided by law.

IT IS SO ORDERED.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 7/16/09
Date of Mailing: 7/16/09

* Notices were provided to petitioner at all three of her known addresses. Although two notices were returned by the postal service as "not deliverable," the certified copy of one was returned as "unclaimed" while the regular mail copy was not returned.

234-09

IN THE MATTER OF THE TENURE HEARING OF ANATOL KOUS, SCHOOL DISTRICT OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board filed tenure charges of insubordination against respondent, a tenured teacher, and sought his removal from employment in the Old Bridge Public Schools. 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 removal of the respondent from his tenured position. Accordingly, the Commissioner granted summary decision to the Board, ordered respondent dismissed from his tenured position, and transmitted a copy of this decision 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.

July 17, 2009

AGENCY DKT. NO. 109-6/09

IN THE MATTER OF THE TENURE HEARING OF ANATOL KOUS, SCHOOL DISTRICT OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

For the Petitioner, Philip E. Stern, Esq.

No appearance by or on behalf of Respondent, Anatol Kous

This matter was opened before the Commissioner of Education on June 1, 2009 through tenure charges of insubordination certified by the Secretary of the Old Bridge Board of Education, together with supporting evidence against Anatol Kous, a tenured teacher in the petitioner's employ. Petitioner provided respondent with written notice of such certification via certified mail sent on or about May 20, 2009.

On June 2, 2009, the Commissioner directed respondent – via both certified and regular mail – to file an answer to the charges. 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. However, although respondent received the certified mailing on or about June 4, 2009 – as evidenced by his signature on the return receipt ("green

card") – and the regular mailing was not returned as undeliverable, no reply was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioning Board of Education in this matter indicate that respondent showed evidence of deviation from normal mental health such that the Board placed him on paid administrative leave pending the results of a psychiatric evaluation. However, respondent has been persistently uncooperative in securing such an evaluation to ascertain his ability to return to his teaching position.

Deeming the allegations to be admitted and noting that respondent has failed to respond to the charges certified against him, the Commissioner finds that petitioner's charge of insubordination has been proven and that it warrants respondent's dismissal.

Accordingly, summary decision is hereby granted to petitioner, and respondent is dismissed from his tenured position. A copy of this decision shall be forwarded to the State Board of Examiners for action as it deems appropriate.

IT IS SO ORDERED.[1]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 7/17/09

Date of Mailing: 7/17/09

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

STATEMENT OF CHARGES

I, Simon M. Bosco, Ed. D., Superintendent of Schools, do herewith charge that Anatol Kous, employed by the Old Bridge Township Board of Education ("Board") as a tenured teaching staff member, is guilty of Insubordinate Conduct so as to require that his employment with the Board be terminated. More particularly, it is charged that:

During the 2008-2009 school year Mr. Kous showed evidence of deviation from normal mental health such that the Board placed him on administrative paid leave pursuant to N.J.S.A. 18A:16-2, and pending the results of a psychiatric evaluation.

At all times following his placement on administrative leave, Mr. Kous has been uncooperative and in fact, subversive, in the Board's attempt to secure his psychiatric evaluation.

The Board, through its counsel, informed Mr. Kous' attorneys of the urgency and necessity of his obtaining a psychiatric evaluation in order to ascertain his ability to return to his teaching position. Those efforts, however, have not resulted in Mr. Kous' cooperation in securing the requisite evaluation.

There can be no doubt that Mr. Kous' deliberate and persistent refusal to undergo psychiatric testing is insubordinate. Moreover, his conduct has jeopardized the educational interests of his students, and the continuity of their instruction. Mr. Kous' continued refusal to submit to a psychiatric evaluation, violates every tenet and policy that the Board upholds relative to safeguarding the interests of its students and staff, and is thus just cause to warrant his dismissal.

By: _____
Simon M. Bosco, Ed. D.
Superintendent of Schools

Sworn and subscribed to before me
on this 1ST day of April, 2009

Kathleen Kennedy

KATHLEEN KENNEDY
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 10/15/2009

STATEMENT OF EVIDENCE

Documentary evidence in support of Charges that Anatol Kous is guilty of Insubordinate Conduct is found in the Affidavit of Simon Bosco and accompanying exhibits.

Simon M. Bosco, Ed.D.
Superintendent of Schools
Old Bridge Township Board of Education

Sworn and subscribed to before me
on this 1ST day of April, 2009

Kathleen Kennedy

KATHLEEN KENNEDY
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 10/15/2009

APPENDIX OF EXHIBITS

1. Affidavit of Simon Bosco, with accompanying exhibits.

AFFIDAVIT OF SIMON BOSCO

I, Simon Bosco, hereby depose and say:

1. At all times relevant hereto, I served as Superintendent of Schools for the Old Bridge Township Board of Education, Old Bridge, New Jersey.

2. I am making this affidavit in support of the Tenure Charges against Anatol Kous ("Mr. Kous"), tenured teaching staff member for the Old Bridge Township Board of Education.

3. During the 2008-2009 school year Mr. Kous showed evidence of deviation from normal mental health such that the Board placed him on administrative paid leave pending a psychiatric evaluation pursuant to N.J.S.A. 18A:16-2.

4. The Board, through its counsel, informed Mr. Kous' attorneys of the urgency and necessity of his obtaining a psychiatric evaluation in order to effectuate his return to his teaching position. However, those efforts have not resulted in Mr. Kous' cooperation in securing the requisite evaluation, and he therefore remains on administrative paid leave. True and accurate copies of the Board Attorney's correspondence to Mr. Kous' attorneys are attached hereto as Exhibit "A".

5. Mr. Kous has blatantly disregarded the Board's directive to obtain a psychiatric evaluation. Given his lack of cooperation, and the fact that he remains on a paid leave of absence, the Board is left to view Mr. Kous' insubordinate conduct as a deliberate attempt to extend his paid leave at the Board's expense.

6. Mr. Kous has not only been insubordinate in his refusal to comply with the Board's directive to obtain a psychiatric evaluation, be he has also perpetrated a fraud upon this District by deliberating extending his paid leave of absence.

7. Furthermore, Mr. Kous' continued insubordinate has led to his abandonment of his teaching position. He has have jeopardized his students' education interests, as well as inexcusably compromised the continuity of their instruction.

8. The District has an absolute obligation to provide a Thorough and Efficient Education to its students, and Mr. Kous has deliberately compromised our ability to carry out this fundamental obligation. Accordingly, the only remedy for such insubordinate conduct is Mr. Kous' dismissal.

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.

Simon Bosco
Superintendent of Schools
Old Bridge Township Board of Education

Sworn and subscribed to before me
on this 1st day of April, 2009

Kathleen Kennedy

KATHLEEN KENNEDY
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 10/15/2009

EXHIBIT A

ASG&L
ADAMS STERN GUTIERREZ & LATTIBOUDERE, LLC

744 Broad Street, Suite 1600
Newark, NJ 07102
973-735-2742
Fax 973-735-2743
www.asgllaw.com

January 23, 2009

VIA TELEFAX and REGULAR MAIL
Stuart J. Moskovitz, Esq.
819 Highway 33
Freehold, New Jersey 07728

Re: Anatol Kous/Old Bridge Township Board of Education

Dear Mr. Moskovitz:

Please accept this letter on behalf of the Old Bridge Township Board of Education ("Board"), regarding your client, Anatol Kous ("Mr. Kous"). As we discussed today, Mr. Kous has yet to schedule an appointment with our psychiatrist, Dr. Kargman. You informed me that Mr. Kous seeks an appointment with his own psychiatrist prior to seeing Dr. Kargman. You also informed me that your client is aware of the urgency of his need to see Dr. Kargman.

The issues underlying your client's need to see Dr. Kargman are now overshadowed by his recalcitrance in scheduling a psychiatric appointment. Mr. Kous' conduct constitutes insubordination. You should be aware that on November 14, 2008, the undersigned sent a similar letter to Mr. Kous' then-attorney, Michael Barrett, voicing concerns that Mr. Kous canceled his psychiatric appointment scheduled at that time. We are thus faced with a situation where we have placed Mr. Kous on a paid administrative leave pending a psychiatric examination that Mr. Kous refuses to schedule. We have no choice but to view Mr. Kous' conduct as a deliberate attempt to extend his paid leave.

The Board next meets on February 10, 2009 (agenda meeting) and February 17, 2009 (televised meeting). Mr. Kous will receive, via your office, a *Rice* notice prior to those meetings, allowing the Board to discuss him in closed session. In such discussions, the Board reserves the right to consider any actions it deems appropriate, particularly in light of Mr. Kous' insubordinate conduct. Such discussions will be positively informed by the news that Mr. Kous has completed his psychiatric examinations – both by his psychiatrist, and by Dr. Kargman.

In light of the difficulties Mr. Kous reports regarding receiving his mail, please accept this letter on behalf of Mr. Kous. We will assume that your receipt of this letter, and all future correspondence, constitutes completed service upon Mr. Kous. Thank you for your anticipated cooperation.

Very truly yours,

PHILIP E. STERN

cc: Dr. Simon M. Bosco (via telefax and regular mail)

ASG&L
ADAMS STERN GUTIERREZ & LATTIBOUDERE, LLC

744 Broad Street, Suite 1600
Newark, NJ 07102
973-735-2742
Fax 973-735-2743
www.asgllaw.com

November 18, 2003

VIA TELEFAX and REGULAR MAIL
Michael T. Barrett
Bergman & Barrett
9 Tamarack Circle
Montgomery Knoll
U.S. Highway 206 North
Skillman, NJ 08558

Re: Anatol Kous/Old Bridge Township Board of Education

Dear Mr.Barrett:

On behalf of the Old Bridge Township Board of Education ("Board"), please accept this letter in furtherance of our conversation on this date in which you informed me that your client, Mr. Anatol Kous, canceled his medical examination. In order to allow me to advise the Board of its options regarding Mr. Kous, you agreed to accept this letter as a waiver his rights pursuant to *Rice et als.*

Accordingly, we will be discussing Mr. Kous in closed session at tonight's agenda meeting. As always, thank you for your courtesies and cooperation in this regard. I will apprise you of any further developments in this matter.

Very truly yours,

PHILIP E. STERN

cc: Dr. Simon M. Bosco (via telefax and regular mail)

235-09

OAL DKT. NO. EDU 51-09
AGENCY DKT. NO. 347-11/08

P.S. on behalf of minor child, J.R.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CLEARVIEW REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement (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 review, the Commissioner observes that the Agreement is neither signed by the Board's attorney, who is the Board's duly authorized representative in litigation, nor authorized by a Board resolution. The Commissioner consequently cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Agreement to include either the Board attorney's signature or a Board resolution approving the settlement and designating who may sign it on behalf of respondent. If the parties are unwilling or unable to effectuate the requested revisions, the matter shall proceed to hearing.

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 7/17/09
Date of Mailing: 7/17/09

* 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 51-09

AGENCY DKT. NO. 347-11/08

P.S. ON BEHALF OF MINOR CHILD, J.R.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CLEARVIEW REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,

Respondent.

Patrick Sullivan, petitioner, pro se

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

Record Closed: May 29, 2009 Decided: June 2, 2009

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

This matter was transmitted to the Office of Administrative Law on January 8, 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.

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

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

6/2/09
DATE

DONALD J. STEIN, ALJ

Date Received at Agency: JUN - 3 2009

Date Mailed to Parties: JUN - 3 2009

cmo

RECEIVED
2009 MAY 29 P 3:32
OFFICE OF ADMIN LAW

File No. 14305-0001
Law Offices
PARKER McCAY P.A.
Three Greentree Centre, Suite 401
7001 Lincoln Drive West
Marlton, NJ 08053
(856) 596-8900
Attorneys for Respondent, Clearview Regional High School District Board of Education

PATRICK SULLIVAN o/b/o JORDAN MYERS, Petitioners, v. CLEARVIEW REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION STATE OF NEW JERSEY AGENCY REF. NO. 347-11/08 OAL DOCKET NO. CIVIL ACTION **SETTLEMENT AGREEMENT**

This Agreement is made this 27th day of March, 2009 by and between the Clearview Regional School District Board of Education (the "District"), and Patrick Sullivan and Charles Myers ("Petitioners"), all of whom are collectively referred to as "the Parties."

WITNESSETH:

WHEREAS, Jordan Myers was enrolled in the Clearview Regional School District by Charles Myers prior to the start of the 2008-09 school year; and

WHEREAS, at the time of enrollment Patrick Sullivan claimed that he was applying for guardianship of Jordan Myers; and,

WHEREAS, the District permitted Jordan Myers to enroll in the Clearview High School pending proof of guardianship and/or affidavit of the parent, Charles Myers, that Jordan Myers was being kept in Patrick Sullivan's home gratis for longer than the school year; and,

WHEREAS, the Petitioners, collectively, neither filed the appropriate guardianship documents, nor appropriate affidavit establishing that Jordan Myers was domiciled in the District; and,

WHEREAS, the District provided notice of the removal of Jordan Myers from the Clearview High School to the Petitioners; and,

WHEREAS, the Petitioners filed a Petition of Appeal with the Commissioner of Education challenging the removal of Jordan Myers from the Clearview High School; and

WHEREAS, the District filed an Answer and Counter-petition of Appeal seeking payment of tuition from the Petitioners; and

WHEREAS, a Settlement Conference was scheduled at the Office of Administrative Law for March 27, 2009, before the Honorable Donald Stein, ALJ; and

WHEREAS, the Parties, participated in extensive settlement discussions; and

WHEREAS, the Parties have reached agreement and are desirous of memorializing a settlement of all issues, educational and financial, relating to everything that has happened until now; and

NOW, THEREFORE, the Parties, for the consideration specified below, set forth their full and complete agreement as follows:

1. **Payment.** Petitioners agree to donate the total amount of Two Thousand Dollars ($2,000.00) to the District. Said payment will be made as follows: $1,000.00 on or before April 30, 2009 and $1,000.00 on or before May 30, 2009. Failure to make said payments shall be cause for the immediate removal of Jordan Myers from the District without any right of appeal of said action.

2. **Other Conditions and Agreement.** Jordan Myers shall be permitted to remain in attendance in the District so long as the provisions of Paragraph 1 are met and all other Rules and Regulations of the Student Handbook and Board of Education Policy are followed by Jordan Myers. Upon successful completion of the course of study at the Clearview High School, Jordan Myers shall receive a High School Diploma.

3. **No Admissions of Liability; Execution.** 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 District or the Petitioners and shall not be referred to in any subsequent proceeding by any party other than to enforce the express terms of this Agreement. In the event that this Agreement is not fully executed and approved by the Parties hereto, this Agreement shall become null and void and shall neither constitute an admission of any party, nor be referred to by any party in any subsequent legal proceeding for any purpose whatsoever.

4. **Parents' Representation by Counsel.** The Petitioners acknowledge that they have not been represented by legal counsel during the negotiations of this Agreement and all proceedings leading to the entry into this Agreement and that they have knowingly and voluntarily waived the right to be represented by legal counsel.

5. **Voluntariness.** The Petitioners hereby state that they are signing this Agreement voluntarily of their own free will and not under duress or coercion of any kind.

6. **Confidentiality.** The Parties agree that the terms and conditions of this Settlement Agreement are confidential and my not be disclosed to any third parties, except as is necessary to carry out the terms and conditions of this Agreement.

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

8. **Successors and Assigns.** The Parties are bound by this Agreement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns, are also bound. This Agreement is made for the benefit of the Parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors or assigns.

9. **Entire Agreement.** This Agreement constitutes the full and complete agreement of the Parties hereto with respect to its subject matter, it 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 the Parties hereto.

IN WITNESS WHEREOF, the Parties hereto set their hands this 30th day of April, 2009.

PETITIONERS

4-14-09

PATRICK SULLIVAN **Date**

4-1-09

CHARLES MYERS **Date**

CLEARVIEW REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION

4/30/09

Date

237-09

#237-09

IN THE MATTER OF THE TENURE	:	
HEARING OF DESLY GETTY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ASBURY PARK, MONMOUTH COUNTY	:	
	:	

SYNOPSIS

The petitioning Board certified tenure charges of conduct unbecoming and insubordination against respondent Desly Getty – a tenured performing arts and English teacher – as the result of events that occurred in a classroom at Asbury Park High School on January 10, 2008. Specifically, respondent used her cell phone for a personal call during a class to which she was assigned, failed to respond appropriately to a student "dancing incident" which occurred while she was occupied with her phone call, and later made a related foray into another teacher's classroom on January 14, 2008. The Board initially issued a written reprimand citing the district cell phone policy and respondent's failure to maintain an orderly classroom environment. More than seven months later, the Board filed tenure charges seeking dismissal of respondent from her tenured employment.

The ALJ found that: respondent's conduct during and after the incident on January 10, 2008 was inappropriate, and exhibited a lack of attention to the class she was charged to supervise and a failure to assess her priorities; respondent's actions fell below the standard of conduct expected of school teachers, and constituted misconduct; respondent's use of her cell phone during the event in question – which did not comply with district policy, or with specific permissions for limited use of her cell phone – constitutes insubordination. In consideration of the penalty to be recommended, the ALJ found: respondent has been a teacher for over twenty years, and has no prior disciplinary record; respondent's misconduct arose out of a specific incident of limited duration, without intent to harm or jeopardize students in her charge; and her removal from tenure for what occurred would amount to a distortion of the events into much more than they were. Accordingly, the ALJ ordered that respondent: be reprimanded for her misconduct and insubordination; shall forfeit the 120 days of salary withheld following the certification of tenure charges; and shall be returned to her teaching duties.

Upon independent review of the record, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, finding that the Board's prior issuance of a reprimand, along with the loss of the 120 days salary, are a sufficient penalty given the circumstances 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 17, 2009

OAL DKT. NO. EDU 8750-08
AGENCY DKT NO. 260-8/08

IN THE MATTER OF THE TENURE	:	
HEARING OF DESLY GETTY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ASBURY PARK, MONMOUTH COUNTY	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Exceptions of both the District and respondent – filed in accordance with *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her determination herein.

The District excepts to the Administrative Law Judge's (ALJ) determination that respondent's actions do not warrant her removal from her tenured position. In so maintaining, the District essentially presents a verbatim recitation of its arguments advanced below which it is determined were fully considered and addressed by the ALJ in his decision and, therefore, these will not be revisited here.

Similarly, respondent excepts to what she contends were certain "factual errors" made by the ALJ, which in essence are no more than areas of disagreement between the ALJ's findings and those presented in respondent's post-hearing brief below. Specifically, respondent charges that the ALJ: 1) failed to give proper weight to the fact that the telephone call placed by respondent was to address a serious incident involving a student; 2) failed to recognize that respondent immediately addressed the dancing incident; 3) should have found that respondent's

use of her cell phone, under the particular circumstances, cannot be viewed as an insubordinate act; 4) incorrectly found that respondent's entrance into Ms. DeMarsico's classroom resulted in up to 20 minutes of disruption of instructional time; 5) erred in concluding that equitable estoppel and double jeopardy did not bar the prosecution of tenure charges in this matter; and 5) recommended a penalty in excess of that imposed in similar matters. (Respondent's Exceptions at 3-10) As it is determined that resolution of each of these "factual differences" was fully considered and explained in the Initial Decision, further elaboration on these points will not be entertained here.

Upon careful review and consideration of the record – which included transcripts of the hearing conducted at the OAL on January 21 and February 26, 2009[1], the Commissioner concurs with the ALJ – for the reasons presented on pp. 15-17 of his decision – that respondent's actions with respect to the January 10, 2008 classroom "dance" incident and her foray into Ms. DeMarsico's classroom on January 14, 2008 "fell below the standard of conduct that the district was entitled to expect from her, and as such constituted misconduct." (Initial Decision at 16). The Commissioner further agrees that respondent's use of her cell phone on January 10 "did not comply with the district's cell phone policy or with the specific permission she had obtained from Blackmore for limited use of her cell phone, and, as such, was insubordinate." (*Ibid.*)

As to the penalty to be imposed, while in no way minimizing the seriousness of respondent's infractions, the Commissioner, nonetheless, is in accord with the ALJ – for the reasons fully detailed on pp. 17-22 of his decision – that, under all of the circumstances and considerations existing in this matter, removal of respondent from her tenured position is an

[1] It is noted that the record did not include a transcript of the proceedings conducted on March 20, 2009.

unduly harsh penalty. Rather, the Commissioner finds and concludes that the Board's prior issuance of a reprimand, along with the loss of the 120 days salary withheld pursuant to *N.J.S.A.* 18A:6-14, following the certification of tenure charges, are a sufficient penalty to impress upon respondent the seriousness of her errors in judgment displayed in this matter.[2]

Accordingly, the recommended decision of the OAL is adopted for the reasons expressed therein. Respondent shall forfeit the 120 days salary withheld following certification of the within tenure charges. The District shall forthwith return respondent to her tenured employment.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 7/17/09

Date of Mailing: 7/20/09

[2] The Commissioner does not reach to that portion of the ALJ's recommended Order which specifies "[Respondent] is to be made whole for any other salary and benefits of which she has been deprived due to her suspension and the institution of tenure charges. She may file an affidavit of lost salary and benefits with the Board within 20 days of the issuance of the Commissioner's final decision, accounting therein for any mitigation of damages required by law." (Initial Decision at 22) The instant record before the Commissioner does not indicate that respondent lost any salary and/or benefits prior to the certification of tenure charges against her in violation of *N.J.S.A.* 18A:6-8.3 or that she was not promptly placed back on the payroll subsequent to the expiration of the statutory 120 days after such certification pursuant to *N.J.S.A.* 18A:6-14. If such is not the case and respondent feels she has been illegally deprived in this regard, she may file a new petition of appeal before the Commissioner.

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



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 08750-08S

AGENCY DKT. NO. 260-8/08

IN THE MATTER OF THE TENURE HEARING OF DESLY GETTY, BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY.

Nicholas Celso III, Esq., and **Joseph L. Roselle,** Esq., for petitioner Board of Education of the City of Asbury Park (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Stephen B. Hunter, Esq., for respondent (Detzky & Hunter, attorneys)

Record Closed: April 30, 2009 Decided: June 4, 2009

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

The Board of Education of the City of Asbury Park filed a certified tenure charge with the New Jersey Commissioner of Education seeking to impose sanctions, including possible termination of tenure, upon Desly Getty, a tenured teacher within the Asbury Park District, due to her alleged misconduct in regard to events purportedly occurring on January 10, 2008, and January 14, 2008. On January 15, 2008, the building principal met with Getty and representatives of the Asbury Park Teacher's Association and issued a written reprimand to Getty in regard to these events. Thereafter, on August 29, 2008, the Board filed its tenure charges with the Commissioner. Getty answered the charges, moved for their dismissal due to the Board's alleged failure to comply with procedural requirements necessary for the proper pursuit of tenure charges

and requested that if the motion was not successful, that a hearing be held to consider the matter. The Commissioner transferred the contested case, including the pending motion to dismiss, to the New Jersey Office of Administrative Law on September 23, 2008. The motion to dismiss was denied in an interlocutory order issued by this judge on October 10, 2008. Discovery was conducted and hearings began on January 21, 2008, and continued on February 26 and March 20, 2009, on which day the hearing process was completed. The attorneys requested the opportunity to file closing briefs and arguments and the record closed on April 30, 2009.

The charges against Desly Getty concern events occurring in a classroom at the Asbury Park High School during the second half of a two-period block covering the 8th and 9th periods on January 10, 2008. The class was generally taught by a Ms. DeMarsico, but she had to attend a meeting that day and, as a result, two teachers were assigned to provide coverage for the class that afternoon. The two periods spanned approximately eighty minutes. During the 8th period, or first portion of the block, coverage was provided by a Ms. Akins. DeMarsico testified that she had left instructions with the class to complete a test. Apparently, most, if not all, of the students completed this test during the 8th period. Coverage for the 9th period was assigned to Getty, an experienced teacher whose employment history will be discussed later in this decision. During a portion of that 9th period, while Ms. Getty was, by her own admission, seated in the front of the classroom and speaking on the telephone to the District's suspended superintendent, Dr. Antonio Lewis, two members of the class, a man and a woman, danced in front of her desk and between her and the class. Another student captured video images of this dancing on a camera and later transferred an edited version of the video, with sound, to YouTube, a popular internet website where the images were viewed by others who had not been in the classroom at the time.[1] According to the charges, on the next school day, January 14, after Getty had become aware that the images had become public knowledge, she entered Ms. DeMarsico's classroom uninvited and proceeded to question students as to who it was who had placed the images on the Web. This action purportedly caused significant

[1] A copy of the video was played during the hearing and is in evidence as Exhibit P-1. Its creator, M.H. a 17-year old 11th grade student, testified that he edited the materials captured on his camera before uploading the edited version to YouTube. He had made two separate video recordings on his camera while in class and when he edited the finished product, he combined parts of the two separate recordings. He testified that he was playing the music heard on the video, a song called "Swing That," on his cell phone in class while the dancers danced. He claimed that this music was loud enough to be heard, but when he edited the captured images, he added visual effects and added some of the song from another source.

disruption within the class. As noted, once the building administration learned of the matters, the principal determined to issue a written reprimand. That document follows:

TO: Mrs. Desley Getty
FROM: Tyler Blackmore
RE: Letter of reprimand

DATE: 1-15-08

On January 15th, 2008, you were informed in a meeting that you would be given a written reprimand. Present at this meeting was you, Mr. Napolitani, Mr. Vetrano, Mr. Zajac, Mr. Murphy, and Mr. Gerbino. This letter of reprimand comes as a result of an investigation that included student statements as well as the viewing of a video posted on "Utube.com" of you on the phone while students were dancing in front of your desk without any reprimand for their behavior. Below, you will find a list of findings. There as follows:

1. Students were on task with the sub prior to your entering the classroom
2. You got on the phone with a "judge or lawyer" and were on your phone for an extended period of time
3. While you were on the phone, two students began dancing in front of the class and did not have this inappropriate, off task behavior addressed
4. Only when a student kicked a desk while dancing did you address this student's behavior and you simply yelled for the student to "be quiet" because you were on the phone with a "judge"
5. A student was able to pull out their cell phone and video this happening in the classroom without you noticing it or addressing the situation
6. This video was posted on Youtube.com and nearly all students and staff members are aware of and have seen this video and, thus, serves as an embarrassment to the district, the school, the entire staff, and myself as the principal
7. That on the Monday following the incident, you entered Mrs. DeMarsico's classroom without

permission from the teacher or administration and demanded to speak to the teacher and the students about this incident, thus interrupting the lesson. You did this despite being told by administration this year to not enter any classrooms other than your own during instructional time.

In addition, it was brought to my attention, after our meeting on the morning of the 15th that you were also discussing this incident with your students in your classroom. A student's written statement indicates that, on the 15th, you took approximately thirty minutes of instructional time to discuss the Video incident with students. It is highly inappropriate to bring students into this situation and is certainly not related to the NJCCCS. It must be understood that this incident is damaging to the progress we make everyday so that our students get the very best, most rigorous educational experience. In closing, I want to make very clear my expectations. They are as follows:

1. Follow the district cell phone policy at all times when in the building
2. At no time are you to discuss this incident or any other incident with any students without permission from an administrator as well as having an administrator present
3. You are not to enter any classroom and interrupt instruction for any reason (with the exception of Mr. Getty's in the case of an emergency)
4. Instructional time should only be used for mastering the NJCCCS, topics and activities that do not accomplish this are not to happen
5. Maintain an orderly room environment where students are on task and working towards mastery of the NJCCCS

Acknowledgement of receipt:_____Date:_____
Desley Getty

Cc: Mr. Parham
Ms. Belfield

[Exhibit P-3]

Eventually, some seven and one-half months later, the Board filed its tenure

charges.[2] These alleged that Getty had engaged in conduct unbecoming a teaching staff member and/or other just cause warranting dismissal and insubordination. More specifically, Charge I addressed the "dance" event of January 10, charging that Getty's conduct in permitting the actions depicted on the video "posed a direct threat to the safety and educational well-being of the students she was charged with supervising, depriving them of valuable instructional time and placing them in a situation in which injury due to activity unrelated to the approved curriculum was likely to occur." The Charge II alleged that Getty's use of a cell phone during instructional time was in violation of District policy. Charge III asserted that Getty's conduct of entering and disrupting DeMarsico's classroom on January 14, "prevented the students from receiving the benefit of appropriate instruction, encouraged the students to be and remain off-task while she was present, and interfered with the intended lesson of another teacher."

Tyler Thomas Blackmore, the principal of Asbury Park High School, testified that he learned about the video from another teacher. It was still posted on YouTube two days after the event and was "disturbing to say the least." The video was apparently later removed from the site. He viewed the video, which was the same as the copy offered in evidence, and was "taken aback" and "couldn't believe it." He contacted the District's Central Office and spoke with Acting Superintendent James T. Parham. Students who were seen on the video were called in and questioned at his direction by Vice Principal McGrath. He also learned about Getty's entry into DeMarsico's class on the 14th. He prepared the letter of reprimand about the January 10 incident. When he spoke to Getty, she explained that she had been on the cell phone with a lawyer or a judge for an extended period of time, during which time the students were dancing. According to student "testimony", only when one student kicked a desk did Getty yell at the students to stop, but she remained on the phone. Blackmore referred to the video as an "embarrassment to the district." In response to my question, Blackmore advised that he issued the reprimand at the direction of Acting Superintendent Parham. Blackmore believed that the reprimand was warranted.

[2] While the record reveals that some further investigation was conducted after the issuance of the reprimand and prior to the issuance of the tenure charges, there is no indication that any substantive additional factual information was uncovered that changed the Board's knowledge of the character of the events that form the subject matter of the allegations against Ms. Getty from the base of knowledge upon which Mr. Blackmore acted in issuing the reprimand.

Blackmore identified the District's policy regarding "Staff Member's Use of Cellular Telephones," which was adopted by the Board on October 18, 2007. It allows a staff member to make a necessary personal telephone call that cannot otherwise be made outside the regular school day, so long as the call is made during the member's duty free lunch/break periods and/or preparation periods for teaching staff and outside the presence of pupils in areas of the building or outside of the building designated for such by the principal or the immediate supervisor. "A personal telephone call by a staff member on their personal cellular telephone shall not be made while the staff member is performing assigned school district responsibilities." There is a provision regarding emergencies requiring personal use of personal cellular phones.

Blackmore claimed to be "somewhat aware" that Ms. Getty had for some time served as an advocate for students in court proceedings. He recalled that when Getty had to be in court concerning a student, she would submit a document attesting to her presence in court. He never denied her the ability to perform such responsibilities. He also was aware that her husband, also a staff member, had serious medical issues and that she had been given permission to leave her personal cell phone on so as to be able to receive phone calls made to her regarding her husband's health, or to her regarding her advocacy role, which was not an official position with the District, but a strictly voluntary role that Getty had undertaken. She was never given any authority to make phone calls except in accordance with the policy. He could not recall if teachers were provided with any cover letter regarding this policy and they were not required to sign for a copy of the policy.

Mr. Blackmore could not recall if, when he presented the written reprimand to Getty, he told her that "this ends here." He thought that Getty continued to teach until she was suspended with pay. He did not tell her not to report after January 15. Blackmore was not involved in the decision to bring tenure charges.

Christine DeMarsico testified that on January 10, 2008, she had to attend an SRA meeting during Block 4, which consisted of the 8th and 9th periods. She had prepared a lesson plan for the day and placed a planned activity on the desk for the

substitutes. The students had an assignment which they had to complete for a test grade. She felt that this would take two periods, unless some students were unsure about what to do, in which case they might "shut off early." She explained that she did advise the class about the assignment and told them that if they had problems, she would work with them the next school day. She did not provide any other lesson plan besides the test. She heard about the incident that occurred in the classroom on the following Monday when Ms. Getty came into her classroom near the end of the day. Getty asked if she could speak to her, but DeMarsico replied that she was teaching and could not talk to Getty at that moment. Getty then started to ask the students questions regarding the video. This inquiry was occurring during regular class time. She asked Getty to leave, but Getty was in the classroom for about five minutes. She was yelling, accusing the students of something. However, DeMarsico could not recall exactly what Getty said. The class was in an uproar when Getty left and DeMarsico tried to calm them down, a process she estimated took about fifteen minutes.

According to her written statement, DeMarsico had entered her classroom on January 10 at 2:05 pm to check on the students' progress with the test. She had a brief conversation with Getty about diabetes, from which DeMarsico's husband suffers, and observed that the students were sitting, with K. seated next to Getty. She did not inquire as to whether anyone had completed the work. She estimated that she was in the class at this time for about ten minutes. DeMarsico then returned to her meeting. She had also gone in to check on the students earlier, while Ms. Akins was covering the class during the first half of the block, helping a few of the students at that time.

M.H., a 17-year-old, 11th grader, testified that he recorded the dancing that occurred in the classroom on January 10 on a digital camera. He played music from his cell phone. The two students depicted in the video were the only two who danced. The music was "loud enough to be heard." Ms. Getty was talking on the telephone and did not say anything when the music and dancing began, although he did recall that she did say that she was on the phone with a "lawyer" or a "judge." She did not tell him to stop videoing the activity. He made two recordings on his camera, and later edited them together. The song heard, "Swing That," lasts for between three and four minutes and may have played twice in class.

K.R., an 11th grader, testified that he and N.T. were the dancers shown on the video. When N.T. accidentally hit against a desk, Getty said that she was on the phone with a judge. She recalled that during the time that she and N. were dancing and Getty was on the telephone, some of the other students were getting up and walked in and out of the classroom, while others were watching the dancing. At first, she did not realize that M.H. was videoing the dancing, but when she became aware that he was she decided to go along with it. She recalls that they danced to the song twice, and estimated that the dancing lasted for about ten minutes. The music could be heard in the classroom. Getty remained on the phone throughout the dancing, which stopped when she got off of the phone. The next school day, Getty came into Ms. DeMarsico's classroom in the middle of the class and wanted to know who put the video on YouTube.

N.T., also seventeen years old, testified that Getty entered the class, said "Hi," sat down and eventually was talking on the telephone. After Getty took over the class and the students had finished the test, the class "started getting wild." Kids were walking out while some were still taking the test. She echoed K.R.'s description of having finished the assigned work and being "bored." She and K.R. started to dance. She recalled that Getty was on the phone for some minutes before the music and dancing started. The next day, Getty "barged into" DeMarsico's class and began pointing and asking who put the video on YouTube and that such conduct was "not right."

Lisa Griffin, a coordinator and custodian of records for Verizon Wireless, identified cell phone records for cell phones associated with Ms. Getty. The parties stipulated that a call placed at 1:46 pm, which lasted for 3 minutes and 59 seconds, was placed to Dr. Antonio Lewis, the suspended Superintendent of the Asbury Park District.

The video entered in to evidence and viewed at the hearing is one minute, fifty-six seconds long. As has been explained by its creator, M.H., it is an edited compilation of the material he recorded in the classroom on January 10, 2008. As such, it is not by

any means an exact depiction of the actual sequential, start-to-finish activity that took place. It quite obviously includes some of the same scenes more than once. However, it appears to accurately reflect the general nature of events occurring in the classroom at that time, with two students exuberantly and athletically dancing to music. The sound level of the music on the video cannot be reliably fixed as the level that actually existed in the classroom. Indeed, while students have said that the music was loud enough to hear, it is clear enough that the music on the video is enhanced to a level that is highly unlikely to reflect its actual volume in the classroom. The video also clearly shows Ms. Getty seated behind a desk at the front of the classroom, with cell phone to her ear. The words to the song included repeated use of the word "shit." At one moment the video shows one student attempting to jump over or perhaps on to the back of the other. There is no evidence on the video of Getty attempting to stop the music or the dancing or of her directing the students to be seated, until a point where the male student bumps into a desk and Getty gestures, seeming to point, and the dancers stop dancing. They seem to hesitate for a moment and begin again, but as the video is a compilation and an edited version of the actual events it is impossible to be certain from it of the exact sequence of events. Indeed, the moment when she gestures is seen twice on the video, and she herself testified that she twice told the students to stop, but it cannot be determined if the video shows both times or only one of the times, shown twice. The video does not show any students leaving the room, but the door is not visible. It is impossible to determine from the video how long the actual event lasted, from the start of the dancing to its end, or how many times the song was repeated, or how long after the dancing actually began it was that Getty stopped talking on the phone and gestured and spoke to the students.

Desly Getty is a teacher of Performing Arts and English at Asbury Park High School. This would be her eighth year. She started to work in education as a permanent substitute in Manalapan in 1971 and received her BA from Monmouth College in 1972. She detailed her work history, which has included stints with the former State Department of Institutions and Agencies, Neptune Board of Education, the Department of Education, nine years with the Irvington Board of Education and her eventual hiring by Asbury Park in May 2001. She then taught in the Middle School for four years and was then assigned to the High School.

Getty described how she first became involved in court liaison work under the auspices of Governor Byrne in the early 1970's. This work, which was undertaken on a voluntary basis, included interceding with parents, school authorities, public defenders and the courts. She later was asked by an attorney, Lawrence Lawson, now the Monmouth County Assignment Judge, to work on several cases. She has assisted students in several counties. When she first came to work in Asbury Park, she spoke with Superintendent Antonio Lewis, who was then active, about the work and the need for release time, which he had no problem with, so long as she obtained approval when such time was needed.

On December 11, 2007, Kelly Gale, an 8th grade vice-principal, asked that Getty become involved with a case of some four or five eighth grade girls, who were not attending school. Getty had advised Mr. Blackmore of her liaison activities in August 2007 and he saw no problem with her continuing. She had also discussed her need to carry a cell phone while conducting her teaching duties, due to the precarious health of her mother and husband, also a staff member at the school; her assignment to In School Suspension (ISS) duties in a remote area of the building; and her occasional need to answer phone calls from a judge or lawyer in respect to her court liaison responsibilities.

Ms. Getty explained that on January 9, 2007, Mark Gerbino, a vice principal in the High School who predominantly dealt with student discipline matters, approached her about M.Y., a female student who was causing a lot of problems in the building. He described her as causing "terrible trouble" and said that Mr. Blackmore wanted her out of the building and asked that Getty see what she could do. The student had been out of school and was to return, a result that Blackmore did not want. That evening Getty called the County Probation Office and tried to contact Judge Iadanza's clerk. On the morning of January 10, she did speak with both these contacts. She had been told by Probation the previous evening that the only thing that could be done was for a motion to be filed before the judge, which course of action Gerbino "strongly" recommended be accomplished by the end of the day.

When Getty arrived at school on January 10, she was told that she would have to cover the last portion of DeMarsico's class. She had no chance to eat her lunch that day and did so during her normal prep time. When she arrived at the classroom, the students were "just sitting." Ms Akins was at the teacher's desk. She asked Akins what assignment there was for the students, but she was not told about any test and was not told of any lesson plan. She was told that "they knew what they had to do." She said, "Hi", and the class was "quiet," with students just "sitting and talking." Mr. Gerbino had seen her earlier and asked that she get back to him at the end of class about her progress regarding M.Y. Exercising what she acknowledged was "poor judgment," Getty placed a cell phone call to suspended superintendent Lewis, who she described as her "mentor." She would occasionally call him if she had a serious question, and she did so at this time to inquire as to how she might handle the M.Y. situation. The fact that Lewis was suspended did not enter into her thinking. As she was speaking with Lewis, two students began to dance, diagonal to her desk. She asked that they please sit down as she was "talking to a judge." She was unaware of any music or of anyone videoing the activity. She told K. to "please have a seat." The call lasted for four minutes, during which she stopped twice to tell the students to sit. When she hung up the dancing ended. No one was going in and out of the room. She recalled that Ms. DeMarsico entered the room after the dancing had ended and at that time K. was seated next to Getty, talking about something unrelated to the events at issue here. DeMarsico was in the room for about 10 to 12 minutes, until about 2:11 or 2:12 pm., asking Getty if she knew of a good diabetes doctor. The students left after the instructional day ended. Before she left the building Getty saw Blackmore and told him that there was as yet no decision about M.Y., as Judge Iadanza was on the bench.

Getty first learned of any problem on the 14th, when the union president told her about the YouTube posting and said that he would handle it. During the 4th Block, she saw DeMarsico, whose classroom door was open, at a time before the class had begun. She spoke to DeMarsico and then turned to leave and said to the students, "who decided to make me a movie star and put me on video?" She said nothing else. That evening she advised Blackmore that she wanted to meet with him at 8 am. She did so, with union personnel and DeMarsico, Blackmore and Gerbino present for a meeting that lasted for twenty-five to thirty minutes. Ultimately, she was given a letter of

reprimand. She read it and Napolitani asked questions. She felt that the reprimand was "unjust." Napolitani asked if "this was the end of this, the end of punishment." Blackmore responded, "this is what Parham wanted." She asked if Blackmore recalled that he had given her permission to have the cell phone available due to her mother, husband and her court liaison duties and he said that he did remember "something to that effect."

After January 15th, Getty was advised by the Board attorney and by Acting Superintendent Parham that she was not to return pending a suspension with pay. She was never interviewed by any Board representative. She recalled that a grievance was filed in regard to the January 15th reprimand.

On cross-examination, Ms. Getty said that she did not hear any music, that she saw the students dancing for a "brief moment" and asked them to sit as she was concerned about their physical safety. They did not stop the first time that she asked them to. They then got back up as she was finishing the phone call and she told them to stop. When she had inquired of the students what work they were supposed to be doing they told her that they had already finished the work. Contrary to the picture portrayed by some students, the students were not going in and out of the room or running around.

The parties stipulated that Ms. Getty has no prior disciplinary history. Her evaluation will be considered later in this opinion.

John Napolitani, a 5th grade teacher now in his eleventh year with the District and president of the teacher's association for the past five years, testified that the telephone policy adopted by the Board in October 2007 was received by him as a matter of course as union president, but the union does not disseminate the policies to its members. He had questioned this policy, as he wondered if there was a similar policy for students. He was present for the meeting between administration representatives and Getty on January 15. The incident was discussed and he asked what the administration planned to do. Blackmore told them that a letter of reprimand was to be issued, but he did not recall any such letter being produced at the meeting. As far as Blackmore was

concerned, the matter was "over" and he would recommend to Central Office that the reprimand serve as the punishment.

Discussion

Teachers who have acquired tenure may not be dismissed or reduced in compensation except for ". . . , unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10. The Board of Education bears the burden of persuasion in the prosecution of tenure charges and must establish the grounds for action against the employee's tenure status by a preponderance of the credible evidence. Matter of Polk, 90 N.J. 550 (1982).

There is no one single definition of what constitutes misconduct by a public employee. "Conduct unbecoming a public employee," including teachers, is an elastic phrase, which encompasses conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998); see also In re Emmons, 63 NJ. Super. 136, 140 (App. Div. 1960). It is sufficient that the complained-of conduct and its attending circumstances "be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (quoting In re Zeber, 156 A.2d 821, 825 (1959)). Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955)). Unfitness to remain as a teacher may be demonstrated by a single incident if it is sufficiently flagrant, although in less serious matters progressive disciplinary measures may be more appropriate. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967).

Black's Law Dictionary 802 (7th Ed. 1999) defines insubordination as a "willful disregard of an employer's instructions" or an "act of disobedience to proper authority."

Webster's II New College Dictionary (1995) defines insubordination as "not submissive to authority: disobedient." Such dictionary definitions have been utilized by courts to define the term where it is not specifically defined in contract or regulation.

> "Insubordination" is not defined in the agreement. Consequently, assuming for purposes of argument that its presence is implicit, we are obliged to accept its ordinary definition since it is not a technical term or word of art and there are no circumstances indicating that a different meaning was intended.
>
> [Ricci v. Corporate Express of the East, Inc., 344 N.J. Super. 39, 45 (App. Div. 2001) (citation omitted).]

Importantly, this definition incorporates acts of non-compliance and non-cooperation, as well as affirmative acts of disobedience. Thus, insubordination can occur even where no specific order or direction has been given to the allegedly insubordinate person. In the Matter of Peter Loria, State-Operated School District of City of Newark, Essex County, January 26, 1988, slip op. at 69, aff'd State Bd. August 7, 1988. Insubordination is always a serious matter. "Refusal to obey orders and disrespect cannot be tolerated. Such conduct adversely affects the morale and efficiency of the department." Rivell v. Civil Serv. Comm'n, 115 N.J. Super. 64, 72 (App. Div.), certif. denied, 59 N.J. 269 (1971).

In the present matter, there are certain facts that are not in dispute. As such, I **FIND** that on January 10, 2008, Desly Getty, a tenured teacher in the Asbury Park district, was assigned to cover Ms. DeMarsico's class for the second half of the 4th Block. She entered the classroom. While she was in that room with a class of students, she spoke on the telephone for three minutes and fifty-nine seconds with the district's suspended superintendent, Antonio Lewis. Also, while she did so, two students performed a dance in front of the class and in plain view of Getty, who was seated at the teacher's desk in the front of the room, so that the dancing students were, for the most part, situated between Getty and the rest of the class. While there is some dispute about how long this dancing went on, with estimates ranging between about three to up to perhaps seven or eight or even ten minutes, depending in part on whether the song was played through twice or only partially a second time, it is fair to

say that no one disputes that it did last for a period of at least several minutes. The exact time cannot be fixed.

In the end what is more important than the actual duration of the dancing, which was, after all, not a matter of seconds or only a minute but surely considerably longer, is the overall picture of what was occurring in the room. And there is no factual dispute about that, at least regarding the essential fact of the dancing.[3] I **FIND** that as the students danced, Getty sat in her chair and spoke on the phone for nearly four minutes. And while this occurred, M.H. recorded the scene with his camera phone. There is also no dispute that an edited version of the events was later uploaded to YouTube. Representatives of the district and the union learned of or observed the recording; others no doubt did as well. It is also not disputed that on January 14, Getty entered Ms. DeMarsico's classroom and spoke to the students, inquiring as to who posted the video. Ms. DeMarsico reported this to her principal. Thereafter, I **FIND** that the principal, after conferring with the Acting Superintendent, issued a written reprimand to Getty on January 15, 2008.

The Board charges that Ms. Getty engaged in conduct unbecoming a teacher and insubordination and/or other conduct warranting removal. I **FIND** that the undisputed evidence clearly demonstrates that on January 10, when she was supposed to be paying attention to the students in the class to which she was assigned, Ms. Getty, for reasons that she determined were important enough to warrant her calling Mr. Lewis, went ahead and made the phone call to him and simply allowed the students in the class to do as they chose, at least to the extent that she sat back and ignored, for all intents and purposes, the vigorous dance performed practically in her face by two students. Neither she nor any of the students suggest that before she made the call she endeavored to determine how many of the students had completed the assignment that she understood Ms. DeMarsico had given to them, or attempted to give them any work or task to do to keep them busy for the time that she felt she needed to speak on the telephone. Instead, she entered the classroom, said hello and proceeded to make her call. This call was not made to a judge or to a lawyer, and was certainly not made to respond directly to any call she had received from such a person. Ms. Getty herself

[3] I **do not find** sufficient credible evidence that students were exiting or entering the classroom during Getty's phone call.

concedes that she made an error of judgment in calling Dr. Lewis at that time. And while I **FIND** that she had some permission to use her cell phone to summon assistance if she needed it while serving in the remote location where the in-school suspension was held, or to respond to any summons regarding her husband or her mother, or possibly to answer a call from a judge or lawyer in respect to her unofficial, but nevertheless valuable, court liaison work, I **FIND** that Getty, who clearly knew that she did not have carte blanche to use her cell phone at any time or for any reason, had no permission to use the phone otherwise, and certainly no authority to telephone Dr. Lewis, whether he was a mentor to her or not, from a classroom, when she was serving there on an assignment, even though it be as a substitute for another teacher. As such, I **FIND** that none of the exceptions to the restrictions imposed by the cell phone policy, or importantly, the permission specifically obtained from Mr. Blackmore, applied to permit the call Getty made. Additionally, I must note that even to the extent that Getty might have felt compelled by Mr. Gerbino to try to deal with the situation of the student M.K., if she absolutely needed to make a phone call in class, which is itself a doubtful proposition, she could have first made sure that the students were busy with something educationally productive before she did so. However, she did not do so, simply leaving the students on their own while she called Lewis.

In view of these facts, it is clear enough that Getty's conduct on January 10 was less than what was properly expected from an experienced, tenured teacher. Her conduct exhibited a lack of attention to the class she was charged to supervise and a failure to adequately assess her priorities. In doing so, she presented to the students the image of a distracted, uninterested and essentially absent teacher, albeit for only a matter of minutes. Given this, I **CONCLUDE** that her actions fell below the standard of conduct that the district was entitled to expect from her, and as such constituted misconduct. Additionally, her use of the cell phone did not comply with the district's cell phone policy or with the specific permission she had obtained from Blackmore for limited use of her cell phone, and, as such, was insubordinate. And in regard to her foray into Ms. DeMarsico's classroom on the 14th, here again it can be appropriately said that she should never have sought to question, accuse or even engage with the students about the YouTube posting. Such an inquiry was bound to cause some disruption in the classroom and drag innocent students into a matter that was properly a

subject for inquiry by appropriate school authorities, to whom Ms. Getty could have referred any concerns that she had regarding the posting of the video. Here again, while I **FIND** that her intrusion caused about twenty minutes of interruption, as DeMarsico testified, rather than thirty minutes, as the written reprimand states a student indicated, I **CONCLUDE** that her action was not in accord with the reasonable expectations of the district as to the conduct of its teachers and constituted misconduct. But that said, even to the degree that her actions that day can be labeled as misconduct and insubordinate, the question that must be answered is, what was the degree of misconduct and what remedy does such conduct require? And in connection with the question of penalty, I **FIND** that Ms. Getty, who has been a teacher for well over twenty years, has no prior disciplinary record, a fact that is relevant, if at all, only in regard to the degree of any sanction that may be imposed.

In describing Ms. Getty's misconduct, the Board contends that the "dance" event of January 10, "posed a direct threat to the safety and educational well-being of the students she was charged with supervising, depriving them of valuable instructional time and placing them in a situation in which injury due to activity unrelated to the approved curriculum was likely to occur." While I agree that Getty did not properly supervise and control the class, nevertheless it appears that the Board may have somewhat overstated the case when describing the nature of the misconduct. Stripped of its rather dramatic tone, the misconduct involved a teacher who allowed, or better yet, ignored, some dancing, admittedly exuberant, while she sat in a chair for a matter of minutes and talked on a phone. The actual, or indeed the potential, risk of harm to anyone from this dancing appears to have been minimal, although certainly not non-existent. The claim of a deprivation of "valuable instructional time" is also somewhat suspect. I suppose that to the extent that the regular teacher, Ms. DeMarsico, did not provide the substitutes with a plan of what to have the students do if they finished the assignment she had left for them, it might be said that she also deprived them of the use of instructional time, but such claims of deprivation constitute a bit of a reach. No doubt if Getty observed that students were not working on the assigned task, she could have given them educationally productive work to do, or at least told them to sit quietly, but to raise the matter to one that seems to smack of a calculated "deprivation" is to claim too much. Frankly, the tone of the charge seems geared to support the need to

remove the teacher, but the facts, while certainly supportive of discipline, may not require such a drastic and final remedy. As for Charge III, the assertion that Getty's conduct of entering and disrupting DeMarsico's classroom on January 14, "prevented the students from receiving the benefit of appropriate instruction, encouraged the students to be and remain off-task while she was present, and interfered with the intended lesson of another teacher," may not misstate the case, but again, the question is what remedy does such conduct require? Thus the issue of penalty must be examined.

The Double Jeopardy Argument

Initially, Ms. Getty argues that as she was given a reprimand for the very conduct involved in these tenure charges, the principle of double jeopardy should apply and thus bar the Board from seeking any further sanction against her for this conduct. Acknowledging that double jeopardy is generally a doctrine applicable only in the context of criminal law, Getty nevertheless argues for its application in this administrative matter. However, as the Appellate Division stated in the unpublished decision, I/M/O Tenure Hearing of R. Scott McIntyre, 96 N.J.A.R. 2d (EDU) 726 (App. Div. 1996), tenure hearings are not quasi-criminal in nature and are not primarily directed at imposing punishment upon teachers, but are instead vehicles to determine a teacher's fitness to teach and to set examples for impressionable students. As such, while the doctrine of double jeopardy may indeed have some limited application in civil or administrative matters that primarily involve punishment, tenure hearings do not come within that description. Therefore, Getty's double jeopardy argument must fail.

What is the Appropriate Sanction?

As noted above, a single instance of misconduct can, if sufficiently severe, justify loss of tenure. In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967); Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), aff'd o.b. 131 N.J.L. 326 (E. & A. 1944). In such instances, it matters not that a teacher may have had a spotless record prior to the incident in question. But in other cases, the teacher's actions, while deserving of discipline, simply do not rise to the level of severity that justifies loss of

tenure. Factors that must be considered in determining the proper sanction include not only the details of the violation, but also the teacher's overall record. As the Fulcomer Court said, given the facts of that case,

> Although such conduct 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. . . . consideration should be given to the impact of the penalty on appellant's teaching career, including the difficulty which would confront him, as a teacher dismissed for unbecoming conduct, in obtaining a teaching position in this State, with the resultant jeopardy to his equity rights in the Teacher's Pension Fund accruing from his 19 years credit.
>
> [Fulcomer, supra. at 421].

While the Board asserts that the concept of progressive discipline is not applicable in tenure matters, this statement is not entirely correct and reflects reliance upon case law that does not quite stand for the proposition for which the cases are cited. In Matter of the Tenure Hearing of John Guarni, EDU 8705-06, Initial Decision, (June 5, 2007), adopted, Comm'r. of Ed. (July 23, 2007) <http://lawlibrary.rutgers.edu/oal/search.html> the issue that caused a reference by the ALJ to uncertainty as to whether the principle applied was the fact that the tenured teacher was a state employee working in a state facility who had violated the Drug Free Workplace Policy which specifically stated that "Following a finding that a Department employee, who is not a 'law enforcement officer' . . . has illegally . . . possessed . . . drugs, the employee must be discharged unless the Division Director determines that discipline less than discharge is appropriate . . . ." The Commissioner properly decided that the language of this policy did not apply to the question of whether to remove tenure for a teacher who violated that policy, but as Fulcomer and numerous other cases have held, where a tenured employee violates applicable standards, the decision as to whether to remove tenure or impose a lesser sanction must be made with due recognition of all appropriate factors, including any prior disciplinary record. Similarly, in In re Tenure Hearing of Wachendorf, EDU 6860-04, Initial Decision (May 3, 2005), aff'd, Comm'r (July 14, 2005), aff'd, St. Bd. of Ed. (February. 1, 2006) <http://lawlibrary.rutgers.edu/oal/search.html>, also cited by the Board, the Commissioner's reference was to the inapplicability of the Title 4A provisions

concerning progressive discipline where Wachendorf, as Guarni, was a state employee who had certain protections under the Civil Service System, but as a teacher his tenure status was subject to Title 18A. In the end, the issue of the degree of sanction to be imposed is, whether in a civil service or a tenure case, a matter to be determined following a careful evaluation of all the relevant factors, including the nature and circumstances of the proven violations of rules, statutes, policies, responsibilities, standards and the like, as well as the underlying policy concerns implicated by the violations, and the prior employment and disciplinary history of the employee. In the Matter of the Tenure Hearing of Frederick, L. Ostergren, 1966 S.L.D. 185, 188. Certainly, in some cases one proven incident can be enough to warrant the ultimate penalty, but in other cases such is simply not the case.

In the present matter Ms. Getty's misconduct arose out of a specific incident of limited duration that occurred without any suggestion of intent to harm or to jeopardize the students in her charge. She made an admitted mistake of judgment, deciding that it was more important to deal with the situation of another student who was of some concern to the administration rather than to pay close attention to and, as needed, provide guidance and direction to the students placed in her immediate charge. This was a spur-of-the-moment situation and decision. Her subsequent response to the posting of the dance video was unfortunate and certainly wrong, but again there is no suggestion that this action actually strikes at the ability of this teacher to properly fulfill her responsibilities as a teacher in the District in the future. No harm came to anyone, except perhaps embarrassment to her and certainly to the District from the fact that in this day and age, a situation of little actual import to the lives and educational progress of a small group of students occurring within the confines of one classroom for no more than a few minutes became a matter open to the world by the "magic" of technology. Ms. Getty's long and distinguished career in education cannot be dismissed as unimportant simply because someone was embarrassed. This is not to suggest that there was not a real offense here, or that Getty did nothing wrong, for she certainly did. Her use of the cell phone in front of the students was misguided, and a poor example to students who might be inclined to use cell phones while in class, as in fact M.H. did. Her interruption of Ms. DeMarsico's class and comments to the students was uncalled for and provocative. But her removal from tenure for what occurred here would amount

to a gross distortion of the events into much, much more than they were. In large part, the school principal and the acting superintendent properly dealt with Getty in January. An immediate reprimand was warranted and was issued. A teacher of merit and experience was called on the carpet and no doubt further embarrassed by being reprimanded for what she agrees was a mistake of judgment. Instead of letting the matter rest there, where it no doubt would have made sufficient impact on the teacher to assure that in the future she would pay proper attention to her immediate responsibilities and defer those that were not so close at hand, the Board decided to push for the ultimate sanction, at great loss of time and no doubt substantial expense to the public and Ms. Getty.[4] I am fully cognizant of the great responsibility that rests on teachers, the role models that they are for students, and the detrimental impact that a teacher's failure to act properly within their professional roles can have on impressionable youngsters. And I am certainly not unaware that this Abbott district operates under some serious additional burdens. But reason and fairness must play a role in determining the sanction to which one who fails in one instance should be exposed.[5] While the ultimate goal must always be the best interests of the students and while Ms. Getty's actions do warrant some additional response, neither the students nor the general public will be best served by removing Ms. Getty's tenure.

Each party has referenced prior decisions of the Commissioner to support their particular view as to the nature of the penalty to be imposed. Given the enormous body of tenure decisions and the varying facts in each case, support for the imposition of one or another level of penalty can be found easily enough. But the cases cited by the Board in support of the principle that tenure can be removed for a single incident of misconduct involved the possession of marijuana (I/M/O R. Scott McIntyre, 96 N.J.A.R. 2d (EDU) 718); a teacher directing a student to kick another student (I/M/O the Tenure Hearing of Brian Eilert, EDU 8059-99, Initial Decision, (February 14, 2000), adopted, Comm'r. of Ed. (April 3, 2000) <http://lawlibrary.rutgers.edu/oal/search.html)>; and theft (I/M/O Alan P. Tighe, EDU 6704-98, Initial Decision, Summary Decision, (March 17, 1999),°aff'd°in°part,°rev'd°in°part,°Comm'r.°of°Ed.°(May°3,°1999)°<http://lawlibrary.rutgers.edu/oal/search.html)>). Each of these matters involved misconduct far more

[4] The Board was certainly within its rights to seek certification of tenure charges; whether such a course was necessary given all of the relevant factors is, I suggest, another matter.

[5] The two events under consideration here, occurring on January 10 and 13, are in a real sense one ongoing matter, occurring within a very short time span.

serious in nature than the current matter. In each the employee violated the criminal law and/or engaged in matters of moral turpitude. Here, the employee's misconduct involved certain errors of judgment, which without trivializing them, simply do not reach the level of impropriety found in each of the cited cases. Indeed, other cases cited involved improper physical contact or grossly inappropriate comments made to students. I/M/O The Tenure Hearing of Neal A. Ercolano, EDU 6138-98, Initial Decision (March°13,°2000),°aff'd,°Comm'r°of°Ed.°(May°1,°2000)°<http://lawlibrary.rutgers.edu/oal/search.html)>; I/M/O Catherine Cooper, EDU 6550-00, Initial Decision (February 2, 2001),°aff'd,°Comm'r°of°Ed.°(March°22,°2001)°<http://lawlibrary.rutgers.edu/oal/search.html)>. While it may sometimes be difficult to draw lines between different types of misconduct, I believe that it is fair to conclude that the judgment errors displayed here are not quite as severe as in these other cited matters.

Based upon the facts of this case, the errors of judgment displayed and the failure to comply with policy, and giving account to the teacher's record of service, and with due regard for the role of a teacher in our society, I **ORDER** that Ms. Getty shall be reprimanded for her misconduct and insubordination as detailed in this decision and as explained in the reprimand issued to her on January 15, 2008. She shall also forfeit 120 days of pay. She is to be made whole for any other salary and benefits of which she has been deprived due to her suspension and the institution of tenure charges. She may file an affidavit of lost salary and benefits with the Board within 20 days of the issuance of the Commissioner's final decision, accounting therein for any mitigation of damages required by law. She shall also be returned to her teaching duties.

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

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

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

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

June 4, 2009
DATE

JEFF S. MASIN, ALJ

Date Received at Agency: June 4, 2009

Date Mailed to Parties: June 4, 2009

mjm

EXHIBIT LIST

FOR THE PETITIONER:

P-1 CD-R Video of January 10, 2008 incident

P-2 S.J. Student Statement

P-3 Letter of Reprimand dated January 15, 2008

P-4 Board Policy #3322, "Staff member's Use of Cellular Telephones"

P-5 Directive to District Principals, dated August 31, 2007

P-6 Assignment of Christine DeMarsico

P-7 Christine DeMarsico Statement

P-8 I.D. Student Statement

P-9 H.T. Student Statement

P-10 D.J. Student Statement

P-11 S.B. Student Statement

P-12 A.A. Student Statement

P-13 S.W. Student Statement

P-14 to P-21 Not in Evidence

P-22 Verizon Wireless Phone Records

P-23 Verizon Wireless Phone Records

FOR THE RESPONDENT:

R-1 Appraisal of Teacher Performance of Desly Getty dated December 6, 2006

R-2 Appraisal of Teacher Performance of Desly Getty dated June 1, 2007

R-3 Summary Evaluation of Teacher Performance of Desly Getty dated June 8, 2007

R-4 Appraisal of Teacher Performance of Desly Getty dated October 17, 2007

R-5 Not in evidence

R-6 Letter from Judge Iadanza's Chambers dated January 15, 2009

WITNESS LIST

Desly Getty

M.H.

K.R.

N.K.

N.T.

Lisa Griffin

Tyler Thomas Blackmore

Christine DeMarsico

John Napolitani

Gavin McGrath

238-09

OAL DKT. NO. EDU 8132-09
AGENCY DKT. NO. 135-6/09

A LITTLE CLASS, INC. & KIM NOTTE, PETITIONERS, V. BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY, & NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF EARLY CHILDHOOD EDUCATION, RESPONDENTS.	COMMISSIONER OF EDUCATION DECISION ON APPLICATION FOR EMERGENT RELIEF

The record of this emergent matter – which included a CD of the digital recording of the hearing conducted at the Office of Administrative Law (OAL) on July 8, 2009 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner adopts the recommended order denying emergent relief as she concurs with the ALJ's determination 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), specifically, that the legal rights upon which their claim is based are settled, that they have a likelihood of prevailing on the underlying merits of the matter or that a balancing of the equities and interests of the parties inures to their favor.

Accordingly, the instant application for emergent relief is hereby denied. This matter is being returned to the OAL for hearing on the merits as scheduled by the ALJ.

IT IS SO ORDERED.*

Lucille Day

COMMISSIONER OF EDUCATION

Date of Decision: 7/22/09
Date of Mailing: 7/23/09

* 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 8132-09
AGENCY DKT. NO. 135-6/09

A LITTLE CLASS, INC. AND
KIM NOTTE,
Petitioners,
v.
NEPTUNE TOWNSHIP BOARD OF EDUCATION,
NEW JERSEY DEPARTMENT OF EDUCATION, AND
OFFICE OF EARLY CHILDHOOD EDUCATION,
Respondent.

Dennis A. Collins, Esq., for petitioners (Collins, Vella, and Casello, attorneys)

James T. Hundley, Esq., for respondent Neptune Township (Hundley and Parry, attorneys)

Melissa T. Dutton, Deputy Attorney General, for respondent New Jersey Department of Education and Office of Early Childhood Education (Anne Milgram, Attorney General of New Jersey, attorney)

Record Closed: July 8, 2009 Decided: July 9, 2009

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

STATEMENT OF THE CASE

A Little Class, Inc. and Kim Notte (petitioners) filed a petition for emergency relief to renew their contract with the Neptune Board of Education (Neptune) to provide an early childhood education program for Neptune. The New Jersey Department of Education (DOE) and Neptune assert that the nonrenewal of the contract with the petitioners was not arbitrary, capricious or unreasonable.

PROCEDURAL HISTORY

On June 29, 2009, petitioners filed an application for emergent relief with the New Jersey Department of Education. On the same day, this matter was transmitted to the Office of Administrative Law (OAL) for a hearing on the requested emergent relief. On July 8, 2009, the application for emergent relief was heard in the OAL, Trenton (Hamilton Township), and the record closed.

STATEMENT OF FACTS

A Little Class, Inc. has been engaged in the education of preschool children since 1982 and is a private provider of preschool education in Neptune Township. Petitioner Kim Notte is the President of A Little Class, Inc., the Executive Director of A Little Class 3 (P-1).

Since the 2001-2002 school year, Neptune has contracted with the petitioners to provide a quality preschool education for approximately thirty of the resident children of Neptune Township since the inception of the Abbott Preschool Program in Neptune in September 2001 (P-1). The current contract between the petitioners and Neptune ran from July 1, 2008 through June 30, 2009 (P-2).

Neptune attempted to not renew the contract with the petitioners for the 2007-2008, and 2008-2008 school years, but each year the Department of Education issued a determination that the Board's non-renewal violated N.J.A.C. 6A:10A-2.2, which

prohibited the duplication of services and ordered the Board to continue to contract with A Little Class 3 for the 2007-2008 school year (P-1).

On February 12, 2009, and April 28, 2009, Neptune notified petitioners that it would not renew its contract for the 2009-2010 school year, alleging that the regulations (N.J.A.C. 6A:13A-3.1) require districts to contract with the most cost efficient preschool education providers (P-3, P-4). Petitioners assert that the in-district provider is more costly on a per pupil basis than they are. Petitioners further assert that they provide a superior education as compared to that of Neptune, and provides greater services to a portion of the Neptune Township community (P-5).

On June 16, 2009, the BOE affirmed the Board's decision not to renew the contract with petitioners on the basis that Neptune has demonstrated the ability to serve all of its preschool children in district facilities, and that Neptune can serve its preschool students more efficiently than the petitioners (R-1). BOE agreed with Neptune's assertion that the cost per student in Neptune was $12,092 for the 2009-2010 school year as opposed to the petitioners' cost of $13,593. Petitioners assert that their cost is $12,587 per pupil (P-1, P-5). They further assert that Neptune's per pupil cost is far in excess of $12,092 (P-1).

Neptune asserts that it would cost far less to bring the thirty Little Class students in-district. They have new facilities and two classrooms available. They would place fifteen students in each classroom. Since the facility is already open and operating, the only additional cost would be the salaries and benefits for two teachers and two paraprofessionals, estimated to be $200,000. This would amount to a cost of $6,666.67 per student. Alternatively, Petitioners' cost to Neptune, based on their figure of $12,587, would be $377,608 (R-2). Neptune further asserts that more expense is required to administer this program.

Petitioners also argue that if the contract is not renewed, the petitioners may be forced to close their doors.

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. 6A:14-2.7(m)1, N.J.A.C. 1:6A-12.1, 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 petitioners must satisfy all four prongs of the Crowe test.

Applying these standards to the parties' arguments and proofs, petitioners have not satisfied the second, third, and fourth prong of the four elements necessary for granting emergency relief.

The legal rights upon which petitioners' claim is based are not yet settled. The appeal is predicated on recently adopted regulations. Effective July 3, 2000, the Department of Education (DOE) adopted regulations requiring Abbott districts, such as Neptune, to expand their early childhood education programs to full-day, full-year and to contract with community providers to implement the required programs. The regulations further required that there would be no duplicate programs or services otherwise available in the community. N.J.A.C. 6A:24-3.3(c). N.J.A.C. 6A:10A-2.2 (a) and (b) continued the requirement that Abbott boards offer a full-day, preschool program for three and four-year olds, to contract with local providers and not duplicate programs or services otherwise available in the community.

Effective January 13, 2008, the Legislature enacted the "School Funding Reform Act of 2008," (SFRA), N.J.S.A. 18A:7F-43, et seq. The Act represented a complete revision of the prior school funding statutes and eliminated the "Abbott district" designation. Effective the same day, DOE adopted new regulations to implement high quality preschool programs pursuant to SFRA. N.J.A.C. 6A:13A-1.1, et seq. The regulations eliminated the requirement that boards contract with private providers for early childhood education services. The regulations also eliminated the prohibition against duplicating programs or services.

Petitioners are the first private provider to appeal since the enactment and adoption of the SFRA and its implementing regulations. Thus, the legal rights underlying petitioners' claim is not yet settled.

Petitioners have also failed to establish that they are likely to prevail on its underlying claim. Districts are no longer prohibited from using their own preschool programs even if a district has contracted with community private providers, and must provide reasons for the a nonrenewal to both the provider and the BOE by May 1 of the preceding year. Neptune provided their reasons for nonrenewal to the petitioners on February 12, 2009, and April 28, 2009. Petitioners have not established that Neptune's actions were arbitrary and capricious. The action was taken because the incorporation of the thirty students into the district would reduce the per pupil cost of providing services to the students.

Petitioners have failed to establish that it will suffer greater harm than Neptune if the requested relief is granted. The public has an interest in the efficient operation of the School District. The reduction in preschool per pupil cost and the efficient use of the District's preexisting classrooms far outweigh the hardships anticipated by the petitioners as a result in the reduction of their tuition revenue.

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 all petitioners have failed to satisfy three of the four requirements, I **CONCLUDE** that the petitioners have failed to establish grounds for the granting of emergency relief. Accordingly, it is **ORDERED** that the Petition for emergent relief is **DENIED** without prejudice. This case shall be scheduled for further proceedings in order to resolve all legal and factual disputes.

This order on application for emergency relief may be adopted, modified or rejected by **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.

July 5, 2009
DATE

DONALD J. STEIN, ALJ

cmo

LIST OF EXHIBITS

For Petitioners:

P-1 Affidavit of Kim Nolte

P-2 Contract for 2008-2009 School Year

P-3 Letter from Neptune, dated February 12, 2009

P-4 Letter from Neptune, dated April 28, 2009

P-5 Letter from petitioner, dated May 10, 2009

For Respondent:

R-1 Letter from DOE, dated June 16, 2009

R-2 Neptune Budget Analysis 2009-2010

240-09

OAL DKT. NO. EDU 5839-09
AGENCY DKT. NO. 111-6/09

K.Y. and J.Y. on behalf of minor child D.Y.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREENWICH, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioners challenged a three-day suspension imposed upon their minor child by the respondent school board, and moved for emergent relief. On the hearing date in 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 "Stipulation of Settlement" (Agreement) the Commissioner rejects same for the following reason.

Section "c" of the Agreement "affirms" that D.Y.'s disciplinary records will not follow him to high school. That is a pledge that respondent does not have the authority to make. Respondent's district does not have a high school. Students who successfully complete eighth grade are sent to the Phillipsburg school district for their secondary education. *N.J.A.C.* 6A:16-7.10 requires that D.Y.'s disciplinary records follow him to Phillipsburg.

Accordingly, this matter is remanded to the OAL for revision of the settlement or for further proceedings.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 7/24/09

Date of Mailing: 7/24/09

* 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 05839-09

AGENCY DKT. NO. 111-6/09

K.Y. AND J.Y. ON BEHALF OF MINOR CHILD, D.Y.,

(petitioners)

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF GREENWICH, WARREN COUNTY.

(respondent)

Donald E. Souders, Jr., Esq., for petitioners

(Florio, Perrucci, Steinhardt & Fader, attorneys)

Sidney A. Sayovitz, Esq., for respondent

(Schenck, Price, Smith & King, attorneys)

Record Closed: June 8, 2009 Decided: June 9, 2009

BEFORE **BARRY N. FRANK**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 5, 2009 for an emergent relief hearing pursuant to N.J.S.A. 52:14B-1 to -13 and N.J.S.A. 52:14F1 to -15.

On the day of hearing, the parties agreed to an amicable resolution of this matter and prepared the attached Stipulation of Settlement indicating the terms of settlement.

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

June 9, 2009

DATE

BARRY N. FRANK, ALJ

Date Received at Agency: 6-12-09

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUN 12 2009

DATE

OFFICE OF ADMINISTRATIVE LAW

cml

(1-2/85-OAL) OAL DKT. NO.: EDU-5839-09

STIPULATION OF SETTLEMENT

A hearing was requested in this case because Petitioner contested suspension issued by Respondent and sought emergent relief.

The Petitioners, KY+JY o/b/o DY and Respondent, Greenwich Twsp. School District have reached an agreement. The terms of the settlement are as follows:

Basis and Terms of Settlement or Withdrawal: Petition to be dismissed on following conditions:
a. Petitioner shall be allowed to participate in 8th grade graduation exercises, and in valley game scheduled for day after graduation.
b. These proceedings and all discussions related thereto shall be held in strictest confidence by all parties, in accordance with law.
c. The parties affirm that Petitioner's disciplinary records will not follow him to high school.

Date of Settlement: June 8, 2009

By: Kevin Young and Jeanette Young
Client

c: Client

For the Greenwich Board of Ed.

OAL Clerk (2)

241-09R

241-09

OAL DKT. NO. EDU 7932-05
(EDU 8101-01 ON REMAND)
AGENCY DKT. NO. 408-10/01

ADAM E. DRAPCZUK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WINFIELD, UNION COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the parties' agreement as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Edy

COMMISSIONER OF EDUCATION

Date of Decision: 7/24/09

Date of Mailing: 7/24/09



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 07932-05
AGENCY DKT. NO. 408-10/01

ON REMAND
OAL DKT. NO. EDU 08101-01

ADAM E. DRAPCZUK,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WINFIELD, UNION COUNTY,
Respondent.

Beth L. Finkelstein, Esq., for petitioner

Mark A. Tabakin, Esq., for respondent (Weiner Lesniak, attorneys)

Record Closed: June 15, 2009 Decided: June 15, 2009

BEFORE **MUMTAZ BARI-BROWN,** ALJ:

These matters were transmitted to the Office of Administrative Law (OAL) as contested cases pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The parties acknowledged and confirmed that the attached settlement agreement and release indicating the terms of settlement resolved all issues contained in the initial filing and on remand.

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.

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 15, 2009
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency:

6-17-09

Date Mailed to Parties: JUN 17 2009

dr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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STATE OF N.J.
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2001 OCT -3 P 4:58

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is made and entered into between the Board of Education of the Township of Winfield (the "Board") and Adam E. Drapczuk ("Drapczuk"). This Agreement is made pursuant to the following terms and conditions.

RECITALS

WHEREAS, on or about August 17, 1998, Drapczuk was employed as the Superintendent of the Winfield Public School District pursuant to a contract of employment, effective August 17, 1998 through June 30, 2002; and

WHEREAS, on or about April 24, 2001, the Board forwarded Drapczuk a letter advising him that the Board did not intend to renew his employment contract; and

WHEREAS, on or about September 18, 2001, the Board adopted a resolution ratifying its previous decision to non-renew Drapczuk's employment contract; and

WHEREAS, Drapczuk filed a Petition for a Declaration Ruling on or about September 29, 2001, asserting that he had not been afforded timely notice of his non-renewal in accordance with N.J.S.A. 18A:17-20.1; and

WHEREAS, the matter was docketed before the Office of Administrative Law as OAL Docket Number EDU-OA-08101-01N; and

WHEREAS, the parties elected to settle all outstanding matters and allegations in dispute so as to avoid expending further resources and to eliminate the uncertainties of litigation; and

WHEREAS, the Board and Drapczuk deem it to be in their best interests to set forth in a formal written agreement their respective rights, duties and obligations; and

WHEREAS, the Board and Drapczuk are now mutually desirous of settling the matters and allegations in dispute; and

WHEREAS, all parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

1. The "Board", as used herein, shall at all times mean the Board of Education of the Township of Winfield, its affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, and successors, whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.
2. "Drapczuk," as used herein, shall mean Adam E. Drapczuk, his heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.
3. The parties acknowledge and agree that Drapczuk's Employment Contract dated August 13, 1998 terminated on June 30, 2002.
4. Drapczuk shall cause to be filed a withdrawal, with prejudice, of the matter currently pending before the Office of Administrative Law and docketed as EDU- OA-08101-01N, subject to the approval of this Settlement and Release Agreement by the Office of Administrative Law and the Commissioner of Education.
5. Drapczuk promises and agrees never to seek re-employment or assert any tenure status or employment with the Board at any time in the future in any capacity.
6. Within thirty (30) business days of execution of the Settlement Agreement by all parties, and approval of this Settlement Agreement by the Office of Administrative Law, the Board shall pay Drapczuk the lump sum of Seven-thousand, five-hundred dollars ($7,500.00). Drapczuk and the Board acknowledge and agree that said payment is in full and complete settlement of any and all claims that have been asserted or can be asserted or may be asserted or could be asserted by Drapczuk for reinstatement, automatic renewal of his employment contact, reemployment, compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental anguish, medical expenses, punitive damages, interests, attorneys fees, costs of suit, loss of sick time, loss of vacation time, loss of benefits, loss of seniority, loss of pension, loss of salary placement, consequential damage, reputation damage, breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage which arose out of or could arise out of Drapczuk's Complaint against the Board now docketed before the OAL as EDU-OA-08101-01N, for, but not

limited to, violation of his civil rights, privileges and immunities secured by the Civil Rights Act of 1871, 42 U.S.C. §§1981, 1983, 1985, 1986, and 1988, Title 18A of the New Jersey Statutes; Titles 6 and 6A of the New Jersey Administrative Code, the New Jersey Tort Claims Act N.J.S.A. Title 59, the Fourth and Fourteenth Amendments to the United States Constitution and any and all other federal, state and local constitutional, statutory, regulatory or administrative laws, ordinances or common law duties, whether enumerated herein specifically or not. Drapczuk and the Board expressly understand and agree that said payment includes any and all amounts that may be claimed by Drapczuk or on his behalf, or by his attorneys, heirs, successors or assigns, against the Board. Specifically excluded from this release are Drapczuk's rights arising under the Teachers' Pension and Annuity Fund (TPAF) and related statutes and regulations, and any rights he may have for indemnification by the Board through his last day of employment, June 30, 2002, pursuant to *N.J.S.A.* 18A: 16-6 and 6.1.

7. Drapczuk hereby acknowledges and agrees that he further expressly waives and assumes the risk of any and all claims or damages which exist as of this date for which Drapczuk does not know of or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise and which, if known, would materially effect his decision to enter into this Settlement Agreement and General Release.

8. This Settlement Agreement is contingent upon the approval of the Office of Administrative Law and the Commissioner of Education.

9. Drapczuk and the Board agree and acknowledge that this Settlement Agreement and General Release is also contingent on and subject to approval and ratification by the Board.

10. This settlement is intended as and for damages for any and all possible injuries and Drapczuk hereby waives any and all claims for lost wages, income or future earnings.

11. Should it be determined that any payments made pursuant to Paragraph 6 herein constitute gross income within the meaning of the Internal Revenue Code and its applicable amendments, or under any other federal, state or local statute or ordinance, Drapczuk shall be solely liable for and agrees to pay any amount that may be determined to be due and owing as taxes, interest and penalties arising out of such payments. Specifically, Drapczuk understands and agrees that his attorney will be provided with a 1099 Miscellaneous form with his payment from the Board. Drapczuk

also understands and agrees that any adjustments to his withholding or any estimated tax payments are his responsibility. Further, Drapczuk understands and agrees that the Board will report the payment made to Drapczuk to the Internal Revenue Service, the New Jersey State Division of Taxation and other pertinent agencies, but the Board will not take a position as to whether the payment is taxable.

12. In any action commenced against by either party to enforce the provisions of this Agreement, the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

13. Drapczuk specifically acknowledges that the payment referred to in Paragraph 6 hereof constitutes any and all additional consideration not otherwise owed to him for this Settlement Agreement and General Release. Drapczuk agrees that he shall not seek any further amount from the Board other than the amount stated in Paragraph 6.

14. The parties and their attorney(s) agree and promise that they will not disclose, either directly or indirectly any information contained in this Settlement Agreement, except that the parties or their attorney(s) shall not be precluded from disclosing the existence or terms of this Settlement Agreement and General Release when required to do so by law. The parties may only state, without elaboration, as follows: "The situation has been resolved to the mutual satisfaction of Drapczuk and the Board."

15. This Settlement Agreement and General Release contains the full agreement of Drapczuk and the Board and may not be modified, altered, changed or terminated except upon the express prior written consent of Drapczuk and the Board, which consent must be signed by Drapczuk and the Board, or their duly authorized agents.

16. The waiver by Drapczuk and/or the Board of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other.

17. If any term, provision or condition of this Settlement Agreement and General Release is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Settlement Agreement and General Release.

18. This Settlement Agreement and General Release shall be construed and interpreted in accordance with the laws of the State of New Jersey.

19. Drapczuk and the Board agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to get full force and effect of the basic terms and interest of this Settlement Agreement and General Release.

20. This Settlement Agreement and General Release may be executed in counterparts, with each of which shall be deemed to be an original copy, but all of which together shall be deemed one and the same instrument.

21. In entering into this Settlement Agreement and General Release, Drapczuk has relied upon the legal advice of his attorney, who is the attorney of his own choice, as to the terms of this Settlement Agreement and General Release which have been completely read and explained by his attorney and those terms are fully understood and voluntarily accepted.

IN WITNESS WHEREOF, Drapczuk and the Board have hereunto set their hands.

ADAM E. DRAPCZUK

By: _____
Adam Drapczuk

By: _____
Beth Finkelstein, Esq.

BOARD OF EDUCATION OF THE TOWNSHIP OF WINFIELD

By: _____
Frederick Viteka, Board President

By: _____
Mark A. Tabakin, Esq.

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WINFIELD BOARD OF EDUCATION

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2006 OCT -3 P 4:58

RESOLUTION
September 19, 2006

BE IT RESOLVED that the Winfield Board of Education approve the settlement agreement and release between Adam Drapczuk and the Winfield Board of Education in the amount of $7500.00.

MOTION MADE BY: Ms. Baker SECONDED BY: Mr. Heuser

The motion was carried by roll call vote as follows:
Yes-Mrs. Fellner, Mrs.Gerhart, Mr. Heuser, Mr. Koomer, Mrs. Vail, Mr. Viteka
No-Ms. Baker
Abstain-Mrs. Byrne
Absent-Mrs. Quinn

I certify the foregoing to be a true and correct abstract of a resolution regularly passed at a meeting of the Board of Education of the Township of Winfield held September 19, 2006 and in that respect is a true and correct copy of its minutes.

Thomas J. West
Board Secretary
Winfield Board of Education

242-09

#242-09

KENTWOOD ACADEMY, :

PETITIONER, :

V. :

LUCILLE DAVY, COMMISSIONER, NEW JERSEY STATE DEPARTMENT OF EDUCATION, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Kentwood Academy, a private school for students with disabilities preliminarily approved to operate in 2005, appealed the Department's revocation of such approval, effective July 1, 2008. The Department had acted pursuant to a May 15, 2007 settlement of prior litigation between itself and Kentwood, in which Kentwood's continued approval was conditioned on reaching an average daily enrollment (ADE) of 24 public school placements between April 1, 2007 and March 31, 2008, which it did not do. Kentwood contended that it cannot be held to the terms of the settlement because the Department's actions rendered it unable to meet such terms, and also because the Department had breached its own obligation under the agreement by failing to send a specified letter – which rescinded a March 14, 2007 letter to Kentwood advising that its approval would be revoked effective July 1, 2007 if it failed to meet regulatory ADE requirements – to districts placing students at Kentwood.

The ALJ dismissed the petition, concluding that the Kentwood was bound by the May 15, 2007 stipulation – which was entered into freely and knowingly by the parties and was intended to resolve all prior disputes and litigation between them – and that the Department was justified in revoking Kentwood's preliminary approval under the terms of the agreement. In so concluding, the ALJ found as fact that the record supported Kentwood's assertion that the Department did not send a letter as agreed in the stipulation.

The Commissioner adopted the Initial Decision with modification. The Commissioner concurred with the ALJ that Kentwood is not entitled to relief because there is no basis on which to set aside the May 15, 2007 agreement, but rejected the finding that the Department did not send a letter as agreed. The Commissioner found that the Department did, in fact, issue the letter in strict accord with the terms of the agreement, which incorporated a draft letter providing for forwarding of the letter to sending districts only if they had been sent the prior letter which it rescinded. The Commissioner upheld the Department's actions 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.

July 27, 2009

OAL DKT. NO. EDU 7165-08
AGENCY DKT. NO. 154-5/08

KENTWOOD ACADEMY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
LUCILLE DAVY, COMMISSIONER, AND THE NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the respective exceptions filed by petitioner (Kentwood) and respondents (the Department) pursuant to *N.J.A.C.* 1:1-18.4, and each party's reply to the other's exceptions.

In its exceptions, the Department urges the Commissioner to adopt the Initial Decision's conclusions of law, but modify its findings of fact to correct a number of errors and omissions. The Department first objects to the failure of the Administrative Law Judge (ALJ) to reference – and presumably, therefore, to consider – the binder of exhibits presented by the Department at the time of hearing[1]; the Department contends that, while several of these exhibits duplicate documents which were introduced elsewhere by itself, Kentwood or both – and are reflected in the Initial Decision – there remain a number of documents not otherwise found on record. (Department's Exceptions at 8-10) In reply, Kentwood does not dispute the

[1] The exhibits are labeled R-1 through R-19 and R-22 through R-28. The Department agreed, at Kentwood's request, to remove R-20 and R-21 from the binder prior to presenting it to the ALJ.

Department's representation as to its entry of the referenced exhibits at hearing, and states that it does not object to modification of the record to include such exhibits; it does, however, reject the Department's suggestion that the ALJ failed to consider the documents in question, asserting that there is insufficient basis to draw such a conclusion. (Kentwood's Reply at 2)

The Department next contends that the Initial Decision contains a number of "typographical" errors requiring clarification by the Commissioner. These include statements: 1) on page 4, that the prior regulation governing Average Daily Enrollment (ADE) required a minimum of 16 *public school* students, when that requirement dates from 2004 and the prior regulation simply required an ADE of 16 *students* without reference to public school placements; 2) on page 10, that it is not known whether the Department brought to the attention of ALJ Frank that it had sent out a general notice removing Kentwood from conditional approval so as to effectively moot a pending motion for stay, when the record clearly reflects that the notice was sent after the OAL hearing but prior to issuance of ALJ Frank's decision on the motion; 3) on page 12, that Assistant Commissioner Attwood sent out a letter on March 14, 2007 rescinding "Ms. Thomas's letter of the same day" with respect to the time frame within which Kentwood must attain 24 ADE, when the Attwood letter was, in fact, dated and sent on *May* 14, 2007, approximately two months later than Ms. Thomas's letter; and 4) on page 13, that the period of compliance set forth in the Final Stipulation of Settlement was "April 11, 2007 through March 31, 2008," rather than the actual dates of "April *1*, 2007 through March 31, 2008." (Department's Exceptions at 11-12; *id.* at 3, note 3; *id.* at 6, note 5; further exceptions *infra*) In reply, Kentwood states that it does not object to correction of these errors as requested by the Department – one of which was noted in its own exceptions – but does

oppose any suggestion that such errors should prevent the Commissioner from adopting the ALJ's findings of fact. (Kentwood's Reply at 2, 5; see also Kentwood's Exceptions, *infra*)

The Department then seeks rejection of the ALJ's finding (at 15) that "the record supports Kentwood's factual assertion" that the Department failed to send the letter required by the Final Stipulation of Settlement. The Department asserts that this finding is clearly in error and attributes it to the ALJ's having mistakenly dated Assistant Commissioner Attwood's letter, as noted above, on March 14, 2007 rather than *May* 14, 2007, and having relied on a copy of the settlement agreement (PE-28) that did not include the attached letter incorporated as part of the agreement – which is identical, except for being dated May 10, 2007, to the letter sent by Assistant Commissioner Attwood (PE-27 and R-14);[2] the Department states that it issued the required letter (PE-27 and R-14) on May 14, 2007, the same date it signed the settlement agreement, and that this document's date and content directly contradict the ALJ's finding that the Department did not send a letter as agreed in the Final Stipulation of Settlement. (Department's Exceptions at 12-13; *Id.* at 6, note 5) In reply, Kentwood counters that the Department has provided no evidence that the ALJ's typographical error regarding the date of Assistant Commissioner Attwood's letter in any way contributed to the finding in question, since the *date* the letter was sent has no effect on *where* it was sent, and what the ALJ found was that it was not sent *to the sending districts* as agreed in the Final Stipulation. (Kentwood's Reply at 3)

Finally, the Department contends that the ALJ erred in concluding that the Department did not explain how Kentwood could reach an ADE of 24 public school students when its approval to operate was limited to two classes of a maximum of nine students each.

[2] The Department notes that a complete copy of the agreement may be found at R-11 (see note 1 above) or Exhibit L of the Verified Petition. The Commissioner observes that it may additionally be found at DOE-D.

According to the Department, counsel explained at the April 27, 2009 hearing in this matter that approval for a new class is needs-driven and, for efficiency purposes, will not be granted unless enrollment is adequate to justify such class; thus, Kentwood would not have been approved for a third classroom unless its enrollment so warranted. Moreover, the Department notes, the record shows that: 1) Kentwood's enrollment in 2005-06 – when it was approved for two 9-student classrooms – was twenty students (Petition of Appeal, ¶9), so that even prior to approval of a third classroom it could have accepted more students and sought a class size waiver as provided by *N.J.A.C.* 6A:14-7.1; 2) Kentwood did not have sufficient enrollment to justify a third classroom at the time of its July 19, 2006 application – which stated that a third class was needed because enrollment had increased to 18 students, and which was denied by the Department on September 5, 2006 after confirming that numerous students were not returning to Kentwood and that its enrollment at that point was only 12 students (DOE-I, Request #11); and 3) Kentwood was, by its own admission (PE-29), approved for a third classroom not later than September 2007,[3] so that from at least this time through the concluding date specified in the settlement agreement – March 31, 2008 – it had the capacity to reach 24 ADE. (Department's Exceptions at 14-16) In reply, Kentwood states that the Department's factual recitation of the history of Kentwood's approval to operate a third classroom – with which Kentwood notes its disagreement as to the number of requests made and the propriety of the Department's denials – still does not explain how Kentwood could have met the required ADE

[3] The Department states that the approval in question was actually granted in June 2007, as found by the ALJ in his recitation of the facts at the April 27, 2009 hearing in this matter; however, the wrong supporting document was inadvertently appended to the Department's pre-hearing brief, and the Department recognizes that the Commissioner may determine not to consider the correct document – the June 14, 2007 approval notice appended to the Department's exceptions as Exhibit A – because it was not part of the record below. (Department's Exceptions at 15-16)

when the Department did not approve it to operate a third classroom until June 2007, well after the April 1, 2007 start of the stipulated ADE compliance period. (Kentwood's Reply at 3-5)

In its own exceptions, Kentwood urges the Commissioner to accept the ALJ's findings of fact with modification to correct the date of Assistant Commissioner Attwood's May 14, 2007 letter, but reject his conclusion that the Final Stipulation resolved all outstanding issues between the parties so that, pursuant to it, the Department was justified in revoking Kentwood's preliminary approval to operate as a private school for the disabled. Kentwood initially asserts that, although the ALJ found as fact that the Department failed to send a letter to sending districts in violation of the settlement agreement, he inexplicably did not reach the concomitant conclusion that such omission constituted a material breach of the agreement so as to require that Kentwood be released from its own obligations thereunder; Kentwood states that the Department's failure to send the stipulated letter was a breach that "severely limited Kentwood's ability to comply with the agreement, [so that] the Final Stipulation's requirement that Kentwood meet the minimum ADE of 24 by March 31, 2008 is invalid." (Kentwood's Exceptions at 7-9, quotation at 9)[4] In reply, the Department reiterates that it did, in fact, issue the letter as required, again attributing the ALJ's erroneous factual conclusion to his mistake in dating the letter and his reliance on a copy of the Final Stipulation that did not include the attached draft. (Department's Reply at 2; see also Department's Exceptions, *supra*)

Kentwood next contends that the Final Stipulation cannot stand because the Department violated the implied covenant of good faith and fair dealing, limiting and obstructing Kentwood's ability to receive any benefit from the agreement; according to Kentwood, the

[4] Kentwood additionally notes that the letter in question was sent not on *March* 14, 2007 as stated by the ALJ, but rather on *May* 14, 2007 – one day prior to execution of the agreement, yet another example of the Department's questionable behavior in this matter. (Kentwood's Exceptions at 13-14)

Department – with its superior knowledge of the law and of statewide practice with respect to private schools for the disabled – knew or should have known that Kentwood would be unable to meet the required ADE by the specified date, so that entering into the "grossly unfair" and "one-sided" stipulation as it did rises to the level of unconscionability and necessitates that the agreement be vacated. (Kentwood's Exceptions at 9-12) In reply, the Department counters that – even assuming that the concept of good faith and fair dealing applies to contract formation as opposed to contract performance – Kentwood has provided no evidence whatsoever of ill motive or intentional misleading on the Department's part, nor was the Final Stipulation of Settlement unfair or excessively disproportionate as would be necessary for a finding of unconscionability – a charge which, the Department notes, Kentwood raises for the first time on exception; also, to the extent that Kentwood now claims the stipulation should be set aside due to impossibility, it cannot be overlooked that the duty of which Kentwood complains was created by its own contract, and that impossibility cannot be claimed as a result of hardship arising from bad judgment, miscalculation, change in circumstance or subsequent events. The Department observes that Kentwood has been operating as a private school for students with disabilities since the 2005-06 school year and has been calculating its ADE during that entire period, and further that, at the time of settlement, it: 1) knew based on experience when districts were likely to place students and also knew that its current enrollment was insufficient to support a third classroom; 2) engaged in extensive discussion of the settlement terms with the assistance of an ALJ; and 3) was represented by counsel. (Department's Reply at 3-6)

Finally, Kentwood urges rejection of the ALJ's conclusion that it entered into the Final Stipulation of Settlement knowingly and freely, asserting that it cannot be held bound by an agreement wherein, at the time of execution, it did not understand a material term; according to

Kentwood, it was unaware of how the ADE requirement would be applied and how this would affect its ability to reach 24 ADE by March 31, 2008 – something the Department did nothing to explain or clarify. (Kentwood's Exceptions at 12-13) In reply, the Department notes that the terms of the agreement are clear and unambiguous on their face, and that while "ADE" is not defined within the agreement itself, it is an official term defined by regulation of which Kentwood's owner (Diane Richards) was required to be aware and with which Kentwood was obliged to comply; it further notes the existence of documents (Exhibits R-4, R-5 and R-19) showing that the Department consistently advised Ms. Richards to become familiar with the Department's regulations, and points out that Kentwood chose not to present oral testimony regarding its understanding of the terms of the Final Stipulation. (Department's Reply at 6-7)

Upon careful review and consideration, the Commissioner determines to adopt the Initial Decision of the OAL, with modification as set forth below.

As a preliminary matter, the Commissioner first corrects the Initial Decision to include the exhibits entered into the record by the Department, without objection from Kentwood, at the hearing on April 27, 2009[5]; these exhibits – which were not included in the file forwarded to the Commissioner by the OAL and were supplied by counsel for the Department under cover letter dated July 16, 2009 – are listed in an Appendix at the end of this decision. The Commissioner additionally corrects the errors noted by the parties in their respective Exceptions, incorporating such corrections into the Initial Decision as detailed above.

Turning to the Initial Decision's substantive findings and conclusions, the Commissioner fully concurs with the ALJ that the Final Stipulation of Settlement executed by Kentwood and the Department on May 15, 2007 is a valid and binding agreement standing as the

[5] The record does not include a transcript of the proceedings of that day; however, as noted above, Kentwood does not dispute the Department's representation as to entry of these documents.

resolution of all prior issues in dispute between the parties, so as to both preclude Kentwood's attempts at relitigation of such issues and justify the Department's revocation of Kentwood's preliminary approval in accordance with the terms of settlement.

With respect to Kentwood's arguments to the effect that the Final Stipulation is invalid due to infirmities in its formation, the Commissioner finds no basis in the record either to disturb the ALJ's conclusion that the agreement was entered into freely by both parties or to support Kentwood's claims of not understanding the terms of the agreement. To the contrary, the stipulation states on its face that the parties had "conferred during a conference before the [ALJ] and [had] negotiated and come to an agreement in the interest of resolving amicably the outstanding issues of the pending appeal," and the record plainly shows the agreement to have been entered into after extensive discussions and negotiation, in conference with the presiding ALJ and with both parties represented by counsel.[6] Moreover, the terms of the Final Stipulation document – actually drafted by counsel for Kentwood – are clear on their face, with no need to define within the body of the agreement a regulatory calculation which private schools for the disabled are required to know and apply routinely as a condition of ongoing operation.[7] Indeed, Kentwood's claims are belied by its own response to the Department's interrogatory regarding its understanding of ADE as used in the stipulation: "At the time the parties entered into the Final Stipulation of Settlement, I believed and continue to believe that the average daily enrollment requirement of twenty-four (24) would be met by the time prescribed in the

[6] See ALJ Barry N. Frank's Initial Decision of May 18, 2007, adopted by the Commissioner on June 19, 2007. (Exhibit DOE-D)

[7] See *N.J.A.C.* 6A:23-4.1 (definition) and *passim* thereafter.

Stipulation, as long as the Department of Education complied with all provisions in the Stipulation."[8] (DOE-I, Interrogatory No. 12)

Nor is the Commissioner persuaded by Kentwood's claim that the settlement must be vacated because its requirement that Kentwood establish an ADE of 24 public school students between April 1, 2007 through March 31, 2008 was made in bad faith and impossible to meet. Not only did Kentwood believe the requirement attainable, *supra*, and accept it voluntarily as found by the ALJ (at 20), but the Department states, without contradiction, that the April 1, 2007 – March 31, 2008 time frame was chosen for the final settlement precisely to ensure that sending districts would have been aware – in view of the Department's delay until March 8, 2007 in issuing a retraction of Kentwood's conditional approval status as required by the preceding Partial Stipulation of Settlement – that Kentwood was at that point deemed to be in compliance with regulation and able to accept new students. (Department's Pre-Hearing Brief at 11-12) Moreover, the record is clear that Kentwood was approved for a third classroom for all but 2-1/2 months of the designated compliance period, *i.e.*, from mid-June 2007[9] through March 31, 2008, and the Commissioner finds entirely satisfactory the Department's explanation, at the April 27, 2009 hearing, of the waiver process by which additional students could have been enrolled – and, indeed, in the past had been enrolled – over and above the number

[8] It is noted that the only requirements placed on the Department by the stipulation were timely issuance of the letter from Assistant Commissioner Attwood, see *infra*, and refraining until February 13, 2008 from issuing any letter to sending districts regarding Kentwood's compliance with the stipulation's ADE requirement (there is no dispute that such letter was not sent until May 21, 2008).

[9] Again, although the record does not include a transcript of proceedings, Kentwood does not dispute the content of the Department's representation as to the statements of counsel – only to the sufficiency of such statements as an explanation of how it could have met 24 ADE. Similarly, notwithstanding the Department's error in the attaching of an exhibit (see note 3 above), it is clear that Kentwood does not dispute the Department's representation as to the date it received approval for a third classroom.

ordinarily permitted during the time Kentwood was approved for only two classrooms, *i.e.*, between April 1, 2007 and June 14, 2007. [10]

Lastly, the Commissioner rejects both the ALJ's finding that the Department did not send the letter required by the Final Stipulation of Settlement and Kentwood's concomitant assertion that the Department, therefore, breached the agreement in performance. Although the ALJ finds as fact (at 15) "that the record supports Kentwood's factual assertion the Department failed to send a letter, which it agreed to do in the Settlement Agreement," nowhere in the Initial Decision is the basis for such finding set forth,[11] and the Commissioner's review of the record evinces nothing in support of such assertion; indeed, notwithstanding that Kentwood here bears the burden of proof – or at the very least the burden of production – it has brought forward not one scintilla of evidence that the Department did not send the letter as stipulated.[12]

Moreover, even if Kentwood had produced evidence that the letter was not sent to one or more *sending districts*, the record is clear that, contrary to Kentwood's assertions, the Department complied *precisely* with the terms of the Final Stipulation of Settlement *as set forth in the appended May 10, 2007 draft letter expressly incorporated by reference into Term No. 3.* That letter – which is undisputedly identical to the letter issued by the Department on

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[10] In so holding, the Commissioner expressly rejects the ALJ's statements that the Department did not explain how Kentwood could reach an ADE of 24 public school students when its approval to operate was limited to two classes of a maximum of nine students each (at 19), and that under the specifics of Kentwood's approval, it would have been impossible to meet the amended ADE of 24 (at 7).

[11] The narration of facts in the Initial Decision at 12-13 tends to support to the Department's assertion on exception that the ALJ's finding was due to his error in dating the Department's May 14, 2007 letter.

[12] In its responses to the Department's interrogatories on this point, Kentwood states that it did not intend to rely on any documents but might rely on the knowledge of staff members (it ultimately did not), and that its evidence for claiming that the Department did not send the required letter "is that Kentwood has never received documentation of this letter or proof that the letter was sent as required in the Stipulation." (DOE-I, Interrogatory Nos. 8-9) Consistent with this position, Kentwood argues in its April 24, 2009 Pre-Hearing Brief (at 17) that it did not receive notification until recently that the May 14, 2007 letter was sent to County Supervisors (*sic*) and still has not "received sufficient proofs that the NJDOE's May 14, 2007 letter was sent to all sending district[s] in receipt of the March 14, 2007 letter."

May 14, 2007 (Exhibit PE-27) – was not addressed to sending districts, but rather to Kentwood's owner (Diane Richards) with copies to the Department's county offices of education, and expressly directed that "[any] county offices of education that forwarded Ms. Thomas' original letter dated March 14, 2007 to school districts are asked to forward this letter to school districts. If the original letter was not forwarded, please do not forward this letter." Thus, the only districts that were required to receive the May 14, 2007 letter under the terms of the Final Stipulation were those that had been sent the March 14, 2007 letter from Yut'se Thomas (PE-26), which the May 14, 2007 letter acted to rescind. In this regard, the record (Exhibit R-14) clearly shows that the Department not only issued the stipulated letter forthwith, but approximately two weeks thereafter, on May 29, 2007, followed up with all county offices and confirmed that the letter was received by them and sent to any sending district which had been sent the March 14, 2007 letter from Yut'se Thomas (PE-26) – which, it is noted, was addressed to Diane Williams and copied to county offices of education and other Department staff, with no provision for either copies to sending districts or instructions for forwarding. Thus, to the extent that the Department's letter of May 14, 2007 was not sent to sending districts pursuant to Term No. 3 of the Final Stipulation, it is because the districts were not sent – as indeed, they were not intended to have been sent[13] – Ms. Thomas's letter of March 14, 2007 (Exhibit R-14) and were consequently not required to receive Assistant Commissioner Attwood's subsequent letter of rescission.

Finally, with respect to Kentwood's objection to the Department's letter having been issued one day prior to full execution of the settlement agreement on May 15, 2007, the Commissioner finds such deviation to be *de minimis* under the circumstances, and Kentwood's objection to elevate form over substance. Moreover, the Commissioner additionally notes that:

[13] In addition to PE-26 itself, see also email from Jim Verner to county offices, Exhibit R-14, Item 1.

1) Kenwood has not disputed the Department's representation that Department counsel signed the agreement on May 14, 2007, the same date it acted to send the letter; 2) the settlement document was prepared by counsel for Kentwood, so there would be no question of any subsequent disagreement by Kentwood as to its contents; and 3) pursuant to *N.J.A.C.* 1:1-19.1(c) and (d), the settlement did not require further review by the Commissioner prior to its adoption as a final decision, since the agency was a party to the case.

Thus, there being no basis in fact or law on which to set aside the parties' May 15, 2007 agreement in this matter, the Commissioner concurs with the ALJ that Kentwood is not entitled to the relief it seeks. To the extent that Kentwood now regrets that to which it previously agreed, the Commissioner notes – as was well stated by ALJ Jeff S. Masin in an Initial Decision subsequently adopted by the Commissioner – that such discontent is "a not at all uncommon event after parties compromise their positions in the course of settling an oft-times contentious litigation," as was "wisely noted" by the court in *Pascarella v. Bruck*, 190 *N.J. Super.* 118, 126, and that if Kentwood "is allowed to back out of this agreement, such a step would undermine the strong public policy [favoring settlement[14]] and would damage the ability of attorneys and the courts and administrative forums to rely on the stated agreements of parties to end litigation." *In the Matter of the Tenure Hearing of Beverly Jones, Trenton School District, Mercer County*, Commissioner's Decision No. 315-07, decided August 9, 2007.

Accordingly, for the reasons expressed herein, the Initial Decision of the OAL is adopted – with modification as set forth above – as the final decision in this matter. The petition

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[14] *Department of Public Advocate v. N.J. Board of Public Utilities*, 206 *N.J. Super.* 523, 528 (App. Div. 1985); *Bistricer v. Bistricer*, 231 *N.J. Super.* 143, 147 (Ch. Div. 1987); *Jannarone v. W.T. Co.*, 65 *N.J. Super.* 472, 476 (App. Div.), *certif. den.* 35 *N.J.* 61 (1961); *Pascarella v. Bruck*, 190 *N.J. Super.* 118, 125 (App. Div.), *certif. den.* 94 *N.J.* 600 (1983). The doctrine is of such importance that a court should "strain" to uphold such settlements. *Dept. of Public Advocate,* 206 *N.J. Super.* at 528.

of appeal is dismissed, and the Department's revocation of petitioner's preliminary approval to operate as a private school for the disabled, effective July 12, 2008, is upheld.

IT IS SO ORDERED.[15] [16]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 7/27/09

Date of Mailing: 7/27/09

[15] The court had ordered this matter to be completed by June 11, 2009, as set forth in the Initial Decision's procedural recitations at 2 and 16. However, because the Initial Decision was not received until June 9, 2009, a further extension – until July 27, 2009 – was granted so as to afford the parties an opportunity to submit exceptions and the Commissioner a 45-day period within which to render a final decision in accordance with the Administrative Procedure Act.

[16] The Appellate Division of the Superior Court has retained jurisdiction over this matter pursuant to its order of December 16, 2008 (PE-43).

APPENDIX OF ADDITIONAL DEPARTMENT OF EDUCATION EXHIBITS

Exhibit Number	Description of Document
R-1	*N.J.A.C.* 6A:23-4.1
R-2	36 *N.J.R.* 3895(a)
R-3	*N.J.A.C.* 6A:23-4.3
R-4	Email from Elise Sadler-Williams to Mark Richards dated January 11, 2005.
R-5	Affidavit signed by Diane Richards dated March 2, 2005
R-6	Letter dated March 1, 2005 from Diane Richards to Jim Verner
R-7 (duplicate of PE-11)	Letter dated March 11, 2005 from Judyth Vazquez to Diane Richards
R-8 (duplicate of PE-12)	Letter dated May 20, 2005 from Cecelia Downey to Diane Richards
R-9 (duplicate of PE-15)	Letter dated December 30, 2005 from Lucille Davy to Diane Richards
R-10 (duplicate of PE-26)	Letter dated March 14, 2007 from Yut'se Thomas to Diane Richards
R-11	Stipulation of Settlement dated May 15, 2007, with attached letter incorporated by reference
R-12	Letter dated July 26, 2007 from Jim Verner to Diane Richards
R-13 (duplicate of PE-27)	Letter dated May 14, 2007 from Katherine P. Attwood to Diane Richards
R-14	E-mail dated May 29, 2007 from Jim Verner to CSCS Distribution List, with county responses
R-15	Facsimile dated April 17, 2008 from Mark Richards to Jim Verner
R-16 (duplicate of PE-32)	Memorandum dated May 21, 2008 from Katherine P. Attwood to County Superintendents
R-17	Kentwood Academy's Financial Statements for the Fiscal Year ended June 30, 2008
R-18 (duplicate of PE-8)	Letter dated January 10, 2005 from Judyth Vazquez to Diane Richards
R-19	Letter dated March 18, 2005 from Diane Richards to Ms. Vazquez
R-22	E-mail dated June 22, 2006 from Kentwood Academy to Tereasa Utter, Elaine Lerner and Judyth Vazquez
R-23 (duplicate of PE-19 and DOE-B)	Letter dated August 7, 2006 from Roberta Wohle to Diane Richards
R-24	*N.J.A.C.* 6A:14-7.10
R-25 (duplicate of DOE-C)	E-mail dated September 28, 2006 from Judyth Vazquez to CSCS Distribution List
R-26 (duplicate of PE-23)	Partial Stipulation of Settlement dated December 12, 2006
R-27 (duplicate of PE-25)	E-mail dated March 6, 2007 from Helene Leona to CSCS Distribution List
R-28 (duplicate of DOE-E)	Letter dated April 25, 2007 from Tammy Miller to Diane Richards

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7165-08
AGENCY DKT. NO. 154-5/08

KENTWOOD ACADEMY,
Petitioner,
v.
COMMISSIONER OF EDUCATION LUCILLE DAVY AND THE NEW JERSEY DEPARTMENT OF EDUCATION,
Respondents.

Paul N. Barger, Esq., and **Samantha L. Skabla**, Esq., for petitioner (Barger & Bolger, attorneys)

Cynthia Raymond Rimol, Deputy Attorney General, for respondents (Anne Milgram, Attorney General of New Jersey, attorney)

Record Closed: April 27, 2009 Decided: June 9, 2009

BEFORE **DANIEL B. MC KEOWN**, ALJ (t/a):

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case was filed before the Commissioner of Education (Commissioner) as a four-count Verified Petition of Appeal, with an emergent relief application by which Kentwood Academy sought a stay of its revocation of approval to operate as a private school for students with disabilities under N.J.A.C. 6A:14-7.1 and N.J.A.C. 6A:23-4.3. The Commissioner declared the matter to be a contested case and transferred the matter to the Office of Administrative Law (OAL) for hearing, where it was filed on June 2, 2008.

Kentwood had received preliminary approval in 2005 from the New Jersey Department of Education (or Department) to operate as a private school for students with disabilities, but that approval was subsequently revoked, effective July 1, 2008. The application for emergency relief was filed seeking a stay of that revocation. The then assigned administrative law judge granted the application for a stay, which was reversed by the Commissioner, who was then reversed by the legal committee of the State Board of Education, while a simultaneously filed appeal was being denied in the New Jersey Superior Court, Appellate Division, which formed the basis for the Commissioner to reverse the legal committee of the State Board, from which an emergency appeal was sought to be taken to the Appellate Division, which found the appeal not to be of an emergent nature, from which an interlocutory appeal was taken to the New Jersey Supreme Court.

The Honorable Justice Rivera-Soto granted Kentwood's application for emergent relief pending a disposition on the merits of the appeal before the Appellate Division and stayed the revocation of Kentwood's approval to operate as a private school for students with disabilities. The Appellate Division remanded the matter on December 11, 2008, to the Office of Administrative Law and ordered the matter to be completed within ninety days which was, by Order, extended for another ninety days. The Court retained jurisdiction. Prior to this administrative law judge being assigned the matter on remand, counsel to the parties sought and were granted an extension of time within which to complete the matter until June 11, 2009.

A hearing was scheduled and conducted on April 27, 2009, at the Newark Office of Administrative Law. The parties agreed that the facts of the matter are set out in the prehearing briefs and exhibits they filed prior to the time of hearing. The parties insisted that there was no need for witnesses to be called because witness testimony would establish only those facts already in the record. Consequently, the facts of the matter are established in reliance upon the parties' prehearing briefs and exhibits[1] as submitted.

FACTS

I **FIND** that the record establishes the following facts. Diane Richards is the owner of Kentwood Academy (petitioner, or the Academy). The present matter is filed in the name of the Academy. The Academy is a private school for students with disabilities located in Lake Hopatcong, New Jersey. It is considered a receiving school for purposes of N.J.A.C. 6A:14-7.1. The main source of enrolling students is local public school districts that act as sending districts to Kentwood of students who are identified under the Individual with Disabilities Education Act of 2004, 20 U.S.C. §§ 1401-1485, as being in need of special education and for whom the district is not otherwise equipped to offer an appropriate program of education.

The rule cited above provides that receiving schools shall obtain prior written approval from the Department of Education to provide programs for students with disabilities through contracts with district boards of education. Requirements for obtaining approval from the Department of Education are set out in N.J.A.C. 6A:14-7.2. The requirements include submitting a description of the program and services to be offered, a survey of need by students with disabilities to be served by the proposed programs and service and as supported by documentation from local public school districts, and, finally, an affidavit of compliance with relevant law, that the programs and services are nonsectarian, and various other documents, including a certificate of

[1] References to exhibits are as follows: PE, followed by a number, refers to petitioner's exhibits filed with its prehearing brief; DOE, followed by a letter in upper case, refers to the Department of Education's exhibits filed with its prehearing brief.

incorporation, a certificate of occupancy, and a copy of the proposed school's administrative policies and procedures.

Once the "approval procedures" of the rules are met, N.J.A.C. 6A:23-4.3(b)(1), as amended, the rule requires the applicant to "document the need for a minimum of 24 public school placement students[2] in order to be approved by the commissioner." Prior to the rule amendment by the New Jersey State Board of Education, effective August 16, 2004, the rule required that applicants for new private schools document the need for a minimum average daily enrollment[3] (ADE) of 16 public school placement students. The history of the rule shows the change was made to "ensure efficiency and effectiveness in the programs provided." See 36 N.J.R. 3895(a) (August 16, 2004).

Kentwood, through Diane Richards, filed the initial application for its approval prior to August 16, 2004. Thus, the ADE requirement under which it filed for approval was 16. Indeed, the parties agreed on the record that the first step of the application process for program approval was filed by petitioner in or about October 2003 in the form of program description and services to be offered. See N.J.A.C. 6A:14-7.2; see also PE-1; PE-2.

A series of e-mails shows that the Department of Education, Office of Special Education, acting for the Commissioner of Education, did receive the program description and services to be offered in or about October 2003. Nevertheless, a response was not provided petitioners to the filed documents until June 15, 2004, when the Department of Education's coordinator of approved private schools for the disabled, Judyth Vazquez, advised in writing that petitioner's section one of the application process as filed above was approved. Vazquez also advised petitioner that it had to distribute a Needs Assessment Survey, as provided, to those public school districts it anticipated would be interested in referring students to Kentwood. Vazquez stated that

[2] Privately placed students at Kentwood, that is without public board of education determination, do not count towards the ADE.

[3] N.J.A.C. 6A:23-4.1 defines "average daily enrollment" as "the sum of the days present and absent of all school students enrolled in the register(s) of the school divided by the number of days the approved private school for students with disabilities was actually in session for the entire school year rounded to the nearest four decimal places, except in no event shall the divisor be less than 180 days."

"A minimum of 16 possible referrals is required to verify need of the new program." PE-4. Petitioner submitted the results of the Needs Assessment Survey on the forms provided by Vazquez to the Office of Special Education in or about September 2004.

After the survey results were submitted, Vazquez advised Kentwood by e-mail on October 6, 2004, that it used an improper format for the needs assessment carried out; the format had been revised "at least three years ago," and Kentwood's submission was, therefore, not acceptable. Vazquez explained she had no knowledge of how the wrong format was used. Vazquez provided the Academy with the forms in June 2004 for carrying out the Needs Assessment Survey.

The Academy, through Richards in an e-mail to Vazquez the next day, October 7, 2004, advised that the results showed at least "16 interested students," with some survey responses not having been received because the forms were sent during summer months when school employees take vacation. PE-6. The same e-mail recites:

> You told me to hold off on sending what I had until I received more responses because it was in my best interest to have more than 16 in case when you made your phone calls some districts had changed their minds and would not be sending the number that they initially stated. At no time was it mentioned that [I] would have to meet the new requirement of 24 students.
>
> [Ibid.]

On November 5, 2004, Vazquez notified petitioner by e-mail that the completed Needs Assessment Survey conducted did not establish need for the proposed program already approved by her office in June 2004. Vazquez explained that she contacted all school districts from whom replies were received and those districts reported that they have no current need for the program. Finally, Vazquez advised that a "moratorium" on new applications for approval as a private school for students with disabilities is "still" in effect until such time that "new application procedures are ready for distribution." PE-7.

There is no evidence other than this e-mail to show that a "moratorium" on new applications for approval as a private school for disabled students was put into effect by the Department of Education, or that petitioner was advised that such a condition existed, or that it would be subject to "new application procedures."

Despite having advised Kentwood that the needs assessment was done in an incorrect format and that the needs assessment does not establish need as is required under the cited administrative rules, Vazquez advised the Academy on January 10, 2005, that the application submitted was reviewed by the Office and "it has been determined that you may proceed." PE-8.

The application that was reviewed consists of the program and services that were submitted in October 2003 and approved by the Office of Special Education in June 2004, and the Needs Assessment Survey that was fully filed with the Office in September 2004, but viewed to be insufficient in establishing need. Vazquez also advised petitioner:

> Current regulations require a minimum needs assessment of 24 possible referrals, for students with similar educational needs and within appropriate age ranges. Since you initiated the needs assessment process when the regulations required 16 referrals, however, you must document a need for 16 referrals. The required minimum ADE by the end of the second year of operation would then be 16.
>
> As you were informed in October, your needs assessment survey was conducted using a form which was no longer valid at that time. Please utilize the enclosed Section II of the application, which includes the appropriate *Needs Assessment Survey*. Attach the approved version of the program description to the form prior to mailing.
>
> I suggest that you survey the original districts, as their needs may have changed by now. I also suggest that you contact additional districts within the geographic region you have chosen.
>
> [Ibid.]

Vazquez confirmed the advice provided petitioner on January 10, 2005, in another letter dated February 3, 2005. See PE-9. Petitioner relies on the January 10 information regarding the ADE requirement regarding its application to be 16 not 24, and the confirmation of that advice to the Department of Education's Jim Varner, in the Division of Finance.

On March 11, 2005, Vazquez sent petitioner another letter advising as follows:

> I am writing to provide clarification concerning my January 10, 2005 letter, in which a reference to the required minimum average daily enrollment (ADE) was made. I apologize for this error.
>
> A new private school for the disabled must comply with the Department of Education regulations in effect at the time preliminary approval of an application is granted. New Jersey Administrative Code 6A:23-4.3 regulations require that beginning in the 2004-05 school year, a new school must attain an average daily enrollment of 24 public school placement students by the end of the second school year of operation.

But, in a letter dated a little more than two months later, on May 20, 2005, the manager of the Office of Special Education's Bureau of Program Review and Approval, Cecelia Downey, advised petitioner that the application filed for Kentwood Academy was preliminarily approved for the 2005-06 and 2006-07 school years. PE- 12. While not stated in the letter, the Academy was still being held to the amended ADE of 24 as set forth at N.J.A.C. 6A:23-4.3.

Specifically, petitioner was advised that the preliminary approval was for two classes of students with behavioral disabilities, with an age range of twelve to eighteen, and with an instructional class size of nine. Thus, petitioner was advised of approval for a total enrollment of 18, 2 more than the ADE requirement of 16, but 8 less than the amended ADE of 24. Under the specifics of the approval, it would have been impossible for Kentwood to meet the amended ADE of 24.

Petitioner was also advised that an on-site visit to Kentwood would be done by Department staff during the approval period, and if the Academy was found in compliance with the regulations it would then be approved prior to the 2007-08 school year forward.

Presumably with confidence that the application of Kentwood Academy was finally preliminarily approved as a private school for students with disabilities, the Academy submitted a request on June 8, 2005, (PE-13) to the Department to change the maximum age of students to be served from eighteen to twenty-one, and/or to add a new class to serve such students. There is no explanation of the outcome of the application in this record.

Despite the foregoing, the record does show that the Department of Education was holding petitioner Kentwood Academy's application to the 24 ADE requirement. On November 29, 2005, Richards, on behalf of the Academy, wrote to the then Acting Governor of New Jersey, the Honorable Richard J. Codey, and asked him to intervene with the Department so that Kentwood would be held to the 16 ADE requirement. PE-14. The then Acting Commissioner of Education, now Commissioner Lucille E. Davy, responded to petitioner on behalf of Governor Codey on December 30, 2005. PE-15. The Commissioner stated in part:

> According to the correspondence, consideration was originally given to the fact that the initial application was filed prior to a recent change in New Jersey Administrative Code 6A:23.
>
> A review of subsequent correspondence (February 3 and March 11, 2005 copies enclosed) indicates that, following interoffice consultation, you were notified that a new private school for the disabled is required to comply with regulations in effect when preliminary approval to operate the program is granted. Since Kentwood Academy's letter of preliminary approval was issued on May 20, 2005 (copy enclosed), exception to the current regulations, requiring an ADE of 24, by the end of the second year of operation, may not be granted.

It is noted that the Commissioner makes no reference to the January 10, 2005, letter from Vazquez stating unequivocally, "Since you [petitioner] initiated the needs assessment process when the regulations require 16 referrals . . . you must document a need for 16 referrals. . . ." PE-8. Without exception from the respondent Department of Education, the Academy submitted a Statement of Enrollment showing an ADE of 16 for the fiscal year ending June 30, 2006. PE-16. **I FIND AS FACT** that Kentwood Academy achieved an ADE of 16 by the end of the 2005-06 school year.

On or about June 19, 2006, the Department of Education's Office of Special Education performed an on-site review of Kentwood Academy as was promised by Cecilia Downey in her letter of May 20, 2005. PE-12. The review was, in part, critical of some areas of the Academy. Kentwood submitted an informal response to the criticism to the Office of Special Education, along with a plan of correction. PE-17.

On July 19, 2006, petitioner filed an e-mail request to add an additional class to the Kentwood Academy educational program (PE-18). The report of the Office of Special Education's site visit is part of PE-19. This request was denied in an undated letter from the Sussex County Office of Education. PE-21.

A letter dated August 7, 2006, on the letterhead of the Department of Education, but signed by Roberta whole, who is identified under her signature as RW/CD/JV/Kentwood Academy, advises that Kentwood Academy is placed on conditional approval status until further notice. Under N.J.A.C. 6A:14-7.10(b), conditional approval status means that the Academy may not accept placement of any new students and it must take immediate action to address the areas of noncompliance set out in the evaluation report. Wohle also advised that all county offices of education and public school districts with currently enrolled students will be informed of this revised status. Kentwood responded to this notice on August 11, 2006, by filing a more formal Corrective Action Plan than the one filed by e-mail on July 19, 2006.

Petitioner filed the first Petition of Appeal on September 8, 2006, before the Commissioner of Education, together with a motion for a stay of the conditional approval status. In the meantime, the Department sent out a general notice that Kentwood was

removed from conditional approval, which tended to moot the motion for a stay. See DOE-C.

The Commissioner transferred the matter to the Office of Administrative Law as a contested case. The Honorable Barry Frank, ALJ, was assigned the matter. On October 4, 2006, ALJ Frank granted petitioner's motion for a stay[4] of the conditional status imposed upon the Academy regarding the acceptance of new students. ALJ Frank also set a hearing date on the merits of the matter for December 12, 2006. On the scheduled hearing day, the parties entered a Partial Stipulation of Settlement. The terms of the Agreement (see PE-23) provided:

1. The Department agrees Kentwood is in compliance with all regulations where they were found to be non-compliant; and

2. Kentwood is not on conditional approval status; that Kentwood is free to accept, and sending districts are free to refer students to Kentwood Academy; and

3. Kentwood agrees to cooperate in good faith with the Department's monitoring team consistent with Department regulations; and

4. The Department was to issue a letter forthwith to any sending district boards of education stating that Kentwood Academy resolved prior concerns of the Department and is in compliance with Department regulations, is not on conditional approval status, and all sending districts are free to refer students to Kentwood Academy.

Kentwood Academy v. State of New Jersey, Department of Education, OAL Dkt. No. EDU 9997-06, Agency Dkt. No. 319-9/06, Partial Stipulation of Settlement, Dec. 12, 2006.

[4] It is not known whether the parties brought the information to ALJ Frank's attention that it already sent out a general notice to this effect.

The term of the settlement by which the Department was to "issue a letter forthwith to any sending district boards of education stating that Kentwood . . . is not on conditional approval status" was important because the Department had earlier notified all districts through its county offices of education that Kentwood could no longer accept students because it was placed on conditional status. But, the Department failed to "forthwith" issue its letter pursuant to the settlement that all concerns were resolved by Kentwood and it was not on conditional status and was free to accept students, and boards of education were free to send students to Kentwood. Such a letter was not sent by the Department until March 6, 2007. PE-24; PE-25. The lapse of time was December 12, 2006, to March 6, 2007.

Within one week of the Department sending its letter that Kentwood was not on conditional status, another letter (PE-26) from an assistant to the Commissioner of Education, Yut'se Thomas, dated March 14, 2007, with copies to numerous persons, including county offices of education, reminds petitioner that its request to be held to the ADE standard of 16 rather than 24 was denied on December 30, 2005 (see PE-15). The letter further stated:

> In accordance with the regulations in effect on the date of the approval letter (N.J.A.C. 6A:23-4.3(c)), a school will receive preliminary approval to operate for a two year period, after which the school must provide documentation that the school has a minimum average daily enrollment (ADE) of 24 public school placement pupils by the end of the second school year. A school not meeting the minimum ADE of 24 public school placement pupils shall have its status as a preliminary approved private school for the disabled revoked and no longer be considered an approved private school for the disabled . . . .
>
> Kentwood Academy must attain an ADE of 24 public school placement pupils for the 2006-2007 school year or the school's preliminary approval status will be revoked and the school will be unable to operate as an approved private school for the disabled effective July 1, 2007.
>
> [PE-26.]

On the same day this letter was sent, March 14, 2007, Assistant Commissioner of Education Katherine P. Attwood advised petitioner in writing (PE-27) that Ms. Thomas' letter of the same day was rescinded with respect to the time period by which Kentwood must attain 24 ADE. The new time period within which Kentwood was to achieve 24 ADE was set as April 1, 2007, through March 31, 2008. Assistant Commissioner Attwood asked in the same letter for any county office of education that may have forwarded Thomas' rescinded letter to local districts to send those districts a copy of her letter.

A letter to Kentwood dated April 25, 2007, advises that its "recent request to establish an Extended School Year Program" was approved. DOE-E.

In the meantime, the parties worked toward a complete settlement of the above-referenced litigation. The parties were successful in this regard, and on May 15, 2007, signed a Stipulation of Settlement (PE-28) with the following terms:

1. Kentwood Academy shall have until March 31, 2008 in order to establish an Average Daily Enrollment [ADE] of 24 public school placement students;

2. The ADE of Kentwood Academy shall be determined based on Kentwood's enrollment established between April 1, 2007 through March 31, 2008;

3. Within two weeks of the execution of this Stipulation of Settlement, the Department of Education shall issue the attached letter, which is incorporated by reference, to all sending districts;

4. The Department of Education shall not issue any letter to the sending districts regarding Kentwood's compliance with the April 11, 2007 through March 31, 2008 ADE requirement prior to February 13, 2008;[5]

[5] A copy of the referenced letter is not part of this record.

5. Kentwood shall provide quarterly year-to-date copies of its school register(s) with a demarcation as to which students are private placements, complete a department generated spreadsheet with monthly actual and year-to-date information along with projected enrollment(s) for the remaining month(s). This year-to-date information shall be provided monthly beginning with the time period ending January 31, 2008. These documents shall be provided in accordance with the following schedule: July 15, 2007, October 15, 2007, January 15, 2008, February 15, 2008, March 15, 2008, and April 15, 2008.

The Stipulation of Settlement was determined by the Commissioner of Education to be the final decision in the matter. DOE-D.

In its prehearing brief, Kentwood asserts that during 2007-08 it increased its average daily enrollment to 29 students. However, this figure is a combination of public and private placements. Indeed, on April 17, 2008, then counsel for Kentwood filed in writing (PE-29) with the Department of Education contending that the Department breached the Settlement Agreement (PE-28) by failing to send a letter to all sending districts, as is referenced in paragraph three.

In any case, there are two reports detailing the ADE of Kentwood for the period April 1, 2007, through March 31, 2008, the time period within which Kentwood agreed to reach a public school student ADE of 24. See PE-30 (dated May 19, 2008); PE-31 (undated). Exhibit PE-30 shows an ADE of 21.7807 students, but that figure does not reveal a "demarcation" between public school students and privately placed students. Exhibit PE-31 shows an ADE of 20.6367 public school student placements, and a privately placed student ADE of 0.3524. Regardless of which exhibit is most accurate, both exhibits combined show that Kentwood did not reach the agreed upon, and mandated, 24 ADE of public school students by March 31, 2008.

On May 21, 2008, Assistant Commissioner of Education Attwood advised Kentwood Academy, and others, including county superintendents of schools

throughout the state, that because Kentwood did not meet the ADE requirement of 24 public school students with disabilities ADE between April 1, 2007, and March 31, 2008, its approval status as an approved private school for students with disabilities was revoked as of July 1, 2008.

In response, Kentwood filed a four-count petition of appeal on May 28, 2008, with the Commissioner of Education, with an application for emergency temporary restraints. Once again, the Commissioner transferred the matter to the Office of Administrative Law as a contested case. Kentwood alleges that the Department breached the Partial Stipulation of Settlement of December 12, 2006; that it breached the Stipulation of Settlement entered on May 15, 2007; that it misapplied the elements of the average daily enrollment; and, that its conduct towards Kentwood's application for approval as a private school for students with disabilities is arbitrary, capricious, and unreasonable.

Administrative Law Judge Barry Frank was assigned the matter. On June 5, 2008, ALJ Frank found that Kentwood would suffer irreparable harm if its approval was revoked prior to a full hearing on the merits of the matter and that because of the prior conduct of the Department it was likely that it would prevail on the merits of the matter. ALJ Frank enjoined the Department from revoking Kentwood's approval and ordered the Department to notify sending districts that Kentwood was approved to accept student enrollment for the 2008-09 school year. It must be remembered the Commissioner of Education declared the application for emergency constraints to be a contested case; consequently, the Commissioner had final decision authority.

On June 12, 2008, the Commissioner, in a written opinion, rejected ALJ Frank's Order and independently found that Kentwood failed to demonstrate a likelihood of success on the merits and failed to demonstrate that a balance of equities was in Kentwood's favor. DOE-G. In the Commissioner's decision, one of petitioner's factual assertions, that the Department failed to notify sending districts as it agreed to in the Settlement Agreement, was rejected and, therefore, the matter could not have been resolved in Kentwood's favor absent a hearing. **I FIND AS FACT** that the record supports Kentwood's factual assertion the Department failed to send a letter, which it agreed to do in the Settlement Agreement. The Department also notes that Kentwood

failed to achieve an ADE of 24 public school students between April 1, 2007, and March 31, 2008.

Kentwood appealed the Commissioner's decision to the State Board of Education and it filed a motion for leave to appeal before the Superior Court of New Jersey, Appellate Division. Kentwood also moved for a stay of the Commissioner's decision pending disposition of its appeal to the State Board of Education and its motion for leave to appeal.

The Commissioner denied Kentwood's application for a stay in writing on June 20, 2008 (PE-36); the State Board's legal committee granted Kentwood's application for emergency relief and reversed the Commissioner's decision reversing ALJ Frank (PE-36); and the emergency application for leave to appeal to the Superior Court of New Jersey, Appellate Division, was denied on June 30, 2008 (PE-37).

The Commissioner issued a subsequent ruling on July 16, 2008, noting that Kentwood failed to notify the State Board that a simultaneous appeal was then pending before the Appellate Division of the Superior Court. The Commissioner then held that because there was an identical appeal pending in a higher forum, the State Board of Education's decision was the result of mistake and, upon reconsideration, pursuant to N.J.A.C. 6A:4-3.5(b), vacated the State Board legal committee's ruling and affirmed her denial of Kentwood's application for a stay of the revocation of its approval to operate as a private school for students with disabilities.

On July 22, 2008, Assistant Commissioner Attwood notified all school districts that Kentwood's revocation of its approved status as a private school for students with disabilities, effective July 1, 2008, remained in effect. PE-39. On July 22, 2008, the Appellate Division ruled that the emergency relief application before it was not emergent. Kentwood filed an application for emergency relief before the New Jersey Supreme Court on July 25, 2008.

Justice Rivera-Soto granted Kentwood's application for emergent relief pending a disposition on the merits of the appeal before the Appellate Division, and ordered the

Department to notify all recipients of the July 22, 2008, letter that revocation of Kentwood's approval status had been stayed. The Appellate Division remanded the matter on December 11, 2008, to the Office of Administrative Law and ordered the matter to be completed within ninety days, which was, by Order, extended for another ninety days. The Court retained jurisdiction. Prior to this administrative law judge being assigned the matter on remand, counsel to the parties sought and were granted an extension of time within which to complete the matter until June 11, 2008.

One final note must be made regarding exhibits filed in this case. Kentwood filed a projected ADE for the 2008-09 year that reflects an ADE of public school students of 26.2666. PE-45.

I FIND AS FACT that the foregoing recitation sets forth all of the relevant facts of this case.

ARGUMENTS OF THE PARTIES

Kentwood argues on that the facts above it should be held to an ADE requirement of 16 since it began the process for approval almost one year prior to the rule amendment, which was effective August 16, 2004. This is so, Kentwood says, because the Department delayed for at least one year the approval process necessary to have been applied to its application. Next, Kentwood argues that even if it is held to the minimum ADE of 24 under the rule, the Department intentionally obstructed Kentwood's ability to achieve the increased enrollment requirement by denying it permission to open additional classrooms. Kentwood argues that the Department issued an erroneous inspection report based upon which the Department placed Kentwood on conditional approval status prior to the commencement of the 2006-07 school year. Kentwood argues this action had a negative impact on its ability to increase enrollment during that time. Kentwood contends that the Department breached the partial and final stipulations of settlement entered into and that the Department inhibited Kentwood's ability to increase enrollment by delaying or denying repeated requests for additional classrooms. Finally, Kentwood argues that it has

substantially complied with the ADE requirements and has met the spirit of all regulations and that, therefore, it should be approved as a private school for students with disabilities.

The Department contends that its determination to revoke the preliminary approval status of Kentwood because of Kentwood's inability to meet the ADE requirements of the May 15, 2007, final settlement, freely entered into by the parties, must be upheld. Public policy, the Department argues, favors settlement of litigation, citing Smith v. Fireworks by Girone, Inc., 380 N.J. Super. 273, 291 (App. Div. 2005). The Department says that any insufficiency with respect to the Partial Stipulation of Settlement of December 12, 2006, must be viewed as having been cured by the Final Stipulation of Settlement. In this regard, the Department contends that the period April 1, 2007, through March 31, 2008, was chosen as the period within which Kentwood was allowed to achieve an ADE of 24 public school students because it had not issued a retraction as was required by the December 2006 agreement. Next, the Department argues that to the extent, if any, that Kentwood seeks to claim that it should be allowed to consider privately placed students, in addition to students placed with it by public school boards of education, in determining ADE, such an argument must be rejected because of the term's definition at N.J.A.C. 23-4.1, which, it is noted, refers only to those students enrolled in the register maintained on a daily basis for purposes of State aid.

Finally, the Department argues that Kentwood is attempting to relitigate issues that have been resolved through the Final Stipulation of Settlement of May 15, 2007. There, the Department says, Kentwood knowingly and freely entered into a settlement by which the issues between the parties were conclusively settled. Consequently, Kentwood may not now relitigate those issues resolved in the May 2007 agreement because to do so would violate the public policy of this state on the settlement of litigation and would frustrate the purpose of entering such agreements. Indeed, as the Department points out in its brief, the Commissioner of Education approved the Final Settlement of May 15, 2007, as recommended by ALJ Frank, and adopted the recommended decision as the final decision in the then contested case.

CONCLUSIONS

The facts do establish, and I **CONCLUDE**, that the Department's response to Kentwood's initial application for approval as a private school for students with disabilities was less than efficient, particularly when Kentwood filed an application for approval sometime in or about October 2003 and no response was provided until June 15, 2004, when Kentwood was notified of program application approval. Furthermore, the inconsistent advice Kentwood received from the Department's coordinator of approved private schools for the disabled regarding the form to be used for the needs assessment after preliminary approval had been received by Kentwood, only to be subsequently advised after the work was done by Kentwood to gather the data necessary for the assessment, is less than admirable.

Kentwood was advised by the coordinator that Kentwood would have to meet the 24 ADE requirement, and that on that basis the needs assessment that was completed using the forms Kentwood received from the Department failed to meet that requirement. Shortly thereafter, in January 2005, the coordinator advised Kentwood that based on the application submitted, it could proceed with the approval process. At the same time, the coordinator completely reversed her November 2004 determination and advised now that Kentwood would be held to the lesser standard of 16 ADE. This advice was confirmed by the coordinator in February 2005. So, Kentwood was to be held to the lesser standard of 16 ADE public school students.

The coordinator sent another letter rescinding her January and February letters setting 16 ADE as the standard to be met, and stating that Kentwood now had to meet the 24 ADE requirement. But the fact is that the manager of the Office of Special Education's Bureau of Program Review and Approval, Cecelia Downey, told Kentwood on May 20, 2005, that its application as a private school for students with disabilities was preliminarily approved for 2005-06 and 2006-07. But, this approval was limited to Kentwood operating two classes with no more than nine students in each class. The Department did not explain how Kentwood could reach an ADE of 24 public school students when its approval to operate was limited to two classes with nine pupils

maximum in each class. Moreover, Kentwood's application to operate an additional class was not approved, or acted upon, by the Department.

The facts do disclose that from the time in March 2005 when the coordinator reversed herself and told Kentwood it would be held to the higher 24 ADE standard in the amended rule until the present, Kentwood knew or should have known that it was being held to the higher standard, despite the inconsistent letters of advice from the coordinator. The Commissioner of Education advised Kentwood in writing on December 30, 2005, that an "exception to the current regulations, requiring an ADE of 24, by the end of the second year of operation, may not be granted."

Kentwood offers no authority by which it should be excused from the higher ADE of 24, and be bound by the lower standard of 16.

The fact that Kentwood was placed on conditional approval status following an on-site evaluation of the program, facilities, and services being offered at Kentwood is of no moment in this case because the Partial Stipulation of Settlement entered into by the parties on December 12, 2006, shows that the Department acknowledged that Kentwood was in compliance with all regulations. Thus, to the extent that the evaluation report could have been an issue, the report for purposes of this dispute is rendered moot by the settlement agreement.

Nevertheless, it must be mentioned that the Department did fail to honor its agreement to issue a letter "forthwith" advising all districts that Kentwood resolved prior concerns the Department had and was in compliance with all Department regulations and was not on conditional approval status. It appears safe to conclude that the Department of Education had to this point treated the application of Kentwood to operate as a private school for students with disabilities in a manner not reflective of the quality work the Department otherwise accomplishes.

It is recognized that the Department cured its oversight of failing to send a letter to all districts stating that Kentwood was not on conditional status in the final Stipulation of Settlement it entered on May 15, 2007. There, the parties voluntarily agreed to the

time frame of April 1, 2007, through March 31, 2008, as the time within which Kentwood was to achieve a 24 ADE of public school students. The final Stipulation of Settlement was freely entered into by the parties, which shows that Kentwood voluntarily accepted 24 ADE as the standard it must meet in order to secure approval to operate as a private school for students with disabilities and to enter contracts with public boards of education for the tuition payments of such students. Kentwood also voluntarily agreed to have met the 24 ADE standard by March 31, 2008. Clearly, Kentwood did not reach 24 ADE public school students by the agreed-upon date.

I **CONCLUDE** on the foregoing facts that the Department of Education was justified in revoking the preliminary approval of Kentwood Academy to operate as a private school for students with disabilities effective July 1, 2008.

There was no evidence brought forward by Kentwood Academy to support its claim that the Department misapplied the elements of the average daily enrollment of public school students. The rule, N.J.A.C. 6A:23-4.3, as amended, which sets the 24 ADE standard, must be read with N.J.A.C. 6A:14-7.1, which requires, in part, that receiving schools, such as Kentwood, shall obtain prior written approval from the Department of Education "to provide programs for students with disabilities through contracts with district boards of education." These rules, read in conjunction with each other, contemplate an ADE of 24 public school students, not privately placed students.

To the extent that the Department's actions prior to the final Stipulation of Settlement of May 15, 2007, may be viewed as questionable, the fact is that the final Stipulation of Settlement resolves all outstanding issues in dispute. Consistent with the public policy of encouraging settlements of litigation, I **CONCLUDE** that the parties are entitled to the benefit of what they bargained for as outlined in the agreement.

I **CONCLUDE** that there is no basis upon which relief may be granted to Kentwood Academy in light of its agreement to settle the dispute by the May 15, 2007, accord.

The petition of 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 9, 2009
DATE

DANIEL B. MC KEOWN, ALJ t/a

Date Received at Agency: June 9, 2009

Date Mailed to Parties: June 9, 2009

jb

243-09

#243-09

DANIEL FLYNN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured teacher, filed a petition and an application for emergent relief challenging respondent's decision to suspend him without pay following alleged criminal offenses involving one or more of his students. Petitioner contended that, pursuant to *N.J.S.A.* 18A:6-14, he cannot be suspended without pay unless tenure charges have been filed or an indictment has been handed up to a grand jury.

The ALJ found that the petitioner did not meet the criteria for emergent relief, as he failed to establish irreparable harm, and his motion for emergent relief was denied.

The Commissioner determined to reach a decision which would dispose of both the emergent relief application and the underlying petition of appeal, and found that: respondent had no basis to suspend petitioner without pay; the law applicable to this controversy is clear and the uncontested facts allow summary decision; and the only issue presently before her is whether respondent may withhold petitioner's pay where there is no indictment and where respondent has failed to certify tenure charges against petitioner. The Commissioner directed respondent to provide petitioner with back pay commencing May 1, 2009, and with prospective pay until such time as certified tenure charges and/or an indictment are brought against petitioner.

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, 2009

OAL DKT. NO. EDU 4760-09
AGENCY DKT. NO. 97-5/09

DANIEL FLYNN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner Daniel Flynn filed both a petition and an application for emergent relief challenging the respondent Freehold Regional School District Board of Education's decision to suspend him without pay.

Flynn, a tenured teacher, had been charged on April 22, 2009 with certain criminal offenses allegedly involving one or more of his students. Respondent initially put him on paid administrative leave but, as of May 1, 2009, changed petitioner's status to unpaid administrative leave. As of May 1, 2009 petitioner had not been indicted and no tenure charges had been certified against him. That was still the case on the date of petitioner's emergent hearing in the Office of Administrative Law (OAL) – June 15, 2009.

The OAL hearing addressed only petitioner's emergent application for immediate reinstatement of pay during his administrative leave. The application was denied because the ALJ determined that one of the four regulatory requirements for the granting of emergent relief – *i.e.,* the requirement of *N.J.A.C.* 6A:3-1.6(b)(1) that petitioner show that respondent's actions will cause him irreparable harm – was not satisfied. Petitioner had been given two days post-hearing to present proof of harm that would not be curable by back pay, and he failed to do so.

While no determination concerning the ultimate issue of this controversy was made at the June 15, 2009 hearing, the parties' papers and the recorded discussion between the Administrative Law Judge (ALJ) and the parties revealed that both petitioner and respondent acknowledge the applicability of *N.J.S.A.* 18A:6-14 to this case. The Commissioner of Education's (Commissioner) review of the record also indicates that the material facts are not in dispute. In consideration of the foregoing, the Commissioner has resolved to reach a decision which will dispose of both the emergent application and the underlying petition of appeal.

The circumstances under which a tenured employee's compensation may be withheld are outlined in *N.J.S.A.* 18A:6-14 and *N.J.S.A.* 18A:6-8.3.

> ***N.J.S.A.* 18A:6-14** provides as follows:
>
> *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. Should the charge be dismissed, the person shall be reinstated immediately with full pay from the first day of such suspension. Should the charge be dismissed and the suspension be continued during an appeal therefrom, then the full pay or salary of such person shall continue until the determination of the appeal. However, the board of education shall deduct from said full pay or salary any sums received by such employee or officers by way of pay or salary from any substituted employment assumed during such period of suspension . . . .
>
> [Emphasis added.]
>
> ***N.J.S.A.* 18A:6-8.3** instructs that:
>
> Any employee or officer of a board of education in this State who is suspended from his employment, office or position, *other than by reason of indictment*, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such

> suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.
>
> [Emphasis added.]

Thus, "a tenured employee may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education. In all other circumstances, a suspension must be with pay." *Gregory Slater v. Board of Education of the Ramapo Indian Hills Regional High School District,* 237 *N.J. Super.* 424, 426 (App. Div. 1989).

It is undisputed that no tenure charges have been certified against petitioner,[1] and – as of July 17, the date of respondent's correspondence to this office objecting to summary decision – no indictment appears to have been brought against him. Respondent consequently has had no basis to suspend petitioner without pay.

In response to the Commissioner's invitation to the parties to comment upon the Commissioner's inclination to dispose of the ultimate issue posed in the instant appeal, respondent has articulated two objections. First, respondent urges that the willingness of the ALJ to expeditiously entertain dispositive motions on the ultimate issue renders a ruling by the Commissioner unnecessary. The Commissioner finds, however, that the law applicable to this controversy is clear and the uncontested facts allow summary decision.

Second, respondent suggests that rather than decide this controversy, the Commissioner should consolidate it with another appeal filed by petitioner, *i.e.,* a challenge to a May 8, 2009 determination by the Department of Education's Criminal History Review Unit

[1] At the OAL hearing, the ALJ asked counsel for respondent why – notwithstanding respondent's purported investigation into the charges against petitioner – respondent did not certify tenure charges to the Commissioner. Counsel was not able to provide an answer.

(CHRU) that petitioner may not execute his employment responsibilities pending the resolution of the criminal charges.[2] Respondent reasons that:

> ...the relief requested in the second action directly impacts and relates to the Board's actions as alleged in the initial filing. Accordingly, it is the Board's contention that both Petitions should be consolidated and the entire matter set down for a plenary hearing to consider and adjudicate both issues.
>
> Respondent's Correspondence, July 17, 2009, at 2.

The Commissioner does not agree. The issue before her is whether respondent may withhold petitioner's pay where there is no indictment, let alone conviction, and where respondent has failed to certify tenure charges against him. The answer is no, and represents an issue independent of the question of whether petitioner may perform his teaching duties while the criminal charges are pending.

Accordingly, the Commissioner grants the relief requested in the petition. More specifically, respondent is directed to provide petitioner with back pay commencing on May 1, 2009, and with prospective pay until such time as certified tenure charges and/or an indictment are brought against petitioner. Petitioner's application for emergent relief is dismissed as moot.

IT IS SO ORDERED.[3]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/03/09
Date of Mailing: 8/03/09 (faxed)

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[2] The record presented to the Commissioner in this appeal contains no reference to the subsequent proceedings initiated by petitioner against the CHRU.

[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

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 4760-09
AGENCY DKT. NO. 97-5/09

DANIEL FLYNN,
Petitioner,
v.
BOARD OF EDUCATION OF THE
FREEHOLD REGIONAL SCHOOL DISTRICT,
Respondent.

Marcie L. Mackolin, Esq, for petitioner (Chamlin, Rosen, Uliano & Witherington, attorneys)

Joseph L. Roselle, Esq. for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, LLC, attorneys)

Record Closed: June 18, 2009 Decided: June 19, 2009

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

STATEMENT OF THE CASE

Petitioner Daniel Flynn has petitioned the Commissioner of Education (Commissioner), pursuant to N.J.A.C. 6A:3-1.1 et seq., for an order that the respondent

Board of Education of the Freehold Regional High School District (Board) place Flynn, a tenured teacher, on administrative leave with pay and that he be reimbursed for the time that he was placed on administrative leave without pay since May 1, 2009.

PROCEDURAL HISTORY

On May 11, 2009, petitioner Flynn filed an Order to Show Cause with the Commissioner seeking 1) reversal of the Board's decision to suspend him without pay and 2) reimbursement for his unpaid days since May 1, 2009. On May 11, 2009, the Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education (Director) wrote a letter to Flynn's counsel setting forth that it would treat the Order to Show Cause as a duly verified and served petition of appeal and that if he sought emergent relief, then he had to file a motion and memorandum addressing the standard for such relief. On May 21, 2009, counsel for Flynn filed a Motion for Emergent Relief with letter memorandum. On the same day, the Director wrote a letter asking that the Board file both an answer to the Order/Petition and an answer to the Motion for Emergent relief. On June 1, 2009, the Board filed an answer to the Order/Petition and a letter brief in opposition to the Motion for Emergent Relief. On June 3, 2009, the Director transmitted the matter to the Office of Administrative Law (OAL), where it was filed on June 5, 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 June 15, 2009, I heard oral argument on the Petition/Order and the application for emergent relief. I kept the record open to allow petitioner to submit additional evidence of irreparable harm and to hear from the Board as to a possible resolution of the matter that I suggested. The Board was scheduled to meet that evening. I held a teleconference on June 18, 2009, to discuss whether there were any changed circumstances since the oral argument. However, Flynn submitted no additional documentation and the Board did not accept the proposed resolution. I therefore closed the record on June 18, 2009.

FINDINGS OF FACT

The facts that are material to the Order/Petition and Motion are not in dispute in this matter and are taken from the Certification of James Wasser, Superintendent of the Board. Petitioner, Daniel Flynn is a tenured teacher employed by the Board. On or about April 20, 2009, the Board's Administration was informed that Flynn allegedly engaged in improper behavior with one or more of his students. On that date, the Board began an investigation into the alleged conduct and Flynn was placed on paid administrative leave pending the outcome of the investigation. On April 22, 2009, while the District's investigation was ongoing, Flynn was charged with criminal violations of N.J.S.A. 2C:14-3b, Criminal Sexual Contact and N.J.S.A. 2C:24-3a, Endangering the welfare of a child. Based on the alleged conduct, the criminal charges pending, and the findings revealed by the District's investigation, the Board voted on April 27, 2009 to convert Flynn's leave with pay to an administrative leave without pay effective May 1, 2009. Flynn has not been indicted, nor has his case been presented to the grand jury to date. The Board has not certified tenure charges to the Commissioner of Education.

CONCLUSION OF LAW ON EMERGENT RELIEF

At issue is the statute N.J.S.A. 18A:6-14, which provides that a tenured school employee may only be suspended without pay either 1) after tenure charges have been preferred by the school board and certified to the Commissioner of Education or 2) an indictment was handed up by a grand jury. 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. 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.

I have heard the arguments of the parties and read their legal memoranda. Flynn contends that there is irreparable harm in that he is not receiving a salary and therefore, will soon be unable to meet his financial obligations. This inability to meet his financial obligations will have a negative effect on his credit rating and his ability to maintain a residence. As set forth above, although given extra time to submit evidence of his inability to meet his financial obligations, he failed to submit any proof of actual harm to his credit rating or inability to maintain his residence. As noted by the Board, irreparable harm is defined as the type of harm that "cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-133. Petitioner has not submitted any evidence of actual harm to him. The speculative type of harm that Flynn raised in oral argument that can come to anyone who suddenly loses employment is the type that can be redressed by monetary damages. Therefore, Flynn has failed to establish irreparable harm.

Regarding the remaining three criteria, it appears that the legal right to petitioner's claim is settled by N.J.S.A. 18A:6-14. It further appears that petitioner has a likelihood of prevailing on the merits of the underlying claim since he has neither been indicted nor had tenure charges certified against him. Last, it appears that, when the equities are balanced, petitioner is likely to suffer greater harm than the respondent if the requested relief is not granted. However, since all four criteria must be satisfied in order to grant emergent relief, I **CONCLUDE** that the motion for emergent relief must be denied.

ORDER

I **ORDER** that Flynn's Motion for Emergent relief is **DENIED**. This case will either proceed to a hearing on the merits or a summary decision motion as there appear to be no material facts in dispute.

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.

6/19/09
DATE

LISA JAMES-BEAVERS, ALJ

cmo

244-09

#244-09

OAL DKT. NO. EDU 7359-06
AGENCY DKT. NO. 176-5/06

LINDA MANDEL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN 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.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/03/09

Date of Mailing: 8/04/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7359-06

AGENCY DKT. NO. 176-5/06

LINDA MANDEL,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLE BROOK, BERGEN COUNTY,

Respondent.

Nancy I. Oxfeld, Esq., for Petitioner (Oxfeld Cohen, attorneys)

Anthony N. Gallina, Esq., for Respondent

Record Closed: June 16, 2009 Decided: June 17, 2009

BEFORE **MARIA MANCINI LA FIANDRA**, ALJ:

Petitioner Linda Mandel filed a petition on May 12, 2006 with the Department of Education ("Department") asserting that Respondent Board of Education of the Township of Saddle Brook failed to pay full salary without loss of sick time for injury

sustained in the course of employment. The Department transmitted this matter to the Office of Administrative Law ("OAL") where it was filed on June 29, 2006, for hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A review of the file indicated there was a pending Workers' Compensation claim pending. Therefore, the matter was assigned to Thomas E. Clancy, ALAJ. On August 24, 2006, ALAJ Clancy ordered the matter be placed on the inactive list and continue automatically for successive periods of six months each until either party notified this office that it should be restored to active status.

On April 4, 2007, the matter was assigned to the undersigned for ultimate disposition. Counsel for the parties requested that the matter remain inactive since the Workers' Compensation claim had not been resolved. Subsequently, I issued an Order of Inactivity continuing the matter inactive.

By letter dated January 27, 2009, counsel for Petitioner indicated that the Workers' Compensation claim had been settled. As a result, a telephone conference was held on February 18, 2009, during which counsel indicated they were discussing settlement of the matter pending at the OAL. After numerous settlement discussions, the parties submitted a Settlement Agreement and Resolution on June 16, 2009, indicating the terms thereof, which is attached and fully incorporated herein.

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 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, 2009
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Date Received at Agency: 6-22-09

Date Mailed to Parties: JUN 22 2009

Laura Dudics
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

jb

Oxfeld Cohen, PC
60 Park Place, 6th Floor
Newark, NJ 07102-5504
(973-642-0161
Attorney(s) for the Petitioner

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2009 JUN 16 P 4:46

LINDA MANDEL,	
Petitioner,	**COMMISSIONER OF EDUCATION**
	OFFICE OF ADMINISTRATIVE LAW
	OAL DKT. NO.: EDU 7359-06
and	**AGENCY REF. NO.: 176-5/06**
BOARD OF EDUCATION OF THE TOWNSHIP OF SADDLEBROOK, BERGEN COUNTY,	**SETTLEMENT AGREEMENT**
Respondent.	

Linda Mandel, Petitioner, and the Board of Education of the Township of Saddle Brook, Respondent, hereby agree to resolve the issues in this matter upon the following terms:

1. The Respondent will pay to the Petitioner $4,120.79 in full satisfaction of her claims in this matter;

2. The parties agree this represents payment to Petitioner of $8,957.79 for days on which she went without pay but was actually out for reasons of workers compensation, less $4,837.00 in temporary disability benefits she received for that same period of time;

3. The Petitioner agrees to withdraw with prejudice her petition in this matter;

4. This agreement constitutes the entire agreement between the parties with regard to the matters at issue herein. The agreement may not be utilized by either party in any other preceding as support or proof of any contention raised by the party in this proceeding and neither party is admitting any liability with regard to the allegations set forth in these proceedings.

Dated: Linda Mandel
LINDA MANDEL

OXFELD COHEN, PC
Attorney(s) for Petitioner

DATED: 6/5/09 By: _____
NANCY L. OXFELD, ESQ.

Anthony N. Gallina, Esq.
Attorney(s) for Respondent

DATED: 6-15-09 By: _____
ANTHONY N. GALLINA, ESQ.

SADDLE BROOK BOARD OF EDUCATION
COUNTY OF BERGEN
STATE OF NEW JERSEY

RESOLUTION AUTHORIZING SETTLEMENT OF LITIGATION

WHEREAS, Petitioner in a certain matter entitled: *LINDA MANDEL V. TWP. OF SADDLE BROOK, BOE, BERGEN COUNTY,* has asserted various claims against Respondent, Saddle Brook Board of Education in a Verified Petition filed with the Commissioner of Education, bearing Agency Reference No. 176-5/06 (hereinafter referred to as "the Litigation");

WHEREAS, the Litigation was transferred by the Commissioner of Education to the Office of Administrative Law for hearing, bearing OAL Docket No. EDU 7359-06;

WHEREAS, a Motion was made in closed caucus on June 8, 2009 to determine if the Board should settle this matter. Said motion was approved by a role call vote;

WHEREAS, at the regular meeting of the Board held on June 10, 2009, a motion was made to approve the decision reached in closed session during the June 8, 2009 caucus meeting concerning a proposed Settlement Agreement, attached hereto and made a part hereof. Said Motion was approved by a roll call vote;

NOW THEREFORE, BE IT RESOLVED:

1. The Board Attorney is hereby authorized to enter into, on behalf of the Board, a Stipulation of Settlement incorporating the terms of the settlement approved by the Board in its meetings of June 8, 2009 and June 10, 2009;

2. The Board Attorney is hereby authorized, on behalf of the Board, to execute any and all further documents which may be reasonably required to effectuate the terms of the Stipulation of Settlement;

AS UNANIMOUSLY APPROVED this 10th Day of June , 2009:

RAYMOND KARATY
Business Administrator/Board Secretary
Saddle Brook Board of Education

245-09

OAL DKT. NO. EDU 1765-09
AGENCY DKT. NO. 15-1/09

E.G., on behalf of minor child, T.D.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
RESPONDENT.	:	

The record of the matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Subsequent to issuance of the Initial Decision, however, the Commissioner received a June 18, 2009 letter from counsel for the Board of Education advising that the Board had determined to withdraw its claim for tuition reimbursement in light of petitioner's having been appointed temporary guardian of T.D. – thus, effectively, rendering this matter moot.

Accordingly, the Commissioner modifies the Initial Decision of the OAL to reflect that no tuition shall be due in light of the Board's revised position, and dismisses the matter as moot.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/03/09
Date of Mailing: 8/04/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1765-09
AGENCY REF. NO. 15-1/098

E.G. ON BEHALF OF MINOR CHILD, T.D.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY

Respondent.

E.G., on behalf of **T.D.**, pro se (no appearance)

Paul F. Chiaramonte, Esq., for respondent
(Bisceglie and Demarco, attorneys)

Record Closed: June 12, 2009 Decided: June 17, 2009

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals from the decision of the respondent, Board of Education of the City of Clifton ("the Board"), denying her application to enroll her granddaughter, T.D., as an "affidavit student" in the Clifton public schools in accordance with N.J.S.A. 18A: 38-1(b)(1) and N.J.A.C. 6A:22-3.2(a). By letter dated January 22, 2009, the Board advised petitioner that her application did not satisfy the requirements of N.J.S.A. 18A: 38-1(b)(1) because it did not include a

sworn statement from T.D.'s parent or guardian or otherwise establish that T.D.'s parent or guardian was incapable of supporting or providing care for her due to family hardship.

Petitioner filed an appeal with the Department of Education on January 23, 2009. On February 5, 2009 the Board filed an answer and counterclaim for tuition reimbursement. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on February 13, 2009. A hearing was scheduled for April 27, 2009, and a Notice of Plenary Hearing, dated March 18, 2009, was sent to the parties advising them of the hearing date. The Notice of Plenary Hearing was sent to petitioner at the address listed in her pro se appeal. Counsel for the Board appeared on April 27, 2009. Petitioner failed to appear.

I received a packet of documentary evidence from the Board at the April 27, 2009 hearing (R-1), and granted the Board's request for leave to supplement the record with a certification in support of its counterclaim for tuition reimbursement. By letter dated May 8, 2009 the Board submitted the certification of its Superintendent of Schools, Richard Tardalo. (R-2) By letter dated May 11, 2009, I advised the parties that I would hold the record open until May 20, 2009 to afford petitioner an opportunity to submit a certification contesting the amount of tuition owed. My letter was sent to petitioner at the address listed in her pro se appeal. I received no response from petitioner.

In the interim, by letter dated May 12, 2009, counsel for the Board further supplemented the record by forwarding to me an April 28, 2009 order of the Superior Court, Chancery Division, Family Part, granting temporary custody of T.D. to E.G. (R-3) That order reflected that E.G. had appeared in Superior Court to seek custody of her granddaughter. In light of this new information, I felt it appropriate to schedule an additional hearing date, and offer E.G. one more opportunity to appear. I so apprised the parties via letter dated May 27, 2009. My letter clearly indicated that the hearing would be conducted at the OAL in Newark on June 12, 2009. My letter again was sent to petitioner at the address

listed in her pro se appeal. Additionally, a Notice of Plenary hearing, dated June 2, 2009 was forwarded to petitioner and further apprised her of the hearing date. She again failed to appear. Counsel for the Board appeared and indicated that the Board would rest on its prior submissions. Accordingly, on June 12, 2009 the record closed.

FINDINGS OF FACT

Based on a review of the record, including the documentary evidence presented by the Board at the hearing and the certification and correspondence submitted by the Board thereafter, I **FIND** the following **FACTS**:

1. Petitioner failed to appear at the hearings scheduled for April 27, 2009 and June 12, 2009.

2. Petitioner was afforded proper notice of the hearing dates, and did not contact this office to request an adjournment or otherwise explain the reason for her failure to appear.

3. Petitioner's granddaughter, T.D., began attending the Clifton public schools as an eighth grade student at Christopher Columbus Middle School on September 3, 2008.

4. Petitioner is a resident of Clifton, New Jersey. She sought to enroll T.D. in the Clifton Schools in accordance with the provisions of N.J.S.A. 18A: 38-1(b)(1), which allows the enrollment of a child who is kept and supported gratuitously in the home of a district resident.

5. The Board rejected petitioner's application to enroll T.D., and advised that the sworn statements submitted were not compliant with law.

6. T.D. continues to attend Christopher Columbus Middle School to date.

7. On April 28, 2009, the Superior Court of New Jersey, Chancery Division, Family Part, entered an order granting temporary custody of T.D. to E.G.

8. The annual per pupil cost for a student in grade eight is $10,621. The per diem rate is $59, which is established by dividing the per pupil cost by 180.

9. Petitioner was afforded an opportunity to submit a certification contesting the Board's claim to tuition and failed to do so. She has not contacted this office as of the date of this decision.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Generally, the Board is required to provide a free public education only to persons who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile is that place where a person has his true, fixed and permanent home, and to which whenever he is absent he has the intention of returning. State v Benny, 20 N.J. 238, 250 (1955). A minor is incapable of choosing her own domicile, and accordingly the domicile of a minor child follows that of her parent. P.B.K. o/b/o E.Y. v Bd. of Educ. of Tenafly, 343 N.J. Super. 419, 427 (App. Div., 2001).

Petitioner sought to enroll T.D. in the Clifton public schools in accordance with the exception to this general rule created by N.J.S.A. 18A:38-1(b)(1) which provides that the public schools are also free to a student "who is kept in the home of a person who is domiciled within the school district" where that student is supported by "such other person as if he were such other person's own child." The statute and accompanying regulations specify that two sworn statements may be required before a local board of education will approve such enrollment. See: N.J.A.C. 6A:22-3.2(a). The resident may be required to supply a sworn

statement which states that he or she will assume all personal obligations relative to the child, and intends to keep and support the child gratuitously for a longer time than merely through the school term. Additionally, the child's parent or guardian may be 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 and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education." N.J.S.A. 18A: 38-1(b)(1).

Where a school district determines that the sworn statements do not meet the requirements of law, it may deny enrollment. The resident has a right of appeal, but has the burden of proving by a preponderance of the credible evidence that the child is indeed eligible for a free education under the statutory criteria.

Petitioner failed to appear on two hearing dates, and thereafter offered no explanation for her nonappearance. Accordingly, she has failed to meet her burden of proof and I have no basis upon which to overturn the determination of the Board that T.D. should not be enrolled as an "affidavit student" under the requirements of N.J.S.A. 18A: 38-1(b)(1). Accordingly, I **CONCLUDE** that from the period from September 3, 2009 through April 27, 2009 T.D. was ineligible for attendance in the Clifton Public Schools.

Although the Board asserts that T.D.'s ineligibility to attend its schools continues to date, I am unable to agree. On April 28, 2009, the Superior Court entered an order granting temporary custody of T.D. to petitioner. N.J.S.A. 18A:38-2 provides that the public schools "shall be free to any person over five and under 20 years of age nonresident in a school district who is placed in the home of another person, who is resident in the district, by order of a court of competent jurisdiction of this state..." Likewise, N.J.A.C. 6A:22-3.1(a)(1) provides that a student is domiciled in a school district "when he or she is living with a parent or legal guardian whose permanent home is located within the school district." (Emphasis supplied). T.D. thus became eligible for attendance

in the Clifton school district once legal custody had been granted to her grandmother.

Accordingly, I **CONCLUDE** that effective April 28, 2009, T.D. became eligible for attendance in the Clifton schools. Having received no evidence that the April 28, 2009 order of the Superior Court has been vacated or amended, I further **CONCLUDE** that T.D.'s eligibility to attend the Clifton schools continues to date.

Via counterclaim the Board asserts that it is entitled to be reimbursed for tuition for the period of T.D.'s ineligible enrollment in its schools. Where, as here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition, pursuant to N.J.A.C. 6A:22-6.2(a) which provides as follows:

> If an appeal to the Commissioner is filed, where the appellant does not sustain the burden of demonstrating entitlement to attend the schools of the district, or abandons the appeal through withdrawal, failure to prosecute or any means other than settlement agreeing to waive tuition, the Commissioner may order assessment of tuition for any period of a student's ineligible attendance in a school district, including the 21 day period for filing of an appeal and the period during which the hearing and decision on appeal were pending.

N.J.S.A. 18A: 38-1(b) requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

In accordance with N.J.A.C. 1:1-14.4(d), I accepted ex parte proofs from the Board in support of its tuition claim. The Board submitted the certification of its Superintendent of Schools attesting to the amount owed. That certification is uncontested, and its calculation of tuition owed is consistent with the requirements of N.J.S.A. 18A: 38-1(b). In light of the Superior Court custody order entered on April 28, 2009 I am unable to grant tuition reimbursement for

T.D.'s attendance to date, as requested by the certification. However, I do **CONCLUDE** that the Board has demonstrated an entitlement to tuition reimbursement in the amount of $59 per day for each day that T.D. attended the public schools from September 3, 2008 through April 27, 2009.

ORDER

Based on the foregoing, petitioner's claims on behalf of T.D. for attendance tuition free in the Clifton public schools during the period from September 3, 2008 through April 27, 2009 are **DISMISSED WITH PREJUDICE**. The Board's application for tuition reimbursement is **GRANTED** in the amount of $59 per day for each day that T.D. attended the Clifton public schools from September 3, 2008 through April 27, 2009. I further **ORDER** that, effective April 28, 2009, and in accordance with the provisions of N.J.S.A. 18A:38-2 and N.J.A.C. 6A:22-3.1(a)(1), T.D. became eligible for free attendance in the Clifton public schools.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO**

Box 500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 17, 2009

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 6/17/09

Mailed to Parties:

JUN 18 2009

DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

List of Witnesses

For Petitioner

None

For Respondent

None

Exhibits

For Petitioner

None

For Respondent

R-1 Packet of information from Board of Education, including application for non-resident student and denial letter

R-2 Affidavit of Richard Tardalo, Superintendent of Schools

R-3 Order of the Superior Court, Chancery Division, Family Part, dated April 28, 2009

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1765-09
AGENCY REF. NO. 15-1/098

E.G. ON BEHALF OF MINOR CHILD, T.D.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY

Respondent.

E.G., on behalf of **T.D.**, pro se (no appearance)

Paul F. Chiaramonte, Esq., for respondent
(Bisceglie and Demarco, attorneys)

Record Closed: June 12, 2009 Decided: June 17, 2009

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals from the decision of the respondent, Board of Education of the City of Clifton ("the Board"), denying her application to enroll her granddaughter, T.D., as an "affidavit student" in the Clifton public schools in accordance with N.J.S.A. 18A: 38-1(b)(1) and N.J.A.C. 6A:22-3.2(a). By letter dated January 22, 2009, the Board advised petitioner that her application did not satisfy the requirements of N.J.S.A. 18A: 38-1(b)(1) because it did not include a

sworn statement from T.D.'s parent or guardian or otherwise establish that T.D.'s parent or guardian was incapable of supporting or providing care for her due to family hardship.

Petitioner filed an appeal with the Department of Education on January 23, 2009. On February 5, 2009 the Board filed an answer and counterclaim for tuition reimbursement. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on February 13, 2009. A hearing was scheduled for April 27, 2009, and a Notice of Plenary Hearing, dated March 18, 2009, was sent to the parties advising them of the hearing date. The Notice of Plenary Hearing was sent to petitioner at the address listed in her pro se appeal. Counsel for the Board appeared on April 27, 2009. Petitioner failed to appear.

I received a packet of documentary evidence from the Board at the April 27, 2009 hearing (R-1), and granted the Board's request for leave to supplement the record with a certification in support of its counterclaim for tuition reimbursement. By letter dated May 8, 2009 the Board submitted the certification of its Superintendent of Schools, Richard Tardalo. (R-2) By letter dated May 11, 2009, I advised the parties that I would hold the record open until May 20, 2009 to afford petitioner an opportunity to submit a certification contesting the amount of tuition owed. My letter was sent to petitioner at the address listed in her pro se appeal. I received no response from petitioner.

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FINDINGS OF FACT

Based on a review of the record, including the documentary evidence presented by the Board at the hearing and the certification and correspondence submitted by the Board thereafter, I **FIND** the following **FACTS**:

1. Petitioner failed to appear at the hearings scheduled for April 27, 2009 and June 12, 2009.

2. Petitioner was afforded proper notice of the hearing dates, and did not contact this office to request an adjournment or otherwise explain the reason for her failure to appear.

3. Petitioner's granddaughter, T.D., began attending the Clifton public schools as an eighth grade student at Christopher Columbus Middle School on September 3, 2008.

4. Petitioner is a resident of Clifton, New Jersey. She sought to enroll T.D. in the Clifton Schools in accordance with the provisions of N.J.S.A. 18A: 38-1(b)(1), which allows the enrollment of a child who is kept and supported gratuitously in the home of a district resident.

5. The Board rejected petitioner's application to enroll T.D., and advised that the sworn statements submitted were not compliant with law.

6. T.D. continues to attend Christopher Columbus Middle School to date.

7. On April 28, 2009, the Superior Court of New Jersey, Chancery Division, Family Part, entered an order granting temporary custody of T.D. to E.G.

8. The annual per pupil cost for a student in grade eight is $10,621. The per diem rate is $59, which is established by dividing the per pupil cost by 180.

9. Petitioner was afforded an opportunity to submit a certification contesting the Board's claim to tuition and failed to do so. She has not contacted this office as of the date of this decision.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Generally, the Board is required to provide a free public education only to persons who are domiciled within the school district. N.J.S.A. 18A:38-1(a). Domicile is that place where a person has his true, fixed and permanent home, and to which whenever he is absent he has the intention of returning. State v Benny, 20 N.J. 238, 250 (1955). A minor is incapable of choosing her own domicile, and accordingly the domicile of a minor child follows that of her parent. P.B.K. o/b/o E.Y. v Bd. of Educ. of Tenafly, 343 N.J. Super. 419, 427 (App. Div., 2001).

Petitioner sought to enroll T.D. in the Clifton public schools in accordance with the exception to this general rule created by N.J.S.A. 18A:38-1(b)(1) which provides that the public schools are also free to a student "who is kept in the home of a person who is domiciled within the school district" where that student is supported by "such other person as if he were such other person's own child." The statute and accompanying regulations specify that two sworn statements may be required before a local board of education will approve such enrollment. See: N.J.A.C. 6A:22-3.2(a). The resident may be required to supply a sworn

statement which states that he or she will assume all personal obligations relative to the child, and intends to keep and support the child gratuitously for a longer time than merely through the school term. Additionally, the child's parent or guardian may be 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 and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education." N.J.S.A. 18A: 38-1(b)(1).

Where a school district determines that the sworn statements do not meet the requirements of law, it may deny enrollment. The resident has a right of appeal, but has the burden of proving by a preponderance of the credible evidence that the child is indeed eligible for a free education under the statutory criteria.

Petitioner failed to appear on two hearing dates, and thereafter offered no explanation for her nonappearance. Accordingly, she has failed to meet her burden of proof and I have no basis upon which to overturn the determination of the Board that T.D. should not be enrolled as an "affidavit student" under the requirements of N.J.S.A. 18A: 38-1(b)(1). Accordingly, I **CONCLUDE** that from the period from September 3, 2009 through April 27, 2009 T.D. was ineligible for attendance in the Clifton Public Schools.

Although the Board asserts that T.D.'s ineligibility to attend its schools continues to date, I am unable to agree. On April 28, 2009, the Superior Court entered an order granting temporary custody of T.D. to petitioner. N.J.S.A. 18A:38-2 provides that the public schools "shall be free to any person over five and under 20 years of age nonresident in a school district who is placed in the home of another person, who is resident in the district, by order of a court of competent jurisdiction of this state..." Likewise, N.J.A.C. 6A:22-3.1(a)(1) provides that a student is domiciled in a school district "when he or she is living with a parent or legal guardian whose permanent home is located within the school district." (Emphasis supplied). T.D. thus became eligible for attendance

in the Clifton school district once legal custody had been granted to her grandmother.

Accordingly, I **CONCLUDE** that effective April 28, 2009, T.D. became eligible for attendance in the Clifton schools. Having received no evidence that the April 28, 2009 order of the Superior Court has been vacated or amended, I further **CONCLUDE** that T.D.'s eligibility to attend the Clifton schools continues to date.

Via counterclaim the Board asserts that it is entitled to be reimbursed for tuition for the period of T.D.'s ineligible enrollment in its schools. Where, as here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition, pursuant to N.J.A.C. 6A:22-6.2(a) which provides as follows:

> If an appeal to the Commissioner is filed, where the appellant does not sustain the burden of demonstrating entitlement to attend the schools of the district, or abandons the appeal through withdrawal, failure to prosecute or any means other than settlement agreeing to waive tuition, the Commissioner may order assessment of tuition for any period of a student's ineligible attendance in a school district, including the 21 day period for filing of an appeal and the period during which the hearing and decision on appeal were pending.

N.J.S.A. 18A: 38-1(b) requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

In accordance with N.J.A.C. 1:1-14.4(d), I accepted ex parte proofs from the Board in support of its tuition claim. The Board submitted the certification of its Superintendent of Schools attesting to the amount owed. That certification is uncontested, and its calculation of tuition owed is consistent with the requirements of N.J.S.A. 18A: 38-1(b). In light of the Superior Court custody order entered on April 28, 2009 I am unable to grant tuition reimbursement for

T.D.'s attendance to date, as requested by the certification. However, I do **CONCLUDE** that the Board has demonstrated an entitlement to tuition reimbursement in the amount of $59 per day for each day that T.D. attended the public schools from September 3, 2008 through April 27, 2009.

ORDER

Based on the foregoing, petitioner's claims on behalf of T.D. for attendance tuition free in the Clifton public schools during the period from September 3, 2008 through April 27, 2009 are **DISMISSED WITH PREJUDICE**. The Board's application for tuition reimbursement is **GRANTED** in the amount of $59 per day for each day that T.D. attended the Clifton public schools from September 3, 2008 through April 27, 2009. I further **ORDER** that, effective April 28, 2009, and in accordance with the provisions of N.J.S.A. 18A:38-2 and N.J.A.C. 6A:22-3.1(a)(1), T.D. became eligible for free attendance in the Clifton public schools.

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO**

Box 500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 17, 2009

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 6/17/09

Mailed to Parties:

JUN 18 2009

DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

List of Witnesses

For Petitioner

None

For Respondent

None

Exhibits

For Petitioner

None

For Respondent

R-1 Packet of information from Board of Education, including application for non-resident student and denial letter

R-2 Affidavit of Richard Tardalo, Superintendent of Schools

R-3 Order of the Superior Court, Chancery Division, Family Part, dated April 28, 2009

248-09

OAL DKT. NO. EDU 5071-09
AGENCY DKT. NO. 47-3/09

S.K., on behalf of minor child, M.J.S.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record of the matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge that the matter is appropriately dismissed in light of the fact that the Board no longer contests M.J.S.'s eligibility to attend school in the district.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, which is hereby dismissed as moot.

IT IS SO ORDERED.

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/04/09
Date of Mailing: 8/04/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 05071-09
AGENCY DKT. NO. 47-3/08

S.K. ON BEHALF OF MINOR CHILD M.J.S.
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,
Respondent.

S.K., appearing pro se

Joseph L. Roselle, Esq. on behalf of respondent (Schwartz, Simon, Edlestein, Celso & Kessler, LLC)

Record Closed: July 2, 2009 Decided: July 2, 2009

BEFORE **WALTER M. BRASWELL**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law (OAL) on April 23, 2009, 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 matter was scheduled for hearing June 15, 2009. Prior to the hearing date a telephone conference was conducted wherein the parties advised the undersigned that the District no longer contests M.J.S. enrollment and that the within appeal is now unnecessary. Respondent submitted a motion for dismissal on July 2, 2009 on which date the record closed. The letter requesting the dismissal is attached hereto and made a part hereof.

Having reviewed the attached correspondence I **FIND** that the issues in this matter have been resolved and therefore, this matter is hereby **DISMISSED**.

ORDER

Accordingly, I hereby file this Dismissal Order to administratively dispose of this matter since respondent no longer has standing to pursue a claim of action.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 2, 2009
DATE

Walter M. Braswell
WALTER M. BRASWELL, ALJ

Date Received at Agency:

July 2, 2009
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: JUL 6 2009
ljb

247-09

M.Y., on behalf of minor child, N.M.,	:	
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 daughter in December 2008. The respondent filed an answer and counterclaim for tuition. Petitioner failed to appear at the hearing on May 18, 2009 and provided no explanation for her nonappearance.

The ALJ found that petitioner failed to prosecute her appeal, leaving no basis to consider overturning the residency determination of the respondent Board, and respondent's proofs as to tuition rate establish entitlement to tuition reimbursement from petitioner in the amount of $12,535.56.

The Commissioner adopted the Initial Decision as the final decision in this matter and directed the petitioner to reimburse the Board for $12,535.56 in tuition owed.

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 4, 2009

247-09
OAL DKT. NO. EDU 1631-09
AGENCY DKT. NO. 378-12/08

M.Y., on behalf of minor child, N.M.,	:	
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) – memorializing petitioner's failure to appear at the OAL hearing and to otherwise prosecute her appeal, and finding that the Board of Education (Board) had demonstrated entitlement to tuition in the amount of $12,535.56 – have been reviewed. No exceptions were filed by the parties, nor did petitioner file an explanation for her failure to appear.

Upon review, the Commissioner concurs with the findings and conclusions of the Administrative Law Judge, and, accordingly, adopts the Initial Decision of the OAL as the final decision in this matter for the reasons expressed therein. The petition of appeal is dismissed, and petitioner is directed to reimburse the Board for $12,535.56 in tuition owed.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 8/04/09
Date of Mailing: 8/04/09

[1] 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 1631-09
AGENCY DKT. NO. 378-12/08

M.Y. O/B/O MINOR CHILD, N.M..,
Petitioner,
v.
TOWNSHIP OF WEST ORANGE BOARD OF EDUCATION, ESSEX COUNTY,
Respondent.

M. Y. petitioner, pro se, on behalf of **N.M.** minor

Stephen J. Christiano, Esq., for respondent (Christiano & Christiano, attorneys)

Record Closed: May 18, 2009 Decided: July 2, 2009

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner M.Y., mother of minor child N.M., challenged the respondent West Orange Board of Education's November 25, 2008 decision to remove her daughter from school because she is not a West Orange resident. (Exhibit R-1). She appealed by

letter dated December 11, 2008. (Exhibit R-2). She requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) on February 5, 2009. At the prehearing status conferences attended by both parties, the matter was scheduled for a hearing on May 18, 2009 at 1:00p.m. The petitioner failed to appear. Also, respondent's counsel did not receive responses to his interrogatories served on or about March 25, 2009. (Exhibit R-3).

Respondent counter claimed for tuition and made a supportive documentary submission at the May 18, 2009 hearing.

At the hearing, the tribunal noted that the petitioner failed to appear and that the case will be processed accordingly with an Initial Decision to resolve the tuition counter claim.

STATEMENT OF THE ISSUES

The residual issue is whether respondent is entitled to tuition reimbursement, and if so, the amount due.

FINDINGS OF FACT

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

1. During the 2008/2009 West Orange, New Jersey school year, petitioner's minor child N.M. attended 8th grade in the West Orange, New Jersey School System while residing in another district for 159 days of the 180 day school year.
2. The cost per day for educating an 8th grade student in the West Orange New Jersey schools is $78.84. Accordingly, the counterclaim is for $12,535.56.
3. The above costs were certified at the OAL hearing by Frank Guarneri, District Registrar of the West Orange Board of Education. (Exhibit R-4).

LEGAL AUTHORITY

Persons over five and under twenty years of age are entitled to attend public schools without charge if they are domiciled in the school district in which the school is located. N.J.S.A. 18A:38-1. The school board may recover tuition from the parents of a child found ineligible to attend the school in its district. N.J.S.A. 18A:38-1(6)(2). The tuition is 1/180th of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance. Ibid. If an appellant challenging a domicile decision fails to demonstrate entitlement to attend school in the district, or abandons the appeal through withdrawal, failure to prosecute or any means other than settlement agreeing to reduce tuition, the Commissioner may order assessment of tuition for any period of a student's ineligible attendance in a school district, including the 21 day period of filing of an appeal and the period during which the hearing and decision on appeal were pending. N.J.A.C. 6A:22-6.2. Tuition is assessed based upon a per student basis for the period of a student's ineligible enrollment, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23-3.1. N.J.A.C. 6A:22-6.3(a).

Petitioner's failure to appear at the May 18, 2009 hearing constituted a failure to prosecute with in the meaning of the regulation. Respondent submitted probative reliable information concerning calculation of tuition due. The Board of Education of the Township of Cranford v. A. McG and L. McG, 95 N.J.A.R.2d (EDU) 74, aff'd, 96 N.J.A.R.2d (EDU) 140, rev'd and remanded, App. Div. February 10, 1998 A-474295T3, Slip Opinion at pages 8-10.

CONCLUSION

Based on the foregoing findings of fact and legal authority, I **CONCLUDE** that the respondent has established entitlement to tuition reimbursement from petitioner in the amount of $12,535.56.

DISPOSITION AND ORDER

Based on the foregoing findings of fact and conclusion of law, I decide this matter in favor of the respondent and **ORDER** petitioner to reimburse respondent for tuition in the amount of $12,535.56.

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

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

7/2/'09
DATE

James A. Geraghty
JAMES A. GERAGHTY, ALJ

Date Received at Agency: 6/2/09

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: JUL 6 2009
sej

APPENDIX

WITNESSES

For Petitioner

NO ONE APPEARED

For Respondent

Frank Guarneri

Exhibits

R-1 Letter from West Orange Board of Education to M.Y. dated 11/25/08

R-2 Letter from M.Y. to West Orange Board of Education dated 12/11/08

R-3 Letter from West Orange Board of Education dated 4/17/09

R-4 Tuition calculations data from West Orange Board of Education dated 5/11/09

254-09

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF CLAUDE GENTIL, GRAY CHARTER SCHOOL, ESSEX COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In October 2007, 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 unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 for resigning her position as a kindergarten teacher without notice, contrary to the terms of her employment contract. The respondent contended that the aforementioned statute is not applicable to charter schools.

The ALJ found that: *N.J.S.A.* 18A:26-10 applies to teaching staff members in charter schools; and *N.J.S.A.* 18A:26-10 prohibits a teaching staff member from ceasing to perform her duties contrary to the provisions of her contract with the charter school. The ALJ concluded that respondent ceased to perform her duties before the expiration of the term of her employment contrary to *N.J.S.A.* 18A:26-10, and that respondent's teaching certificate should be suspended for a period of one year.

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, summary decision is granted to petitioner, and respondent's certificate is suspended for a period of one year from the date of the filing of this decision – a copy of which has been 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.

August 11, 2009

254-09

OAL DKT. NO. EDU 11745-07
AGENCY DKT. NO. 298-10/07

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF CLAUDE GENTIL, GRAY CHARTER SCHOOL, ESSEX COUNTY.	COMMISSIONER OF EDUCATION DECISION

Petitioner requests that respondent's teaching certificate be suspended for one year in consequence of her resignation – without petitioner's consent – prior to the completion of her contractual term of employment. Having reviewed the record[1] and the Initial Decision of the Office of Administrative Law (OAL),[2] the Commissioner adopts the Initial Decision for the reasons set forth therein.

Respondent's teaching certificate is suspended for the period of one year. This decision shall be forwarded to the New Jersey State Board of Examiners for the effectuation of the suspension.

IT IS SO ORDERED.[3]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8|11|09
Date of Mailing: 8|11|09

[1] The record does not include the hearing transcript.

[2] No exceptions were filed by either party.

[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 11745-07
AGENCY DKT. NO. 298-10/07

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF CLAUDE GENTIL, GRAY CHARTER SCHOOL, ESSEX COUNTY.

Cherie L. Adams, Esq., for Gray Charter School
(Adams, Stern, Gutierrez & Lattiboudere, attorneys)

Philip Feintuch, Esq., for Claude Gentil
(Feintuch, Porwich & Feintuch, attorneys)

Record Closed: May 28, 2009 Decided: July 10, 2009

BEFORE **RICHARD McGILL**, ALJ:

Gray Charter School (petitioner) seeks the suspension of the teaching certificate of Claude Gentil (respondent) for unprofessional conduct based upon a resignation that did not comply with applicable statutory requirements. Respondent maintains that the statutes upon which petitioner relies are not applicable to her as an employee of a charter school and that any suspension is discretionary in nature and unwarranted under the circumstances of this case.

PROCEDURAL HISTORY

At the request of petitioner, the Commissioner of Education issued an Order to Show Cause on October 2, 2007, ordering respondent to show cause why her teaching certificate should not be suspended for unprofessional conduct pursuant to N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8. Respondent filed an Answer on November 1, 2007, and the matter was transmitted to the Office of Administrative Law on November 8, 2007, for determination as a contested case.

One of respondent's contentions in this proceeding is that N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 are not applicable to charter schools. In the same general time frame, six similar matters were transmitted to the Office of Administrative Law raising the issue of the applicability of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 to charter schools.[1] By Order dated March 31, 2008, the seven matters were consolidated for the limited purpose of determining the applicability of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 to charter schools.

Three teachers filed a motion to dismiss based on the contention that N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 do not apply to charter schools. In an Order dated June 6, 2008, the determination was made that these statutes, N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8, are applicable to charter schools. However, one statute, N.J.S.A. 18A:28-8, relates to teachers who have tenure. The determination was that this statute is not applicable to teachers who do not have tenure. Five of the seven teachers in the consolidated proceeding including respondent herein did not have tenure. As a result,

[1] The other matters are as follows: In the Matter of the Suspension of the Teaching Certificate of Nadira Raghunandan, Gray Charter School, Essex County, OAL Dkt. No. EDU 11437-07, Agency Dkt. No. 292-10/07; In the Matter of the Suspension of the Teaching Certificate of Melissa Van Pelt, Gray Charter School, Essex County, OAL Dkt. No. EDU 11556-07, Agency Dkt. No. 298-10/07; In the Matter of the Suspension of the Teaching Certificate of Tyarra Hunter, Gray Charter School, Essex County, OAL Dkt. No. EDU 11956-07, Agency Dkt. No. 293-10/07; In the Matter of the Suspension of the Teaching Certificate of Danielle Ponti, Gray Charter School, Essex County, OAL Dkt. No. EDU 11971-07, Agency Dkt. No. 294-10/07; In the Matter of the Suspension of the Teaching Certificate of Taheerah Jackson, Gray Charter School, Newark, Essex County, OAL Dkt. No. EDU 11972-07, Agency Dkt. No. 300-10/07; and In the Matter of the Suspension of the Teaching Certificate of Jenelle Stokes, Gray Charter School, Essex County, OAL Dkt. No. EDU 12569-07, Agency Dkt. No. 332-10/07.

the portion of the Order to Show Cause based on N.J.S.A. 18A:28-8 was dismissed as to those five teachers including respondent.

One or more parties sought interlocutory review of the Order dated June 6, 2008. By Decision on Motion for Interlocutory Review dated July 9, 2008, the Commissioner of Education affirmed the Order dated June 6, 2008. Thereafter, by Order dated August 14, 2008, the seven matters were severed for each to proceed separately.

This matter was brought to hearing on May 14, 2009, at the Office of Administrative Law in Newark, New Jersey. The record closed on May 28, 2009, upon receipt of briefs.

ISSUES

With the question of applicability of N.J.S.A. 18A:26-10 and N.J.S.A. 18A:28-8 to charter schools having been resolved by motion, the remaining issues are whether respondent engaged in unprofessional conduct within the meaning of N.J.S.A. 18A:26-10, whether respondent's teaching certificate should be suspended and, if so, the length of the suspension.

FACTS

A. Stipulated Facts

The parties stipulated as follows:

1. Ms. Gentil is a duly certified Elementary School Teacher in the state of New Jersey.

2. Ms. Gentil began her employment with the Gray Charter School in August of 2006.

3. On or about May 9, 2007, the respondent, Claude Gentil, executed an employment agreement to teach Kindergarten at the Gray Charter School for the 2007-2008 school year.

4. On August 14, 2007 Ms. Gentil reported for the first day of work. However, five other contracted teachers failed to report.

5. On August 15, 2007 Ms. Gentil asked to leave early. On August 16 and 17th she failed to report for work and did not call to report an absence.

6. Miss Gray then received a letter of resignation dated August 17, 2007 which stated as follows:

> This is to inform you that a job opportunity has presented itself this week. It was not my intention to leave you, but I must follow this career path. I know that this comes at a very inconvenient time. It is with great regret that I tender my resignation effective immediately. I would like to thank you for giving me my start in the teaching profession.

No notice was given to Ms. Gentil in connection with her resignation from the Gray Charter School.

7. On or about September 21, 2007 an Order to Show Cause was filed with the Commissioner of Education by the Gray Charter School. The application sought the suspension of Ms. Gentil's teaching certificate for her unprofessional conduct in resigning without notice.

8. Ms. Gentil answered the verified complaint wherein Ms. Gentil stated: "Respondent admits that she resigned her position," and "she [Gentil] did resign her position."

B. Undisputed Facts

Other facts are not really in dispute, and I **FIND** as follows:

1. Ms. Verna Gray is the Executive Director and the principal of the Gray Charter School, and she has held these positions since 2000.

2. Ms. Gray is responsible for curriculum planning, parent relations and staffing at Gray Charter School including hiring, training and terminating teachers.

3. Respondent searched for another job as a teacher over the summer of 2007.

4. Staff members were scheduled to report to the Gray Charter School on August 14, 2007.

5. Five teachers did not report for work on August 14, 2007, and resigned their positions unexpectedly.

6. Ms. Gray held a staff meeting on August 14, 2007, and advised teachers that they were supposed to give notice. The specific details as to Ms. Gray's statement are in dispute.

7. Respondent was present at this meeting.

8. Ms. Gray telephoned respondent on August 16 and again on August 17, but respondent did not return the calls.

9. Gray Charter School was scheduled to open for students on August 21, 2007.

10. Respondent's contract contains a provision which states as follows: "Upon the written agreement of both Employee and the School (which agreement may be made by the Executive Director), this agreement shall immediately terminate."

Ms. Gray testified that certain consequences resulted from decisions by five teachers not to report to the Gray Charter School for the 2007-2008 school year. It is noted that respondent contends that these consequences were caused by the five teachers who did not report for work on August 14, 2007, and not by her departure. But the events in themselves are not in dispute. I **FURTHER FIND** as follows:

11. At that time, the Gray Charter School had seventeen classroom teachers and five other teachers.

12. Five teachers with contracts did not report to Gray Charter School to begin the 2007-2008 school year.

13. Gray Charter School was unable to open as scheduled due to a lack of teachers.

14. Ms. Gray had to stop a consultant from traveling from Chicago for training.

15. Ms. Gray had to cancel the delivery of supplies.

16. The opening of school was delayed until August 27, 2007.

17. As a result of the lost days, Ms. Gray had to modify the schedule for spring vacation and extend the school year.

18. Gray Charter School incurred additional costs as a result of the changes.

C. Summary of Testimony

The disputed facts in this matter relate to the staff meeting on August 14, 2007, and the information conveyed by Ms. Gray on that occasion and others. In addition, respondent contends that at Ms. Gray's direction a teacher called respondent on August 17, 2007, and told her that she was fired. Further, respondent maintains that her position was filled by August 21, 2007.

1. Verna A. Gray

Verna A. Gray has been the Executive Director and Principal of the Gray Charter School since September 5, 2000. On August 14, 2007, Ms. Gray held a staff meeting under unusual circumstances in that five teachers resigned without notice. During this initial meeting, Ms. Gray welcomed the teachers, aides and others back and gave them instructions. Ms. Gray told staff members that they should provide two months' written notice if they were leaving the Gray Charter School. This requirement applied to all staff members and was not limited to tenured teachers. Ms. Gray had advised the staff of the requirement of two months' written notice at previous staff meetings. Ms. Gray did not mention respondent to Ms. Johnson, who is a teacher at the Gray Charter School, and did not ask her to call respondent. It took several weeks to find a replacement for respondent.

2. Richard Salles

Richard Salles is employed by the Gray Charter School as a vice principal and assistant director, and he was present at the staff meeting on August 14, 2007. Ms. Gray reminded staff members that they must give two months' written notice if they intend to resign their position at the Gray Charter School. These remarks were not limited to tenured teachers. Ms. Gray had mentioned this requirement at previous

meetings. Mr. Salles acknowledged that the contract contains a provision which provides that an employee may be terminated for failure to report for work for two consecutive days without notifying the Executive Director.

3. Tanesha Renee Johnson

Tanesha Renee Johnson has been employed by the Gray Charter School for three years as a teacher, and she knows respondent. Ms. Johnson and respondent were present at the meeting on August 14, 2007. Ms. Gray stated that teachers had resigned without proper notice. Ms. Gray mentioned a notice requirement for a proper resignation.

Ms. Gray did not ask Ms. Johnson to telephone respondent, and Ms. Johnson never discussed respondent with Ms. Gray. On approximately August 17, 2007, Ms. Johnson and respondent spoke on the telephone, but Ms. Johnson did not tell respondent that she had been terminated.

4. Claude Gentil

Respondent began her employment with the Gray Charter School as a kindergarten teacher in August 2006. During her first year, respondent received no guidance as to the steps that a teacher should take to resign her position. At a staff meeting on August 14, 2007, Ms. Gray said that several teachers had resigned improperly and that they should have spoken with her first. Ms. Gray referred to tenured teachers.

After respondent wrote her letter of resignation, she received a telephone call from Ms. Johnson, who stated that Ms. Gray told Ms. Johnson to call respondent and tell her not to come back. After reviewing her contract, respondent sent her letter of resignation. If respondent knew of the requirement, she would have provided the

notice. A custodian, who was a friend of hers, informed respondent that her position was filled by August 21, 2007.

D. Findings

Petitioner's witnesses were fully credible, and their testimony is accepted as true. Respondent's testimony did not really make sense when she claimed that Ms. Gray referred only to tenured teachers. First, there are statutory requirements with respect to resignations by both tenured and non-tenured teachers. Second, under the circumstances that prevailed on August 14, 2007, Ms. Gray had as much reason to be concerned about resignations by non-tenured teachers as by those who had tenure. It would make no sense for Ms. Gray not to mention requirements that were applicable to non-tenured teachers. Likewise, it makes no sense that Ms. Gray would have a regular teacher, as opposed to an administrator, tell respondent that she had been terminated. Under the circumstances, respondent's testimony is overborne by that of petitioner's witnesses.

Based upon the evidence presented at the hearing, I **FIND** as follows:

1. At a meeting on August 14, 2007, Ms. Gray advised staff members, including both tenured and non-tenured teachers, that they must provide two months' notice if they intended to leave the Gray Charter School.

2. Similar advice was given to staff members during the prior school year.

3. Ms. Gray did not tell Ms. Johnson to inform respondent that she was terminated.

4. Ms. Gray never discussed respondent with Ms. Johnson.

5. Ms. Johnson did not tell respondent that she had been terminated.

6. Respondent accepted an offer of employment with another school.

7. It took several weeks to find a replacement for respondent.

LAW AND ANALYSIS

The applicable statute 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 or, in the case of an approved private school for the disabled, the board of directors of the school, 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 obvious 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 Board of Education v. Leinen, 94 N.J.A.R.2d (EDU) 405, 407. The ultimate objective is to protect the students.

In the context of this case, N.J.S.A. 18A:26-10 prohibits a teaching staff member from ceasing to perform his duties without the consent of the charter school. Here, respondent entered into an employment agreement for a term set to expire on June 30, 2008, and thereafter, respondent submitted a letter of resignation dated August 17, 2007. This date was only a few days before the beginning of the school year, and the resignation was effective immediately. Respondent did not have the consent of the charter school. Under the circumstances, I **CONCLUDE** that respondent ceased to perform her duties before the expiration of the term of her employment without the consent of the Gray Charter School contrary to N.J.S.A. 18A:26-10.

Petitioner seeks a suspension of respondent's teaching certificate for a period of one year and cites multiple cases in which such action was taken. According to petitioner, this matter should be handled in the same manner as in the cited cases.

The prior precedent has been summed up as follows: "Generally, the Commissioner has imposed the full one-year suspension of a teaching certificate for leaving a district without adequate notice. (Citations omitted). In rare circumstances in which the Commissioner has seen fit to lessen the suspension period, it was for compelling reasons. (Citation omitted.)" Board of Education of Borough of Alpine v. Leonid Yuz, EDU 1116-06, Initial Decision (July 17, 2008), adopted, Commissioner of Education (September 23, 2008), http://lawlibrary.rutgers.edu/oal/search.shtml.

In opposing the suspension of her teaching certificate, respondent argues that her contract is silent as to notification by the teacher and that no one advised her as to any requirement as to notice prior to her resignation. Further, respondent believed that she had been terminated as the result of a telephone call from one of her colleagues. Additionally, her resignation did not cause any loss of teaching time, as a replacement was found promptly. Finally, respondent maintains that if she had known that she was required to provide notice, she would have done so.

To a large extent, respondent's arguments are based on factual assertions which are contrary to the actual facts in this matter. First, while the employment contract does not contain an explicit sixty-day notice requirement, there is a provision which expressly addresses termination of the agreement. That provision states that the contract can be terminated upon written agreement with the school. This means that respondent could have determined the proper procedure by reading the contract. Second, the teachers were advised during staff meetings as to notice requirements. It follows that respondent knew or should have known the proper procedure for a resignation. Further, another teacher did not advise respondent that she had been terminated.

Respondent makes the point that resignations by five other teachers had already caused the delay in the start of the school year. Nonetheless, respondent must have known that she was compounding an already difficult situation by resigning effective immediately under the circumstances. Respondent's claim that a replacement was found within a few days is not accepted as true. Likewise, respondent's claim that she would have given the notice if she was aware of the requirement is speculative and is not based on actual events.

The core facts are that the contract contains a specific provision as to termination by agreement, Ms. Gray advised staff members including respondent at a meeting on August 14, 2007, as to notice requirements for a resignation, and nonetheless, respondent submitted a letter of resignation effective immediately. Respondent did so purely out of self-interest so that she could accept another job. By doing so, respondent knowingly compounded the difficulties being experienced by the Gray Charter School. Under the circumstances, I **CONCLUDE** that respondent's teaching certificate should be suspended for a period of one year.

Accordingly, it is **ORDERED** that respondent's teaching certificate 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.

July 10, 2009

DATE

Richard DeGill

RICHARD McGILL, ALJ

Date Received at Agency: 7/10/09

Mailed to Parties: Laura Sanders

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 13 2009

DATE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

WITNESS LIST

For petitioner:

Verna A. Gray
Richard Salles
Tanesha Renee Johnson

For respondent:

Claude Gentil

EXHIBIT LIST

J-1	Stipulation of Facts with attachments	Evidence

255-09

OAL DKT. NO. EDU 4050-09
AGENCY DKT. NO. 50-3/09

C.O'B. on behalf of minor children, S.O'B. and C.O'B.,JR.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, the proposed settlement agreement and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 8/11/09

Date of Mailing: 8/11/09



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4050-09

AGENCY DKT. NO. 50-3/09

C.O'B ON BEHALF OF MINOR CHILD, S.O'B. AND C.O'B., JR.

Petitioner,

Vs.

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY.

C.O'B., petitioner, pro se

Harold Shapiro, Esq., for respondent (Shapiro and Shapiro, attorneys)

Record Closed: June 26, 2009 Decided: July 6, 2009

BEFORE **W. TODD MILLER,** ALJ:

This matter was transmitted to the Office of Administrative Law on April 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.

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.

7-6-09
DATE

W. TODD MILLER, ALJ

Date Received at Agency: JUL 8 2009

Date Mailed to Parties: JUL 8 2009

/sd

SHAPIRO & SHAPIRO
ATTORNEYS AT LAW
A PROFESSIONAL ASSOCIATION
1063 EAST LANDIS AVENUE
P.O. BOX 787
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856-691-6800
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6/29

EDU 4050-09

HAROLD B. SHAPIRO
CERTIFIED CRIMINAL TRIAL ATTORNEY
LOUIS CHARLES SHAPIRO
CERTIFIED CRIMINAL TRIAL ATTORNEY
LL.M. IN TRIAL ADVOCACY
(ALSO ADMITTED IN PA)

SAMUEL L. SHAPIRO
ATTORNEY AT LAW
COUNSELOR AT LAW
1940 (ADMITTED TO NJ BAR) - 1996

June 17, 2009

RECEIVED
2009 JUN 26 A 10:38
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Honorable William Todd Miller, A.L.J.
1601 Atlantic Avenue
Atlantic City, N.J. 08401

RE: C.O'B., on behalf of minor children, S.O'B. and C.O'B., JR. v. Board of Education of the City of Vineland, Cumberland County
Agency Docket No.: 50-3109

Dear Judge Miller:

Enclosed please find Resolution of the Vineland Board of Education, attached to which as Exhibit A is Settlement Agreement between Christopher O'Brien and the Vineland Board of Education resolving the above matter. If the Resolution and Settlement Agreement meet with Your Honor's approval I would be most appreciative if the settlement could be processed for approval. If anything further may be required, kindly contact the undersigned.

Respectfully yours,

Harold B. Shapiro

HBS:asc
Enclosure
cc: Christopher O'Brien (w/ encls.)
Kevin J. Franchetta, Asst. Superintendent for Business/Board Secretary (w/ encls.)

RESOLUTION
OF THE VINELAND BOARD OF EDUCATION

WHEREAS, the Vineland Board of Education has responded to an appeal filed by Christopher O'Brien on behalf of S.O'B and C.O'B, Jr. his minor children, challenging the February 18, 2009 determination made by the Vineland Board of Education that the minor children did not reside in the City of Vineland and therefore were not entitled to attend the Vineland Public Schools;

WHEREAS, the Vineland Board of Education filed a Counterclaim against Christopher O'Brien for reimbursement of tuition costs in the amount of $4,277.35 for S.O'B and $3,899.61 for C.O'B, Jr.;

WHEREAS, in advance of the day scheduled for trial, the Parties, with the Vineland Board of Education represented by Harold B. Shapiro, Esquire and Christopher O'Brien appearing pro se, advised the Administrative Law Judge that a resolution of all outstanding matters had been reached; and

WHEREAS, there are extensive documents, proofs and trial days possible for this matter to proceed; and

WHEREAS, the parties have conferred;

NOW, THEREFORE, BE IT RESOLVED, as follows:

The Vineland Board of Education hereby determines that it is in its best interest and the best interests of the public to agree to the Settlement Agreement attached hereto as Exhibit A which Settlement Agreement resolves the student residency appeal filed by Christopher O'Brien and the tuition reimbursement counterclaim filed by the Vineland Board of Education;

BE IT FURTHER RESOLVED the Vineland Board of Education determines that this is in the best interests of the public to resolve this matter for the reasons set forth as follows:

1. Attached hereto is the comprehensive Settlement Agreement (Exhibit A) prepared and

executed by the parties which sets forth in particular the documentation as to the nature of the matter, an explanation of the circumstances justifying the settlement and evidence of the consent of both parties.

2. It is anticipated that trial in this matter could consume one or more trial days.

3. The anticipated trial would result in substantial financial expense to the Vineland Board of Education both with respect to attorney's fees, investigator's fees and loss of staff time.

4. It is anticipated that the loss of work days for the Vineland Board of Education's Business Administrator would amount to several days in lost work time, including time spent at trial, in witness preparation and document preparation.

5. The Vineland Board of Education, if the settlement were not to occur, may be responsible to allow the minor children to continue attending the Vineland Public Schools, at substantial additional expense to the Board of Education.

6. Due to the complicated and involved nature of this student residence hearing and due to the uncertainties of litigation, the Vineland Board of Education determines that it is in its best interest to approve the Settlement Agreement which will bring finality to this matter and eliminate possible continued litigation and expense, as well as risk of outcome.

7. Both the Vineland Board of Education and its Administration feel that they could do better for the public and the students of Vineland with the resolution of this student residency appeal.

BE IT FURTHER RESOLVED, that the President of the Board of Education is hereby authorized to execute the Settlement Agreement attached as Exhibit A on behalf of the Vineland Board of Education.

The foregoing resolution was moved by Mr. Franceschini; and seconded by Mr. Fanucci.

ROLL CALL VOTE

NAME	AYES	NOES
Allan Bernardini	✓	
Brian DeWinne	✓	
Frank DiGiorgio	✓	
Anthony Fanucci	✓	
Ronald J. Franceschini, Jr.	✓	
Frank Giordano	✓	
Patricia Phillips	✓	
Diamaris Rios	✓	
Thomas Ulrich	✓	

CERTIFICATION

I, Kevin J. Franchetta, Asst. Superintendent for Business/Board Secretary of the Vineland Board of Education, herewith certify that the foregoing Resolution was approved by the Vineland Board of Education in a roll call vote as herein set forth in executive session, at the regular meeting of the Vineland Board of Education held on June 10, 2009.

Dated: June , 2009

Kevin J. Franchetta

KEVIN J. FRANCHETTA,
Asst. Superintendent for Business/Board Secretary

SETTLEMENT AGREEMENT

WHEREAS, CHRISTOPHER O'BRIEN (hereinafter "O'BRIEN") is the parent of S.O'B and C.O'B, Jr., minor children attending the Vineland Public Schools, operated by the Vineland Board of Education (hereinafter "BOARD"); and

WHEREAS, O'BRIEN filed a petition of appeal from the BOARD'S decision of February 18, 2009 determining that the minor children were not residents of the City of Vineland and were not therefore entitled to a free public education in the Vineland Public Schools; and

WHEREAS, the BOARD filed a response and counterclaim to the petition filed by O'BRIEN, which response and counterclaim opposed the appeal and set forth a separate counterclaim for the reimbursement of tuition costs incurred by the Vineland Board of Education for S.O'B in the amount of $4,277.35 and C.O'B, Jr. in the amount of $3,899.61; and

WHEREAS, the petition and response and counterclaim were assigned to the Office of Administrative Law for a hearing under OAL Docket No. EDUOS 04050-20095 and Agency Ref. No. 50-3-09; and

WHEREAS, it appears that the Parties mutually desire to terminate and settle amicably all issues in dispute;

IT IS, hereby AGREED by and between O'BRIEN and the BOARD, as follows:

1. O'BRIEN shall withdraw with prejudice his appeal challenging the February 18, 2009 BOARD determination that S.O'B and C.O'B, Jr. were not residents of the City of Vineland and not therefore entitled to a free public education in the Vineland Public Schools.

2. The BOARD shall withdraw with prejudice its counterclaim for reimbursement of tuition relating to the attendance of the aforesaid minor children in the Vineland Public Schools.

3. O'BRIEN shall enroll the minor children aforementioned in the public schools where he maintains his residence either in the City of Bridgeton or at such other bona fide address as he may establish.

EXHIBIT A

4. The minor children shall be permitted to conclude the 2008-2009 school year as students in the Vineland Public Schools.

5. This SETTLEMENT AGREEMENT is not and shall not in any way be deemed to constitute an admission or evidence of any wrongdoing or liability on the part of the BOARD or O'BRIEN. Rather, this SETTLEMENT AGREEMENT constitutes the good faith settlement and release of disputed claims, and it is acknowledged and agreed by the Parties that this SETTLEMENT AGREEMENT is being entered into by the Parties solely to avoid the burden, expense, delay and uncertainties of further litigation and to fully and finally resolve, settle and dismiss with prejudice, any and all claims of any kind whatsoever, whether known or unknown, which the BOARD or O'BRIEN has ever had or now has against each other arising out of or relating to the attendance of S.O'B and C.O'B, Jr. in the Vineland Public Schools.

6. This SETTLEMENT AGREEMENT may not be changed orally and no modification, amendment or waiver of any provision contained in this SETTLEMENT AGREEMENT, or any future representation, promise or condition in connection with the subject matter of this SETTLEMENT AGREEMENT, shall be binding upon any party hereto unless made in writing and signed by such party and subject to approval by the BOARD.

7. This SETTLEMENT AGREEMENT contains the entire agreement and complete settlement between the Parties and supersedes any and all previous agreements of any kind whatsoever between them, whether written or oral. All prior and contemporaneous discussions and negotiations have been and are merged and integrated into, and are superseded by this SETTLEMENT AGREEMENT. This is an integrated document.

8. In the event that any provision of this SETTLEMENT AGREEMENT or the application thereof should be held to be void, voidable, unlawful or, for any reason, unenforceable, the remaining provisions shall remain in full force and effect and to that end, the provisions of this SETTLEMENT AGREEMENT are declared to be severable.

9. This SETTLEMENT AGREEMENT is made and entered into, and shall be subject to, governed by and interpreted in accordance with the laws of the State of New Jersey and shall be fully enforceable in the courts of that state, without regard to principles of conflict of laws. The parties agree that any suit, action or other legal proceeding arising out of this SETTLEMENT AGREEMENT shall be brought in the Superior Court for the State of New Jersey, County of Cumberland.

10. In executing this SETTLEMENT AGREEMENT O'BRIEN, who has proceeded pro se, has had the opportunity to speak to an attorney and obtain legal advice as to the terms of this SETTLEMENT AGREEMENT, but has knowingly, willingly and voluntarily waived his right to consult with or to be represented by an attorney and agrees that the terms of this SETTLEMENT AGREEMENT are fully understood and voluntarily accepted.

11. This SETTLEMENT AGREEMENT shall not be executed in counterparts and shall be enforceable only if executed by O'BRIEN and the BOARD.

12. This SETTLEMENT AGREEMENT shall become effective immediately following the execution by O'BRIEN, approval by the BOARD and execution on behalf of the BOARD.

WHEREFORE, intending to be legally bound hereby, O'BRIEN and BOARD execute the foregoing SETTLEMENT AGREEMENT this 10th day of June, 2009.

WITNESS:

April S Carter

CHRISTOPHER O'BRIEN

WITNESS:

Kevin J. Franchetta

KEVIN J. FRANCHETTA, CPA
ASSISTANT SUPERINTENDENT
FOR BUSINESS/BOARD SECRETARY

Frank N Giordano

FRANK N. GIORDANO, BOARD
PRESIDENT

257-09

OAL DKT. NO. EDU 9953-08
AGENCY DKT. NO. 234-8/08

JESSICA OLIVERA-SOKOL, BEATRIZ MARIA BARROS, THELUSMA CADET, PAMELA EDUARDO, MARGARETTE M. ELIE, SARA LAFACE, JESSICA LUI, RONALD M. ORINICK, KELLIA PASTEUR, JEAN FILSAIME PIERRE, LOURDES SOTO, SHAWN R. STOKES, MELISSA THOEN, DENISE C. UNIACKE, AND JANET WALTON,	:	
PETITIONERS,	:	
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 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.

COMMISSIONER OF EDUCATION

Date of Decision: 8|13|09

Date of Mailing: 8|13|09



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9953-08

AGENCY DKT. NO. 234-8/08

JESSICA OLIVERA-SOKOL, BEATRIZ MARIA BARROS, THELUSMA CADET, PAMELA EDUARDO, MARGARETTE M. ELIE, SARA LAFACE, JESSICA LUI, RONALD M. ORINICK, KELLIA PASTEUR, JEAN FILSAIME PIERRE, LOURDES SOTO, SHAWN R. STOKES, MELISSA THOEN, DENISE C. UNIACKE, AND JANET WALTON,

Petitioners,

v.

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

Respondent.

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

Karen A. Murray, Esq., for respondent (The Murray Law Firm, attorneys)

Record Closed: July 14, 2009 Decided: July 15, 2009

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

On August 1, 2008, petitioners filed a Petition of Appeal with the Commissioner of Education challenging action by respondent Board of Education of the City of Elizabeth (the Board) related to a reduction in force.[1] On August 25, 2008, the Board filed its answer to the Petition of Appeal. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on September 2, 2008, for determination as a contested case. The undersigned held a prehearing conference on October 17, 2008. The hearing scheduled for March 24 and 26, 2009 was adjourned at the parties' joint request to provide additional time towards an amicable resolution of the matter. Subsequently, under letter dated July 8, 2009, counsel for the Board submitted the attached Settlement Agreement and 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

[1] The petition originally included seventeen petitioners. By letter dated March 31, 2009, petitioners' counsel informed the undersigned that two of the petitioners, Jennifer Lieberman and Peter Vosseler, were withdrawing their appeal.

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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, 2009
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: 7-20-09

Date Mailed to Parties: JUL 20 2009

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

jb

BUCCERI & PINCUS, ESQS.
1200 US Highway 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioners

JESSICA OLIVERA-SOKOL, BEATRIZ MARIA BARROS, THELUSMA CADET, PAMELA EDUARDO, MARGARETTE M. ELIE, SARA LAFACE, JESSICA LUI, RONALD M. ORINICK, KELLIA PASTEUR, JEAN FILSAIME PIERRE, LOURDES SOTO, SHAWN R. STOKES, MELISSA THOEN, DENISE C. UNIACKE and JANET WALTON,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	AGENCY REF. NO. 234-8/08 OAL DKT. NO. EDUOT 09953-2008N
v.	:	
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

This Settlement Agreement ("Agreement") is made and entered into between the **BOARD OF EDUCATION OF THE CITY OF ELIZABETH** (the "Board"), with offices at 500 North Broad Street, Elizabeth, New Jersey 07207 and **JESSICA OLIVERA-SOKOL**, residing at 8 Pine Hill Court, Dover, NJ, **BEATRIZ MARIA BARROS**, residing at 713 Floral Avenue, Elizabeth, NJ, **THELUSMA CADET**, residing at 19 Brookwood Drive, Maplewood, NJ, **PAMELA EDUARDO**, residing at 96 Marion Street, Carteret,

NJ, **MARGARETTE M. ELIE**, residing at 71 Tabb Avenue, Piscataway, NJ, **SARA LAFACE**, residing at 600 Riverside Drive, Cranford, NJ, **JESSICA LUI**, residing at PO Box 7244, Watchung, NJ, **RONALD M. ORINICK**, residing at 341 Mortimer Avenue, Rutherford, NJ, **KELLIA PASTEUR**, residing at 1 Joyce Drive, Piscataway, NJ, **JEAN FILSAIME PIERRE**, residing at 410 Holland Spring Drive, Powder Spring, GA, **LOURDES SOTO**, residing at 1651 Taylor Drive, North Brunswick, NJ, **SHAWN R.STOKES**, residing at 2715 Hudson Street, Piscataway, NJ, **MELISSA THOEN**, residing at 301 E. 47th Street, Apt. 11H, New York, NY, **DENISE C. UNIACKE**, residing at 11 Dawn Drive, Clark, NJ, **JANET WALTON**, residing at 1428 South Avenue, Apt. 5G, Plainfield, NJ, (the "Petitioners").

WHEREAS, The Petitioners were tenured social workers employed by the Board during the 2007-08 school year who filed a petition with the New Jersey State Commissioner of Education claiming that certain salary amounts were due and owing to them; and

WHEREAS, the Board and the Petitioners have elected to settle all outstanding matters in lieu of expending further resources and to eliminate the uncertainties of litigation; and

WHEREAS, the Board and the Petitioners have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

1. The Board shall pay the Petitioners listed below gross back salary for the month of July, 2008 in the amounts specified. These monies shall be subject to all normal payroll deductions. The parties agree that these amounts were calculated after deducting any and all mitigating salary earned from other employment during July, 2008:

BEATRIZ MARIA BARROS	$5,801.34
THELUSMA CADET	$5,554.84
PAMELA EDUARDO	$7,727.08
MARGARETTE M. ELIE	$6,410.92
JESSICA LUI	$6,047.92
JESSICA OLIVERA-SOKOL	$6,047.92
KELLIA PASTEUR	$6,047.92
JEAN FILSAIME PIERRE	$6,047.92
LOURDES SOTO	$7,102.10

SHAWN R.STOKES	$6,410.92
MELISSA THOEN	$5,946.92
JANET WALTON	$5,801.34

Each of the Petitioners receiving these payments has the obligation to refund any Unemployment Benefits received by them during July, 2008 to the State of New Jersey from the amount they receive. The Board will inform the New Jersey Department of Labor and Workforce Development of the payment of these amounts.

2. Some of the Petitioners have returned to employment in the Elizabeth School District after a period of layoff due to a reduction in force. The Board agrees that any of the following Petitioners who return to its employ shall be credited with accumulated sick days in the number specified below, based upon the sick days they had accumulated through June 30, 2008:

THELUSMA CADET	17 days
PAMELA EDUARDO	20.5 days
MARGARETTE M. ELIE	48 days
SARA LAFACE	1 day
RONALD M. ORINICK	64 days

KELLIA PASTEUR	17.25 days
JEAN FILSAIME PIERRE	60.75 days
MELISSA THOEN	15.5 days
DENISE C. UNIACKE	24 days

3. In return for compliance with this settlement agreement the Petitioners hereby agree to the dismissal, with prejudice, of the petition in this matter. The Board and the Petitioners acknowledge that this settlement must be approved by the Administrative Law Judge and the Commissioner of Education. Compliance with the terms of this Agreement, including payments of the amounts due, shall occur within sixty (60) days of approval of the Agreement by the Commissioner of Education. This Agreement shall be null and void if it is not so approved. In the event the Agreement is not approved, the parties shall be returned to the status quo ante and this litigation shall proceed thereafter as if settlement had not been reached.

4. The Board and the Petitioners further agree and understand that this Agreement is a compromise settlement of all claims asserted in connection with the Petition in this matter. Entering into this agreement does not

constitute an admission of wrong-doing, error or omission by the Board. The Board does not admit that it has violated Title 18A, state or federal law or any contractual provisions that might exist by virtue of its entry into this Agreement.

5. This Agreement does not constitute a past practice or policy in the Elizabeth School District. The terms of this Agreement do not apply to any employee other than the Petitioners and may not form the basis for a claim by other employees, nor act as a bar to claims by other employees, against the Board.

6. The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms. The Board shall adopt a resolution approving this settlement which shall be annexed hereto prior to the submission of this Agreement to the Administrative Law Judge.

7. All terms of this Agreement are deemed material. This document may not be altered, amended or modified except by an instrument executed in writing by all parties.

8. This Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.

9. This Agreement may be executed in counterparts but shall be enforceable only if executed by all of the Petitioners named herein and by the Board's authorized representatives.

10. In entering into this Agreement, the parties have each relied upon the legal advice of their respective attorney and have read its terms. Neither party shall be responsible for the counsel fees of the other party's attorney.

Attest:

, Board Secretary

Dated:

BOARD OF EDUCATION OF THE CITY OF ELIZABETH

BY: _____

, Board President

Dated:

Louis P. Bucceri

PETITIONERS:

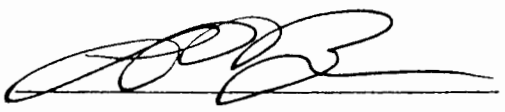
JESSICA OLIVERA-SOKOL

Dated: 06/07/09

JESSICA OLIVERA-SOKOL, BEATRIZ MARIA BARROS, THELUSMA CADET, PAMELA EDUARDO, MARGARETTE M. ELIE, SARA LAFACE, JESSICA LUI, RONALD M. ORINICK, KELLIA PASTEUR, JEAN FILSAIME PIERRE, LOURDES SOTO, SHAWN R. STOKES, MELISSA THOEN, DENISE C. UNIACKE and JANET WALTON,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
	:	AGENCY REF. NO. 234-8/08
	:	OAL DKT. NO. EDUOT 09953-2008N
Petitioners,	:	
v.	:	
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

I hereby agree to the terms of the Settlement Agreement:

Witness:





x BEATRIZ MARIA BARROS

Dated: 6/8/09

JESSICA OLIVERA-SOKOL, BEATRIZ MARIA BARROS, THELUSMA CADET, PAMELA EDUARDO, MARGARETTE M. ELIE, SARA LAFACE, JESSICA LUI, RONALD M. ORINICK, KELLIA PASTEUR, JEAN FILSAIME PIERRE, LOURDES SOTO, SHAWN R. STOKES, MELISSA THOEN, DENISE C. UNIACKE and JANET WALTON,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	AGENCY REF. NO. 234-8/08 OAL DKT. NO. EDUOT 09953-2008N
v.	:	
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

I hereby agree to the terms of the Settlement Agreement:

Witness:

6/9/09
Dated:

X 6/9/09 THELUSMA CADET
Dated:

JESSICA OLIVERA-SOKOL, BEATRIZ MARIA BARROS, THELUSMA CADET, PAMELA EDUARDO, MARGARETTE M. ELIE, SARA LAFACE, JESSICA LUI, RONALD M. ORINICK, KELLIA PASTEUR, JEAN FILSAIME PIERRE, LOURDES SOTO, SHAWN R. STOKES, MELISSA THOEN, DENISE C. UNIACKE and JANET WALTON,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
	:	AGENCY REF. NO. 234-8/08
	:	OAL DKT. NO. EDUOT 09953-2008N
Petitioners,	:	
v.	:	
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

I hereby agree to the terms of the Settlement Agreement:

Witness:

Pamela Eduardo

6-5-2009

x PAMELA EDUARDO

Dated:

JESSICA OLIVERA-SOKOL, BEATRIZ MARIA BARROS, THELUSMA CADET, PAMELA EDUARDO, MARGARETTE M. ELIE, SARA LAFACE, JESSICA LUI, RONALD M. ORINICK, KELLIA PASTEUR, JEAN FILSAIME PIERRE, LOURDES SOTO, SHAWN R. STOKES, MELISSA THOEN, DENISE C. UNIACKE and JANET WALTON,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
	:	AGENCY REF. NO. 234-8/08
	:	OAL DKT. NO. EDUOT 09953-2008N
Petitioners,	:	
v.	:	
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

I hereby agree to the terms of the Settlement Agreement:

Witness:

Marie Margarette Elie

Dated: 6/8/09

JESSICA OLIVERA-SOKOL, BEATRIZ MARIA BARROS, THELUSMA CADET, PAMELA EDUARDO, MARGARETTE M. ELIE, SARA LAFACE, JESSICA LUI, RONALD M. ORINICK, KELLIA PASTEUR, JEAN FILSAIME PIERRE, LOURDES SOTO, SHAWN R. STOKES, MELISSA THOEN, DENISE C. UNIACKE and JANET WALTON,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	AGENCY REF. NO. 234-8/08 OAL DKT. NO. EDUOT 09953-2008N
v.	:	
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

I hereby agree to the terms of the Settlement Agreement:

6/22/09

SARA LAFACE

Dated: 6/19/09

WITNESS:

Mary Louise LaFace

Dated: 6/19/09

JESSICA OLIVERA-SOKOL, BEATRIZ MARIA BARROS, THELUSMA CADET, PAMELA EDUARDO, MARGARETTE M. ELIE, SARA LAFACE, JESSICA LUI, RONALD M. ORINICK, KELLIA PASTEUR, JEAN FILSAIME PIERRE, LOURDES SOTO, SHAWN R. STOKES, MELISSA THOEN, DENISE C. UNIACKE and JANET WALTON,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	AGENCY REF. NO. 234-8/08 OAL DKT. NO. EDUOT 09953-2008N
v.	:	
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

I hereby agree to the terms of the Settlement Agreement:

Witness:

x Jessica Lui

Dated: 6/12/2009

JESSICA OLIVERA-SOKOL, BEATRIZ MARIA BARROS, THELUSMA CADET, PAMELA EDUARDO, MARGARETTE M. ELIE, SARA LAFACE, JESSICA LUI, RONALD M. ORINICK, KELLIA PASTEUR, JEAN FILSAIME PIERRE, LOURDES SOTO, SHAWN R. STOKES, MELISSA THOEN, DENISE C. UNIACKE and JANET WALTON,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	AGENCY REF. NO. 234-8/08
v.	:	OAL DKT. NO. EDUOT 09953-2008N
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

I hereby agree to the terms of the Settlement Agreement:

Witness:

Sharon Del Vecchio

SHARON DEL VECCHIO

Dated: 6-9-09

Ronald Orinick LCSW

Ronald Orinick

Dated: 6/9/09

JESSICA OLIVERA-SOKOL, BEATRIZ MARIA BARROS, THELUSMA CADET, PAMELA EDUARDO, MARGARETTE M. ELIE, SARA LAFACE, JESSICA LUI, RONALD M. ORINICK, KELLIA PASTEUR, JEAN FILSAIME PIERRE, LOURDES SOTO, SHAWN R. STOKES, MELISSA THOEN, DENISE C. UNIACKE and JANET WALTON,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	AGENCY REF. NO. 234-8/08 OAL DKT. NO. EDUOT 09953-2008N
v.	:	
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

I hereby agree to the terms of the Settlement Agreement:

Witness:

Kellia Pasteur

June 8, 2009

KELLIA PASTEUR

Dated:

Witness: Louis P. Bucceri

JESSICA OLIVERA-SOKOL, BEATRIZ MARIA BARROS, THELUSMA CADET, PAMELA EDUARDO, MARGARETTE M. ELIE, SARA LAFACE, JESSICA LUI, RONALD M. ORINICK, KELLIA PASTEUR, JEAN FILSAIME PIERRE, LOURDES SOTO, SHAWN R. STOKES, MELISSA THOEN, DENISE C. UNIACKE and JANET WALTON,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	AGENCY REF. NO. 234-8/08 OAL DKT. NO. EDUOT 09953-2008N
v.	:	
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

I hereby agree to the terms of the Settlement Agreement:

Witness:

Jean Filsaime Pierre

Dated: June 8th, 2009

JESSICA OLIVERA-SOKOL, BEATRIZ MARIA BARROS, THELUSMA CADET, PAMELA EDUARDO, MARGARETTE M. ELIE, SARA LAFACE, JESSICA LUI, RONALD M. ORINICK, KELLIA PASTEUR, JEAN FILSAIME PIERRE, LOURDES SOTO, SHAWN R. STOKES, MELISSA THOEN, DENISE C. UNIACKE and JANET WALTON,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	AGENCY REF. NO. 234-8/08
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BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

I hereby agree to the terms of the Settlement Agreement:

Witness:

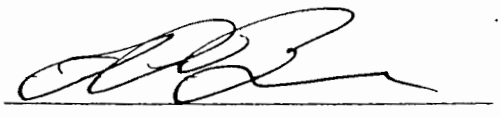
Lourdes Soto

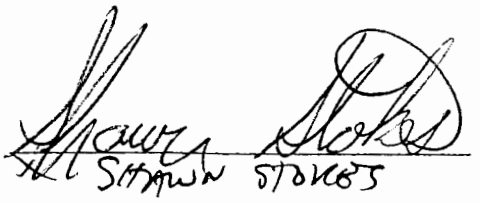
Dated: 6/6/09

JESSICA OLIVERA-SOKOL, BEATRIZ MARIA BARROS, THELUSMA CADET, PAMELA EDUARDO, MARGARETTE M. ELIE, SARA LAFACE, JESSICA LUI, RONALD M. ORINICK, KELLIA PASTEUR, JEAN FILSAIME PIERRE, LOURDES SOTO, SHAWN R. STOKES, MELISSA THOEN, DENISE C. UNIACKE and JANET WALTON,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	AGENCY REF. NO. 234-8/08 OAL DKT. NO. EDUOT 09953-2008N
v.	:	
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

I hereby agree to the terms of the Settlement Agreement:

Witness:





SHAWN STOKES

Dated: 6/6/09

JESSICA OLIVERA-SOKOL, BEATRIZ MARIA BARROS, THELUSMA CADET, PAMELA EDUARDO, MARGARETTE M. ELIE, SARA LAFACE, JESSICA LUI, RONALD M. ORINICK, KELLIA PASTEUR, JEAN FILSAIME PIERRE, LOURDES SOTO, SHAWN R. STOKES, MELISSA THOEN, DENISE C. UNIACKE and JANET WALTON,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	AGENCY REF. NO. 234-8/08 OAL DKT. NO. EDUOT 09953-2008N
v.	:	
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

I hereby agree to the terms of the Settlement Agreement:

Witness:

D. Thoen

6-17-09

Dated:

Melissa Thoen

Melissa Thoen

Dated: 6/17/09

JESSICA OLIVERA-SOKOL, BEATRIZ MARIA BARROS, THELUSMA CADET, PAMELA EDUARDO, MARGARETTE M. ELIE, SARA LAFACE, JESSICA LUI, RONALD M. ORINICK, KELLIA PASTEUR, JEAN FILSAIME PIERRE, LOURDES SOTO, SHAWN R. STOKES, MELISSA THOEN, DENISE C. UNIACKE and JANET WALTON,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
	:	AGENCY REF. NO. 234-8/08
	:	OAL DKT. NO. EDUOT 09953-2008N
Petitioners,	:	
v.	:	
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

I hereby agree to the terms of the Settlement Agreement:

Witness:

Denise C. Uniacke

x DENISE UNIACKE

Dated: 6/7/09

JESSICA OLIVERA-SOKOL, BEATRIZ MARIA BARROS, THELUSMA CADET, PAMELA EDUARDO, MARGARETTE M. ELIE, SARA LAFACE, JESSICA LUI, RONALD M. ORINICK, KELLIA PASTEUR, JEAN FILSAIME PIERRE, LOURDES SOTO, SHAWN R. STOKES, MELISSA THOEN, DENISE C. UNIACKE and JANET WALTON,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioners,	:	AGENCY REF. NO. 234-8/08 OAL DKT. NO. EDUOT 09953-2008N
v.	:	
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
Respondent.	:	**SETTLEMENT AGREEMENT**

I hereby agree to the terms of the Settlement Agreement:

Witness:

x Janet Walton

Dated: 6/8/09

10j

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P
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BOARD OF EDUCATION

WHEREAS, the Elizabeth Board of Education and Jessica Olivera-Sokol, et al. have discussed a resolution of Office of Administrative Law case (OAL Docket No. EDUOT 09953-2008N; Agency Reference # 234-8/08); 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 it has been signed by all parties.

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD JUNE 25, 2009

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

08-274

256-09

256-09W

OAL DKT. NO. EDU 1613-07
AGENCY DKT NO. 8-1/07

IN THE MATTER OF THE TENURE	:	
HEARING OF CURTIS ROBINSON,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
THE CITY OF PATERSON,	:	
PASSAIC COUNTY.	:	
	:	

This matter was recently returned to the agency as a withdrawal, pursuant to *N.J.A.C.* 1:1-19.2, purportedly upon advisement of such withdrawal from counsel for respondent. Although tenure charges can never be withdrawn by a respondent, it is noted that the subject of these charges, Curtis Robinson, was removed from his tenured position by the Commissioner on October 3, 2008 as a consequence of adjudication of a separate set of tenure charges filed in June of 2004 (OAL Dkt. No. 7481-04, Agency Dkt. No. 230-6/04). Consequently, this matter is hereby dismissed as moot.[1]

IT IS SO ORDERED.[2]

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 8/13/09

Date of Mailing: 8/13/09

[1] It is noted that subsequent to the receipt of the withdrawal, the parties were provided an opportunity to provide any objection they may have to the dismissal of the matter as moot. No objections 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).

Office Of Administrative Law

WITHDRAWAL FORM

OAL DKT. NO. : EDU 01613-07

CASE NAME: Curtis Robinson vs District of Passaic/Paterson County

DATES SCHEDULED: —

ALJ: RiGO **NOTIFIED:**

CALL/LETTER RECEIVED FROM: MARY HAMMER, ESQ

PHONE #: 973 773-5665

CALL/LETTER RECEIVED BY: AO **DATE RECEIVED:** 11-6-08

DATE CTS UPDATED: 11-6-08 **DATE OUTLOOK UPDATED:**

COMMENTS:

DUPLICATE OF: **RESCIND:**

RETURN:

6/8 smr

FOR CLERK'S OFFICE USE ONLY

258-09

OAL DKT. NO. EDU 8127-09
AGENCY DKT. NO. 131-6/09

D & B ENGINEERING OF NEW JERSEY, INC.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY AND TORMEE CONSTRUCTION, INC.,	:	DECISION
RESPONDENTS.	:	

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

Upon full consideration, the Commissioner concurs with the Administrative Law Judge that this matter is appropriately dismissed as 1) petitioner lacks standing to challenge the Board's bid award of a contract to Tormee Construction, Inc. which proposed utilizing Calmac rather than Fafco equipment and 2) its challenge to the bid specifications was untimely.

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

IT IS SO ORDERED.*

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/13/09
Date of Mailing: 8/13/09

* 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).

258-09

D & B ENGINEERING OF NEW JERSEY, INC.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SHORE REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY AND TORMEE CONSTRUCTION, INC.,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

D & B Engineering of New Jersey challenged the respondent Board's award of a contract for utility upgrades to respondent Tormee Construction, based upon a bid which was allegedly not the lowest responsive and responsible bid. Respondents assert that the petitioner lacks standing to bring this action as it is not a bidder but rather a vendor of specific equipment, and that the petition was untimely filed. The petitioner filed a motion for emergent relief.

The ALJ found, *inter alia,* that: petitioner is a vendor of heating, ventilation and air conditioner (HVAC) equipment and the sole supplier of Fafco brand equipment in the State of New Jersey; the respondent Board's bid specifications indicated a Fafco product, however, a bid addendum provided for an alternate product by another manufacturer; respondent Tormee Construction was awarded the contract as lowest responsible bidder utilizing the alternate bid specification; and petitioner's challenge was clearly out of time pursuant to *N.J.S.A.* 18A-15(e). The ALJ denied the emergent relief motion, and issued an Initial Decision dismissing the petitioner for lack of standing and on timeliness grounds.

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.

August 13, 2009



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8127-09

AGENCY REF. NO. 131-6/09

D&B ENGINEERING OF
NEW JERSEY, INC.,

Petitioner,

v.

BOARD OF EDUCATION OF THE
SHORE REGIONAL HIGH SCHOOL
DISTRICT, MONMOUTH COUNTY
AND TORMEE CONSTRUCTION, INC.,

Respondents.

Stephen J. DeFeo, Esq., for petitioner (Brown & Connery, attorneys)

John R. Tatulli, Esq., for respondent Shore Regional (Tucci and Tatulli, attorneys)

Anthony J. Belkowski, Esq., for respondent Tormee Construction, Inc. (Hedinger & Lawless, attorneys)

Record Closed: July 9, 2009 Decided: July 14, 2009

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner challenges the respondent board of education's award of a contract for utility upgrades to respondent Tormee Construction (hereinafter "Tormee") which did not include the product for which the petitioner is the sole vendor for in the state of New Jersey. The petition was filed on or about June 24, 2009. Pending resolution of the matter, petitioner seeks emergent relief, thereby staying the award to Tormee. The matter was transmitted to the Office of Administrative Law (OAL) on June 26, 2009, 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. The emergent relief petition was heard on July 6, 2009. I requested supplemental briefs and the record closed upon receipt of same on July 9, 2009.

While ordinarily an Order would be issued either granting or denying emergent relief and setting the matter for a hearing, in this instance, I am issuing an Initial Decision dismissing the case concluding that the petitioner lacks standing to challenge the bid award and even if it petitioner has standing, it untimely challenged the bid specification. Based upon the petition and argument advanced by petitioner's counsel at oral argument, I have concluded that petitioner is challenging both the bid specifications and award, respectively, notwithstanding its assertion to the contrary.

FACTUAL DISCUSSION

The following facts are undisputed and shall constitute findings of fact. Petitioner is essentially a vendor, a manufacturer's representative, who sells heating, ventilation and air conditioner (HVAC) equipment, to the commercial, industrial and public sectors in the state. It is the sole supplier of the Fafco brand of equipment in New Jersey. Respondent Tormee is a contractor. On May 19, 2009, Shore Regional opened public bidding for utility upgrades to its HVAC system as well as other areas throughout the high school.[1] The specifications in relation to the HVAC system indicated a Fafco

[1] Although respondent BOE asserts in its opposition to the emergent relief application that public bidding opened on May 25, 2009, in its supplemental submission that I requested, the addendum documents dated May 4, 2009, reflect that the bid opening date was May 19, 2009.

product and the addendum, which was available on or about May 6, 2009, provided for an alternate bid for "Calmac Manufacturing Corporation ice storage tanks in lieu of the Fafco Ice Storage Banks specified."[2] On May 28, 2009, Shore Regional awarded the contract to Tormee as the lowest responsible bidder but utilizing the alternate bid specification which included the Calmac equipment in lieu of the Fafco equipment. The Tormee winning bid was $9,882,777.00.[3] Regardless of whether the board of education awarded Tormee the contract with or without including the Fafco equipment, which was $18,000.00 less than the Calmac product, Tormee was still the lowest responsible bidder. Petitioner does not dispute that Tormee is a responsible bidder or contractor.[4]

LEGAL ANALYSIS

Respondents[5] assert petitioner lacks standing to bring the within action and that it is untimely filed.

With regard to standing, they assert that petitioner is not a bidder but instead a vendor of specific equipment. Petitioner relies upon general contractors, such as Tormee, to include its equipment as part of a larger bid proposal seeking to obtain an award. As such, respondents contend, it is not entitled to challenge the award.

Petitioner contends the standing issue is irrelevant and that public policy in this state favors a decision on the merits.

However, that argument ignores the Supreme Court's differentiation between a challenge to a bid specification and a challenge to a bid award. In Jen Electric, Inc., v. County of Essex, 197 N.J. 627(2009), Justice Rivera-Soto, writing for the majority,

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[2] See alternate bid GC-17, attached as exhibit G to the respondent's opposition.
[3] See exhibit F attached to the respondent's opposition.
[4] Indeed, petitioner initially asserted in support of its application that it was not claiming that Tormee failed to meet the bid specification. At the hearing, petitioner asserted, after reviewing the affidavits submitted in opposition to the emergent relief application, that the Calmac product did not meet specifications. However, that assertion ignores the threshold issues of standing and timeliness as well as the fact that the Calmac product was provided for in the alternate bid specifications.
[5] Respondent Tormee entered an appearance at the emergent relief hearing and participated in oral argument. Counsel submitted a letter brief on July 9, 2009.

concluded that a potential supplier of equipment had standing to timely challenge a bid specification based upon the "liberal rules of standing" recognized in this state. Id., at 645, citing New Jersey Builders Ass'n v. Bernards Twp., 219 N.J. Super. 539 (App. Div. 1986). With regard to challenging a bid award, Justice Rivera-Soto, discussing the Appellate Division's decision which found no standing, wrote:

> ... the Appellate Division concluded that 'it is well established that only taxpayers, bidders, and prospective bidders may challenge the award of a contract to the successful bidder.' Jen Electric., Inc., supra, 401 N.J. Super. at 212, 949 A. 2d 861. One cannot quarrel with that proposition.
> [Jen Electric, supra, at 644.]

Although petitioner contends that it is challenging the bid award solely, it is also challenging the bid specifications because, it asserted at the emergent relief hearing that the Calmac product was contrary to bid specifications. However, the Calmac equipment was included in the bid specification addendum as an alternate acceptable bid. As such, petitioner was required to challenge the bid by filing the challenge in writing with the purchasing agent "no less than three business days prior to the opening of the bids." N.J.S.A. 18A:18A-15(e). In concluding that a vendor would have standing to challenge a bid specification, Justice Rivera-Soto, interpreted the 2000 amendment to the Public Contracts Law, N.J.S.A. 40A:11-13. That amendment mirrors the amendment to the Public School Contracts Law, N.J.S.A. 18A:18A-15, both of which became effective on April 17, 2000. The language of statutory amendments is essentially the same. N.J.S.A. 18A:18A-15(e), provides:

> Any prospective bidder who wishes to challenge a bid specification shall file such challenges in writing with the purchasing agent no less than three business days prior to the opening of the bids. Challenges filed after that time shall be considered void and having no impact on the board of education or the award of a contract.

Petitioner sent a letter of protest dated May 26, 2009, to Dennis Kotch, Shore Regional's Business Administrator. Regardless of whether the bid opening date was May 19, 2009, or May 25, 2009, the protest was clearly out of time, relying upon the time limitation set forth at N.J.A.C. 18A:18A-15(e).

Based upon the foregoing discussion, I am issuing this Initial Decision dismissing the petition for lack of standing and on timeliness grounds. I have not addressed other issues raised by the petitioner at the hearing relating to whether the Calmac product complies with the specifications or which is the better product because it is not necessary to reach those issues. However, alternatively addressing the merits of the emergent relief petition, if the Commissioner determined that petitioner has standing and has timely filed the protest to the bid specification, I would deny emergent relief as petitioner has not met all the criteria set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). In that regard, the likelihood of prevailing on the merits of the claim does not inure in its favor as the Calmac equipment was specified in the bid specifications alternate bid addendum. As respondents assert, the use of brand names "or equivalents" for specification in bid proposals complies with the statutory goal. N.J.S.A. 18A:18A-15(d).

DECISION AND ORDER

Based on the foregoing, this 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.

July 14, 2009
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

Date Received at Agency: 7-14-09

Date Mailed to Parties: 7-14-09

/jfk

260-09

SCHOOL ETHICS COMMISSION DKT. NO. C41-07
COMMISSIONER DKT. NO. 2-3/09A

JENNIFER DERICKS, MAUREEN SHARPE, DARYL SAVAGE, SHIRLEY BOUSHELL, ARMEN KOOCHAGIAN, AND RONALD BASSANI,	:	
COMPLAINANTS-RESPONDENTS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
MICHAEL SCHIAVONI, BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA, SUSSEX COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decided by the School Ethics Commission, February 24, 2009

For Complainants-Respondents, Maureen Sharpe, *Pro Se*[1]

For Respondent-Appellant, Howard B. Mankoff, Esq.
(Marshall, Dennehey, Warner, Coleman & Goggin, PC)

The above-captioned matter came before the Commissioner of Education by way of a March 19, 2009 appeal by Respondent-Appellant Michael Schiavoni (respondent) of the February 24, 2009 decision of the School Ethics Commission finding him in violation of *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members and recommending a penalty of censure. In its decision, the Commission specifically determined that respondent – at the time President of the Sparta Board of Education (Board) – took private action capable of compromising the Board by submitting a letter to the editor, dealing with Board matters, for

[1] Where a complaint is submitted by more than one person, the Commission may designate a lead complainant – in this case Ms. Sharpe – for purposes of communication. See Commission's decision at 3, note 2.

publication in the *Sparta Independent* in response to an article appearing a few days earlier, without the prior review and consent of the Board.[2]

In appealing to the Commissioner, respondent argues that the Commission erred in finding him in violation of the Code of Ethics, contending that the Commission failed to accord appropriate weight to the undisputed fact that he conferred with Board counsel prior to sending the letter in question – which, according to respondent, distinguishes this matter from the cases cited by the Commission in support of its position. Respondent proffers that: 1) he reasonably assumed he was in compliance with the School Ethics Act, since he had counsel's approval of a final letter which was fact-based rather than an expression of opinion; 2) counsel was clearly aware that the letter had not been formally approved by the Board; 3) there is no evidence that any member of the Board objected to the letter; 4) neither any individual Board member nor the Board as a whole, nor the Superintendent, subsequently wrote to the *Sparta Independent* to dispute the accuracy of the letter's contents or respondent's authority to write it; and 5) the Board was not scheduled to meet for several weeks "so any BOE response would [have been] untimely had [respondent] delayed for the next BOE meeting for Board member concurrence of the letter." (Respondent's Appeal Brief at 2-4, quotation at 4) Moreover, respondent continues, even if the Commissioner agrees that a violation occurred, the Commission's recommended penalty is excessive because respondent's action did not involve "personal gain, self dealing or conflict of interest," and no member of the public was harmed; respondent opines that a reprimand is the appropriate penalty in this case, where "a lay person

[2] This matter was heard as part of a consolidated proceeding involving two additional complaints (C46-07 and C47-07) filed by the same complainants against respondent and other Sparta Board members. The complaints in those matters, as well as the additional allegations in the complaint herein, were dismissed by the Commission and are not before the Commissioner on appeal. *N.J.A.C.* 6A:4-1.3(c)1, referencing *N.J.S.A.* 18A:12-29(b) and *N.J.A.C.* 6A:28-11.1.

[made] an erroneous decision that the reliance on counsel was reasonable, and prudent." (*Id.* at 4-5)

In reply, complainants counter that: 1) the Commission did not find, contrary to respondent's assertion, that the statements in respondent's letter were factually accurate – indeed, complainants maintain they were not; 2) the review and opinion of an attorney, whatever it may be, does not override the responsibility of a board member to seek input from the full board before taking private action, nor does an attorney's advice relieve board members from adhering to the School Ethics Act; 3) respondent could have waited a week to submit his letter, or communicated with Board members by email or called a special meeting – as he frequently did on other occasions – immediately upon reading the article to which he thought it so important to respond; and 4) the question of objections to respondent's letter by individual Board members was not raised at hearing, otherwise complainants "would have been happy to provide written documentation of the objections of at least one [Board] member." Complainants contend that the penalty of censure is entirely appropriate, especially given respondent's own recognition – as evidenced by his emails subsequent to sending the letter[3] – that he should have discussed the letter with the entire Board before submitting it for publication in the newspaper; they further contend that harm was, indeed, done by the letter, which gave the impression that the full Board shared respondent's negative view of the statements and actions of the district's superintendent. (Complainants' Answer Brief at 1-3, quotation at 2)

Upon careful review and consideration, the Commissioner can find no basis on which to disturb the decision of the School Ethics Commission as to its determination of violation, since the Commission's decision is supported by sufficient credible evidence in the

[3] Exhibits C-3, C-5 and C-6.

record, and respondent has not demonstrated that such decision is arbitrary, capricious or contrary to law. *N.J.A.C.* 6A:4-4.1(a) Indeed, the Commissioner fully concurs with the Commission that:

> ***While Schiavoni, as the President, may have been the spokesman for the Board at the time, and while he was addressing Board issues in his letter, ***by rushing to submit the letter to the editor without first obtaining the consent of the Board, Schiavoni failed to recognize that the authority to address any perceived problems with the October 26th article rested with the Board. To the extent that Mr. Schiavoni maintained that the October 26th article required rebuttal, he should have brought the matter to the attention of the Board for review, even if that meant delaying the publishing of the article for another week. Having failed to do so, ***Mr. Schiavoni took "private action;" i.e., action taken by a member of a district board of education that is beyond the scope of the duties and responsibilities of the member. *N.J.A.C.* 6A:28-7.1.
>
> *** Because the letter to the editor in C41-07 clearly addresses Board business and is plainly intended to speak *for* the Board of Education, *** there was a reasonable likelihood that the public would perceive this letter to be an official statement of the Board's position. ***[Therefore,] Schiavoni's private action could have compromised the Board if, indeed, the Board did not subscribe, as whole, to the statements made in the letter to the editor, particular[ly] since these statements concerned the administration of the schools. Accordingly, ***Mr. Schiavoni violated *N.J.S.A.* 18A:12-24.1(e).
>
> (Commission's Decision at 13-14)

The Commissioner further finds the Commission's analysis to hold true regardless of whether respondent's letter was intended to be "fact-based" or an expression of opinion – and regardless of whether the statements within it were true or not – since the very act of deciding whether, when and how to reply to a published letter, and selecting the information with which to counter it, in itself constitutes the taking of an official board position. Nor is the Commissioner persuaded by respondent's attempt to insulate himself from the consequences of his actions by pointing to the Board attorney's review of the letter prior to its submission to the newspaper – particularly since the appropriateness of such review and the specific nature and scope of the

discussions on which respondent purportedly relied is not at all clear from the record.[4] Finally, respondent's contention that there was no clearly or publicly stated after-the-fact objection to his action on the part of Board members is of no import, even accepting it as true,[5] since the acquiescence of individual board members – or even the Board as a whole – to a violation by one of their number does not alter the fact that the violation occurred.

Similarly, the Commissioner deems entirely appropriate the Commission's recommended penalty of censure. Although recognizing that the board members in the matters cited (at 13-14)[6] as precedent for the Commission's finding of violation received reprimands for their respective offenses – the penalty suggested by respondent in the event the Commissioner upholds the Commission's determination of violation – the Commissioner finds those matters distinguishable in that: 1) there is no indication on record that respondent herein was a new or inexperienced Board member; 2) the Board has clear policies (Exhibit C-4) addressing both the inability of individual members to speak on behalf of the full Board without authorization to do so[7] and the duties of the President; 3) the School Ethics Commission had, by the time of respondent's actions, published at least two decisions establishing that *N.J.S.A.* 18A:12-24.1(e)

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[4] The record before the Commissioner suggests, if anything, that counsel's review may have been limited to a determination of whether the statements in respondent's letter were "factual" and "accurate." Nothing in this record supports respondent's claim on appeal that the Board attorney was "clearly aware" that the letter had not been approved by the Board, nor is there any indication that respondent sought advice regarding – or that he and counsel even discussed – the propriety of his actions under the School Ethics Act. In this latter regard, the Commissioner notes that respondent neither objected to the Commission's summation of testimony nor provided a transcript of proceedings to support proposed additional findings of fact. *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987)

[5] In actuality, the Board minutes of November 6, 2009 (Exhibit C-2) and emails from respondent to Board member Keith Smith (Exhibits C-5 and C-6) suggest that respondent's actions *did* cause concern, if not outright objection, on the part of at least one Board member.

[6] *I/M/O Bruce Freilich, Washington Township Bd. of Education*, C18-04 & C19-04 Consolidated, (April 4, 2005), Commissioner Decision No. 156-05, decided May 2, 2005; *I/M/O Randie Zimmerman*, C49-02 (July 22, 2003), Commissioner Decision No. 497-03, decided August 21, 2003.

[7] The Commissioner notes that Board Policy No. 9120, to which Policy 0146 makes reference, is not included in the record; however, respondent did not claim that he acted pursuant to such policy.

was violated by communications from individual board members purporting or appearing to represent the full board;[8] 4) there is no evidence on record that respondent was advised by counsel that sending the letter in question would not be a violation of the School Ethics Act; and 5) respondent's actions had significant implications for both the Board and the public, in that he as an individual unilaterally usurped the full Board's sole authority to determine whether, when and how to officially respond to a newspaper article (Exhibit C-7) dealing with Board issues that were obviously sensitive, contentious, and of significant interest to township residents – thereby leading the public to believe his own reaction was, in fact, that of the Board.

Nor is the Commissioner persuaded by respondent's contention that he did not act in a manner that involved "personal gain, self dealing or conflict of interest." While the Commissioner recognizes that such was, in fact, the case in the matters cited by the Commission (at 25-26)[9] in support of its recommended penalty, the Commissioner cannot permit personal benefit or inconsistent interest – whether actual or potential – to become necessary preconditions to imposing a penalty of censure for a single offense where, as here, the violation is sufficiently serious and respondent's conduct cannot be sufficiently excused by circumstances established in the record so as to warrant a lesser penalty.

Accordingly, for the reasons set forth therein and above, the Commissioner affirms the decision of the School Ethics Commission finding that respondent Michael Schiavoni

[8] The aforementioned decisions are available online at http://www.state.nj.us/education/legal/ethics/2005/c18-04c19-04v.pdf and http://www.state.nj.us/education/legal/ethics/00-03/c4902.pdf, respectively.

[9] *I/M/O Raymond Bonker, Lenape Valley Reg'l Bd. of Ed.*, C11-97 (March 30, 1998), Commissioner Decision No. 225-98, decided May 22, 1998; *I/M/O Lawrence James, Chesilhurst Bd. of Ed.* C10-98 (December 15, 1998), Commissioner Decision No. 30-99, decided February 9, 1999; *I/M/O Doris Graves, Pleasantville Bd. of Education*, C47-05 (May 27, 2008), Commissioner Decision No. 301-08, decided July 10, 2008.

violated *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members, and adopts the Commission's recommendation that Mr. Schiavoni be censured for such violation.

IT IS SO ORDERED.[10]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8|18|09
Date of Mailing: 8|19|09

[10] 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).

JENNIFER DERICKS, MAUREEN SHARPE, DARYL SAVAGE, SHIRLEY BOUSHELL, ARMEN KOOCHAGIAN, RONALD BASSANI,	:	BEFORE THE SCHOOL ETHICS COMMISSION
	:	DOCKET NO. C41-07
v.	:	
MICHAEL SCHIAVONI, SPARTA BOARD OF EDUCATION, SUSSEX COUNTY	:	DECISION (CONSOLIDATED)

MAUREEN SHARPE, DARYL SAVAGE, SHIRLEY BOUSHELL, ARMEN KOOCHAGIAN, RONALD BASSANI,	:	BEFORE THE SCHOOL ETHICS COMMISSION
	:	DOCKET NO. C46-07
v.	:	
PAUL JOHNSON, MICHAEL SCHIAVONI, MICHAEL SCHILL, SPARTA BOARD OF EDUCATION, SUSSEX COUNTY	:	DECISION (CONSOLIDATED)

JENNIFER DERICKS, MAUREEN SHARPE, DARYL SAVAGE, SHIRLEY BOUSHELL, ARMEN KOOCHAGIAN, RONALD BASSANI,	:	BEFORE THE SCHOOL ETHICS COMMISSION
	:	DOCKET NO. C47-07
v.	:	
LINDA CURCIO, PAUL JOHNSON, MICHAEL SCHIAVONI, KAREN SCOTT, RICHARD SULLIVAN, SPARTA BOARD OF EDUCATION, SUSSEX COUNTY	:	DECISION (CONSOLIDATED)

PROCEDURAL HISTORY

This matter arises from three complaints filed on October 22, 2007, November 13, 2007 and November 23, 2007 by various complainants, as set forth above, against members of the Sparta Board of Education ("Board") alleging violations of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. Specifically, the complainants allege that the respondent violated the Code of Ethics for School Board Members.

In the matter docketed as C41-07, complainants Jennifer Dericks, Maureen Sharpe, Daryl Savage, Shirley Boushell, Armen Koochiagian and Ronald Bassani assert that: (1) Respondent Michael Schiavoni, violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members when he wrote a letter to the editor which was published on November 2, 2006 (Complaint at paragraph 1); (2) Board member Schiavoni violated N.J.S.A. 18A:12-24.1(a), (g) and (i) pursuant to statements made in the letter to the editor (Id. at paragraph 2); (3) Schiavoni's statements in the letter to the editor with respect to the hiring of supplemental counsel violated N.J.S.A. 18A:12-24.1(a), (c), (d), (g) and (i) of the Code of Ethics for School Board Members. (Id. at paragraph 3 – first part)[1]; (4)Bo ard members Linda Curcio, Paul Johnson, Michael Schill and Richard Sullivan violated N.J.S.A. 18A:12-24.1(a), (c), (d), (g) and (i) of the Code of Ethics by voting on August 14, 2006 to approve a resolution to approve supplemental counsel. (Id. at paragraph 3 – second part); and (5) In presenting differing reasons for the hiring of supplemental counsel, Schiavoni was "lying to the public" in violation of N.J.S.A. 18A:12-24.1(a) and (e). An Answer to the complaint docketed as C41-07 was filed on December 10, 2007.

In the matter docketed as C46-07, complainants Maureen Sharpe, Daryl Savage, Armen Koochiagian and Ronald Bassani assert that respondents Paul Johnson, Michael Schiavoni, and Michael Schill violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members when they wrote letters to the editor and placed ads in the newspaper. An Answer to the complaint docketed as C46-07 was filed on January 18, 2008.

In the matter docketed as C47-07, complainants Jennifer Dericks, Maureen Sharpe, Daryl Savage, Shirley Boushell, Armen Koochiagian and Ronald Bassani assert that: (1) Respondents Linda Curcio, Paul Johnson, Michael Schiavoni, Karen Scott and Richard Sullivan made critical, negative and evaluative statements about the administration and citizens of the District in a series of newspaper articles; (2) Michael Schiavoni made a presentation at the January 8, 2007 Board meeting without the input of the Board; (3) Paul Johnson improperly sent letters on June 27, 2006 to solicit law firms and was thereafter involved in the selection of supplemental counsel; and (4) Michael Schiavoni met with a member of the teachers' association without direction or knowledge of the Board. The complainants assert these actions violated N.J.S.A. 18A:12-24.1(e), (g), and (i) of the Code of Ethics for School Board Members. An Answer to the complaint docketed as C47-07 was filed on January 4, 2008.

In March 2008, the Commission learned that Mr. Schiavoni filed a matter in Superior Court, which appeared to necessitate that the complaints be placed in abeyance, as per N.J.S.A.

[1] The Commission is granting these *pro se* complainants the benefit of the doubt as to the specific violations alleged inasmuch as this portion of the complaint is difficult to understand.

18A:12-32. The parties were so notified by letter dated April 3, 2008; after providing an opportunity to comment, at its meeting on May 27, 2008, the Commission determined to place the complaints in abeyance pending resolution of the matter filed in Superior Court.

The lawsuit was dismissed in September 2008; the parties were immediately contacted to arrange for a telephone conference in order to set hearing dates. A conference call was conducted on October 21, 2008 with lead complainant, Ms. Maureen Sharpe[2], complainant Jennifer Dericks and counsel for the respondents, Howard Mankoff, Esq. The parties did not object to consolidating the above-captioned matters for hearing and decision by the Commission. This consolidated matter was set for hearing on November 25, 2008 and, thereafter, continued on December 16, 2008 and January 27, 2009.

Pursuant to a Motion to Dismiss, on December 16, 2008, the Commission determined to dismiss the allegation that respondents violated N.J.S.A. 18A:12-24.1(a), as summarized below. Testimony for these consolidated matters concluded on January 27, 2009. At its meeting on February 24, 2009, the Commission found that respondent Michael Schiavoni violated N.J.S.A. 18A:12-24.1(e), as alleged in the matter docketed as C41-07 and voted to recommend that he be censured; all other allegations in the matters docketed as C41-07, C46-07 and C47-07 were dismissed.

SUMMARY OF THE RECORD

On November 25, 2008, the matter docketed as C41-07 was heard by the Commission.[3] In attendance were complainants Maureen Sharpe, Ronald Bassani, Daryl Savage and Jennifer Dericks. Ms. Dericks presented the case for complainants. In attendance for respondents were Linda Curcio, Paul Johnson, Richard Sullivan, Michael Schill and Howard Mankoff, Esq. Michael Schiavoni attended by phone.

Ms. Dericks testified that Schiavoni's letter to the editor which was published on November 2, 2006 contained misinformation, which compromises the Board. In order to demonstrate that the letter to the editor contained untrue and inaccurate statements, Ms. Dericks presented testimony which essentially consisted of a series of exhibits;C -1 through C-11 and C-

[2] Where a complaint is submitted by more than one person, a lead complainant may be designated by the Commission for the purpose of communication.

[3] At its meeting on November 25, 2008, the Commission determined not to hear the allegations against respondents Curcio, Johnson, Schill and Sullivan, as set forth in the second part of paragraph 3 of the complaint in C41-07 with respect to their vote on August 14, 2006 in that such allegations were untimely filed, pursuant to N.J.A.C. 6A:28-6.1(b). (See, IMO Glascoe and Rush, Paterson Board of Education, C36-07 (August 26, 2008) wherein the Commission determined that "notice of the alleged violation" pursuant to N.J.A.C. 6A:28-6.1(b) must be interpreted in a manner that anticipates the reasonable diligence of the complainants.) Here, all documentation which formed the basis of the allegations was a matter of public record. Absent any indication that the facts as alleged by the complainants were unavailable or otherwise concealed from them, the Commission need not reach to untimely claims. At the Commission's December 16, 2008 meeting, counsel for the respondents moved to have these respondents dismissed from the matter docketed as C41-07. The motion was granted.

13 were accepted into the record and are identified below. She also presented Exhibits C-12 and C-14, which were not accepted into the record.[4]

Ms. Dericks testified that Schiavoni's letter called into doubt the veracity of the Superintendent. Ms. Dericks further testified that she believed that Schiavoni's involvement in a parental complaint which arose in the summer of 2006 was contrary to Board policy.

Ms. Dericks testified on the issue of hiring additional counsel in the summer of 2006. She noted that Exhibit C-10, the Board minutes from the date when counsel were approved, uses the term "supplemental" counsel, although Schiavoni's letter says this "is an inaccurate statement." (Exhibit C-1) Ms. Dericks offered C-11 into evidence in order to demonstrate that there was regular contact with supplemental counsel in the summer of 2006 and their hiring was not because of any actions taken by the Superintendent, as stated in the letter to the editor. When asked on cross-examination whether the Superintendent had ever been denied access to legal advice, Ms. Dericks stated that the new policy with respect to getting legal advice added a layer – an "unnecessary" requirement. Ms. Dericks stated that she did not know whether the president or vice president of the Board ever denied access to anyone; she did not know if Dr. Morton was ever denied access. However, she testified that President Schiavoni was overstepping his bounds. The very nature of this policy was to limit access to counsel. Ms. Dericks questioned what gave the Board the background and expertise for adopting such a policy.

Ms. Dericks referenced paragraph four of the complaint wherein the complainants allege that Schiavoni was "lying to the public" because he made statements, as quoted in a newspaper article, which attributed the hiring of additional counsel to a reconstruction project, but the letter said otherwise.

When cross-examined on the issue of hiring additional counsel, Ms. Dericks initially stated that she did not know why they were hired. She then stated that the Board's existing counsel was retained to continue work on union and special education issues and the Board already had bond counsel and construction counsel. According to Ms. Dericks, the "bottom line" was that the hiring was not for construction and they were not hired to deal with communications from Dr. Morton's attorney, because "the whole process" began earlier.

When cross-examined on the question of how the Board was compromised by the letter to the editor, Ms. Dericks asserted that the Board's authority was undermined because one person was speaking for them and making inaccurate statements, although she could not identify anything specific which the Board was unable to accomplish. Ms. Dericks said that this letter and other actions helped to raise questions about the authority of the Board, and whether the District was a good place to work. When pressed on this issue, Ms. Dericks stated that this letter was merely the "tip of the iceberg." State stated that in the public's view, making repeated inaccurate statements and attributing inaccuracies to the Superintendent erodes the public's confidence. She stated that the inaccuracies were the Board President's and the public was left unknowing. The two documents that were released by Dr. Morton have not been called into question.

[4] The complainant's testimony in this regard was not based on her first-hand knowledge of events, but, rather on the possession of public documents which she alleges support the claims of violation.

When cross-examined on the issue of Board oversight for the transfer of personnel, Ms. Dericks stated that the action referenced in the letter to the editor was actually a reassignment and there was no oversight function by the Board. She statedt hat this was confirmed by the New Jersey School Board's Association (NJSBA). The fact that the Superintendent placed the item on the Board's agenda was, according to Ms. Dericks, "just a courtesy."

Ms. Dericks could not point to any inaccuracies in the last two paragraphs of the letter to the editor.

Tom Morton, Superintendent of Schools, presented testimony for the complainants. Dr. Morton testified that there is a distinction between the reassignment of staff within a building, which is within the purview of the Superintendent versus a "transfer" either between certifications or between buildings, which requires approval by the Board. The employee action referenced in the Schiavoni letter to the editor was, according to Dr. Morton, a reassignment within the building from vice principal's secretary to library secretary. Dr. Morton testified that he advised the Board that it was not their role to oversee such actions. The board also received advice from the NJSBA and from board counsel that it was not their role. Dr. Morton stated that a principal who left the district indicated to him that the Board's involvement in this decision led to his resignation. On cross-examination, Dr. Morton stated that this principal was one of six administrators who left the district and attributed their leaving to the Board's micro-management.

Dr. Morton also testified about the process for investigating complaints raised by parents, in that this issue was also addressed in the letter to the editor. His process was to meet with parents or staff, and go back to the employee to discuss the matter. He testified about a letter that was sent to the Board of Education and the Board got involved. According to Dr. Morton, there was a discussion between the Board President and himself regarding the need to discuss with the Board, when Dr. Morton returned from vacation, what had transpired between the parents and Dr. Morton. Dr. Morton suggested that he and the Board President should meet when he returned from vacation. On his first day back to work, the Board asked the principal and the secretary, who were the employees involved in the matter, to appear at a board meeting. His understanding is that Mr. Schiavoni directed the assistant superintendent to send a "Rice"[5] notice to the involved employees. Dr. Morton testified that he was very angry that the Board had the meeting without input from him; he felt that this meeting was an interrogation of the principal and the secretary, after which the employees were asked to leave and they spoke to parents for a long time.

Dr. Morton testified that he believed there was a meeting with the assistant superintendent and the parents; the Board President and Vice President were supposed to attend, but did not. Dr. Morton affirmed that he has informed Board members in writing that they

[5] "Rice" notice refers to the matter entitled, *Rice v. Union County Regional High School Bd. of Ed.*, 155 *N.J. Super.* 64 (App. Div. 1977), certif. den. 76 *N.J.* 238 (1978) which established the right of employees to obtain notice when they will be discussed by the Board of Education.

should not be directing employees to take any action; communications to staff should go through him. Dr. Morton stated that, in his absence, he was not aware that the assistant superintendent was directed by the Board to investigate this parental complaint, although he was in daily contact with his office while away.

On cross-examination, Dr. Morton stated that he believed that the Board should investigate what comes before them; in this case, they should have spoken to him. Here, they "Riced" the employees without his knowledge and proceeded to "grill" them in a meeting. Dr. Morton stated there was never an opportunity at that meeting for him to share what was going on. Dr. Morton acknowledged that Schiavoni's letter was accurate in stating that there was a meeting in closed session. Dr. Morton said he does not know who suggested the meeting, as referenced in Schiavoni's letter, although the Rice letters were signed by the assistant superintendent. Dr. Morton could not confirm whether Schiavoni's statement in his letter that the meeting was "suggested by a senior administrator, and the board followed the administrator's recommendation and arranged for the principal to meet with the board," was accurate. (Exhibit C-1).

Dr. Morton testified about the Board's desire for supplemental counsel. He stated that the Board did not discuss with him the need for additional counsel; they did not seek his advice. Rather, he testified that there was discussion after the fact. Dr. Morton stated that the Board approved a policy that no administrator could contact an attorney and no attorney could contact an administrator; this made it difficult to get a legal opinion on any issue, particularly where there was a need for a quick response. Dr. Morton affirmed that he never took legal action against the Board and the first letter written by his attorney was in August 2006. On cross-examination, Dr. Morton acknowledged that after the Board approved its initial resolution limiting attorney access, it later created an exception to this prohibition.

Dr. Morton testified that Board members Keith Smith, Jonathon Rush and Kevin Pollison indicated to him that the Board talked to the new counsel and directed new counsel to do everything in his power to get rid of the Superintendent of Schools. Dr. Morton stated that when the Superintendent is questioned publicly on everything he does, it raises questions among the public and staff and also affects potential candidates coming to the district. On cross-examination, Dr. Morton acknowledged that there are ways that a Board can be critical and going through the press is detrimental to everyone. Dr. Morton stated that he could be criticized in open session, with just cause. But there is a process to be followed to conduct evaluations and have discussion in a closed session.

The matter docketed as C41-07 was continued at the Commission's meeting on December 16, 2008. Prior to presenting their case on C41-07, the respondents made a motion to dismiss N.J.S.A. 18A:12-24.1(a) as a potential violation. Respondents' counsel argued that the Commission's regulations require that, in order to prove factually a violation of N.J.S.A. 18A:12-24.1(a), a complainant:

> shall include a copy of a final decision from any court of law or administrative agency of this State that finds the respondent(s) failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that the

> respondent[s] brought about changes through illegal or unethical means. N.J.A.C. 6A:28-6.9(b).

At no time, however, did the complainants assert that a final decision has been rendered with respect to these respondents from any court of law or administrative agency of this State as is their burden when bringing forth an allegation under N.J.S.A. 18A:12-24.1(a). As such, the Commission determined to dismiss the allegation in C41-07 that the respondent violated N.J.S.A. 18A:12-24.1(a)[6].

In attendance at the December 16, 2008 meeting were complainants Jennifer Dericks, Maureen Sharpe, Daryl Savage and Ronald Bassani. Respondents Michael Schiavoni, Paul Johnson, Linda Curcio and Karen Scott were in attendance along with their attorney Howard Mankoff, Esq.

Mr. Schiavoni provided testimony regarding the letter to the editor of the Sparta Independent on November 2, 2006. He testified that prior to submitting his letter to the editor, he asked for attorney review and the letter was then submitted to the newspaper. Mr. Schiavoni testified that he wrote the letter in response to an article that had been written in the Sparta Independent on October 26th; he stated that the reporter had tried to reach him when writing that article, but he was away. He returned on a Friday. According to Schiavoni, the article stated that Board members were violating the Code of Ethics. Schiavoni testified that he believed that the article was not fact-based, and he wanted to respond. He further stated that he was surprised that in the article, the superintendent released confidential documents to the newspaper; he asserts that he was "stunned" when he got emails and phone calls from other Board members.

Consequently, Schiavoni testified that on Monday morning, he called the editor of the Sparta Independent and stated that the article was not factual or balanced. Furthermore, he believed that the article contained information that included "ongoing board business." According to Schiavoni, the editor said he could write a letter in response and state the Board's position; however, the editor needed the letter by Tuesday afternoon. Schiavoni then called the Board's attorney to provide a "heads up" that he was going to be requesting her review. Schiavoni stated that he did not "want an opinion piece." The attorney returned the letter he drafted and Schiavoni took that version and sent it to the Sparta Independent; it was printed on November 2, 2006. Schiavoni further testified that on Wednesday night, he sent an email to Board members and the Superintendent alerting them; additional emails further explained his rationale for sending the letter to the editor.

Schiavoni testified that Board minutes reflect that the letter was discussed at the next Board meeting, however, he does not recall the discussion. No Board member objected to the letter. He acknowledged on cross-examination that he vetted the letter with the attorney, but not the Superintendent or the Board.

With respect to the issue of hiring another law firm, Schiavoni testified that although the Board had counsel at the time, he did not feel that the Board was getting adequate attention from that attorney. Schiavoni explained that the Board has a multitude of issues and potential for law

[6] The Commission so voted during the public portion of its meeting on December 18, 2008.

suits; if the town council had an attorney who regularly attended meetings, why not the school board? Schiavoni testified that for cost reasons, it occurred to him and to others that having a local attorney who does not have to charge travel time would be a good idea.

According to Schiavoni, Board member Paul Johnson did the research and recommended four local firms. Mr. Johnson invited the firms to submit a letter. Schiavoni acknowledged on cross-examination that the Superintendent had no input into the criteria, although he could have offered comments and did not. He does not recall if Johnson's letter was written pursuant to direction from the full Board. Law firms were interviewed and Schiavoni then made a written recommendation to Board, which was reviewed by the Human Resources Committee, which the Superintendent chaired. The recommendation was later approved by the Board. According to Schiavoni, the goal was to divide the existing work. Schiavoni affirmed that he reviewed the Board's budget and legal fees paid; they came under the allotment in 2007 and 2008. According to Schiavoni, no one raised the concern about the cost of supplemental counsel prior to hiring. He said that the motion to approve the supplemental firm passed 9-0. On cross-examination, complainant Dericks pointed out that the Board minutes at Exhibit C-10 shows a vote of 5 to 4.

According to Schiavoni, the Superintendent never asked for access to counsel that was denied. As for the policy regarding attorney access, Schiavoni stated that Dr. Morton felt that getting Board approval was a problem if there was an emergency. Therefore, Schiavoni affirmed that they changed the policy and, if there is an emergency, Dr. Morton could contact the attorney and obtain Board approval within 24 hours. Schiavoni said that after the policy was changed, there were no complaints about access.

Schiavoni further testified about the parental complaint. He stated that a letter from the parents of two students attending school in the district was addressed to the Board. The letter, dated July 5, 2006, raised concerns about how the children were treated by staff. The letter was entered into evidence as Exhibit R-1. Schiavoni stated that he believed the letter was discussed at the July 2006 meeting in closed session. Schiavoni referenced the local policy regarding the handling of complaints, Policy R9130, which was accepted into evidence as Exhibit R-2. He admitted he was "slightly foggy" with respect to what happened after the Board meeting, but the Board felt that they had to respond to the letter. Schiavoni testified that he does not recall exactly what the Board agreed to, but it was clear that the Superintendent had met with the parents unsuccessfully and the parents wanted the Board involved; the last page of the letter asked the Board to investigate the complaint. Schiavoni stated that he believed it was appropriate for the Board to review the matter since Dr. Morton had not resolved the complaint. Schiavoni believed this was consistent with the aforementioned Board policy.

Schiavoni stated that the parental complaint was discussed at the meeting of the Human Resources Committee on August 7, 2006; Dr. Morton was on vacation. The Committee discussed how to do fact-finding. The assistant superintendent recommended that the two administrators from the Alpine School who were part of the complaint would come before the Board so the Board could more fully understand the charges. The parents also attended the August 14, 2006 Board meeting. Dr. Morton was present at the August 14th meeting and made no objection. Both administrators were given a chance to explain; Schiavoni testified that he viewed it as a cordial discussion which took about 30 minutes, whereupon the Board "took on face value" what the administrators said. The Board decided there would be a meeting of the

Superintendent, the assistant superintendent, Board members Sullivan and Schiavoni and the administrators to try and mediate the issue with the parents. According to Schiavoni, the parents were prepared to file a lawsuit and this was a last attempt to address the issues several weeks before school was due to open. The meeting took place, but Sullivan and Schiavoni could not attend. The parents met with the Superintendent; the students continued with the school and the problem was resolved, according to Schiavoni, with the Board's action. No lawsuit was filed.

Schiavoni acknowledged that an email from Dr. Morton dated July 28, 2006 indicated that before Schiavoni met with the parents, he should meet with the Superintendent. However, Schiavoni did not first meet with Dr. Morton because he was on vacation. According to Schiavoni, Morton's first day back was August 14, 2006.

Schiavoni testified about the secretary in the high school principal's office. The Superintendent, based upon the recommendation of the principal, recommended transferring her to the media center. Schiavoni stated that he later received a letter from media specialist who outlined her concerns about the transfer stating that the other person was not qualified to be moved there; she raised issues of pay, hours and experience. Schiavoni wrote a letter back to the media specialist, but did not meet or speak with her. The Board then tabled the Superintendent's motion and did not approve the transfer. As to the distinction between a reassignment and a transfer, Schiavoni testified that he consulted with counsel and it was counsel's opinion that this was a transfer, thereby warranting Board approval. On this, Schiavoni testified that his goal as a Board member was to provide oversight to district. He was on the Human Resources Committee for three years.

The matter docketed as C47-07 was heard on December 16, 2008.[7] The complainants herein allege that over the course of many months, the respondents made negative and evaluative statements to the press. Such statements, according to the complainants, affected the employment in the District. The complainants assert this was a violation of N.J.S.A. 18A:12-24.1(e), (g) and (i). In support of their positions, the complainants presented exhibits C-15 through C-25 as identified below; all but C-19 were accepted into evidence.

Doug Chesnolovitch testified for the complainants. He was a Board member from 1998 until 2007. Mr. Chesnolovitch testified that he was concerned about how the public perceived the board; that the Board was taking action that did not include the full Board. Mr. Chesnolovitch stated that he was surprised by Schiavoni's presentation at the meeting on January 8, 2007.

The respondents did not offer any evidence with respect to the allegations in C47-07.

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[7] At its meeting on November 25, 2008, the Commission determined not to hear the allegations against respondents which were untimely filed, pursuant to N.J.A.C. 6A:28-6.1(b). Specifically, the Commission does not reach to allegations of violations in connection with the November 15, 2006 article in the N.J. Herald (Item A of the Complaint), the November 16, 2006 article in the Sparta Independent (Item B of the Complaint), and the November 17, 2006 article in the N.J. Herald (Item E of the Complaint). At its December 16, 2008 meeting, the Commission further determined that the allegation that Paul Johnson improperly sent letters on June 27, 2006 to solicit law firms and was thereafter involved in the selection of supplemental counsel was untimely and, therefore, dismissed. Finally, with respect to C47-07, the Commission dismissed the allegation that Schiavoni met with the president of the teachers' association, as that allegation includes no date, as required by N.J.A.C. 6A:28-6.3.

The matter docketed as C46-07 was heard on January 27, 2009. Appearing for the complainants were Maureen Sharpe and Daryl Savage. Respondents Paul Johnson, Michael Schiavoni and Michael Schill were present and represented by counsel, Howard Mankoff, Esq. Complainant Maureen Sharpe presented the case for the complainants, asserting that the respondents violated N.J.S.A. 18A:12-24.1(e) when they wrote a series of letters to newspapers and when they placed ads in the newspapers which supported local candidates for the Board. Ms. Sharpe entered into evidence C-26 through C-31, identified below.

Kevin Pollison, a current member of the Board of Education, testified for the complainants, asserting that he has been on the Board since April 7, 2007 and that he was not consulted or shown copies of the letters before they were written and published. Mr. Pollison stated that he believed that these letters undermined the authority of the Board.

Dr. Morton, Superintendent, testified for the complainants. He stated that the respondents did not consult with him before writing the letters. As to the effect of these letters, Dr. Morton testified that it was his belief that they caused the public to question the authority in the district and damaged relationships. It is his belief that these letters caused a rift that has not yet been resolved. On cross-examination, Dr. Morton acknowledged that a political endorsement does not question the board and he is not suggesting that an endorsement is not permitted.

The respondents offered no specific testimony on this case. While there was no challenge as to the authenticity of these letters and advertisements, counsel argued that the letters speak for themselves and were not a violation of the Act.

Complainants' Exhibits

C-1	Schiavoni Letter to the Editor, Sparta Independent, November 2, 2006
C-2	Board Minutes, November 6, 2006
C-3	Schiavoni emails to the Board, November 5, 2006
C-4	Board Policy #0146 Board Member Authority; #0171 Duties of President and Vice President
C-5	Schiavoni email to BOE re: November 2, 2006 letter; November 3, 2006
C-6	Schiavoni email to BOE re: November 2, 2006 letter; November 2, 2006
C-7	Sparta Independent article, October 26, 2006 by Fran Hardy (to which Schiavoni responded)
C-8	Memorandum dated October 12, 2006 from school administrators to Superintendent Morton re: administrative concerns.
C-9	Email from Superintendent Morton re: parental complaint and three letters addressed to administrators at the Alpine School notifying that the Board would be discussing performance on August 14, 2006.
C-10	Board Minutes, August 14, 2006
C-11	Attorney bills from August 2006, September 2006, July & August 2007
C-12	Not accepted into evidence.
C-13	Sparta Independent article, 2006 (specific date not shown) by Fran Hardy
C-14	Not accepted into evidence.
C-15	Minutes of Meeting, January 8, 2007
C-16	Daily Record article, April 18, 2007, by Abbott Koloff

C-17	NJ Herald article, April 18, 2007, by Stephen Novak
C-18	NJ Herald article, April 24, 2007, by Stephen Novak
C-19	Not accepted into evidence.
C-20	NJ Herald article, September 30, 2007, by Stephen Novak
C-21	NJ Herald article, April 19, 2007, by Stephen Novak
C-22	Sparta Independent article, April 26, 2006 by Fran Hardy
C-23	Sparta Independent article, September 20, 2007 by Fran Hardy
C-24	Sparta Independent article, October 4, 2007 by Fran Hardy
C-25	Board Minutes, October 1, 2007
C-26	Paul Johnson's Letters: Sparta IndependentA pril 5, 2007 & NJ Herald April 9, 2007
C-27	Paul Johnson & Michael Schill's advertisement, Sparta Independent, April 12, 2007
C-28	Michael Schiavoni's Letter: Sparta Independent, April 5, 2007 & NJ Herald, April 2007
C-29	Paul Johnson & Michael Schill's letters,Spar ta Independent April 12, 2007 and NJ Herald April 15, 2007.
C-30	Paul Johnson's letter, Sparta Independent, July 5, 2007
C-31	Michael Schill's letter, NJ Herald, December 1, 2006

Respondents' Exhibits

R-1	Parents' letter dated July 5, 2006 addressed to Sparta BOE
R-2	Board Policy #9130 Public Complaints and Grievances

FINDINGS OF FACT

As to C41-07

1. On October 26, 2006, an article appeared in the Sparta Independent written by Fran Hardy. (Exhibit C-7)
2. A t the time, Michael Schiavoni was president of the Sparta Board of Education.
3. I n response to the October 26th article, Michael Schiavoni wrote a letter to the editor which was published in the Sparta Independent on November 2, 2006. (Exhibit C-1)
4. M r. Schiavoni did not obtain prior consent from the Board to write the letter, although he submitted a draft of the letter to the Board's attorney for review.
5. Sch iavoni informed the Board about the letter after he submitted it to the Sparta Independent. (Exhibits C-3, C-5 and C-6)
6. The letter is "signed," Michael R. Schiavoni, President, Sparta Board of Education. (Exhibit C-1)

As to C46-07

1. Michael Schiavoni, Michael Schill and Paul Johnson were members of the Board of Education in 2006 and 2007.[8]
2. Michael Schill wrote a letter to the editor of the NJ Herald dated December 1, 2006. (Exhibit C-31)
3. Paul Johnson wrote a letter to the editor which was published in the Sparta Independent on April 5, 2007 and NJ Herald on April 9, 2007. (Exhibit C-26)
4. Paul Johnson wrote a letter to the editor of the Sparta Independent dated July 5, 2007. (Exhibit C-30)
5. Paul Johnson and Michael Schill placed an advertisement in the Sparta Independent, April 12, 2007. (Exhibit C-27).
6. Paul Johnson and Michael Schill wrote letters to the editor published in the Sparta Independent on April 12, 2007 and the NJ Herald on April 15, 2007. (Exhibit C-29)
7. Michael Schiavoni wrote a letter to the editor which was published in the Sparta Independent on April 5, 2007 and the NJ Herald in April 2007. (Exhibit C-28)

As to C47-07

1. Linda Curcio, Paul Johnson, Michael Schiavoni, Karen Scott and Richard Sullivan were members of the Board of Education in 2007.
2. Newspaper articles appeared in the Sparta Independent and the NJ Herald quoting these board members. (Exhibits C-16, C-17, C-18, C-20, C-21, C-22, C-23 and C-24)
3. The articles were not written by the Board members.

ANALYSIS

The Commission initially notes that, pursuant to N.J.S.A. 18A:12-29b, the complainants bear the burden of factually proving any violations of the Code of Ethics for School Board Members.

C41-07

In the first paragraph of the complaint, the complainants assert that Board member Schiavoni wrote a letter to the editor of the Sparta Independent and signed it as Board President. According to the complaint, Mr. Schiavoni spoke on behalf of the entire board about contentious issues, without having first asked the board to review the letter and approve it for publication. Thereafter, in two separate emails that followed to board members, Schiavoni admits to taking this action on his own; he admits to having the letter reviewed by the board attorney. (Complaint at paragraph 1) The complainants assert this was a violation of N.J.S.A. 18A:12-24.1(e).

[8] Pursuant to N.J.A.C. 1:1-15.2, at its meeting on January 27, 2009, the Commission informed the parties that it would take official notice of which respondents were still on the Board of Education. The Commission permitted the parties the opportunity to object to taking official notice of this information; there were no objections. Thus, the Commission found that respondents Michael Schiavoni and Richard Sullivan are no longer serving on the Board, while respondents Linda Curcio, Paul Johnson, Michael Schill and Karen Scott are currently serving on the Board.

There is no question on this record that Mr. Schiavoni sent the letter to the editor of the Sparta Independent without the full knowledge and consent of the Board. The Commission must now determine whether, having done so, he violated N.J.S.A. 18A:12-24.1(e), which states:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

Initially, the Commission notes that although Schiavoni's failure to duly notify the Board may have violated local policy, the Commission does not have the authority to consider alleged violations of local policy; rather, the Commission's jurisdiction is limited to reviewing violations of the School Ethics Act.

The first paragraph of the letter states, "As board president and spokesman for the board, I am providing important facts and corrections about matters covered in the recent Sparta Independent article." (Exhibit C-1) Schiavoni's emails (Exhibits C-3, C-5 and C-6), as well as his testimony, indicate that, upon returning home on Friday, October 27, 2006, he read the article dated October 26, 2006 in the Sparta Independent. He believed that the article was "one sided" and contained inaccuracies. Upon learning from the editor of the Sparta Independent that a letter response would be due on Tuesday, October 31, 2006, he made "a Presidential decision not to miss the 11/2 edition." (Exhibit C-5) Mr. Schiavoni testified that he did not want an opinion piece, but wanted to factually address the information provided in the October 26th article.[9]

The Schiavoni letter addresses three issues that were raised in the October 26, 2006 article in the Sparta Independent: access to legal resources; interfering with personnel decisions and improper handling of a parental complaint to the principal. These were, indeed, Board matters. While Schiavoni, as the President, may have been the spokesman for the Board at the time, and while he was addressing Board issues in his letter, the Commission finds that by rushing to submit the letter to the editor without first obtaining the consent of the Board, Schiavoni failed to recognize that the authority to address any perceived problems with the October 26th article rested with the Board. To the extent that Mr. Schiavoni maintained that the October 26th article required rebuttal, he should have brought the matter to the attention of the Board for review, even if that meant delaying the publishing of the article for another week. Having failed to do so, the Commission finds that Mr. Schiavoni took "private action;" *i.e.*, action taken by a member of a district board of education that is beyond the scope of the duties and responsibilities of the member. N.J.A.C. 6A:28-7.1.

The Commission has similarly found that a Board member violated N.J.S.A. 18A:12-24.1(e) when he sent a letter to a private donor giving the impression that the letter was written on behalf of the board when, in fact, the board had not authorized the respondent to send the letter (see, I/M/O Bruce Freilich, Washington Township Bd. of Education, C18-04 & C19-04 Consolidated, (April 4, 2005) and where a Board member investigated a complaint and drafted a letter that appeared to have the endorsement of the Board. (See, I/M/O Randie Zimmerman,

[9] For this reason, the Commission chooses not to apply the standards established in Advisory A02-06, issued on March 10, 2006, because the letter to the editor therein, and the advice which followed from the Commission, was based on an opinion piece which was written by the Board member.

C49-02 (July 22, 2003). The board member in Zimmerman referred to a classroom as being substandard and an obvious code violation when the classroom had previously been approved by the county superintendent. The Commission found sufficient evidence that the board member created the impression that she was representing the interests of the Board in violation of N.J.S.A. 18A:12-24.1(e). Because the letter to the editor in C41-07 clearly addresses Board business and is plainly intended to speak *for* the Board of Education, the Commission finds that there was a reasonable likelihood that the public would perceive this letter to be an official statement of the Board's position. The Commission finds, therefore, that Schiavoni's private action could have compromised the Board if, indeed, the Board did not subscribe, as whole, to the statements made in the letter to the editor, particular since these statements concerned the administration of the schools.[10] Accordingly, the Commission finds that Mr. Schiavoni violated N.J.S.A. 18A:12-24.1(e).

In the second paragraph of the complaint, the complainants assert that Schiavoni's letter to the editor states, "Superintendent Dr. Morton released information to this newspaper that is not entirely accurate." The complainants allege this statement is untrue. The complainants further allege, "The remainder of the article goes on to make statements about actions the board has taken, which in and of themselves violate the code of ethics and are the subject of additional charges. The letter, taken as a whole, is an unwarranted, untruthful statement about the superintendent." The complainants assert Schiavoni's conduct violated N.J.S.A. 18A:12-24.1(g) and (i). (Complaint at paragraph 2)

In order to address these allegations, the letter to the editor is excerpted, in relevant part, as follows:

> Recently, Superintendent Morton released information to this newspaper that is not entirely accurate. As board president and spokesman for the board, I am providing important facts and corrections about matters covered in the recent Sparta Independent article.
>
> Three issues were raised in the communications from Dr. Morton's attorney and the Principal's Union:

[10] Contrast the Commission's determination in Dressel v. Kolupanowich, Monroe Township Board of Education, C11-07 (June 24, 2008), where the Commission found that while the respondent's letter to the editor began with "As President of the Monroe Township Board of Education...," the respondent credibly testified that she used her title of Board President in the letter because she expected the newspaper to follow a practice common in the industry by putting her name and title at the end of the letter. The Commission also found that the respondent *did not* state in the letter that it was being written on behalf of the Board and that she used first person pronouns throughout the letter. The Commission dismissed the allegation that the respondent board member was in violation of N.J.S.A. 18A:12-24.1(e), noting also that the record does not show and the complainant does not establish how the respondent's clarification of the Board's position on the construction issue in the letter to the editor may have compromised the Board.

1.L imiting access to legal resources.
The board has initiated a process that is designed to oversee the cost and necessity for legal advice. It has not denied the superintendent access to legal advice.

2.I nterfering with personnel decisions.
The board has exercised its responsibility to approve assignments. The board clearly has oversight authority on matters regarding the transfer of personnel. The board denial of the personnel transfer included research and review of documents, including a letter from the involved school staff person that stated major concerns about the negative impact of the proposed transfer on support service's ability to adequately serve students.

3.I mproper handling of a parent's complaint regarding a principal.
There was a meeting with a principal and the board in closed session. The meeting, however, was suggested by a senior administrator, and the board followed the administrator's recommendation and arranged for the principal to meet with the board.

The board is confident that it operated within the proper oversight role as outline by the Sparta School District policy and New Jersey statue [sic].
(Exhibit C-1)[11]

The Commission notes that the complainants appear to be asking this Commission to review the documents that Dr. Morton released to the Sparta Independent for the October 26, 2006 article so as to challenge the veracity of Schiavoni's statement that such information is "not entirely accurate." The Commission declines to engage in this level of review, as it is not necessary to assessing whether the letter to the editor was in violation of the Code of Ethics for School Board Members. To the extent the complainants paint a broad-brushed allegation as to the "remainder of the article" violating the Code of Ethics, or the letter when "taken as a whole" contains unwarranted and untruthful statements about the Superintendent, the Commission shall review the letter, below, with respect to the claim that there are inaccuracies in violation of N.J.S.A. 18A:12-24.1(g), which provides:

> I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.[12]

[11] Notably, complainant Dericks admitted on cross-examination that there was nothing inaccurate in the last two paragraphs of Schiavoni's letter. Accordingly, these paragraphs are not excerpted herein.

[12] The complainants do not allege that Schiavoni breached the confidentiality portion of this provision.

"Inaccurate information" under N.J.S.A. 18A:12-24.1(g) must be more than a personal opinion. N.J.A.C. 6A:28-6.9(a)2. In this connection, Schiavoni wrote:

> 1. Limiting access to legal resources.
> The board has initiated a process that is designed to oversee the cost and necessity for legal advice. It has not denied the superintendent access to legal advice.

The complainants' own exhibit evidences that the board took action to curtail the direct access of school administrators to legal counsel. (Exhibit C-8) Dr. Morton's testimony was consistent with the above statements, as he explained that the Board limited administrators' access to attorneys. He did not testify that he was denied access. Indeed, Derick's testimony merely confirmed that the board adopted a policy that added "an unnecessary requirement." She did not know whether the President or Vice President of the Board ever denied the Superintendent access to legal advice. The Commission finds that the complainants have failed to prove that Schiavoni's statements in #1 above are inaccurate so as to be in violation of N.J.S.A. 18A:12-24.1(g).

> 2. Interfering with personnel decisions.
> The board has exercised its responsibility to approve assignments. The board clearly has oversight authority on matters regarding the transfer of personnel. The board denial of the personnel transfer included research and review of documents, including a letter from the involved school staff person that stated major concerns about the negative impact of the proposed transfer on support service's ability to adequately serve students.

There appears to be a dispute as to whether the employment action in question was a "reassignment" so as to be within the exclusive responsibility of the Superintendent or "transfer," so as to come within the purview of the Board of Education. The Superintendent asserted it was the former and Schiavoni testified that Board counsel advised him it was the latter. The Commission is without jurisdiction to resolve this dispute, inasmuch as it implicates school law other than the School Ethics Act. In any event, that the complainants disagree with Schiavoni's interpretation does not prove that his account is inaccurate. The Commission finds that t he complainants have failed to prove that Schiavoni's statements in #2 above are inaccurate so as to be in violation of N.J.S.A. 18A:12-24.1(g).

> 3. Improper handling of a parent's complaint regarding a principal.
> There was a meeting with a principal and the board in closed session. The meeting, however, was suggested by a senior administrator, and the board followed the administrator's recommendation and arranged for the principal to meet with the board.
>
> The board is confident that it operated within the proper oversight role as outline by the Sparta School District policy and New Jersey statue [sic].

Both Dr. Morton and Mr. Schiavoni testified that there was a meeting with the principal and secretary before the Board on August 14, 2006. Schiavoni testified that this meeting was at the suggestion of the assistant superintendent and Dr. Morton could not confirm otherwise. The complainants have failed to prove that Schiavoni's statements in #3 above are inaccurate so as to be in violation of N.J.S.A. 18A:12-24.1(g).

The Commission now turns to the complainants' allegation that Schiavoni's letter, as excerpted above, violated N.J.S.A. 18A:12-24.1(i), which states:

> I will support and protect school personnel in proper performance of their duties.

Here, the complainants point to no specific portion of the letter which violates this provision, but rather, assert that "[t]he letter as a whole" contains unwarranted and untruthful statements about the Superintendent. For the reasons set forth above, the Commission cannot credit the allegation that the letter contains "untruthful" statements about the Superintendent as it addressed the three issues that were raised in the October 26, 2006 Sparta Independent article. To the extent the letter starts by stating, "Recently, Superintendent Morton released information to this newspaper that is not entirely accurate," (Exhibit C-1), the Commission finds that this statement does not rise to the level of failing to support and protect school personnel in violation of N.J.S.A. 18A:12-24.1(i).

Moving to the third paragraph of the complaint docketed as C41-07, the complainants allege that Schiavoni's statements in the letter to the editor with respect to the hiring of supplemental counsel violated N.J.S.A. 18A:12-24.1(c), (d), (g) and (i) of the Code of Ethics for School Board Members (Complaint at paragraph 3 – first part).[13] Schiavoni's statement in the letter to the editor regarding the hiring of additional counsel is as follows:

> The Oct. 26 Sparta Independent article stated that the school board has hired supplemental legal resources. This is an inaccurate statement. The board decided to divide the required legal work between two law firms. The Board researched area law firms and selected Morris, Downing & Sherred based on their prior extensive experience with New Jersey school boards, their research capability for educational issues, and their stellar legal reputation. This matter was thoroughly discussed at the August board meeting and approved by a majority vote of the board. The board has recently incurred additional legal expenses. The legal expenses are in large part due to the superintendent's actions through his lawyer. (Exhibit C-1)

[13] It is not entirely clear in this portion of the complaint whether the complainants confine their allegations to the letter to the editor, as written on November 2, 2006, or whether they are also addressing preliminary activities in the Summer of 2006 on the part of Schiavoni which led to the hiring of additional legal counsel. In any event, any such preliminary activities are not clearly stated as part of the charges and could not be reviewed by the Commission as they are untimely.

As to this allegation, the Commission first considers N.J.S.A. 18A:12-24.1(c), which states:

> I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

The Commission finds that Schiavoni's statements, as quoted above, merely show: (1) that he engaged in the process of reviewing additional counsel and (2) that the Board approved the appointment of the firm in August 2006. The complainants failed to demonstrate how these *statements* violate N.J.S.A. 18A:12-24.1(c). Indeed, it appears that, based on Derick's testimony on cross-examination, the complainants believe that the Board was "overstepping its bounds" in the hiring of outside counsel. The charge, however, does not concern the hiring itself, but Schiavoni's statement about the hiring. Accordingly, the Commission finds that the complainants have failed to prove that the respondent violated N.J.S.A. 18A:12-24.1(c).[14]

The Commission next turns to the allegation that the above-excerpted statement violates N.J.S.A. 18A:12-24.1(d), which states:

> I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

In order to establish a violation of N.J.S.A. 18A:12-24.1(d), the complainants must show that the respondent "administered" the schools, contrary to his duty as a board member. To administer the schools means that a board member has become directly involved in activities or functions that are the responsibility of school personnel or the day to day administration of the school district. N.J.A.C. 6A:28-7.1. To the extent that the complainants contend that Schiavoni's statements, as set forth above, so demonstrate, they have failed to carry their burden of proof. Accordingly, the Commission finds that the complainants have failed to prove that the respondent violated N.J.S.A. 18A:12-24.1(d).

The complainants further allege that the excerpted language violates N.J.S.A. 18A:12-24.1(g) provides:[15]

> 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.

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[14] Moreover, any allegation that the respondent's conduct in August 2006 violated the Act would be untimely, as C41-07 was filed on October 22, 2007.

[15] Here again, the complainants do not allege that Schiavoni breached the confidentiality portion of this provision, but, rather, that the information provided in the letter to the editor was inaccurate.

As noted above, "inaccurate information" under N.J.S.A. 18A:12-24.1(g) must be more than a personal opinion. N.J.A.C. 6A:28-6.9(a)2. The complainants herein point to Exhibit C-10 which states, in relevant part,

> On a motion by Mrs. Curcio, seconded by Dr. Schill and carried by roll call vote of the members present, the Sparta Board of Education appointed [names omitted] and the law firm of Morris, Downing & Sherred, [address omitted] as supplemental attorneys of record. (Exhibit C-10 at page 18)

Complainants argue that the use of the term "supplemental counsel" in the Board's minutes renders Schiavoni's statement untruthful, because he said, as excerpted above, "[t]he Oct. 26 Sparta Independent article stated that the school board has hired supplemental legal resources. This is an inaccurate statement." Schiavoni goes on to explain that the board decided to divide the required work between two law firms. The Commission finds that this is a distinction that simply does not rise to the level of an inaccuracy that would implicate N.J.S.A. 18A:12-24.1(g). Here again, the complainants' own evidence shows that the matter went before the Board on August 14, 2006 and the additional law firm was approved by a vote of 5 to 4.[16] (Exhibit C-10) Moreover, the complainants did not establish that Schiavoni's statement concerning recent expenses incurred was inaccurate. Schiavoni merely states, "The board has recently incurred additional legal expenses. The expenses *are in large part* due to the superintendent's actions against the district." (emphasis added) The complainants' own exhibits support Schiavoni's statement in that some of the entries identified in Exhibit C-11 show legal costs incurred for (new) counsels' review of correspondence from Dr. Morton's attorney. That such activity was a contributing rather than causal factor in the hiring of additional counsel is of no consequence because Schiavoni does not state that it was the sole reason that additional counsel were hired. Therefore, the Commission finds that the complainants have failed to prove that Schiavoni's statements in this paragraph violated N.J.S.A. 18A:12-24.1(g).

The final allegation with respect to the third paragraph of the complaint is that Schiavoni violated N.J.S.A. 18A:12-24.1(i), which states:

> I will support and protect school personnel in proper performance of their duties.

Once again, Schiavoni's statements, as quoted above, merely show: (1) that he engaged in the process of reviewing additional counsel and (2) the Board approved the appointment of the firm. The Commission finds that the complainants failed to demonstrate that these statements violate N.J.S.A. 18A:12-24.1(i).

Finally, with respect to the fourth paragraph of the complaint docketed as C41-07, the complainants appear to contend that Schiavoni was quoted in an article published in the Sparta Independent on October 27, 2006 (Exhibit C-13) as stating that additional counsel were needed for the high school reconstruction project. However, "[a]fter being questioned by fellow board members in correspondence on the same topic, Mr. Schiavoni states, 'TOM MORTON legal

[16] One board member voted against the action and three board members were absent.

issues with the BOE...' to be the true reason for [additional counsel's] presence [at board meetings]." (Complaint at paragraph 4; emphasis in text). Thus, the complainants assert that Schiavoni violated N.J.S.A. 18A:12-24.1(e). As noted above, N.J.S.A. 18A:12-24.1(e) states:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

Here, the Commission notes that the newspaper article at Exhibit C-13 was written by Fran Hardy. The complainants brought no evidence to the record to prove that Schiavoni made the statements to Ms. Hardy that were attributed to him in the article. Even assuming, *arguendo*, that there was evidence on the record before the Commission to prove that Schiavoni made such statements, the complainants have not established that a different reason was later provided to fellow board members *or* that, in presenting differing reasons for the hiring of supplemental counsel, Schiavoni was "lying to the public" in violation of N.J.S.A. 18A:12-24.1(e). Accordingly, the Commission finds that the complainants have failed to prove that Schiavoni violated N.J.S.A. 18A:12-24.1(e) as alleged in the fourth paragraph of C41-07.

C46-07

In the matter docketed as C46-07, complainants assert that respondents Paul Johnson, Michael Schiavoni, and Michael Schill violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members when they improperly wrote letters to the editor and also placed ads in the newspaper. As noted above, N.J.S.A. 18A:12-24.1(e) states:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

The Commission initially addressed the issue of a board member sending a letter to the editor in *Advisory Opinion A02-06*, which was issued on March 10, 2006. Therein, the Commission advised that a board member would not violate the Act if he were to write a letter to the editor expressing his opinion about the budget[17] as long as, in the letter, he: (1) did not hold himself out as a board member and (2) provided accurate information that is not confidential. Later, the Commission revisited the issue of letters to the editor and refined its advice in *Advisory Opinion A03-07*, which was issued on April 2, 2007, stating that a Board member would not violate the Act by sending a letter to the editor expressing his/her opinion about the budget as long as, in the letter, that person (1) identified himself/herself as a board member; (2) indicated that the letter is not authorized by or written on behalf of the board; (3) provided accurate information that is not confidential; (4) and ensured that his/her private action does not compromise the board.

[17] The Commission has applied this standard to cases were the board member was writing on matters other than the budget. (See, Dressel v. Kolupanowich, Monroe Township Board of Education, C11-07 (June 24, 2008)).

The Commission notes, however, that all but one of the letters in C46-07 written by respondents either predated *Advisory Opinion A03-07* or were written almost concurrent with its issuance on April 2, 2007. Accordingly, the analysis set forth below does not strictly apply the prerequisites set forth in the advisory opinions, but uses them as guideposts to evaluate conduct vis a vis a board member 's affirmative duty in N.J.S.A. 18A:12-24.1(e).

Michael Schill

The complainants contend that Michael Schill wrote a letter to the editor of the NJ Herald on December 1, 2006 "criticizing the superintendent and members of the public, [and] discussing a specific issue from a Board of Education meeting." (Complaint at paragraph 1) The complainants state that although the letter indicates that Schill is speaking as a resident, "this does not negate the fact that he is known as a member of the BOE and is speaking solely about a BOE issue." (Id.) The Commission notes that Michael Schill's December 1, 2006 letter to the editor specifically states that he is writing "as a resident of Sparta and these views are mine, not the Board of Education's. I do not speak for them." (Exhibit C-31). What follows is a paragraph about Dr. Morton's refusal to discuss "issues," which are never identified, in private. There are no specifics in the letter. Even assuming, *arguendo*, that this was private action, there is simply no showing that such ill-defined statements were of such a nature that they may compromise the board. Thus, the Commission finds that the complainants have failed to demonstrate that Schill violated N.J.S.A. 18A:12-24.1(e) with his letter to the editor on December 1, 2006.

Paul Johnson

The complainants contend that on April 5 and 9, 2007, Paul Johnson wrote a letter to the editor of the Sparta Independent and NJ Herald newspapers discussing the campaign for the April 2007 Board elections. The complainants assert that he therein "alludes to inappropriate behavior being exhibited by one slate of candidates and is supportive of the other two candidates. He makes accusations without substance or detail." (Complaint at paragraph 5) Here, the Commission notes that the complainants' own allegation is the reason they cannot prevail on their claim of violation: indeed, Johnson's letter to the editor provides comment with no details or specifics. It merely states that he and Michael Schill "were accused of all sorts of negative actions and positions" during the prior Board election, but they were both elected. Johnson continues,

> Recently, I was given copies of emails sent by supporters of one of the slates of candidates. These contain veiled references to the 2 opposition candidates and allude to their being in appropriate for board membership.
>
> I hope this is as far as it goes and stops now.
>
> I don't believe that the candidates condone what their supporters are doing. I urge them to counsel their supporters to run a clean, dignified campaign. ... (Exhibit C-26)

Even assuming, *arguendo*, that writing this letter was private action, there is simply no showing that such statements about candidates to the board were of such a nature that they may compromise the board. Thus, the Commission finds that the complainants have failed to demonstrate that Johnson violated N.J.S.A. 18A:12-24.1(e) with his letter to the editor on April 5 and 9, 2007.

The complainants contend that Board member Paul Johnson wrote a letter to the editor of the Sparta Independent on July 5, 2007 discussing his abstention vote on a resolution before the board. The complainants assert that the respondent's "discussion of the issues surrounding the resolution are not supportive of the school district. While he states he is not writing as a member of the BOE, the subject of the letter is clearly BOE business." (Complaint at paragraph 7) Here again, the Commission notes that Johnson states, "I have to state that I am speaking as an individual and do not present my views as those of the board." (Exhibit C-30)J ohnson therein addresses an article that appeared in the Sparta Independent about his abstaining on a vote for a drug testing policy. Johnson clarified that the vote actually included a number of policies, and he had reservations about some of them. However, he specifically expressed *his support* for the Drug Testing Policy. Even assuming, *arguendo*, that writing this letter was private action, there is simply no showing that such statements were of such a nature that they may compromise the board. Indeed, the article merely explains Johnson's reasons for his vote. Thus, the Commission finds that the complainants have failed to demonstrate that Johnson violated N.J.S.A. 18A:12-24.1(e) with his letter to the editor on July 5, 2007.

Paul Johnson and Michael Schill

The complainants contend that on April 5 and 9, 2007, board members Schill and Johnson paid for advertisements endorsing two candidates for the 2007 Board election. According to the complainants, the respondents names appear at the bottom of the endorsement and they state that "School Board members hear constantly from Administration that business people don't understand education. We now have an opportunity to elect..." The complainants argue that the respondents acted without the consent of the board. (Complaint at paragraph 3)

The Commission notes that the advertisement endorses candidates Linda Curcio and Karen Scott. While the text includes the statement, "School Board members hear constantly from Administration that business people don't understand education," (Exhibit C-27) the Commission cannot find that this statement rises to the level of a violation of the Act. At the bottom of the ad is the text:

> This opportunity should be embraced.
> Paid for by Michael Schill and Paul Johnson.
> (not affiliated with any special interest group) (Exhibit C-27)

The Commission has determined that Board members have the right to endorse board candidates. I/M/O Alphonse A. DeMao, Belleville Board of Education, C09-04, (September 30, 2004). Where a board member may run afoul of the School Ethics Act, however, is by using his/her official position to the potential advantage of the candidate. Indeed, in DeMao, the Commission found that the respondent violated N.J.S.A. 18A:12-24(b) of the School Ethics Act in that "[t]he

totality of the endorsement including the letterhead, the content of the letter, and the nature of the return address on the envelope, could lead someone reading the letter to reasonably assume that the endorsement was made by Mr. DeMao in his official capacity as the President of the Board." DeMao, slip op. at 5. The Commission does not find that the text of the ad as set forth above in a newspaper is similarly problematic. Nor do the complainants allege that the respondents used, or attempted, to use their official positions to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others, in violation of N.J.S.A. 18A:12-24(b). Rather, they asserted that the respondents violated N.J.S.A. 18A:12-24.1(e). Even assuming, *arguendo*, that this advertisement was private action, there is simply no showing that such statements were of such a nature that they may compromise the board. Thus, the Commission finds that the complainants have failed to demonstrate that Johnson and Schill violated N.J.S.A. 18A:12-24.1(e) with this advertisement on April 5 and 9, 2007.

The complainants further contend that on April 12 and April 15, 2007, board members Paul Johnson and Michael Schill wrote a letter to the editor of the Sparta Independent and NJ Herald wherein they "discuss a contentious issue regarding the BOE election for April 2007." (Complaint at paragraph 6). The complainants affirm that the information they give is "incomplete and clearly gives support to two candidates." (Id.) The Commission initially notes that the letters are substantially identical. They are a response to an article written in the Sparta Independent regarding candidate attendance at a Sparta Education Association Candidate Forum – an open meeting where all candidates were invited to attend with the press. Apparently, three candidates chose not to attend and two candidates chose to attend. The article states in relevant part:

> The three candidates allege that by attending this meeting, Linda Curcio and Karen Scott, some how [sic] violated the Code of Ethics and could not now participate in any deliberations or votes involving the teacher's association. They quickly relayed their opinion to the press in order to fuel a controversy. (Exhibit C-29)

As set forth above, Board members have the right to endorse board candidates. Even assuming, *arguendo*, that the articles constitute private action, there is simply no showing that such statements were of such a nature that they may compromise the board. Thus, the Commission finds that the complainants have failed to demonstrate that Johnson and Schill violated N.J.S.A. 18A:12-24.1(e) with these letters to the editor.

Michael Schiavoni

The complainants contend that Michael Schiavoni wrote a letter to the editor of the Sparta Independent and NJ Herald newspapers which "is a clear endorsement of two candidates for the April 2007 BOE elections." (Complaint at paragraph 4). The complainants further contend that Schiavoni therein discusses "board issues," although he was not given direction from the board to give this endorsement.

The Commission initially notes that the letters are substantially identical. Further, while Schiavoni clearly endorses the candidacy of Linda Curcio and Karen Scott, both letters are written in the first person as Schiavoni makes a personal endorsement. (Exhibit C-28)

Additionally, the articles indicate that they are written by "Michael R. Schiavoni, Sparta." Underneath the "signature" in the letter that appears in the NJ Herald is the following text: "The writer is the school board president, but this is his own opinion, not that of the board." (Id.) Board members have the right to endorse board candidates; this board member did so as an individual, not as a Board member. Even assuming, *arguendo*, that the articles constitute private action, there is simply no showing that such statements were of such a nature that they may compromise the board. Thus, the Commission finds that the complainants have failed to demonstrate that Schiavoni violated N.J.S.A. 18A:12-24.1(e) with these letters to the editor.

C47-07

In the matter docketed as C47-07, the complainants assert that respondents Linda Curcio, Paul Johnson, Michael Schiavoni, Karen Scott and Richard Sullivan violated the Code of Ethics in connection with a series of newspaper articles which the complainants assert contained critical, negative and evaluative statements about the administration and citizens of the District. The complainants assert the respondents violated N.J.S.A. 18A:12-24.1(e), (g), and (i) of the Code of Ethics for School Board Members. In support of its claim, the complainants offer the following evidence:

C-16	Daily Record article, April 18, 2007, by Abbott Koloff
C-17	NJ Herald article, April 18, 2007, by Stephen Novak
C-18	NJ Herald article, April 24, 2007, by Stephen Novak
C-20	NJ Herald article, September 30, 2007, by Stephen Novak
C-21	NJ Herald article, April 19, 2007, by Stephen Novak
C-22	Sparta Independent article, April 26, 2006 by Fran Hardy
C-23	Sparta Independent article, September 20, 2007 by Fran Hardy
C-24	Sparta Independent article, October 4, 2007 by Fran Hardy
C-25	Board Minutes, October 1, 2007

It is critical to note that the evidence brought to the record by the complainants, other than minutes of board meetings, consisted exclusively of articles written by *other people*, and not the respondents. The complainants offered no evidence to prove that the respondents actually made the statements that the complainants are alleging they made in the above-noted articles. Indeed, the answer submitted on behalf of the respondents asserts that such statements are merely hearsay and do not violate the School Ethics Act. (Answer at page 2) There is no concession as to their authenticity. While hearsay evidence is admissible pursuant to N.J.A.C. 1:1-15.5, it is also subject to the "residuum rule," which requires that findings be supported by a residuum of competent evidence. Matter of Tenure Hearing of Cowan, 224 N.J.Super. 737 (App. Div. 1988). Consequently, the Commission finds that the complainants failed to *factually prove* that respondents Linda Curcio, Paul Johnson, Michael Schiavoni, Karen Scott and Richard Sullivan made the statements in the newspaper articles and the Commission, therefore, need not reach to any analysis of violations. Instead, the Commission dismisses the allegations that respondents Linda Curcio, Paul Johnson, Michael Schiavoni, Karen Scott and Richard Sullivan violated N.J.S.A. 18A:12-24.1(e), (g), and (i) of the Code of Ethics for School Board Members in connection with the newspapers articles.

The complainants also contend in C47-07 that at the Board's meeting of January 8, 2007, Schiavoni made a presentation about the progress of the Board, wherein he discussed goals met, disappointments and challenges ahead. In this connection, the complainants assert Schiavoni:

> created this presentation on his own. The board as a whole, had not been included in the discussion nor was able to give input as to what they considered to be highlights, disappointments and challenges ahead. He presented this document in public with many evaluative and negative statements, representing that it reflected the opinion of the entire board. (Complaint at paragraph 5)

The Commission notes that the only evidence on this record concerning this allegation is testimony from Mr. Chesnolovitch that he was "surprised" by Schiavoni's presentation at the meeting on January 8, 2007, along with minutes from the meeting which state:

> Mr. Schiavoni gave a power point presentation on his views of the Board progress. He presented highlights, disappointments and the major challenges the Board will face in 2007. (Exhibit C-15)

There is no evidence before the Commission that, in so doing, Schiavoni failed to recognize that authority rests with the board of education and made personal promises or took private action that may compromise the board in violation of N.J.S.A. 18A:12-24.1(e). Similarly, there is no evidence on this record that Schiavoni either failed to hold confidential all matters which, if disclosed, would needlessly injure individuals or the schools, or that he provided inaccurate information in violation of N.J.S.A. 18A:12-24.1(g). Finally, there is no evidence on this record that Schiavoni, with this presentation failed to support and protect school personnel in proper performance of their duties in violation of N.J.S.A. 18A:12-24.1(i). Accordingly, the Commission dismisses the allegations that Schiavoni violated N.J.S.A. 18A:12-24.1(e), (g), and (i) of the Code of Ethics for School Board Members in connection with the January 8, 2007 Board presentation.

DECISION

The Commission finds that respondent Michael Schiavoni violated N.J.S.A. 18A:12-24.1(e) when he took private action to submit an article to the editor of the Sparta Independent which was published on November 2, 2006 before having received the consent of the Board to do so, as set forth in the complaint docketed as C41-07. All other allegations in the matters docketed as C41-07, C46-07 and C47-07 are dismissed.

PENALTY

The Commission recommends that respondent Schiavoni be censured for violating N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members. In so doing, the Commission notes that board members have been censured for single findings of violations of the Act. (*See*, I/M/O Raymond Bonker, Lenape Valley Reg'l Bd. of Ed., C11-97 (March 30, 1998), Commissioner of Education Decision No. 522-98, decided May 22, 1998, where a board member was censured for violating N.J.S.A. 18A:12-24(b) when he released staff email

addresses in his campaign literature before the board had discussed and approved releasing them in public; I/M/O Lawrence James, Chesilhurst Bd. of Ed. C10-98 (December 15, 1998), Commissioner of Education Decision No. 30-99, decided February 9, 1999, where a board member was censured for violating N.J.S.A. 18A:12-24(b) when he asked the Business Administrator to intercede on his behalf in order to acquire an unsecured loan from the bank that held the Board's accounts). The Commission also notes that board members have been censured for single violations of the Code of Ethics for School Board Members. (*See*, I/M/O Doris Graves, Pleasantville Bd. of Education, C47-05 (May 27, 2008), Commissioner of Education Decision No. 301-08, decided July 10, 2008, wherein a board member was found to have violated 18A:12-24.1(d) when she spoke with the district's facilities coordinator and later appeared at a board personnel meeting regarding a personnel action affecting her cousin by marriage.

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.

Paul C. Garbarini
Chairperson

Mailing Date: February 25, 2009

Resolution Adopting Decision – C41-07, C46-07 & C47-07 Consolidated

Whereas, the School Ethics Commission has considered the pleadings, testimony and all documentary evidence brought to the record in these consolidated matters; and

Whereas, at it meeting on February 24, 2009, the Commission found that the respondent Michael Schiavoni violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members; and

Whereas, the Commission dismissed all other allegations that respondents violated the Code of Ethics of School Board members, as set forth in the complaints;

Whereas, the Commission found that censure is the appropriate penalty to recommend to the Commissioner of Education in this matter;

Now Therefore Be It Resolved, that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs it staff to notify all parties to this action of the Commission's decision herein.[18]

_____

Paul C. Garbarini, Chairperson

I hereby certify that this Resolution
was duly adopted by the School Ethics
Commission at it public meeting on
February 24, 2009.

_____

Joanne Boyle, Executive Director

[18] Commissioner Robert Copeland was recused from participating in the hearing and determination of these consolidated matters.

2 61-09

#261-09

SHARON FRANCIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured teacher holding an instructional certificate with an endorsement as a Teacher of Physical Education – was employed by the respondent Board from the 2000-2001 through the 2007-2008 school years as a physical education teacher. From 2000 through 2006, she was also assigned to teach Health. Petitioner's employment was terminated in June 2008 after the Board voted, for reasons of economy and efficiency, to create the position of Health and Physical Education Teacher, which requires endorsements in both subject areas. Petitioner contends, *inter alia*, that her tenure and seniority rights were violated pursuant to *N.J.S.A.* 18A:28-5 and *N.J.A.C.* 6A:32-5.1. The Board asserts that petitioner was terminated because she did not hold an endorsement to teach Health, and had failed to take the necessary steps to obtain the required certification despite communications from the District that she needed to do so. Both parties filed motions for summary decision.

The ALJ found that: the Board's action to abolish the position of Physical Education Teacher in favor of the position of Teacher of Physical Education and Health was in compliance with *N.J.S.A.* 18A:28-9 thru -13, and was not arbitrary, capricious or unreasonable; the Board advised petitioner to obtain the required endorsement to teach health classes almost two years before the Board eliminated the Physical Education Teacher job title; and the Board's actions in abolishing the Teacher of Physical Education position in favor of the new position of Teacher of Health and Physical Education was rooted in public economy, not discrimination. Accordingly, respondent's motion for summary decision was granted and petitioner's cross motion was denied. The ALJ ordered that petitioner's appeal be dismissed with prejudice.

The Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

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

August 20, 2009

OAL DKT. NO. EDU 9131-08
AGENCY DKT. NO. 179-6/08

SHARON FRANCIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner is a certified physical education teacher who earned tenure in respondent's district. Her employment was terminated when the Board of Education voted to create the position of Physical Education/Health Instructor and require dual certification in Physical Education and Health as a qualification for all employees who teach Physical Education or Health. Upon reviewing the record, the 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's actions in creating the above referenced position – for which petitioner is not properly certified and in terminating petitioner's employment – were not arbitrary, capricious or unreasonable.

The factual background to this controversy, as stipulated by the parties is, in brief, as follows. Sharon Francin has a teaching certificate with an endorsement for Physical Education but not for Health. She gained tenure in Maywood in or about September of 2003. From the onset of her employment in 2000 through the 2005-2006 school year, petitioner

taught Physical Education and Health. The record indicates that it was, in fact, a long-standing practice in respondent's district for Physical Education teachers to also teach Health.

In or about August 2006, the respondent Board was advised by representatives of the State Department of Education that petitioner's teaching certificate did not authorize her to teach Health; it was only appropriate for the teaching of Physical Education. Respondent consequently made adjustments to petitioner's schedule and that of other teachers so that petitioner no longer taught Health. The record indicates that Francin was told in a December 2006 evaluation that she should verify which courses would be needed for her to obtain teaching certification for Health, and that she was advised in at least two other communications from administrators – in August 2006 and December 2007 – that the district expected her to pursue a Health endorsement to her teaching certificate.

On April 28, 2008, respondent adopted Resolution P. 137 (Summary Decision Exhibit J-3) creating the position of "Health and Physical Education Teacher." A true copy of the new job description for the position referenced in the resolution was annexed to the summary decision papers as Exhibit J-4. On May 6, 2008, relying upon Resolution P. 137, respondent's superintendent of schools wrote to petitioner advising her that, since she had failed to secure an endorsement to teach Health, she would not be employed by respondent after June 30, 2008.

At the time that petitioner's employment was terminated, respondent employed three other teachers who are certified in both Physical Education and Health: Jean Kosits – who had more seniority than petitioner; Keith Timmons – tenured; and David Wells – untenured. As of September 2008, respondent hired Michael Halligan, who is certified to teach both Health and Physical Education.

It is undisputed that a local board of education is entitled by statute to abolish a position "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." *N.J.S.A.* 18A:28-9. In the Initial Decision, the ALJ cited to *Donald Wollman v. Board of Education of the City of Trenton, Mercer County* (Commissioner Decision #140-95), *aff'd.* in pertinent part, State Board Decision #62-95 (January 7, 1998), for the proposition that a petitioner who challenges the board's action must prove that the board's decision was arbitrary, capricious or motivated in bad faith.

In the OAL, petitioner apparently contended that respondent's actions constituted "bad faith" because the Board abolished the position of Physical Education Teacher, while retaining a less senior teacher in a position with substantially the same responsibilities that she could fulfill as a fully credentialed and tenured teacher of Physical Education. This contention referred to the fact that although all the remaining Maywood physical education teachers were dually certified to teach both Health and Physical Education, Timmons' schedule in the first half of the 2008-2009 school year included no Health classes.[1]

In considering petitioner's argument, the ALJ looked to *Caldwell-West Caldwell Educ. Ass'n v. Caldwell-West Caldwell Bd. of Educ.,* 180 *N.J. Super.* 440 (App. Div. 1981), wherein the education association challenged several changes in teaching assignments implemented within the school district. In that case, the Appellate Division explained that a board must have "flexibility and discretion . . . in shaping educational policies and fulfilling its educational obligations," and must have some flexibility in making managerial decisions. *Id.* at 447. The court further stated:

[1] Petitioner also contended that the district's reorganization of Timmons' schedule in February 2009 to include Health classes was the result of its recognition that it improperly terminated petitioner when there was a job that petitioner could have performed.

> Unless there is room in the joints for modification and adaptation necessary to make the system work, educational machinery would become stalled in endless dispute, grievance procedures, arbitration, unfair labor practice charges, hearings, reviews, and appeals.
> [*Ibid.*]

The ALJ concluded that petitioner's position did not properly recognize that unlike the circumstances presented in the cases she cited – *e.g. Lingelbach* v. *Hopatcong Bd. of Educ.,* 1984 *S.L.D.* 1955, *McGlynn v. Sea Girt Bd. of Educ.*, 93 *N.J.A.R.*2d. (EDU) *and Dennery v. Passais County Regional High School District Bd. of Educ.*, 131 *N.J.* 626 (1993), where positions were created that were substantially similar to the abolished positions – the positions involved in the instant case are distinct, separately recognizable, and require different endorsements. The ALJ referenced *N.J.A.C.* 6A:9-9.2(a)(2) which lists the separate endorsements relating to Health and/or Physical Education and *N.J.A.C.* 6A:9-11.8 which sets forth the course requirements for a dual Health/Physical Education endorsement. Further, the ALJ viewed petitioner's failure to acquire an endorsement to teach Health as an absolute bar to her employment in the newly created position. Thus, the findings of bad faith in the above cited cases were based upon circumstances not present in this matter.

To further support the reasonableness of respondent's decision to require dual certification in Health and Physical Education, the ALJ pointed to the history in the district of teachers, including petitioner, being required to provide instruction in both Health and Physical Education. Petitioner was only moved into a Physical Education-only position after representatives of the State Department of Education advised respondent that petitioner's teaching certificate did not authorize her to teach Health. At that point in time petitioner was retained, but told to obtain the endorsement to teach Health classes. The ALJ concluded that the

Board's subsequent action of creating the Health and Physical Education position reflected its long-time preference for the dual teaching position, and was reasonably meant to achieve greater efficiency and economy by employing multidisciplinary teachers.

In her first exception, petitioner complains that the cases that the ALJ cited concerning a petitioner's burden to prove that a board of education's action is arbitrary or driven by bad faith were inapposite to the fact pattern in the instant case and that the ALJ was incorrect in concluding that it is necessary for her to meet that burden. While the Commissioner notes that the ALJ could have relied on cases with fact patterns closer to the matter at hand, she nonetheless rejects the petitioner's suggestion that she need not show arbitrariness, unreasonableness or bad faith by respondent.

The consolidation of positions in a school district, such as the consolidation that was mandated by respondent, is one of many actions which a board has authority to make. *Dunellen Board of Education v. Dunellen Education Asso.,* 64 *N.J.* 17, 30 (1973). If that action is challenged, the challenger must show that under the circumstances of his or her case, the action was arbitrary, capricious, unreasonable or in bad faith. For example, in *Dennery, supra,* a consolidation of supervisory positions – and an accompanying requirement of dual certification for the newly created position – was at issue. The Supreme Court applied the above articulated standard and was "unable to conclude . . . that the requirement of two certificates to qualify for a single education position is anomalous, arbitrary, or irrational. Nor is it unlawful or invalid." *Dennery v. Bd. of Educ.*, 131 *N.J.* 626, at 638-39. Thus, the action of the instant respondent in combining the teaching of Health and Physical Education and in requiring dual certification of teachers of those subjects is valid unless petitioner can prove arbitrariness, unreasonableness or bad faith.

The remaining issue in petitioner's first exception is her contention that the ALJ failed to recognize that her tenure rights must be honored "even when a board claims goals of economy or educational policy." (Petitioner's Exceptions at 3) For the proposition that her tenure rights were violated by respondent she cites *Bednar v. Westwood Bd. of Ed.*, 221 *N.J. Super* 239 (App. Div. 1987), *certif. denied* 110 *N.J.* 512 (1988), in which a non-tenured art teacher was retained in a full-time job while the hours of Bednar – a tenured teacher certified to instruct in all grade levels of art – were reduced. The Board's rationale for its action, *i.e.*, that the untenured teacher had more experience teaching at the Junior High School level, was rejected by the Appellate Division which explained that:

> Seniority is a statutory concept created by Chapter 28 of Title 18A, a chapter which deals only with the various aspects of tenure. *Old Bridge Tp. Bd. of Educ. v. Old Bridge Educ. Ass'n.*, 98 *N.J.* 523, 531 (1985). It does not purport to create employment rights for non-tenured employees. This court has thus held that non-tenured teachers whose contracts are not renewed by reason of a RIF are not entitled to the reemployment rights conferred by Chapter 28. *Union Cty. Bd. of Ed. v. Union Cty. Teach. Assn.*, 145 *N.J. Super.* 435 (App Div. 1976), certif. den. 74 *N.J.* 248 (1977). Chapter 28 surely does not contemplate use of the concept of seniority to justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher. *Capodilupo v. West Orange Tp. Ed. Bd., supra.*

Thus, the Commissioner cannot agree that *Bednar* is apposite to the instant case. In that case the tenured petitioner possessed the appropriate certification for the available full time position. In the case at hand, petitioner does not hold the dual certification necessary for the Health/Physical Education teaching position. In other words, petitioner can no longer be considered qualified for a vacancy because there is no longer a position calling for certification solely in Physical Education, and she does not possess the dual certification necessary for the available Health/Physical Education positions in Maywood. *See, Francey v. Board of Education*

of the City of Salem, Salem County, 286 *N.J. Super.* (App. Div. 1996) (The scope of the position to which tenure protection attached was initially limited by the scope of the certificate the staff member was required to possess in order to satisfy the qualifications for such employment [citing *Capodilupo v. West Orange Bd. of Ed*, 1986 *S.L.D.* 3010, *aff'd*, 218 *N.J. Super.* 510 (App. Div. 1987), *certif. den.*, 109 *N.J.* 514 (1987), p.5]).

In summary, respondent's action in creating a new, consolidated position requiring dual certification – which petitioner does not have – was proper, so long as it was not arbitrary or unreasonable under the facts of this matter, and as long as no bad faith was involved. *See, e.g., Dennery, supra*; *Kopko v. Board of Education of the Borough of Carteret, Middlesex County*, Commissioner Decision No. 570-97, October 30, 1997; *Yucht v. Board of Education of the Borough of Milltown, Middlesex County*, State Board Decision #84-97, July 5, 2000. Petitioner did not meet her burden to prove either the existence of arbitrariness and unreasonableness or the perpetration of bad faith by respondent.

Petitioner's second exception to the Initial Decision concerns the ALJ's failure to address her contention that respondent erred in not terminating her by name via a resolution based upon a roll-call vote. This alleged error by respondent, in petitioner's view, entitles her to reinstatement and back pay and benefits. In support of this position, petitioner cites to *N.J.S.A.* 18A:27-4.1(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.

The Commissioner finds that no harmful error results from the absence in the Initial Decision of a specific response to this argument by petitioner. The petitioner's separation

from respondent's district was the result of the termination of a position, in keeping with the rules regarding reductions in force. *N.J.S.A.* 18A:28-9. It was not a specific termination of petitioner. In point of fact, had petitioner possessed the required dual certification, she would have remained employed in Maywood.

The fact that petitioner's colleague, Timmons, did not receive a letter like the Maywood Superintendent's May 6, 2008 letter to petitioner advising her of the elimination of the position of Physical Education Teacher, flows from the fact that Timmons' dual certification in Health and Physical Education rendered him qualified to fill the new, consolidated position. The fact that Timmons happened to teach only Physical Education classes for a period of time after the creation of the new consolidated position is not germane to the question of whether he held the certification required for the new position.

In petitioner's third exception she describes the 2008-2009 teaching schedules of two non-tenured teachers – David Wells and Michael Halligan. These two instructors, together, were teaching seven periods of Physical Education per day in Maywood during the 2008-2009 school year. Petitioner contends that the schedules show that there was sufficient need for Physical Education classes to continue petitioner's employment. Citing to case law relating to tenure rights, petitioner argues that respondent was obligated to retain her to teach the above-mentioned Physical Education classes instead of hiring a new, non-tenured teacher.

Similarly, petitioner references the 2008-2009 schedule of Keith Timmons, who taught only Physical Education classes until February 2009, when he was assigned Health classes. At the time of her separation from service petitioner admittedly had more experience than Timmons teaching Physical Education in respondent's district, and thus argued that her

seniority in that subject was superior. This, petitioner reasoned, required respondent to retain her over Timmons.

Once again, petitioner ignores respondent's previously discussed authority to create positions which will provide the managerial flexibility (including the discretion to schedule work as they see fit) discussed in *Caldwell-West Caldwell Educ. Ass'n v. Caldwell-West Caldwell Bd. of Educ., supra,* 180 *N.J. Super.* at 447. And without the required certification, petitioner has no right to employment in those positions.

Petitioner's reliance on *Miles v. Board of Education of the Borough of Watchung, Somerset County,* 1984 *S.L.D.* 1058 (Commissioner of Education) *aff'd.* 1984 *S.L.D.* 1072 (State Board of Education), *aff'd.* 1985 *S.L.D.* 1969 (App. Div. 1985); *Prysinanzny v. Board of Education of the Borough of Sayreville*, OAL DKT. NO. EDU 2722-79 (March19,1980); and *Viemeister v. Board of Education of the Borough of Prospect Park,* 5 *N.J. Super.* 215 (App. Div. 1949) is misplaced. In those cases the petitioners were restored to employment because they were tenured and held the certification required for the positions in question. More specifically, in *Miles*, the tenured petitioner whose work hours had been reduced, was restored to a full-time schedule because she possessed the certification necessary for the position of full-time vocal music teacher. Similarly, in *Prysinanzny,* the petitioner was restored to work as a social studies teacher because she had the proper certificate and endorsement for the position, notwithstanding the fact that there were less senior teachers in the district who had additional endorsements which were superfluous to the job requirements. In *Viemeister,* a tenured principal was installed into the new position of "Teaching Principal" because he was qualified to be both a principal and a teacher.

Petitioner's fourth exception poses a novel argument. Without any evidential proffer, petitioner maintains that no economy was achieved in respondent's district during the 2008-2009 school year by the creation of the new Health/Physical Education position. Bootstrapping on that assertion, petitioner reasons that respondent's creation of the new position was fraudulent.[2] (Petitioner's Exceptions at 24- 25) This line of argument does not persuade the Commissioner, both because it is not grounded in evidence and because there is no authority in school law for the proposition that a board of education's action may be deemed arbitrary, irrational or in bad faith based on a retrospective evaluation of its success in accomplishing the intended purpose. Moreover, even if it were appropriate to impose such an unusual standard, it is doubtful that an evaluation could be fairly made solely on the basis of the first year of implementation of the action or policy.

There are ancillary arguments in petitioner's fourth exception. First, petitioner suggests that Timmons' teaching schedule of only Physical Education classes at the beginning of the 2008-2009 school year was proof that the position of Physical Education teacher had not been abolished, and that she consequently should have been retained to fill that position. That argument fails insofar as petitioner confuses schedules with positions. Second, petitioner asserts that there had never been a formal written job description for 'Physical Education Teacher' in respondent's District and that the absence of same necessarily signified that such a position could not have been abolished. This argument fails, since the position of Physical Education Teacher clearly existed *de facto* in Maywood, whether or not there was a formal written job description. Third, petitioner contends that the wording of the job description for the new Health/Physical

[2] Petitioner also claims that because during the 2008-2009 school year none of respondent's teachers taught both Health and Physical Education in the same class to the same students, the goal of multidisciplinary curriculum, which served as one of the rationales for the creation of the new position, was also "a fraud." (Petitioner's Exceptions at 25)

Education position (J-4) allowed persons with only an endorsement in Physical Education to qualify for the position. She relies on the following text in a footnote on the first page of the job description:

> This sample reflects the endorsement for a teacher eligible to teach both health and physical education in all grades. Teachers may be eligible to teach health or physical education with the appropriate endorsement.

Petitioner's interpretation of the foregoing ambiguous language is unpersuasive, in light of the fact that the first qualification listed on the "Health and Physical Education Teacher" job description unequivocally requires "Valid New Jersey Instructional Certificate and Health and Physical Education Endorsement or eligibility." Moreover, this dual certification requirement is paralleled in the first line item of the "Performance Responsibilities" section of the job description where it states that a teacher in the position would be responsible for "teaching skills in comprehensive health and physical education." (J-4, page 1)

Petitioner begins her fifth exception by alleging that the Initial Decision contains no analysis of petitioner's claim that bad faith underlay respondent's creation of the new Health/Physical Education position. The Commissioner notes, however, that the issue was squarely addressed in the Initial Decision on page 13 – particularly in the second full paragraph – and rejects petitioner's assertions about bad faith for essentially the same reasons articulated by the Administrative Law Judge.[3]

The balance of petitioner's fifth exception reiterates arguments made in prior exceptions – particularly the fourth exception. The Commissioner finds nothing therein that

[3] Petitioner's comments about not falsifying her credentials are not germane to the issue of whether she holds the right ones for the position at issue in this case. Nor is her statement that she taught Health [without a proper endorsement] because she was told to, and no problems were created by her exclusive teaching of Physical Education in 2007-2007 and 2007-2008. What is germane is the fact that respondent advised petitioner to look into obtaining a Health endorsement, but in the two years subsequent to being so advised petitioner chose not to do so.

persuades her that bad faith drove respondent to create a position requiring dual certification in Health and Physical Education, particularly in light of the district's history of assigning teachers to instruct both subjects. Further, there is nothing in the record that would suggest that respondent's action was precipitated by the specific intent to terminate petitioner from her employment. To the contrary, it is undisputed that at least three of petitioner's supervisors advised her – immediately after being informed by the State Department of Education that petitioner was unqualified to teach Health and at least two years prior to respondent's creation of the new Health/Physical Education position – to seek the Health endorsement to her instructional certificate which, if pursued, might have avoided the instant controversy. *See,* Joint Exhibits J-27, J-28, J-29, annexed to the parties' Stipulation of Facts.

In summary, for the reasons expressed above, the Commissioner adopts the Initial Decision as the final decision in this case. The petition is hereby dismissed.

IT IS SO ORDERED.[4]

Millie Day

COMMISSIONER OF EDUCATION

Date of Decision: 8/20/09

Date of Mailing: 8/20/09

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 09131-08

AGENCY DKT. NO. 179-6/08

SHARON FRANCIN

Petitioner,

v.

MAYWOOD BOARD OF EDUCATION,

Respondent.

Louis P. Bucceri, Esq., for petitioner (Bucceri and Pincus)

Brent R. Pohlman, Esq., for respondent, Maywood Board of Education (Fogarty & Hara)

BEFORE **JOANN LASALA CANDIDO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Sharon Francin, a physical education teacher, brings this action against the Maywood Board of Education (Board) alleging a violation of her tenure and seniority rights in violation of N.J.S.A. 18A:28-5 and N.J.A.C. 6A:32-5.1 when she was terminated on June 30, 2008 due to a resolution adopted by the Board on April 28, 2008 providing for the creation of a new job description for the position of Health and Physical Education Teacher for which petitioner was not certified to teach. Petitioner also alleges that the Board did not comply with N.J.S.A. 18A:27-4.1(a) by failing to adopt a resolution to terminate her which was to designate her by name, and which was to have

a roll call vote. The Board asserted that the reason for petitioner's termination was for "economy and efficiency."

At the time of the adoption of this resolution, there were three other teachers employed by the Board to teach physical education. The significant difference between those teachers and petitioner was that they all possessed an endorsement enabling them to teach health as well as physical education.

Petitioner filed her petition with the Department of Education on June 20, 2008. On July 22, 2008 the matter was forwarded 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. The matter was scheduled for multi hearing dates as well as telephone status conferences the last being May 29, 2009.

On April 13, 2009, petitioner and respondent filed motions for summary decision pursuant to N.J.A.C. 1:1-12.5. On April 20, 2009 the parties filed their respective responses.

STIPULATION OF FACTS

The parties entered into a Joint Stipulation of Facts and accordingly I **FIND** that:

1. Respondent's school district consists of two (2) schools, Memorial School (grades K-3) and Maywood Avenue School (Grades 4-8).
2. Petitioner was continuously employed by the respondent as a teacher from September 2000 through June 30, 2008, as follows:
   a) 2000-2001, .78 part-time teacher (6th & 8th grade physical education, 4th & 7th grade family life);
   b) 2001-2002, .78 part-time teacher (grades 6-8 physical education and health);
   c) 2002-2003, .78 part-time teacher (grades 6-8 physical education and health);
   d) 2003-2004, part-time teacher (grades 6-8 physical education and health);

e) 2004-2005, part-time teacher (grades K, 4 & 6-8 physical education, family life and health);

f) 2005-2006, .8 part-time teacher (grades 4 & 6-8 physical education and health);

g) 2006-07, .8 part-time teacher (grades 6-8 physical education);

h) 2007-08, full time teacher (grades K & 6-8 physical education).

3. Petitioner has held instructional certification in New Jersey, with an endorsement as a Teacher of Physical Education, since January 1980 (Exhibit J-1). The certificate was issued in Petitioner's maiden name, Sharon Francese.

4. In or about August 2006, the respondent Board was advised by representatives of the State Department of Education that petitioner's teaching certificate did not authorize her to teach Health, but was appropriate for the teaching of Physical Education. As a result, the Respondent made adjustments to Petitioner's schedule and that of other teachers so that Petitioner's schedule did not include the teaching of Health and to assure appropriate coverage of all classes. (Exhibits J-25 and J-26) A true copy of Petitioner's teaching schedule for the 2007-08 school year is attached as Exhibit J-2. (A and B).

5. On April 28, 2008, the Respondent adopted Resolution P. 137 (attached as Exhibit J-3). A true copy of the new job description for the position of "Health and Physical Education Teacher," referenced in that resolution is attached as Exhibit J-4. Relying solely upon Resolution P. 137 (J-3), Respondent's Superintendent of Schools wrote to Petitioner on May 6, 2008 and advised her that she would not be employed by Respondent after June 30, 2008. (J-5)

6. Respondent had no separate job description for the position of Teacher of Physical Education or Teacher of Health prior to April 2008.

7. As of the date of this stipulation, Respondent has not adopted a separate resolution terminating Petitioner's employment by name.

8. By virtue of her term of service as a teacher in respondent's employ, petitioner attained the status of a tenured teacher, prior to June 30, 2008, pursuant to N.J.S.A. 18A:28-5, with seniority rights pursuant to N.J.A.C. 6A:32-5.1, et seq.

9. For the 2008-09 school year, the Respondent employs the following teachers, among others:

a) Michael C. Halligan

b) David J. Wells

c) Keith D. Timmins

d) Jean Kosits

10. Michael C. Halligan was hired as a teacher by Respondent effective as of September 1, 2008 and continues to be employed on a full-time basis to the present. He is not tenured. A true copy of his Provisional instructional certification, endorsed as a teacher of Health and Physical Education, is attached as Exhibit J-6. A true copy of Mr. Halligan's 2008-09 teaching schedule is attached as Exhibit J-7.

11. David J. Wells was hired as a teacher by Respondent effective as of September 1, 2006 and continues to be employed on a full-time basis to the present. He is not tenured. A true copy of his instructional certification, endorsed as a teacher of Health and Physical Education, is attached as Exhibit J-8. A true copy of Mr. Wells' 2008-09 teaching schedule is attached as Exhibit J-9.

12. Jean Kosits was hired as a teacher by Respondent effective as of January 1, 1995 and continues to be employed by Respondent and has greater seniority than Petitioner in the area of Physical Education. A true copy of her instructional certification, endorsed as a teacher of Health and Physical Education, is attached as Exhibit J-15. A true copy of Ms. Kosits' 2008-09 teaching schedule is attached as Exhibit J-16.

13. Keith D. Timmins was hired as a teacher by Respondent effective as of September 26, 2003 and continues to be employed on a full-time basis to the present. He is tenured. A true copy of his instructional certification, endorsed as a teacher of Health and Physical Education, is attached as Exhibit J-10.

14. Mr. Timmins' 2008-09 teaching schedule has changed during the course of the 2008-09 school year, as follows:

    A) For the period from the start of the 2008-09 school year through February 20, 2009, Mr. Timmins was assigned to teach Physical Education classes only and did not teach any Health classes. A true copy of his schedule for the period 9/1/08 through 2/20/09 is attached as Exhibit J-11.

    B) Effective February 23, 2009 Mr. Timmins' teaching schedule was changed to include the teaching of Health classes for the first time in his career in Respondent's District. Mr. Timmins' schedule as it has existed since February 23, 2009 to the date of this stipulation is attached as Exhibit J-12.

15. As of February 23, 2009, the students in grades one, two and three in Respondent's Memorial School who had been attending Physical Education classes with Mr. Timmins during periods 1, 2, 3, 4, 5 and 7 on Tuesdays, 3 and 4 on Wednesdays and 1, 2, 3, 4, 6 and 7 on Thursdays no longer received that instruction during those periods due to Mr. Timmins' reassignment to teach Health during those periods.

16. As of February 24, 2009 the District instituted a program in its Memorial School in which teachers assigned to supervise lunch/recess on Tuesdays, Wednesdays and Thursdays were assigned to supervise and direct various

Physical Education activities during their recess assignment. The staff members involved were notified of this assignment by their Building Principal by memorandum of February 13, 2009 (Exhibit J-13).

17. The teachers assigned pursuant to the February 13, 2009 memorandum (Exhibits J-13 and J-14) to conduct Physical Education activities during recess at Memorial School are:

    a) Keith Timmins (Tuesday 11:55a.m. – 12:22p.m.)

    b) Helen Bonafede (Tuesday 12:22p.m. -12:50p.m.)

    c) Claire Palm (Wednesday 11:55a.m. -12:22p.m.)

    d) Nancy Poalillo (Wednesday 12:22p.m. -12:50p.m.)

    e) Rachel Aloe (Thursday 11:55a.m.-12:22p.m.)

    f) Patricia Donovan (Thursday 12:22p.m. -12:50p.m.)

18. Helen Bonafede, Nancy Poalillo, Rachel Aloe and Patricia Donovan are all tenured teachers in Respondent's employ and are certified as Elementary teachers (K-8), among other certificates. Each has more seniority in the elementary teaching category than Petitioner's seniority in the category of Physical Education Teacher.

19. Claire Palm was hired as a teacher of Art by Respondent effective as of September, 2006 as a .5 part-time teacher. Her employment as a teacher of Art increased to .6 part-time for the 2007-08 and 2008-09 school years. She is not tenured as a teacher in respondent's district. The only instructional certification she holds is as a Teacher of Art.

20. Rachel Aloe was hired as a Teacher of Spanish by Respondent effective as of September 1998 on a .6 part-time basis and continues to be employed by Respondent on a .6 part-time basis to the present as a Teacher of Spanish. She has never worked for Respondent as an Elementary Teacher. She is tenured as a teacher in Respondent's District and has Certifications as a Teacher of Spanish, Teacher of Italian and as an Elementary Teacher (K-8).

21. The average student teacher ratio in the Physical Education classes taught in Respondent's Memorial school during the 2008-09 school year ranges between one (1) teacher to seventeen (17) students to one (1) teacher to twenty-three (23) students.

22. The average student teacher ratio during those recess periods in Memorial School when the staff supervise and direct various Physical Education activities pursuant to J-13 since February 24, 2009 ranges between one (1) teacher to one hundred nine (109) students to one (1) teacher to one hundred seventy-five (175) students.

23. The District has developed an assessment protocol with regard to student progress in the physical education activities supervised during recess periods

as established on February 24, 2009 pursuant to J-13. It is attached as Exhibit J-24.

24. During the 2007-08 school year petitioner earned gross wages of $45,820.00 from employment with respondent.

25. If Petitioner had been employed by Respondent for the 2008-09 school year she would have earned a gross salary of $48, 100.00.

26. Attached hereto are true copies of communications between Respondent's Superintendent of Schools, Dr. Robert Otnisky and the Principal of its Memorial School, Ray Bauer, and parents and staff regarding the change in the schedule of Keith Timmins to include the teaching of Health Classes. (Exhibits J-17 through J-23) The District initially planned to have Mr. Timmins' Physical Education classes taught by Elementary Classroom teachers. (Exhibits J-17 through J-19) The respondent subsequently determined to implement the Recess plan described in J-13 instead (J-20 through J-23).

27. In the Petitioner's December 19, 2006 teacher evaluation (Exhibit J-27 at page 2), it is recommended that she contact the County Office to verify courses needed to complete her certification to teach Health classes.

28. Exhibit J-28 and J-29 are true copies of communications from members of the Respondent's administration to Petitioner regarding obtaining Health certification.

SUMMARY DECISION

The parties agree that the underlying facts are clear and that no genuine issue of material fact exists. The rules governing motions for summary decision in an OAL matter are embodied in N.J.A.C. 1:1-12.5. These provisions mirror the language of R. 4:46-2 of the New Jersey Court Rules. See also Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995). Under N.J.A.C. 1:1-12.5(b), the motion for summary decision may be granted ". . . if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The opposing party must submit responding affidavits showing that there is indeed a genuine issue of material fact, which can only be determined in an evidentiary proceeding, and that the moving party is not entitled to summary decision as a matter of law. Failure to do so, entitles the moving party to summary judgment. Brill, supra, 142 N.J. 520. Moreover, even if the non-moving party comes forward with some evidence, the courts must grant

summary judgment if the evidence is "so one-sided that [moving party] must prevail as a matter of law." Id. at 536. 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 New Jersey Supreme Court's standard for summary judgment is thus designed to "liberalize the standards so as to permit summary judgment in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Brill, supra, 142 N.J. at 539.

POSITIONS OF THE PARTIES

The Board

The Board contends it was entirely within its discretion to abolish the position of physical education teacher, in favor of a position of teacher of physical education and health. It avers that its objective was to integrate a multidisciplinary approach to the subjects of Health and Physical Education

In support of this position, the Board relies substantially on Kopko v. Carteret Bd. of Educ., 96 N.J.A.R.2d (EDU) 665. In that case, the board eliminated two part-time positions and instituted one full time position, combining the areas of physical education and health. The petitioner teacher alleged that her seniority rights had been violated when the newly created position went to the other part-time teacher, who (unlike petitioner) held endorsements in both subject areas. The Board maintained that it abolished the part-time positions and combined them into one class for reasons of economy since enrollment in the two classes was low. The ALJ reasoned:

> The petitioner's seniority rights that accrued in her position as COE/Coordinator are not transferable to the newly-created position in which capacity she has never served. N.J.A.C. 6:3-5.1(l)(17)(i) provides, "any person holding

> an instructional certificate with subject area endorsements shall have seniority within the secondary category only in such subject area endorsement(s) under which he or she has actually served." While the petitioner would have superior seniority rights in her position as COE/Coordinator if she and the intervenor were both seeking that position, she is not entitled to superior seniority rights in respect of the newly-created position because her seniority accrued only in the COE/Coordinator position in which she actually served.
>
> Therefore, even though the intervenor, who holds an endorsement in COE does not have seniority in COE because he has never actually served in that position, neither the petitioner nor the intervenor may claim seniority rights in respect of the newly-created position precisely because it is new. Seniority at the secondary school level depends upon actual service in a position. The abolition of the petitioner's position and subsequent creation of the new position means that the newly-created position was not a position in which the petitioner could claim superior seniority rights because she has accrued seniority only in her previous position as COE/Coordinator The petitioner's seniority rights were not violated by the Board's appointment of the intervenor to the COE/Marketing Education Coordinator position.
>
> [Id. at 667.]

The Board argues that this is precisely on point and that petitioner, who does not possess the proper endorsements, has no greater right to the position than Mr. Timmins, who does possess the appropriate endorsements.

The Board bolsters its position by relying upon Yucht v. Milltown Bd. of Educ., EDU 10767-96, Final Decision, State Board of Education (July 5, 2000) http://law library.rutgers.edu./oal/search.html in which a law librarian was a casualty of a reduction in force because the board eliminated the librarian position and in its place created a librarian/media specialist position for which there was a "preference" for an instructional certificate in elementary education. The petitioner possessed all the credentials for the new librarian/media specialist position except that her instructional certificate was not in elementary education. The State Board affirmed the Commissioner who adopted the

ALJ's findings that the new position had new requirements which petitioner did not meet.

Petitioner

Petitioner alleges that the action to terminate her was improper and unnecessary. She posits that it was a clear violation of both her tenure and her seniority rights. She points to the schedule of a colleague, who possesses an endorsement enabling him to teach health and physical education, but who had never taught health prior to February 2009. At that time, months after she was terminated, major alterations were made to his schedule, ensuring that he taught health and physical education, and adjusting the schedules of at least five other teachers (not all of whom possessed the requisite credentials for their position) along with many students, whose recess periods were re-structured to include physical education activities. Petitioner argues that all these machinations would have been unnecessary had she simply exchanged schedules with a faculty member who had the required endorsement to teach health, but was only teaching Physical Education.

Petitioner argues that the case law cited by the Board is not relevant because when she was terminated, Mr. Timmins, although holding the proper endorsements for the new position, was only performing the job responsibilities of a physical education teacher, not a teacher of physical education and health. His schedule of physical education classes could have been performed by her. Since there were no significant differences in responsibilities, there was a violation of her tenure and seniority rights.

Petitioner contends that it was only after the threat of litigation, and on advice of the Board's counsel, that the Board acted to alter Mr. Timmins' schedule to include health classes and to alter the students' schedules from small group full period classroom instruction in physical education to a recess schedule which was supervised by non-physical education teachers, and which no longer consisted of small groups but groups of 100 students or more. Petitioner argues that the changed schedule was a

sham, and without the threat of litigation, Mr. Timmins, a teacher with less seniority in the position, was actually working out of the new title, and performing a job for which the health endorsement was superfluous.

Petitioner further argues that the Board acted in bad faith by ousting her for reputed reasons of economy and efficiency. It also wanted her to obtain an endorsement in health when in fact a less senior teacher, who only taught physical education, although he possessed required endorsements, was retained. She also argues that a new, non-tenured teacher was hired to teach both health and physical education.

Petitioner cites Lingelbach v Hopatcong Bd. of Educ., 1984 S.L.D. 1955, and McGlynn v. Sea Girt Bd. of Educ., 93 N.J.A.R.2d. (EDU) 438 in support of her arguments. In Lingelbach, a school social worker was terminated as part of a plan to economize and re-organize. Lingelbach, the petitioner, along with a psychiatric social worker were both terminated as a reduction in force. The board then hired two part time hourly paid social workers. In fact the need for social services actually increased. By hiring the two hourly social workers, the board saved money, but the amount of services provided remained virtually the same. The State Board of Education held: "[t]o permit this board of education to discharge, without cause, an employee such as petitioner, who has served long and well, and secured a tenure status, would nullify the Teacher Tenure Law and would result in that which the Legislature sought to prevent when it recognized tenure." Lingelbach, supra, 1984 S.L.D. at 1958.

Petitioner argues that the same principle should apply to her. Although it is perfectly permissible for the Board to require dual endorsements for teachers of both health and physical education, it was not permissible for the Board, in the name of "flexibility," to abolish the position of physical education teacher, while retaining a teacher, albeit with dual endorsements, in a position with substantially the same responsibilities that she could fulfill as a fully credentialed and tenured teacher of physical education. She maintains that this constitutes bad faith on the part of the

Board, citing Dennery v. Passaic County Regional High School District #1 Bd. of Educ., 131 N.J. 626 (1993), which held:

> When the duties of the position in which a teaching-staff member has acquired tenure are substantially identical to those of the position that the person seeks, a local school board may not sidestep an educator's tenure rights by simply renaming the position or tacking on additional meaningless requirements. The local board must extend the teaching-staff member's tenure rights to the newly-created position.
>
> A mere overlap in duties, however, 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.
>
> [Id. at 639-640. (citations omitted).]

Petitioner, therefore, claims that the requirement of the Health endorsement was "meaningless," and a ploy to violate her tenure rights. She also contends that she could have remained in her position had the Board switched her schedule with that of Mr. Timmins since he was teaching only physical education while a new hire, Mr. Halligan, was teaching both Health and Physical Education.

Petitioner also argues the Board acted illegally, in violation of N.J.S.A. 18A:27-4.1(a), by not adopting a separate resolution which identifies her by name, and terminates her employment.

ANALYSIS

A local board of education is entitled by statute to abolish a position "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." N.J.S.A. 18A:28-9. A petitioner who opposes the abolition must prove by a

preponderance of the credible evidence that the board's decision was arbitrary, capricious or motivated in bad faith. See Wollman v. Trenton Bd. of Educ., 96 N.J.A.R.2d (EDU) 20, 24.

In Wollman, supra, the petitioner was a tenured assistant director of buildings and grounds whose position was abolished by the local board of education, pursuant to the recommendation of an accounting firm's efficiency study. Noting that the local board was entitled to abolish a position for reasons of economy and its actions were to be accorded a presumption of correctness, the presiding ALJ found the petitioner had failed to prove the board's action was arbitrary, capricious, undertaken in bad faith, or contrary to N.J.S.A. 18A:28-9.

In this matter, the Board argues that its objective in abolishing the position of physical education teacher, in favor of a position of teacher of physical education and health was to integrate a multidisciplinary approach to the subjects of health and physical education. Petitioner does not challenge the Board's managerial prerogative to abolish tenured positions pursuant to N.J.S.A. 18A:28-9 for reasons of economy and administrative reorganization, but instead argues the Board's actions constituted "bad faith" where the Board abolished the position of physical education teacher, while retaining a teacher in a position with substantially the same responsibilities that she could fulfill as a fully credentialed and tenured teacher of physical education.

In Caldwell-West Caldwell Educ. Ass'n v. Caldwell-West Caldwell Bd. of Educ., 180 N.J. Super. 440 (App. Div. 1981), the union challenged several changes in teaching assignments implemented within the district. The court concluded that a board must have "flexibility and discretion . . . in shaping educational policies and fulfilling its educational obligations," and must have some flexibility in making managerial decisions. Id. at 447. The court added:

> Unless there is room in the joints for modification and adaptation necessary to make the system work, educational machinery would become stalled in endless dispute,

> grievance procedures, arbitration, unfair labor practice charges, hearings, reviews, and appeals.
>
> [Ibid.]

In this matter, petitioner contends that the Board's actions constituted "bad faith." However, her contention fails to properly recognize that unlike the circumstances presented in Lingelbach, supra, McGlynn, supra, and Dennery, supra, where the positions created were substantially similar to the positions abolished, the positions here are distinct and separately recognized positions requiring different endorsements. See N.J.A.C. 6A:9-9.2(a)(2); 6A:9-11.8. As such, they are not substantially similar positions and petitioner's lack of a physical education and health endorsement is an absolute bar to her employment in the newly created position. Therefore, Petitioner presents no evidence that the Board's actions were done in "bad faith."

Indeed, contrary to petitioner's contention, the record indicates that the Board hired petitioner to teach both physical education and health and only moved petitioner into a physical education position after being advised by representatives of the State Department of Education that petitioner's teaching certificate did not authorize her to teach health; but was only appropriate for the teaching of physical education. Instead of terminating petitioner, the Board accommodated her by advising her to obtain the endorsement to teach health classes. Subsequently, almost two years later, following petitioner's failure to obtain the endorsement, the Board abolished the physical education teacher position and created the position of health and physical education teacher to achieve greater efficiency through having a multidisciplinary teaching position. It also created a greater economy through employing a single teacher for both health and physical education. As such, the Board's action abolishing the physical education teacher position and creating the health and physical education teacher position reflected the Board's long time preference for the dual certification teaching position.

"The School Law vests the management of the public schools ... in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal." Kopko, supra, 96 N.J.A.R.2d (EDU) at 668. (quoting Kenney v. Montclair Bd. of Educ., 1938 S.L.D. 647 (1935), aff'd St. Bd. of Ed. 649, 653 (1935)).

> It is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. Finally, boards of education are responsible not to the Commissioner, but to their constituent for the wisdom of their actions.
>
> [Ibid. (citing Boult and Harris v. Passaic Bd. of Educ., 1939-49 S.L.D. 7, 13, aff'd St. Bd. of Ed. 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), 136 N.J.L. 521 (E & A 1948)).]

Based upon the facts adduced and the legal principles cited above, I **CONCLUDE** that the Board's action abolishing the position of physical education teacher, in favor of the position of teacher of physical education and health was in compliance with the statutory language of N.J.S.A. 18A:28-9 thru -13 and it was not arbitrary, unreasonable or capricious. Cf. Weider v. High Bridge Bd. of Educ., 112 N.J.L. 289 (1934) (The Board's abolishment of the position of, exclusively, physical instructor, and the creation, at reduced expense, of a new position involving the teaching of another subject, which petitioner could not teach because she lacked the necessary endorsements, was rooted in public economy, not discrimination).

I further **CONCLUDE** that petitioner has failed to prove, by a preponderance of the credible evidence, that the abolition of the position of physical education teacher with the replacement of the position of physical education and health for purposes of

fiscal efficiency was undertaken in bad faith or was arbitrary and capricious or was in any other fashion contrary to the dictates of N.J.S.A. 18A:28-9.

DISPOSITION AND ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's motion for summary decision be and is hereby **GRANTED** and petitioner's cross motion is **DENIED**. It is further **ORDERED** that petitioner's Verified Petition 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.

July 6, 2009

DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: July 6, 2009

Date Mailed to Parties: July 6, 2009

ljb

262-09

OAL DKT. NO. EDU 7238-09
(EDU 13005-08 on Remand)
AGENCY DKT. NO. 218-7/08

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and the Initial Decision on Remand issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1(a) and (b), have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8|26|09

Date of Mailing: 8|26|09

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 07238-09

Agency Docket No.218-7/08

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF GARFIELD, BERGEN COUNTY,

Respondent.

ON REMAND EDU 13005-08

Eliyahu S. Scheiman, Esq. appearing on behalf of petitioner (Porzio, Bromberg & Newman)

Toni Belford Damiano, Esq., appearing on behalf of respondent

Record Closed: July 9, 2009 Decided: July 13, 2009

BEFORE **JOANN LaSALA CANDIDO**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on October 23, 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. A hearing was scheduled on March 3, 2009 at which

parties reached a settlement. On May 18, 2009, the undersigned received the fully executed Settlement, which is attached hereto.

An Initial Decision approving the settlement was rendered by the undersigned (OAL Docket Number EDU 07238-09) on May 18, 2009 which was remanded to the OAL by Order dated June 18, 2009, and received by the OAL on June 23, 2009. The Commissioner's reason for remanding this matter to the OAL is because both the file and the agreement did not include any indication that Garfield Board had approved the agreement.

On July 9, 2009, the undersigned received a copy of the Board Resolution, which is attached hereto.

Accordingly, I have reviewed the contents of the Settlement, Commissioner's Order and the attached Board Resolution, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 13, 2009
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: 7-15-09

Date Mailed to Parties: JUL 15 2009

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

PORZIO, BROMBERG & NEWMAN, P.C.
100 Southgate Parkway
Morristown, NJ 07962-1997
(973) 538-4006
Attorneys for Petitioner West Milford Board of Education

WEST MILFORD BOARD OF EDUCATION, Petitioner, v. GARFIELD BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OAL DOCKET NO.: EDUOT 13005-2008 AGENCY REF. NO. 218-7/08 **STIPULATION OF SETTLEMENT AND RELEASE**

TO: Toni Belford Damiano, Esq.
Damiano Law Offices
51 East Main Street
Little Falls, New Jersey 07424

This Settlement Agreement and Mutual Release ("Agreement") is made and entered into by and between petitioner, West Milford Board of Education (the "West Milford Board") and respondent, Garfield Board of Education (the "Garfield Board"), in settlement of the claims set forth in the above-captioned matter.

WITNESSETH:

WHEREAS, on or about July 23, 2008, the West Milford Board filed a Petition of Appeal before the State of New Jersey Commissioner of Education (the "Commissioner"), captioned *West Milford Bd. of Educ. v. Garfield Bd. of Edu.*, OAL Docket No. EDUOT 13005-2008 (the "Petition"), for reimbursement of tuition incurred by the West Milford Board for homeless students that attended school in the West Milford School District, as set forth more fully in the Petition;

WHEREAS, this matter is currently pending before the Honorable JoAnn LaSala Candido, A.L.J.; and

WHEREAS, the parties to this Agreement (the "Parties") desire to amicably resolve their differences and avoid additional expenses of further litigation in connection with the Petition of Appeal.

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, it is hereby agreed by and between the parties hereto as follows:

1. This Agreement shall not be construed as an admission by the Parties of any acts or omissions alleged or those that could have been alleged by any of the Parties, or of any acts or omissions alleged or which could have been alleged against any of the Parties. Each party to this Agreement specifically denies any liability whatsoever for damages, injuries, or other claims by any other party to this Agreement or those that were alleged or could be claimed by any of the other Parties.

In exchange for the valuable consideration set forth herein, the Parties mutually release and give up all claims and rights they may have against each other for damages or injuries arising from the West Milford Board's claims against the Garfield Board for reimbursement of tuition relating to students I.F. and B.B., for the 2000-01 school year, and students AC1, AC2 and AC3, for the 2007-08 school year, as set forth more fully in the Petition.

As used in this Agreement, the term the "West Milford Board" means: the West Milford Board of Education, its current or former elected or appointed officials, administrators, employees, attorneys, agents, servants, representatives, predecessors and successors, insurance carriers, and all other persons or entities for whom any of the above have been or may be legally responsible.

As used in this Agreement, the term the "Garfield Board" means: the Garfield Board of Education, its current or former elected or appointed officials, administrators, employees, attorneys, agents, servants, representatives, predecessors and successors, insurance carriers, and all other persons or entities for whom any of the above have been or may be legally responsible.

The Parties specifically release the following claims as to each other:

> Any and all claims and counterclaims that were brought and that could have been brought in the Petition relating to tuition reimbursement for students I.F. and B.B., for the 2000-01 school year, and students AC1, AC2 and AC3, for the 2007-08 school year, as set forth more fully in the Petition bearing OAL Docket No. EDUOT 13005-2008; and

2. In total and complete settlement of the claims referred to in Paragraph no. 1 above, the Garfield Board shall pay the West Milford Board the sum of ($24,000.00) (the "Settlement Sum"). Payment comprising the settlement sum shall be delivered to Vito Gagliardi, Jr., Esq., Porzio, Bromberg & Newman, P.C., 100 Southgate Parkway, P.O. Box 1997, Morristown, N.J. 07962-1997.

3. The parties agree that neither they nor their attorneys, nor representatives shall reveal to anyone, verbally or in writing, other than as may be mutually agreed to in writing, any of the terms of this Agreement. The Parties acknowledge that this confidentiality requirement is a material term to this Agreement and that violating this Paragraph is a material breach of this Agreement.

4. The parties agree that this Agreement may not be used to establish precedent in any future proceeding of any type whatsoever and that it shall be inadmissible in any such proceeding, other than a proceeding to enforce or prove the existence of this Agreement. This Agreement is a compromise of disputed claims and shall not be construed as an admission by

any party of any of the acts or omissions alleged or those that could have been alleged by any party against another party in this matter.

5. This Agreement contains the entire agreement among the Parties, and fully supersedes any and all prior agreements and understandings among the Parties pertaining to the subject matter of this Agreement. The Parties represent and acknowledge that they have not relied upon any representation or statement by any other party, or their counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth in this Agreement. No other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to be a modification of this Agreement. No waiver, modification, or amendment of this Agreement shall be valid or enforceable unless reduced to writing and signed by the party against whom enforcement is sought.

6. The Parties acknowledge that they are fully satisfied with their respective legal representation in this matter and that they have reviewed the terms of this Agreement with their respective counsel.

7. The Parties acknowledge that each party has engaged counsel in connection with the negotiation and completion of this Agreement, and, consequently, agree that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party will not be used in the interpretation of this Agreement or any amendment or exhibit hereto.

8. The Parties agree that the Superior Court, State of New Jersey, shall have sole exclusive jurisdiction to adjudicate any action to enforce the provisions in this Agreement. The parties agree that all terms to this Agreement are valid and enforceable by the Superior Court of New Jersey. This Agreement shall be governed by, construed, interpreted, and enforced in accordance with the laws of the State of New Jersey.

9. If any of the provisions of this Agreement shall be held by any court to be invalid or unenforceable, such invalidity or unenforceability shall not invalidate or render unenforceable the entire Agreement, but rather the entire 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.

10. This Agreement is subject to ratification by the Parties at their respective, next scheduled Board meetings, and is without prejudice to any party if the terms are not agreed upon.

PETITIONER

Steve J. Cea
Board Secretary/Business Administrator
West Milford Board of Education

Dated: 5/6/09

~~Dr. Michelle Fenwick~~ Tim Foley
Board President
West Milford Board of Education

Dated:

RESPONDENT

Dennis Frohnapfel
Board Secretary/Business Administrator
Garfield Board of Education

Dated: 4/1/09

Gerald Wich
Board President
Garfield Board of Education

Dated: 4/1/09

WEST MILFORD TOWNSHIP
BOARD OF EDUCATION
Office of the Business Administrator/Board Secretary

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of West Milford in the County of Passaic, New Jersey, convened in public session on Tuesday, February 24, 2009, at 9:00 p.m. at the Westbrook School Media Center.

The following members of the Board of Education were present: Mr. Bailey, Dr. Fenwick, Mr. Foley, Mr. Gottlieb, Mr. Murray (arrived 9:25 p.m.), and Mrs. Van Dyk

The following member(s) of the Board of Education was/were absent: Mrs. Babbitt, Mr. Florian, Mrs. Touw

Motion by Mr. Bailey, seconded by Mr. Foley to approve the following agenda item:

The recommendation of the Board to approve a settlement in the matter of the West Milford Board of Education v. the Garfield Board of Education, in an amount to be received by West Milford totaling $24,000, subject to the terms and conditions to be reflected in a duly negotiated settlement agreement.

ROLL CALL:	Mrs. Babbitt	---	Mr. Florian	---	Mr. Murray	*
	Mr. Bailey	Yes	Mr. Foley	Yes	Mrs. Touw	---
	Dr. Fenwick	Yes	Mr. Gottlieb	Yes	Mrs. Van Dyk	Yes

*Absent for Vote

__5__ yes, __0__ no **MOTION PASSED.**

STATE OF NEW JERSEY)
)ss
COUNTY OF PASSAIC)

I, Steven J. Cea, Business Administrator/Board Secretary, of the Township of West Milford, in the County of Passaic, 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 February 24, 2009, has been compared by me with the original minutes as officially recorded in my office in the minute book of said West Milford Township Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract. I witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 25th day of February 2009.

Board Seal

Steven J. Cea
Board Secretary/Business Administrator

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02-357-09 **Be It Resolved,** that the Garfield Board of Education, upon the recommendation of the Superintendent of Schools, Assistant Superintendent, and Business Administrator/Board Secretary, in accordance with advice of Board counsel, approves the settlement agreement *West Milford Board of Education v. Garfield Board of Education,"* OAL Docket O. EDUOT 13005-2008N, Agency Docket No. 218-7/08, in the amount of $24,000.00.

MOTION: Mr. Damato	SECOND: Mr. Benanti

	YES	NO	ABSTAIN
Mrs. Aloia (Rosemarie)	X		
Ms. Visotcky (Lou Ann)			
Mr. Damato (Anthony)	X		
Dr. Conte (Kenneth)	X		
Mr. Benanti (Salvatore)	X		
Mr. Hicks (Heath)			
Mr. DeMarco (Anthony)	X		
Mr. Puzio (Edward)	X		
Mr. Wich (Gerard)	X		

I, Dennis R. Frohnapfel, Ed.D., Secretary of the Garfield Board of Education, hereby certify that the foregoing is a true copy of a motion duly adopted by said Board at a Regular Meeting held on February 24, 2009.

IN WITNESS WHEREOF, I have set my hand and the seal of the Garfield Board of Education, June 30, 2009.

Dennis R. Frohnapfel, Ed.D., Secretary
Garfield Board of Education

RECEIVED
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GARFIELD BOARD OF EDUCATION

264-09

OAL DKT. NO. EDU 8627-09
AGENCY DKT. NO. 187-8/08

BOROUGH OF CHESILHURST, CAMDEN COUNTY AND MICHAEL BLUNT	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CHESILHURST, CHIEF SCHOOL ADMINISTRATOR ABDI H. GASS, BOARD OF EDUCATION OF WINSLOW TOWNSHIP, WINSLOW SUPERINTENDENT MAJOR POTEAT, WINSLOW BUSINESS ADMINISTRATOR ANN GARCIA, EXECUTIVE COUNTY SUPERINTENDENT MARGARET J. NICOLOSI AND COUNTY SCHOOL BUSINESS ADMINISTRATOR RITA M. HANNA,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

The record of this emergent matter – which included a digital recording of the hearing conducted at the Office of Administrative Law (OAL) on August 11, 2009 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner adopts the recommended order denying emergent relief as she concurs with the ALJ – for the reasons clearly articulated on the digital recording and in her Order – that petitioners have not satisfied their burden of establishing any of the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the instant application for emergent relief is hereby denied. This matter is being returned to the OAL for such further action as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 8/26/09

Date of Mailing: 8/26/09

* 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 8627-09
AGENCY DKT. NO. 187-8/09

BOROUGH OF CHESILHURST, CAMDEN COUNTY AND MICHAEL BLUNT,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF CHESILHURST, CHIEF SCHOOL ADMINISTRATOR ABDI H. GASS, WINSLOW TOWNSHIP BOARD OF EDUCATION, WINSLOW SUPERINTENDENT MAJOR POTEAT, WINSLOW BUSINESS ADMINISTRATOR ANN GARCIA, EXECUTIVE COUNTY SUPERINTENDENT MARGARET J. NICOLOSI AND COUNTY SCHOOL BUSINESS ADMINISTRATOR RITA M. HANNA,

Respondents.

Rafael C. Haciski, Esq., for petitioners (Duane Morris)

Megan M. Schwartz, Esq., for respondents BOE Chesilhurst and Chief School Administrator Gass, (Hill Wallack, attorneys)

John B. Comegno, II, Esq. and **Kimberly A. Varillo**, Esq., for respondents Winslow Board of Education, Superintendent Poteat and Business Administrator Garcia (Comegno Law Group, attorneys)

Susan M. Huntley, Deputy Attorney General, for respondents Margaret J. Nicolosi and Rita M. Hanna (Anne Milgram, Attorney General of the State of New Jersey, attorneys)

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

Petitioners seek to enjoin the respondent Chesilhurst Board of Education's expansion of its sending-receiving agreement with Winslow Township, whereby all of the pre-Kindergarten through 6th grade students at its sole elementary school would be sent to Winslow, thus rendering the petitioning school district a non-operational district subject to consolidation and ultimate elimination pursuant to N.J.S.A. 18A:8-43, et. seq. Petitioners assert the methodology by which this was accomplished violated statutory and regulatory requirements and was accomplished by deceptive means on the part of the respondent Chesilhurst Board of Education and Chief School Administrator Abdi H. Gass. The petition was filed on August 5, 2009, and transmitted to the Office of Administrative Law on August 6, 2009. The emergent relief petition was scheduled and heard on August 11, 2009.

For reasons set forth below, emergent relief is denied as petitioners have not met any of the criteria required by Crowe v. DeGioia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6.

The following are the relevant facts. Chesilhurst students enrolled in grades 7 through 12 have attended Winslow Township schools through a pre-existing sending/receiving relationship with the respective boards of education. Chesilhurst

students enrolled in pre-Kindergarten through 6th grade attended school in the Chesilhurst school district's sole school, the Shirley B. Foster Elementary School. In late 2008, early 2009, the respective boards of education began discussing expanding their sending/receiving relationship in consideration of the new Accountability Regulations set forth at N.J.A.C. 6A:23A-2.1 et. seq. Additionally, in anticipation of the amended consolidation legislation, the Commissioner of Education has encouraged school districts to consider consolidation. Chesilhurst was one of the 26 school districts in the state, already having had an established sending/receiving relationship for some of its students, for whom consolidation was being encouraged. Ultimately, on March 30, 2009, the Chesilhurst Board of Education passed a resolution to expand the sending/receiving relationship with Winslow to include pre-Kindergarten through 6th grade. In reliance of this resolution, the respective boards of education prepared their budgets for the 2009-2010 school year to include tuition payments to Winslow for the attendance of all Chesilhurst students to its schools. The budget incorporates approximately $1.8 million in tuition dollars, and additional state aid, from Chesilhurst. This budget was approved by Executive County Superintendent Nicolosi pursuant to N.J.A.C. 6A:23-8.1. In further reliance upon this approval, Winslow Board of Education has already expended funds providing for extended school year (ESY) programs for the Summer 2009 to the additional students from Chesilhurst classified as eligible for special education and related services; has created class schedules for the new students; has hired eight tenured teachers from Chesilhurst; has provided for the bus transportation needs of its new students and advised their parents of the new bus routes; has conducted IEP (individualized education program) meetings for all the new students classified eligible for special education and related services; and has provided financially for the out-of-district placements for those students classified eligible for special education and related services for whom Chesilhurst IEP teams had previously designated their respective placements. The 2009-2010 school year commences on September 8, 2009.

In its pleadings, as further asserted at oral argument, petitioners contend they were unaware that the district would be placed in a position that it would be targeted for elimination, that they were assured that a feasibility study would be undertaken with

regard to consolidation and that its residents would be able to vote on any proposed consolidation. They contend that its board of education and the superintendent have unclean hands in this process. Petitioners assert that they have met all the criteria for the granting of emergent relief. They assert that they have been irreparably harmed because they have been deprived of the opportunity to vote upon a consolidation by what they term a *de facto* consolidation. In that regard, they contend that the legal right underlying their claim has been settled because the procedures set forth in the recent legislation that clarified the methodology to be applied in order to consolidate districts was not followed. Thus, they assert, they have a reasonable probability of success on the merits. When balancing the equities, the relative hardship to petitioners is greater if the relief is denied because their school district would cease to operate if emergent relief is not granted. Finally, they assert they are ready to take their pre-Kindergarten to 6th grade students back by re-hiring teachers, passing an emergency budget, fixing their school building and delaying the start of the school year, if necessary, in order to accomplish this goal.

I am denying emergent relief for the reasons set forth by the respondents in their respective pleadings and as advanced at oral argument and as further set forth below. Petitioners have not met any of the criteria set forth in Crowe v DeGioia for the granting of emergent relief. The true irreparable harm here is to the approximate 108 students if the start of their school year is delayed for what could be an indeterminate period of time if emergent relief is granted. Petitioners' legal rights are not well settled as there exists a significant dispute as to the material facts. The likelihood of success on the merits does not inure to the benefit of the petitioners. It is unquestionable that the Chesilhurst school district would be eliminated pursuant to N.J.S.A. 18A:8-43 et. seq. Additionally, there are significant jurisdictional issues with regard to this petition. For example, petitioners seek relief pursuant to N.J.S.A. 18A:12-24 for alleged violation of the School Ethics Act, of which the Commissioner does not have jurisdiction. Similarly, the petitioners seek redress for alleged violations of the Open Public Meetings Act, N.J.S.A. 10:4-12 et. seq. in the wrong forum. Additionally, while Michael Blunt has been named as a petitioner in his individual capacity and not in the official capacity as mayor, the Borough of Chesilhurst lacks standing as a municipality seeking redress

against a state agency. County of Bergen v Port Auth. of New York, 32 N.J. 303, 314-315 (1960), Borough of Carteret v Department of Education, OAL Docket No. EDU 8564-04 (August 26, 2005), aff'd by Commissioner (December 27, 2005). Finally, in balancing the equities, the respondents Winslow Board of Education and Chesilhurst Board of Education, and most importantly, -- its students, -- would suffer greater harm than the petitioners if the emergent relief is granted because both boards of education have passed resolutions adopting the sending/receiving relationship, have drafted budgets approved by the Executive County Superintendent, and have already acted upon that budget for the 2009-2010 school year scheduled to commence on September 8, 2009.

Based on the foregoing, emergent relief is hereby **DENIED.** A pre-hearing conference is scheduled for August 19, 2009, at 2:00 p.m., by telephone, with arrangements to be made by petitioner's counsel, at which time potential resolution of this matter as well as comprehensive case management to include discussion of the filing of potentially dispositive motions will be addressed.

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.

Ana C. Viscomi

8-12-09

DATE

ANA C. VISCOMI, ALJ

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268-09

BELINDA MENDEZ-AZZOLLINI,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, a guidance counselor who was employed by the Board of Education for each year from 2004-05 through 2007-08, contended that she had acquired tenure and that her employment was unlawfully terminated on January 29, 2008. The Board countered that petitioner – owing to leaves of absence, including two granted pursuant to the federal Family and Medical Leave Act (FMLA) – had not provided the thirty-plus months of service required to obtain tenure under *N.J.S.A.* 18A:28-5(c).

The ALJ dismissed the petition, finding that the FMLA on its face precluded petitioner from applying FMLA leave toward acquisition of tenure, since, under FMLA, an employee is not entitled to accrual of any seniority or employment benefits during any period of leave and is required in each instance of leave to be returned to the status quo as it existed prior to the leave's commencement.

The Commissioner rejected the Initial Decision, finding that: 1) the FMLA was not dispositive of petitioner's claim because the act neither required nor prohibited the counting of FMLA leave toward acquisition of tenure, and 2) the matter must be reviewed pursuant to the standards of applicable education case law (*Kletzkin v. Bd. of Ed. of the Borough of Spotswood*). However, the Commissioner found the record insufficient for a determination on the merits under *Kletzkin*, and remanded the matter for further fact-finding and argument.

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 26, 2009

268-09

OAL DKT. NO. EDU 5801-08
AGENCY DKT. NO. 112-4/08

BELINDA MENDEZ-AZZOLLINI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
RESPONDENT.	:	

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

In her exceptions, petitioner contends that the Administrative Law Judge (ALJ) erred in treating leave taken pursuant to the federal Family Medical Leave Act (FMLA) differently from other forms of unpaid leave. According to petitioner, the ALJ failed to consider the numerous State education law decisions cited by petitioner in support of her position, and further misapplied the FMLA by reading 29 *U.S.C.A.* §2614(3)(A) – which states that an employee is not entitled to accrual of employment benefits while on leave – as a bar to counting FMLA leave time toward acquisition of tenure. In this latter regard, petitioner asserts, the ALJ ignored implementing regulations which clarify the referenced provision by expressly stating that an employee returning from unpaid FMLA leave *may*, but is not entitled to, accrue

[1] On May 27, 2009, Board counsel wrote to the Commissioner asking for leave to submit a reply to petitioner's March 10, 2009 exceptions. This request was denied because it was filed well beyond the time frame permitted by rule and was not due to emergency or other unforeseeable circumstances. *N.J.A.C.* 1:1-18.4, *N.J.A.C.* 1:1-18.8(b).

additional benefits or seniority during such leave,[2] and which additionally make it clear that FMLA leave is to be treated as any other leave and that an employee's rights are to be neither enhanced nor diminished by the taking of such leave.[3] (Petitioner's Exceptions at 6-9)[4]

The Commissioner has carefully reviewed this matter and, upon such review, finds that she must reject the Initial Decision.

Initially, the Commissioner concurs with petitioner that, contrary to the conclusion of the Initial Decision, the provisions of the FMLA cannot be read as an absolute bar to accrual of leave time granted pursuant to it toward an employee's acquisition of tenure. While the FMLA plainly creates no *entitlement* to such accrual, neither does it establish a prohibition against it, as evidenced both by the implementing regulation cited by petitioner:

> An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (e.g., paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.
>
> 29 *C.F.R.* 825.215(d)(2)

and by the provision of the act itself, at 29 *U.S.C.* § 2651(b), which states that nothing therein shall be construed to supersede any provision of any State law that provides greater family or medical leave rights than those established under the FMLA – which *N.J.S.A.* 18A:28-5 does, in effect, by basing acquisition of tenure on periods of "employment," rather than "active service" or "performance of duties."

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[2] 29 *C.F.R.* 825.215(d)(2), see *infra.*

[3] Petitioner cites to 29 *C.F.R.* 825.215(c)(1), pay increases conditioned upon seniority or work performed need not be granted unless the employer does so for other employees on unpaid leave; 29 *C.F.R.* 825.215(c)(2), entitlement to same consideration for bonuses as other employees on paid or unpaid leave; and 29 *C.F.R.* 825.215(d)(3), same right to continue life insurance coverage as other instances of unpaid leave. Petitioner also references the FMLA provision at 29 *U.S.C.A.* §2614(3)(B) stating that an employee returning from leave is not entitled to any right, benefit or position of employment other than any right, benefit or position to which the employee would have been entitled had the leave not been taken.

[4] Petitioner additionally reiterates Points II-IV of her OAL brief, wherein she argues that, under education case law, the Board violated her tenure rights so as to entitle her to reinstatement with back pay and other emoluments and benefits of employment. (Petitioner's Exceptions at 2-6, 9)

Consequently, the FMLA is not dispositive of petitioner's claim, as the ALJ has in effect concluded; rather, as recognized by petitioner, the Commissioner must consider this matter in light of applicable school law. Having done so, the Commissioner finds the record presently before her insufficient to render a final decision.

Petitioner argues that there can be but one conclusion in this matter: that she acquired tenure prior to the termination of her employment by the Board. According to petitioner, this is so because: 1) clear and controlling case precedent establishes that, where a teacher performs services under contract during any given year, continuous employment exists for the purposes of satisfying the tenure statute even if the teacher is absent or on leave for part of such year, *Dorothy Kletzkin v. Board of Education of the Borough of Spotswood, Middlesex County*, 136 *N.J.* 275 (1994), affirming decision of the Superior Court, Appellate Division, at 261 *N.J. Super.* 549 (1993), affirming State Board of Education decision dated February 5, 1992; 2) it is undisputed that sequential contracts of employment between the Board and petitioner were in place for sufficient time for petitioner to acquire tenure under *N.J.S.A.* 18A:28-5(c) (employment in the district for the equivalent of more than three academic years within a period of any four consecutive academic years); and 3) petitioner performed services under each of these contracts during the years in question (2004-05 through 2007-08). Petitioner asserts that the fact that she did not provide services – and hence could not be evaluated – during various partial-year leaves arising in the course of the thirty-plus months of continuous employment necessary for her to acquire tenure can be of no import in light of *Kletzkin, supra*; nor does it matter that her absences did not arise as the result of a work-related injury pursuant to *N.J.S.A.* 18A:30-2.1, since the reasoning of the *Kletzkin* decisions applies to leaves of all types.

Important considerations of policy and precedent make it impossible for the Commissioner to agree. While the decision of the State Board of Education, *supra*, might arguably be read without qualification or condition of any kind as suggested by petitioner, the Commissioner can overlook neither the negative educational implications of such a reading nor the fact that – despite holdings regarding the meaning of "employment" in the context of tenure acquisition which might, at first blush, appear absolute – the decisions of both the Appellate Division and the Supreme Court rely in significant measure upon the particular factual circumstances before them in concluding that tenure acquisition was the correct result in Kletzkin's case.

In terms of educational policy, the dangers of unqualified application of *Kletzkin* were explored at some length in a dissenting opinion wherein Justice Stein – who would have held that "employment" in the tenure context contemplated actual service[5] – cautioned that:

> ...the Court's conclusion may allow insufficiently-evaluated teachers to acquire tenure. Because tenured teachers cannot be discharged except for substantial cause, the probationary tenure period is critically important in determining a teacher's competence in classroom instruction, and a decision that effectively shortens that probationary period disserves the interests of school children and potentially undermines the purpose of the tenure statute. (*Id.* at 281)***
>
> The Legislature required "employment" for a proscribed *(sic)* probationary period so that a school board could decide which teachers were qualified and should acquire tenure. A school board cannot evaluate a teacher who is on leave, whether that leave is voluntary or involuntary, and therefore cannot make an informed decision to grant the teacher the job security that tenure provides. The Court's holding, that "employment" in the tenure context does not require availability to teach, circumvents the purpose of the statutory probationary period. (*Id.* at 290-91)

Indeed, the interpretation of *Kletzkin* espoused by petitioner could, in theory, result in the acquisition of tenure by a staff member who provides one day of service under a series of annual

[5] This view was rejected by the majority as indicated in the above-cited quotation from the Court's opinion at 280-81. The dissenting opinion in its entirety may be found at 136 *N.J.* 275, 281-291.

contracts in each of four consecutive academic years – a result surely not intended by the Legislature and self-evidently contrary to any semblance of sound educational policy.

Nor is this danger necessarily obviated by the "remedy" suggested by the Appellate Division for the possibility of an insufficiently evaluated teacher acquiring tenure under an unqualified interpretation of the law. As found by Justice Stein:

> In holding that Kletzkin had acquired tenure while on leave, the Appellate Division noted that "the effect of this holding upon a local school board, hesitant to grant tenure to a work-injured employee on involuntary leave, is simply to require that timely notice of dismissal or non-renewal must be given before expiration of the * * * tenure period." (citation omitted) Such a dismissal, however, might be challenged as inconsistent with the statutory mandate against discharge of an employee for claiming workers' compensation benefits, see *N.J.S.A.* 34:15-39.1, and could expose a school board to suits by dismissed disabled employees for retaliatory discharge. (citation omitted)
>
> Not crediting a teacher's time on leave towards acquisition of tenure is preferable, both for the teacher and the school board, to dismissal of the teacher while out on leave. (*Id.* at 289)

Additionally, quite apart from the potential for litigation noted by the dissent, the Commissioner is troubled by the prospect of boards of education feeling compelled to dismiss or nonrenew teaching staff members – whom they might otherwise wish to retain – solely because they are reluctant to risk an employee acquiring tenure before he or she has been sufficiently evaluated due to leave(s) occurring during the statutory probationary period. This is a situation that serves no one well.

With respect to the *Kletzkin* opinions themselves, the Commissioner cannot ignore that the Appellate Division, in affirming the decision of the State Board of Education, centered its discussion on the nature and purpose of *N.J.S.A.* 18A:30-2.1, a statute which does not apply in the present matter:

> We agree with the Board that this case may properly be distinguished from our officially unreported decision in *Stachelski v. Bd. of Ed. of the Bor. of Oaklyn*, A-1144-79, decided April 10, 1981, (Printed at 1981 S.L.D. 1493), *certif. den.*,

88 *N.J.* 493, 443 *A.*2d 707 (1981). There we held that a teacher's voluntary one-year maternity leave broke "the seam of employment" for tenure purposes. Referring to *N.J.S.A. 18A:30-2.1* which applies in the present case, the Board here recognized, in effect, a legislative policy that work-injured employees should not lose the benefit of statutorily provided rights by reason of an involuntary work-connected leave, absent a clearly enunciated legislative declaration.

Were we to adopt the interpretation of *N.J.S.A.* 18A:28-5 contended for by Spotswood and NJSBA, a teacher injured on the job during a third year of satisfactory performance, and unable to perform service during the consecutive year because of that injury, would necessarily lose all credit toward tenure of the prior service. Even if the school board desired to grant tenure upon the teacher's completion of 30 months of aggregate service, the consecutive chain of employment would have to be deemed broken, albeit involuntarily and as the result of performing services for the employer. We are unwilling to read such an intent into the statute absent a definitive expression by the legislature. We conclude that the Board reasonably interpreted *N.J.S.A.* 18A:28-5 to provide that Kletzkin's employment continued while receiving full salary under *N.J.S.A.* 18A:30-2.1.

(261 *N.J. Super.* 549, 552-53 (1993))

Moreover, although the Supreme Court, in affirming the judgment of the Appellate Division, did not condition application of its holding on a leave arising pursuant to *N.J.S.A.* 18A: 30-2.1 as the result of a work-related injury,[6] it expressly left open the possibility – notwithstanding that "employment" means contractual employment encompassing leaves of absence so that the thirty-month-plus-one-day period required to obtain tenure pursuant to *N.J.S.A.* 18A:28-5 need not be fully spent in active service – that an extended leave of absence or one that deprives a board of education of its opportunity to evaluate a teaching staff member could still preclude the acquisition of tenure:

We reject Spotswood's argument, embraced by the dissent, that the statute requires that a teacher render a full thirty months of active service during the probationary period. In rejecting that argument, we recognize the importance of a probationary period as a means of assessing a teacher's performance. (citations omitted) Kletzkin, however, was no stranger to the Board. It had ample opportunity to assess her over twenty-eight months during four school years. Nothing indicates that the Board had any reason to deny her tenure before she was injured on the job. *Under the unusual circumstances of this case, we conclude*

[6] The Court (at 280) specifically likened *Kletzkin*'s situation to others where continuity of employment was found to have been maintained during a leave of absence, whether voluntary and involuntary.

> *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.* As the [State] Board recognized, the happenstance that Kletzkin's leave occurred at the end of her probationary period does not justify excluding the time that she was on leave from her probationary period. *(emphasis supplied)*
>
> (136 *N.J.* 275, 280-81 (1994))

These statements, which explicitly pertain to the facts of Kletzkin's situation and render the result of the Court's ruling understandable in her case,[7] are simply not consistent with the categorical reading urged by petitioner; indeed, had the Court intended the principles enunciated elsewhere in its decision to be applied uniformly under all circumstances, its inclusion of the above-cited paragraph would make no sense.

Consequently, where unqualified application of *Kletzkin* holds the potential to thwart the tenure law in whole or part and in the process do a disservice to students, school boards and employees alike – and where the language of the Court's opinion itself provides a basis for something other than uniform application under all circumstances – the Commissioner will not conclude, in the absence of a full factual record and further argument specific to such record, that *Kletzkin* must here be read to require that petitioner acquired tenure simply by being contractually employed for the equivalent of more than three academic years within a period of four consecutive academic years. Rather, the Commissioner prefers to revisit the merits of this matter following development of a factual record setting forth the effect of petitioner's series of leaves on the Board's ability to evaluate her performance, and consideration of argument regarding the appropriate application of *Kletzkin* to such facts.

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[7] Indeed, even the dissenting opinion of Justice Stein noted that the result of the Court's ruling "may seem appropriate in the case of respondent, Dorothy Kletzkin, who served subject to the evaluation of the Spotswood school board for twenty-eight months and was injured on the job just two months before she would have completed the full probationary period." *Kletzkin, supra*, at 281.

Accordingly, for the reasons set forth herein, the Initial Decision of the OAL – dismissing the petition of appeal – is rejected, and this matter is remanded for further proceedings consistent with the Commissioner's determination above.

IT IS SO ORDERED.[8]

COMMISSIONER OF EDUCATION

Date of Decision: 8/26/09

Date of Mailing: 8/27/09

[8] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 05801-08
AGENCY DKT. NO. 112-4/08

BELINDA MENDEZ-AZZOLLINI,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,

Respondent.

Gregory T. Syrek, Esq., for petitioner, Belinda Mendez-Azzollini (Bucceri and Pincus, attorneys)

Kalimah H. Ahmad, Esq., for respondent, Irvington Board of Education (Hunt, Hamlin and Ridley, attorneys)

Record Closed: January 30, 2009 Decided: February 24, 2009

BEFORE **J. HOWARD SOLOMON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Belinda Mendez-Azzollini, appeals the denial of tenure by the Board of Education of the Township of Irvington, Essex County (respondent or Board). The Department of Education forwarded this matter to the Office of Administrative Law (OAL)

where it was received on May 14, 2008, for determination as 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 19, 2008, the date scheduled for hearing, the parties advised that none of the facts were in dispute and that they had entered into a Stipulation of Facts and Documents. J-1 and J-2. The parties were given the opportunity to submit post-hearing submissions, and on January 30, 2009, additional facts were stipulated by the parties, on which date the record closed.

The sole issue is whether petitioner, under the facts presented, is entitled to tenure.

FACTUAL DISCUSSION

None of the facts were in dispute. The parties entered into the following Stipulation of Facts (J-1), and, accordingly, I **FIND** that:

1. Petitioner was employed by respondent as a guidance counselor commencing on October 27, 2004. She was employed in that capacity through June 30, 2005.

2. Petitioner was re-employed by respondent as a guidance counselor from September 1, 2005, through June 30, 2006. From June 5 through June 30, 2006, petitioner was on an approved family leave.

3. Petitioner was re-employed as a guidance counselor from September 1, 2006 to June 30, 2007. From December 4, 2006, through March 4, 2007, petitioner was on an approved family leave. From March 5 through March 30, 2007, petitioner was on an unpaid child-care leave. She returned to work on April 2, 2007, and continued working through June 30, 2007.

4. Petitioner was re-employed as a guidance counselor from September 1, 2007, to January 29, 2008. By letter dated January 25, 2008, received by petitioner on January 29, 2008, petitioner was notified that her employment was terminated effective January 29, 2008.

5. Throughout her employment with the respondent, petitioner held a standard educational services certificate with an endorsement for student personnel services.

The parties also stipulated documents into evidence referred to as J-1A through J-1F, and enumerated as follows:

J-1A Request from petitioner dated June 1, 2006, for an unpaid medical leave with paid benefits as per the Federal Family Medical Leave Act (the FMLA) from June 5, 2006, to July 1, 2006;

J-1B Approval of the Board for the leave of absence recited above.

J-1C Request from petitioner for unpaid maternity leave of absence with paid benefits as per the FMLA from December 4, 2006, to March 4, 2007, followed by an unpaid leave for child care with paid benefits from March 4, 2007, to March 30, 2007;

J-1D Letter from the office of the superintendent, dated January 25, 2008, terminating petitioner's employment;

J-1E Letter from petitioner to the Board, dated February 7, 2008, requesting reasons for her termination.

The parties also stipulated to the days petitioner worked and the days she was on leave (J-2). Accordingly, I **FIND** the following:[1]

Worked	10/27/04 - 06-30-05	8 months, 05 days
Worked	09/01/05 - 06/04/06	9 months, 04 days
Family Leave	06/05/06 - 06/30/06	26 days
Worked	09/01/06 - 12/03/06	3 months, 03 days

[1] Petitioner's leaves were for her pregnancy and subsequent child care.

Family Leave	12/04/06 - 03/04/07	
	and	
Child Care	03/05/07 - 03/30/07	3 months, 28 days
Worked	04/02/07 - 06/30/07	3 months
Worked	09/01/07 - 01/29/08	4 months, 29 days
Total Working Days		28 months, 14 days
Total Leave (unpaid)		04 months, 23 days
Grand Total		**33 months, 06 days**

The parties further stipulated that petitioner's leaves of absence from June 5 to June 30, 2006, and from December 4, 2006, to March 4, 2007, were pursuant to the Federal FMLA.[2] Her leave of absence for child care from March 5 to March 30, 2007, was an approved unpaid leave which was not pursuant to the Federal FMLA or any family leave under the laws of this State.[3]

LEGAL ANALYSIS AND CONCLUSION

The acquisition of tenure is governed by N.J.S.A. 18A:28-5 which provides, in pertinent part:

> The services of all teaching staff members employed in the positions of teacher . . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, . . . 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 this Title, after employment in such district or by such board for:

[2] On January 30, 2009, this stipulation was placed on the record through a telephone conference with counsel for the parties.

[3] She had used up the twelve weeks of leave allowed by the Federal FMLA. 29 U.S.C.A. § 2612.

> (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.

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)). Under 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." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 81 (1982). According to N.J.S.A. 18A:28-5(c), all teaching staff members, including guidance counselors, shall acquire tenure once employed in a school district for "the equivalent of more than three academic years within a period of any four consecutive academic years." Ibid. "An academic year runs for the ten months between September 1 and June 30 of the school year." Kletzkin v. Spotswood Bd. of Educ., 136 N.J. 275, 277 (1994) (citing N.J.S.A. 18A:1-1). Due to "its remedial purpose, the Tenure Act [N.J.S.A. 18A:28-1 to -18] should be liberally construed to achieve its beneficent ends." Spiewak, supra, 90 N.J. at 74 (citing Barnes v. Jersey City Bd. of Educ., 85 N.J. Super. 42, 45 (App. Div. 1964)).

The parties stipulated that petitioner was actively employed for twenty-eight months, fourteen days. It is unclear whether respondent agreed that an employment relationship existed between petitioner and respondent during her four months, twenty-three days of approved leaves, although in an inactive status. In that regard, the Appellate Division in Blinn v. Board of Trustees of the Public Employees' Retirement System, 173 N.J. Super. 277 (App. Div. 1980) held that:

> [w]e are convinced that the grant of a leave of absence to [an] employee does not terminate the employment relationship . . . and that, during the term of such leave of absence, the employment relationship continues – albeit in an inactive status. The phrase "leave of absence" itself "connotes a continuity of the employment status."
>
> [Id. at 278 (citations omitted).]

The court further stated that:

> [a leave of absence] is simply an authorized temporary absence from active service which, in the normal course and all other things being equal, implies the right of the employee to return to active employment in the employer's service at the conclusion of such leave of absence. Were it to be equated with a discontinuance or termination of employment, a leave of absence would be a meaningless term, signifying nothing.
>
> [Ibid.]

Therefore, the employment relationship between petitioner and respondent continued during her leaves of absence, "albeit in an inactive status," until she was eventually terminated. Ibid.

Petitioner argued that her leaves should have been included in the accretion of tenure, citing Kletzkin, supra, 136 N.J. 275, as authority. In Kletzkin, the petitioner was employed initially as a learning disabilities teacher/consultant and later as the school psychologist in the same local board cumulatively from January 1986 until April 1989 when she was terminated. She provided active service continuously from January 1986 until November 1988 when she was forced to take an involuntary leave of absence due to a work-related injury. Prior to her involuntary leave, her active service was slightly in excess of twenty-eight consecutive months. The issue in Kletzkin was whether she obtained tenure when the thirtieth month passed in January 1989 while she was still disabled. The court held that she was entitled to tenure after being employed for thirty months and one day, over four academic years, because her employment continued during her absence by virtue of N.J.S.A. 18A:30-2.1, which required her employer to

continue her pay up to one calendar year. Id. at 278. The court also reasoned that even though it recognized the importance of the probationary period during which a teacher's performance is assessed, the board had ample time to assess Kletzkin during her twenty-eight consecutive months of active employment in four school years and upheld her accretion of tenure which included the time she was on her leave of absence.

Respondent, conversely, argued that petitioner's leaves should not have been included in meeting the requirements of N.J.S.A. 18A:28-5, contending that Kletzkin was inapplicable since only leaves of absence pursuant to N.J.S.A. 18A:30-2.1 could be included in acquiring tenure.[4]

N.J.S.A. 18A:30-2.1 provides:

> a. Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in N.J.S.A. 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.
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> b. 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.

[4] The parties could not agree on whether petitioner's absences for her pregnancy and subsequent child care were considered voluntary or involuntary leaves. This decision does not address that issue since it is not considered pivotal or dispositive under the facts presented.

Furthermore, respondent argued that petitioner's leaves of absence were granted pursuant to the FMLA and not under N.J.S.A. 18A:30-2.1. Therefore, in order to assess the merits of that argument, a discussion of the FMLA follows. The FMLA provides in part:

> . . . [s]ubject to section 103 [29 U.S.C.S. § 2613], an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
>
> (A) [b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter.
>
> [29 U.S.C.A. § 2612(a)(1)(A).]

And further provides:

> (1) In general. Except as provided in subsection (b), any eligible employee who takes leave under section 102 [29 U.S.C.S. § 2612] for the intended purpose of the leave shall be entitled, on return from such leave-
>
> (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
>
> (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.
>
> (2) Loss of benefits. The taking of leave under section 102 [29 U.S.C.S. § 2612] shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.
>
> (3) Limitations. Nothing in this section shall be construed to entitle any restored employee to
>
> (A) the accrual of any seniority or employment benefits during any period of leave; or
>
> (B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

[29 U.S.C.A. § 2614.]

Of particular note are the enumerated limitations under the FMLA which specifically provide that "[n]othing in this section shall be construed to entitle any restored employee to . . . the accrual of any seniority or employment benefits during any period of leave" or to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave." Ibid. In other words, an employee on a leave of absence under the FMLA would not be entitled to any right, benefit or position of employment except those for which the employee would have been entitled had he or she not taken a leave of absence. In essence, the employee is returned to the status quo of his or her position which existed at the time the leave of absence commenced, nothing more or less.

Although not mentioned in the statutory language of the FMLA, tenure is clearly a benefit since tenured employees can only be removed, suspended or otherwise disciplined for inefficiency, incapacity, conduct unbecoming or other just cause within the strict limitations of N.J.S.A. 18A:28-5. Non-tenured employees serve at the leisure of the district and their terms of employment are not afforded the same protections as tenured employees. N.J.S.A. 18A:27-4.1. If tenure were granted to petitioner by including her leaves under the FMLA, she would have, in effect, been granted a benefit for "which [she] would [not] have been entitled had [she] not taken leave." 29 U.S.C.A. § 2614(a)(3)(B).[5] The FMLA only restored petitioner to the status quo of her position, or to an equivalent position, that existed at the time she had commenced her leave. Ibid. When she commenced her FMLA leaves, she was not tenured, and accordingly, was only to be returned or restored to the same status she held – as a non-tenured employee.

[5] With regard to the term "seniority" mentioned in the FMLA, Black's Law Dictionary 1362 (6th ed. 1990) defines "seniority" as a "[p]recedence or preference in position over others similarly situated," not necessarily upon length of service. Tenure is a process by which a "preference" is attained over others, such as non-tenured employees, which is not permitted under the FMLA.

Parenthetically and although not applicable here,[6] a review of the New Jersey "Family Leave Act" (FLA), N.J.S.A. 34:11B-1 to -16, provides comparable provisions as the Federal FMLA. Specifically, under N.J.S.A. 34:11B-7

> [a]n employee who exercises the right to family leave under section 4 of this act shall, upon the expiration of the leave, be entitled to be restored by the employer to the position held by the employee when the leave commenced or to an equivalent position of like seniority, status, employment benefits, pay, and other terms and conditions of employment. If during a leave provided by this act, the employer experiences a reduction in force or layoff and the employee would have lost his position had the employee not been on leave, as a result of the reduction in force or pursuant to the good faith operation of a bona fide layoff and recall system including a system under a collective bargaining agreement where applicable, the employee shall not be entitled to reinstatement to the former or an equivalent position. The employee shall retain all rights under any applicable layoff and recall system, including a system under a collective bargaining agreement, as if the employee had not taken the leave.

Even though there was an employment relationship, albeit inactive, between petitioner and respondent during her leaves of absence, see Blinn, supra, nevertheless, the limitations imposed by the FMLA, under which the majority of petitioner's leaves were taken, precluded her from accruing tenure. In each instance, petitioner was returned to the same position as it existed at the time each leave under the FMLA commenced. In other words, she was restored to the same non-tenured position she held prior to her leave.

Arguably Kletzkin had twenty-eight months of service prior to her termination, as did petitioner. However, Kletzkin's twenty-eight months were consecutive until she suffered a work-related injury. There the court determined that, in light of her twenty-eight consecutive months of service, the district had sufficient time to evaluate her

[6] The State Family Leave Act is available for reasons involving another, not the employee. However, as with the FMLA, the employee under the FLA is also restored to the same status as existed prior to his or her leave.

performance.[7] The court also took into consideration the continuity of her service provided by N.J.S.A. 18A:30-2.1, which was the applicable statute in that matter.

Length of consecutive service aside, the compelling factor here is that the majority of petitioner's leaves were under the FMLA, which are therefore precluded from being considered towards accretion of tenure since the specific language of the FMLA only returned her to the status quo of her position as it existed when each FMLA leave commenced, and nothing more. To grant tenure would ignore the limitations provided by 29 U.S.C.A. § 2614. The initial analysis of a statute's meaning begins with its plain language. Hardwicke v. Am. Boychoir Sch., 188 N.J. 69, 95 (2006) (citations omitted); DiProspero v. Penn, 183 N.J. 477, 493 (2005). Where the language of a statute is clear and unambiguous, its interpreter should not turn to extrinsic interpretive aids in an attempt to ascribe to it further meaning. Id. at 492.

Based upon the foregoing, I **CONCLUDE** that petitioner has not accrued tenure because her leaves of absence under the FMLA should not be considered towards the accretion of tenure. Therefore, she has not fulfilled the requirements of N.J.S.A. 18A:28-5(c).

ORDER

Based upon the foregoing, it is **ORDERED** that the petition filed by petitioner be and is hereby **DISMISSED**.

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

[7]Petitioner had seventeen months and nine days of consecutive active service, substantially less than Kletzkin.

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

2-24-09
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency: 2-24-09

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

5 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

Joint:

J-1 Joint Stipulation of Facts

J-1A Request from petitioner dated June 1, 2006, for an unpaid medical leave with paid benefits as per the Family Medical Leave Act (FMLA) from June 5, 2006, to July 1, 2006

J-1B Approval of the Board dated June 21, 2006, for the leave of absence from June 5, 2006, through June 30, 2006

J-1C Request from petitioner dated November 13, 2006, for unpaid Maternity Leave of Absence with paid benefits pas per the FMLA from December 4, 2006, to March 4, 2007, followed by an unpaid Child Care Leave with paid benefits from March 4, 2007, to March 30, 2007

J-1D Termination of employment letter dated January 25, 2008, signed by Ethel W. Davion of the office of the superintendent

J-1E Letter from petitioner dated February 7, 2008, to the Board requesting reasons for her termination

J-1F Letter from petitioner dated February 7, 2008, from petitioner requesting an appearance at the Board meeting on February 20, 2008

J-2 Stipulated Computation of Work and Leave Time

J-3 Approval of the Board dated December 20, 2006, for the leave of absence from December 4, 2006, through March 4, 2007, followed by an unpaid childcare leave of absence effective March 4 (sic) through March 30, 2007

269-09

#269-09

M.K. on behalf of minor child, S.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination by the Board to disenroll her daughter, S.T. Petitioner M.K. and C.T. are the natural parents of S.T., who resided with both parents in Ridgefield until the parents separated in 2002. S.T. moved with her mother to another address in Ridgefield after the separation. In June 2004, M.K. was diagnosed with breast cancer. Between June 2004 and December 2005, M.K. underwent surgery, extensive follow-up treatment, and a lengthy recovery period, during which time she resided in Palisades Park with her mother. In December 2005, M.K. leased an apartment and resumed her residency in Ridgefield. During her mother's illness and convalescence, S.T. moved in with her father at his Ridgefield residence. The Board contended that during the 2004-2005 school year, S.T. was not residing in Ridgefield, but in Palisades Park with her mother. The Board counterclaimed for tuition.

The ALJ found that: the undisputed facts show that S.T. was residing with her father in Ridgefield while her mother recuperated from a serious illness at her family's home in Palisades Park; S.T. did not reside in Palisades Park with her mother; and petitioner has satisfied the requirements of *N.J.S.A.* 18A:38-1, in that S.T. resided with her father in Ridgefield while her mother temporarily moved to Palisades Park. Accordingly, the ALJ concluded that S.T. was entitled to a free public education in Ridgefield schools during the 2004-2005 school year, and ordered that the petition be granted and the respondent's counterclaim for tuition be dismissed.

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 26, 2009

OAL DKT. NO. EDU 1996-06
AGENCY DKT. NO. 25-1/06

M.K. on behalf of minor child, S.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties. For the reasons set forth therein, the Commissioner adopts the Initial Decision as the final decision in this case.

Accordingly, respondent's determination disenrolling S.T. is reversed, and the counterclaim for tuition is dismissed.

IT IS SO ORDERED.*

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 8/26/09

Date of Mailing: 8/28/09

* 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 1996-06
AGENCY DKT. NO. 25/1-06

M.K., INDIVIDUALLY AND ON BEHALF OF S.T.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,
Respondent.

Nina C. Remson, Esq., for petitioner (Law Offices of Kevin G. Roe, attorneys)

Eva V. Signore, Esq., for respondent (Ferrara, Turitz, Harraka & Goldberg, attorneys)

Record Closed: June 1, 2009 Decided: July 15, 2009

BEFORE **CARIDAD F. RIGO,** ALJ:

STATEMENT OF THE CASE

S.T., who was born in 1996, is the daughter of petitioner M.K. (mother) and C.T. (father). She lived with her parents in Ridgefield, N.J., until the parents separated in

2002. M.K. moved out of the house and obtained another residence in Ridgefield, taking S.T. with her. S.T. lived with her mother until about June 2004, when M.K. was diagnosed with breast cancer. Because of her illness, M.K. moved out of her Ridgefield apartment and moved in with her mother in Palisades Park. C.T. remained living in Ridgefield.

In September 2005, after receiving an anonymous report, the Ridgefield Board of Education de-enrolled S.T., stating that S.T. was no longer residing in Ridgefield, but in Palisades Park with her mother. M.K. appealed the board's decision.

PROCEDURAL HISTORY

On February 3, 2006, petitioner filed a pro se residency appeal with the Commissioner of Education appealing the Ridgefield Board of Education's decision to de-enroll S.T. The Commissioner transmitted the matter as a contested case to the Office of Administrative Law (OAL), where it was filed on February 22, 2006, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

In February 2007 petitioner requested leave to seek legal representation, and her request was granted. Conferences were held on May 3, 2006, March 16, 2007, October 29, 2007, April 23, 2008, and October 8, 2008. Discovery issues were debated and resolved. On or about June 26, 2008, petitioner filed a motion to amend the petition and her motion was granted. Thereafter a motion for summary decision was filed by the petitioner. Both motions were opposed by the respondent. The parties submitted briefs and a stipulation of facts. The record was closed on June 1, 2009.

ISSUE

Is S.T. entitled to be enrolled in the Ridgefield School District for the 2004-2005 academic year?

FINDINGS OF FACT

The parties agreed to the following stipulated **FACTS** (J-1).

1. Petitioner, M.K., is the natural mother of S.T.

2. C.T. is the natural father of S.T.

3. S.T. is presently a student in the Borough of Ridgefield School District and has been without interruption since at least in or about 2002.

4. S.T. resided with her mother and father in Ridgefield from 2001 to 2002.

5. C.T. and M.K. separated in 2002.

6. S.T. lived part of the time with M.K. at Edgewater Ave., Ridgefield, and part of the time with C.T. at Kingsland Ave., Ridgefield, from 2002 until in or about June 2004.

7. On or about June 11, 2004, M.K. learned she had breast cancer.

8. In or about June 2004, S.T. began residing exclusively with C.T. and his mother, the child's paternal grandmother, A.T., at the Kingsland Ave. address because of M.K.'s illness.

9. M.K. had bilateral mastectomies in June 2004, extensive follow-up treatment and a lengthy recovery period, during which she required assistance with her daily living needs.

10. M.K. relocated to her mother's home on Abbott Ave., Palisades Park, from in or about June 2004 until December 2005 due to her illness, so that her mother could assist her with her daily living needs.

11. In September 2005 the school board received an anonymous tip that M.K. was residing with the child at Abbott Ave. in Palisades Park.

12. This information caused an investigation to be conducted into the residency of the minor child, S.T.

13. As a result of the investigation, the school board made a decision to de-enroll the child.

14. M.K. appealed the school board's decision, resulting in the within action.

15. M.K. originally did not have counsel and filed the matter as a residency case.

16. M.K. eventually retained counsel, who filed a motion to amend the petition to a hardship application, which application was granted despite the board's opposition that it was out of time.

17. M.K. indicates that due to her illness, from June 2004 until December 1, 2005, S.T. spent time in both Palisades Park and Ridgefield, but resided in Ridgefield. M.K. was required to live in Palisades Park due to her mother residing there and assisting her physically, financially, and emotionally.

18. On or about December 1, 2005, petitioner had recovered from her illness enough that she no longer required assistance for her daily living needs, and she rented an apartment on Broad Ave., Ridgefield, at which time S.T. moved back in with her.

19. Petitioner and S.T. have resided in Ridgefield continuously from on or about December 1, 2005, through the present.

LEGAL ANALYSIS AND CONCLUSIONS

In the instant matter, the undisputed facts indicate that S.T. was residing with her father in Ridgefield while her mother recuperated from a serious illness. The undisputed facts show that M.K. moved to Palisades Park temporarily so her family could help her emotionally, financially and physically while she recovered. There is no evidence that S.T. moved to Palisades Park with her mother or that she remained in Ridgefield for the sole purpose of attending school in the Ridgefield district. Her father lived in Ridgefield. There is no evidence that there were any illicit motives for S.T. to reside with her father in Ridgefield; her mother, at that time, simply could not adequately care for her.

Attendance at public schools shall be free to any person who meets the requirements set forth in N.J.S.A. 18A:38-1. A child who is domiciled within the school district and satisfies other requirements may attend the public schools free of charge. N.J.S.A. 18A:38-1(a). If the board of education denies admission to the child, the resident may contest that determination before the Commissioner of Education. In the proceeding before the Commissioner of Education, the parent has the burden of proof by a preponderance of the evidence to establish that the child meets the requirements for eligibility. If the evidence does not support the claim, the parent shall be assessed tuition for the student prorated to the time of the student's ineligible attendance within the district. N.J.S.A. 18A:38-1(b)(2).

It has been established that M.K. was not able to provide care for S.T. because of her illness, and that she temporarily moved to Palisades Park with her mother, leaving S.T. to domicile in Ridgefield with her father, but spending time with her mother in Palisades Park. I **FIND** that S.T. did not reside in Palisades Park with her mother. I

FIND that S.T. resided in Ridgefield with her father and paternal grandmother while her mother was convalescing in Palisades Park.

N.J.S.A. 18A:38-1(a) provides that a student is domiciled in the school district when he or she is with a parent or legal guardian whose permanent home is located within the district. It has been stipulated that S.T.'s father lived in Ridgefield, and S.T. lived with her father while her mother convalesced from her illness.

Based on the above, I **CONCLUDE** that petitioner has satisfied the requirements of N.J.S.A. 18A:38-1 et seq., in that the child resided with her father in Ridgefield while her mother temporarily moved to Palisades Park. Therefore, I further **CONCLUDE** that S.T. is entitled to a free public education in the Ridgefield School District during the 2004-2005 school year.

ORDER

For all of the foregoing reasons, it is hereby **ORDERED** that the determination of the Ridgefield School District is **REVERSED**. Petitioner's request to allow S.T. to attend school in the respondent district without cost for the 2004-2005 academic year is **GRANTED**. Respondent's counterclaim for tuition 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.

July 15, 2009
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: July 15, 2009

Date Mailed to Parties:

lr

APPENDIX

EXHIBITS

Joint:

J-1 Joint Stipulation of Facts

274-09

OAL DKT. NO EDU 736-09
AGENCY DKT. NO. 36-2/09

IN THE MATTER OF THE TENURE	:	
HEARING OF GILBERT ALVAREZ,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF LAKEWOOD, OCEAN COUNTY.	:	

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

Upon such review, the Commissioner finds that she is unable to accept the proposed settlement as recommended by the OAL.

Preliminarily, the Commissioner recognizes that the parties and Administrative Law Judge have attempted to address the standards established by the State Board of Education to govern settlement of tenure charges. *In re Cardonick*, 1990 *S.L.D.* 842, 846; codified at *N.J.A.C.* 6A:3-5.6(a). Specifically, they have sought to propose a settlement that: 1) is accompanied by documentation as to the nature of the charges; 2) includes an explanation of the circumstances which they believe justify settlement; 3) evidences the consent of both the charged and the charging parties; 4) indicates that the charged party entered into the agreement with a full understanding of his rights; 5) attempts to demonstrate that the agreement is in the public interest; and 6) indicates that respondent, as a teaching staff member, is aware of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible action against the staff member's certificate.

However, the Commissioner cannot agree in this instance that the settlement as presented is, in fact, in accord with *Cardonick* standards.

In the proposed agreement, the Lakewood Board of Education (Board) now asserts that it will likely be unable to prove its allegations – which respondent denies – that respondent dealt with a disruptive student by pushing him into a wall and using profane language and threats; all the Board can likely prove, according to the agreement, is that respondent "did push the desk with the student in it, that the desk may have made contact with the student, [and] that the student may have made contact with the wall" – although "the student was not injured," the language used, while inappropriate, was "not necessarily profane," and respondent had been taunted and provoked by the student in question as well as others in the class. As to the Board's charges – likewise denied by respondent – that respondent treated African-American and Mexican-American students inappropriately and that the Board had "ongoing concerns" with respondent's behavior, the agreement notes that these charges did not include specific allegations of "racial remarks or statements" or prior instances of "profane language or physical contact," and that respondent has not previously been the subject of tenure charges or increment withholdings. Thus, the agreement proffers, loss of the 120 days pay already withheld from respondent following certification of tenure charges is sufficient penalty for any conduct likely to be proven at hearing, especially in view of respondent's "tenured service in the district" and "all other respects favorable record." (Settlement Agreement at 2-4)

It is by now well established that, having once taken up the burden of tenure charges, a board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges need no longer be pursued or why it is now in the public interest not to pursue them. *In the Matter of the Tenure Hearing of Kenneth Smith, School District of Orange, Essex County*, decided by the Commissioner March 22, 1982,

decision on remand June 16, 1983, *aff'd with modification* by the State Board of Education November 2, 1983, *aff'd* N.J. Superior Court, Appellate Division, January 30, 1986. Here, the parties have made no showing whatsoever as to how settlement of this matter is in the public interest, instead seeking to relieve the Board of the burden it has taken up – and hold respondent essentially harmless but for a monetary penalty that is relatively light in the context of tenure proceedings – by relying on subtle distinctions which, in effect, do nothing more than minimize and re-characterize the very conduct forming the basis for both the Board's tenure charges and its contention, in earlier briefs before the OAL, that respondent posed a danger to students and had a detrimental impact upon them so as to warrant his removal from employment with the district. In the Commissioner's view, conduct of this type – no matter how it is characterized – raises serious questions not only about the propriety of a teacher's continued presence in the district, but also about his fitness to serve in that position elsewhere. [1]

In this regard, the Commissioner recognizes that she has, under certain circumstances, found settlement of tenure charges to be in the public interest notwithstanding that serious allegations had been made against the charged party and these remained unadjudicated following settlement. However, agreements in such cases have typically provided for both the charged party's resignation or retirement from the employing district *and* the voluntary relinquishment of his or her certificate(s) pursuant to *N.J.A.C.* 6A:9-17.11. See, for example, *In the Matter of the Tenure Hearing of Adam Aquilina, School District of the City of Elizabeth, Union County*, Commissioner's Decision No. 431-07, decided October 31, 2007; *New Jersey State Department of Children and Families, Institutional Abuse Investigation*

[1] As to the settlement's reliance on respondent's service and record, the Commissioner notes that respondent was hired in September 2004 and acquired tenure in September 2007, and the *latest* conduct alleged in the tenure charges – the pushing incident – occurred in December 2008. The parties also stipulate (Settlement Agreement at 4) that the behaviors at issue "have never been the subject of *significant* discipline" (*emphasis supplied*) and that respondent's evaluations ranged from "good to fair."

Unit v. A.S. and *In the Matter of the Tenure Hearing of A.S., Jr., School District of the City of Elizabeth, Union County* (Consolidated), Commissioner's Decision No. 441-07S, decided November 13, 2007; *Scott Powell v. Board of Education of the Township of Lopatcong, Warren County* and *In the Matter of the Tenure Hearing of Scott Powell, School District of Lopatcong Township, Warren County* (Consolidated), Commissioner's Decision No. 246-07, decided June 15, 2007.

The proposed settlement in the present matter, however, not only contains no such provision; it actually purports to preserve respondent's certificates as "intact without stigma" (Term 9B) – a provision the Commissioner would be without authority to accept in any event[2] – and contrives to circumvent the requirements of *Cardonick* by stipulating on the one hand (Terms 8-9A) that respondent's impending resignation from the district, following reinstatement to his employment position and payment of salary and benefits until December 31, 2009,[3] is for reasons unrelated to the charges against him and constitutes neither "part of the consideration for this agreement" nor a "loss of position" so as to warrant referral to the Board of Examiners under *N.J.A.C.* 6A:3-5.6(d), *N.J.A.C.* 6A:9-17.6(a)1, *N.J.A.C.* 6A:9-17.4 or any other statute or rule – while at the same time *specifically conditioning* such resignation on the Commissioner's full approval of the tenure settlement, most particularly the provision precluding referral to the Board of Examiners.[4] [5]

---

[2] The Commissioner here reminds the parties that decisions and underlying records in tenure matters are public documents unless sealed for good cause shown, *Williams v. The Board of Educ. of the Atlantic City Public Schools et al.* 329 *N.J. Super.* 308 (App. Div. 2000) and *N.J.A.C.* 1:1-14.1(a), and that any determination by the Commissioner not to refer a matter to the Board of Examiners cannot act to circumscribe the authority of that body to act independent of such referral, should it so wish, nor relieve the district of its responsibility to cooperate with the Board of Examiners in that eventuality.

[3] There is no indication that the Board intends to return respondent to active duty during this time.

[4] Term 8 of the Settlement Agreement reads in pertinent part: "Mr. Alvarez's determination not to return to employment after December 31, 2009...is contingent upon this settlement being approved." Term 10 further provides: "The parties agree that in the event the Commissioner of Education does not accept paragraph nine (9) [the paragraph prohibiting referral to the Board of Examiners] nor any other paragraph of this settlement agreement,

Under these circumstances – where the settlement's only identifiable benefit to the Board and public is avoidance of the uncertainty, expense and disruption that nearly always accompanies tenure proceedings centered on charges of unbecoming conduct involving students, while respondent retains the unfettered right to represent himself as the holder of a certificate in good standing issued by the State Board of Examiners and potential employers inquiring of the district will be provided with only minimal information and a "neutral" reference (Term 6)[6] – the Commissioner simply cannot accept the agreement as proposed, and must remand this matter for further proceedings. In so holding, the Commissioner stresses that she does not preclude the possibility of settlement, but reminds the parties that she cannot meet her broader obligation to the schools and children of this State without ensuring that any proposed agreement is consistent with the standards of *Cardonick* – including provision of a more compelling explanation as to why settlement is in the public interest and recognition of the Commissioner's duty to refer the respondent to the State Board of Examiners pursuant to *N.J.A.C.* 6A:3-5.6(d) and *N.J.A.C.* 6A:9-17.6(a)1 or *N.J.A.C.* 6A:9-17.4.

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this settlement agreement shall be null and void, and the matters (*sic*) shall be returned to the Office of Administrative Law for hearings (*sic*) without prejudice to either parties' (*sic*) position."

[5] In this regard, the Commissioner notes the distinction between the present matter and *Carol Ann Moore v. Board of Education of the City of Trenton, Mercer County, and In the Matter of the Tenure Hearing of Carol Ann Moore, School District of the City of Trenton, Mercer County (Consolidated)*, Commissioner's Decision No. 182-07, decided May 18, 2007. In that matter, the conduct deemed provable – failure to review a compendium of student literary works, some of which contained inappropriate language, prior to their distribution to a 12th grade literature class – was of a far less serious nature, and the charged party's resignation from employment with the district not only was stipulated as voluntary and unrelated to the tenure proceeding, but also was not conditioned on the Commissioner's acceptance of the settlement agreement.

[6] The Commissioner reminds the parties that the Board's actions must at a minimum comport with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, which states that the following employment information shall be public:

> An individual's name, title, position, salary, payroll record, length of service in the instrumentality of government and in the government, date of separation and the reason therefor; and the amount and type of any pension received ***. (emphasis added) *N.J.S.A.* 47:1A-10[6]

Accordingly, the proposed settlement and the Initial Decision of the OAL recommending its approval are hereby rejected, and this matter is remanded to the OAL for further proceedings addressing the concerns set forth above. If the parties are unable to reach agreement consistent with this decision, the tenure charges shall duly proceed to plenary hearing.

IT IS SO ORDERED. [7]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/04/09

Date of Mailing: 9/04/09

[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

SETTLEMENT

OAL DKT. NO. EDU 00736-09

AGENCY DKT. NO. 36-2/09

SCHOOL DISTRICT OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,

Petitioner,

v.

GILBERT ALVAREZ,

Respondent.

Michael I. Inzelbuch, Esq., for petitioner

Richard A. Friedman, Esq., for respondent (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Record Closed: July 27, 2009 Decided: July 27, 2009

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

The Lakewood Township Board of Education filed certified tenure charges with the New Jersey Commissioner of Education sufficient for termination of employment

and suspension without pay, against Gilbert Alvarez, a tenured teacher within the Lakewood Township District. on February 23, 2009, the Board filed its tenure charges with the Commissioner. The Commissioner of Education transmitted the matter to the Office of Administrative Law 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 now entered into a settlement of all issues in dispute and prepared a Stipulation of Settlement and Settlement Agreement, which is attached and fully incorporated herein. In that document, the parties have detailed the nature of the allegations made against Mr. Alvarez, the evidential considerations which have been considered in determining to resolve the matter without a full hearing, including the limits of proof perceived by the Board in connection with the charges made, the recognition of the importance of the matter and of the right of the Commissioner of Education to refer matters to the Board of Examiners, as well as their position that this matter should be permitted to resolve without any such referral, and the recognition that should the Commissioner determine that she cannot abide by the parties' view that the matters involving Mr. Alvarez not be sent to the Board of Examiners that the settlement will be null and void and the matter be returned to the Office of Administrative Law for a full evidentiary hearing. The parties have also presented their position that the nature of the charges, taken in light of the proof issues detailed within the Stipulation of Settlement, are such that removal of tenure would not be warranted although other sanctions might be proper, and have noted that as a result of this agreement Mr. Alvarez will no longer be employed by the Board after December 31, 2009, contingent upon the acceptance of this Settlement by the Commissioner.

I have consulted with counsel regarding this matter and based upon those discussions, I am satisfied that this Settlement, which I **FIND** was entered into voluntarily and disposes of the issues in dispute, incorporates a proper and reasonable resolution of the issues in dispute between this Board and its employee. The Settlement also reasonably protects the interests of the public and students, while acknowledging that in a case of this nature, there is no certainty as to the outcome of a hearing, one way or another.

I **CONCLUDE** that this settlement is in accord with the requirements of N.J.A.C. 1:1-19.1 and of In re Cardonick , 1990 S.L.D. 842, 846 and that it should be approved. I 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**, which by law is authorized to make a 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.

July 27, 2009
DATE

JEFF S. MASIN, ALJ

Date Received at Agency: 28 2009

Date Mailed to Parties: JUL 28 2009

mjm
Attachment

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Respondent
Gilbert Alvarez

IN THE MATTER OF THE TENURE CHARGES AGAINST GILBERT ALVAREZ, LAKEWOOD BOARD OF EDUCATION, OCEAN COUNTY	:BEFORE THE OFFICE OF :ADMINISTRATIVE LAW : :AGENCY DKT NO.: 36-2/09 : :OAL DOCKET NO.: EDUTH-00736-2009S : : STIPULATION OF SETTLEMENT AND : SETTLEMENT AGREEMENT :

The parties to these matters, the Lakewood Board of Education ("Board") and Gilbert Alvarez ("Mr. Alvarez"), having reached an agreement to resolve the within matters, hereby request that the Administrative Law Judge and the Commissioner of Education approve the following terms and conditions as their settlement agreement.

1. The parties agree that their agreement to this agreement and its validity is contingent upon the approval of the Commissioner of Education of all of the terms of this agreement, and that if any of the terms of this agreement are rejected by the Commissioner of Education, this agreement shall be deemed null and void, and that in such event, neither parties' position in relation to the tenure charges shall be prejudiced and the matter shall be returned to the Office of Administrative Law for hearings in relation to the tenure charges, provided that nothing in this paragraph or in this agreement shall, in such event, preclude the parties from agreeing to a new, revised, or modified settlement agreement, provided that such agreement must be subject to the approval of the Commissioner of Education.

2. The parties agree that based upon and subject to the Commissioner of Education's approval of all of the terms of this agreement, the Board shall withdraw the tenure charges

3. Rationale for Settlement

A. The tenure charges allege that on about December 23, 2008, an incident occurred in Mr. Alvarez' classroom, in which Mr. Alvarez pushed a student's desk and used inappropriate language. Specifically, the charges allege that Mr. Alvarez pushed the student's desk, thereby resulting in the student being pushed to the wall, that Mr. Alvarez stated that he did not care if he lost his job, and that Mr. Alvarez invited the student to "go to another room." In addition, the charges allege that Mr. Alvarez used profanity.

B. Mr. Alvarez has admitted that he pushed the student's desk and stated that he didn't care if he lost his job, but has denied actually touching the student or using profane language.

C. The charges also allege that Mr. Alvarez did not treat African-American or Mexican students appropriately (although there are no allegations that Mr. Alvarez made racial remarks or statements), that the Board had ongoing concerns with Mr. Alvarez' behavior and performance, and that he used inappropriate language and/or instructional techniques with another student in November 2008 (which allegation does not involve profane language or physical contact).

D. The charges also allege that Respondent was not prepared for or did not always report to certain activities, on an occasion failed to prepare an emergency lesson plan, and was unhappy and detached from other staff.

E. With the exception of these tenure charges, at no time during his employment has Mr. Alvarez been subject to discipline, such as tenure charges or withholding of his employment or adjustment increments.

F. There are no other allegations that Mr. Alvarez made improper physical contact with any other student or with any other student's desk or chair.

G. Except as set forth in paragraph 3 B, Mr. Alvarez has denied all of the allegations in the tenure charges.

H. In the course of their investigation and discovery, information was exchanged between the parties which demonstrates to the Board's satisfaction that the Board can only rely on some students from one class, and no adults, in order to present the allegations involving Mr. Alvarez' contact with the student's desk and/or the student. Further, different students gave differing statements, it is not clear from the statements that physical contact was made with the student himself, and the students' statements demonstrate that the student involved, as well as other students, were taunting Mr. Alvarez for a substantial period of time prior to the incident, and that he was provoked by the taunting.

The Board understands that Mr. Alvarez will deny that he engaged in some of the conduct referred to, specifically that he made physical contact with the student, engaged in or used profane language, or wanted an altercation with the student, although he agrees that he wanted to talk to the student outside of the presence of the class.

I. In the course of their investigation and discovery in the case, information was exchanged between the parties which demonstrates to both parties satisfaction that it is likely that the Board can prove that Mr. Alvarez did push the desk with the student in it, that the desk may have made contact with the student, that the student may have made contact with the wall.

However, the parties also believe that the evidence will show that the student was not injured, that some inappropriate language was used, but not necessarily profane language, that is was the only time that such an incident occurred involving Mr. Alvarez, and that there is substantial doubt that the other charges can be proven, or if proven would warrant Mr. Alvarez' dismissal. The parties further understand that conflicting testimony will be offered by witnesses for both parties on those matters, and that those matters have never been the subject of significant discipline. Further, the parties recognize that the evaluations in Respondent's file will range from good to fair.

J. Both parties acknowledge that this settlement agreement is based upon their analysis and understanding of the evidence which would be proffered at the hearing, that these conclusions appear to be probable, but cannot be stated with certainty, and that in the event that this settlement agreement is not approved and the charges proceed to a hearing, neither this agreement nor anything in this agreement shall be admissible in evidence, and that neither party will be deemed to have admitted or conceded any of the contents of or the statements in this agreement.

K. The Board is aware of the public interest in the proper pursuit and handling of tenure charges to assure that unqualified persons do not teach in the public schools in New Jersey. However, upon review of all the circumstances, which includes evaluation of the time and expense of pursuing tenure charges, the uncertainty of the result which might be obtained, both in terms of sustaining the charges and the penalty which might be imposed, Mr. Alvarez' tenured service in the district, and in all other respects favorable record, the Board believes, and Mr. Alvarez concurs, that it is in the best interest of all parties and the public to resolve these matters by this settlement agreement.

4. The parties agree that the acts or omissions engaged in by Respondent as referred to in paragraph 3 above may be deemed to constitute conduct unbecoming and were sufficient to warrant the filing of the tenure charge, but not his removal, and that the appropriate penalty in the circumstances will be the suspension of Respondent without pay for 120 days, a penalty which has been imposed and served by Respondent as a result of the tenure charges.

5. The parties further agree that the Board will reinstate Respondent to his employment position and pay his salary through December 31, 2009, with all benefits and emoluments, including, but not limited to health insurance benefits for himself and his family through that date. In addition, the parties agree that at the expiration of that date, Mr. Alvarez will be offered the opportunity to obtain COBRA coverage for himself and his dependents.

6. In addition, the parties agree that if any prospective employers contact the Board, or any of the Board's officers, agents, employees, representatives, or members about Mr. Alvarez, the only information provided about Mr. Alvarez shall be the date(s) of Mr. Alvarez' employment with the Board and his teaching position(s) with the Board; and that a reference shall be provided which shall be a neutral reference, provided that nothing herein shall limit any legal right which may exist to access to this settlement agreement.

7. By settling these matters, Mr. Alvarez acknowledges that he is waiving his right to a hearing before the Office of Administrative Law and Commissioner of Education, in which he could seek an adjudication on the merits of the tenure charge, and on the penalty, if any, if the tenure charge is sustained. Mr. Alvarez also acknowledges that he understands and agrees to the terms of this agreement and is satisfied with the legal representation that he received in this matter.



8. The parties understand that as a result of circumstances unrelated to the tenure charges, if the settlement agreement is approved, Mr. Alvarez will not return to employment with the Board after December 31, 2009, instead choosing to seek other employment opportunities. The parties further agree that the appropriate penalty for Mr. Alvarez's acts or omissions is as set forth in paragraph 4 above, and that Mr. Alvarez's determination not to return to employment after December 31, 2009, which is contingent upon this settlement agreement being approved, does not constitute part of the consideration for this agreement, and is not as the result of the tenure charges.

9. A. As per paragraph eight (8) above, the parties expressly agree that neither the tenure charge nor the settlement thereof shall be deemed to have resulted in Respondent's loss of his tenured position, that the facts do not warrant suspension or revocation of Respondent's certificates, and that in these circumstances, the tenure matters are not appropriate for transmittal or referral to the State Board of Examiners pursuant to N.J.A.C. 6A:3-5.6 (d), N.J.A.C. 6A:9-17.4, N.J.A.C. 6A:17-6 (a) (l), or under any other statute or regulation, and will not be referred to the State Board of Examiners by the Commissioner of Education, and the Commissioner accepts this agreement, and will not refer the matter to the State Board of Examiners for consideration of suspension or revocation of Mr. Alvarez' certificates

B. The parties further agree that all certificates issued by the State Board of Examiners will remain intact without stigma.

10. The parties agree that in the event that the Commissioner of Education does not accept paragraph nine (9) or any other paragraph of this settlement agreement, this settlement agreement shall be deemed null and void, and the matters shall be returned to the Office of Administrative Law for hearings without prejudice to either parties' position.

11 The Board has approved the terms of this settlement agreement as acknowledged by the attached resolution.

Chet Arnold, President of the Lakewood Board of Education

STATE OF NEW JERSEY :
: SS
COUNTY OF :

I certify that on July 22, 2009, Chet Arnold, President of the Lakewood Board of Education, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

Michael F. Inveld

Eugenia Lawson, Acting Superintendent of Schools
Lakewood Board of Education

STATE OF NEW JERSEY :
: SS
COUNTY OF :

I certify that on July 22, 2009, Eugenia Lawson, Acting Superintendent of the Lakewood Board of Education, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

Michael F. Inveld

Gilbert Alvarez

STATE OF NEW JERSEY :
: SS
COUNTY OF :

I certify that on July _____, 200, Gilbert Alvarez, personally came before me and acknowledged under oath, to my satisfaction, that she is the person named in and personally signed this document, and signed, sealed and delivered this document as her act and deed.

_____

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21326-975

LAKEWOOD BOARD OF EDUCATION
LAKEWOOD, NEW JERSEY

RESOLUTION

WHEREAS, the Lakewood Board of Education reviewed a proposed settlement agreement with employee Gilbert Alvarez and placed same on the agenda of Board of Education meeting of July 20, 2009 for formal action,

NOW, THEREFORE, BE IT RESOLVED, by a unanimous affirmative vote of the members present, the Lakewood Board of Education accepted and approved the settlement agreement pending approval from the Office of Administrative Law and the Commissioner of Education.

CERTIFICATION

I, Robert S. Finger, Board Secretary to the Board of Education of the Township of Lakewood, hereby certify the foregoing is a true copy of Resolution adopted by the Board of Education of the Township of Lakewood at a public meeting held on the 20th Day of July 2009.

ROBERT S. FINGER
BOARD SECRETARY

MOTION MR.THOMAS SECONDED MR.OSTREICHER

AYES 8 NAYS 0 ABSENT 1 ABSTAINED 0

275-09

JEAN JARMOND,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner was employed by the Board pursuant to her instructional certificate with an endorsement as a teacher of the handicapped from May 2, 2005 through May 9, 2008, when she received a letter notifying her that the Board had non-renewed her contract. Petitioner was asked to leave work that day, but received her full pay for the 2007-2008 school year. She contends that she was terminated in violation of her tenure rights. The Board maintains that petitioner had not been employed for the requisite thirty months and one day necessary to acquire tenure at the time of its May 2008 notice of non-renewal because of a forty-three day approved, unpaid medical leave of absence from December 20, 2005 through January 31, 2006. The parties filed cross motions for summary decision.

The ALJ found that: there is no genuine issue of material fact in question, and the matter is ripe for summary judgment; petitioner was continuously employed under her endorsement as a teacher of the handicapped; petitioner achieved sufficient time under her endorsement to be tenured, notwithstanding an approved unpaid medical leave of absence; the Board was not deprived by such leave of its opportunity to evaluate petitioner; and clear and consistent precedent supports these findings, notably *Dorothy Kletzkin v. Board of Education of the Borough of Spotswood, Middlesex County*, 136 *N.J.* 275 (1994). Accordingly, the ALJ ordered that petitioner's motion for summary decision be granted, and that the Board recognize petitioner's right to tenure effective May 3, 2008 and reinstate her with back pay, benefits and emoluments retroactive to May 9, 2008.

The Commissioner adopted the Initial Decision of the OAL as the final decision in this matter for the reasons expressed therein, and directed the Board to reinstate petitioner to employment forthwith.

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 8, 2009

OAL DKT. NO. EDU 9107-08
AGENCY DKT. NO. 171-6/08

JEAN JARMOND,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the Board of Education (Board) pursuant to *N.J.A.C.* 1:1-18.4 and 1:1-18.8 and petitioner's reply thereto.

In its exceptions, the Board first contends that the case law discussed in the Initial Decision is inapposite to the facts of the present matter, where petitioner's absences were neither less than 30 days nor due to a work-related injury. The Board then asserts that the conclusion reached by the Administrative Law Judge (ALJ) creates a "dichotomy" between seniority and tenure – since leaves greater than 30 days do not count toward acquisition of seniority pursuant to *N.J.A.C.* 6A:32-5.1, but would, under the ALJ's decision, count toward acquisition of tenure – and precludes "accountability" by allowing tenure to be acquired notwithstanding that the employing board of education has not had the full opportunity contemplated by statute – that is, 30 months and one day – to evaluate an employee's work performance before such employee effectively attains lifetime job security. According to the Board, if the Initial Decision is allowed to stand, "Pandora's Box" will be opened, since the decision establishes no parameters – theoretically permitting tenurable leaves of several months

and allowing holidays and school breaks to be considered as factors in assessing the effect of a leave – and places boards of education in the position of having to litigate what lengths of absence, up to a year, must still be considered "employment" for tenure acquisition purposes. The Board "submits that the Commissioner must, if the accountability regulations are to have any meaning, find that actual service is the basis for attaining tenure, not simply dates on a calendar signifying a beginning and ending date of an employment contract." (Board's Exceptions at 1-2, quotation at 2)

In reply, petitioner substantially reiterates the arguments of her OAL brief (Point II, at 9-16) and asserts that the Board's position fails to take account of several other pertinent decisions – such as those cited by the ALJ – which apply approved leave time toward acquisition of tenure. (Petitioner's Reply at 1-7)

Upon careful review and consideration, the Commissioner is unpersuaded by the Board's exceptions and adopts the Initial Decision of the OAL.

As it has throughout proceedings in this matter, the Board is, in effect, asking the Commissioner to ignore the holding of the New Jersey Supreme Court – in *Dorothy Kletzkin v. Board of Education of the Borough of Spotswood, Middlesex County*, 136 *N.J.* 275 (1994), affirming decision of the Superior Court, Appellate Division, at 261 *N.J. Super.* 549 (1993), affirming State Board of Education decision dated February 5, 1992 – that "employment" in the context of tenure acquisition refers to contractual employment. The Commissioner, however, is not at liberty to disregard the Court's majority holding and instead adopt the stance advocated by the Board that "employment" as used in *N.J.S.A.* 18A:28-5 refers to "actual service" so as to preclude the counting of *any* period of leave taken by an employee toward the 30 months and one day necessary to satisfy the probationary period of the statute.

Rather, the Commissioner finds that the ALJ in this matter conducted the appropriate analysis of petitioner's claim in light of the facts and controlling law, correctly concluding that petitioner had acquired tenure because: 1) sequential contracts of employment were in place for sufficient time under *N.J.S.A.* 18A:28-5(c) (employment in the district for the equivalent of more than three academic years within a period of any four consecutive academic years); 2) petitioner performed services under each of these contracts during the years in question (2004-05 through 2007-08); and 3) the duration and placement of petitioner's leave – a single period of 43 calendar days encompassing not more than 20 school days – was such that the Board was not deprived of an adequate opportunity to evaluate her performance before she acquired tenure.[1] Similarly, the ALJ was correct in finding, for the reasons stated, that: 1) *Kletzkin* was not rendered inapplicable because petitioner's absences did not arise pursuant to *N.J.S.A.* 18A:30-2.1 as the result of a work related injury; and 2) the Family and Medical Leave Act – although not applicable to the facts herein – would not in any event support the Board's position that leave time may not be considered "continuous employment" for purposes of tenure acquisition.[2]

Finally, in response to the Board's exception with respect to a "dichotomy" between seniority and tenure, the Commissioner observes that the rule referenced by the Board – which provides that seniority credit does not accrue for unpaid absences exceeding 30 calendar days aggregate in one academic or calendar year[3] – is part of the regulatory framework adopted

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[1] In this regard, the Commissioner notes that the Board did not claim, nor proffer facts to support a contention, that the leave in question deprived the Board of a specific or necessary opportunity to evaluate petitioner; rather, the Board's position throughout this proceeding has been that unbroken service of anything less than 30 months and one day is unacceptable, as a matter of law, for purposes of tenure acquisition.

[2] With respect to the latter, see also *Belinda Mendez-Azzolini v. Board of Education of the Township of Irvington, Essex County,* Commissioner's Decision No. 268-09, decided August 27, 2009.

[3] *N.J.A.C.* 6A:32-5.1(b), reads in pertinent part: "The periods of unpaid absences not exceeding 30 calendar days aggregate in one academic or calendar year, leaves of absence at full or partial pay and unpaid absences granted for

under authority of *N.J.S.A.* 18A:28-10 to address the very different purpose of establishing the order of dismissals among a district's tenured staff in the event of a reduction in force, and, as such, has no bearing on – and cannot act to alter or limit – the conditions for acquisition of tenure established by *N.J.S.A.* 18A:28-5.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL – granting petitioner's motion for summary decision – is adopted as the final decision in this matter. The Board of Education of the City of Elizabeth is directed to reinstate petitioner to employment forthwith – or to place her on a preferred eligibility list if no position within the scope of her tenure rights is presently vacant or held by a nontenured or less senior staff member – retroactive to the date of her termination, together with all salary, benefits and emoluments due her, less mitigation as applicable.

IT IS SO ORDERED.[4]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9|08|09

Date of Mailing: 9|08|09

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study or research shall be credited toward seniority. All other unpaid absences or leaves of absence shall not receive seniority credit."

[4] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), decisions of the Commissioner are appealable to the Appellate Division of the Superior Court.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 09107-08
AGENCY DKT. NO. 171-6/08

JEAN JARMOND,
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 (The Murray Law Firm, attorneys)

Record Closed: March 23, 2009 Decided: April, 23 2009

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

STATEMENT OF CASE AND PROCEDURAL HISTORY

Petitioner Jean Jarmond contends that the Elizabeth Board of Education's (Board) May 9, 2008, non-renewal or summary termination of her employment violated N.J.S.A. 18A:28-5(c), since she allegedly gained tenure on May 3, 2008, by virtue of her instructional certificate with an endorsement as a teacher of the handicapped.

At issue is whether an approved unpaid medical leave of absence during a non-tenured year tolls the tenure requirement of service for the equivalent of more than three academic years within a period of any four consecutive academic years. If not, did the Board non-renew or terminate Jarmond in violation of the tenure law?

Jarmond filed her petition with the Commissioner of Education on June 13, 2008. After receiving the Board's Answer on July 8, 2008, the Bureau of Controversies and Disputes of the Department of Education referred the matter to the Office of Administrative Law (OAL) on July 21, 2008, 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. At the hearing of January 22, 2008, the parties stipulated to most facts. The Board submitted an additional certification with an agreement by Jarmond that I could consider it. Both parties requested that the matter be decided on cross-motions for summary decision. After receiving briefs on February 23, 2009, and reply briefs on March 23, 2009, I closed the record.

STATEMENT OF FACTS

I **FIND** the following undisputed and stipulated **FACTS**:

1. Jarmond holds a standard instructional certificate with an endorsement as teacher of the handicapped, issued March, 2005. See Exhibit J-2.

2. The Board employed Jarmond for the period from May 2, 2005, through June 30, 2005, as a behavioral disabilities teacher pursuant to her endorsement as a teacher of the handicapped. (See employment contract, dated May 12, 2005, (Exhibit J-3), Board minutes and vote appointing Jarmond (Exhibit J-15)).

3. The Board reappointed Jarmond for the 2005-2006 school year and employed her as a behavioral disabilities teacher pursuant to her endorsement as a teacher of the handicapped. (See recommendation for re-employment (Exhibit J-4) and Board minutes and vote reappointing Jarmond (Exhibit J-16)).

4. During the course of the 2005-2006 school year, petitioner underwent surgery. Petitioner was absent with pay from and including December 8 through and including December 19, 2005, using sick, personal and family illness days. From December 20, 2005, through January 31, 2006, inclusive, petitioner was on an approved, unpaid medical leave of absence (forty-three calendar days). See Exhibit J-17.

   Supporting documents are:

   (a) Letter from Jarmond to Ada Garcia, dated November 16, 2005, requesting leave of absence (Exhibit J-5);

   b) Recommendation to grant medical leave of absence, dated November 18, 2005 (Exhibit J-6);

   c) Jarmond's letter, dated December 16, 2005, requesting a change in the start of her leave of absence (Exhibit J-7);

   d) Recommendation for assignment upon return from leave of absence, dated November 29, 2005 (Exhibit J-8);

   e) Recommendation for change in date of leave of absence, dated January 24, 2006 (Exhibit J-9).

   Jarmond returned to work on February 1, 2006. See Exhibit J-18.

5. The Board reappointed Jarmond for the 2006-2007 school year and employed her as a behavioral disabilities teacher pursuant to her endorsement as a teacher of the handicapped. (See employment contract dated May 15, 2006 (Exhibit J-10)).

6. The Board reappointed Jarmond for the 2007-2008 school year and employed her as a cognitive moderate teacher pursuant to her endorsement as a teacher of the handicapped. (See employment contract, dated May 15, 2007 (Exhibit J-11); employment contract, dated September 20, 2007, reflecting Jarmond's change in assignment (Exhibit J-11A); and letter notifying Jarmond of her change in assignment (Exhibit J-12)).

7. On May 8, 2008, Jarmond received a letter of the same date notifying her that the Board would be discussing her employment at a meeting on May 8, 2008. See Exhibit J-13.

8. On May 9, 2008, Jarmond received a letter of the same date notifying her that, on May 8, 2008, the Board "non-renewed [her] contract with sixty days notice pay payable in one lump sum effective May 12, 2008." (See letter and enclosed resolution (Exhibit J-14)).

Petitioner left work on May 9, 2008. Petitioner received her full pay for the 2007-2008 school year.

Assistant superintendent for human resources for the Board certified that Jarmond was on an approved forty-three-day unpaid leave of absence from December 20, 2005, through February 1, 2006. Consistent with the practice of the Department of Human Resources, Jarmond did not receive two months seniority credit for December 2005 and January 2006. Also, as per the Payroll Department, because Jarmond worked part of one pay period in December 2005, a full month of pension payment was deducted from her wages and paid to the Division of Pensions. No monies were deducted and/or paid to Pensions for Jarmond for the month of January 2006, as she had no wages. (See Certification of Aida Garcia, undated).

LEGAL DISCUSSION

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. The parties agree and I **CONCLUDE** that there is no genuine issue as to any material fact challenged.

N.J.S.A. 18A:28-5 contains three requirements for the acquisition of tenure. A teaching staff member must be employed by a local board of education in a position included in the tenure statutes. The individual must hold an appropriate certificate. And finally, the employment service must continue for a specified length of time. Relevant to the circumstances of this matter, N.J.S.A. 18A:28-5(c) provides for tenure after "[t]he equivalent of more than three academic years within a period of any four consecutive academic years." This would cover a teaching staff member such as Jarmond hired for a fraction of an academic year.[1] An academic year runs for ten months between September 1 and June 30 of a school year. Kletzkin v. Bd. of Educ., Borough of Spotswood, 136 N.J. 275, 277 (1994); see N.J.S.A. 18A:1-1 (defining academic year as "the period between the time school opens in any school district or any board of education after the general summer vacation until the next succeeding summer vacation").

There is no dispute that Jarmond was employed by the Board and that she held an appropriate certificate to qualify her for tenure. In order to satisfy the final requirement to obtain tenure, Jarmond would have had to be "employed" for thirty months and one day over four academic years. Kletzkin, supra, 136 N.J. at 277. The Board contends that Jarmond was not employed for thirty months and one day at the time of its May 8, 2008, notice of non-renewal to her because of her forty-three-day approved unpaid medical leave of absence extending from December 20, 2005, through February 1, 2006. If those forty-three days are counted for tenure-acquisition purposes, Jarmond clearly would meet the thirty-month-plus-one-day requirement during her employment from May 2, 2005, to her termination effective May 12, 2008.

I **CONCLUDE** that Jarmond was continuously employed under her endorsement as a teacher of the handicapped and that she achieved sufficient time under this

[1] Jarmond was a mid-year hire initially working from May 2 through June 30, 2005.

endorsement to be tenured notwithstanding her approved unpaid medical leave of absence. Clear and consistent precedent supports this conclusion.

Kletzkin had served for slightly more than twenty-eight months when she went out on paid leave due to a work-related injury. The Supreme Court held that continuous employment exists notwithstanding the mere occasional absence of a teacher by reason of illness or excuse and that a teacher who performs services under a contract for the year is employed for the purposes of the tenure statute even if she takes an involuntary leave. Kletzkin, supra, 136 N.J. at 279; see also Bd. of Educ. v. Wall, 119 N.J.L. 308, 309-10 (Sup. Ct. 1938). It thereby concluded that Kletzkin's board maintained the employment relationship with her during her leave until it terminated her three months after she became tenured. Although the Court recognized the importance of a probationary period as a means of assessing a teacher's performance, it found that the board had ample opportunity to assess her over twenty-eight months during four school years. Her brief period of sick leave did not deprive the board of its opportunity to evaluate her before she acquired tenure, although the Court acknowledged that a more extended leave of absence might warrant a different result. Kletzkin, supra, 136 N.J. at 280-81.

The attempt of the Board here to rely on the dissenting opinion in Kletzkin is unavailing to suggest a different meaning of "continuous employment" from that applied by the majority opinion. Similarly unpersuasive is the Board's effort to distinguish the holding of Kletzkin from this situation because Kletzkin's leave of absence was involuntary and paid due to a work-related injury whereas Jarmond was on unpaid leave for a medical condition unrelated to her work. The Kletzkin majority opinion did not make a paid leave of absence due to a work-related injury a condition for finding "continuous employment." That situation was but one example of "continuous employment" in addition to examples of voluntary unpaid leaves of absence. Id. at 280 (citing Ward v. Keenan, 3 N.J. 298 (1949) and Blinn v. Bd. of Tr., 173 N.J. Super. 277, 278 (App. Div. 1980)).

The same principle of "continuous employment" also applies in tenure cases as well even if the approved leave of absence, as here, is unpaid. In Maloney v. Bd. of

Educ. of the Ocean Cty. Vocational Sch. Dist., 1989 S.L.D. 2723, the Board contended that Maloney did not acquire tenure under N.J.S.A. 18A:28-5(c) as a consequence of a six-week unpaid leave of absence, that it had granted her. The Commissioner, however, concluded that approximately twenty-two school days of unpaid leave at the beginning of a school year constituted "employment" under N.J.S.A. 18A:28-5(c) and that the board's termination of Maloney was unlawful.

In Goebel v. Bd. of Educ. of the Borough of Maywood, 1984 S.L.D. 1638, aff. with mod., State Bd. of Educ., 1985 S.L.D. 1928, relied upon the Commissioner in Maloney, the Commissioner rejected the board's argument that a secretary did not gain tenure because she had been absent for approximately ninety days, sixty of which were unpaid leave, over a three-year period. The Commissioner distinguished these absences from ones where the leaves of absence were for a full year of not being employed by stating,

> [those] leaves of absence were for a full year of not being "employed." In this matter, there is no question that petitioner was employed for each of the years in question, albeit that a portion of those employment years was devoted to a leave of absence.
>
> [Id. at 1655].

Also see Apollony v. Bd. of Educ. of the Twp. of Bernards, 93 N.J.A.R.2d (EDU) 707 (two-month sick leave did not deprive the board of the ability to adequately evaluate performance and should not be counted against acquisition of tenure).

Kletzkin, Maloney, Goebel, and Apollony all involved leaves of absence of greater duration than that of Jarmond. Although Jarmond's unpaid leave of absence extended from December 20, 2005, to January 31, 2006, she missed no more than twenty school days due to school vacation and holidays. As in the other cases, the Elizabeth Board was not deprived of an adequate opportunity to evaluate Jarmond before she acquired tenure.

The Board also fails in its attempt to rely on the New Jersey Family Leave Act (NJFLA), N.J.S.A. 34:11B-1 et seq., and the Federal Family Medical Leave Act (FMLA),

29 U.S.C. § 2601 et seq., for the proposition that other statutes do not support the notion that the employment relationship continues during an unpaid and voluntary leave of absence. Although 29 U.S.C. § 2614(a)(3) of the FMLA indicates that seniority and employment benefits may not necessarily accrue during leave, 29 U.S.C. § 2651(b) provides that nothing in the FMLA shall be construed to supersede any provision of any State law that provides greater family or medical leave rights than those established under the FMLA. Clearly, N.J.S.A. 18A:28-5 provides a greater benefit with regard to the effect of "continuous employment" for the purpose of attaining tenure. There is no showing that practices of the Board restricting seniority credit during a leave of absence necessarily restrict the treatment of such absence for tenure-attainment purposes. Case law is to the contrary.

ORDER

It is hereby **ORDERED** that Jarmond's Motion for Summary Decision be **GRANTED**.

It is further **ORDERED** that the Board of Education of the City of Elizabeth immediately recognize Jarmond's right to tenure as a cognitive moderate teacher effective May 3, 2008, and reinstate her retroactive to May 9, 2008, together with all the salary, benefits and emoluments owing her, including pension and seniority, less mitigation of any monies earned during the period of unlawful termination.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless 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 23, 2009
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: 4/23/09

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APR 27 2009
DATE

OFFICE OF ADMINISTRATIVE LAW

id

APPENDIX

JOINT EXHIBIT LIST

J-1 Stipulation of Facts and Exhibits

J-2 Certificate – teacher of the handicapped

J-3 Employment Contract May 2, 2005 through June 30, 2005 (dated May 12, 2005)

J-4 Memo to Pablo Munoz, from Aida Garcia, RE: appointment to School #3/behavior disabilities, effective September 1, 2005 (dated September 1, 2005)

J-5 Letter to Aida Garcia, from Jean Jarmond, RE: request for medical leave of absence, dates not specified (dated November 16, 2005)

J-5A Attachment to November 16, 2005, letter to Aida Garcia, from Jean Jarmond (dated November 15, 2005)

J-6 Letter to Aida Garcia, from Elaine DePre, RE: medical leave of absence effective December 20, 2006, [sic] (error – should be '05) through February 3, 2006 (dated November 18, 2005)

J-7 Letter to Elaine DePre, from Jean Jarmond, RE: medical leave of absence changed from December 8, 2005, to December 20, 2005 (dated December 16, 2005)

J-8 Memo to Aida Garcia, from Elaine DePre, RE: election and assignment of personnel – Jean Jarmond returned from leave of absence effective February 1, 2006 (dated November 29, 2005)

J-9 Memo to Aida Garcia, from Elaine DePre, RE: change in date of leave of absence from December 20, 2005, to January 31, 2006 (dated January 24, 2006)

J-10 Employment Contract – September 1, 2006 through June 30, 2007 (dated May 15, 2006)

J-11 Employment Contract – September 1, 2007 through June 30, 2008 (dated May 15, 2007)

J-11A Employment Contract September 1, 2007 (dated September 20, 2007)

J-12 Letter to Jean Jarmond, from Pablo Munoz, RE: transfer effective September 1, 2007

J-13 May 8, 2008 RICE Letter to Jean Jarmond, from Pablo Munoz, RE: Board meeting on May 8, 2008

J-14 Letter to Jean Jarmond, from Aida Garcia, RE: non-renewal with resolution (dated May 9, 2008) with resolution – non-renewal effective May 12, 2008

J-15 Board minutes and vote – appointment (May/05–June/05) (dated May 12, 2005)

J-16 Board minutes and vote – reappointment (September/05–June/06) (dated August 18, 2005)

J-17 Board minutes and vote – leave of absence (December 20, 2005–February 3, 2006) (dated December 15, 2005)

J-18 Board minutes and vote – return from leave of absence (December 20, 2005–January 31, 2006) (dated February 16, 2006)

J-19 EDU-MET sheets for Jean Jarmond

J-20 Annual attendance record

J-21 Annual attendance record code

276-09

OAL DKT. NO. EDU 10448-08
AGENCY DKT. NO. 339-11/08

IN THE MATTER OF THE TENURE HEARING OF ANTHONY BROCCO, III SCHOOL DISTRICT OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY.	COMMISSIONER OF EDUCATION DECISION

Upon review of 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, the Commissioner approves the settlement as compliant with the standards set forth in *In re Cardonick,* 1990 *S.L.D.* 842 (State Board 1983), and adopts the Initial Decision as the final decision in this case with the following comment.

Paragraph 7 suggests that the Commissioner may have the duty to refer this matter to the State Board of Examiners for possible action on respondent's teaching certificate. *N.J.A.C.* 6A:3-5.6(a)(6), however, imposes no such duty on the Commissioner where, as here, the settlement does not result in the loss of respondent's employment in the district.[1]

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

IT IS SO ORDERED.

Lucille Way
COMMISSIONER OF EDUCATION

Date of Decision: 9|10|09

Date of Mailing: 9|10|09

[1] The Commissioner also notes that, contrary to the text of Paragraph 1 of the Stipulation of Settlement, the tenure charges are not "moot," but are rather withdrawn in keeping with the terms of the parties' settlement agreement.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10448-08

AGENCY DKT. NO. 339-11/08

IN THE MATTER OF THE TENURE HEARING OF ANTHONY W. BROCCO, II, SCHOOL DISTRICT OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY.

Paul H. Green, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, LLC, attorneys)

Matthew B. Wieliczko, Esq., for respondent (Zeller and Wieliczko, attorneys)

Record Closed: July 9, 2009 Decided: July 29, 2009

BEFORE **ISRAEL D. DUBIN,** ALJ:

This matter was transmitted to the Office of Administrative Law on December 1, 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 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.

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

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

7/29/2009
DATE

ISRAEL D. DUBIN, ALJ

Date Received at Agency:

Date Mailed to Parties:

cmo

RECEIVED

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Schwartz Simon Edelstein Celso and Zitomer, LLC
44 Whippany Road
P.O. Box 2355
Morristown, New Jersey 07962
(973) 301-0001
Attorneys for the Cherry Hill Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST ANTHONY W. BROCCO, II, BY THE CHERRY HILL TOWNSHIP BOARD OF EDUCATION, CAMDEN COUNTY, NEW JERSEY.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY/OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUTH 10448-2008S AGENCY REF. NO: 339-11/08 ADMINISTRATIVE ACTION **STIPULATION OF SETTLEMENT**

WHEREAS, the Board of Education of the Township of Cherry Hill ("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 Cherry Hill Public School District; and

WHEREAS, Anthony W. Brocco, II ("Respondent") commenced employment with the Board as a certificated teaching staff member on or about September 1, 2004; and

WHEREAS, on or about November 11, 2008, sworn tenure charges against Respondent, together with a certificate of determination and certificate of service, were certified by the Board to and filed with the Commissioner of Education, and Respondent was simultaneously served with the sworn tenure charges, sworn statement of evidence, certificate of determination and certificate of service, pursuant to N.J.A.C. 6A:3-5.1 *et seq.*; and

WHEREAS, the Department of Education thereafter transmitted the matter to the Office of Administrative Law as a contested case, which was assigned to Administrative Law Judge Israel Dubin under Docket No. EDUTH 10448-2008-S, Agency Ref. No. 339-11/08; and

WHEREAS, the parties, wishing to resolve the within matter amicably without the need for further, protracted litigation, while achieving the goals of both parties,

hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by the Court and the Commissioner of Education;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, they agree as follows:

1. Tenure Charges to be Moot/No Further Board Action

This Stipulation is expressly contingent upon and subject to approval by the Commissioner of Education of New Jersey. The Board agrees that upon approval of this Stipulation of Settlement by the Commissioner, the subject tenure charges shall be moot and shall be withdrawn by the Board, Respondent shall be immediately reinstated and no further action shall be initiated by the Board regarding the underlying charges. Both parties agree, however, that in the event this agreement 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 in such event their obligations under this agreement shall be null and void.

2. Loss of Pay

Upon certification of tenure charges to the Commissioner of Education, Respondent was suspended by the Board without pay for a period of One Hundred Twenty (120) days, following which respondent's suspension continued with full pay. The parties agree as part of their settlement that Respondent shall not receive any reimbursement or restitution of his loss of 120 days' pay, and as an integral part of this settlement respondent hereby forever waives any claim to such reimbursement. The Board agrees as part of this settlement that it shall have no claim against Respondent for any unemployment benefits paid to Respondent.

3. Reassignment

Upon approval of this settlement by the Commissioner, the Board shall immediately reinstate the Respondent and reassign Respondent to a teaching position within the scope of his certificate and endorsement at the District's Beck Middle School; provided, however, that in the event a staff position vacancy within the scope of Respondent's certificate and endorsement occurs at the District's Rosa Middle School prior to September 1, 2009, then respondent will be assigned to such position instead.

4. Future Employment Assignment Requests

Nothing in this Agreement shall prevent respondent from making application after the 2009-2010 school year for transfer to any vacant teaching position in the District for which he is qualified. The Board agrees that its Administration will

give favorable consideration to any application made by respondent for a transfer to an available vacancy at the Rosa Middle School or Carusi Middle School for which he is qualified, but does not guarantee that respondent will be appointed to such position or to any other position for which he makes application.

5. Applications for Extracurricular Assignments

Upon approval of this Agreement by the Commissioner, and continuing thereafter, Respondent shall have the same right as all other District staff to apply for and potentially be appointed to any coaching or other extracurricular positions in the District. The Board makes no guarantee or representation that respondent will be appointed to any extracurricular position for which he makes application.

6. No Impact on Salary Increment or Seniority

The parties stipulate and agree that their resolution of the tenure proceedings will not result in any loss to respondent of service credit seniority under *N.J.A.C.* 6A:32-5.1, nor will respondent suffer any loss of the applicable employment or adjustment salary increments on the teacher salary guide, either as presently constituted or ultimately negotiated between the Board and the Cherry Hill Education Association, for the 2009-2010 school year.

7. Referral to State Board of Examiners

Respondent acknowledges that he has been apprised of the Commissioner's duty to refer tenure matters, pursuant to N.J.A.C. 6A:3-5.6(a)(6), to the State Board of Examiners for possible suspension or revocation of his certificate.

8. Public Interest

The proposed settlement of this tenure dispute is justified and will serve the public interest because: given the difficulties inherent in the nature of anticipated testimony, including but not limited to the issue of impact of consumption of alcohol on the witnesses to the alleged incident, the limited nature of the alleged off-campus exchange with an 18-year old adult pupil who was not respondent's student, and respondent's otherwise satisfactory written employment record, it is reasonably likely that the result of this settlement is equivalent to the outcome that could be expected following a hearing if the charges were fully proven to be true. The Board is satisfied with this result and will save the expenditure of significant legal fees through this settlement. The Board is further of the opinion that the reassignment of respondent pursuant to this Stipulation is in the parties' best interests and that respondent's voluntary consent to same adds valuable consideration to this settlement. Moreover, since most of the Board's witnesses are former District students, this settlement will obviate the need for the Board to expose these individuals to a potentially confrontational legal proceeding.

9. Release

In exchange for the above consideration, Respondent and his heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any claims or rights, whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively, its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns, including, but not limited to any claims for attorneys fees, back pay or front pay, any claims for emotional distress or pain and suffering, and any claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retaining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any other claims for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim, from the beginning of time until the date of execution 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.* The Board hereby irrevocably waives, releases and forever discharges any claims or charges which it could have asserted against Respondent in this tenure proceeding.

10. Board Approval

The Board President has been duly authorized by the Board to execute this Stipulation of Settlement on behalf of the Board of Education.

11. Assent to Terms

Respondent hereby acknowledges that he enters into this Stipulation of Settlement with a full understanding of his rights and that he was fully informed of the implications of this Agreement by his legal counsel. Respondent also enters into same without duress and of his own free will and volition.

12. Entire Agreement

This Stipulation of Settlement represents the entire understanding of the parties as to the settlement and withdrawal of the tenure charges against Respondent and all other litigation between the parties, and may be modified only in a subsequent

written instrument, duly executed by the parties. No other representations of any kind except as contained in this Agreement shall be binding upon the parties.

13. Severability

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then this Agreement shall be void and of no force and effect.

14. 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.

15. Separate Counterparts

This Stipulation of Settlement may be signed by the parties in one or more counterparts, each of which shall be deemed an original.

IN WITNESS WHEREOF, the parties have knowingly and voluntarily executed and delivered this Stipulation of Settlement on the dates set forth below.

RESPONDENT

_____
ANTHONY W. BROCCO, II

WITNESS:

By_____

DATED:

CHERRY HILL BOARD OF EDUCATION

By _____
LISA CONN, President

ATTEST:

By _____
JAMES DEVEREAUX, Board Secretary

DATED: July 7, 2009

written instrument, duly executed by the parties. No other representations of any kind except as contained in this Agreement shall be binding upon the parties.

13. Severability

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then this Agreement shall be void and of no force and effect.

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This Stipulation of Settlement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

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IN WITNESS WHEREOF, the parties have knowingly and voluntarily executed and delivered this Stipulation of Settlement on the dates set forth below.

RESPONDENT

ANTHONY W. BROCCO, II

CHERRY HILL BOARD OF EDUCATION

By_____
LISA CONN, President

WITNESS:

By_____
Matthew B Wielicka, Esq

DATED: 7/6/09

ATTEST:

By_____
JAMES DEVEREAUX, Board Secretary

DATED:

STATE OF NEW JERSEY)
ss:
COUNTY OF Camden)

I CERTIFY that on July 6, 2009, Anthony W. Brocco, II, personally came before me and acknowledged under oath, to my satisfaction, that he:

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

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

Attorney or Notary Public

Kelly A. Neiman
State of New Jersey
Commission Expires 1/27/2013

CHERRY HILL PUBLIC SCHOOLS
Cherry Hill, New Jersey

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OFFICE OF COMM LAW

SPECIAL ACTION AGENDA
July 7, 2009

C. HUMAN RESOURCES/NEGOTIATONS

ITEM 4. OTHER MOTIONS

Resolved, that the Cherry Hill Board of Education approve the Stipulation of Settlement in the administrative proceeding filed under Agency Ref. No. 339-11/08, OAL Docket No. EDUTH 10448-2008S, and authorizes it President and Secretary to execute same on behalf of the Board of Education for submission to the Administrative Law Judge assigned to the controversy.

Motion: Mr. Goodwin Second: Mr. Klukoff Vote: Ayes - 9 No - 0

This is to certify that the above is a true and correct copy of the Resolution adopted by the Cherry Hill Township Board of Education at a Special Action Meeting held on July 7, 2009.

James Devereaux
Assistant Superintendent
Business/Board Secretary

Notary Public

CECILIA ROSADO
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires May 3, 2011

281-09

#281-09

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
ERIN MAC GILLIVRAY,	:	DECISION
BRIDGEWATER-RARITAN REGIONAL	:	
SCHOOL DISTRICT, SOMERSET COUNTY.	:	
	:	

SYNOPSIS

Petitioning Board filed an Order to Show Cause with the Commissioner seeking suspension of respondent's teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-8. Respondent was a tenured language arts teacher at petitioner's middle school until she resigned on insufficient notice – contrary to the terms of her contract – in August 2008, citing her engagement and impending move to Canada as the reason for her departure. The Board filed a motion for summary decision.

The ALJ found that: the matter is appropriate for summary decision; respondent did not give the statutory 60-day notice of her intention to resign; she therefore violated the terms of *N.J.S.A.* 18A:28-8 and 18A:26-10. Accordingly, the ALJ granted the Board's motion for summary decision, and ordered respondent's certificate suspended for one year.

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, noting that because respondent was a tenured teaching staff member, her suspension arises solely under *N.J.S.A.* 18A:28-8 and not under *N.J.S.A.* 18A:28-10. Accordingly, respondent's certificate is suspended for a period of one year from the date of the filing of this decision – a copy of which has been 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.

September 14, 2009

OAL DKT. NO. EDU 12099-08
AGENCY DKT. NO. 335-11/08

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE OF	:	COMMISSIONER OF EDUCATION
ERIN MAC GILLIVRAY,	:	DECISION
BRIDGEWATER-RARITAN REGIONAL	:	
SCHOOL DISTRICT, SOMERSET COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that a one-year suspension of respondent's teaching certificate is warranted under the circumstances. In so concurring, the Commissioner further observes that respondent's letter of resignation (Board's Exhibit B) – in addition to noting her engagement to a Canadian and consequent decision to relocate – specifically references the availability of a job opportunity in Canada in apologizing for her late notice to the district.

Accordingly, for the reasons expressed therein and above, the Initial Decision of the OAL is adopted as the final decision in this matter.[1] Respondent's certificate is hereby suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[2]

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/14/09
Date of Mailing: 9/14/09

[1] In so adopting, the Commissioner notes that – because respondent was a tenured teaching staff member – her suspension arises solely under *N.J.S.A.* 18A:28-8 and not under *N.J.S.A.* 18A:26-10, which has no direct applicability in this matter notwithstanding the common practice of citing both statutes in disputes of this type.

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 12099-08
AGENCY DKT. NO. 335-11/08

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF ERIN MACGILLIVRAY, BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY.

Nicholas Celso III, Esq., for petitioner Bridgewater-Raritan Regional School District (Schwartz, Simon, Edelstein, Celso and Zitomer, attorneys)

Arnold Mellk, Esq., for respondent Erin MacGillivray (Wills, O'Neill and Mellk, attorneys)

Record Closed: June 16, 2009 Decided: July 31, 2009

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

STATEMENT OF THE CASE

Petitioner Bridgewater-Raritan Regional School District (District) filed an Order to Show Cause with the Commissioner of Education (Commissioner) seeking the

suspension of the teaching certificate of Erin MacGillivray for unprofessional conduct pursuant to N.J.S.A. 18A:26-10 and 18A:28-8.

PROCEDURAL HISTORY

On October 8, 2008, the District filed a Petition and accompanying certification with exhibits with the Commissioner. 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 2, 2008, 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 April 23, 2009, Nicholas Celso, Esq., filed a motion for summary decision on behalf of the District. On May 15, 2009, MacGillivray filed a brief in opposition to the motion for summary decision. On May 26, 2009, the District filed a letter brief in response to MacGillivray's opposition brief. On June 15, 2009, the parties had oral argument, during which they both agreed that there were no material facts in dispute and the only question before me was the length of the suspension of the teaching certificate. The record closed on June 16, 2009.

FINDINGS OF FACT

The following is undisputed, and therefore **FOUND** as **FACT**.

On September 1, 2003, respondent Erin MacGillivray began employment with the District as a sixth-grade Language Arts teacher. She received an employment contract for the following year, and continued as a Language Arts teacher at petitioner's Middle School until the date of her resignation on August 21, 2008.

On June 10, 2008, MacGillivray entered into an employment contract with the District in which she agreed to serve as a teaching staff member in the District for the 2008-2009 school year. The employment contract signed by respondent set forth: "If I

should decide to resign, I shall give the Board of Education sixty days' written notice of my intention."

On August 21, 2008, less than two weeks before the beginning of the 2008-2009 school year, MacGillivray resigned from her position, effective immediately. She set forth as the reason that she had become engaged to a Canadian and decided to move to Canada. On August 29, 2008, a District assistant superintendent advised MacGillivray that she would be held to her contract, which required sixty-day notification. MacGillivray replied that she would not report to work on September 2, 2008. She never returned to work in the District.

The only dispute regarding the facts is the extent to which the District was disrupted and damaged as a result of MacGillivray's leaving her teaching position. The District, by way of the certification of the superintendent, said that it had to hire two substitutes at a cost of $1,530 and then a replacement teacher at a salary $3,500 higher than MacGillivray's. The District submitted that, for eighteen days, teachers without certification in Language Arts/English taught the students. The substitute teachers and the permanent replacement had to prepare quickly for the assignment and missed the teacher orientation on September 2, 2008. MacGillivray denies that the cost of substitutes constitutes disruption or damage because the cost of substitutes was less than her salary. However, MacGillivray did not respond with any facts to set forth what she did to lessen the negative impact on her assigned students or the District, such as send prepared lesson plans or offer to talk to the substitutes or the replacement. I **FIND** that MacGillivray's resignation less than two weeks before the start of the school year constituted a disruption to the District both financially and instructionally. There is no way that it could not have.

DISCUSSION

N.J.S.A. 18A:28-8 sets forth the procedure that a tenured teaching staff member employed by a board of education must follow in resigning from his or her position. It provides:

> Any teaching staff member, under tenure of service, desiring to relinquish his position shall give the employing board of education at least 60 days written notice of his intention, unless the board shall approve of a release on shorter notice and if he fails to give such notice he shall be deemed guilty of unprofessional conduct and the commissioner may suspend his certificate for not more than one year.

N.J.S.A. 18A:26-10 also provides that a teaching staff member employed by a board of education who, without consent of the board, stops performing his duties before the expiration of the term of his employment will be guilty of unprofessional conduct. In addition, MacGillivray's employment contract set forth that she would give sixty days' written notice of her intention before she resigned.

There is no dispute that MacGillivray gave notice of her resignation on August 21, 2008, and made it effective immediately. She did not give sixty days' notice. Further, it was less than two weeks prior to the start of the school year. The Board did not approve her early release from her teaching contract.

CONCLUSIONS OF LAW

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged, and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). In the present case, there is no genuine issue as to any material fact challenged and, therefore, I **CONCLUDE** that the case is appropriate for summary decision.

As set forth above, there is no dispute that MacGillivray did not give the statutory sixty days' notice of her intention to resign. Therefore, I **CONCLUDE** that she violated the provisions of N.J.S.A. 18A:28-8 and 18A:26-10 and is guilty of unprofessional conduct. The question is the penalty to be applied.

The District argues that a one-year suspension is in accordance with the applicable case law interpreting the statutes. It cites Board of Education of Penns Grove-Carneys Point Regional School District v. Leinen, 94 N.J.A.R.2d (EDU) 405, 407 for the proposition that "[m]ost cases have resulted in the suspension of any and all teaching certificates for the maximum, one-year permitted if the Commissioner finds the teacher guilty of violating N.J.S.A. 18A:26-10." The District also cited East Amwell Township Board of Education v. Acken, 1986 S.L.D. 2803, which also found a one-year suspension to be appropriate where a teacher gave only eleven days' notice of her intention to move to Florida and was found to have committed unprofessional conduct in violation of N.J.S.A. 18A:28-8. Acken provided, "the purpose of the notice requirement is to provide the School and the administrator with sufficient time to locate and hire an acceptable replacement so that the students are not switched from substitute to substitute until a replacement is hired." Acken, supra, 1986 S.L.D. at 2813.

MacGillivray urges a more lenient penalty, stating that she was not motivated by money, but the emotional and practical difficulty of leaving her fiancé in Canada to return to New Jersey to teach. She ultimately decided that she could not do it. She cites In the Matter of the Suspension of the Teaching Certificate of Capshaw, EDU 12318-06, Initial Decision (April 30, 2007), adopted in part and rejected in part, Comm'r (June 12, 2007) <http://lawlibrary.rutgers.edu/oal/search.html>, to demonstrate that the penalty is discretionary and vested with the Commissioner of Education. In Board of Education of Black Horse Pike Regional School District v. Mooney, 1984 S.L.D. 810, when a teacher left, not to seek other employment, but to remain with her husband, the judge was lenient and determined that a lesser penalty was appropriate, and the Commissioner determined that no suspension was warranted at all.

I **CONCLUDE** that Acken is more on point with the facts of the present case. In Mooney, the school district knew that the teacher was leaving, but the teacher decided she needed to leave earlier than the date agreed upon and that became the subject of dispute. In the present case, there is no indication that the District had any idea that MacGillivray would not be available to teach at the start of September 2008. It placed the District in an awful position of having to fill in with uncertified substitutes, just as in Acken, and, therefore, the same penalty is warranted and justified. MacGillivray had

her reasons for leaving, but she still placed her needs above those of her students. I therefore **CONCLUDE** that a one-year suspension of MacGillivray's teaching certificate is appropriate.

ORDER

It is hereby **ORDERED** that the District's motion for summary decision is **GRANTED** and MacGillivray's teaching certificate is suspended for one year to commence on the day following the Commissioner's decision, if this decision is adopted.

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

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

7/31/09
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: 7/31/09

Date Mailed to Parties: 7/31/09

cmo

#282-09SEC

282-09

AGENCY DKT. NO. 174-7/09

IN THE MATTER OF GWENDOLYN TORRES,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF WOODLYNNE,	:	DECISION
CAMDEN COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission, 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. Respondent filed neither exceptions nor proof of having attended the required training subsequent to issuance of the Commission's decision, nor did she 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 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 November 14, 2009, respondent shall be summarily removed from office.

IT IS SO ORDERED.*

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/14/09

Date of Mailing: 9/14/09

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

IN THE MATTER OF	:	**BEFORE THE**
GWENDOLYN TORRES	:	**SCHOOL ETHICS COMMISSION**
Woodlynne Board of Education	:	**DECISION FOR**
Camden County	:	**FAILURE TO ATTEND TRAINING**
	:	**DOCKET NO. T09-09nb**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on June 25, 2009 to the above-named respondent alleging that the board member/charter school trustee violated N.J.S.A. 18A:12-33 for failure to complete, during the first year of the respondent's first term, a training program offered by the New Jersey School Boards Association (NJSBA) entitled "New Board Member Orientation" which includes the skills and knowledge necessary to serve as a local school board member or charter school trustee.

The respondent was advised by the NJSBA of the training requirement in writing upon election or appointment, as well as through notices published in its newsletter, *School Board Notes*. The NJSBA conducted six training sessions between May, 2008 and March, 2009 at varying locations and continuously published the dates and times of those sessions in *School Board Notes*. By correspondence dated March 2, 2009, the School Ethics Commission notified all board secretaries and charter school designees of the training mandates and encouraged them to register any board member or trustee who had not yet complied with the mandate. An additional two training opportunities were offered in May and June 2009.

As required by N.J.A.C. 6A:28-4.2(c), the NJSBA provided the School Ethics Commission with a report listing those board members and trustees who had not fulfilled the training mandate for the first year of their first term. The report from the NJSBA indicated that the respondent failed to attend the orientation program within the required period.

The June 25, 2009 OTSC, 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 filed a timely response to the Commission's OTSC acknowledging failure to attend the New Board Member Orientation program.

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 that each newly elected or appointed board member and charter school trustee complete, during the first year of the member's first term, a training program offered by the NJSBA. There is no dispute that the respondent did not complete the orientation program, notwithstanding fair and adequate notice of this long-standing training obligation and ample opportunity to do so.

DECISION/PENALTY RECOMMENDATION

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 comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33. 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. The Commission recommends to the Commissioner of Education that the respondent be suspended from the above-named Board until demonstrating completion of the orientation program, and further recommends that the board member/trustee be removed from the Board if the orientation program is not completed by November 14, 2009. 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 attend the orientation 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.

Paul C. Garbarini
Chairperson

Mailing Date: July 29, 2009

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on July 28, 2009.

Joanne Boyle, Executive Director

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283-09

OAL DKT. NO. EDU 9258-09
AGENCY DKT. NO. 182-8/09

H&S CONSTRUCTION & MECHANICAL, INC.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF POMPTON LAKES, PASSAIC COUNTY, AND DE SESA ENGINEERING COMPANY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

The record of this matter – including the audio 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 well and 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 *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application 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.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 9|14|09
Date of Mailing: 9|14|09

* 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 09258-09
AGENCY REF. NO. 182-8/09

H & S CONSTRUCTION & MECHANICAL INC.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF POMPTON LAKES, PASSAIC AND DESESA ENGINEERING COMPANY, INC.,

Respondent.

Stephen Paul Winkles, Esq., for petitioners
(Tesser & Cohen, attorneys)

Cherie L. Adams, Esq., for respondent Pompton Lakes Board of Education
(Adams Stern Gutierrez & Lattiboudere, LLC, attorneys)

James J. DiGiulio, Esq., for respondent DeSesa Engineering Company, Inc.
(McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys)

Record Closed: August 10, 2009 Decided: August 10, 2009

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

Petitioner, H&S Construction and Mechanical, Inc. (H&S), has filed an application for emergency relief pursuant to N.J.A.C. 1:1-12.6, seeking an order restraining the respondent, Pompton Lakes Board of Education (the Board), from entering into a contract for certain construction work with DeSesa Engineering Company (DeSesa). H&S submitted a bid in accordance with specifications issued by the Board and the requirements of N.J.S.A. 18A:18A-1 et. seq. Although H&S submitted the lowest bid, its bid was rejected by the Board, which contends that it was not responsive to the specifications. The Board contends that it properly awarded the contract to DeSesa, which in its view is the lowest responsible bidder who submitted a responsive bid proposal.

At issue is whether H&S's failure to name the subcontractor who would perform the Control System aspects of the project was noncompliant with the specifications, and if so, whether this deviation from the specifications was material and non-waivable by the Board.

The underlying facts are not in dispute, and I **FIND** as follows:

In the Spring of 2009 the Board advertised for bids for a Boiler Replacement and Mechanical System Upgrade project at Pompton Lakes High School. H&S submitted its sealed bid to the Board on or about July 1, 2009, as did DeSesa. It is uncontroverted that H&S submitted the lowest bid, in the amount of $2,171,000. DeSesa submitted the third lowest bid in the amount of $2,618,250. After reviewing the bid documents the Board determined that the bid submitted by H&S was not responsive as it did not conform to the specifications. Of concern to the Board was H&S's failure to name a properly qualified subcontractor for the Control System work specified for the project.

The Board likewise determined that the second lowest bidder was non-responsive and awarded the contract to DeSesa, the third lowest bidder, on or about July 8, 2009. DeSesa commenced work on the job site on July 10, 2009 and has had a foreman at the site every working day since. The work is underway. Meetings have taken place, materials have been purchased and "walk-throughs" conducted to prepare to commence work on the project. DeSesa has already allocated significant sums of money to subcontractors and vendors, and signed contracts with subcontractors. In accordance with state law, the heat must be ready and available for the high school no later than October 15, 2009. The specifications require that the contract be completed no later than November 15, 2009.

The project specifications required bidders to:

> Identify each major subcontractor for each of the major trades indicated below. By indicating the subcontractors below, the Bidder certifies that if awarded the bid, the Subcontractors listed below will be awarded subcontracts provided they are approved by the architect. All prequalification documentation required for the Prime Contractor shall be submitted for each Subcontractor for each of the major trades and specialty trade(s).

The specifications further require that all subcontractors must be registered by the State of New Jersey pursuant to the Public Works Contractor Registration Act, N.J.S.A. 34:11-56.48 or, "prequalified."

H&S's bid named itself as the subcontractor for HVAC Controls, but concedes that it is not prequalified to perform this work. H&S is prequalified to perform HVAC work, and accordingly relies on language in the New Jersey Department of Property Management and Construction Manual (DPMC-27), which states the "[a] contractor who is classified in trade CO39, HVAC, shall also be eligible to bid on contracts including [certain] specialty trades, but shall be required to engage a subcontractor who is classified in the specialty trades listed." "Control systems" is a specialty trade denoted as one for which H&S

could bid. Hence, H&S argues that it bid proposal should not have been rejected, since it was clearly permitted to bid on the Control System portion of the project.

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.

I **CONCLUDE** that H&S has not satisfied the standard for emergent relief, as it cannot demonstrate a likelihood of success on the merits of its claim. Its reliance on the language of the DPMC-27, which arguably allowed it to submit a bid for Control System work, is misplaced and ignores the express requirement contained in the specifications that all bidders "identify each major contractor." H&S did not comply with this aspect of the specifications, and the Board acted properly in rejecting its bid as a result. Indeed, H&S concedes that it cannot perform the control work, insofar as it is not qualified to so under applicable state regulations. The DPMC-27 language upon which it relies is in accord, stating that H&S must engage a properly qualified subcontractor to perform the Control

System work. Accordingly, H&S clearly will have to subcontract that aspect of the work, and did not include the identity of that subcontractor in its proposal as required by the specifications.

Under the public school contracts law, N.J.S.A. 18A:18A-1 to -59, contracts for the performance of work to be paid out of school funds generally are required to be made only after public advertisement for bids. N.J.S.A. 18A:18A-4. N.J.S.A. The contract must be awarded to the lowest responsible bidder. N.J.S.A.18A:18A-37. The "lowest responsible bidder" is the one whose response to a request for bids offers the lowest price and is responsive and who is responsible. N.J.S.A. 18A:18A-2(t). "Responsible" means able to complete the contract in accordance with its requirements, including but not limited to requirements pertaining to experience, moral integrity, operating capacity, financial capacity, credit, and workforce, equipments, and facilities available. N.J.S.A. 18A:18A-2(x). "Responsive" means conforming in all material respects to the terms and conditions, specifications, legal requirements and other provisions of the request. N.J.S.A.18A:18A-(y).

The purpose of all bidding statutes is "to secure competition and 'guard against favoritism, improvidence, extravagance and corruption,' in order to benefit the taxpayers and not the bidders." In re Honeywell Info. Sys., Inc., 145 N.J. Super. 187, 200-01 (App. Div. 1976) certif. denied, 73 N.J. 53 (1977) (quoting Township of Hillside v. Sternin, 25 N.J. 317, 322 (1957)). Therefore, public bidding statutes must be construed with sole reference to the public good. Statewide Hi-Way Safety, Inc. v. New Jersey Dep't of Transp., 283 N.J. 223, 230 (App. Div. 1995).

Legally acceptable bids cannot materially deviate from the specifications set forth by the contracting agency. Meadowbook Carting Co., Inc., v. Borough of Island Heights, 138 N.J. 307, 314 (1994). While minor or inconsequential discrepancies and technical omissions can be waived, material conditions

contained in bidding specifications cannot be waived. Terminal Const. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 411 (1975). New Jersey Courts have developed a two-prong test for determining if a deviation is material: (1) does waiver of such defect deprive the purchaser of its assurance that the contract will be entered into, performed, and guaranteed according to the specified requirements, and (2) does it adversely affect the competitive bidding process by placing a bidder in a position of advantage over other bidders, or by otherwise undermining the necessary common standard of competition. Meadowbrook Carting, supra, 138 N.J. at 315. The Meadowbrook Court cited from Terminal Const. Corp., supra, regarding the limitation on the doctrine of strict compliance for bids as follows:

> Essentially this distinction between conditions that may or may not be waived stems from a recognition that there are certain requirements often incorporated in bidding specifications [that] by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding. In sharp contrast, advertised conditions whose waiver is capable of becoming a vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance, or likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding, or which are capable of affecting the ability of the contracting unit to make bid comparisons, are the kind of conditions [that] may not under any circumstances be waived.[67 N.J. at 412]

I **CONCLUDE** that the non-conformities or deviations which caused the Board to reject H&S's bid proposal were material and were not waivable. Indeed, our courts have specifically held that a failure to provide a fully responsive list of subcontractors, when requested to do so, is a material deviation from the specifications which cannot be waived. Gaglioti Contracting v. City of Hoboken and LaRocca, Inc. 307 N.J.Super. 421 (App. Div., 1997); Star of the Sea Concrete Corp. v. Lucas Brothers and Middlesex County Board of Freeholders, 370 N.J. Super. 60 (App. Div. 2004). As the Star of Sea court aptly stated:

> ...the list of subcontractors [requirement]... prevents a general contractor from negotiating or renegotiation with subcontractors after it is warded the contract....If the general contractor could negotiate with subcontractors after the contract was awarded, any savings achieved would not inure to the public....Allowing such conduct ' would adversely affect competitive bidding by placing a bidder in a position of advantage.'" Star of Sea at 69-70 citing Gaglioti at 433.

H&S cites at length the case law which addresses the need to preserve the integrity of the public bidding process, but clearly, the integrity of that process is best preserved by the action taken by this Board in rejecting H&S's bid as nonconforming.

In light of my conclusion that H&S cannot prevail on the merits of its claim, it becomes equally clear that the remaining considerations in the Crowe v. DeGioia test likewise require rejection of H&S's application for emergency relief. The work on the project has begun, and needs to, since the specifications, and the exigencies of a properly heated school building, so require. A balancing of the equities supports my conclusion here, as the children of Pompton Lakes, and their educational programming, will be irreparably harmed if this project is delayed by a grant of injunctive relief.

Finally, I have considered the contention raised at oral argument that N.J.S.A. 18A:18A-18 somehow limited the Board's right to ask for the identity of more than five subcontractors. I do not read the statute to so require; rather it provides that for certain aspects of construction work separate specifications may be developed. I further agree with the Board that, in any event, any challenge to the specifications should have been filed by H&S prior to the bid opening, and that a challenge filed after the bid opening is considered void, per N.J.S.A. 18A:18A-15.

Accordingly, I **ORDER** that the petition for emergency relief be **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 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 10, 2009
DATE

ELLEN S. BASS, ALJ

284-09

A.F., on behalf of minor child, J.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MONMOUTH REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged her daughter's long-term suspension from Monmouth Regional High School, and sought reinstatement in the regular education program on the grounds that the length of the suspension was arbitrary, capricious and unreasonable, and in effect constituted an expulsion. The suspension stemmed from an incident in March 2009 in which J.H. used profanity and personal insults, and was willfully disobedient and openly defiant with the student teacher in charge of her class. The Board contends that the suspension imposed upon J.H. was for a reasonable amount of time under the circumstances, and was not arbitrary or capricious.

The ALJ found that: the student teacher was a staff member with authority over J.H., who – at a minimum – was openly defiant of that authority in violation of *N.J.S.A.* 18A:37-2; the Board was within its authority to impose a suspension upon J.H.; however, the length and terms of the suspension imposed were disproportionate to the facts in the record; and petitioner presented evidence mitigating against the imposition of such a long suspension. The ALJ concluded that the discipline imposed upon J.H. was not reasonable, and vacated the remainder of her suspension, ordering that J.H. be returned to the general education program for the 2009-2010 school year.

Upon a full and independent review, the Commissioner rejected the Initial Decision, finding that: the ALJ's disagreement with the penalty imposed does not equate to an abuse of discretion on the part of the Board, and the ALJ's substitution of her judgment for that of the Board by altering the term and conditions of the suspension imposed upon J.H. is not acceptable absent evidence of arbitrary, capricious or unreasonable action on the part of the Board. The Commissioner additionally found troubling a written account of the incident by the student teacher involved which described extreme profanity, threatening behavior, and intimidation on the part of J.H., along with her student discipline reports which evidence a series of incidents for which discipline was imposed upon her for infractions including disruption in the classroom, insubordination, use of profanity, and not reporting to detention. Consequently, there is no basis in the record for determining that the Board's handling of this matter was arbitrary, capricious, or unreasonable. Accordingly, the Commissioner ordered that the Board's discipline of J.H. shall remain as originally imposed.

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 15, 2009

OAL DKT. NO. EDU 4547-09
AGENCY DKT. NO. 99-5/09

A.F., on behalf of minor child, J.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MONMOUTH REGIONAL 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. Exceptions of the Board – filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her determination herein.[1]

The Board objects to the Administrative Law Judge's (ALJ) modification of the length and terms of the Board's suspension of student, J.H, on the basis that they "appear disproportionate to the facts in the record." (Board's Exceptions at 4) In so concluding, the Board charges, the ALJ – who apparently disagreed with the Board's decision in this regard – improperly substituted her judgment for that of the Board. (*Id.* at 3) Citing numerous school law cases, the Board submits that it is well-established that there is a presumption of validity that attaches to decisions of a Board of Education and such decisions cannot be overturned unless the action was arbitrary, capricious or unreasonable. (*Id.* at 3-4) The Board maintains that the

[1] Petitioner's reply exceptions were untimely filed and, thus, were not considered by the Commissioner.

punishment it imposed on J.H. in this matter was not arbitrary, capricious or unreasonable and, therefore, it is not susceptible to modification by the ALJ. (*Id.* at 4)

In support of its position, the Board advances that it is without question that it has the responsibility to provide a safe learning environment for its students and staff and the obligation to discipline students who disrupt this environment. It cites to *N.J.S.A.* 18A:37-2 **Causes for suspension or expulsion of pupils**, which in pertinent part reads:

> Any pupil who is guilty of continued and willful disobedience, or of open defiance of the authority of any teacher or person having authority over him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injure any school property, shall be liable to punishment and to suspension or expulsion from school.
>
> Conduct which shall constitute good cause for suspension **or expulsion** of a pupil guilty of such conduct shall include, but not be limited to, any of the following:
>
> a. **Continued and willful disobedience**;
> b. **Open defiance of the authority of any teacher or person, having authority over him**;...
>
> (Board's Exceptions at 1-2) (emphasis added)

In the incident at issue in this matter, it is without question that J.H. used profanity, was willfully disobedient, and was openly defiant to an individual who had authority over her. Additionally, as is obvious from her discipline record [Expulsion Hearing Package – R-1, Exhibit E], J.H. has had a significant number of problems at Monmouth Regional in a short period of time and her disobedience has most definitely been continuous. The Board advances that – although pursuant to *N.J.S.A.* 18A:37-2 the Board had the authority to expel J.H. – it, rather, chose a compromise position. J.H. was suspended for what the Board viewed as a reasonable amount of time, and offered an alternative educational opportunity at Monmouth Ocean Educational Services Commission, which she declined – choosing instead home instruction. This alternative

educational opportunity is still available to J.H. and, absent any further problems with her behavior, she will be allowed to return to Monmouth Regional for the second half of the 2009-10 school year. (*Id.* at 3) The Board submits that the ALJ cited no statute, regulation or case law to support her conclusion that it acted improperly – in any manner whatsoever – in its imposed discipline on J.H. and, therefore, the Board argues, she had no authority to overturn its action. (*Id.* at 5)

Upon her full review, the Commissioner is compelled to reject the ALJ's decision modifying the Board's imposed penalty on J.H. In so finding, the Commissioner is well aware – as the Board correctly notes – that it is well-settled that boards of education in New Jersey have broad discretion with regard to the operation and management of their local districts. 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). The Commissioner cannot find that it has been demonstrated on this record that the Board's handling of this matter was carried out in a manner that was arbitrary, capricious, unreasonable, or otherwise contrary to law. Notwithstanding that the ALJ may disagree with the length and conditions of suspension imposed on J.H., the Commissioner has been unable to find any tangible objective evidence which would support a finding that the Board's penalty imposition was arbitrary, capricious or unreasonable. Indeed, upon the Commissioner's review of the Expulsion Hearing Package (P-1, Exhibit E) provided to board members prior to their consideration of this matter, she finds particularly troubling the written account of the student teacher involved in the incident with J.H. who described it as one filled with profanity, threatening behavior and intimidation on the part of J.H. Also contained

in this package are J.H.'s Student Discipline Reports since her enrollment at Monmouth Regional High School, which evidence a number of instances for which discipline was imposed on her for infractions which include disruption in class/school, insubordination, use of profanity, and not reporting to detention. The Commissioner notes that the ALJ's mere disagreement with the penalty imposed by the Board for the incident involving J.H. and the student teacher does not equate to an abuse of discretion on the part of the Board. Rather,

> In the law, "arbitrary" and "capricious" means having no rational basis....Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. **Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached....**Moreover, the court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling. (citations omitted) (emphasis added) *Bayshore Sew. Co. v. Dep't of Env., N.J.* 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

Under these circumstances, the Commissioner cannot accept the ALJ's substitution of her judgment for that of the Board by altering the term and conditions of its suspension imposed on J.H. for the March 6, 2009 incident.

Accordingly, the recommended decision of the OAL is rejected. The Board's discipline of J.H. shall remain as originally imposed.

IT IS SO ORDERED.*

Lucille E. Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9|15|09

Date of Mailing: 9|15|09

* 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 4547-09
AGENCY DKT. NO. 99-5/09

A.F. ON BEHALF OF J.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE MONMOUTH REGIONAL SCHOOL DISTRICT SCHOOL, MONMOUTH COUNTY,
Respondent.

Lester E. Taylor, Esq., for petitioner (Florio, Perrucci, Steinhardt and Fader, attorneys)

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Barger, Kenny & Steel, attorneys)

Record Closed: August 3, 2009 Decided: August 14, 2009

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE

Petitioner A.F., on behalf of her daughter J.H., challenges J.H.'s long-term suspension from Monmouth Regional High School by respondent Board of Education of Monmouth Regional School District (Board). She seeks J.H.'s reinstatement in the regular education program on the grounds that the length of the suspension was arbitrary, capricious or unreasonable, and in effect constituted an expulsion.

PROCEDURAL HISTORY

On or about March 6, 2009, J.H was suspended from Monmouth Regional pending a hearing before the Board. That hearing was held on April 7, 2009, and the Board upheld the suspension. On May 13, 2009, petitioner filed a Petition for Emergent Relief with the Department of Education (Department), Bureau of Controversies and Disputes. The petition was transmitted to the Office of Administrative Law (OAL), where it was filed on May 19, 2009, and scheduled for a hearing on May 21, 2009. On that hearing date, the parties reached a tentative settlement, subject to Board approval, and the request for emergent relief was withdrawn. When the parties could not reach agreement on the terms of the settlement, the matter was rescheduled for June 12, 2009. On that date the parties again attempted to reach a settlement, but were unable to do so. The matter was rescheduled for a hearing on August 3, 2009. On that date the parties chose to rely on the documentary evidence placed in the record, as well as the argument of counsel. No testimony was presented and the record closed on that date.

FACTUAL DISCUSSION

This matter concerns the long-term suspension of J.H. for an incident that occurred on March 6, 2009, at Monmouth Regional High School, where she was a sophomore student. Since October 2008 she had been a voluntary member in Monmouth Regional's Anger Management Group program, where, according to the counseling staff, she had been making progress on self-discipline issues. Her anger-

management skills were put to the test on that March date in an English class taught by a student teacher, and were found lacking.

When Elizabeth Kozar, the student teacher, intercepted a note being passed to J.H. from another student, the incident in question began. J.H. reacted with anger, demanding that Kozar give the note to her, using profanity and personal insults. As J.H. continued to berate her over the course of several minutes, Kozar moved toward the classroom door to seek assistance in managing the situation. Kozar reached the doorway of the classroom and sought help from fellow teachers Ruscavage and Nappi, who were in the hallway. Ruscavage then took charge of the situation. Although J.H. did not relent in her pursuit of the confiscated note and continued to verbally assault Kozar, the parties are in agreement that J.H. neither threatened to, nor did she, hit Kozar.

After the incident, assistant principal Scott Larkin suspended J.H. for making threats to staff, in particular, "now you've done it," which was directed at Kozar during the incident. As Larkin believed that J.H.'s infraction required an expulsion hearing, the matter was set for a hearing by the Board. That hearing was held on April 7, 2009. The Board suspended J.H. for the balance of the 2008-09 academic year, as well as for the first two marking periods of the 2009-10 academic year. She was offered an alternative educational opportunity at the Monmouth-Ocean Educational Services Commission (MOESC). The decision also provided that her eligibility to return to the regular education program at Monmouth Regional was contingent upon no further disciplinary issues at her MOESC placement. Although the "expulsion hearing package" reviewed by the Board was placed into the record, R-1(e), neither a transcript of the proceeding nor minutes of the hearing was placed in evidence.

While not denying intemperate words and behavior during the incident in question, J.H. provided evidence in mitigation at the Board hearing and in this proceeding. Her mother was present at both hearings, and her birth father traveled from out of state to attend the Board hearing. In addition to parental involvement, she received the support of her pastor at the Second Baptist Church in Long Branch. The Reverend Aaron Gibson, Sr., provided a letter in support of J.H., whom he has been

counseling. Acknowledging her anger-management issues, he cited her ongoing attempts to deal with those issues. He described J.H. and her family in positive terms and questioned the need for such a long-term suspension. In addition to her family and church support, J.H. presented letters of support from teachers and members of the school's guidance staff who worked with her in the anger-management program. They noted her ongoing efforts to improve her behavior, her cooperation with them, and her remorse over the incident with Kozar.

Since her suspension on March 6, 2009, J.H. has been home-schooled, as her parents declined the alternative educational placement. For the 2009-10 academic year, she wishes to attend a vocational program, with the remainder of her school day spent at the regular education program at Monmouth Regional.

LEGAL DISCUSSION

The issue in this matter is the reasonableness of the penalty imposed upon J.H. for her behavior. Neither party disputes that her outburst against the student teacher was inappropriate behavior. The question remains, however, as to whether an almost year-long suspension, from March 6, 2009, until the beginning of the third marking period in early 2010, is reasonable under the circumstances of this case. It should also be noted that her return to the general education program was made contingent upon no further discipline problems at her alternative educational placement. What would constitute a discipline issue sufficient to further disqualify her from returning to the general education program was not defined.

Respondent relies upon the broad authority provided to boards of education in exercising their duties and responsibilities, including the discipline of students. Although the Board has not provided a transcript or a written explanation of its reasoning in imposing the almost year-long suspension upon J.H., through counsel it noted that a wrong message would be sent to the school community at Monmouth Regional by J.H.'s early return to the student body.

Petitioner questions the underlying charge against J.H., that of threatening a school employee, as well as the length of the suspension, arguing that its duration and contingency of return in effect constitutes an expulsion. As J.H. has already been suspended since March 6, 2009, her suspension time already served through the end of the 2008-09 school year is at least three and a half months.

Students in public schools are required to "submit to the authority of the teachers and others in authority over them," N.J.S.A. 18A:37-1, and specific causes for suspension or expulsion of a student include "[o]pen defiance of the authority of any teacher or person, having authority over him," N.J.S.A. 18A:37-2. Regulations promulgated by the Department provide further guidance on the discipline of students, including the imposition of long-term suspensions. N.J.A.C. 6A:16-7.3.

Whether or not Kozar came within the literal definition of a school employee, she was functioning as a staff member with authority over J.H., who at a minimum was openly defiant of that authority. Given those facts, the Board was within its authority to impose a suspension upon J.H. The length and terms of that suspension, however, appear disproportionate to the facts in the record. While J.H.'s words were defiant, threatening and profane, she did not physically attack Kozar. There is nothing in the record to indicate that she previously was a threat to others at the school, or would be so in the future, nor did respondent detail its reasoning for the imposition of such a lengthy suspension.

Petitioner, on the other hand, presented evidence mitigating against the imposition of an almost year-long suspension. J.H.'s family is involved in her educational experience, and her pastor attested to her inherent character and his counseling of her. She had voluntarily participated in an anger-management program offered by the school, and guidance staff cited her efforts to control her temper. Additionally, her teachers, with whom she had daily contact, expressed their positive opinion of her and her willingness to admit remorse over her actions and to work on improving her conduct.

Given the facts in the record, the imposition of an almost year-long suspension for J.H.'s infraction was not reasonable. She has been suspended since March 6, 2009, at least three and a half months, and her return to the general education program at Monmouth Regional is appropriate.

ORDER

I **ORDER** that J.H. be returned to the general education program at Monmouth Regional High School for the 2009-10 school year, and the remainder of her suspension by respondent is vacated.

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

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

8/14/09
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: 8-14-09

Date Mailed to Parties: 8-14-09

/lam/jfk

WITNESSES

For Petitioner:

None

For Respondent:

None

EXHIBITS

For Petitioner:

P-1 Letter dated July 30, 2009, from Lester E. Taylor, Esq., to Martin M. Barger, Esq. (with attachments)

For Respondent:

R-1 Statement of Facts (with attachments)

285-09E

285-09

OAL DKT. NO. EDU 8735-09
AGENCY DKT. NO. 195-8/09

P.B., on behalf of minor child, K.B., :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION ON APPLICATION FOR EMERGENT RELIEF

The record of this matter – including the audio recording of proceedings – and the recommended Order of the Office of Administrative Law (OAL) have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge, 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, supra,* and *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application is adopted for the reasons well expressed therein, and proceedings on the merits shall ensue as contemplated by the ALJ.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/14/09

Date of Mailing: 9/14/09

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9 1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF

OAL DKT. NO. EDU 8735-09

AGENCY DKT. NO. 195-8/09

P.B. ON BEHALF OF
MINOR CHILD, K.B.,

Petitioners,

v.

WILLINGBORO BOARD OF EDUCATION,

Respondent.

P.B., petitioner, pro se

Joseph Roselli, Esq., for respondent (Schwartz Simon Edelstein Celso & Kessler, attorneys)

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

STATEMENT OF THE CASE

P.B., on behalf of minor child K.B. (petitioner), asserts that the punishment imposed on her daughter, specifically placing her on probation for the 2009-2010 school year for trespassing, defiance, disruption, and violation of probation, is arbitrary and capricious. The Willingboro Board of Education (Board) asserts that K.B. has been disciplined at least four times during the 2009-2009 school year and the penalties imposed are not arbitrary and capricious.

PROCEDURAL HISTORY

On August 6, 2009, petitioner filed an application for emergent relief with the Commissioner of Education. On August 11, 2009, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing on the requested emergent relief. On August 19, 2009, the case was heard in the OAL, Trenton (Hamilton Township) and the record closed.

STATEMENT OF FACTS

K.B. is entering the twelve grade at Willingboro High School. The parties did not dispute the essential facts in this matter.

On March 9, 2009, K.B. entered Willingboro High School when she was suspended and not allowed to be present in the building. K.B. got into a loud argument with the Assistant Principal, refused to comply with her instructions, and left the area of her locker without permission. Petitioner did not dispute these facts and offered no explanations for what occurred (J-2). The Board argues that this was the latest of a series of insubordinate, defiant and disruptive behaviors.

The records revealed that on June 24, 2008, K.B. was suspended and placed on probation beginning in September 2008 for abusive behavior and using inappropriate language to a teacher (R-6). The Board offered an incomplete and somewhat sketchy history of prior behavior. The only records presented were for the 2008-2009 school year.

On October 30, 2008, K.B. was on probation and was found to have been (1) defiant, (2) used abusive language, (3) caused a major disruption, and (4) violated probation (R-1). Pursuant to the student handbook, she was assessed six points (J-1). On February 26, 2009, she was found to have used her cell phone and been defiant and was given four points (R-2). The March 9, 2009 incident constituted six points.

Also, on March 11, 2009, she refused to turn and stop walking, and ignored the Assistant Principal. The Board did not the know the outcome of these charges.

Petitioner did not dispute any of the facts, except argued that K.B. did nothing wrong with the cell phone and was not properly charged or found to have committed that violation. However, she did not appeal that violation.

Petitioner also argued that K.B. will suffer irreparable harm from the stress of being placed on probation, and the stress will hurt her health, and that she had Juvenile Rheumatoid Arthritis. However, no medical records were supplied.

It is undisputed that K.B. entered the school when she was suspended and not permitted to do so, and was trespassing, defiant, disruptive, and violated her probation. Therefore, I **FIND** that on March 9, 2009, K.B. was on probation and violated probation by going on school property when not allowed, and engaged in defiant and disruptive behavior pursuant to school policy.

Petitioner further argues that imposition of probation is not warranted. However, K.B. has had at least four violations during the 2008-2009 school year and accumulated sixteen points. According to the student handbook, once a student has accumulated fifteen points, the Board may impose a harsher penalty then stated in the policy.

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. 6A:14-2.7(m)1, N.J.A.C. 1:6A-12.1, 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.

The petitioner argued that K.B. will suffer irreparable harm because the probation will cause her stress. However, no medical documentation was presented to support this allegation. Additionally, K.B. was on probation for the 2008-2009 school-year, and no stress problems were reported. Therefore, I **FIND** the petitioner has been unable to meet her burden that K.B. will suffer irreparable harm if this relief is not granted.

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 petitioner 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).

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. The school has clearly established a policy that does not tolerate repetitive incidents of improper behavior toward their teachers and administrators. As a result, I **FIND** that the Board's actions in placing K.B. on probation was justified and cannot be disturbed.

Petitioner alleges that the penalty given to her daughter was arbitrary and capricious. These safeguards were put into place to promote discipline and order in the school. As stated above, the actions of boards of education have a presumption of validity. Based on these factors, I **FIND** that the petitioner did not meet her burden of

proof that there is a legal right underlying the claim, and further **FIND** it unlikely that the petitioner would have prevailed on the merits.

Clearly, the Board has a substantial interest in promoting order and discipline in the school and preventing disobedience and defiance toward teachers. If it did not enforce its disciplinary policies, the Board would be sending the wrong kind of message and possibly establishing a dangerous precedent. Consequently, I **FIND** that respondent will suffer greater harm than petitioner if the requested relief is granted.

DECISION AND ORDER

Since N.J.A.C. 6A:14-2.7(m) 1 and N.J.A.C. 1:6A-12.1 are written in the conjunctive and the petitioner has failed to satisfy any of the 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 P.B. for emergent relief is **DENIED** without prejudice. This case shall be scheduled for further proceedings in order to resolve all legal and factual disputes.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

August 19, 2009
DATE

DONALD J. STEIN, ALJ

cmo

APPENDIX

EXHIBITS

Joint:

J-1 Student Discipline Policy

J-2 Letter to petitioners, dated June 1, 2009

For Petitioner:

P-1 Appeal letter

P-2 Appeal letter

For Respondent:

R-1 Incident Report, dated October 30, 2008

R-2 Incident Report, dated February 26, 2009, and March 9, 2009

R-3 Incident Report, dated March 11, 2009

R-4 Letter to petitioners, dated April 3, 2009

R-5 Letter to petitioners, dated May 8, 2009

R-6 June 30, 2008 Findings and Recommendations

R-7 Letter Brief

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
FAX TRANSMISSION
9 Quakerbridge Plaza
Mercerville, New Jersey 08625

TO: Lucille Davy, Commissioner FAX NO: (609) 292-4333
ATTN: M. Kathleen Duncan, Director of Controversies & Disputes

FROM: David J. Stein, ALJ OFFICE OF ADMINISTRATIVE LAW

Telephone Number: 609-588-6533

RE: PBobo KB v. Willingboro BOE

OAL DKT NO: EDU 8735-09

DATE: 8/19/09

PLEASE NOTE THAT THERE ARE 7 PAGE(S) TO FOLLOW THIS COVER SHEET. IF YOU DO NOT RECEIVE ALL OF THE PAGES, PLEASE CALL THE SENDER AT THE TELEPHONE NUMBER LISTED ABOVE. THANK YOU.

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286-09

OAL DKT. NO. EDU 5050-08
AGENCY DKT. NO. 92-3/08

J.A.O. on behalf of minor child, A.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON 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 July 29, 2009, providing petitioner thirteen days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/14/09

Date of Mailing: 9/14/09

* 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).

287-09

#287-09SEC

SEC DKT. NO. T07-09NB
AGENCY DKT. NO. 173-7/09

IN THE MATTER OF DIANA WHITTAKER,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
BOROUGH OF HI-NELLA, CAMDEN	:	DECISION
COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission (SEC), 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. Respondent filed a "Response/Certification" to the SEC decision acknowledging that she had not attended the required training within the time set forth in *N.J.S.A.* 18A:12-33.[1] Asserting 1) that she had not been "fully aware" of the training requirement, 2) that she had been registered to attend a January 2009 training that was cancelled due to inclement weather, 3) that the next training session after January 2009 was scheduled during her maternity leave, and 4) that she plans to attend a training on October 30, 2009, respondent requested that the Commissioner decline to impose upon her the penalties recommended by the SEC.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and is not persuaded that a lesser penalty is warranted by respondent's contention that she was not aware of her duties. Additionally, respondent is admonished 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 suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the required training is

[1] Thus, respondent is not appealing – pursuant to *N.J.A.C* 6A:4 – the SEC's determination that she violated the School Ethics Act.

completed; provided, however, that if such training is not completed by November 14, 2009, respondent shall be summarily removed from office.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/14/09

Date of Mailing: 9/15/09

* 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)

AUG 17

SCHOOL ETHICS COMISSION **v.** **DIANNA WHITTAKER** **Hi-Nella School Board of Education** **Camden County**	**BEFORE THE** **SCHOOL ETHICS COMMISSION** **RESPONSE / CERTIFICATION TO ORDER OF SHOW CAUSE FOR FAILURE TO NEW BOARD MEMBER ORIENTATION** **DOCKET NO. T07-09NB**

The undersigned, **Dianna Whittaker**, a sitting member of the Hi-Nella Board of Education (HBOE), being of full age and being duly sworn, by way of affidavit in response to the Order to Show Cause For Failure to Attend Advanced Training states the following:

1. I was first elected to the HBOE and became a Board Member on or about April 8, 2008 and have been duly elected and served as a Board Member to this day.
2. Since that time, I have served as a member in good standing.
3. I am aware of the School Ethics Act, NJSA 18A:12-21 et seq.
4. I was not fully aware of the requirements of NJSA 18A:12-33 that require that within *one year* after re-election or re-appointment to a board of education that I was to complete a training program offered by the New Jersey School Boards Association (NJSBA) entitled "New Board Member Orientation":.
5. Once being sworn in as a Board Member I was registered for a training session in January 2009. That session was cancelled due to inclement weather. The next session was scheduled during Spring 2009 at the same time as my maternity leave.
6. I wrote a letter to the School Ethics Commission on July 10 in response to their June 25 letter.

7. I have reviewed NJSA 18A:12-33 of the School Ethics Act.
8. As a result of that review of the aforesaid Statute, I understand the requirement outlined therein.
9. As a further result, I have requested through the Administration of the HBOE that I be registered immediately for the next sessions for "New Board Member Orientation" offered by the NJSBA.
10. It is my understanding that the next session being offer for the aforesaid Training is Friday, October 30, 2009 for which I am being registered and plan on attending.
11. For the aforesaid reasons, and representing that I was not fully aware of the requirements, I request that the Commissioner of Education not take any action to impose a sanction of reprimand, censure, suspension or removal from my position as a Board Member.

Dianna Whittaker

Sworn to and Subscribed
before me this day of
August, 2009

Lauranne L. Caimi

Lauranne Caimi
Notary Public – State of New Jersey

LAURANNE L. CAIMI
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 4/7/2010

289-09

#289-09SEC

AGENCY DKT. NO. 175-7/09

IN THE MATTER OF ANDREW MARANCIK,	:	
BOARD OF TRUSTEES OF THE	:	COMMISSIONER OF EDUCATION
RIDGE AND VALLEY CHARTER SCHOOL,	:	DECISION
WARREN COUNTY.	:	
	:	

The record of this matter and the decision of the School Ethics Commission, 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. Pursuant to applicable rule, respondent filed a timely submission to the Commissioner, explaining that – while he does not dispute that he did not take the required training – he does except to the Commission's recommended penalty because he: 1) did attend a specialty training in the belief that it was an acceptable substitute for the New Board Member training;[1] 2) could not attend the New Board Member Training in May 2009 because it conflicted with his end-of-year responsibilities as a high school teacher and consequently registered for the session offered November 14, 2009; and 3) immediately registered for the next available session on August 29, 2009[2] upon receiving the Commission's decision; according to respondent, he is committed to improving education and, under the circumstances, should be allowed to remain as a Board member. In a subsequent submission, respondent advised that he was unable to complete his training as anticipated because the August 29, 2009 session had been cancelled by the New Jersey School Boards Association (NJSBA).[3]

Upon review, the Commissioner concurs with the Commission that respondent should be penalized for his delay in honoring a clear obligation placed upon board members by law,

[1] Respondent claimed he was so advised by staff at the New Jersey School Boards Association (NJSBA), and further stated that NJSBA was searching its records to prove such attendance; however, no supporting information was provided in this regard, either to the Commission or the Commissioner.

[2] Respondent provided the Commissioner with a copy of his registration confirmation from the NJSBA.

[3] The NJSBA confirmed that this session was, in fact, cancelled.

since such failure has both resulted in his serving as a public trustee without the requisite training and caused unnecessary expenditure of administrative and adjudicative resources at both State and local levels. It is not uncommon for board of education members to have busy work schedules and family responsibilities; however, this circumstance does not lessen their duty to obtain – at some point within the more than ample time frame provided by law – the training deemed necessary to fulfill the functions of their office. The Commissioner further concurs that the continuum of penalties recommended by the Commission is appropriate in view of the violation found.

Accordingly, consistent with that recommended continuum – since respondent would have completed training prior to issuance of the Commissioner's decision but for cancellation of the August 29, 2009 session by the NJSBA – respondent is hereby censured as a school official found to have violated the School Ethics Act; provided, however, that if he does not complete such training by November 14, 2009, he shall be summarily removed from office.

IT IS SO ORDERED.[4]

Priscilla E Dodd

COMMISSIONER OF EDUCATION

Date of Decision: 9/14/09

Date of Mailing: 9/15/09

[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.

IN THE MATTER OF	:	**BEFORE THE**
ANDREW MARANCIK	:	**SCHOOL ETHICS COMMISSION**
Ridge and Valley Charter School	:	**DECISION FOR**
Warren County	:	**FAILURE TO ATTEND TRAINING**
	:	**DOCKET NO. T19-09nb**

PROCEDURAL HISTORY

This matter arises from an Order to Show Cause issued by the School Ethics Commission on June 25, 2009 to the above-named respondent alleging that the board member/charter school trustee violated N.J.S.A. 18A:12-33 for failure to complete, during the first year of the respondent's first term, a training program offered by the New Jersey School Boards Association (NJSBA) entitled "New Board Member Orientation" which includes the skills and knowledge necessary to serve as a local school board member or charter school trustee.

The respondent was advised by the NJSBA of the training requirement in writing upon election or appointment, as well as through notices published in its newsletter, *School Board Notes*. The NJSBA conducted six training sessions between May, 2008 and March, 2009 at varying locations and continuously published the dates and times of those sessions in *School Board Notes*. By correspondence dated March 2, 2009, the School Ethics Commission notified all board secretaries and charter school designees of the training mandates and encouraged them to register any board member or trustee who had not yet complied with the mandate. An additional two training opportunities were offered in May and June 2009.

As required by N.J.A.C. 6A:28-4.2(c), the NJSBA provided the School Ethics Commission with a report listing those board members and trustees who had not fulfilled the training mandate for the first year of their first term. The report from the NJSBA indicated that the respondent failed to attend the orientation program within the required period.

The June 25, 2009 OTSC, 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 filed a timely response to the Commission's OTSC acknowledging failure to attend the New Board Member Orientation program.

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 that each newly elected or appointed board member and charter school trustee complete, during the first year of the member's first term, a training program offered by the NJSBA. There is no dispute that the respondent did not complete the orientation program, notwithstanding fair and adequate notice of this long-standing training obligation and ample opportunity to do so.

DECISION/PENALTY RECOMMENDATION

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 comply with the training mandate, and is, therefore, in violation of N.J.S.A. 18A:12-33. 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. The Commission recommends to the Commissioner of Education that the respondent be suspended from the above-named Board until demonstrating completion of the orientation program, and further recommends that the board member/trustee be removed from the Board if the orientation program is not completed by November 14, 2009. 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 attend the orientation 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.

Paul C. Garbarini
Chairperson

Mailing Date: July 29, 2009

I hereby certify that this decision was duly adopted by the School Ethics Commission at its public meeting on July 28, 2009.

Joanne Boyle, Executive Director

E/training/2009/decisions/NB.suspend.remove T19-09nb.doc

291-09

OAL DKT. NO. EDU 13902-08
AGENCY DKT. NO. 340-11/08

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF W. ALAN BROWN, BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter, the parties' proposed Settlement Agreement and Release, and the Initial Decision issued by the Office of Administrative Law (OAL) – recommending approval of the proposed agreement – have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner observes that an unidentified person has signed the Settlement Agreement on behalf of the Board, and that neither the file nor the agreement includes a copy of the Board resolution approving the settlement and designating such 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. Consequently, the Commissioner cannot approve the settlement agreement as recommended.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9|15|09
Date of Mailing: 9|15|09

* 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 13902-08

AGENCY REF. NO. 340-11/08

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF W. ALAN BROWN, BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY.

Matthew J. Giacobbe, Esq., for petitioner East Brunswick Board of Education (Scarinci & Hollenbeck, attorneys)

Michael T. Barrett, Esq., for respondent W. Alan Brown (Bergman & Barrett, attorneys)

Decided: August 3, 2009

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

This matter was transmitted to the Office of Administrative Law on December 5, 2008 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.

8/3/09
DATE

JAMES A. GERAGHTY, ALJ

Date Received at Agency: 8-5-09

Date Mailed to Parties: AUG 5 2009

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

db

SETTLEMENT AGREEMENT AND RELEASE
BETWEEN THE EAST BRUNSWICK BOARD OF EDUCATION
AND W. ALAN BROWN

RECEIVED
STATE OF NEW JERSEY
2009 AUG 18 A 9:51

This Settlement Agreement and Release (hereinafter referred to as the "Agreement") is entered into this _____ day of March, 2009 between the East Brunswick Board of Education, with an address of 760 Route 18, East Brunswick, New Jersey 08816 (hereinafter collectively referred to as "Board") and W. Alan Brown, with an address of _____ New Jersey _____ (hereinafter referred to as "Brown")(all collectively referred to as the "Parties").

WHEREAS, Brown was employed by the Board as a Teacher; and

WHEREAS, Brown accepted employment at another school; and

WHEREAS, Brown acknowledges that he did not provide the Board with sixty (60) days notice prior to resignation pursuant to N.J.S.A. 18A:28-8 and N.J.A.C. 6A:9-17.9; and

WHEREAS, the Board initiated the process seeking to suspend the teaching certificate of Brown for one (1) year for said failure; and

WHEREAS, the Board and Brown desire to resolve any and all outstanding issues with respect to this matter.

NOW, THEREFORE, in consideration of the promises and conditions set forth herein, the receipt and sufficiency of which is hereby acknowledged, the Board and Brown agree as follows:

1. The Board shall not be required to pay Brown any salary or payment for accrued sick days, vacation days, personal days and any and all other leaves for September 2008 and October 2008.

2. The Board shall withdraw its action seeking suspension of Brown's teaching certificate for one (1) year.

3. Brown irrevocably waives any and all claims arising out of his employment. Further, Brown hereby releases and forever discharges any and all claims which he may have against the Board, occurring at any time up to the date of this Agreement, arising out of his employment, including, but not limited to, claims arising under (1) the Constitution of the United States, (2) the Age Discrimination in Employment Act of 196", as amended, 29 U.S.C. § 621 *et seq.*, (3) Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.*, (4) the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981 *et seq.*, (5) the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq.*, (6) the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, (7) the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.*, (8) the Family Leave

Act, *N.J.S.A.* 34:11B-1 *et seq.*, (9) the Constitution of the State of New Jersey, (10) the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, (11) the Conscientious Employee Protection Act, *N.J.S.A.* 35:19-1 *et seq.*, (12) any expressed or implied contract between the parties, (13) all regulations promulgated pursuant to any of the aforementioned laws, (14) any other Federal, State, County, local or Board common law, statutes, ordinances, resolutions and regulations not mentioned above, and (15) any employment manual or handbook or personnel policies;

4. **NON-ADMISSION OF LIABILITY.** This Agreement is executed and all consideration is given in final settlement of disputed claims, and shall not be construed as an admission of any allegation or of liability by the Board, by whom any such obligation or liability is expressly denied;

5. **INDEMNIFICATION.** If Brown violates this Agreement in any way, Brown will pay in addition to all other remedies allowed by law or this Agreement, all costs and expenses incurred by the other party as a result of such violation, including reasonable attorneys' fees;

6. **CONSULTATION WITH ATTORNEY.** Brown has consulted with his attorney with respect to this Agreement and reviewed with his attorney all the terms and conditions of this Agreement prior to executing this Agreement;

7. **REASONABLE PERIOD OF TIME.** Brown stipulates that he has been given a reasonable period of time of at least twenty-one (21) days within which to review and consider this Agreement prior to executing this Agreement, but Brown may waive the twenty-one (21) days period by signing in the space provided at the end of the Agreement. Further, Brown may revoke his acceptance to this Agreement by submitting written revocation to the Board, which must be **received** within seven (7) days after his execution of the Agreement;

8. **COMPLETE AGREEMENT.** This Agreement contains the entire agreement between Brown and the Board, and each of them, with respect to the subject matter and supercedes all prior agreements or understandings dealing with the same subject matter. There is no agreement on the part of Board to do anything other than as is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey;

9. **MODIFICATION.** No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged;

10. **SEVERABILITY.** Should any provision of this Agreement be declared or determined by any court 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 not to be a part of this Agreement; and

THE UNDERSIGNED STATE THAT THEY HAVE CAREFULLY READ THE FOREGOING RELEASE AND SETTLEMENT AGREEMENT, KNOW THE CONTENTS THEREOF, HAVE HAD THE OPPORTUNITY TO DISCUSS THOSE CONTENTS WITH COUNSEL OR OTHER PERSONAL ADVISOR OF THEIR CHOOSING, FREELY AND VOLUNTARILY CONSENT TO ALL TERMS AND CONDITIONS THEREOF AND SIGN THE SAME AS THEIR OWN FREE ACT.

W. Alan Brown — Date: 5/4/09

EAST BRUNSWICK BOARD OF EDUCATION

By: _____ — Date: 7/23/09

292-09

OAL DKT. NO. EDU 8748-09
AGENCY DKT. NO. 133-6/09

R.W., ON BEHALF OF MINOR CHILDREN, A.W., J.W., O.W. AND L.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this matter – including 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 Administrative Law Judge (ALJ) – for the reasons fully 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).

Accordingly, the Order of the ALJ – DENYING petitioner's application – is adopted as the final decision in this emergent matter, which shall be returned to the OAL for such proceedings as are necessary to bring it to closure.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/14/09

Date of Mailing: 9/15/09

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

ON EMERGENT RELIEF

OAL DKT. NO. EDU 8748-09

AGENCY DKT. NO. 133-6/09

R.W., O/B/O OF MINOR CHILDREN,
A.W., J.W., O.W. AND L.W.
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY,
Respondent.

R.W., petitioner, pro se

Kelly Estevam, Esq., for respondent (Capehart & Scatchard, P.A., attorneys)

Record Closed: September 8, 2009 Decided: September 8, 2009

BEFORE **LAURA SANDERS**, CHIEF ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

R.W. has filed a Petition of Appeal and Request for Emergent Relief contesting the Washington Township Board of Education's decision to test her children, J.W., O.W., and L.W. prior to determining grade placement after a year of home schooling. She seeks an order placing J.W. in ninth grade; L.W. in seventh grade, and O.W. in fourth grade.[1] She also seeks an order requiring that all three children to be tutored as needed in any academic subject. It should be noted that R.W. also requested and received transmittal of a claim for A.W; however, since the claim for A.W. is identical to that of another matter at the Office of Administrative Law (OAL) in OAL Docket Number EDU 08073-08, which is itself the subject of ongoing proceedings at OAL, the claim is not addressed here.

The district contends that it has authority to test children who have not been in the district schools prior to placement, that it uses the same tests for everyone, and that R.W. has not filed a claim for which relief may be granted.

On August 17, 2009, the Department of Education, Bureau of Controversies and Disputes, transmitted R.W.'s Petition of Appeal and Request for Emergency Relief to the OAL for hearing as a contested case. It was filed on the same date, and a conference held on August 24, 2009, in an effort to resolve matters. The Board of Education agreed to explore placement of one or more children in a Choice School within the County. During a second conference on September 1, the district submitted a letter from David W. Datz, Superintendent of the South Harrison Township School District stating that at the present time, the district was not accepting additional students into the program. Although during the conference call, R.W. said she would withdraw her petition, on September 3, she notified the OAL that she had determined to pursue it. Therefore, oral argument was scheduled and held on September 8, and the record closed on that date. With the consent of the parties, oral argument was held with R.W.

[1] Although the petition requested third grade; R.W. clarified at hearing that she had meant to say fourth grade.

participating by telephone because she failed to physically appear at the hearing, citing a mistaken impression that it could be done by telephone.

FACTUAL DISCUSSION AND LEGAL ANALYSIS

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.

It is important to note that these standards are written in the conjunctive and not the disjunctive. Therefore, a petitioner must satisfy all four prongs in order to obtain the requested relief. Having considered the parties' arguments, I have determined that the petition may not be granted because prongs two and three are not met.

First, with regard to testing, it is well-settled that school districts may test children to determine grade placement. See, for example, J.U. and J.U. on behalf of T.U. v. Warren Hills Regional High Board of Education, 2008 N.J. Agen Lexis 1263. The statutes specifically reserve to the local school district the right to prescribe its own rules for promotion, notwithstanding the commissioner's duty to ascertain the thoroughness and efficiency of operation of any of the public schools and any grades therein. N.J.S.A. 18A:4-24. Therefore, I **CONCLUDE** that petitioner's demand for relief from the district's standard testing is unsupported by current law and therefore likely to fail.

Moreover, the parties agreed at hearing that O.W. was tested on September 8, 2009. According to the district, L.W. had completed reading and grammar tests at time

of hearing and was in the process of taking other tests. At the time of hearing, according to the district, the completed testing did not support a seventh grade placement. R.W. stated that J.W. appeared at school and was willing to take tests today but was sent home. The district agreed with the statement, and said it occurred through an unfortunate miscommunication, but that he would be allowed into school tomorrow and would take tests then.

Second, as regards to the demand for tutoring in all subjects, it is possible that two distinctive concepts of service were being employed by the parties. By the term "tutoring," M.W. made clear, she meant any variety of academic support service including after school programs that occur outside of the special education rubric. Counsel for the district indicated that the district did not have tutoring programs in the general education setting. That concept of tutoring meant one-on-one teaching, or specialized off-hours teaching.

It should be noted that the district in a prior year determined O.W. to be eligible for special education, which would have made available various additional supports in various academic subjects. However, R.W., had declined to allow her child to be so classified. Counsel for the district represented that testing of O.W. today placed her at or around first grade level, while R.W. said she was told she scored below. The district said it would place her in second grade because she is so much older than the first graders. R.W. said the district is essentially forcing her to make a trade-off between placement in fourth grade, which is the norm for children O.W.'s age, and the self-esteem problem that is sure to develop if O.W. is placed in general education second grade. R.W. made clear that she views special education as a dumping ground for children the district does not wish to educate. She noted that her other children, who are older than these three, did very well in another school districts and states unequivocally that it is discrimination by this district that is affecting her children negatively.

With regard to additional academic support for her children, she cites the federal No Child Left Behind Law as support for her position, but she has previously been

advised that such claims cannot be brought before the OAL, which has no jurisdiction to hear them. Thus, I **CONCLUDE** that petitioner's demand for tutoring as needed in all subjects is also unsupported by current law, and therefore must fail.

Since N.J.A.C. 6A:3-1.6(b) and N.J.A.C. 1:1-12.6 are written in the conjunctive and R.W. has failed to satisfy two of the four requirements for the granting of emergent relief with regard to testing and tutoring, I need not reach the remaining two parts of the four-part test. Therefore, on the facts presented, I **CONCLUDE** that the requirements for emergent relief have not been met.

ORDER

The petition for emergent relief is hereby **DISMISSED WITH PREJUDICE**.

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.

September 8, 2009
DATE

Laura Sanders
LAURA SANDERS, CHIEF ALJ

/caa

SCHOOL ETHICS COMMISSION DKT. NO. C45-07
COMMISSIONER DKT. NO. 4-5/09A

JENNIFER DERICKS, MAUREEN SHARPE, DARYL SAVAGE, SHIRLEY BOUSHELL, ARMEN KOOCHAGIAN, AND RONALD BASSANI,	:	
COMPLAINANTS-RESPONDENTS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
MICHAEL SCHIAVONI, BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA, SUSSEX COUNTY,	:	
RESPONDENT-APPELLANT.[1]	:	

Decided by the School Ethics Commission, April 28, 2009

For Complainants-Respondents, Maureen Sharpe, *Pro Se*[2]

For Respondent-Appellant, Howard B. Mankoff, Esq.
(Marshall, Dennehey, Warner, Coleman & Goggin, PC)

This matter came before the Commissioner of Education by way of a May 28, 2009 appeal by Respondent-Appellant Michael Schiavoni (respondent) of the April 28, 2009 decision of the School Ethics Commission (Commission) finding him in violation of *N.J.S.A.* 18A:12-24.1(c) and (d) of the Code of Ethics for School Board Members and recommending a penalty of censure.[3] In its decision, the Commission specifically determined

[1] The complaint under review additionally included Sparta Board members Linda Curcio, Paul Johnson, Michael Schill, Karen Scott and Richard Sullivan as named respondents; however, the Commission made no finding of violation with respect to these respondents, and they are not parties to the within appeal.

[2] Where a complaint is submitted by more than one person, the Commission may designate a lead complainant – in this case Ms. Sharpe – for purposes of communication. See Commission's decision at 3, note 2.

[3] This matter was heard as part of a consolidated proceeding involving an additional complaint (C40-07) filed by the same complainants against respondent Michael Schiavoni. The complaint in that matter and all allegations in the complaint herein, other than those of Count Two, were dismissed by the Commission and are not before the

that respondent – at the time President of the Sparta Board of Education (Board) – took Board action that went beyond policy making, planning and appraisal, and administered the schools by creating and developing a detailed and all-encompassing staffing process and becoming directly involved in the functions and responsibilities of the Superintendent during the hiring of a school principal.

On appeal to the Commissioner, respondent contends that the Commission erred in finding him in violation of the Code of Ethics, asserting that the Commission "engaged in unfounded leaps of logic" through findings that are not supported by the evidence on record, and that its recommended penalty is not appropriate to the offense found. (Brief on Appeal at 1-2)

According to respondent, the underlying basis of the Commission's finding is that the district Superintendent, Dr. Tom Morton, was "somehow forced" to adopt respondent's suggestions – a conclusion which is not only unsupported by the record, but could not be the case in any event because "there is nothing [respondent] could have done to compel Dr. Morton to accept his recommendation or suggestions" and Dr. Morton "was at all times in charge of staffing the Principal (*sic*)," notwithstanding that he may have chosen to adopt some of respondent's suggestions. (Brief on Appeal at 2-3) Respondent asserts that Dr. Morton should not have been found credible as a witness, since he presented no documentation to support his contention that he was not allowed to do anything independent of respondent or that respondent caused a delay in the hiring process – neither of which is borne out by the facts.[4] (*Id.* at 3-5)

Commissioner on appeal. *N.J.A.C.* 6A:4-1.3(c)1, referencing *N.J.S.A.* 18A:12-29(b) and *N.J.A.C.* 6A:28-11.1. The complaint under review additionally included Sparta Board members Linda Curcio, Paul Johnson, Michael Schill, Karen Scott and Richard Sullivan as named respondents; however, the Commission made no finding of violation with respect to these respondents, and they are not parties to the within appeal.

[4] With respect to causing a delay, respondent asserts that the hiring process at issue took eight weeks, which is precisely the amount of time such processes commonly take, according to Dr. Morton's own testimony (Appeal Brief at 3); he further asserts that no specifics were provided as to exactly how he caused the process to be delayed, adding that it could not have been the staffing guide, since this was not completed until June 2007 while the

Indeed, respondent avers, had Dr. Morton truly believed that respondent was interfering with the hiring process, he would have "undoubtedly brought this to the attention of the full Board" and his failure to do so "strongly suggests that [his] testimony before the Commission is his attempt to revise history." (*Id.* at 4)

Respondent also rejects as "completely illogical and unfounded" – as well as not warranted based on complainants' actual charges – the Commission's finding regarding his purported removal of candidate resumes before Dr. Morton had an opportunity to copy them for other staffing team members, asserting that there is no evidence that Dr. Morton was prevented from copying the resumes – which he could have done before, during or after the group's June 1st staffing meeting – or objected when respondent and fellow Board member Linda Curcio discussed taking the resumes home over the weekend for review in order to expedite the hiring process. To the contrary, respondent asserts, Dr. Morton's testimony "is another example of him revising history." (*Id.* at 5-6)

Finally, respondent opines that the Commission's recommended penalty is excessive even for the violation found, because respondent's offense involved "no self dealing, no personal gain, and no evidence of dishonesty," and that "[at] worst, there was a good faith disagreement between the Sparta Board of Education and [the Superintendent]" about the extent to which Board members could be involved in the hiring of a school principal. Respondent further urges that the charges against him be "viewed in the broader context of a situation in

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principal position was posted on May 18 of that year (*Ibid.*). With respect to Dr. Morton's purported inability to act independently, respondent claims that not a single specific example of this may be found on record; according to respondent, his ideas and suggestions were offered for *advisory* purposes – consistent with the role assigned to Board members in the revised Board of Education Hiring Process discussed at the July 2006 Board meeting, to which Dr. Morton did not object – and there is no evidence whatsoever that the hiring team was *compelled* to use the staffing guide drafted by respondent. (Id. at 4-5)

which the complainants have brought more than one hundred charges, almost all of which have been dismissed, for political gain." (*Id.* at 6)[5]

The complainants did not answer respondent's arguments on appeal.

Upon review and consideration, the Commissioner can find no basis on which to disturb the decision of the School Ethics Commission as to its determination of violation, since the Commission's decision is supported by sufficient credible evidence in the record, and respondent has not demonstrated that such decision is arbitrary, capricious or contrary to law. *N.J.A.C.* 6A:4-4.1(a) In particular, the Commissioner notes that respondent's appeal fundamentally challenges the Commission's assessment of witness credibility, recitation of testimony, and resulting findings of fact, yet – notwithstanding clear notice by the Commission of a party's obligation in this regard[6] – fails to provide the relevant and necessary portions of the hearing transcript supporting such challenge.[7] *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987) Moreover, the documentary record provides ample evidence in support of witness testimony – and the Commission's conclusion – that respondent as a Board member went well beyond policy making and appraisal and instead acted to administer the schools by his direct and extensive involvement in functions and responsibilities properly within the purview of the school administration.

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[5] At the outset of his appeal brief (at 1-2), respondent stated his view that complainants were "predominantly unsuccessful candidates for the Sparta Board of Education" who brought and manipulated ethics charges for political purposes and routinely disregarded the Commission's confidentiality rules.

[6] In its June 16, 2009 Statement of Items Comprising the Record, filed and copied to the parties (see *N.J.A.C.* 6A:4-2.5(a)1), the Executive Director expressly noted that parties challenging findings of fact are required to provide the relevant and necessary portions of the transcript, and that unofficial copies of sound recordings do not suffice to meet this requirement. (Statement of Items at 1, note 2)

[7] For example, the Commission represents (at 6) that Dr. Morton's testimony on the ordinary time frame for filling positions was four to six weeks, not eight as claimed by respondent (see note 4 above). Similarly, the delay in the hiring process attributed to respondent appears not in the time prior to posting of the position, as respondent suggests (*Ibid.*), but afterward, as confirmed by Exhibits C-3 (June 9, 2007 email) and C-11 (July 15, 2007 memorandum, misdated in the Commission's decision at 9 as *June* 15, 2007).

Indeed, the Commissioner fully concurs with the Commission that:

> ***Mr. Schiavoni went far beyond policy making, planning and appraisal. ...While the Board may have approved the staffing documents created by Mr. Schiavoni, ...the creation of the documents and the content of the documents went beyond the making of policy, planning and appraisal. The documents ranged from a "white paper" on Predicting Future Performance Based on Past Behavior, which supported the use of behavioral questions in interviews, to specific forms such as an interview form and a candidate rating form, which included a detailed rating scale. The documents also included an assessment interview guide, which presented specific steps that should be taken in an interview and indicated how many minutes should be spent at each step. The documents included an Administrator Recruiting Guide that detailed the roles and responsibilities of the chief school administrator and Board members on a staffing team, and provided for a 10-phase recruitment process along with specific selection criteria. The documents were very specific, all encompassing and covered every step of the hiring process leaving very little discretion to anyone utilizing them.
>
> ***Dr. Morton credibly testified that virtually every step of the interview process for the Helen Morgan School Principal position was controlled by Mr. Schiavoni who would not allow Dr. Morton to continue any aspect of the hiring process without his approval. Dr. Morton further testified that he was not allowed to do anything independent of Mr. Schiavoni. Dr. Morton did not even review the resumes of the candidates; it was Mr. Schiavoni who took the resumes home to review them. While Mr. Schiavoni testified that he was disappointed in the way Dr. Morton handled the resumes, by taking the only copy of the resumes out of the district for review, Mr. Schiavoni became directly involved in a function that was the responsibility of Dr. Morton. Dr. Morton testified that Mr. Schiavoni wrote the questions for the interview of the Helen Morgan School Principal, directed the interview process and analyzed which candidates were the best candidates. While Mr. Schiavoni testified that, as chief staffing office[r], Dr. Morton had the ability to use or not use the questions, Mr. Schiavoni's overall conduct in relation to the interview shows that Mr. Schiavoni administered the schools and became directly involved in a function that was the responsibility of the Superintendent. The evidence also shows that Mr. Schiavoni assumed the responsibilities of the Superintendent when he prepared a detailed and all-encompassing staffing process without input from the Superintendent, and when he controlled the role of the Superintendent in the hiring process for the Helen Morgan School Principal position.
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> (Commission's Decision at 12-14)

In light of the above, the Commissioner likewise deems appropriate the Commission's recommended penalty of censure. Contrary to his assertions on appeal – and however worthy his intentions may have been – respondent's actions as evidenced by the record

herein evince far more than a "good faith disagreement" about the extent to which a board member may become involved in the hiring process for staff; rather, they are tantamount to a willful, full-scale usurpation of the role and responsibilities of the district administration. Moreover, even granting, *arguendo*, that the charges against respondent may have been rooted in Board and community politics, a complainant's motivation for bringing a matter to the attention of the Commission does not alter the fact that a violation occurred; nor can the Commissioner permit personal benefit or inconsistent interest to become necessary preconditions to imposing a penalty of censure where, as here, the violation found is sufficiently serious or flagrant.

Accordingly, for the reasons set forth therein and above, the Commissioner affirms the decision of the School Ethics Commission finding that respondent Michael Schiavoni violated *N.J.S.A.* 18A:12-24.1(c) and (d) of the Code of Ethics for School Board Members, and adopts the Commission's recommendation that Mr. Schiavoni be censured for such violation.

IT IS SO ORDERED.[8]

COMMISSIONER OF EDUCATION

Date of Decision: 9/15/09
Date of Mailing: 9/15/09

[8] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.

JENNIFER DERICKS, MAUREEN SHARPE DARYL SAVAGE	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	**DOCKET NO. C40-07**
MICHAEL SCHIAVONI SPARTA BOARD OF EDUCATION, SUSSEX COUNTY	:	**DECISION (CONSOLIDATED)**
JENNIFER DERICKS, MAUREEN SHARPE, DARYL SAVAGE, SHIRLEY BOUSHELL, ARMEN KOOCHAGIAN, RONALD BASSANI	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**DOCKET NO. C45-07**
v.	:	
LINDA CURCIO, PAUL JOHNSON, MICHAEL SCHIAVONI, MICHAEL SCHILL, KAREN SCOTT, RICHARD SULLIVAN SPARTA BOARD OF EDUCATION, SUSSEX COUNTY	:	**DECISION (CONSOLIDATED)**

PROCEDURAL HISTORY

This matter arises from two complaints filed on October 12, 2007 and November 13, 2007 by various complainants, as set forth above, against members of the Sparta Board of Education ("Board") alleging violations of the Code of Ethics for School Board Members found in the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq.

In the matter docketed as C40-07, complainants Jennifer Dericks, Maureen Sharpe and Daryl Savage assert that Michael Schiavoni violated N.J.S.A. 18A:12-24.1(d), (i) and (j) of the Code of Ethics for School Board Members. An answer to the complaint docketed as C40-07 was filed on December 10, 2007.

In the matter docketed as C45-07, complainants Jennifer Dericks, Maureen Sharpe, Daryl Savage, Shirley Boushell, Armen Koochiagian and Ronald Bassani assert that respondents Linda Curcio, Paul Johnson, Michael Schiavoni, Michael Schill, Karen Scott and Richard Sullivan violated N.J.S.A. 18A:12-24.1(a), (c), (d), (e), (g), (i) and (j) of the Code of Ethics for School Board Members.

In March 2008, the Commission learned that Mr. Schiavoni filed a matter in Superior Court, which appeared to necessitate that the complaints be placed in abeyance,

as per N.J.S.A. 18A:12-32. The parties were so notified by letter dated April 3, 2008, and were provided an opportunity to comment. At its meeting on May 27, 2008, the Commission determined to place the complaints in abeyance pending resolution of the matter filed in Superior Court. The Superior Court matter was dismissed in September 2008; the parties were immediately contacted to arrange for a telephone conference to discuss the possibility of consolidating the complaints and to schedule a hearing. A conference call was conducted on October 21, 2008 with lead complainant, Ms. Maureen Sharpe[1], complainant Jennifer Dericks and counsel for the respondents, Howard Mankoff, Esq. The parties did not object to consolidating the complaints for hearing and decision by the Commission.[2] This consolidated matter was set for a hearing at the Commission's January 27, 2009 meeting.

At the January meeting, the Commission heard the testimony and evidence from both the complainants and the respondents with regard to all allegations contained in the matter docketed as C40-07. At the close of the complainants' case, counsel for the respondents moved to dismiss the complaint, asserting that complainants failed to meet their burden of proof. Upon consideration of the motion and the complainants' response, the Commission voted to dismiss C40-07.[3] The Commission also heard testimony and evidence with regard to the allegations contained in counts one, two and three in the matter docketed as C45-07.[4] Thereafter, the respondents moved to dismiss C45-07 on the basis that complainants failed to meet their burden of proof.[5]

At the public portion of the Commission's January 27, 2009 meeting, it voted to dismiss the complaint docketed as C40-07, as set forth below, but tabled the matter docketed as C45-07 to allow the parties to submit written briefs addressing respondents' motion to dismiss C45-07.[6] Additionally, both parties agreed to the dismissal of the allegation in count three of the complaint docketed as C45-07 that the respondents violated N.J.S.A. 18A:12-24.1(a) because the complainants failed to provide evidence of a final determination as required at N.J.A.C. 6A:28-6.9(b). The parties further agreed to the dismissal of counts four and five in the matter docketed as C45-07 in that the complainant acknowledged that the Commission does not have jurisdiction to consider matters which do not arise under the Act[7].

At its March 24, 2009 meeting, the Commission considered the parties' testimony from the January 27, 2009 meeting, the exhibits entered into the record, the parties'

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[1] Where a complaint is submitted by more than one person, a lead complainant may be designated by the Commission for the purpose of communication.

[2] Ordinarily, and where the Commission deems it appropriate, multiple complaints involving the same or similar parties are consolidated for review in order to save time, expense, duplication and avoid inconsistency.

[3] A full analysis of the Commission's determination to dismiss C40-07 is set forth supra.

[4] Due to time constraints, the respondents did not present testimony or evidence with regard to the allegations in count three.

[5] Although respondents did not offer any witnesses or evidence to address count three, they retained the right to present evidence as to count three in the event that the Motion to Dismiss was denied.

[6] Pursuant to correspondence from the Commission dated January 29, 2009, a briefing schedule was established which provided the parties with an opportunity to submit original and reply briefs.

[7] Counts four and five alleged violations of the Open Public Meeting Act, N.J.S.A. 10:4-6, et seq.

primary briefs on the Motions to Dismiss and the complainants' reply brief on the Motions to Dismiss with regard to C45-07.[8] Upon such consideration, the Commission granted the respondents' Motion to Dismiss counts one and three, and denied the respondents' Motion to Dismiss count two.[9] With regard to count two, the sole remaining count before the Commission, it voted to find a violation of N.J.S.A. 18A:12-24.1(d) and (e), but no violation of N.J.S.A. 18A:12-24.1(c). The Commission also voted to recommend to the Commissioner of Education a penalty of censure. By correspondence dated April 16, 2009, the Commission notified the parties of its determinations as to the Motions to Dismiss and indicated that it would adopt a final written decision as to these consolidated matters at its April 28, 2009 meeting. At its April 28, 2009 meeting, the Commission reconsidered its findings as to count two of C45-07, and voted to find a violation of N.J.S.A. 18A:12-24.1(c) and (d) and no violation of N.J.S.A. 18A:12-24.1(e).[10] The Commission also found that its previous recommendation to the Commissioner of Education of a penalty of censure was appropriate. This decision was adopted at the Commission's April 28, 2009 meeting.

SUMMARY OF THE RECORD

C40-07

On January 27, 2009, the matter docketed as C40-07 was heard by the Commission. In attendance were complainants Maureen Sharpe, Daryl Savage and Jennifer Dericks with their witness Tom Morton, Superintendent for the district. Ms. Dericks presented the case for complainants. Respondent Michael Schiavoni was in attendance with his attorney, Howard B. Mankoff.

Prior to presentation of testimony in the matter, Mr. Mankoff made a Motion to Dismiss the complaint as untimely pursuant to N.J.A.C. 6A:28-6.1(b). He argued that, although the complaint was filed on October 12, 2007, the substance of the charge, Mr. Schiavoni's summary of a November 2, 2006 meeting with four administrators, referenced incidents that occurred more than a year before the charge was filed. Ms. Dericks responded that the summary was not public information, and came to public light when the letter was discussed at a Board meeting. Due to the lack of information regarding the date of the summary, and granting all inferences to the complainant, the Commission decided to hear testimony from the complainants. The Commission determined that it would allow testimony and deny the Motion to Dismiss, for two reasons. First, the allegations contained in the complaint relate to the November 20, 2006 summary provided by Schiavoni (See C-1) which was within the timeframe, and secondly, to the extent that counsel argued that the complaint was not clear as to whether

[8] The respondents submitted their reply brief out of time and, thus, it was not considered by the Commission in rendering its decision in this matter.

[9] The parties were notified of the Commission's determinations on the motion to dismiss in a letter decision dated, April 16, 2009.

[10] As the Commission addressed the Motions to Dismiss counts one and three in the matter docketed as C45-07 in its April 16, 2009 correspondence, this final decision addresses the remaining count two in C45-07 and the matter docketed as C40-07.

it reached to the underlying investigation, the Commission notes that the respondents addressed this issue in their answer.

Complainants first presented the testimony of Jennifer Dericks. Ms. Dericks testified that a letter was written by the principals in the district to the Board, which discussed three specific issues that the principals claimed compromised their ability to do their jobs effectively. The first issue was the Board's interference with the assignment of a secretary to the high school. The Board had asked for additional information regarding the reassignment. The principals' letter also discussed the Board's interference with an investigation of a parent's complaint about a principal. According to Ms. Dericks, the Superintendent was asked to investigate a parent's complaint pursuant to Board policy. The Superintendent was not allowed to bring that investigation to its conclusion.

Ms. Dericks then testified that, rather than waiting for a discussion of the parent's complaint until the Superintendent returned from vacation, Mr. Schiavoni invited the parents to lodge the complaint at the next Board meeting and directed the Assistant Superintendent to issue Rice[11] notices for a work session meeting scheduled for August 11, 2006. She argued that Mr. Schiavoni intervened in the investigation and directed Rice notices to be issued without the Superintendent's knowledge. Ms. Dericks introduced into evidence Mr. Schiavoni's summary of the November 2, 2006 meeting with administrators, which was accepted as Exhibit C-1, over the respondents' objection.

Tom Morton, Superintendent of the district, presented testimony for the complainants. Dr. Morton identified Exhibit C-1 as being written by Mr. Schivoni. Dr. Morton testified that the summary did not accurately reflect what occurred at the meeting. After reviewing the summary, he stated that there were four things in the letter that were not agreed to by the administrators. With respect to the investigation of a parental complainant, one issue was the manner in which the principal and the secretary were treated. He explained that the principal and the secretary were brought in very quickly without a complete investigation on his part due to his vacation. While he was on vacation the principal and the secretary had been given Rice notices and asked to appear at a Board meeting. Dr. Morton testified that he attended that Board meeting and the principal and the secretary were "grilled by the Board" and given a limited amount of time to speak in front of the Board. He claimed that, at the end of that session, the vice-president of the Board turned to that group and said, "I guess I know which people are not telling the truth." Dr. Morton claimed that the parents were brought in and given an extraordinarily long amount of time to talk with the Board members. He stated that he felt the process was pre-determined by the Board and was negatively perceived by the principal and the secretary.

Dr. Morton then testified that in paragraph three of Exhibit C-1, the second and third sentences were inaccurate. He explained that the principals had written a letter to the Board saying that the Board was making their job impossible to do. He stated that the

[11] "Rice" refers to the case *Rice v. Union City. Reg. H. Sch. Dist. Bd. of Educ.*, 155 N.J. Super. 64 (App. Div. 1977) *certif. den.* 76 *N.J.* 238 (1978), which established the right of employees to have notice when they will be discussed by the Board of Education.

intent of the meeting with the administrators was to go over item by item what was in the principals' letter to the Board and to repair the principals' relationship with the Board. He claimed that, as result of the meeting, the principals felt that the Board was untruthful and there was less trust then there was before. He claimed that the statement in the summary, "The meeting ended on a positive note..." was untrue.

At the close of the complainants' case, Mr. Mankoff made a Motion to Dismiss C40-07. He argued that the complaint should be dismissed because the provision of the Code alleged to have been violated required a showing that the summary designated as Exhibit C-1 contained inaccurate statements and complainants failed to offer any testimony showing that the document was inaccurate. He further argued that the only direct testimony provided by the complainants was from Dr. Morton, which consisted of his opinion only. Ms. Dericks responded that the complaint was not alleging that the summary was inaccurate, but that the summary did not support and protect school personnel.

C45-07[12]

The consolidated matter docketed as C45-07 was also heard at the January 27, 2009 meeting. In attendance were complainants Maureen Sharpe, Daryl Savage and Jennifer Dericks with their witness Tom Morton, Superintendent for the district. Ms. Dericks presented the case for the complainants. Respondents Linda Curcio, Paul Johnson, Michael Schiavoni, Michale Schill, Karen Scott and Richard Sullivan were in attendance with their attorney, Howard B. Mankoff.

Prior to hearing testimony on the allegations contained in C45-07, the Commission notified the parties that it did not have jurisdiction to consider matters outside of the School Ethics Act, and, therefore, the Commission would not accept testimony as to any claims that reached to violations of the Open Public Meetings Act, (OPMA) N.J.S.A. 10:4-6 *et seq.*, or Rice notice requirements.

Ms. Dericks stated that, on April 25, 2007, a principal resigned from the Helen Morgan Elementary School effective June 30, 2007. Ms. Dericks claimed that Mr. Schiavoni would not allow the Superintendent to post the job for nearly six weeks while Mr. Schiavoni developed an entire staffing process including, but not limited to, position requirements, advertising, application form and interview evaluation forms. She noted that the Board's interference in this process delayed the staffing process by six weeks. Ms. Dericks claimed that, when the new principal was finally hired, she was only in her position for three days prior to the start of the school year. Ms. Dericks asserted that the same process was used again when, on June 11, 2007, a high school principal resigned. Ms. Dericks claimed that, through these actions, Mr. Schiavoni violated N.J.S.A. 18A:12-24.1(c), (d) and (e).

[12] The summary of the record for C45-07 relates solely to the allegations contained in count two of the complaint. Testimony and Exhibits for counts one and three alleged in C45-07 are not included in this summary as the Commission granted the respondents' Motion to Dismiss those counts at its March 24, 2009 meeting as memorialized in its April 16, 2009 correspondence to the parties.

Ms. Dericks entered the following documents into evidence without objection: Exhibit C-3, a June 9, 2007 email from Mr. Schiavoni; Exhibit C-4 a principal rating form; and Exhibits C-5 through C-23, which represented the remaining documents attached to the complaint docketed as C45-07. Ms. Dericks explained that she received the documents when she was on the staffing committee for the Sparta High School principal position.

Tom Morton, Superintendent of the district, also presented testimony for the complainants. In describing the hiring process for the principal of the Helen Morgan School, Dr. Morton testified that the process was not one he would have used. He confirmed that he had experience in the hiring of personnel. He explained that he would always post a position the week following the resignation of the individual in order to accommodate the possibility that candidates would have to give a 60 to 90-day notice to their current employer. He confirmed that this practice was not followed in the process for the hiring of the principal of the Helen Morgan School.

As to the hiring of the Helen Morgan School Principal, Dr. Morton claimed that Mr. Schiavoni would not allow him to post the advertisement without his clearance. Dr. Morton further testified that Mr. Schiavoni would not allow Dr. Morton to continue any aspect of the hiring process without his approval. Dr. Morton stated that the interview process in this case took a long time, and virtually every step of the way was controlled totally by Mr. Schiavoni. He stated that he was not allowed to do anything independent of Mr. Schiavoni, which delayed the process by seven or eight weeks. Dr. Morton explained that he did not review the resumes, but Mr. Schiavoni and other Board members took the resumes out of the district to review them. Dr. Morton claimed that Mr. Schiavoni wrote the questions for the interview, directed the interview process and analyzed which candidate was the best candidate. Dr. Morton testified that Mr. Schiavoni ran the whole show. Dr. Morton claimed that he would have liked to have recommended a couple of the candidates, but Mr. Schiavoni told Dr. Morton that he would not support Dr. Morton's recommendations and he had the votes to stop the hiring. He explained that the final decision was made at the end of June and that the candidate had a 60-day clause in her contract so she could not start work until the end of August, about two days before school began. Dr. Morton testified that the initial search for the high school principal followed the same process as that used for the Helen Morgan principal. As a result, the district was not able to get a high school principal and ended up hiring an interim principal.

On cross-examination, Dr. Morton admitted that it normally took four weeks and could take up to six weeks to hire someone, but he usually tried to minimize the hiring time. On redirect, Dr. Morton testified that the hiring process that was brought in by Mr. Schiavoni compromised the running of the school because the person who was hired for the Helen Morgan principal position was not able to begin before the school year started.

Mr. Schiavoni testified for the respondents with respect to count two. He confirmed that he was president of the Board during all relevant times. Mr. Schiavoni

confirmed that he was the chief staffing officer for three different businesses, all of which were worth a billon dollars or more, the largest one having 10,000 employees, and he had a staffing team report to him in his senior position. Mr. Schiavoni stated that Dr. Morton's previous testimony, that Mr. Schiavoni would not support Dr. Morton's recommendation, was an inaccurate statement. Mr. Schiavoni stated that he never told Dr. Morton that he would not support Dr. Morton's candidate.

Mr. Schiavoni testified that he was part of the staffing team when the Superintendent was looking for a business administrator. He explained that there was no hiring process in place he was asked to come up with interview questions off the top of his head. He stated that interview times varied and he was concerned that several of the people in the room were asking non-job related questions that were not consistent, did not apply to the basic criteria for the position and could result in a discrimination claim. He testified that he was dismayed by the lack of process and offered to develop the material for the staffing process only to help Dr. Morton, who had the ability to make the final decision to use it or not. Mr. Schiavoni claimed that Dr. Morton offered no objection when he volunteered to come up with a staffing process, which Mr. Schiavoni did on evenings and weekends.

Mr. Schiavoni admitted that he created a series of staffing document packets which were adopted by the Board at its July 17, 2006 meeting. He stated that he did not force this process on anyone, but created it pursuant to an invitation. Mr. Schiavoni maintained that he talked to either Dr. Morton or the Assistant Superintendent and said he would be willing to create this process and one of them agreed that Mr. Schiavoni should do it. He explained that he gave the documents to the person in charge of the staffing team for the middle school and she decided not to use them, which was fine. Mr. Schiavoni was then referred to Exhibit C-23, which was a staffing guide from a business where Mr. Schiavoni had worked. Mr. Schiavoni explained that he had used it as a best practices staffing guide, which he had refined for use in the schools. He admitted that the technical elements were different, but noted that the staffing guides were similar. Mr. Schiavoni stated that he prepared the staffing documents in conjunction with the human resources committee chaired by Ms. Curcio. Mr. Schiavoni explained that the staffing process was reviewed by the human resources committee and Dr. Morton, and, at that time, there was no objection.

Mr. Schiavoni testified that he did not tell Dr. Morton that he could not post the position or put the ad in the Star Ledger until May 18, 2007, nor did Linda Curcio. He explained that, for the Helen Morgan staffing, Ms. Curcio and he were the two Board members that were part of the staffing team, supporting and assisting Dr. Morton. He stated that Dr. Morton had not called for a meeting of the staffing committee and he was concerned about the delay from April 25, 2007. Mr. Schiavoni then called Dr. Morton to ask him when he was going to call the first staffing meting and Dr. Morton suggested May 15. Mr. Schiavoni maintained that as a result of the May 15th staffing meeting, the job specifications were developed, as suggested by Dr. Morton, with input by both Board members. He claimed that the only delay in the process was the three weeks from the time the resignation was accepted on April 25th until May 15th when Dr. Morton finally

agreed to have the first staffing meeting. Mr. Schiavoni stated that Dr. Morton made the final decisions as the chief staffing officer and that the two Board members were there to help support the staffing process. He stated that the job was posted on May 18th and there was not a six-week delay.

Mr. Schiavoni explained that June 1 was the deadline for candidates to submit applications and, immediately after June 1, he and Ms. Curcio met with Dr. Morton and found that Dr. Morton had not screened any of the 20 to 25 resumes, had not looked at any of them and had not made copies of the resumes. He testified that he and Ms. Curcio offered to take the resumes home over the weekend. He stated that he spent three and a half hours reviewing the resumes. He explained that, in an effort to help expedite the process, on Monday he passed the resumes on to Ms. Curcio who did a quick review so that the next week they were able to meet and have an update. Mr. Schiavoni then noted that he was disappointed that Dr. Morton had simply collected the paperwork and done no preliminary screening or review of the paperwork. Mr. Schiavoni explained that he volunteered, as a member of the staffing team, to develop interview questions and there was no objection to him doing it. He noted that Dr. Morton, as the chief staffing officer, had the ability to use the interview questions or not to use them. Mr. Schiavoni noted that the staffing team could ask any of the questions or come up with others and it was not mandatory to ask the questions.

Mr. Schiavoni stated that, on June 11th, Dr. Morton advised the board that the staffing team was ready to recommend four candidates. Mr. Schiavonni then quoted the following from the Board minutes of June 11th, "They had the first round of interviews for the Helen Morgan principal. They were ready to recommend four candidates. There would be candidate interviews on June 20. There would be a special meeting on June 21 to appoint the principal." Mr. Schiavoni noted that the Board had already arranged a special meeting with the sole subject of the meeting to be the interviews so that there would be no delay from the time of the final interviews. Mr. Schiavoni claimed that this was all part of the Board's good will to expedite the staffing process. Mr. Schiavoni confirmed that the candidate was selected at the June 21st meeting.

Mr. Schiavoni stated that, after a review of Dr. Morton's previous hiring process for the Helen Morgan Principal's position, he learned that it had taken Dr. Morton 10 weeks to hire the current principal who was resigning. He concluded that the Board's staffing process had taken eight weeks and Dr. Morton's staffing process had taken 10 weeks, thus there was a 20 percent reduction in time. Mr. Schiavoni noted that for both processes, they were hiring from outside of the district, which is typically a longer process. Mr. Schiavoni claimed that everybody on the staffing team believed that they had accomplished the hiring on an expedited manner. Mr. Schiavoni stated that he was stunned to hear Dr. Morton's remarks in his testimony because it was in dire contrast to what he said and other members of the staffing team had said during the staffing process. Mr. Schiavoni stated that he had notes from the human resource committee meeting where the committee called this a best practice in terms of the staffing process used.

Mr. Schiavoni testified that he was not on the staffing team for the position of the Sparta High School Principal, but he noted that the team followed the Board process for administrative staffing. He stated that he was aware that there was a significant delay and Dr. Morton did not meet the timelines that the Board set for him. Mr. Schiavoni explained that he provided interview training for the staffing team for the Sparta High School Principal position because the team included community members who were not trained in interviewing. He claimed that he volunteered to do the training and there was nothing to make his training mandatory.

On cross-examination, Mr. Schiavoni confirmed that he had a background in adult education, but not in education administration. He stated that he only offered suggestions during the staffing process and that, as the chief staffing officer, Dr. Morton had the ability to make the final decision, which was never challenged by anyone on the staffing team. He explained that Dr. Morton made all the final decisions and that the staffing team was there in a support capacity only. He stated that having no formal staffing process and having no documentation was not a best practice.

COMPLAINANTS' EXHIBITS

C-1	November 20, 2006 Highlights of Meeting with Administrators by respondent
C-3	June 9, 2007 email from respondent re: principal rating form
C-4	Principal Rating Form
C-5	Predicting Future Performance document
C-6	Typical Behavioral Interview Sequence
C-7	Interview Form
C-8	Rating Sheet Helen Morgan School Principal
C-9	Balanced Leadership Document
C-10	Assessment Interview Guide
C-11	June 15, 2007 memo from respondent to Staffing Team
C-12	Importance of Effective Staffing document
C-13	Sparta School District Administrative Recruiting Guide
C-14	Selection Criteria for High School Principal
C-15	Balanced Leadership document (also C-9)
C-16	Job Demands document
C-17	Rating Sheet Sparta High School Principal
C-18	Predicting Future Performance document (also C-5)
C-19	Typical Behavioral Interview Sequence (also C-6)
C-20	Follow up questions document
C-21	Selection Model document
C-22	Possible questions for SHS Principal Candidates document
C-23	Recruiting Guide

FINDINGS OF FACT

1. The respondents were all members of the Board at all times relevant to these complaints.

2. Respondent Mr. Schiavoni was Board President at all times relevant to these complaints.

3. Mr. Schiavoni is not currently a member of the Board.

4. On October 12, 2006, the President, Vice-President, Secretary and Treasurer of the Sparta Administrators' Association submitted a memorandum to Dr. Morton regarding their concerns with the Board.

5. On November 2, 2006, Dr. Morton and Board members Sullivan and Schiavoni attended a meeting with the President, Vice-President, Secretary and Treasurer of the Sparta Administrators' Association to address the concerns that were raised in the October 12, 2006 memorandum.

6. Mr. Schiavoni prepared a document summarizing what occurred at the November 2, 2006 meeting.

7. Mr. Schiavoni prepared a series of staffing document packets to be used in the hiring process for administrative staff positions. The staffing packets consisted of several documents including rating forms, interview forms, rating sheets, an assessment interview guide, an administrative recruiting guide, selection criteria, a list of interview questions, a general recruiting guide and a "white paper" entitled "Predicting Future Performance Based on Past Behavior." (Exhibits C-3 through C-23)

8. The staffing process for administrative staff positions developed by Mr. Schiavoni was adopted by the Board at its July 17, 2006 meeting.

9. The principal of the Helen Morgan Elementary School submitted a letter of resignation dated April 20, 2007.

10. At its April 25, 2007 meeting, the Board accepted the resignation of the Helen Morgan Principal, which was effective June 30, 2007.

11. The first meeting of the staffing team for the Helen Morgan Principal position was held on May 15, 2007. Mr. Schiavoni and Ms. Curcio were on the staffing team.

12. On May 18, 2007 the position was posted and an ad was placed in the Star Ledger on May 22, 2007.

13. June 1, 2007 was the deadline for submission of applications, and the staffing team met on that day.

14. Mr. Schiavoni and Ms. Curcio took the resumes out of the district to review them.

15. Mr. Schiavoni wrote the questions for the interview process for the Helen Morgan Principal position.

16. At the June 11, 2007 Board meeting, the Board was given an update on the progress on the hiring of the Helen Morgan Principal and notified that the staffing team was ready to recommend four candidates.

17. At the June 21, 2007 meeting, a candidate was selected.

18. The candidate did not begin employment in the district until the end of August 2007.

19. Mr. Schiavoni trained the staffing team for the High School Principal position in the staffing process adopted by the Board for the hiring of administrative staff positions. Mr. Schiavoni was not on the staffing team for the High School Principal position.

ANALYSIS[13]

The Commission notes that, pursuant to N.J.S.A. 18A:12-29b, the complainants bear the burden of factually proving any violations of the Code of Ethics for School Board Members. After consideration of the respondents' Motion to Dismiss C40-07, the Commission voted to dismiss the complaint in its entirety.[14] The Commission found that the complainants failed to establish that Mr. Schiavoni's memorandum summarizing a meeting could be considered administering the schools as defined at N.J.A.C. 6A:28-7.1.[15] Mr. Schiavoni merely summarized the November 2, 2006 meeting that he attended with another Board member and Dr. Morgan. He did not become directly involved in activities or functions that are the responsibility of school personnel or the day to day administration of the school district and he did not give a direct order to school personnel. Nor did the complainants establish that the content of the document failed to support and protect school personnel in the proper performance of their duties in violation of N.J.S.A. 18A:12-24.1(i).[16] Again, Mr. Schiavoni merely summarized what occurred at the November meeting. The document contained his opinion of what occurred, which does not establish that Mr. Schiavoni failed to support and protect school personnel in the proper performance of their duties. As noted above, the allegations in the complaint related to the memorandum itself and did not reach to the underlying events, which

[13] As counts one and three in the matter docketed as C45-07 were dismissed by the Commission in its April, 16, 2009 correspondence, this final decision addresses the remaining count two in C45-07 and the dismissal of C40-07.

[14] The Commission so voted during the public portion of its meeting.

[15] "Administer the schools" means that a member of the district board of education or a member of a charter school board of trustees has become directly involved in activities or functions that are the responsibility of school personnel or the day to day administration of the school district or charter school or has given a direct order to school personnel.

[16] See, Lauren Spicer v. John Della Vecchia et seq., C31-04 (February 22, 2005) where the Commission found that a board member had not violated N.J.S.A. 18A:12-24.1(i) when he openly expressed resentment toward the Superintendent. The Commission reasoned that it did not believe that purpose of N.J.S.A. 18A:12-24.1(i) was to allow the Commission to become involved in every dispute between a board president and the chief school administrator. (Id., at page 5)

appeared to be untimely pursuant to N.J.A.C. 6A:28-6.1(b). Thus, the complainants failed to establish that Mr. Schiavoni's memorandum violated N.J.S.A. 18A:12-24.1(j).

As to count two of C45-07, the complainants assert that Mr. Schiavoni's conduct violated N.J.S.A. 18A:12-24.1(c), (d) and (e). To prove a violation of the Code of Ethics for School Board Members, the complainants presented testimony from Ms. Dericks and Dr. Morton and Exhibits C-2 through C-23, which contain various documents created by Mr. Schiavoni in relation to the hiring process and an email and a memorandum relative thereto.

To find a violation of N.J.S.A. 18A:12-24.1(c), the Commission must first determine if Mr. Schiavoni's actions in his creation and development of the staffing process, in his participation in the interview process for the Helen Morgan School Principal and in his training of staffing team members in the staffing process was board action. N.J.S.A. 18A:12-24.1(c) provides:

> I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

In his testimony, Mr. Schiavoni testified that the series of staffing document packets that he created were adopted by the Board at its July 17, 2006 meeting. While Mr. Schiavoni admitted that he created interview questions for the Helen Morgan School Principal staffing team, he did so as a member of that staffing team. Both he and Ms. Curcio were the two Board members who were on that team. When he trained staffing team members, he trained them in the staffing process that had been adopted by the Board. Based on this evidence, the Commission finds that Mr. Schiavoni's action in relation to the staffing process was Board action.

Having found that Mr. Schiavoni's action was Board action, the Commission must next determine whether Mr. Schiavoni's Board action went beyond policy making, planning and appraisal. In reviewing the staffing documents that Mr. Schiavoni created, it is apparent to the Commission that Mr. Schiavoni went far beyond policy making, planning and appraisal. While the Board may have approved the staffing documents created by Mr. Schiavoni, the Commission finds that the creation of the documents and the content of the documents went beyond the making of policy, planning and appraisal. The documents ranged from a "white paper" on Predicting Future Performance Based on Past Behavior, which supported the use of behavioral questions in interviews, to specific forms such as an interview form and a candidate rating form, which included a detailed rating scale. The documents also included an assessment interview guide, which presented specific steps that should be taken in an interview and indicated how many minutes should be spent at each step. The documents included an Administrator Recruiting Guide that detailed the roles and responsibilities of the chief school administrator and Board members on a staffing team, and provided for a 10-phase recruitment process along with specific selection criteria. The documents were very specific, all encompassing and covered every step of the hiring process leaving very little

discretion to anyone utilizing them. While Mr. Schiavoni testified that neither the Superintendent nor any Assistant Superintendent had made an objection when he volunteered to come up with the staffing process, there is no evidence to show that he consulted with anyone in the administration during the development of these documents.

The Commission also finds that Mr. Schiavoni's Board actions went beyond policy making, planning and appraisal when he took candidate resumes for the position of the Helen Morgan Principal home to review over the weekend and then passed the resumes on to another Board member for her review. Previously in I/M/O Marlene Polinik, C45-06 (January 22, 2008), the Commission found that a board member violated N.J.S.A. 18A:12-24.1(c) when she went beyond policy making, planning and appraisal by actively attempting to locate candidate resumes while she was at the district office when the chief school administrator was absent. In this matter, the respondent's actions were more severe in that he took the resumes out of the district to review, and then exchanged the resumes with the other Board member on the staffing team. While the Superintendent was aware that Mr. Schiavoni had taken the resumes out of the district, the Commission notes that Mr. Schiavoni removed the resumes before the Superintendent had a chance to copy the resumes for the other members on the staffing team. Accordingly, the Commission finds that Mr. Schiavoni violated N.J.S.A. 18A:12-24.1(c).[17]

To find a violation of N.J.S.A. 18A:12-24.1(d), the Commission must first determine whether Mr. Schiavoni's actions constituted administering the schools. N.J.S.A. 18A:12-24.1(d) provides:

> I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

"Administer the school" means, in part, that a board member has become directly involved in activities or functions that are the responsibility of school personnel. See, N.J.A.C. 6A:28-7.1. Dr. Morton credibly testified that virtually every step of the interview process for the Helen Morgan School Principal position was controlled by Mr. Schiavoni who would not allow Dr. Morton to continue any aspect of the hiring process without his approval. Dr. Morton further testified that he was not allowed to do anything independent of Mr. Schiavoni. Dr. Morton did not even review the resumes of the candidates; it was Mr. Schiavoni who took the resumes home to review them. While Mr. Schiavoni testified that he was disappointed in the way Dr. Morton handled the resumes, by taking the only copy of the resumes out of the district for review, Mr. Schiavoni became directly involved in a function that was the responsibility of Dr. Morton. Dr. Morton testified that Mr. Schiavoni wrote the questions for the interview of the Helen Morgan School Principal, directed the interview process and analyzed which candidates were the best candidates. While Mr. Schiavoni testified that, as chief staffing office, Dr.

[17] Since the Commission has found that Mr. Schiavoni took Board action that went beyond policy making, planning and appraisal, it will not reach to whether Mr. Schiavoni failed to help frame policies and plans only after the Board consulted those who would be affected by them.

Morton had the ability to use or not use the questions, Mr. Schiavoni's overall conduct in relation to the interview shows that Mr. Schiavoni administered the schools and became directly involved in a function that was the responsibility of the Superintendent. The evidence also shows that Mr. Schiavoni assumed the responsibilities of the Superintendent when he prepared a detailed and all-encompassing staffing process without input from the Superintendent, and when he controlled the role of the Superintendent in the hiring process for the Helen Morgan School Principal position. Accordingly, the Commission finds that Mr. Schiavoni violated N.J.S.A. 18A:12-24.1(d).[18]

To find a violation of N.J.S.A. 18A:12-24.1(e), the Commission must first determine whether Mr. Schiavoni's action in relation to the hiring process was private action. N.J.S.A. 18A:12-24.1(e) provides:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

"Private action" is defined, in part, as action taken by a board member that is beyond the scope of the duties and responsibilities of that board member. See, N.J.A.C. 6A:28-7.1. Here, the Commission has already determined that Mr. Schiavoni's action was Board action. Previously in Marc Sovelove v. Paul Breda, C49-05 (September 26, 2006), the Commission found that an action of a board member that has been found to be Board action cannot also be private action. Accordingly, the Commission finds that the complainants failed to carry their burden to show that Mr. Schiavoni's action was private action in violation of N.J.S.A. 18A:12-24.1(e).

DECISION

The Commission finds that respondent Michael Schiavoni violated N.J.S.A. 18A:12-24.1(c) and (d) when he took Board action that went beyond policy making, planning and appraisal and administered the schools by creating and developing a detailed and all-encompassing staffing process, and by becoming directly involved in functions and responsibilities of the Superintendent during the staffing process for the Helen Morgan School Principal position, as set forth in the complaint docketed as C45-07. All other allegations in the matters docketed as C40-07 and C45-07 are dismissed.

PENALTY

The Commission recommends that respondent Michael Schiavoni be censured for violating N.J.A.C. 18A:12-24.1(c) and (d) of the Code of Ethics for School Board Members. In so doing, the Commission finds instructive I/M/O Doris Graves, Pleasantville Board of Education, C47-05 (May 27, 2008), approved by Commissioner,

[18] Since the Commission has found that Mr. Schiavoni failed to carry out his responsibility not to administer the schools, it will not reach to whether Mr. Schiavoni failed to see that the schools were will run in concert with his fellow Board members.

July 10, 2008, wherein a board member was found to have violated N.J.S.A. 18A:12-24.1(d) when she spoke with the district's facilities coordinator and later appeared at a board personnel meeting regarding a personnel action affecting her cousin by marriage. In that matter, the Commission recommended that the board member be censured for a single violation of the Code of Ethics for School Board Members. The Commission also finds instructive I/M/O Marlene Polinik, C45-06 (January 22, 2008). Therein, the Commission recommended the penalty of censure for a single violation of N.J.S.A. 18A:12-24.1(c) when the board member went beyond policy making, planning and appraisal in the review of candidate resumes. Similarly, here where the respondent was found to have violated both N.J.A.C. 18A:12-24.1(c) and (d), the Commission finds that the penalty of a censure is appropriate.

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.

Paul C. Garbarini

Paul C. Garbarini
Chairperson
4/29/09

Mailing Date: April 29, 2009

Resolution Adopting Decision – C40-07 & C45-07 Consolidated

Whereas, the School Ethics Commission has considered the pleadings, testimony and all documentary evidence brought to the record in these consolidated matters; and

Whereas, at it meeting on March 24, 2009, the Commission found that respondent Michael Schiavoni violated N.J.A.C. 18A:12-24.1(d) and (e) of the Code of Ethics for School Board Members; and

Whereas, at its meeting on April 28, 2009, the Commission reconsidered its March 24, 2009 vote and found that respondent Michael Schiavoni violated N.J.A.C. 18A:12-24.1(c) and (d) of the Code of Ethics for School Board Members; and

Whereas, the Commission dismissed all other allegations that respondents violated the Code of Ethics of School Board Members, as set forth in the complaints; and

Whereas, the Commission found that censure is the appropriate penalty to recommend to the Commissioner of Education in these consolidated matters;

Now Therefore Be It Resolved, that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.[19]

Paul C. Garbarini/jb
Paul C. Garbarini, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at it public meeting on April 28, 2009.

Joanne Boyle, Executive Director

PCG/JB/MET/decisions/Sparta II

[19] Commissioner Robert Copeland was recused from participating in the hearing and determination of these consolidated matters.

298-09

ROBERT JEANNETTE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – formerly a non-tenured custodian in the respondent's district – appealed his termination from employment for failure to take a medical examination after being out of work on sick leave for more than four months. The Board contended that it was within its rights to require this examination under the circumstances, and petitioner's failure to submit to the exam constituted insubordination. The Board further argued that the Commissioner does not have jurisdiction over this matter, as it does not arise under the school laws.

The ALJ found that: the petitioner was employed as a non-tenured custodian, a position not governed by the provisions of *N.J.S.A.* 18A:16-2, which provides that a board of education may require an employee to undergo a physical exam; petitioner's employment was governed by the terms and conditions contained in the Collective Negotiations Agreement (CNA); pursuant to the CNA, custodians are contractual employees serving under renewable one year contracts, and may be dismissed for just cause in accordance with *N.J.S.A.* 18A:17-3; and petitioner's refusal to take the physical exam was insubordinate. The ALJ affirmed the action of the Board and ordered petitioner's employment terminated.

Upon independent review and consideration, the Commissioner rejected the Initial Decision, concurring with the respondent that petitioner's claim arises under the provisions of the CNA between the Board and the West Essex Custodian/Maintenance Association rather than under *N.J.S.A.* 18A:16-2. In so determining, the Commissioner additionally noted that the ALJ erroneously construed *N.J.S.A.* 18A:16-2 as applying solely to tenured employees, and that *N.J.S.A.* 18A:17-3 is inapplicable because petitioner was not a tenured employee. Accordingly, the Commissioner dismissed the petition as beyond the scope of the Commissioner's jurisdiction.

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 16, 2009

OAL DKT. NO. EDU 7116-08
AGENCY DKT. NO. 119-5/08

ROBERT JEANNETTE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner's exceptions and the reply thereto by the Board of Education (Board), both duly filed pursuant to *N.J.A.C.* 1:1-18.4.

In his exceptions, petitioner preliminarily observes that the Administrative Law Judge (ALJ) erred in improperly limiting the scope of *N.J.S.A.* 18A:16-2 to tenured employees, when the language of the statute contains no such limitation (Petitioner's Exceptions at 1-2); and in referencing two inapplicable statutes, *N.J.S.A.* 18A:17-3 – which governs acquisition of tenure by custodians and establishes the dismissal proceedings to which they are entitled once tenured – and *N.J.S.A.* 18A:6-5 *et al.* – which prohibits inquiry into a prospective employee's religious belief and which the ALJ likely meant as the equally inapplicable *N.J.S.A.* 18A:6-10 *et seq.*, the Tenure Employees Hearing Law (*Id.* at 2). Petitioner then contends – substantially recasting and reiterating the arguments of his post-hearing brief – that the ALJ erred in concluding that: 1) the district superintendent was authorized to order petitioner to undergo a medical examination, when *N.J.S.A.* 18A:16-2 clearly places such authority solely with the Board;

2) petitioner was insubordinate in refusing to take the required examination, when the superintendent's directive to do so was invalid on its face and petitioner nonetheless made good faith attempts at compliance; and 3) the Board did not act arbitrarily or unreasonably in terminating petitioner's employment on grounds of insubordination, when, in fact, the Board's conclusion that petitioner was guilty of insubordination was patently unreasonable under the circumstances. (*Id.* at 4-10) Finally, petitioner objects to the ALJ's statement (at 8) that petitioner had "other viable alternatives, such as submitting a rebuttal medical report," since, according to petitioner, the record contains no support for this assertion, and it would have been pointless in any event to obtain an additional report when the Board did not accept or believe the medical information petitioner had been providing all along. (*Id.* at 9)

In reply, the Board reiterates its stance that the Commissioner does not have jurisdiction over this matter, since it does not arise under the school laws. (Board's Reply at 1-4) The Board further asserts that the Initial Decision was correct in finding that the superintendent was authorized under the applicable collective agreement to compel petitioner to undergo a medical examination,[1] and that petitioner's refusal to do so constituted insubordination. (*Id.* at 4-5) Finally, the Board renews its contention before the OAL that – even if *N.J.S.A.* 18A:16-2 were applicable to this matter (which it is not) and the Commissioner did have jurisdiction to decide petitioner's claim (which she does not) – the Board nonetheless complied with the statute through its affirmation of the superintendent's action by conducting a hearing and subsequently voting to terminate petitioner's employment, and petitioner would nonetheless have no entitlement to the relief he seeks because, as a nontenured employee, he had no right to

[1] The Board notes that the ALJ did *not* make a finding, as suggested by petitioner on exception, that the superintendent was so authorized by *N.J.S.A.* 18A:16-2. (Board's Reply at 4)

re-employment upon expiration of his one-year contract on June 30, 2008 and he presented no evidence that he would have been able to return to work before that date. (*Id.* at 5-7)

Upon review and consideration, the Commissioner finds that she must reject the Initial Decision.

As a preliminary matter, the Commissioner notes that petitioner is correct in his assertions regarding both the ALJ's construction of *N.J.S.A.* 18A:16-2 as applicable solely to tenured employees – when the statute makes no such distinction – and the relevance to this matter of *N.J.S.A.* 18A:17-3 and *N.J.S.A.*18A:6-10 *et seq.* (incorrectly cited as *N.J.S.A.* 18A:6-5 *et al.*) – which pertain specifically to tenured employees, whereas petitioner is undisputedly nontenured.[2]

However, the Commissioner's primary concern with the Initial Decision is of a more fundamental nature. Although petitioner has attempted to cast his claim as a dispute under the school laws – and the ALJ has reviewed it without addressing the Board's consistent arguments to the contrary and despite the agency's notation of such arguments upon transmittal of this matter to the OAL – the Commissioner concurs with the Board that such claim, in fact, arises under neither *N.J.S.A.* 18A:16-2 and its implementing rules nor the arbitrary and unreasonable standard of *Kopera v. West Orange Bd. of Ed.* 60 *N.J. Super.* 288 (App. Div. 1960), but rather – as effectively recognized by the ALJ in her findings and conclusions on the merits – under the provisions of the Collective Negotiations Agreement (CNA) between the Board and the West Essex Custodian/Maintenance Association (Joint Exhibit O).

[2] The Commissioner additionally notes that the ALJ's summation of the parties' positions (at 6-7) is somewhat misleading, in that petitioner does not, as suggested, base his rejection of the superintendent's authority to order an exam under *N.J.S.A.* 18A:16-2 on the fact that petitioner was on medical leave when the order was given, nor does the Board base its argument that *N.J.S.A.* 18A:16-2 is inapplicable in this matter on petitioner's nontenured status.

The record before the Commissioner is abundantly clear that petitioner was not directed to undergo a medical examination as an employee causing concern because he showed signs of deviation from normal mental or physical health such that his fitness to serve safely and appropriately in the school environment was called into question – as *N.J.S.A.* 18A:16-2 contemplates on its face and has been construed by the courts;[3] rather, such directive plainly arose in furtherance of the Superintendent's attempt to verify, pursuant to Article 10A of the CNA, the legitimacy and scope of petitioner's claimed inability to work due to continuing illness, following what was at that point already a nearly four-month absence from employment under circumstances giving rise to a suspicion of abuse. It is likewise clear that the Board moved to terminate petitioner's employment based on a finding that his refusal to submit to the directed examination was an act of insubordination constituting good cause, pursuant to Article 2M of the CNA, for dismissal prior to the expiration of his individual employment contract.

In light of the above, the Commissioner finds that *N.J.S.A.* 18A:16-2 does not apply in this matter and that resolution of the parties' dispute necessarily turns on the extent of their respective rights, and the propriety of their respective actions, as employer and employee under a collectively negotiated agreement – determinations which the Commissioner of Education has no authority to make because such issues do not arise under the school laws notwithstanding that they occur in a school setting.

[3] See, for example, *Kochman v. Keansburg Bd. of Ed.*, 124 *N.J. Super.* 203, 212 (Ch. Div. 1973) and *Gish v. Bd. of Ed. of Paramus*, 145 *N.J. Super.* 96, 104 (App. Div. 1976), certification denied 74 *N.J.* 251 (1977), writ of certiorari denied 434 *U.S.* 879 (1977). Then as now, the statute pertained to "employees," not solely to teaching staff members, and to both physical and psychiatric exams.

Accordingly, the Initial Decision of the OAL – dismissing petitioner's claim on the merits – is rejected for the reasons herein set forth, and the petition of appeal is instead dismissed as beyond the scope of the Commissioner's jurisdiction.[4]

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 9|16|09

Date of Mailing: 9|16|09

[4] In so holding, the Commissioner stresses that her rejection of the Initial Decision is based solely on jurisdictional grounds, and that she does not reach the ALJ's finding (at 7-8) that termination of petitioner's employment was authorized and warranted under the CNA.

[5] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 07116-08
AGENCY DKT. NO. 119-5/08

ROBERT JEANNETTE,

Petitioner,

v.

BOARD OF EDUCATION OF THE WEST ESSEX REGIONAL SCHOOL DISTRICT, ESSEX COUNTY,

Respondent.

Gregory T. Syrek, Esq., for petitioner (Bucceri and Pincus, attorneys)

Brent Pohlman, Esq., for respondent (Fogarty and Hara, attorneys)

Record Closed: March 26, 2009 Decided: August 7, 2009

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Robert Jeannette, appeals his termination from the West Essex Regional School (respondent) effective March 24, 2008. The respondent terminated the petitioner for failure to take a medical examination.

Petitioner timely filed a request for hearing and on May 29, 2008, the Department of Education transmitted the matter to the Office of Administrative Law for

hearing as a contested case. Hearings were held and concluded on February 4 and 5, 2009. Post-hearing submissions were filed on March 26, 2009, at which time the record closed. At the request of the undersigned the time for issuance of the Initial Decision was extended until August 10, 2009.

STIPULATED FACTS

The parties have stipulated in J-1 the following **FACTS**:

1. On or about January 8, 2001, petitioner was hired by the respondent to serve as the assistant supervisor of buildings and grounds. (Exhibit A).*

2. On or about July 1, 2004, petitioner was promoted by respondent to the position of supervisor of buildings and grounds. (Exhibit B).

3. On or about August 13, 2007, the respondent acted to abolish the position of buildings and grounds supervisor, effective October 12, 2007. (Exhibit C).

4. On or about August 13, 2007, respondent acted to terminate the petitioner's employment contract for the position of supervisor of buildings and grounds, pursuant to the sixty (60) day notice provision contained in the petitioner's 2007-2008 employment contract. (Exhibit D).

5. On or about October 4, 2007, the petitioner informed the respondent that he was interested in the head custodian position at West Essex Senior High School. (Exhibit E).

6. On or about October 8, 2007, the respondent acted to appoint the petitioner to the position of full-time custodian, effective October 15, 2007. (Exhibit F).

* The parties further agreed to the entry of Exhibit A – O into evidence.

7. On or about October 9, 2007, the petitioner went out on sick leave. (Exhibit G).

8. On or about October 17, 2007, the petitioner provided the respondent with a letter from Lina Shihibaddin, M.D., stating that the petitioner was a patient of Dr. Shihibaddin at that time, was under the medical care of and was seen weekly by Dr. Shihibaddin. (Exhibit H).

9. On or about December 19, 2007, respondent contacted petitioner to inquire as to his intentions regarding returning to work once he was physically capable of doing so. (Exhibit G).

10. On or about January 1, 2008, the respondent received a note from Dr. Shihibaddin stating that petitioner needed to be out on sick leave. (Exhibit I).

11. On or about January 18, 2008, the respondent sent a correspondence to the petitioner requesting a physician's note indicating why the petitioner was unable to fulfill the responsibilities of his position. (Exhibit J).

12. On or about January 31, 2008, the respondent contacted the petitioner and directed him to contact the school physician to arrange an appointment for a physical examination to further document his medical condition. (Exhibit K).

13. On or about February 20, 2008, the petitioner appeared for a physical examination at Mountainside Family Practice. Upon arriving at Mountainside Family Practice, the petitioner was asked to fill out five (5) forms:

    a. Authorization to disclose information to employer, school or other third party requesting information.

b. Authorization for release of information.

c. Consent for treatment, payment and health care services including admission and medical treatment authorization.

d. Mountainside Family Practice Associates' general consent and disclosure of health information.

e. Patient registration information. (Exhibit L).

14. On or about February 20, 2008, while at Mountainside Family Practice, the petitioner refused to provide the information requested in the above referenced forms. The petitioner left Mountainside Family Practice without undergoing an examination. (Exhibit L).

15. On or about March 13, 2008, the petitioner was informed by the superintendent of schools that he intended to recommend to the respondent that the petitioner be terminated for cause. The respondent's basis for terminating the petitioner's employment was that it was within the respondent's managerial prerogative to request that the petitioner verify his illness and that requesting that the petitioner be evaluated at Mountainside Family Practice was a reasonable measure to control an abuse of sick leave by an employee. (Exhibit M).

16. Petitioner attended the hearing before the respondent with a representative of his own choosing and was provided the opportunity to provide witnesses and evidence and to cross-examine any witnesses presented and make arguments on his own behalf. (Exhibit N).

17. On or about March 24, 2008, the respondent acted to terminate the petitioner's employment for cause based on alleged insubordination. (Exhibit N).

18. The respondent and the West Essex Custodian/Maintenance Association (hereinafter referred to as the "Association") are parties to a Collective

Negotiations Agreement (hereinafter referred to as the "CNA"). The Association is the majority representative for full-time and regular part-time members of the custodial staff, maintenance staff and grounds personnel. (Exhibit O).

19. Article II (M) of the CNA indicates that the CNA does not create any tenure rights in any of the employees covered by it. (Exhibit O).

20. Article X (A) of the CNA provides that an employee may be required to produce a doctor's certificate verifying the illness with respect to any sick days taken. (Exhibit O).

21. The forms included in Exhibit L were faxed to a representative of the petitioner.

22. A representative of the petitioner provided correspondence, dated February 21, 2008, to the respondent requesting that the respondent select a different physician to conduct the physical examination of the petitioner.

TESTIMONY

Petitioner confirmed that he was employed by the respondent as the assistant supervisor and, then, supervisor of buildings and grounds for some six years. On August 13, 2007, respondent informed him that his position was abolished and thus his employment as supervisor terminated, effective October 12, 2007.

Petitioner further acknowledged that on October 4, 2007, he wrote to the respondent seeking a position as head custodian at the Senior High School. Exhibit E. On October 8, 2007, respondent appointed him custodian, not the head custodian position that he had applied for. Subsequently, he became ill. He took sick leave from October 9, 2007, until he was terminated. By letter dated October 17, 2007, his

physician submitted a letter verifying his sick leave. A second letter from the doctor was submitted on January 8, 2008. Exhibit I.

Petitioner agrees that the superintendent of West Essex Regional School District advised him that further documentation of his medical leave was needed. He was asked to bring a statement from his treating physician along with the results of any laboratory and diagnostic testing. Thus, petitioner was requested to contact the school's physician and schedule an appointment with an outside vendor for a physical examination.

On February 20, 2008, he appeared for the physical at the Board's doctors. He was asked to sign a release form among other forms. He was concerned about disclosing his confidential medical information, thus he refused to sign the document. He asked about one form in particular and was told to sign the form. He requested that the form be faxed to his lawyer for review and it was. He claims that he was advised by the nurse that he needed to sign the forms and if he failed to, the matter would be handled by school superintendent. He left the office without signing the document or being examined. The next day he requested that he be examined by another doctor.

On March 13, 2007, he was advised that the superintendent of schools had recommended that he be terminated on grounds of insubordination. Exhibit M. On March 24, 2008, the Board accepted the superintendent's recommendation and immediately terminated petitioner "for cause for conduct of insubordination." Exhibit N.

FINDINGS AND CONCLUSIONS

Petitioner contends that since he was out on medical leave, the superintendent did not have the authority to require him to undergo a physical examination. Pursuant to N.J.S.A. 18A:16-2(a) only the board of education can require an individual physical examination of a school employee. Garrison v. Commercial Twp. Bd. of Educ., 1971 S.L.D. 13.

Respondent argues that N.J.S.A. 18A:16-2(a) is inapplicable as the petitioner is not a tenured employee. Petitioner was a custodian and the terms and conditions of his employment is governed by the Collective Negotiations Agreement (CNA), which governs the terms and conditions of all custodians employed by the Board. Pursuant to Article II of the CNA, the Board is authorized to dismiss an employee for just cause in accordance with N.J.S.A. 18A:17-3. Further, pursuant to the CNA, custodians and those covered by the Agreement do not obtain any tenure rights. Indeed, since this matter is governed by the CNA, and not N.J.S.A. 18A:16-2, the Board contends that the Commissioner does not have jurisdiction over the instant matter.

I **FIND** that at the time of his sick leave petitioner was employed by the respondent as a custodian. As a custodian, petitioner was a non-tenured employee and not governed by the provisions of N.J.S.A. 18A:16-2. The statute provides that a board of education may require an employee to undergo a physical examination. It does not authorize, implicitly or explicitly, the superintendent to order an employee to undergo a physical examination. Thus, the petitioner contends that the superintendent's directive is invalid.

I disagree and **FIND** that petitioner's employment is governed by the terms and conditions contained in the CNA. Pursuant the CNA, custodial and maintenance employees are contractual employees whose contracts are renewable annually. Further, said employees may be dismissed for just cause in accordance with N.J.S.A. 18A:17-3, which provides for the dismissal of a school janitor for neglect, misbehavior or other offense pursuant to the provisions of N.J.S.A. 18A:6-5 et al.

In this matter, petitioner was on medical leave for five (5) months. After failing to present sufficient medical details as to nature of his illness surrounding his medical leave, the superintendent correctly sent him for a physical by the Board's physician. Petitioner refused to complete the medical forms, thus precluding a medical examination. Petitioner's only justification for his refusal to complete the medical forms is that he believed that the forms had predetermined that he should return to work before the doctor's examination.

I **FIND** and **CONCLUDE** that petitioner's refusal to take the examination was insubordinate. Petitioner was directed by the superintendent to take a physical and he refused without just cause. Petitioner had other viable alternatives, such as submitting a rebuttal medical report, if he believed that his illness precluded his return to work.

ORDER

I hereby **AFFIRM** the action of the respondent and **ORDER** petitioner's employment terminated for refusing to take a medical examination.

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

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

8/7/09
DATE

IRENE JONES, ALJ

Date Received at Agency: 8/7/09

Date Mailed to Parties: 8/7/09

sej

#300-09E

300-09

OAL DKT. NO. EDU 9873-09
AGENCY DKT. NO. 226-9/09

A.A. on behalf of minor children, H.A., R.A. and R.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION ON
RESPONDENT.	:	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 September 10, 2009 – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner adopts the recommended order denying emergent relief as she concurs with the ALJ – for the reasons clearly stated on the digital recording and in his Order – that petitioner has not satisfied her burden of establishing any of the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the instant application for emergent relief if hereby denied. This matter is being returned to the OAL for such further action as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/16/09

Date of Mailing: 9/17/09

* 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- EMERGENT RELIEF
OAL DKT. NO. EDU 9873-09
AGENCY DKT. NO. 226-9/09

A.A. O/B/O MINOR CHILDREN H.A.,
R.A. AND R.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,
Respondent.

Paige Butler, Esq. for petitioner (Law Offices of Rosemarie Arnold, attorneys)

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

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

STATEMENT OF THE CASE

Petitioner seeks an Order for Emergent Relief directing respondent the Board of Education of the Township of Teaneck, County of Bergen (Board) to temporarily arrange for the bus which transports her three children to an out-of-district non-public school to stop and pick up and discharge the children in proximity of her house.

PROCEDURAL HISTORY

Petitioner originally filed a pleading in the Superior Court, Chancery Division. On September 3, 2009, the Honorable Robert T. Contillo determined that he lacked jurisdiction and transferred the matter to the Commissioner of Education. The Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter on September 3, 2009, 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 emergent relief on September 10, 2009.

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.

From the certifications and arguments of the parties, the following has been presented. Petitioner has four children, three of whom are age five, age five and age seven and who attend Ben Porat Yosef School, a non-public school, in Paramus, New Jersey. Pursuant to N.J.S.A. 18A:39-1 et. seq., the Board is required to make transportation available to children who attend non-public schools not more than twenty miles from their homes, as it provides transportation to students attending the Board's own schools. The Board is transporting the three children to Ben Porat Yosef in Paramus as of September 8, 2009, and has designated a bus stop for the children one block from their home in Teaneck.

On or about July 24, 2009, A.A., the mother of the children, was catastrophically injured as a result of a motor vehicle accident, having sustained injuries including but not limited to a grave injury to her right leg, rendering her temporarily disabled and unable to walk. Since the accident, she has had multiple surgeries, the latest of which was on August 28, 2009. She is still unable to walk including walking her three children or to move in a wheel chair all the way to their designated bus stop. Although the Petition alleges that the bus stop is four blocks from petitioner's house, the proofs show that it is only one block away from the intersection of Sussex Road and Forest Avenue. The house is the second from that intersection on Forest Avenue. Petitioner can, by wheelchair, come outside her house while holding her toddler and move a short distance. Her physician had advised on September 2, 2009, that petitioner will not be able to walk her children to their bus stop for ninety days. His note incorrectly assumed that the walk was two blocks.

The Board has rejected petitioner's request to temporarily move the bus stop for her children to the street intersection of Forest Avenue and Sussex Road two doors from her home advising that it gets many, many similar requests on a constant basis from pregnant mothers and others with a variety of physical ailments. It has consistently rejected such requests because the bus routes are based on, not only geography, but also on a careful analysis of the cost of the routes. Given the number of requests received from parents seeking a change in the bus route in any given year, the Board argues that a policy allowing for adjustments in the route upon the request of a parent would have an adverse impact on the Board's transportation budget.

Additionally, without a uniform policy, it would be difficult to make bus stop adjustments on a case by case basis, and an unwieldy slippery slope would be created engendering more litigation.

Petitioner, through counsel, has represented that her children's bus travels along Sussex Road on its designated route. It passes a residential intersection two doors from petitioner's house. Contact has been made with the bus company, and petitioner has advised that the company would be willing and able to have its bus stop before or after this intersection without changing its route, so long as it received permission from the Board.

Petitioner asserts that she has been unsuccessful in attempts to make alternate arrangements to have the children walked to the bus stop. As a result of the accident, petitioner has been unable to work, leaving her husband as the sole wage-earner. His job requires him to be out of Teaneck at the school pickup and return times. Petitioner's mother, due to medical reasons, is unable to assist. Petitioner has not been able to locate any neighbors who are willing to walk the children. Due to the loss of petitioner's income, hiring paid chaperones for the children would be burdensome.

I **CONCLUDE** that the emergent relief requested by petitioner should not be granted.

I **CONCLUDE** that there would not be irreparable harm if the relief is not granted. Although there allegedly is no adult available to walk the children all the way to the bus stop, it appears from the representations that the stop is one block, albeit a long block, from petitioner's home. Petitioner is in rehabilitation and has some, although limited, mobility with the use of a wheel chair. It would appear that petitioner should be able to access with her wheel chair, even with her toddler, the intersection of Forest and Sussex and the distance of a few houses toward the bus stop. She would then be able to observe the children as they walk the remainder of one block to the bus stop, that, from the best proofs submitted, would not require the children to cross any additional streets. Accordingly, the concern for the safety of the children is minimized.

With regard to whether the legal right underlying petitioner's claim is settled, I agree with the Board that the Americans with Disabilities Act upon which petitioner relies, does not apply, as the disabled individual is the mother and not the children. The Board is entitled to wide discretion in setting policy within the school district, and that certainly includes student transportation. There is no law requiring portal-to-portal transportation for non-special education students. The Board is, however, foreclosed from engaging in conduct which is demonstrated to be patently arbitrary, capricious or unreasonable. Kopera v. West Orange, Bd. of Educ., 60 N.J.Super. 288, 294 (App. Div. 1960). The Board's position here, under the unique set of facts and the common sense of the situation, does not appear to be patently arbitrary, capricious or unreasonable. It is true that the bus already passes within sight of petitioner's house, and the accommodation for a temporary pickup and discharge would not disrupt or alter the designated route, and any additional time expended would be minimal. There was no proof that the additional stop would be more costly to the Board. There have been many requests of the Board to relocate a bus route because of various family medical conditions involving the caregiver. One can distinguish this situation, not from the nature of the medical condition of petitioner, but rather because the requested accommodation could be made without altering the route. In balancing the effect of an exception to the Board's policy of not moving stops and its concern with regard to the many similar requests it receives, against the children having to walk but one block while petitioner can at least observe them with minimal physical effort, I cannot conclude that the Board's position is arbitrary capricious or unreasonable. Therefore, I instead **CONCLUDE** that the law is not settled in petitioner's favor. I further **CONCLUDE** that the petitioner does not have a likelihood of prevailing on the merits of the underlying claim and, when the equities and interests of the parties are balanced, the petitioner will not suffer greater harm than the Board will suffer if the requested relief is not granted. Were the distance in question considerably greater preventing petitioner with limited mobility to at least observe the children, the equities might balance otherwise.

ORDER

It is hereby **ORDERED** that petitioner's application for emergent relief be **DENIED.**

It is further hereby **ORDERED** that counsel for petitioner notify this tribunal within five days as to whether petitioner seeks to continue this matter to a plenary hearing. If so, a hearing date will be established.

This order on application for emergent 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.

9/10/09

DATE

JESSE H. STRAUSS, ALJ

301-01

#301-09L

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

JON S. CORZINE
Governor

LUCILLE E. DAVY
Commissioner

September 16, 2009

Arsen Zartarian, Esq.
The Newark Public Schools
Office of General Counsel
2 Cedar Street
Newark, New Jersey 07102-3091

Eugene G. Liss, Esq.
94 Main Street, 1st floor
Little Falls, NJ 07424

Dear Counsel:

Upon review of the record in *In the Matter of the Tenure Hearing of Alfred Morgan, State-Operated School District of the City of Newark, Essex County,* Agency Dkt. No. 208-8/09, I note respondent's September 1, 2009 representation that, due to a change in residence, he did not receive the charges filed against him and hence was unable to reply to them prior to their certification to the Commissioner; I further note the District's September 9, 2009 letter consenting to withdrawal of its charges, without prejudice, on this basis.

Under the circumstances, I agree that further proceedings in this matter would not be appropriate. Accordingly, I approve the District's withdrawal of its charges and dismiss the matter as a contested case before me, without prejudice to the District's ability to recertify such charges in accordance with applicable law, after consideration of respondent's reply to them.

Sincerely,

Lucille E. Davy
Commissioner

c: Executive County Superintendent
State Law Library ✓

#302-09E

302-09

OAL DKT. NO. EDU 8425-09
AGENCY DKT. NO. 164-7/09

ANTONIO N. LEWIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this matter – including the audio recording of proceedings at the Office of Administrative Law (OAL) – and the recommended order of the Administrative Law Judge (ALJ) have been reviewed.[1]

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). In so holding with respect to irreparable harm, the Commissioner concurs with the ALJ that petitioner brought forth no support for his claims of financial harm and damage to his reputation; moreover, she also rejects petitioner's characterization of the action of the Board of Education (Board) as a violation of the tenure statutes so deliberate, flagrant and egregious that its mere commission must be deemed irreparable injury. To the contrary, it is evident from the Board's oral argument at the OAL that this matter is not, as petitioner suggests, a simple case of the Board conceding that petitioner is a tenured employee but refusing to honor his rights notwithstanding the law; rather, while the Board does not dispute that petitioner acquired tenure as a principal in the district, it clearly *does* dispute – in view of the unique circumstances of his subsequent employment – that petitioner necessarily

[1] Petitioner submitted exceptions to the ALJ's recommended order; however, neither these nor the Board's subsequent reply were considered in rendering the within decision, since applicable rules make no provision for such exceptions.

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 Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

AUGUST 27, 2009
DATE

RONALD W. REBA, ALJ

/cad

#303-09E

OAL DKT. NO. EDU 8866-09
AGENCY DKT. NO. 215-8/09

J.O. AND M.O., ON BEHALF OF MINOR CHILD, E.O.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION ON APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this matter – including the audio 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 Administrative Law Judge (ALJ) that, in light of the present posture of petitioners' pending due process petition, emergent relief is not appropriately granted in this matter. In so holding, however, the Commissioner notes that – at the time this matter was filed and transmitted to the OAL – petitioners' due process petition had not yet been transmitted for hearing, so that petitioners had no ability to invoke discovery rules when faced with the Board's silence in response to their repeated requests for their child's student records; under these circumstances, it was not inappropriate for petitioners to seek interim relief – that is, timely access to such records in accordance with law – through the Commissioner of Education, who unquestionably has jurisdiction over this issue pursuant to *N.J.A.C.* 6A:32-7.1(g)1 and *N.J.A.C.* 6A:32-7.7. (See also *N.J.A.C.* 6A:14-1.2(b)9 and *N.J.A.C.* 6A:14-2.9) [1]

[1] This is so notwithstanding that the referenced rules were not cited in petitioners' papers.

Accordingly, with the above clarification, the Order of the ALJ – DENYING petitioner's application – is adopted as the final decision in this emergent matter. In that the present decision fully disposes of the dispute between the parties in so far as it arises under the school laws, no further proceedings are necessary in this matter, which is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 9/16/09

Date of Mailing: 9/17/09

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON

EMERGENT RELIEF

OAL DKT. NO. EDU 8866-09

AGENCY DKT. NO. 215-8/09

J.O. AND M.O. ON BEHALF OF E.O.,

Petitioners,

v.

CHERRY HILL TOWNSHIP BOARD OF EDUCATION,

Respondent.

Jerry Tanenbaum, Esq., for petitioners (Loughlin & Latimer, attorneys)

Russell Weiss, Esq., for respondent (Parker McCay, attorneys)

Record Closed: September 2, 2009 Decided: September 4, 2009

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

Petitioners J.O. and M.O. on behalf of E.O. seek emergency relief, pursuant to N.J.A.C. 6A:14-2.7 and N.J.A.C. 1:6A-12.1. E.O. is a student whom the Cherry Hill School District found eligible for special education and related services pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400, et seq. and related state and federal law. The family resides in Cherry Hill, New Jersey and, therefore, the respondent Cherry Hill Township School Board (Board) is responsible for ensuring that E.O. receives a free and appropriate public education.

Petitioners filed a petition for due process with the Office of Special Education Programs, New Jersey State Department of Education. In connection therewith, the petitioners sought to compel the production of documents pursuant to IDEA, FERPA and N.J.A.C. 1:1-10 et seq. On July 24, 2009, petitioners, through counsel as their agent, provided the district with a written request for all records, notes and correspondence concerning E.O. The documents or timelines for the production of the documents were to be provided within ten days. Petitioners' counsel followed up their request for documents with telephone calls and emails to Paul Kalac, Esq., whom they knew represented the Board on other occasions. When Mr. Tanenbaum received a response from Mr. Kalac on August 17, 2009, Kalac claimed that the parents themselves needed to request the information and sign a release. Although Mr. Tanenbaum sent Mr. Kalac a certification that they were requesting the documents, petitioners still did not get the documents or a schedule of when the documents might be forthcoming. Mr. Tanenbaum complained to OSEP and asked where to take the dispute in light of the fact that an administrative law judge had not yet been assigned to the due process petition. A member of the OSEP staff advised Mr. Tanenbaum to file a petition with the Commissioner of Education. On August 26, 2009, petitioners filed a motion for emergency relief with the Commissioner seeking to compel the production of documents. They request an order that the Board comply with the full scope of the document request within four days. They further seek attorney fees and costs associated with the filing of the motion.

The Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) where it was filed on August 27, 2009. On September 1, 2009, Mr. Kalac, on behalf of respondents, filed a response to the motion setting forth "those records were released to the parents on Friday, August 28, 2009, so, from the District's point of view, the request for relief is moot." In fact, no documents were released to the parents or to Mr. Tanenbaum on August 28, 2009. Oral argument on the request for emergency relief was heard on September 2, 2009. Just before the start of the oral argument at the OAL, respondent finally provided documents to Mr. Tanenbaum. It was not known at the time of the writing of this order whether the documents fully complied with the request since Mr. Tanenbaum had not had a chance

to review the documents. I have considered the parties' pleadings, briefs and oral argument.

CONCLUSIONS OF LAW

Petitioners seek emergent relief from the Commissioner of Education because the District's failure to comply with and respond to their discovery request is a violation of IDEA, FERPA and N.J.A.C. 1:1-10 et seq. The problem with the emergent relief request however, is that petitioners have not set forth any claim under the education statutes and regulations that would give the Commissioner of Education jurisdiction over this matter. The Commissioner of the Department of Education ("Commissioner") shall hear and decide all disputes arising under the school laws. N.J.S.A. 18A:6-9; N.J.A.C. 6A:2-1.2. However, the State Director of the Office of Special Education Programs ("OSEP") determines whether a local education agency has violated the requirements of state and federal laws regarding the provision of special education and related services. N.J.A.C. 6A:14-9.2. The present case is a discovery motion on a pending due process claim. There is no dispute arising under the school laws.

In a due process hearing, the decision of the administrative law judge ("ALJ") is final. N.J.A.C. 6A:14-2.7(l). The finality of the decisions respectively reached by OSEP and OAL is "entirely consistent with the longstanding general absence of the Commissioner and State Board [of Education] from adjudication of special education disputes despite the fact that these arise under State statutes and regulations and are inarguably controversies and disputes arising under the school laws. Lenape Reg'l High Sch. Dist. Bd. of Educ. v. State of New Jersey, Dep't of Educ., Office of Special Educ. Programs, EDU 2781-06, initial decision (June 27, 2006), adopted, Commissioner. (October 16, 2006) <http://lawlibrary.rutgers.edu/oal/search.html>. Further, as argued by the respondents, pursuant to N.J.A.C. 6A:14-2.7(r)1 in the special education regulations, there are only four issues upon which emergent relief may be requested:

i. Issues involving a break in the delivery of services;

ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate placement settings;

iii. Issues concerning placement pending the outcome of due process hearings; and

iv. Issues involving graduation or participation in graduation ceremonies.

Emergent relief does not appear to be available to order the release of pupil records. Thus, respondent argues that the petition should be dismissed with prejudice. There are more issues for which petitioners may file for emergent relief under the school laws under the Commissioner's jurisdiction, but the petitioners have not cited any such laws. It is clear that the present petition is a motion to compel discovery in a special education case; it is not a dispute arising under the school laws. As such, N.J.A.C. 1:1-10.4(d), requiring the placement of a call to the judge and all parties not later than ten days after the discovery was due, was applicable. As time was of the essence, and no administrative law judge had been assigned to the case, one can understand the failure to place the call. Nevertheless, this matter must proceed as a discovery issue within the special education case, N.J.A.C. 6A:14-1 et seq., and accordingly, a telephone conference in the special education case will be scheduled.

For the foregoing reasons, I need not reach the issue of whether petitioners meet the four-part test for emergency relief. I **CONCLUDE** that the petitioners have failed to prove that they have jurisdiction to seek emergent relief from the Commissioner of Education, **DENY** the matter and **DISMISS** the application for emergent relief against respondent Cherry Hill Township Board of Education. This order on application for emergency relief concludes this matter.

I so **ORDER**.

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.

September 4, 2009
DATE

LISA JAMES-BEAVERS, ALJ

cmo

304-09

#304-09R

OAL DKT. NO. EDU 4233-09
(EDU 6120-08 ON REMAND)
AGENCY DKT. NO. 167-6/08

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
ANDREA LAMB, D.U.E. SEASON :
CHARTER SCHOOL, CAMDEN COUNTY. :

COMMISSIONER OF EDUCATION

DECISION ON REMAND

The record of this matter, the parties' proposed Stipulation of Settlement with revised signature page and appended Board resolution approving the agreement, and Initial Decision on Remand issued by the Office of Administrative Law (OAL) have been reviewed pursuant to *N.J.A.C.* 1:1-19.1.

Upon such review, the Commissioner approves the settlement and adopts the parties' agreement as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/16/09
Date of Mailing: 9/17/09



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 4233-09
AGENCY DKT. NO. 167-6/08
(ON REMAND EDU 6120-08)

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF ANDREA LAMB, D.U.E. SEASON CHARTER SCHOOL, CAMDEN COUNTY.

LaTonya N. Bland, Esq., for petitioner (Capehart & Scatchard, P.A., attorneys)

Patricia A. Barasch, Esq., for respondent (Schall & Barasch, LLC, attorneys)

Record Closed: July 23, 2009 Decided: August 7, 2009

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

STATEMENT OF THE CASE

This case concerns petitioner's request that respondent's teaching certificate be suspended due to her resignation without sufficient notice. 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 D.U.E. Season Charter School employed Andrea Lamb under contract for a term from August 13, 2007 to June 30, 2008. Ms. Lamb submitted a resignation letter on February 6, 2008 to be effective February 22, 2008. Ms. Lamb stopped working for the school on February 22, 2008. On May 22, 2008, the School had an Order to Show Cause signed by Commissioner Lucille Davy seeking the suspension of the teaching certificate of Ms. Lamb. On June 16, 2008, Ms. Lamb filed an Answer with the Commissioner of Education. The matter was transmitted to the Office of Administrative Law on June 17, 2008 and filed 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 3, 2009, I issued an Initial Decision accepting the settlement agreement in the case. By decision dated April 14, 2009, the Commissioner of Education remanded the case for revision of the Stipulation of Settlement because (1) the agreement did not contain a copy of the Board of Trustees' resolution approving the settlement and/or (2) the agreement was not signed by the board attorney. These concerns have been addressed by the board attorney who has sent both a board resolution and a page with her signature approving the agreement, which are attached.

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.

8/7/09
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: AUG 11 2009

Date Mailed to Parties: AUG 11 2009

cmo

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

CAPEHART & SCATCHARD, P.A.
A Professional Corporation
Laurel Corporate Center
8000 Midlantic Drive, Suite 300 S
Mt. Laurel, New Jersey 08054
(856)234-6800
Attorneys for D.U.E. Season Charter School

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF ANDREA LAMB.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY AGENCY DOCKET NO. 167-6/08
D.U.E. SEASON CHARTER SCHOOL, Petitioner, vs. ANDREA LAMB, Respondent.	**SETTLEMENT AGREEMENT**

WHEREAS, Andrea Lamb is a former employee with the D.U.E. Season Charter School, who entered into an employment contract with the Board of Trustees of the D.U.E. Season Charter School on July 18, 2007, for the term of August 13, 2007 through June 30, 2008; and

WHEREAS, Andrea Lamb submitted a Letter of resignation on or about February 6, 2008 which was effective on or about February 22, 2008; and

WHEREAS, Andrea Lamb ceased to perform duties as a teacher on or about February 22, 2008; and

WHEREAS, D.U.E. Season Charter School institute l the above-captioned matter seeking the Suspension of the Teaching Certificate of Andrea Lamb. and

WHEREAS, the parties have agreed to a full and fin l settlement of all claims and matters asserted in or which could have been asserted in the contested matter above, and any claims that could be asserted in any civil suit, administrative action, or in a state or federal court proceeding that relate directly or indirectly to the employme it of Andrea Lamb with D.U.E. Season Charter School; and

WHEREAS, the parties have, in resolving this matte , also agreed to a Release and Waiver provision which, covers directly or indirectly, the em ployment of Andrea Lamb with D.U.E. Season Charter School and monetary damage claims of D.U.E. Season Charter School, as described in paragraph 4 below;

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

(1) The Respondent will pay to the Petitioner the otal amount of $2,600.00, representing the cost and legal fees incurred as a result of Re: pondent's resignation and this action;

(2) Except for payment of the settlement amount i n accordance with the terms of paragraph (1), the parties shall not be responsible financially or otherwise for any other cost or obligation.

MUTUAL RELEASE AN D WAIVER

(3) In consideration of the settlement payment des ribed in paragraph (1) and for other good and valuable consideration, the parties release, wai ve and forever discharge the each other (including the former and present board members, office s, employees, agents, and servants

of the D.U.E. Season Charter School) from any and all claims and causes of action whether known or unknown, whether asserted or unasserted, contingent or otherwise, relating directly or indirectly to the matter captioned D.U.E. Season Charter School v. Andrea Lamb, Agency No. 167-6/08. With respect to the claims that were asserted or that could have been asserted in the Petition, Defenses, Counterclaims, or separate actions, this Release and Waiver includes, but is not limited to: (a) any claim concerning failure to provide the proper notice of resignation; (b) any claim for loss, monetary damages, personal injury, property damage, reimbursement, attorneys fees and costs, and expert fees; (c) claims or causes 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.), the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., the New Jersey Constitution, the Individuals with Disabilities Education Act, 20 U.S.C. § 140) et sue., 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, 198 , and 1988.

BY THEIR SIGNATURES TO THIS AGREEMENT, DORIS CARPENTER, Chief Education Officer of D.U.E. Season Charter School, AND ANDREA LAMB, ACKNOWLEDGE THAT THEY HAVE READ THIS RELEASE AND WAIVER, AND ACCEPT AND AGREE TO THE PROVISIONS IT CONTAINS. THEY FURTHER ACKNOWLEDGE THAT THEY ARE EXECUTING THIS RELEASE AND WAIVER VOLUNTARILY, WITH THE FULL UNDERSTANDING OF ITS CONSEQUENCES, AND THAT THEY HAVE HAD THE OPPORTUNITY TO OBTAIN THE ADVICE OF COUNSEL WITH RESPECT TO IT.

(4) The Petition **IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF ANDREA LAMB,** bearing Agency No. 167-6/08 shall be dismissed.

(5) The Respondent agrees not to file a petition or complaint with respect to matters asserted or that could have been asserted in connection with her employment with D.U.E. Season Charter School, and with respect to matters resolved by this Agreement.

Date: _____

Andrea Lamb

Date: _____

Dr. Doris Carpenter, Chief Education Officer of D.U.E. Season Charter School

(4) The Petition **IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF ANDREA LAMB,** bearing Agency No. 167-6/08 shall be dismissed.

(5) The Respondent agrees not to file a petition or complaint with respect to matters asserted or that could have been asserted in connection with her employment with D.U.E. Season Charter School, and with respect to matters resolved by this Agreement.

Date: _____

Andrea Lamb

Date: _____

Dr. Doris Carpenter, Chief Education Officer of
D.U.E. Season Charter School

Date: July 23, 2009 LaTonya N. Bland

LaTonya N. Bland, Esq.
Solicitor, D.U.E. Season Charter School

D.U.E. Season Charter School
Camden, New Jersey

Board Meeting Minutes

Board of Trustees Regular Meeting
Tuesday, December 16, 2008

Call to Order

Ralph Green, Board President, called the meeting to order at 7:25 p.m.

Roll Call

Absence	Olivia Glenn
Present	Ralph Green
Present	Jennifer Idler
Present	Walter Milton
Present	Mahala Pratt
Present	Edward Venable

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2008 MAY -4 P 2:31
CAMDEN CITY CLERK'S OFFICE

Reading of the Sunshine Law

Wellington Davenport read the sunshine law:

The New Jersey Public Meetings Law was enacted to insure the right of the public to have advance notice of and to attend the meetings of public bodies at which any business affecting their interest is discussed or acted upon.

In accordance with the provisions of this act, the D.U.E. Season Charter School Board of Trustees has caused notice of this meeting to be publicized by having the date and time thereof posted in the Courier Post and to the Office of the Camden City Clerk.

Formal action may take place at this meeting.

Agenda Review

Resolved *that the D.U.E. Season Charter School Board of Trustees approves the agenda for the December 16, 2008 meeting*

Motion: Walter Milton Second: Jennifer Idler

Absent	Olivia Glenn
Approve	Ralph Green
Approve	Jennifer Idler
Approve	Walter Milton
Approve	Mahala Pratt
Approve	Edward Venable

Approval of Minutes

Resolved *that D.U.E. Season Charter School Board of Trustees approves the minutes of the November 18, 2008 meeting.*

Motion: Walter Milton Second: Mahala Pratt

Absent	Olivia Glenn
Approve	Ralph Green
Approve	Jennifer Idler
Approve	Walter Milton
Approve	Mahala Pratt
Approve	Edward Venable

CEO/PRINCIPAL'S Report

- ✓ Curriculum and Instruction
- ✓ Professional Development
- ✓ Field Trips
- ✓ Policies
- ✓ Personnel (Executive Session)
- ✓ Discipline
- ✓ Student Achievement
- ✓ Saturday School

Approves Andrea Lamb Settlement

Resolved *that the D.U.E. Season Charter School Board of Trustees approves the Andrea Lamb settlement of $2,600.*

Motion: Mahala Pratt Second: Walter Milton

Absent	Olivia Glenn
Approve	Ralph Green
Approve	Jennifer Idler
Approve	Walter Milton
Approve	Mahala Pratt
Approve	Edward Venable

Approves the Parent/Students Rights under Section 504

Resolved *that the D.U.E. Season Charter School Board of Trustees approves the attached Students Rights under Section 504*

Motion: Mahala Pratt Second: Walter Milton

Absent	Olivia Glenn
Approve	Ralph Green
Approve	Jennifer Idler
Approve	Walter Milton
Approve	Mahala Pratt
Approve	Edward Venable

Approves Grant from Mr. And Mrs. Crawley

Resolved *that the D.U.E. Season Charter School Board of Trustees approves the receipt of and proposed spending against a grant of $100 from Mr. And Mrs. Crawley.*

Motion: Jennifer Idler Second: Walter Milton

Absent	Olivia Glenn
Approve	Ralph Green
Approve	Jennifer Idler
Approve	Walter Milton
Approve	Mahala Pratt
Approve	Edward Venable

Approves Grant from Kathleen and Timothy Murtha

Resolved *that the D.U.E. Season Charter School Board of Trustees approves the receipt of and proposed spending against a grant of $500 from Kathleen and timothy Murtha.*

Motion: Jennifer Idler Second: Walter Milton

Absent	Olivia Glenn
Approve	Ralph Green
Approve	Jennifer Idler
Approve	Walter Milton
Approve	Mahala Pratt
Approve	Edward Venable

Approves the November 2008 Board Secretary & Treasurer's Reports

Resolved *that the D.U.E. Season Charter School Board of Trustees approves the November 2008 Board Secretary & Treasurer's Reports.*

Motion: Jennifer Idler Second: Walter Milton

Absent	Olivia Glenn
Approve	Ralph Green
Approve	Jennifer Idler
Approve	Walter Milton
Approve	Mahala Pratt
Approve	Edward Venable

Approves the December 2008 Bills List

Resolved *that the D.U.E. Season Charter School Board of Trustees approves the November 2008 Bills List for $219,290.26.*

Motion: Jennifer Idler Second: Walter Milton

Absent	Olivia Glenn
Approve	Ralph Green
Approve	Jennifer Idler
Approve	Walter Milton
Approve	Mahala Pratt
Approve	Edward Venable

Public Comment

There were no members of the public Approve at the meeting.

Executive Session

The Board of Trustees moved into Executive Session at 9:16 p.m. after the following vote:

Motion: Edward Venable Second: Walter Milton

Absent	Olivia Glenn
Approve	Ralph Green
Approve	Jennifer Idler
Approve	Walter Milton
Approve	Mahala Pratt
Approve	Edward Venable

The Board of Trustees moved back into Public Session at 9:45 p.m. after the following vote:

Motion: Mahala Pratt Second: Walter Milton

Absent	Olivia Glenn
Approve	Ralph Green
Approve	Jennifer Idler
Approve	Walter Milton
Approve	Mahala Pratt
Approve	Edward Venable

Approves December 2008 Human Resources Report

Resolved *that the D.U.E. Season Charter School Board of Trustees approves the attached December 2008 Human Resource Report presented by the CEO/Principal.*

Motion: Edward Venable Second: Walter Milton

Absent	Olivia Glenn
Approve	Ralph Green
Approve	Jennifer Idler
Approve	Walter Milton
Approve	Mahala Pratt
Approve	Edward Venable

Adjournment

A motion to adjourn the meeting was made by Mahala Pratt and seconded by Walter Milton, and the meeting was adjourned at 10:10 pm. The next board meeting will be held on January 28, 2009.

Respectively submitted by:

Wellington Davenport
Board Secretary & School Business Administrator

305-09

#305-09

AGENCY DKT. NO. 161-7/09

ERIK SCOTT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

This matter was opened as a Petition of Appeal before the Commissioner on July 21, 2009. Therein petitioner was appealing the State Board of Examiners' (SBE) denial of his application for teacher certification in Health and Physical Education. By letter dated August 17, 2009, the Deputy Attorney General representing the SBE reported that the SBE "has recently discovered that its decision with respect to the above-referenced matter was based, in part, on incorrect information. Therefore, on behalf of the [SBE], I hereby request that the Commissioner remand the matter to the [SBE] for reconsideration based upon the correct information." By letter dated August 17, 2009, the Director of the Bureau of Controversies and Disputes advised the parties that – absent an objection by petitioner on or before August 26, 2009 – this matter would be remanded to the SBE. No objection was received from petitioner.

Accordingly, as requested, this matter is hereby remanded to the State Board of Examiners for reconsideration.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/16/09
Date of Mailing: 9/18/09

* 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).

306-09

306-09

SHERRI L. GLENNON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS AND CENTENARY COLLEGE,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner appealed the determination of the State Board of Examiners (Board) to deny her instructional certification with endorsements in elementary education and the teaching of students with disabilities because she had failed to matriculate into and successfully complete a post-graduate certification program – a requirement for candidates, such as petitioner, who do not meet the requisite minimum undergraduate GPA. Petitioner took a number of post graduate courses at Centenary College (Centenary), as well as two other colleges, but she never completed requirements to matriculate into any post graduate teaching certification program. The respondents filed motions for summary decision.

The ALJ found, *inter alia,* that: the OAL has no jurisdiction over Centenary; Centenary did not act in bad faith in declining to recommend petitioner for certification as petitioner had never satisfied the requirements for enrollment in Centenary; the Board did not act in an arbitrary, capricious or unreasonable manner in refusing to issue a certificate to petitioner, as petitioner had not completed all certification requirements at the time her application was submitted to the Department. The ALJ concluded that petitioner had failed to demonstrate her entitlement to certification, granted the respondents' motions for summary decision, and dismissed the petition.

The Commissioner concurred with the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

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

September 18, 2009

OAL DKT. NO. EDU 7419-07
AGENCY DKT. 147-6/07

SHERRI L. GLENNON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS AND CENTENARY COLLEGE,	:	DECISION
RESPONDENTS.	:	

Petitioner challenges the determination of the New Jersey State Board of Examiners (Board of Examiners) that she has not met the requirements for the awarding of instructional certification with endorsements in elementary education and the teaching of students with disabilities. The gravamen of the Board of Examiners' decision was that petitioner had failed to matriculate into and successfully complete a post-graduate certification program. Completion of such a program is a licensing requirement for students, such as petitioner, whose undergraduate GPAs are below the required cut-offs of 2.50 or 2.75 – depending upon the year in which the undergraduate degree was conferred. *N.J.A.C.* 6A:9-8.1(a)(2).

After reviewing the record and the Initial Decision of the Office of Administrative Law (OAL),[1] the Commissioner adopts the Initial Decision – with the following comments:

First, as a threshold matter, the Administrative Law Judge (ALJ) is correct in concluding that the Commissioner does not have jurisdiction over Centenary College (Centenary) and could not order the relief petitioner demands from the College.

[1] The parties submitted no exceptions.

Second, the Commissioner approves of the ALJ's adoption of the respondents' joint stipulation of facts (Joint Stipulation). Much of petitioner's separate "Statement of Facts" is argument, and the facts alleged therein do not, for the most part, contradict those set forth by respondents.

More specifically, the following facts alleged by petitioner that do appear to contradict the Joint Stipulation, even if true, could not lead the Board of Examiners to a different determination.

1. Contrary to the Joint Stipulation, petitioner maintains that she successfully completed EDU 215, one of the prerequisites for admission into Centenary's post graduate teaching certification program. The record indicates that she did complete this course at the end of 2004. However, shortly thereafter – in January 2005 – the Centenary education department determined that it could not accept petitioner into its program because, despite repeated advisements of the requirements necessary for acceptance into Centenary's certification program – beginning with an interview in November 2003 and continuing via correspondence until January 2005 – she had failed to satisfy those requirements. More specifically, since the completion of EDU 215 was but one of several prerequisites to admission into Centenary's certification program, the question of whether petitioner timely completed the course is not determinative of whether she should have been accepted into the program.
2. Petitioner both alleges that she took the Praxis test – another prerequisite to Centenary's certification program – and that she passed it with a score of 143. This, petitioner asserts, is a high score and should have been offset against her low undergraduate grade-point average. By this allegation the petitioner appears to imply

that she should not have had to enroll in a post graduate certification program to be licensed as a teacher in New Jersey. The Commissioner notes, however, that Exhibit D to petitioner's April 14, 2009 reply brief appears to undermine petitioner's assertion. Exhibit D appears to be a copy of petitioner's Praxis test results. It indicates that petitioner's highest score as of 7/16/09 for elementary education was 139. Further, even if petitioner's score for elementary education had been 143, the information in Exhibit D indicates that a score of 155 would have had to have been achieved in order for petitioner to offset an undergraduate GPA of between 2.5 and 2.75. No offset could be effectuated for GPAs below 2.5, and the parties agree that petitioner's undergraduate GPA was 2.42. If petitioner took a second Praxis test for elementary education, it is not evident in the papers she submitted in the OAL. Moreover, any such second test would have been taken after July 16, 2005, which was six months after the Centenary education department decided that petitioner did not qualify to enter its certification program.

3. Petitioner states that her GPA for the post-graduate courses she took at Centenary was 3.857. Respondents did not address this fact, and the Commissioner does not deem it germane to the question of whether petitioner matriculated into and successfully completed a post graduate certification program, as mandated by *N.J.A.C.* 6A:9-8.1(a)(2).

Third, in light of the absence of material issues of fact, the Commissioner concludes that summary decision is appropriate in this case.

Finally, the Commissioner finds that the Board of Examiners was not arbitrary, capricious or unreasonable in declining to waive the certification requirement, set forth in

N.J.A.C. 6A:9-8.1, that petitioner must complete a post baccalaureate certification program with an appropriate GPA and receive a recommendation or verification from the college offering the program. Centenary could not provide such a recommendation for petitioner because, having never satisfied the requirements for admission, she was never enrolled in its post graduate certification program.[2]

For the reasons articulated above and set forth in the Initial Decision, the petition is dismissed against both respondents.

IT IS SO ORDERED.[3]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9|18|09

Date of Mailing: 9|18|09

[2] Petitioner's references to permissive language in *N.J.A.C.* 6A:9-5.16 (and former regulation 6:11-3.19) are not on point, as they give the Board of Examiners the discretion to waive a recommendation from an institution in whose program a candidate is enrolled. Here, petitioner was not enrolled in Centenary's certification program – or any other certification program.

[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 07419-07
AGENCY DKT. NO. 147-6/07

SHERRI L. GLENNON,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMINERS AND CENTENARY COLLEGE,
Respondents.

Barry W. Sirota, Esq., for petitioner

Cynthia Ann Raymond Rimol and **Bryant Laurence Horsley, Jr.,** Deputy Attorneys General, for respondent, New Jersey State Board of Examiners (Anne Milgram, Attorney General of New Jersey, attorney)

Mary Pat Gallagher, Esq., for respondent Centenary College (Adorno and Yoss, attorneys)

Record Closed: July 14, 2009 Decided: August 4, 2009

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Sherri L. Glennon, applied for a credential review pursuant to N.J.A.C. 6A:9-17.13. She sought to substitute her educational background and work experience for the formal regulatory requirements of the Teacher of the Handicapped certificate. Petitioner submitted documentation to the State Board of Examiners of her work experience and educational course work. She also made an oral presentation at the September 21, 2006, meeting. On November 2, 2006, the Examiners issued a decision stating that:

> She (Ms. Glennon) provided evidence of alternative education and/or experience with respect to thirty semester hour credits in education of the handicapped and professional education electives. Through her studies at Felician College in Lodi, New Jersey, Marygrove College in Detroit, Michigan and, particularly, her post baccalaureate program of studies at Centenary College in Hackettstown, New Jersey, Ms. Glennon provided compelling documentation of a one to one relationship of her studies and the academic credits required for the Teacher of the Handicapped certificate. Moreover, Ms. Glennon's more than five years of experience at the Youth Consultation Transitional Education Center of Morris County provided ample evidence to support fulfillment of a comparable student teaching experience. . . . Ms. Glennon's experiences in this venue are both challenging and rigorous and far exceed the goals and objectives included in the student teaching requirement.

The Board of Examiners found, however, that the requirement, under N.J.A.C. 6A:9-10.1(f), of a college recommendation upon completion of the program requirements culminating in student teaching, was critical and had not been met.

The Board suggested that Ms. Glennon return to Centenary College and once again request a recommendation for certification. On December 20, 2006, Ms. Glennon sent a letter to Commissioner Davy in which she outlined her educational background, her personal hardships and her problems with Centenary College. Ms. Glennon requested that the Board consider providing her with a Standard Certificate for a Teacher of Students with Disabilities and a Teacher of Elementary Education. In the

alternative, if that request was denied, she requested certificates of eligibility, so that she could continue to teach while completing the two hundred hours and mentoring requirements of the alternate route.

On June 7, 2007, the petitioner filed a petition of appeal. The Examiners filed its answer on June 27, 2007. The case was forwarded to the Office of Administrative Law on June 12, 2007. The matter was assigned to ALJ Cohen on July 23, 2007. It was set down for a hearing on February 8 and 14, 2008. On January 8, 2008, the respondent filed a motion for summary decision. On January 16, 2008, the attorney for the petitioner asked for an extension of time to file an answer because of serious health issues. On February 5, 2008, the attorney for the petitioner requested an adjournment of the February hearing dates in order for the petitioner to obtain new counsel. The matter was carried until April 14 and May 20, 2008. In the meantime, oral argument on the summary decision motion was scheduled for April 14, 2008. On March 12, 2008, Mr. Evans, an attorney covering for Mr. Sirota, petitioner's attorney, called to say that Mr. Sirota was ill. He asked for an extension of time to file the responsive brief and an adjournment of the date for oral argument. Oral argument was rescheduled for May 20, 2008, and the hearing date was moved to June 27, 2008. The petitioner's brief in opposition to the respondent's motion was filed on March 19, 2008. A cross-motion for summary decision was filed by the petitioner on May 7, 2008. The State Board filed its response to the petitioner's brief on May 14, 2008. Both parties waived oral argument. On May 22, 2008, I issued an order denying both parties' summary decision motions.

Following discussions between the Board and Ms. Glennon, on July 9, 2008, Mr. Sirota submitted a Consent Order and Amended Petition adding Centenary College as an additional respondent. After a number of discussions and revisions by the parties, the Consent Order was signed on August 6, 2008. Centenary filed its Answer and Separate Defenses on October 20, 2008. A conference on discovery issues was held on October 29, 2008, and a discovery end date of January 15, 2009, was agreed upon.

The Board of Examiners submitted a Motion for Summary Decision on March 23, 2009. Centenary College filed a brief in support of its "Motion for Summary Disposition" on April 9, 2009. The petitioner's and college's briefs in reply to the Board's motion

were submitted on April 8, 2009. The petitioner's reply brief was filed on May 12, 2009, and Centenary's response brief was filed on May 18. On April 17, 2009, I sent a letter to the deputy attorney general asking for clarification of certain eligibility requirements. The Board responded to my letter and filed its response brief on May 19, 2009. On June 19, 2009, I requested specific questions to be answered in writing and at oral argument. The Board submitted its response on July 7, 2009. Centenary requested oral argument and the matter was set down for argument on July 14, 2009.

ISSUES

1. Whether this matter can be decided on summary decision?

2. Whether the Board acted in an arbitrary, capricious, or unreasonable manner in denying petitioner a teaching certificate for failure to secure a recommendation for certification from an accredited college upon completion of a State-approved post-baccalaureate certification program?

3. Whether Centenary College (Centenary) acted in bad faith in declining to recommend petitioner for certification to the Department of Education?

STATEMENT OF FACTS

Centenary College and the Board of Examiners submitted a Joint Stipulation of Facts. Ms. Glennon did not join in that Stipulation and submitted her own Statement of Facts. With a few exceptions I am adopting the Joint Stipulation of Facts. I **FIND** that the petitioner's submitted facts do not raise a genuine issue of material fact that would preclude me from deciding this matter by summary decision. Therefore, I **FIND** the following **FACTS**:

1. Sherri L. Glennon is the petitioner in this matter.

2. Ms. Glennon graduated from Ramapo College in 1997 with a 2.42 cumulative GPA. (Transcript).

3. The petitioner applied to the New Jersey Department of Education (NJDOE) for an emergency Teacher of the Handicapped certificate in or around December 2001. (Exhibit B of NJDOE Brief).

4. In December 2001, the Office of Licensure and Credentials determined through a transcript evaluation that the petitioner possessed an undergraduate GPA of 2.42. (Exhibit B of NJDOE Brief).

5. The NJDOE issued Ms. Glennon an emergency Teacher of the Handicapped certificate, which was effective from November 2001 through July 2002. (Exhibit C of NJDOE Brief).

6. The petitioner received the standard form dated "12/10/01" issued by the NJDOE regarding the requirements for a standard Teacher of the Handicapped certificate. (Exhibit A of NJDOE Brief).

7. The NJDOE re-issued the petitioner an emergency Teacher of the Handicapped certificate for the following years: 2002-2003, 2003-2004, 2004-2005 and 2005-2006. (Exhibit C of NJDOE Brief).

8. Ms. Glennon's final emergency Teacher of the Handicapped certificate expired in July 2006. (Exhibit C of NJDOE Brief).

9. The petitioner was employed by Youth Consultation Service Transitional Education Center of Morris County since September of 2001, operating under her emergency Teacher of the Handicapped certificate. (Exhibit C of NJDOE Brief).

10. After the final emergency Teacher of the Handicapped certificate expired in July 2006, the petitioner was no longer employed by Youth Consultation Service Transitional Education Center of Morris County. (Exhibit C of NJDOE Brief).

11. Centenary College (Centenary) is a private college located in Hackettstown, New Jersey. (Certification of Heather Dunham (Dunham cert.), ¶ 2).

12. Centenary offers a Teacher Education Program (Program) of study to undergraduates as well as post-baccalaureate students who have already completed a degree program in a major discipline and are pursuing certification through Centenary's undergraduate program. (Dunham cert., ¶ 3).

13. All candidates have the option of seeking an additional New Jersey certification for Teacher of Students with Disabilities (formerly Teacher of the Handicapped). (Dunham cert., ¶ 4).

14. During the relevant time period, the requirements of Centenary's Program were publicized and accessible in two publications - the Centenary College Education Department Policy Handbook, Revised January 2003 (Policy Handbook) and Centenary College Education Department Guide to Practicum and Student Teaching, Revised June 2008 (Department Guide). (Dunham cert., ¶ 8 and Exhibits. C and D).

15. As set forth in the Policy Handbook, during the relevant time period, the specific criteria for formal admission into the education department included, but was not limited to, the successful completion of two education courses (EDU 200 and 215), a cumulative grade-point average of 2.75 or better, completion of a formal application process, which included an interview with a member of the education department, and demonstrated proficiency in mathematics. (Dunham cert., Ex. C, pp. 12-13 (bate-stamped C0339-340)).

16. As stated in the Policy Handbook, post-baccalaureate students, such as Ms. Glennon, who had already graduated from an accredited college and sought to enter the teaching profession, were required to satisfy certain liberal arts, academic major course and psychology requirements in addition to thirty professional-education credits.

17. Students, like Ms. Glennon, who were seeking Special Education certification, needed an additional eighteen credits in the prescribed sequence of special education courses. (Dunham cert., Ex. C, page 6 (bate-stamped C0333)).

18. In the case of Ms. Glennon, a post-baccalaureate student seeking dual certifications in Elementary Education and Special Education at Centenary, the following requirements had to be met if she was to successfully complete the Elementary Education Certification Program: complete thirty professional credits in the education department in a coherent sequence from introductory to advanced credits; achieve a minimum grade of B- in each education course to remain in the program; complete twelve credits in psychology; complete twenty hours of observation in preparation for practicum; attend a practicum orientation; successfully complete the practicum experience with a grade of B- or better; attend the student teaching orientation; and successfully complete the student teaching component (a twelve-credit course described as the "capstone experience of the program"). (Dunham cert., ¶ 9 and Ex. C, pp. 4, 6-7 and 11 (bate-stamped C0331, C0333-334, C0338). See also Dunham cert., Ex. C, pp. 330-34 (bate-stamped C0360-361)).

19. To obtain the Special Education certification, Ms. Glennon also needed to complete the additional eighteen credits in the prescribed sequence of special education courses. (Dunham cert., Ex. C, pp. 6 and 11-12 (bate-stamped C0333 and C0338-339)).

20. As set forth in the Policy Guide, the professional education component of the Certification Program consisted of a "sequential group of six courses and student teaching," which provided the "performance-based program accredited by National Association of State Directors of Teacher Education and Certification (NASDTEC) for Centenary College." (Dunham cert., Ex. C, page 6 (bate-stamped C0333)).

21. During the relevant time period, the professional education component of the Program required all students to successfully complete EDU 380 (practicum) and EDU 400 (student teaching).

22. As described in the Policy Handbook, practicum required students to observe and teach lessons one day a week (or two half days) in a public school, in addition to a weekly seminar on campus.

23. Centenary's education department faculty recommends students for certification to the NJDOE Office of Licensure and Credentials provided the student has maintained a 2.75 cumulative grade-point average, demonstrated an aptitude for teaching through completion of all professional education courses with a B- or above, and, as stated in the New Jersey State Administrative Code, "'[d]emonstrated competence, aptitude, motivation and potential for outstanding success in teaching as indicated by acceptable evaluation reports of student teaching performance submitted by college and public school supervisors.'" (Dunham cert., Ex. C, page 21 (bate-stamped C0348) (emphasis added)).

24. Beginning with the Fall 2001 semester, Ms. Glennon attended Centenary on a part-time basis. (Dunham cert., ¶ 5).

25. On or about November 24, 2003, John Autore, a former assistant professor in Centenary's education department, interviewed the petitioner, who was seeking admission into Centenary's Certification Program. During that interview, Autore informed Ms. Glennon of the Certification Program entrance requirements. (Dunham cert., ¶ 6 and Ex. A).

26. At the time of the interview, Ms. Glennon was informed by Mr. Autore that before she could be admitted into the program, she needed to provide evidence of proficiency in math and documentation of observation hours. Ms. Glennon was also instructed that all remaining observations must be completed at least

one full semester before applying for practicum. (Dunham cert., ¶ 6 and Ex. A.).

27. The Certification Program's student teaching requirement was also discussed. (Dunham cert., ¶ 6 and Ex. A).

28. Several weeks following the entrance interview, the importance of Ms. Glennon's completing the Certification Program prerequisites was reinforced in a letter dated December 17, 2003. Heather Dunham, who at that time served as the chair of the education department, wrote the petitioner that acceptance in the education department was contingent on her completion of certain prerequisites. Specifically, Ms. Glennon was advised that she needed to submit evidence of ten hours of observation in the schools, evidence of mathematics proficiency as outlined in the department policy, successfully pass Praxis I and complete EDU 215 with a grade of B- or better. Only upon completion of the foregoing requirements would she be eligible for acceptance in to the Education Program. (Dunham cert., ¶ 7 and Ex. B.).

29. In a letter dated May 26, 2004, Ms. Dunham advised Ms. Glennon that certain items still required her immediate attention before she would be allowed to continue with the education department application process and pursue her Education Certification. Among other things, she was advised that she was not able to enroll in any further education courses until she successfully completed EDU 215. (Dunham cert., ¶ 11 and Ex. E.).

30. In response to an e-mail dated September 24, 2004, Ms. Dunham reminded Ms. Glennon to apply for possible acceptance into the Program. (Dunham cert., ¶ 12 and Ex. F (bate-stamped C0048-49)).

31. Despite having been advised in May 2004 that she was not to enroll in any further education courses until she successfully completed the prerequisites for admission to the Program, in or about January 2005, Ms. Glennon attempted to enroll in EDU 327. However, because she had still not met the admissions

criteria for the education department, the petitioner was not eligible to enroll in additional EDU courses as stipulated in the letters dated December 2003 and May 26, 2004. Therefore, in early January 2005, Ms. Dunham wrote the petitioner advising her to drop EDU 327. (Dunham cert., ¶¶ 13-14 and Ex. G.).

32. In that January 2005 letter, Ms. Glennon was also advised that the Special Education Certification at Centenary could only be achieved by being fully admitted to the department, completing a certification in another area such as her psychology major (Elementary Education Certification), and completing the requisite courses for Special Education and Elementary Education Certification. Lastly, Ms. Glennon was advised that since she had still not met the requirements as set forth in the prior letters of December 2003 and May 2004, she was not permitted to continue with the certification at Centenary. Centenary could not process her materials for certification until such time as she successfully completed Centenary's admission process and the mandatory program. (Dunham cert., ¶ 14 and Ex. G.).

33. In a letter dated January 18, 2005, John Sandri outlined what Ms. Glennon needed to accomplish to be admitted to the education department. On January 25, 2005, at her request, the petitioner was given the opportunity to present her case at a meeting of the education department. (Certification of John Sandri (Sandri cert.), ¶¶ 2-3 and Ex. A and B.).

34. Following the presentation, a consensus was reached that Ms. Glennon would not be permitted to enroll in any additional education courses at Centenary until she had completed the prerequisite program requirements. (Dunham cert., ¶ 13 and Ex. H; Sandri cert., ¶ 3.).

35. In the approximately two years following the January 2005 meeting, the petitioner did not submit evidence that she had completed the prerequisites for program admission; did not attempt to gain admission; and did not take any further classes at Centenary. (Sandri cert., ¶ 6; Dunham cert., ¶ 16.).

36. To date, Ms. Glennon never enrolled in Centenary College's Teacher Education Program. (Exhibit H of NJDOE Brief).

37. Ms. Glennon has prerequisites that remain outstanding in order to be accepted into Centenary College's Program.

38. To date, Ms. Glennon never completed Centenary College's Teacher Education Program. (Exhibit H of NJDOE Brief).

39. The petitioner has prerequisites other than student teaching that remain outstanding in order to complete Centenary College's Program.

40. Centenary College will not recommend Ms. Glennon for certification because she did not enroll in their teacher education program, nor did she complete it. (Exhibit H of NJDOE Brief).

41. Ms. Glennon did not enroll in a post-baccalaureate teacher education program. (Exhibit H of NJDOE Brief).

42. The petitioner completed post-baccalaureate special education courses at three separate institutions: 1) Centenary College; 2) Felician College (six credits); and 3) Mary Grove College (on-line course, three credits). (Exhibits H, F, and J of NJDOE Brief).

43. Ms. Glennon never enrolled in or completed Felician College's teacher education program. (Exhibit H of NJDOE Brief).

44. Felician College never recommended Ms. Glennon for certification.

45. Ms. Glennon never enrolled in or completed Mary Grove College's teacher education program. (Exhibit H of NJDOE Brief).

46. Mary Grove College never recommended Ms. Glennon for certification.

47. In or around April 2006, Ms. Glennon filed an application with the NJDOE, Office of Licensure and Credentials requesting the standard Teacher of the Handicapped certificate.

48. To be eligible for the standard Teacher of the Handicapped certificate, the petitioner was required to enroll in a NJDOE-approved, post-baccalaureate teacher education program for students with disabilities. (Exhibit A).

49. To be eligible for the standard Teacher of the Handicapped certificate, Ms. Glennon was required to complete a NJDOE-approved, post-baccalaureate teacher education program for students with disabilities. (Exhibit A).

50. To be eligible for the standard Teacher of the Handicapped certificate, Ms. Glennon was required to possess a 2.75 GPA upon completion of the NJDOE-approved, post-baccalaureate teacher education program for students with disabilities. (Exhibit A).

51. In or around April 2006, Ms. Glennon was advised that she should go forward with a credentials review before the New Jersey State Board of Examiners(Examiners). (Exhibit B of NJDOE Brief).

52. In response to the petitioner's application for a credentials review, by letter dated May 10, 2006, the Examiners provided petitioner with notice of the materials necessary for a review of alternative education and/or experience, and specifically expressed that "the Examiners does not waive requirements." (Exhibit E of NJDOE Brief).

53. On or about June 19, 2006, petitioner submitted the "Certification Credentials Review Summary" form. (Exhibit F of NJDOE Brief).

54. At its meeting on September 21, 2006, the Examiners conducted a review of the materials presented by Ms. Glennon. (Exhibit K of NJDOE Brief).

55. On September 21, 2006, the petitioner appeared before the Examiners and made an oral presentation and responded to questions and concerns of the Examiners. (Exhibit K of NJDOE Brief).

56. The Examiners concluded that Ms. Glennon satisfied the thirty-semester-hour-credit coursework requirement from her post-baccalaureate courses taken at Centenary College, Felician College, and Marty Grove College. (Exhibit K of NJDOE Brief).

57. The Examiners concluded that Ms. Glennon satisfied the student teaching component. (Exhibit K of NJDOE Brief).

58. At the credentials review and to date, Ms. Glennon never submitted a recommendation from a college indicating that she completed their NJDOE-approved teacher education program in special education.

59. The Examiners voted to deny Ms. Glennon's request for a standard Teacher of the Handicapped certificate by a unanimous vote rendered on November 2, 2006.

LEGAL ANALYSIS

1. Applicable Statutes and Regulations

The New Jersey teacher licensure system is designed "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(a). The New Jersey State Board of Examiners, which is part of the Department of Education, is the public body authorized to issue appropriate certificates to qualified teacher candidates. N.J.S.A. 18A:6-38. The Board shall issue an appropriate certificate upon the candidate's completion of all certification requirements in effect at

the time the candidate's application is received by the Office.[1] N.J.A.C. 6A:9-5.16(a). These requirements include, but are not limited to, coursework, degree, tests, fees, GPA and all certificate rules pursuant to N.J.A.C. 6A:9-8, 11, 12, and 13. Ibid. According to N.J.A.C. 6A:9-11.3(r), "[a] candidate who matriculated and enrolled in classes in a special education teacher preparation program by September 1, 2008 shall be issued the Teacher of the Handicapped endorsement." Colleges and universities shall recommend for certification to the Department of Education only those students who have satisfactorily completed a state-approved certification program with an overall cumulative grade point average equal to or above a 2.75, and who demonstrate potential for teaching success. N.J.A.C. 6A:9-10.1(g). The Board may refuse to issue a certificate to a candidate who fails to secure the recommendation from the institution at which the candidate enrolled in a state-approved program. N.J.A.C. 6A:9-5.16(c). A candidate who fails to meet certain requirements for certification may, at a credentials review, present the Board with evidence of alternative education and/or experience equivalent to the unmet requirements. N.J.A.C. 6A:9-17.13(a). A candidate may appeal the Board's certification decision to the Commissioner of the Department of Education. N.J.A.C. 6A:9-17.23. The Board's decision will not be disturbed unless it is found to be arbitrary, capricious, or unreasonable. Flaherty v. New Jersey Dep't of Educ., State Bd. of Exam'rs, EDU 5327-98, Final Decision (June 30, 1999), <http://lawlibrary.rutgers.edu/oal/search.html>. The arbitrary, capricious, or unreasonable standard 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.
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> [Public Serv. Elec. and Gas Co. v. New Jersey Dep't of Envtl. Protect., 101 N.J. 95, 103 (1985).]

[1] "Office" means the office within the Department of Education that is assigned to provide staff support to the State Board of Examiners in the exercise of its statutory and regulatory responsibilities. N.J.A.C. 6A:9-2.1.

2. The Standards Governing a Motion for Summary Decision

The rules governing practice in the OAL 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 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 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 Company 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).

In this matter the Board and Centenary submitted briefs in support of their motions for summary decision. The Board argues that its motion should be granted because the Board's denial of petitioner's application was not arbitrary, capricious, or unreasonable. Centenary, in its motion, argues that the Department of Education does not have jurisdiction over Centenary's decision to deny petitioner's request for a recommendation for certification, and that OAL does not have jurisdiction over petitioner's bad faith claim because such claim was not part of the contested case

transmitted to OAL. In the alternative, Centenary argues that it did not act in bad faith in denying petitioner's request for a recommendation for certification.

A. Should Centenary's motion for summary decision be granted because it is not a proper party in this matter? Or, in the alternative, should Centenary's motion for summary decision be granted because Centenary did not act in bad faith in declining to recommend petitioner for certification to the Department of Education?

Centenary argues that it is not a proper party in this matter because the bad faith claim brought by petitioner is not part of the contested case transmitted to OAL. The contested case before the OAL is limited to a determination of whether the Board's decision to deny petitioner's application for a teaching certificate was arbitrary, capricious, or unreasonable. According to N.J.A.C. 1:1-3.2(a):

> The Office of Administrative Law shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the Office of Administrative Law or as otherwise authorized by law, except as provided by N.J.A.C. 1:1-17. The Office of Administrative Law shall not receive, hear or consider any pleadings, motion papers, or documents of any kind relating to any matter until it has acquired jurisdiction over that matter, except as provided by N.J.A.C. 1:1-17.

While I had previously allowed the petitioner, with the consent of the Board, to amend her petition to add Centenary as a party, after review of the arguments, I **CONCLUDE** that the OAL has no jurisdiction over the bad faith claim petitioner seeks to bring against Centenary because such claim is not part of the contested case that was transmitted to OAL, and N.J.A.C. 1:1-17 does not apply here.

Second, even if petitioner could join Centenary as a party under N.J.A.C. 1:1-1.3(a) and R. 4:29-1, neither the OAL nor the Department of Education could grant petitioner the relief she seeks. Were I to find that Centenary acted in bad faith in not recommending petitioner for certification, and the Department of Education upheld such a finding, neither I nor the Department of Education could order Centenary to

recommend petitioner for certification because there is no statute, regulation, or case law to support such an outcome, nor has petitioner offered any in support of the same. Instead, the proper forum for petitioner's claim against Centenary is Superior Court.[2]

Even if I were to find that the petitioner is entitled to pursue her bad faith claim against Centenary, I **CONCLUDE** that I should grant Centenary's motion for summary decision because the State regulations governing professional licensure and standards preclude Centenary from recommending petitioner for certification. In particular, N.J.A.C. 6A:9-10.1(g) states that colleges and universities shall recommend for certification to the Department of Education only those students who have satisfactorily completed a State-approved certification program with an overall-cumulative GPA equal to or above a 2.75, and who demonstrate potential for teaching success. Here, the facts show that not only did petitioner fail to complete a State-approved certification program at Centenary; she did not meet the requirements for enrollment in the teacher preparation program at the college. As such, Centenary did not act in bad faith in declining to recommend petitioner for certification.

The evidence shows that Centenary could not recommend petitioner for certification because she did not complete its Teacher Preparation Program. Beginning in the 2001 fall semester, petitioner attended Centenary on a part-time basis. Dunham Certif., ¶ 5.[3] When petitioner sought admission into Centenary's Program in November 2003, she was told on several occasions that she would have to meet certain requirements in order to gain admission. Dunham cert. ¶ 6 and Exhibit A; Dunham cert. ¶ 7 and Exhibit B; Dunham cert. ¶ 11 and Exhibit E; Dunham cert. ¶ 12 and Exhibit F; Dunham cert. ¶ 13-14 and Exhibit G; and Dunham cert. ¶ 13 and Exhibit H; see also Centenary Education Department Policy Handbook, Admission to Teacher Education Program, p. 12, Dunham cert. Exhibit C. Those requirements included classroom observation, a passing score on the Praxis I exam, and successful completion of a class known as EDU 215. Dunham cert. Exhibit B. However, and despite repeated notifications regarding the requirements she would have to fulfill, petitioner did not satisfy all of the stated requirements and thus neither successfully enrolled in nor

[2] It is debatable whether the petitioner could obtain the relief she seeks even in Superior Court.
[3] The certifications cited here are part of the original brief submitted by Centenary.

completed the Program at Centenary.[4] Dunham cert. Exhibit G; Dunham cert. ¶ 16; Sandri cert. ¶ 6.[5] As a result, and pursuant to N.J.A.C. 6A:9-10.1(g), Centenary did not recommend petitioner for certification to the Department of Education. Dunham cert. Exhibit I. As such, Centenary did not act in bad faith in declining to recommend petitioner for certification.

B. Was the Board's Decision to Deny Petitioner's Application for Certification Arbitrary, Capricious, or Unreasonable?

There is no evidence that the Board acted in an arbitrary, capricious, or unreasonable manner. In accordance with N.J.A.C. 6A:9-17.13(a), petitioner sought a credentials review in connection with her application for a Teacher of the Handicapped certificate. As part of this review, the Board considered the academic credits petitioner earned at Centenary, Felician College, and Mary Grove College and her five years of experience at the Youth Consultation Transitional Education Center of Morris County. According to the Board, petitioner satisfied the certification requirements listed under N.J.A.C. 6A:9-8.3. However, the Board found that petitioner failed to secure the recommendation from a school at which she completed a teacher preparation program.[6] As the Board pointed out, one of the purposes of the letter of recommendation from the college is to verify that the candidate has in fact successfully completed the post-baccalaureate credential program. As stated above, N.J.A.C. 6A:9-5.16(c) empowers the Board to refuse to issue a certificate to a candidate who fails to secure the recommendation from the institution at which the candidate enrolled in a State-approved

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[4] N.J.A.C. 6A:9-10.1(o) states that "[r]equirements in (d) through (g) above shall be considered minimum requirements. Colleges and universities have the authority to require higher GPAs and higher levels of proficiency for program admission, student teaching and recommendation for certifications."

[5] Petitioner correctly points out that the May 26, 2004, letter from Heather Dunham to petitioner indicates that the only requirement for Program admission that petitioner had yet to fulfill was successful completion of EDU 215. Dunham cert. Exhibit E. However, a subsequent letter from Heather Dunham to petitioner outlines the other requirements petitioner had not fulfilled, including proof of proficiency in math, classroom observation, and a passing score on the Praxis I exam. Dunham cert. Exhibit G; see also Dunham cert. Exhibit C.

[6] As stated above, at her credentials review in 2006 petitioner introduced materials showing that she completed thirty semester-hour credits at three separate institutions. However, the Commissioner of the Department of Education recently decided that a candidate for a teaching certificate must complete a program at a single institution. Maslin v. New Jersey Dep't of Educ., EDU 2689-06, Initial Decision (February 28, 2008), adopted, Commissioner (April 8, 2008), <http://lawlibrary.rutgers.edu/oal/search.html>.

program.[7] As such, on November 2, 2006, the Board denied petitioner's application for a Teacher of the Handicapped certificate.

N.J.S.A. 18A:26-2.7 authorizes the State Board of Education to promulgate rules necessary to effectuate the statutory provisions regarding teaching certificates. Ibid. An implied policy behind the legislation regarding teaching certificates is to issue certificates to those teaching candidates who are qualified to effectively teach school children, and as part of its mandate, the State Board of Education promulgated rules to establish a system of teacher certification 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(a). N.J.A.C. 6A:9-5.16(c), one of the rules promulgated pursuant to the State Board of Education's authority, gives discretion to the Board to deny a certificate to an applicant who fails to obtain a recommendation of certification from a preparing institution. In addition, N.J.A.C. 6A:9-10.1(g) states that colleges and universities shall recommend for certification to the Department of Education only those students who have satisfactorily completed a state-approved certification program with an overall cumulative grade point average equal to or above a 2.75, and who demonstrate potential for teaching success. Finally, N.J.A.C. 6A:9-11.3(r) includes a grandfather

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[7] The reason petitioner needed to complete a State-approved teacher preparation program is that she graduated from college with a 2.42 GPA, and according to N.J.A.C. 6A:9-8.1(a), one of the prerequisites to obtaining a standard certificate is to

> [a]chieve a cumulative GPA of at least 2.50 when a GPA of 4.00 equals an A grade for students graduating before September 1, 2004, in a baccalaureate degree program, higher degree program or a state-approved post-baccalaureate certification program with a minimum of 13 semester-hour credits; for students graduating on or after September 1, 2004, achieve a cumulative GPA of at least 2.75 when a GPA of 4.00 equals an A grade in a baccalaureate degree program, higher degree program or in a state-approved post baccalaureate program with a minimum of 13 semester-hour credits.

Thus, since petitioner did not graduate from a college degree program with the requisite-cumulative GPA, she needed to show that she completed a higher degree program or a State-approved post-baccalaureate program with the requisite cumulative GPA. However, petitioner did not complete a program, and therefore she could not show that she graduated from a higher degree program or post-baccalaureate program with the necessary GPA, Centenary or any other institution could not recommend her for certification, and the Board could not issue the certificate petitioner seeks.

In addition, at the time of the review, the petitioner had not even matriculated into a state-approved post-baccalaureate program. Not only did petitioner not complete such a program, she did not even meet the requirements to matriculate into such a program at Centenary.

clause for obtaining a Teacher of the Handicapped endorsement. A candidate for such an endorsement may only be entitled to it, if she matriculates into a state-approved teacher preparation program before the spring of 2005 and completes such program before September 1, 2008.

Ms. Glennon argues that the Board's denial of her application for certification was arbitrary and capricious, because the Board found, during its credentials review, that petitioner had satisfied all regulatory requirements. However, while petitioner may be correct in arguing that a recommendation for certification from a college is not a requirement, N.J.A.C. 6A:9-5.16(c) clearly gives discretion to the Board to deny certification if a candidate, like petitioner, fails to secure a recommendation from an institution at which she enrolled in a teacher preparation program. There is no evidence showing that the Board clearly erred in denying petitioner's application for certification, or that the Board otherwise acted contrary to the implied legislative policy behind the statutory provisions regarding teaching certificates. The conclusion that the Board did not act in an arbitrary and capricious manner regarding its refusal to issue a certificate to petitioner is further supported by N.J.A.C. 6A:9-10.1(g), which prohibits a college from recommending a teaching candidate for certification unless the candidate completes a state-approved teacher preparation program and the college is satisfied that the candidate demonstrates the necessary skills to succeed as a teacher. As part of its moving papers submitted in this matter, Centenary satisfactorily showed that, not only did the petitioner not complete the college's state-approved teacher preparation program; but Ms. Glennon did not even satisfy the requirements necessary for admission to the program. As a result, Centenary could not recommend petitioner for certification. If a college does not recommend a candidate for certification because she has not completed a teacher preparation program, the Board could, in seeking to issue certificates only to qualified candidates, justifiably deny certification to such a candidate. Therefore, and regardless of the other requirements petitioner had to fulfill at the time she applied for certification in 2006, the Board had no obligation to issue a certificate to petitioner absent a recommendation from a preparing institution. There is no evidence

that the Board's decision in any way offends the policy behind the relevant statutory provisions.[8]

CONCLUSION

Based on the briefs submitted and the argument of counsel, I therefore **CONCLUDE** that the motions for summary decision submitted by Centenary and the Board should be granted for the following reasons. First, Centenary is not a proper party in this matter. In addition, Centenary did not act in bad faith in declining to recommend petitioner for certification. Second, the Board's decision to deny petitioner's application for certification was not arbitrary, capricious, or unreasonable. Instead, the Board properly exercised its discretion to deny certification in the absence of a recommendation for certification from a preparing institution. The Board had no obligation to issue a certificate to the petitioner absent a recommendation from a preparing institution, and there is no evidence that the Board's decision in any way offends the policy behind the relevant statutory provisions. There is no genuine issue of material fact regarding whether Ms. Glennon obtained a recommendation from Centenary, or any other accredited institution pursuant to N.J.A.C. 6A:9-10.1(g), nor is there any question that the petitioner did not complete a State-approved post-baccalaureate program. Therefore the Board prevails as a matter of law under N.J.A.C. 6A:9-5.16(c).

ORDER

Based on the foregoing, it is hereby **ORDERED** that the respondents' motions for summary decision be **GRANTED** and the petitioner's appeal be **DISMISSED**.

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

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[8] While it could be argued that the Board's language in its decision recognizing that Ms. Glennon fulfilled the requirement of student teaching and obtaining thirty education credits might appear to be misleading, since the petitioner was still required to complete the certification program, which included thirty credits and student teaching, this does not affect the outcome of this matter. Ms. Glennon was on notice that she was required, because of her low college GPA, to take the post-graduate certification program.

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

8/4/09
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: August 4, 2009

Date Mailed to Parties: August 4, 2009

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307-09

#307-09

IN THE MATTER OF THE TENURE	:	
HEARING OF BRIAN TAYLOR,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
EAST ORANGE, ESSEX COUNTY.	:	
	:	

SYNOPSIS

The petitioning school district certified thirteen tenure charges of unbecoming conduct and other just cause against respondent – a tenured middle school science teacher – for alleged inappropriate behavior toward students, parents and staff, in which he demonstrated poor judgment, an inability to control his temper and demeanor, and insubordination, and on one occasion, initiated a physical altercation with a fellow teacher. The respondent acknowledged that much of the alleged behavior had occurred, but opined that his inappropriate behavior was attributable, *inter alia,* to a personality conflict with his supervisor, a diagnosis of depression for which he was never referred for counseling by the district, and inadequate support in a challenging educational environment.

The ALJ found that: the Board has established by a preponderance of the credible evidence that respondent acted in a manner that is not appropriate for a school teacher and not commensurate with a teacher's function as a role model; respondent failed to control his temper, exercised poor judgment, made disparaging remarks about students, allowed his feelings of frustration and anger to overwhelm his professional demeanor, and engaged in behaviors which caused staff members to feel physically threatened. Accordingly, the ALJ concluded that the respondent's behavior constituted conduct unbecoming a teacher, and that the determination of the Board to remove respondent was reasonable and necessary in order to insure the safety and well being of students and staff.

Upon careful and independent review of the record, the Commissioner concurred with the findings of the OAL and adopted the Initial Decision as the final decision in this matter. A copy of this decision will be 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.

September 21, 2009

OAL DKT. NO. EDU 11914-08
AGENCY DKT NO. 275-9/08

IN THE MATTER OF THE TENURE	:	
HEARING OF BRIAN TAYLOR,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
EAST ORANGE, ESSEX COUNTY.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Primary and reply exceptions of the District were filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4. Respondent sought and was granted an extension of time within which to file exceptions and replies and these submissions were received within the adjusted timelines.[1]

The District excepts to the Administrative Law Judge's (ALJ) finding that Charge III – which alleges that respondent stormed into a coach's office and intentionally bumped into his supervisor, Mr. Kramer, and subsequently became boisterous and hostile – had not been sustained. Although finding that respondent's conduct was "loud, boisterous and inappropriate," the ALJ concluded that it did not rise to the level of unbecoming conduct because he did not intentionally bump Mr. Kramer. (District's Exceptions at 2) In so concluding the District charges that the ALJ ignored the facts 1) that Mr. Kramer's credible testimony reflects

[1] It is noted that on August 17, 2009, respondent, Brian Taylor, attempted to submit *pro se* exceptions in this matter. By letter of the same date, Mr. Taylor was advised that the Commissioner and her staff are, by law, strictly proscribed from considering information or argument outside the formal record of contested case proceedings – **including papers sent directly by a party who is represented by legal counsel**. Therefore, respondent's submission was returned to him without consideration.

that he perceived respondent's actions as intentional; and 2) that respondent admitted to bumping into Mr. Kramer and further admitted becoming both boisterous and hostile. (*Ibid.*) Moreover, it maintains that given the high level of self restraint required of a teaching staff member, this individual's "conduct, albeit inadvertent or accidental, may rise to the level of unbecoming conduct particularly when such conduct involves pupils or, as in Charge III, an immediate supervisor." (*Id.* at 3) The District, therefore, urges the Commissioner to modify the Initial Decision and find respondent guilty of unbecoming conduct on Charge III.

In reply, respondent urges that the ALJ correctly determined that – while he entered a room in a "rushed" manner, the evidence did not substantiate that he intentionally bumped into his supervisor, Mr. Kramer. The ALJ further recognized that respondent "was upset at having been accused of an absence from a staff meeting. It was this disconcertion which predicated her finding that he was loud, boisterous and inappropriate." (Respondent's Reply Exceptions at 2) Conceding that his demeanor was not entirely appropriate, respondent maintains that the ALJ rightly concluded that the record did not sustain a charge that his conduct warranted a finding of unbecoming conduct. (*Ibid.*)

Respondent's exceptions initially charge that the ALJ inappropriately found the testimony of Gary Kramer to be credible. He argues that Mr. Kramer was not required to testify in person but, rather, was permitted to testify telephonically and, as such, the ALJ did not have a sufficient basis upon which to find his testimony credible. Respondent proposes that the ALJ's opportunity to observe a witness and assess his demeanor is critical to any determination of a witnesses' credibility. In that the ALJ was deprived of the opportunity to personally observe Mr. Kramer's demeanor and, therefore, to fully and accurately determine the credibility which should be ascribed to his testimony, Kramer's uncorroborated testimony – which was the sole

basis for the ALJ's finding that respondent was guilty of unbecoming conduct on charges five and six and instrumental to her determination of unbecoming conduct on charges two and four – should not be accepted. As the ALJ did not have a sufficient basis for finding Mr. Kramer's testimony credible, and as respondent's testimony was not found to be incredible, respondent urges the Commissioner to reject all factual findings based on Mr. Kramer's testimony as being insufficiently supported by the record. (Respondent's Exceptions at 2-3)

Respondent next proposes that the ALJ's recommended penalty in this matter is excessive. He charges that the ALJ failed to take into consideration that in 2008 respondent – at the behest of the District – underwent a psychological evaluation wherein it was determined that he suffered from Depressive Disorder and psychiatric and/or psychological counseling was recommended. However, he avers, the District did not refer him for counseling. Additionally, respondent advances:

> [b]esides failing to refer him for counseling, the record is replete with instances where the Petitioner School District provided Respondent with insufficient support in dealing with disruptive, disrespectful, and belligerent students, as well as inappropriately argumentative and hostile parents....In this case, Respondent was made to teach in a room where obscene, derogatory remarks about him were scrawled on the walls, and left there for two school terms, despite Respondent's bringing the issue to the attention of school administration. It was an unfamiliar student's repeatedly kicking his door which let Mr. Taylor to briefly leave his classroom in the incident described in tenure charge six, leading to the conclusion that the hallways were not adequately supervised...as was also evident from the incidents set forth in tenure charge seven. During the meeting referenced in tenure charge nine, it is clear that Principal Laura Trimmings took no action to protect Mr. Taylor when an irate parent referred to him as a "drug abuser" and possibly as a "child molester," despite having no basis for such claims... Moreover, Respondent testified that he had no classroom assistance, despite the fact that special-education students were included in his class..., and he was supposed to have assistance. It was one of these students, K.H., whose belligerent behavior (detailed in tenure charge one), predicated a finding of

> unbecoming conduct as to Respondent vis-à-vis tenure charge one. At the very least, the allegations of unbecoming conduct faced by Respondent would not have been as significant, had he been afforded adequate support by Petitioner's administration. (Respondent's Exceptions at 4-7)

Respondent again argues – as he did below – that consideration of all of these factors, along with the fact that he has been successfully employed in the District since 1999 compels a penalty like that imposed by the Commissioner in *In the Matter of the Tenure Hearing of Adam Mierzwa*, Commissioner's Decision No. 283-08, decided June 23, 2008, *i.e.,* suspension without pay while he obtains training and assistance in anger management, conflict resolution and the handling of difficult and disruptive students, "together with an appropriate course of psychological counseling, with the understanding that if he fails to do so, his tenured employment with Petitioner will cease." (Respondent's Exceptions at 9) Imposition of such a penalty "places neither the East Orange School District, nor its students, at any risk of being serviced by an inadequate teacher, but rather, simply affords Respondent Taylor the opportunity to demonstrate his ability to resume prior form." (*Id.* at 9-10)

In reply the District counters that not only is respondent's argument that the ALJ improperly credited the testimony of respondent's former supervisor, Gary Kramer, without merit, such an argument is also untimely. It proposes that the ALJ granted permission on February 10, 2009 for Mr. Kramer to testify telephonically because of extenuating circumstances, specifically – he was out of state as a consequence of his wife's illness and medical treatment. The District avers that respondent has waived his right to object to Mr. Kramer's testimony as he failed to follow the appropriate process, *i.e.*, the filing of an interlocutory appeal of the ALJ's decision – whereupon the Commissioner would have issued a ruling on his objection. It charges that the raising of this issue post-hearing is nothing less than

disingenuous. (District's Reply Exceptions at 2-3) Moreover, the District argues, counsel for respondent had every opportunity to cross-examine Mr. Kramer at the hearing, which he did. Consequently, respondent was not prejudiced in any way. (*Id.* at 3) Notwithstanding that the ALJ found Mr. Kramer's testimony credible with respect to six of the thirteen charges filed against respondent by the District, despite respondent's contention that Mr. Kramer's "...uncorroborated testimony [was] the sole basis for the Court's finding," support for each of the charges included overlapping and corroborating testimony from a number of witnesses. (*Ibid.*) Labeling respondent's urging that the ALJ's findings with respect to Mr. Kramer be rejected as baseless, the District submits there was ample basis for the ALJ to find his testimony credible and to reject respondent's uncorroborated, self-serving testimony. (*Id.* at 4)

Turning to respondent's allegation that the ALJ's recommended penalty is unduly harsh, the District vehemently disagrees. Initially, it argues, respondent conveniently ignores the fact that the District engaged in a pattern of progressive discipline with him which included a number of written reprimands, an increment withholding and employment probation for the 2007-08 school year before it finally filed tenure charges against him. Also, contrary to respondent's contention that the District and its administrators failed to provide him support, the District points to Exhibit P-12 which attempted to assist respondent in correcting his deficiencies by setting up a process whereby his performance for the 2007-08 school year would be closely monitored. This process included "1) assessing [his] strengths and weaknesses; 2) feedback from the building principal and/or assistant principal; as well as, 3) additional staff guidance, assistance and support." Despite the District's efforts to counsel and assist him, respondent's behavior significantly deteriorated during the 2007-08 school year. (District's Reply Exceptions at 5) As to respondent's attempt to cast blame on the District for failing to refer him for medical

counseling, it maintains that such a charge is "absurd." Although the District referred respondent for a psychiatric examination following his suspension, it cites to hearing testimony of the evaluating physician, Dr. James Cowan, stating that he found that respondent's judgment appeared to be "within normal limits," and that he did not complain of either depression or anxiety. (*Id.* at 6 – citations omitted) Finally, the District maintains that respondent's reliance on *In the Matter of the Tenure Hearing of Mierzwa*, Commissioner's Decision No. 283-08, decided June 23, 2008, in support of a penalty of training and assistance along with a course of counseling, is misplaced. As correctly found by the ALJ, the facts in that case are totally inapposite to the situation in this matter. Notably, the District points out:

> (...) Respondent in *Mierzwa* engaged in isolated instances of inappropriate behavior that did not constitute a pattern of unbecoming conduct including reprimanding an unruly student who had been fighting on school grounds and allegedly forcing her to sit in a chair in the school office, as well as allegedly expressing himself in a loud, forceful manner with co-workers. At no time does the record indicate that Mierzwa physically assaulted or threatened anyone nor does the record indicate that Mierzwa engaged in one (1) event significantly flagrant action [sic] as to warrant his dismissal.
>
> Unlike *Mierzwa*, Mr. Taylor's single act of physical assault on December 14, 2007 (...) against a fellow teaching staff member, in the presence of students and staff was sufficient to warrant his dismissal. Furthermore, Respondent engaged in a series of inappropriate and unbecoming precursors with students, parents, colleagues and supervisors prior to his violent assault upon a fellow teaching staff member resulting in his suspension.
> (District's Reply Exceptions at 9)

The District, thus, urges the adoption of the Initial Decision.

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

[2] The record contains transcripts of proceedings conducted on March 20, March 23, and April 2, 2009.

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 his tenured position.

In so concluding, the Commissioner was cognizant that the outcome of this matter with regard to the proving of the charges turns – in large measure – on the credibility of witnesses. This being the case – and the ALJ having had the opportunity to assess the credibility of the various witnesses who appeared before her,[3] 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).

Upon a reasoned review of the record with this governing standard in mind, the Commissioner is satisfied that the ALJ's recitation of testimony is both accurate and thorough, and that she carefully measured its relevance to the charges, conflicts, inconsistencies, potential biases, and the plausibility of its content in deciding which testimony to credit in reaching her findings of fact. Consequently, the Commissioner accepts the ALJ's factual findings (Initial Decision at 5-20), as they are amply supported by the record before her.

The Commissioner, therefore, finds – for the reasons presented by the ALJ in her decision – that the District has sustained its burden of proving the following charges of unbecoming conduct against respondent by a preponderance of the competent, relevant and credible evidence:

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[3] Thorough review of the record and transcripts of the telephonic testimony of the District's witness, Gary Kramer, which – as pointed out by the District – was in large measure corroborated by other witness testimony – provides no cause whatsoever to question the determination of credibility ascribed to his testimony by the ALJ.

Charge I – On May 12, 2006, respondent engaged in a verbal altercation with K.S., a special education student, following his refusal to let the student use the bathroom. During this altercation respondent made derogatory remarks to the student and threatened to "mush her in the face." (Initial Decision at 5-6)

Charge II – On October 12, 2006, respondent made disrespectful and insubordinate remarks to his supervisor, Assistant Principal Gary Kramer, in front of students. Later that same day, respondent took his class to the book fair in full disregard of his supervisor's clear directive not to do so. (Initial Decision at 7-8)

Charge IV – In October of 2006, respondent stormed out of an administrative meeting on two occasions, the second time slamming the door to the Principal's office in the presence of the building Principal and an Assistant Principal. (Initial Decision at 9)

Charge V – On more than one occasion during the 2006-07 school year, following his supervisor's classroom observation of him, respondent loudly addressed his supervisor – in the presence of students – with disparaging remarks. (Initial Decision at 10)

Charge VI – On November 21, 2006, respondent left his class unattended and upon returning, in the presence of his class, attempted to push his supervisor, who was standing in the doorway, aside. (Initial Decision at 10-11)

Charge VII – In or about January 2007, respondent engaged in a verbal altercation with student, A.N., after the student failed to adhere to his directive to return to her classroom and he made derogatory remarks to the student, either asking her "are you stupid and retarded?" or stating that she was acting "stupid" and "retarded". Subsequently, at a conference with A.N.'s parent, respondent was unprofessional and disrespectful toward the parent. (Initial Decision at 11-13)

Charge VIII – On April 5, 2007, respondent approached his supervisor in a hostile and threatening manner and proceeded to point his finger and raise his voice at him. After respondent went back to his class for a few minutes, he then returned and confronted his supervisor a second time in a loud voice and in an aggressive manner. (Initial Decision at 13-14)

Charge IX – On April 11, 2007, after encountering disciplinary problems with M.C., a student in his class, respondent telephoned her father to report her behavior. During this call, respondent

asked M.C.'s father to speak with her about her conduct and then put the child on the phone. While M.C. was attempting to explain what had happened to her father, respondent continually interrupted her, screaming and talking over her. After hearing the aggressive nature of respondent's tone, Mr. C. requested that she put respondent back on the phone. When respondent returned to the phone he was rude and shouting. Mr. C. immediately drove to the school in an attempt to rectify the situation. When he arrived he asked to speak to respondent and the principal. During the subsequent meeting, respondent was rude and disrespectful to both Mr. C. and the principal. (Initial Decision at 14-16)

Charge X – On September 5, 2007, during a Superintendent's Convocation, respondent distributed fliers to staff members – encouraging them to join the Newark Chapter of the "International Nude Artists' Collective" – in violation of Board Policy #4136 (Initial Decision at 16)

Charge XI – On September 20, 2007, respondent exhibited aggressive and inappropriate behavior toward another staff member in the presence of students which involved yelling and screaming at the staff member, flinging open a door which hit the staff member, posturing toward the staff member in an intimidating manner while continuing to yell and holding up his fist at the staff member in a threatening manner. (Initial Decision at 17-18)

Charge XII – On December 14, 2007, respondent initiated a physical altercation with a fellow faculty member, James Lansing – in the hallway of the school in the presence of students and other staff members – which involved respondent tossing his cup of coffee, dropping his bag and proceeding to run towards Lansing and begin punching him. (Initial Decision at 18-20)

Charge XIII – All of the above charges are incorporated to find that respondent, as a whole, engaged in a course of behavior which constitutes a pattern of conduct unbecoming a teaching staff member, insubordination or other just cause warranting his dismissal. (Initial Decision at 20)

The Commissioner, however, finding the District's exception arguments unpersuasive, concurs with the ALJ – for the reasons detailed on pp. 8-9 of her decision – that the District has failed to sustain its burden of proof on **Charge III,** alleging that respondent stormed into a coach's office

intentionally bumping into Mr. Kramer who was standing in the doorway and subsequently proceeded to become angry and unruly.

In determining the appropriate penalty to be imposed in this matter, the Commissioner is mindful that she is required to consider respondent's prior record in the District, the nature and gravity of his offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation and must consider any harm or injurious effect which his conduct may have had in the maintenance of discipline and the proper administration of the school system. *In re Fulcomer*, 93 *N.J. Super.* 404, 421-22 (App. Div. 1967). Preliminarily, in this regard, it is by now axiomatic that – by virtue of the unique position they occupy – teachers must be held to an enhanced standard of behavior. As was succinctly stated in *In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional*, 1972 *S.L.D.* 302, 321:

> [Teachers] are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. *This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.* (emphasis added)

The Commissioner has duly considered respondent's service in the District. She has also considered, in general, the stresses and strained relationships that may exist in any employment relationship whether in the public or private sectors. However, the proven charges here substantiate that respondent has demonstrated a pattern of improper conduct toward students, staff and parents alike. He was verbally abusive to his students, embarrassing them in front of their fellow students by calling them names and, on one occasion, even threatening one student with physical abuse; he was rude and disrespectful to parents attempting to conference

with him concerning issues involving their children; he was repeatedly disrespectful and belligerent towards his immediate supervisor and other administrative staff; he engaged in threatening, aggressive behavior towards his colleagues and, at one point, even initiated a physical altercation with one of them. Moreover, it is particularly egregious that many of respondent's negative interactions occurred in front of students in a classroom or in front of teachers and students in the hallways, thus sending a clear message – by example – that angry, disrespectful and out of control behavior is acceptable. This "is not the conduct pupils should be encouraged to emulate." (*See, In the Matter of the Tenure Hearing of Brady, Morris School District,* 92 *N.J.A.R.* 2d (EDU) 410, 420. Additionally, despite receiving repeated warnings from the District that his unprofessional and inappropriate behavior was not consistent with the professional conduct that is expected of a teacher (See Exhibits P-1, P-2, P-4, P-5, and P-13), respondent has remained unwilling or unable to conform his conduct to that which must be reasonably expected from a teaching staff member. Consequently, based on this record, it cannot be said that respondent's behavior is an aberration; nor can it be said that it is more likely than not that such conduct would not be repeated in the future. The Commissioner further notes that rather than taking responsibility for his actions, respondent apparently views himself as a victim rather than a perpetrator attributing his volatile inappropriate conduct to recalcitrant students, argumentative and hostile parents, and an unsupportive administration. This 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. 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 Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein. Respondent is hereby dismissed from his tenured teaching position with the School District of the City of East Orange. 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]

COMMISSIONER OF EDUCATION

Date of Decision: 9/21/09

Date of Mailing: 9/21/09

[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 11914-08
AGENCY DKT. NO. 15275-9/08

IN THE MATTER OF THE TENURE HEARING OF BRIAN TAYLOR, SCHOOL DISTRICT OF THE CITY OF EAST ORANGE, ESSEX COUNTY.

Mark H. Zitomer, Esq., for petitioner, School District of the City of East Orange, Essex County (Schwartz, Simon, Edelstein, Celso and Kessler, attorneys)

Arnold M. Mellk, Esq., for respondent, Brian Taylor (Wills, O'Neill and Mellk, attorneys)

Record Closed: June 16, 2009 Decided: August 4, 2009

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE

This matter involves tenure charges of unbecoming conduct filed by the petitioner, the East Orange Board of Education (Board), against the respondent, Brian Taylor, (respondent or Taylor) pursuant to the provisions of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to -18. The tenure complaint consists of thirteen charges which allege that respondent engaged in inappropriate behavior toward

students, inappropriate treatment of colleagues, insubordination to administrators, and inappropriate treatment of parents.

PROCEDURAL HISTORY

On or about August 14, 2008, Dr. Kenneth King, assistant superintendent of human resources, on behalf of the Board, filed thirteen (13) tenure charges of unbecoming conduct and/or other just cause for dismissal against respondent, together with a sworn statement of evidence in support of the charges. On or about August 14, 2008, the Board secretary served respondent with said charges and evidence. On September 3, 2008, the Board found probable cause to credit the evidence, warranting respondent's dismissal and certified tenure charges. The charges were filed with the Commissioner of Education, on September 3, 2008. Respondent was served with the Certification of Determination and suspended without pay for 120 days, pursuant to N.J.S.A. 18A:6-14.

On October 8, 2008, respondent filed an Answer to the charges. On October 20, 2008, the Department of Education transmitted the charges to the Office of Administrative Law for hearing as a contested case. Hearings were held on March 20 and 23, 2009, and concluded on April 2, 2009. Post-hearing submissions were filed on May 29, 2009, and on June 16, 2009, at which time the record closed.

THE LAW

The legislative design of the tenure law is "to aid in the establishment of a competent and efficient school system by affording to 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). 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). In furtherance of this objective, a tenured teacher shall not be dismissed or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10.

The Board bears the burden of establishing the truth of the tenure charges by a preponderance of the credible evidence. In re Polk, 90 N.J. 550, 560 (1982); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). This forum 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. Del., Lackawanna and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Stated differently, the evidence must "be such as to lead a reasonably cautious mind to a given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). 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 discussing whether conduct reaches the level of conduct unbecoming, the Commissioner of Education in In re Sammons, 1972 S.L.D. 302, stated that teachers are holders of the public trust and thus are held to the highest standards of conduct. [Since] "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." Id. at 321. In Saunders v. N.J. Dep't of Educ., 91 N.J.A.R.2d (EDU) 12, 14, Administrative Law Judge Bari-Brown 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.

The touchstone governing the dismissal of teachers "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. 1974), certif. denied, 65 N.J. 292 (1974). Such unfitness to remain a teacher may be demonstrated by a single incident, if sufficiently flagrant. In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967). While there is no legal standard for what constitutes a single "sufficiently flagrant" incident, dismissal has been upheld for a variety of reasons related to a single event. See e.g., In re Eiler, EDU 8059-99, Final Decision (April 3, 2000), <http://lawlibrary.rutgers.edu/oal/search.html> (teacher told a student to kick another student who was entangled in a desk); In re Ercolano, EDU 8422-97 (consolidated), Comm'r (May 1, 2000), <http://lawlibrary.rutgers.edu/oal/search.html> (teacher dismissed for grabbing a running child and pushing him against the wall); In re Tiefenbacher, 1982 S.L.D. 142, aff'd with modification, 1982 S.L.D. 157 (teacher 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).

In determining the appropriate penalty to be imposed, factors to be considered include the nature and gravity of the offense, the context in which it arose, the impact on the teacher's career and the effect on the maintenance of discipline and the proper administration of the school system. Fulcomer, supra, 93 N.J. Super. at 420-22.

FINDINGS OF FACTS

Respondent is a tenured middle school science teacher employed by the petitioner since October of 1999. He was assigned to the Cicely Tyson School of Performing Arts (Tyson School), which serves students in grades six through twelve. Respondent holds a Bachelor of Arts degree from Virginia State University, awarded May 1994, and an elementary school teaching certificate, issued by the New Jersey State Board of Examiners.

Dr. Kenneth King, assistant superintendent of the District in charge of human resources, testified that issues surrounding respondent's performance and other conflicts first came to his attention prior to the 2006-2007 school year. Because of these issues, respondent was reappointed by the Board for the 2007-2008 school year on a probationary basis and his increment was withheld. Employment probation is a result of deficient performance—including but not limited to teaching performance, attendance punctuality, and conduct—during the previous school year and requires the employee to correct the deficiencies. Consequently, the employee's performance during the next school year is closely monitored, and if there are additional deficiencies, additional adverse action may be taken. Respondent was again placed on probation for the 2008-2009 school year and his increment was withheld, again.

Charge One

Charge One of the tenure charges alleges that on May 12, 2006, respondent engaged in a verbal altercation with K.S., a special education student in his lab class.

Respondent does not deny this charge. He asserts that the incident occurred when he denied K.S.'s request to go to the bathroom. Her request was denied because school policy prohibits teachers from allowing students to go to the bathroom within the first fifteen minutes of class. Additionally, K.S. was exchanging insults and throwing marshmallows at another student. K.S.'s second request to use the bathroom was denied because of her behavior. When he attempted to collect the lab materials from

K.S., she threw them which resulted in a verbal confrontation between the two of them. He attempted to correct K.S.'s behavior, to no avail. She responded with foul language and used "homosexual words." Respondent disputed that security had to intervene because the altercation was "loud and abusive." Rather, he summoned security to remove K.S. from the classroom. He does not specifically recall calling K.S. an "untamed beast" or "fat emotional orangutan" but admits that he may have used "similar words." He acknowledges taking a "defensive stance" against K.S. after she threatened him, and that he threatened to "mush her in the face."

Laura Trimmings is the principal at the Tyson School. She testified that Security Officer Pickens and Mr. Preston, the health and social services coordinator responded to the K.S. incident. Thereafter, they prepared an incident report. P-1. At receipt of the report, and at the request of K.S.'s grandmother and legal guardian Beverly S., Trimmings held a conference to discuss the incident. At the meeting, respondent admitted that he called K.S. an "untamed beast" but denied calling her a "fat emotional orangutan." Trimmings noted that respondent attempted to justify his behavior and was defensive throughout the meeting. Beverly S. confirmed Trimmings's testimony and noted that she and respondent got into a shouting match. Respondent was disrespectful during the meeting.

Trimmings was particularly disturbed by the respondent's conduct because name-calling is never an acceptable way to challenge or reprimand students. Trimmings noted that this was not the respondent's first incident. There were prior incidents she had not documented; however, it seemed this behavior was continuing, therefore it was necessary to start documenting such incidents. Her memorandum reprimanding the respondent is set forth in P-1.

I **FIND** Beverly S. and Trimmings to be credible witnesses. I **FIND** that respondent made derogatory remarks toward K.S. and threatened her. Respondent's statements to K.S. exhibit a lack of sensitivity to a special education student and unprofessional conduct by a teacher and I so **FIND**. Thus I **CONCLUDE** that respondent engaged in actions constitute conduct unbecoming a teacher.

Charge Two

Charge Two alleges that respondent was disrespectful and insubordinate toward his supervisor, Gary Kramer (Kramer) the assistant principal of the middle school. The underlying facts are as follows:

On October 12, 2006, Kramer went to respondent's classroom to conduct an observation. Upon entering the classroom, respondent asked, "What do you want?" Respondent's demeanor was hostile and he had unsuccessfully attempted to close the door to prevent Kramer from even entering the classroom.

In his direct testimony, respondent noted that the two of them had had disagreements during an early morning meeting. He denied attempting to block Kramer from entering the room. He recalls that when Kramer waved his hand at him, he nearly hit him in the face. Thus, he told Kramer "You almost hit me in the face with your hands, and you better be more careful next time." Despite Kramer's presence for the classroom observation, respondent proceeded to tell the class they would be going to the book fair, thus abandoning his scheduled lesson. Subsequently, Kramer directed respondent not to take another class to the book fair, but to complete the lesson he prepared for the day because other teachers were designated to take the students to the book fair. Respondent replied that he had permission from another teacher to take a second class to the fair. As respondent's supervisor, Kramer had authority over the other teacher and he again reiterated that respondent should not go to the fair but to proceed with his lesson plan. Respondent told Kramer, in front of students, "Listen to me, I'm only going to say this one time, you can't tell me what to do, I'm going to do it." Respondent admitted taking the second class "by . . . the book fair." He attempted to mitigate his conduct by saying that he took his class on a "walk" to get exercise, use the bathroom and he just "stopped by . . . the book fair," but they did not go inside. He did not consider this to be insubordination. Kramer prepared a memorandum about the incident. P-2.

I **FIND** Kramer to be a credible witness. I **FIND** that respondent admitted to making disrespectful and insubordinate remarks to Kramer in the presence of students.

Further, that the respondent attempted to block Kramer's entry into his class and used unprofessional language and intimidating conduct toward his supervisor. I further **FIND** that respondent took his class to the book fair contrary to his supervisor's clear directive and said conduct was insubordinate.

Charge Three

Charge Three alleges that respondent intentionally bumped into Assistant Principal Kramer.

On October 18, 2006, Kramer met with several coaches for the Tyson School program "America's Choice." Respondent was not part of that meeting. Nevertheless, respondent stormed into the meeting in a very rushed manner and bumped into Kramer while he was standing in the doorway. Kramer concluded that respondent intentionally bumped him because it would have been easy for respondent to walk around him. Further, there were several other confrontations between them that caused Kramer to view the respondent as a physical threat. Respondent wanted to sign an attendance sheet; however, attendance sheets were not collected at the meetings. When respondent was advised of this, he became loud and boisterous. P-3.

Respondent did not recall bumping into Kramer, but, maintains that if he did so, it was not intentional. Respondent admits being boisterous and hostile when he was in the coach's office that day. He was upset because Kramer had falsely accused him of being absent at a staff meeting. Thus, he created his own sign-in sheets for the day that he was marked absent and for the following day. After the meeting concluded he took both sign-in sheets to Kramer.

In P-3, Kramer described the respondent as "unstable" as he never knew if anything he said would make respondent explode. Respondent's instability made him fearful.

Kramer admitted that he did not actually see respondent enter the room as he was facing the coaches and not looking at the entrance of the door.

I **FIND** that respondent entered the room in a rushed manner. I **FIND** that Kramer did not actually see respondent enter the room as he was facing the coaches and not looking at the entrance of the door. I **FIND** that the record does not support that respondent intentionally bumped into Kramer. Thus, I **CONCLUDE** that respondent's conduct was loud, boisterous and inappropriate. However it does not rise to the level of misconduct and this count should be **DISMISSED**.

Charge Four

Charge Four alleges that respondent stormed out of an administrative meeting on two occasions and inappropriately slamming the door to Principal Trimmings's office, in the presence of Trimmings and Assistance Principal Kramer.

Kramer testified that as a result of his memoranda (P-3), Trimmings called a meeting with him and the respondent to discuss the incident. Respondent was again loud, his behavior was erratic and he stormed out of the room. Kramer recalls there were at least two occasions where the respondent acted out. Trimmings corroborated his testimony.

Respondent denies slamming the door and asserts that it was a kick-stand hitting the ledge of the floor which that Kramer heard.

I **FIND** Kramer and Trimmings to be credible witnesses. Their demeanor was sincere and their testimony to be forthright and candid. I **FIND** respondent's testimony is simply not credible. I **CONCLUDE** that respondent engaged in inappropriate and insubordinate behavior when he stormed out of an administrative meeting.

Charge Five

Charge Five alleges that respondent was insubordinate and exhibited unbecoming conduct during the 2006-2007 school year when he loudly addressed Kramer in the presence of students with disparaging remarks.

On November 13, 2006, Kramer returned a student whom he had found roaming the hallway to the respondent's classroom. Respondent related that the student was sent to the disciplinarian because she was late for class. When Kramer attempted to discuss the matter with the respondent, he became irate and began to loudly belittle Kramer in front of the classroom. Thereafter, Kramer prepared a memorandum which he gave to the respondent and copied Trimmings. P-4. Trimmings held a conference with Kramer, respondent, the assistant principal and a union representative to discuss the matter. Her report is set forth in P-5.

Respondent asserts that Kramer only observed his class on one occasion. He never intended to disparage Kramer in front of students; however, he admits making the statements in the presence of his class, the teachers and students in the hallway.

I **FIND** that the Respondent was disrespectful and belligerent towards his supervisor in the presence of students and with others. I **CONCLUDE** that this pattern of inappropriate comments constitutes conduct unbecoming a teacher.

Charge Six

Charge Six alleges that respondent left his class unattended and upon returning attempted to push the assistant principal (Kramer) aside while he stood in the doorway to the classroom.

On November 21, 2006, Kramer noticed that respondent's class was unsupervised so he was standing in the classroom door to supervise the class. Shortly thereafter, respondent returned to the class. When the respondent returned, Kramer

was standing at the door so he could both observe the students in the classroom and those in the hallway. Kramer attempted to talk to respondent about his whereabouts. However, respondent attempted to push him aside while announcing that he was closing the door to teach his class. P-5.

Respondent reports that he left the classroom when a student kicked his classroom door and ran away, disrupting his class. He was only gone for "one minute." He admits that in the process of looking for the student, he proceeded to chase another student around the hallway in an attempt to learn the identity of the student who had kicked his door. Respondent denied pushing Kramer, although he acknowledged that Kramer was standing in the doorway. Respondent admits that there was physical contact with Kramer when he entered the room – "he pushed my arm, I pushed his back."

I **FIND** that the respondent displayed poor judgment and indifference to the needs of his students by leaving them unsupervised, notwithstanding the short length of his absence. I **FIND** that respondent physically pushed Kramer aside to enter his classroom and thus, inappropriately used physical force in this situation. I **CONCLUDE** that respondent's inappropriate conduct is conduct unbecoming a teacher.

Charge Seven

Charge Seven alleges that in January 2007, respondent engaged in a verbal altercation with a student, A.N., after the student failed to adhere to his instruction to return to her classroom.

Respondent recalled that as he was teaching class he saw a group of students making faces and noise in the hallway. Respondent instructed the students to return to their classroom; however, A.N. fired a rubber band at him nearly striking him in the eye. A.N. also referred to him using expletives. Respondent summoned Security Officer Charles Davis (Davis) to the scene. When Davis arrived, the respondent and A.N. were having a verbal altercation. While A.N. was explaining to Davis her version of the events, respondent interrupted her and asked, "Are you stupid and retarded?" Davis

recalled that the respondent was upset and speaking in a loud voice because he believed A.N. was lying.

Respondent admits that he called A.N. "stupid and retarded," but states that he was not referring to A.N., but speaking to her behavior. In any event, respondent believed his actions were warranted because A.N. shot rubber bands and used expletives at him.

Subsequently, A.N.'s mother requested a conference to discuss the matter. Yvonne Hunter (Hunter), the assistant principal of the high school, presided over the meeting with, the student's mother, A.N., the respondent and his union representative. Hunter recalled that when respondent entered the meeting he was somewhat agitated because he expected to see Principal Trimmings. Initially, he refused to be seated. The union representative repeatedly asked him to please take a seat until he finally sat. Hunter stated that respondent's conduct toward the parent was unprofessional: he was disrespectful to the parent, would not acknowledge or look directly at the parent, turned his back toward the parent and refused to speak directly to the parent or answer her questions. P-6, P-8.

The next day, respondent submitted a memorandum wherein he admits calling the student, "stupid and retarded." He wrote:

> . . . [A.N.] called me an expletive in the class which triggered the entire second half of the altercation. It is during that time I told her that she was acting "retarded and stupid," then later, while Mr. Davis attempted to escort her from class I heard her yelling "No, he called me stupid and retarded," then I said, "Don't put words in my mouth I said you were acting 'stupid and retarded,' but because of what you said I guess you are 'stupid and retarded.'"
>
> [P-7.]

Hunter testified that there is no difference between calling a student "stupid and retarded," and referring to a student's actions as being "stupid and retarded." It is

inappropriate to use such terms when referring to a student. Hunter, admitted, however that she was unaware that A.N. allegedly fired a rubber band at respondent.

I **FIND** Davis and Hunter to be credible witnesses. I find that respondent became angry with A.N. when she refused to comply with his directive to return to her class. While the respondent was justifiably aggravated at A.N.'s misbehavior and her nearly hitting him in the eye, it does not justify respondent's inappropriate remarks to A.N. I **FIND** that this is another example of respondent's unbecoming conduct toward students who question him and do not follow the rules. I further **FIND** that respondent's conduct toward A.N.'s parent was unprofessional and disrespectful. I **FIND** that respondent acted inappropriately when he refused to acknowledge or address A.N.'s parent in the parent conference.

Charge Eight

Charge Eight alleges that on April 5, 2007, respondent approached Assistant Principal Kramer in a hostile and threatening manner and proceeded to point his finger and raise his voice at Kramer.

Security Officer Davis testified that his post was between respondent's room and Kramer's. On the day of the incident, Kramer told Davis to "keep an eye" on respondent. Kramer recalled that on the day of the incident, respondent approached him in a hostile manner and was in such close proximity to him that it was uncomfortable. Davis saw the two and intervened because he believed Kramer felt threatened. He instructed the respondent to return to his classroom. Respondent returned to his classroom but then returned and confronted Kramer a second time with a loud voice and in an aggressive manner. In his memorandum about the incident, Davis described respondent's conduct as "threatening." P-8. Kramer could not recall what brought respondent there or any part of the conversation that took place, but he did remember the incident. He acknowledged that respondent never punched, slapped or otherwise struck him, nor did respondent verbally threaten to physically harm him. Still, he felt compelled to file a police report about it because he thought that the respondent was a physical threat.

Davis testified that there was no physical contact between them and did not recall respondent using any foul language towards Kramer.

Respondent denied having any confrontation with Kramer on April 5, 2007, and in fact did not see Davis's memo until June 2007 when he requested to see his personnel file.

I **FIND** Davis and Kramer to be credible witnesses. Kramer presented credible testimony that he felt physically threatened by respondent. Respondent's testimony that this incident did not occur because he could not remember the content of the conversation is not persuasive. I **CONCLUDE** that respondent engaged in unbecoming conduct in that he was hostile, disrespectful, and threatening.

Charge Nine

Charge Nine alleges that on or about April 11, 2007, respondent engaged in unbecoming conduct in his classroom and in the school's main office.

On the day in question, respondent encountered disciplinary problems with M.C., a student in his class. Respondent had previously called Mrs. C. (M.C.'s mother) to report M.C.'s disruptive behavior from the previous day, but was unable to reach her. Later, respondent called Mr. C., M.C.'s father, concerning her continued disruptive behavior in class. M.C. was present when respondent called her father. During the call, respondent asked the father to speak with M.C. concerning her conduct in class. When M.C. took the phone she was upset and crying, fearful that she would be in trouble with her mom. While she was attempting to explain to her father what had taken place, respondent continually interrupted her, screaming and rudely talking over her. After hearing the aggressive nature of respondent's tone, Mr. C. asked M.C. to put respondent back on the telephone. When respondent returned to the phone, he was rude and shouting. Respondent ended the call to take a call from his wife.

Mr. C. stated that he immediately drove to the school in an attempt to rectify the situation. He spoke with the school's secretary and asked if respondent could come downstairs to discuss the situation. Meanwhile, his wife called and instructed them to meet her in the main office. Principal Trimmings then held a meeting with respondent, Mr. C. and M.C. to discuss the matter. When the respondent arrived he demanded that a union representative be present. Trimmings questioned the need for a union representative. Mr. C. then attempted to introduce himself and explain why he wanted to meet with respondent. Respondent rudely replied, "I'm not talking to you; I'm talking to my boss," and refused to speak to Mr. C. directly.

Trimmings noted that respondent's obligation was to explain to the parent what occurred. Respondent continued to demand a union representative and refused to be a part of the meeting unless a representative was present. Respondent and Mr. C. then engaged in a fifteen-minute verbal-sparring match. M.C. was asked to leave the room because of the heated exchange. Due to the nature of the altercation, other faculty members and an East Orange police officer gathered outside the meeting room. The sparring match resumed and respondent ultimately stormed out of the meeting. Mr. C. was appalled at respondent's conduct and subsequently filed a formal compliant with the Board requesting that M.C. be immediately removed from respondent's class.

On cross-examination, Mr. C. acknowledged that his voice was raised during the meeting and that he accused respondent of being a "drug user" because of the way respondent was conducting himself. He denied referring to respondent as a "child molester." Respondent concluded that his behavior was justified because Mr. C. was "very irate" during the meeting, and had accused him of being "on drugs" and a "child molester." Further, respondent asserted that Mr. C.'s voice and hands were raised throughout the meeting. In his view Trimmings's did not have control of the meeting.

I **FIND** Mr. C. and Trimmings to be credible witnesses. I **FIND** that respondent left a meeting with a parent, student and Principal Trimmings prior to its conclusion. I **FIND** that respondent's action of engaging in a verbal-sparring match with a student's parent, in the presence of the student and the Principal, violated the standards of proper conduct expected of any professional, particularly a teacher. I **CONCLUDE** that

respondent's unrestrained hostile reaction is another example of unbecoming conduct towards a student, a parent and an administrator.

Charge Ten

Charge Ten alleges that on September 5, 2007, respondent distributed fliers to staff members at a superintendent's convocation in violation of Board Policy #4136.

The superintendent holds an annual meeting with all teachers and staff members in the District, which is referred to as the Superintendent's Convocation. The convocation takes place prior to the start of the school year. At the 2007 convocation, it was brought to Dr. King's (the assistant superintendent) attention that an employee was distributing fliers and the content was objectionable. King observed the respondent distributing fliers and told him to stop and confiscated the fliers. After confiscating the fliers, King looked at the flier and found that it encouraged staff to join the Newark chapter of the "International Nude Artists' Collective." There were no students present when the flier was distributed.

As a result of this incident, King wrote a memo to respondent as a warning and a reprimand (P-13). He also gave him a copy of Board Policy #4136 on soliciting, P-14. King testified that respondent violated this policy. In his memorandum, King stated that respondent's actions were in violation of Board Policy, unacceptable, lacking in good judgment and inconsistent with the behavior that is expected of a staff member of the Board. P-13.

I **FIND** Dr. King to be a credible witness. I **FIND** that respondent exercised poor judgment and engaged in inappropriate conduct in distributing fliers of questionable content at the convocation. Therefore, I **CONCLUDE** that this is another example of unbecoming conduct on the part of respondent.

Charge Eleven

Charge Eleven alleges that on September 20, 2007, respondent exhibited aggressive and inappropriate behavior toward another staff member in the presence of students.

School Guidance Counselor Brian Tidwell (Tidwell) testified that as he left the teacher's lounge he found two students roaming the hallway. When asked where they were going, they replied that they were going to "lunch detention." The students were sixth graders, thus they were relatively new and could not recall the name of the detention monitor. However, based on their description, Tidwell determined that it was the respondent. Tidwell had just seen respondent in the teacher's lounge and proceeded there where he found the respondent. He opened the door to the teacher's lounge and asked respondent if he was monitoring detention. Respondent responded by asking Tidwell "What do you mean lunch detention? If anyone has lunch detention they report to guidance." Respondent's response was loud and he was agitated. There were at lease two students present.

Respondent denies shouting but acknowledged that he was upset at the students because he thought they were trying to cut detention. Tidwell explained him that the students were looking for respondent and the detention room. Respondent replied that he did not have lunch detention and, "If any students have detention, they are to go to guidance. If any student walks out of [respondent's] room they report to guidance." Tidwell spoke further to respondent and the conversation ended with the respondent yelling at Tidwell. Respondent denies shouting or threatening Tidwell, but admitted that he "may have raised [his] voice." Tidwell then closed the door to the teacher's lounge.

Tidwell was standing in front of the lounge door attempting to speak with the students when respondent opened the faculty-room door hitting him in the right shoulder. Tidwell does not believe that respondent intentionally hit him with the door. Meanwhile, respondent proceeded to posture towards Tidwell in an intimidating manner while continuing to yell about the students' conduct. This was done in the presence of

the two students and several other students who began to gather in the hallway. In order to diffuse the situation, Tidwell told respondent to go back into the teacher's room. However, respondent became more agitated and, in the presence of several other teachers, respondent held up his fist, telling Tidwell never to let it happen again. Tidwell perceived respondent's gesture as threatening. Concerned about the respondent's behavior, Tidwell advised Principal Trimmings of the incident. P-15.

I **FIND** Tidwell to be a credible witness. I **FIND** that respondent made threatening gestures toward a fellow colleague. I **CONCLUDE** that the respondent engaged unbecoming conduct.

Charge Twelve

Charge Twelve alleges that respondent initiated a physical altercation with a fellow faculty member, James Lansing (Lansing).

On December 14, 2007, at about 8:45 a.m., respondent approached Lansing seeking to have a conversation with him in the men's room. Lansing agreed because he and respondent had verbal altercations in the past and he believed they were going to finally resolve their differences. After entering the lavatory, respondent changed his mind about discussing anything. Lansing testified that, after exiting the lavatory, respondent said in a threatening voice, "This thing between me and you is going to reach a head real soon.'" Lansing testified that all of a sudden, he heard something, turned around and found that respondent had tossed his coffee and was running towards him. Respondent hit him and both ended up on the floor. Security guards separated them.

Lansing emphatically denied saying to respondent prior to the physical altercation, "I'm going to kick your ass."

Respondent does not dispute that he engaged in a physical altercation with Lansing. He admitted that "he tossed his cup of coffee, dropped his bag and proceeded

to run towards Lansing and began punching him." The incident took place in the hallway of the school and in the presence of students and other staff members.

Prior to this incident Lansing had informed Principal Trimmings that he was concerned for his safety. Following the incident, Lansing took a leave of absence because he did not feel safe at the school and the administration could not give him any assurances about any disciplinary action. He filed a criminal complaint against respondent, but subsequently withdrew it when he was advised that withdrawal was in his best interest, because if the respondent counter-claimed and Lansing was found guilty of fighting on any level he could lose his tenure.

Trimmings prepared a memorandum to Dr. Clarence Hoover, superintendent of schools, containing what was reported to her by her staff regarding the altercation. P-18. Trimmings also authored another memorandum to Assistant Superintendent Dr. King as a result of this incident regarding respondent's aggressive behavior. P-17. It is noted that since the respondent was suspended there has been an improvement in the school environment.

Respondent acknowledged the inappropriateness of his involvement in the altercation and expressed remorse for his actions.

Dr. King recommended to the superintendent that respondent be sent for psychological testing. King concluded that the respondent's actions and behavior seemed to deviate from the norm, as it was aggressive with students, argumentative with staff, belligerent, and now violent.

Dr. Bruce Cowan (Cowan), a psychiatrist who evaluated respondent at the recommendation of the Board, testified that he discussed the incident with respondent, and that respondent expressed sincere remorse for his actions. Cowan, recommended that respondent receive psychiatric/psychological counseling. According to King, the respondent also underwent a neurological exam, but the Board did not refer him for counseling nor is the Board responsible for providing counseling for its employees. King noted that the instant tenure charges were filed against respondent due to concern

regarding his actions, behavior, performance, and demeanor; Principal Trimmings had also expressed concern regarding respondent's actions for some time, citing respondent being argumentative with her and his supervisor, as well as disrespectful to students and parents. King saw a pattern of action and behavior that caused him great concern.

I **FIND** Dr. King and Trimmings to be credible witnesses. I **FIND** Lansing's testimony to be generally credible. I **FIND** that the altercation in the presence of students and other staff members was initiated by the respondent. I **FIND** that respondent deviated from the appropriate conduct expected of a teacher and, therefore, I **CONCLUDE** respondent is guilty of unbecoming conduct.

Charge Thirteen

Charge Thirteen incorporates by reference Charge One through Charge Twelve thereof. Thus, the issue with respect to Charge Thirteen is whether the findings and conclusions I have reached in Charge One through Charge Twelve amount to conduct unbecoming a teacher and insubordination or other just cause.

I **FIND** that the making of defamatory statements to or about students is unbecoming conduct for a teacher. I **FIND** that respondent's repeatedly aggressive demeanor towards administrators and his disregard for the directives of his supervisor constitutes insubordination. I **FIND** that it was entirely inappropriate for respondent to have engaged in a physical altercation. Therefore, I **CONCLUDE** that respondent is guilty of unbecoming conduct.

DISCIPLINARY ACTION

The only remaining issue concerns the penalty that should be imposed. The seriousness of respondent's infractions is a critical consideration in this case. Although, the Board presented insufficient evidence to sustain Charge Three, in regard to the remaining charges, I **CONCLUDE** that the credibility of the Board's witnesses and numerous incidents establish by a preponderance of the credible evidence that

respondent acted in a manner that is not appropriate for a school teacher and not commensurate with a teacher's function as a role model. I **FIND** that respondent failed to control his temper, exercised poor judgment, made disparaging remarks about students and allowed his feelings of frustration and anger to overwhelm his professional demeanor. He failed to uphold the standards of the teaching profession. Rather, his conduct displayed a bad temper, disrespect authority and his colleagues. This is most assuredly not the teacher's role.

Respondent contends that his depression and its attendant symptoms, as described by Dr. Cowan in his report, contributed to both his challenges at Tyson School and the perception that he displayed an inappropriate demeanor. Consequently, respondent asserts that with the counseling recommended by Dr. Cowan, and given training in anger management, conflict resolution, and handling difficult and disruptive students, respondent would again be able to satisfactorily perform the duties of a teacher and should be given the opportunity to do so. Respondent relies on In re Mierzwa, EDU 8220-07, Final Decision (June 23, 2008), <http://lawlibrary.rutgers.edu/oal/search.html>, where Mierzwa was suspended for 240 total days and required to successfully complete similar training. However, respondent's reliance is misplaced. In Mierzwa, the Commissioner held that the force used by Mierzwa in compelling a student to sit was "not excessive," and that conduct of the type in which Mierzwa was found to have engaged generally resulted in a penalty less severe than dismissal. Conversely, in the present matter, respondent's single act of physical assault against a fellow teaching staff member, in the presence of students and staff, rises to the level of an act significantly alarming as to warrant dismissal. See Fulcomer, supra, 93 N.J. Super. at 421. Furthermore, respondent engaged in a series of behaviors, which, in its cumulative effect, caused staff members to feel physically threatened. Indeed, respondent admits much of this conduct including, but not limited to, berating students in an inappropriate manner, inappropriate treatment of parents, insubordinate behavior towards the assistant principal, as well as initiating a fight with a fellow staff member.

A school district is not required to continue "to employ a teacher who fails to serve as the role model that a teacher must be, nor to employ a teacher whose temper

is so uncontrolled that he cannot act in a proper and controlled fashion when faced with the strains of modern day school life." Mierzwa, supra, EDU 8220-07, Initial Decision, (May 6, 2008), modified, Final Decision (June 23, 2008). "While no one should minimize the difficulties and provocations that [respondent] and other teachers unfortunately face in the schools, and by no mean should the sanctioning of a teacher for improper conduct in any way be viewed as condoning the actions of misbehaving students, it is still the case that a teacher must comport himself properly despite the slings and arrows of daily life in the schools." Ibid. Respondent "apparently is unable to harness his temper and control his emotions sufficiently to handle the pressures that he inevitably must face when dealing with students." Ibid. Moreover, it is without question that for a teacher to engage in a physical altercation with a fellow teacher is incredible and totally unacceptable. Cf. Goffney v. City of Camden, CSV 106-02, Initial Decision (May 17, 2004), adopted, Final Decision (June 24, 2004) ("a sworn law enforcement officer to assault another off-duty officer because of personal differences is incredible and is totally unacceptable"). Respondent's continued employment does not serve the interests of Tyson School, its staff, the District and most importantly, its students. Given the seriousness of respondent's departure from the conduct appropriate for an educator, I **CONCLUDE** that respondent's tenure must be revoked.

ORDER

Based on the above analysis and findings, I **CONCLUDE** that the respondent's behavior constituted conducting unbecoming an employee, and that the determination of the Board to remove respondent was reasonable and necessary in order to insure the safety and well being of the students and staff.

Therefore, it is **ORDERED** that the tenure charges certified against respondent Brian Taylor are **SUSTAINED** and his dismissal as a tenured science teacher is hereby **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.

August 4, 2009

DATE

IRENE JONES, ALJ

Date Received at Agency: 8/4/09

Date Mailed to Parties: 8/4/09

sej

APPENDIX

WITNESSES

For Petitioner:

Gary Kramer
Yvonne Hunter
Charles Davis
Mr. C.
Brian Tidwell
James Lansing
Beverly S.
Laura Trimmings
Dr. Kenneth King

For Respondent:

Brian Taylor
Dr. James Cowan

EXHIBITS

Joint Exhibits:

J-1 Sworn Tenure Charges against respondent

J-2 Joint Stipulation of Facts

For Petitioner:

P-1 May 26, 2006, memorandum from Principal Trimmings to respondent

P-2 October 13, 2006, memorandum from Assistant Principal Kramer to respondent

P-3 October 20, 2006, memorandum from Assistant Principal Kramer to respondent

P-4 November 14, 2006, memorandum from Assistant Principal Kramer to respondent

P-5 November 22, 2006, memorandum from Principal Trimmings to respondent

P-6 February 1, 2007, memorandum from Assistant Principal Hunter to Principal Trimmings

P-7 February 7, 2007, memorandum from respondent to Principal Trimmings

P-8 April 5, 2007, memorandum from Security Office Davis to Principal Trimmings

P-9 April 11, 2007, correspondence from parent, Mr. C., addresses to the East Orange Board of Education

P-10 April 17, 2007, letter from Assistant Superintendent Dr. King to respondent

P-11 May 3, 2007, letter from Superintendent Dr. Hoover to respondent

P-12 September 7, 2007, memorandum from Assistant Superintendent Dr. King to respondent

P-13 September 11, 2007, letter from Assistant Superintendent Dr. King to respondent

P-14 East Orange Board of Education Policy #4137 regarding Soliciting and Selling

P-15 September 20, 2007, letter from School Counselor Tidwell to Principal Trimmings

P-16 December 14, 2007, memorandum from Principal Trimmings to Assistant Superintendent Dr. King

P-17 December 14, 2007, memorandum from Principal Trimmings to Superintendent Dr. Hoover

P-18 June 5, 2008, letter from Superintendent Dr. Hoover to respondent

P-19 Respondent's answers to interrogatories and admissions

For Respondent:

R-1 March 30, 2006, teaching evaluation of respondent

R-2 Photograph of graffiti

R-3 November 28, 2006, memorandum from respondent to Principal Trimmings

R-4 November 20, 2006, handwritten memorandum from respondent to Assistant Superintendent Dr. King

R-5 Dr. Cowan's psychological evaluation of respondent dated January 23, 2008

308-09

HEATHER HUDSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – formerly a non-tenured English teacher in the respondent's district – appealed her mid-year termination for misconduct following an incident in which she responded to a student's disruptive behavior by taping and wrapping a scarf around the student while he was sitting in a chair. Petitioner claimed that the respondent could not terminate her without "just cause" and asserted that the Board improperly reported her termination to the State Board of Examiners as required by *N.J.S.A.* 18A:16-1.3. The Board contends that it acted within its discretion to terminate non-tenured employees and argued that the Commissioner does not have jurisdiction over this matter, as it does not arise under the school laws.

The ALJ found that: a school board has virtually unlimited discretion, absent a violation of constitutional or legislatively-conferred rights, in the termination of non-tenured teachers; employment contracts of non-tenured teachers which contain provisions for termination by either party upon a specified number of days of notice may be terminated in accordance with the contract without the need to demonstrate just cause; petitioner's contention that just cause is required prior to termination is derived from the Collective Bargaining Agreement between the Board and the Education Association of Mt. Olive; the Commissioner does not have jurisdiction over contractual disputes; the respondent prematurely notified the State Board of Examiners of petitioner's termination, however – because petitioner did not pursue her grievance in an "administrative tribunal of competent jurisdiction" pursuant to *N.J.S.A.* 18A:16-1.3, the respondent's procedural violation had no impact. The ALJ concluded that the OAL does not have jurisdiction to grant petitioner's requested relief, and dismissed the petition.

Upon independent review and consideration, the Commissioner adopted the Initial Decision of the OAL 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.

September 24, 2009

OAL DKT. NO. EDU 9142-08
AGENCY DKT. NO. 145-5/08

HEATHER HUDSON,	:	
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. The Board filed timely exceptions to the Initial Decision. Petitioner requested and was granted three extensions of time within which to file her exceptions and the Board requested and was granted an extension of time to file a reply to petitioner's exceptions. These submissions were received in accordance with the revised timelines.

Although in all other respects agreeing with the Administrative Law Judge's (ALJ) decision, the Board excepts to her determination that the Board engaged in a procedural violation by prematurely notifying the State Board of Examiners of petitioner's termination only two-days after its action to terminate her employment. Although concurring with the ALJ's finding that this alleged violation did not alter her holding because Petitioner never pursued her grievance in the appropriate forum, the Board calls to the Commissioner's attention *N.J.A.C.* 6A:9-17.4, the regulation implementing *N.J.S.A.* 18A:16-1.3 which in sub-part (a) provides:

> The Chief School Administrator of a District shall notify the Board of Examiners when: (2) Non-tenured teaching staff members who are accused of criminal offenses or unbecoming conduct resign, retire or are removed from their positions...
> (Board's Exceptions at 1)

Clearly, the Board argues, this provision does not require the District to wait to notify the State Board of Examiners when an employee is dismissed for unbecoming conduct. The Board, therefore, proposes that it committed no statutory or regulatory violation by immediately notifying the State Board of Examiners of petitioner's termination. (*Id.* at 2)

Petitioner's exceptions challenge the ALJ's determination that the Commissioner does not have subject matter jurisdiction over this matter as it is, fundamentally, one of contract interpretation. In support of her position, petitioner recasts and reiterates her arguments advanced below, essentially maintaining that this is not a contract dispute, but rather is controlled by *N.J.S.A.* 18A:16-1.3 in that she is challenging whether the Board satisfied the "just cause" criteria of this provision necessary to report her termination to the State Board of Examiners and, as such, this matter falls within the jurisdictional purview of the Commissioner. (Petitioner's Exceptions at 6-8) Petitioner further disputes the ALJ's finding that she should have properly pursued her grievance with respect to her termination through arbitration pursuant to her Collective Bargaining Agreement (CBA). Petitioner argues that the CBA expressly states:

> It is however, expressly understood that if the subject matter of the grievance involves an alleged violation or misinterpretation of Board policy or **an alleged improper administrative action or decision**, *the grievance shall terminate at the Board level and there shall be no right to proceed to arbitration* as provided herein. [Exhibit G, Agreement, pg. 8] emphasis added
> (Petitioner's Exceptions at 8)

As indicated above, she argues – because the subject matter of her grievance involves improper administrative action – her "case was not permitted to be the subject of arbitration pursuant to the

CBA" (*Id.* at 8) Petitioner, therefore, requests that the Commissioner reject the recommended decision of the OAL. In the alternative, she asks that the decision be modified to require this matter to be sent to arbitration. (*Id.* at 11)

In reply, the Board advances that petitioner attempts to obfuscate the underlying issue in this matter by her claim that the term "just cause" is derived from *N.J.S.A.* 18A:16-1.3 rather than – as found by the ALJ – her collective bargaining agreement (CBA). In so claiming, it contends, petitioner continues to misread the provisions of this statute, specifically

> [u]nder the statute's provisions, "just cause" relates only to whether there was cause for the employee's actual termination, [thereby triggering a reporting responsibility for the Board.] (...) In this matter, the reasoning as to whether or not Petitioner's termination was with "just cause" is derived directly from the terms of the relevant [CBA] in effect between the parties.
>
> Pursuant to the terms of the [CBA], "the Board shall have the right to take disciplinary action for good and just cause. Disciplinary action may include...termination." See [CBA] at Article 19 [Exhibit G, Petitioner's Exceptions] (...) Throughout Petitioner's Exceptions, and indeed throughout each submission by Petitioner during the course of this litigation, she has claimed that her termination was without just cause. Accordingly, Petitioner's underlying termination, and whether or not just cause existed for same, is governed by the terms of the [CBA] and has no relation to any school law provision contained in Title 18A...
>
> Thus, Petitioner's claim relates directly to the terms of the Agreement. Petitioner did not challenge the Board's finding of just cause before an arbitrator, as was her right under the terms of the Agreement, and her failure to do so then invoked the [reporting] provisions of *N.J.S.A.* 18A:16-1.3. (Board's Reply Exceptions at 8-9)

Similarly, the Board argues, petitioner is mistaken in her allegation that the terms of the CBA precluded her from submitting her grievance to arbitration. "Petitioner's grievance over her termination is not alleging an improper administrative action. Rather, she alleges that she was disciplined without just cause, in violation of the Agreement itself." The terms of both the CBA

and the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-29, expressly provide that issues of "discipline," including terminations, are subject to the grievance procedure, including – ultimately – binding arbitration. Petitioner's failure to exhaust her administrative remedies under the CBA is fatal to the allegations contained in her petition. (*Id.* at 10-11, quotation at 11)

Upon full consideration, the Commissioner concurs with the ALJ that summary decision is appropriately granted to the Board, as she lacks jurisdiction over the instant matter.[1] In so determining, the Commissioner is fully cognizant that it is by now well-established that a district board has virtually unlimited discretion in hiring, firing or renewing non-tenured teachers. *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. Where a non-tenured teacher challenges a district board's decision to terminate her employment, she is entitled to litigate that claim 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). (*See also Kufel v. Union County Vocational-Technical School District* 96 *N.J.A.R.* 2d (EDU) 446; *Randy Pratt v. Board of Education of the Borough of Butler, Morris County*, decided by State Board of Education, January 6, 1999; *Lydia Anderson v. State-operated School District of the City of Newark*, decided by State Board of Education, February 7, 2001). The instant petitioner has made no such claim and, therefore, the

[1] It is noted that subsequent to the termination of her employment, petitioner received 60-days pay in accordance with the terms of her employment contract.

Commissioner lacks jurisdiction to consider the underlying reasons for petitioner's mid-year termination.

Petitioner's argument that her challenge to whether or not the Board satisfied the "just cause" provision of *N.J.S.A.* 18A:16-1.3 brings this matter within the jurisdictional purview of the Commissioner of Education, is wholly without merit. This provision, in pertinent part, specifies:

> A board of education shall notify the State Board of Examiners whenever a non-tenured, certificated employee is dismissed prior to the end of any school year for just cause as a result of misconduct in office...The State Board of Examiners shall maintain a list containing the name...of the employee and the reason for the dismissal. If a disciplinary grievance arbitration is conducted pursuant to... [*N.J.S.A.*] 34:13A-29 as to the dismissal, or if the dismissal is appealed to a court or administrative tribunal of competent jurisdiction the board of education shall not notify the State Board of Examiners unless just cause due to misconduct in office is found by the arbitrator, the court or administrative tribunal of competent jurisdiction.

The Commissioner is in full accord with the ALJ that

> *N.J.S.A.* 18A:16-1.3 has no relevance to a board's decision to terminate an employee or the reasons underlying the termination. Rather, this provision only concerns a board's actions after a non-tenured, certificated employee is terminated mid-year. (Initial Decision at 11)

It is noted that *N.J.S.A.* 18A:16-1.3 – on its face – imposes a reporting obligation on the Board. It provides no right of appeal as to the validity of the Board's reasons for termination but, rather, contemplates that any challenge to the reasons for an individual's removal from employment be made in an appropriate forum and a challenge so made serves to postpone the Board's reporting responsibilities until a "court or administrative tribunal of competent jurisdiction" has made a determination on the individual's appeal. For the reasons detailed above, the Commissioner of

Education lacks jurisdiction to review the reasons for the instant petitioner's termination. The Commissioner, therefore, is not a court or tribunal of competent jurisdiction as contemplated by *N.J.S.A.* 18A:16-1.3. Here, petitioner's claim was derived from and appropriately advanced pursuant to her CBA through arbitration, as a contractual claim in Superior Court or as an action before the Public Relations Commission. (See *N.J.S.A.* 18A:16-1.3)

However, the Board's Motion to Dismiss filed below specifically advances:

> the Collective Bargaining Agreement ...between the Mount Olive Board of Education and the Education Association of Mount Olive..., Article 2...provides that if a grievance is not resolved at the Board level, "the Association may, within the limitations contained herein, submit the grievance to arbitration, which shall be binding to the extent permitted by law." (emphasis added) Art. 2(C)(5). (Exhibit G)
>
> A grievant may submit a written request to the Association to pursue arbitration within 10 days of receiving the Board's grievance determination. The Association then has 28 days to file a petition with the American Arbitration Association. Art. 2(C)(5). The recommendation of the arbitrator is binding. Art. 2(C)(6). (emphasis added. Article 5A, Subsection D provides that "[a]ny grievance not processed in accordance with the time limits specified herein shall be deemed relinquished by the grievant." (emphasis added). (Exhibit G) (Board's Motion to Dismiss at 3-4)

Petitioner's failure to pursue her claim to its conclusion in an appropriate forum – pursuant to her CBA – was a fatal error and provides her no recourse here.

The Commissioner declines petitioner's alternative exception request – that she order that this matter be sent to arbitration – as the Commissioner lacks the jurisdictional authority to consider such a request or to issue such an order.

Notwithstanding this result, the Commissioner cannot support the Board's argument that it was not guilty of a procedural infraction by reporting petitioner's termination to the State Board of Examiners two days after the Board acted to dismiss her. Rather the

Commissioner agrees with the ALJ that such action was "premature" as "[t]his did not afford petitioner the opportunity to pursue an appropriate appeal prior to notification." (Initial Decision at 12) However – as also found by the ALJ – given petitioner's failure to pursue her grievance in an appropriate forum, "the Board's procedural violation has no impact because the Board is required to notify the State Board unless the dismissal is appealed to 'an administrative tribunal of competent jurisdiction.' *N.J.S.A.* 18A:16-1.3" (Initial Decision at 12)

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons stated therein. Summary Decision is hereby granted to the Board and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9|24|09

Date of Mailing: 9|24|09

[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
ORDER ON SUMMARY DECISION
OAL DKT. NO. EDU 09142-08
AGENCY DKT. NO. 145-5/08

HEATHER HUDSON,
Petitioner,
v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE
Respondent.

Mary Frances Palisano, Esq., for petitioner (Law Offices of Alan L. Zegas, attorneys)

Marc H. Zitomer, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, LLC, attorneys)

Record Closed: May 27, 2009 Decided: June 26, 2009

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

PROCEDURAL HISTORY

The petitioner, Ms. Hudson, is a non-tenured teacher who had been employed by the Mt. Olive Board of Education. On March 12, 2008 the Superintendent of the Mt. Olive Township School District sent a letter to the petitioner informing her that at its Board of Education meeting on March 12, 2008 it took action to terminate her employment effective immediately for unbecoming conduct toward a student, by duct taping him to a chair; unprofessional conduct in front of students; not following the principal's directions; poor judgment in using "hip-hop" lingo and language resulting in making students feel uncomfortable in class and inability to grasp the seriousness of the events. The superintendent copied the State Board of Examiners on the correspondence. The petitioner filed a grievance on March 20 and March 26, 2008 contending that she had been disciplined and terminated without just cause. Ms. Hudson presented her case before the Board of Education on April 14, 2008 and her grievance was denied. The petitioner then filed a petition on May 23, 2008 requesting that the Commissioner consider the controversy that had arisen between the Board and herself. The matter was forwarded to the Office of Administrative Law (OAL) on July 23, 2009. A pre-hearing conference was held on October 16, 2008. The matter was set down for a hearing on April 15, 24 & 27. However, the District filed a Motion to Dismiss on March 27, 2009. The petitioner objected to the late filing of the motion. However, because it appeared that the matter might be ripe for Summary Decision, I adjourned the hearing dates until August 3 and 4th and allowed the petitioner time to respond to the motion. Ms. Hudson filed her reply brief on May 8, 2009. On May 13, 2009 the District requested an extension to file its responsive brief, which it submitted on May 27, 2009.

STATEMENT OF THE CASE

Petitioner, Heather Hudson, a non-tenured English teacher, asserts that the respondent, Board of Education of Mount Olive Township, acted improperly when it terminated her mid-year for misconduct. Petitioner then asserts that the Board improperly reported her termination to the State Board of Examiners, as is required by

N.J.S.A. 18A:16-1.3. The crux of petitioner's argument is that the Board's decision to terminate petitioner is governed by Title 18A, and specifically, that the provisions of N.J.S.A. 18A:16-1.3 were violated by petitioner's actual termination. In response, respondent maintains that it acted within its discretion to terminate non-tenured employees and that petitioner has improperly filed an action before the Commissioner of Education who lacks jurisdiction over the present matter.

STATEMENT OF THE FACTS

Petitioner, Heather Hudson, was a non-tenured teacher employed by respondent in the English Department of Mount Olive Middle School. In August of 2007, petitioner was offered and accepted an employment contract with respondent for the 2007-2008 school years. A provision of the contract allowed either party to terminate the contract unilaterally upon sixty days notice. Ms. Hudson's employment began with respondent on September 1, 2007.

On February 25, 2008, the English Department staff was informed that one non-tenured English teacher would be let go because of budget cuts. (Petr. Opposition Brief at 4.) During her employment in Mount Olive Middle School, petitioner never received a negative evaluation, verbal or written, from any member of the administration. (Petr. Opposition Brief, Exh. A.)

On February 26, 2008, Ms. Hudson responded to a student's disruptive behavior by using tape and wrapping a scarf around the student while he was sitting in a chair. This was done in front of the entire class. Petitioner acknowledged doing so in a letter to the Board, dated March 6, 2008. (See Certification of Rosalie Lamonte,[1] Exh. A.) On February 28, 2008, petitioner was questioned by the administration about the incident. On March 6, 2008, petitioner was advised that she was suspended from her teaching duties. On March 10, 2008, she was advised by the Superintendent that she had been terminated by the Board at its meeting that evening.

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[1] Hereinafter known as "Lamonte Cert."

In a letter dated March 12, 2008, Superintendent Rosalie Lamonte (Dr. Lamonte) advised petitioner that on March 10, 2008, the Board terminated petitioner's employment for:

- Unbecoming conduct in taping a student to a chair – first using duct tape[2] – then a scarf
- Unprofessional conduct in comporting [her]self inappropriately in front of students
- Not following the principal's directions in handling of these instances
- Poor judgment in the use of "hip-hop" lingo and language that could result in student's feeling uncomfortable in [her] classroom
- Inability to grasp the seriousness of these events and their inappropriateness.

[Lamonte Cert., Ex. B.]

Dr. Lamonte copied the State Board of Examiners on the March 12, 2008, letter, which was sent two (2) days after the Board voted to terminate petitioner. Petitioner filed a grievance on March 20, 2008, and March 26, 2008, respectively, contending she had been disciplined and terminated without just cause.

The Board reported petitioner's conduct to the Division of Youth and Family Services. An investigation into Ms. Hudson's actions was undertaken by the Institutional Abuse and Investigation Unit (IAIU) of the Department of Children and Families. Petitioner was interviewed by the IAIU on March 26, 2008, and a findings report was issued on April 9, 2008. (Petr. Opposition Brief, Exh. D; Lamonte Cert., Exh.

[2] Petitioner asserts that she did not use duct tape, she maintains that she used masking tape.

E.) The results of the IAIU investigation indicated that the student was not harmed and that the allegations of abuse against petitioner were unfounded. The report further stated that the information gathered "does not support an indication in the referral that [C.] was tied/confined by [petitioner] utilizing masking tape and a scarf." Ibid. The IAIU report concluded that "Ms. Hudson placed a piece of masking tape on C. and placed her scarf around him in response to this student's disruptive behavior." The report found her actions "inappropriate," noted that she was terminated, and recommended that the incident "suggested some form of corrective action, which the school district has taken upon its own discretion." Ibid.

Thereafter, petitioner presented her grievance to the Board on April 14, 2008, and her grievance was denied. (Lamonte Cert., Exh. F.)

LEGAL ANALYSIS

I. ALTHOUGH DESIGNATED AS A MOTION TO DISMISS, THE MOTION FALLS WITHIN THE PARAMETERS OF A MOTION FOR SUMMARY DECISION, AND IS CONTROLLED BY N.J.A.C. 1:1-12.5.

The New Jersey Supreme Court has clarified the analysis required when considering a motion to dismiss: "whether a cause of action is suggested by the facts." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)(citations omitted).

> Because the matter arises on [respondents'] motion to dismiss, [the court must] accept as true the facts alleged in the complaint. . . . [Petitioners] are entitled to every reasonable inference in their favor. A reviewing court must 'search the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim. . . .'

> [Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 625-26 (1995)(citations omitted).]

A motion to dismiss should only be granted in the rarest of instances. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989).[3] "If a complaint must be dismissed after it has been accorded . . . meticulous and indulgent examination . . . then, barring any other impediment such as a statute of limitations, the dismissal should be without prejudice to a [petitioner]'s filing of an amended complaint." Ibid. (emphasis added).

It is well settled that when facts beyond the initial pleadings are relied on in determining the motion, the motion to dismiss is converted to a motion for summary decision.[4] Jersey City Educ. Ass'n v. City of Jersey City, 316 N.J. Super. 245, 253-54 (App. Div. 1998); see e.g. Price v. Bd. of Educ. of Twp. of Washington, EDU 6121-07, Initial Decision, (December 7, 2007), adopted, Comm'r (January 24, 2008) <http://lawlibrary.rutgers.edu/oal/search.html> (motion to dismiss was converted to a motion for summary judgment); see also K.L. & K.L. o/b/o minor children C.L. & M.L. v. Kinnelon Bd. of Educ., EDU 1191-08 and EDU 1192-08 (consolidated), Initial Decision, (April 24, 2008), <http://lawlibrary.rutgers.edu/oal/search.html>, adopted, Comm'r (July 22, 2008) <http://www.state.nj.us/education/legal/index.html> (where judge, sua sponte, converted the board's motion to dismiss into a motion for summary decision). In the present matter, addressing the merits of Ms. Hudson's petition and in support of its motion to dismiss, respondent attached a certification and several exhibits. Petitioner responded by filing additional materials, which they deemed pertinent. Thus, respondent's motion should properly be considered as a motion for summary decision.

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[3] See also F. G. v. MacDonell, 150 N.J. 550, 556 (1997) ("If a generous reading of the allegations merely suggests a cause of action, the complaint will withstand the motion.")

[4] R. 4:6-2 provides in pertinent part:

> If, on a motion to dismiss based on [failure to state a claim], matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable opportunity to present all materials pertinent to such a motion.

The rules governing motions for summary decision in an OAL matter are embodied in N.J.A.C. 1:1-12.5. These provisions mirror the language of R. 4:46-2 of the New Jersey Court Rules. See also Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995)(clarifying the standard for summary judgment). Under N.J.A.C. 1:1-12.5(b), the motion for summary decision may be granted ". . . if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The opposing party must submit responding affidavits showing that there is indeed a genuine issue of material fact, which can only be determined in an evidentiary proceeding, and that the moving party is not entitled to summary decision as a matter of law. Failure to do so, entitles the moving party to summary judgment. Brill, supra, 142 N.J. 520. Moreover, even if the non-moving party comes forward with some evidence, the courts must grant summary judgment if the evidence is "so one-sided that [moving party] must prevail as a matter of law." Id. at 536. 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 New Jersey Supreme Court's standard for summary judgment is thus designed to "liberalize the standards so as to permit summary judgment in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Brill, supra, 142 N.J. at 539.

II. WHETHER THE BOARD ACTED IMPROPERLY WHEN IT TERMINATED PETITIONER MID-YEAR FOR MISCONDUCT

The present matter is different than cases where a nontenured teacher's employment contract is not renewed. In that situation, the teacher is entitled to two separate and distinct procedural safeguards. The first, known as a Rice hearing, which derives its name from Rice v. Union Co. Reg'l High Sch. Bd. of Educ., 155 N.J. Super. 64 (App. Div. 1977), cert. den. 76 N.J. 238 (1978), occurs when a board of education intends to discuss at a meeting of the board, the non-renewal of specific employees for performance or other reasons. Rice requires that the employee receive notice of the meeting so that he/she may be present. Ibid. The second procedural safeguard is a

Donaldson hearing, which must be requested by the non-renewed teacher. Donaldson v. Bd, of Educ., North Wildwood, 65 N.J. 236 (1974). Under Donaldson, pursuant to N.J.S.A. 18A:27-3.2, a non-tenured teacher may request and receive a written statement of the reasons for non-renewal. Ibid.

However, the present matter involves a mid-year termination. The operative facts of the case are essentially undisputed. The petitioner was offered employment for the 2007-2008 school years on August 21, 2007. On February 26, 2008, petitioner responded to a student's disruptive behavior by using tape and wrapping a scarf around the student while he was sitting in a chair. Subsequently, on March 10, 2008, Ms. Hudson was terminated. Petitioner asserts that respondent could not terminate her employment absent "just cause." Consequently the question petitioner presents is whether her termination is valid and, what remedies, if any, petitioner is entitled to.

A school board has "virtually unlimited discretion in hiring or reviewing the contracts of non-tenured teachers." Dore v. Bd. of Educ., Twp. of Bedminster, 185 N.J. Super. 447, 453 (App. Div. 1982). This power to terminate non-tenured teachers is so broad that "absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have almost a 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. Furthermore, employment contracts of non-tenured public school teachers, which contain provisions for termination by either party, upon a specified number of days notice, may be terminated in accordance with the terms of the contract, without the need to demonstrate just cause. Mozier v. Bd. of Educ., Cherry Hill Twp., 450 F. Supp. 742, 748 (D.N.J. 1977).

In the present matter, petitioner, who was not tenured, has made no claim that her termination violated any constitutional or legislatively-conferred rights. Rather, she alleges that the Board improperly terminated her mid-year for misconduct, when it lacked just cause. Petitioner's individual employment contract contained a provision that provided that the contract may be terminated upon sixty days notice from either party. Thus, petitioner is only entitled to sixty days notice of her termination, which she

received. Consequently, even accepting petitioner's allegations as true, the Board is entitled to summary decision as a matter of law. See Mozier, 450 F. Supp. at 748.

III. WHETHER THE COMMISSIONER HAS JURISDICTION OVER CONTRACTUAL DISPUTES

Petitioner's contention that just cause is required prior to termination is derived from the collective negotiations agreement (CNA) entered into between respondent and the Education Association of Mount Olive. (See, CNA, Art. 19: "The Board shall have the right to take disciplinary action for good and just cause. Disciplinary action may include . . . termination."). It is well settled that the Commissioner does not have jurisdiction over contractual disputes. See Picogna v. Bd. of Educ., Twp. of Cherry Hill, 249 N.J. Super. 332 (App. Div. 1991). N.J.S.A. 18A:6-9 limits the Commissioner's subject matter jurisdiction to "controversies and disputes arising under the school laws." The New Jersey Supreme Court has determined that where controversies do not arise under the school laws, they are outside the Commissioner's jurisdiction even though they may pertain to school boards. Bd. of Educ., E. Brunswick Twp. v. Twp. Council of E. Brunswick, 48 N.J. 94, 102 (1966); see also Larsen v. Bd. of Educ., Twp. of Piscataway, State Board (October 6, 1982) ("a dispute does not arise under the school laws merely because one of the parties is a Board of Education"). Contractual disputes are generally considered to be outside the Commissioner's jurisdiction because no special expertise in school law is necessary for the interpretation of contractual language. See Picogna, supra, 249 N.J. Super. 332 (no jurisdiction over contract claim of non-tenured school employee because no interpretation of school laws was required); Paladino v. Bd. of Educ., Twp. of Lacey, 1989 S.L.D. 3063, 3065 ("a contractual dispute does not arise under the school laws"); Demikoff v. Bd. of Educ., Borough of Harrington, 97 N.J.A.R.2d (EDU) 16, 17 ("employment contract claims of non-tenured school employees do not arise under school laws sufficiently to generate the Commissioner's dispute resolution jurisdiction.") and Picogna, supra, 249 N.J. Super. at 335 ("Whether petitioner's employment was wrongfully terminated under the contract . . . is for the court, not the Commissioner, to decide.")

This is especially true in a non-tenured school employee's claim, where no statutory educational entitlement is implicated and where the claim involves contractual rights. Demikoff, supra, 97 N.J.A.R.2d (EDU) at 17. The Commissioner does not have authority to exercise jurisdiction over claims brought by a terminated non-tenured school employee purporting to invoke educational law entitlements, when the overall claim does not sufficiently implicate educational law, since it is fundamentally a contractual matter. Ibid. "Such claims are more properly cognizable in judicial forum." Ibid.; Paladino, supra, 1989 S.L.D. at 3066. See also S. Orange-Maplewood Educ. Ass'n v. Bd. of Educ. of S. Orange-Maplewood, 146 N.J. Super. 457, 462 (App. Div. 1977).

Ms. Hudson's principle claim, that respondent did not have just cause to terminate her, is derived from petitioner's rights under the CNA, Article 19. It is uncontested that petitioner was not tenured and accordingly, her employment was not subject to the protection of the tenure laws, N.J.S.A. 18A:6-10 to -18.1. This claim alleges a breach of contract. Therefore, it is not properly addressed in this forum. The Commissioner lacks the jurisdiction to decide this issue.[5]

IV. WHETHER THE BOARD IMPROPERLY NOTIFIED PETITIONER'S TERMINATION TO THE STATE BOARD OF EXAMINERS PURSUANT TO N.J.S.A. 18A:16-1.3

The thrust of Ms. Hudson's claim is that the respondent improperly notified the State Board of Examiners that petitioner was terminated for just cause for misconduct in office pursuant to N.J.S.A. 18A:16-1.3. Petitioner contends that the Board's notification of the State Board of Examiners triggered N.J.S.A. 18A:16-1.3, which is a school law,

[5] Respondent argues that petitioner was required to submit her grievance to arbitration while petitioner contends that the language of the CNA prohibits her grievance from going to arbitration. The New Jersey Supreme Court has held that mid-year terminations must proceed to arbitration, relying on similar contract language as is contained in the CNA at issue. See Pascack Valley Reg'l High Sch. Bd. of Educ. v. Pascack Valley Reg'l Support Staff Ass'n, 192 N.J. 489, 496 (2007) ("Arbitration is a favored means of resolving labor disputes"). However, the Commissioner does not have jurisdiction to interpret whether the contractual language of the CNA requires arbitration. "Whether the disputes in question are subject to arbitration and what issues must be arbitrated are to be determined in a judicial proceeding." Newark Teacher's Union, Local 481 v. Bd. of Educ., Newark, 149 N.J. Super. 367, 372 (Ch. Div. 1977)

which is within the Commissioner's jurisdiction. Petitioner argues that N.J.S.A. 18A:16-1.3 was violated by her actual termination, because she contends she was terminated without just cause.

N.J.S.A. 18A:16-1.3 provides in pertinent part:

> A board of education shall notify the State Board of Examiners whenever a non-tenured, certificated employee is dismissed prior to the end of any school year for just cause as a result of misconduct in office. . . . The State Board of Examiners shall maintain a list containing the name . . . of the employee and the reason for the dismissal. If a disciplinary grievance arbitration is conducted pursuant to . . . [N.J.S.A.] 34:13A-29 as to the dismissal, or if the dismissal is appealed to a court or administrative tribunal of competent jurisdiction the board of education shall not notify the State Board of Examiners unless just cause due to misconduct in office is found by the arbitrator, the court or administrative tribunal of competent jurisdiction.
>
> [N.J.S.A. 18A:16-1.3.]

N.J.S.A. 18A:16-1.3 has no relevance to a board's decision to terminate an employee or the reasons underlying the termination. Rather, this provision only concerns a board's actions after a non-tenured, certificated employee is terminated mid-year. Petitioner's challenge to her mid-year termination must first be pursued in an appropriate forum to delay the Board's responsibility to notify the State Board of Examiners of the termination. See N.J.S.A. 18A:16-1.3

A Board is required to notify the State Board of Examiners "whenever a non-tenured, certificated employee is dismissed prior to the end of any school year for just cause." N.J.S.A. 18A:16-1.3. However, the non-tenured employee has the right to challenge, in the appropriate forum, whether the board of education has met the "just cause" criteria necessary to report the termination in an effort to prevent her name from being placed on the list maintained by the State Board. Petitioner's defense that she appealed the termination, unfortunately, is not persuasive, because she pursued her

grievance in the wrong forum. OAL is not an "administrative tribunal of *competent jurisdiction*" within the meaning of N.J.S.A. 18A:16-1.3. (Emphasis added). The OAL was created to perform the same functions formerly performed by agency hearing officers; the Administrative Law Judges conduct hearings, make recommended findings of fact and recommended decisions to agency heads. In re Kallen, 92 N.J. 14, 22-23 (1983). See, N.J.S.A. 52:14B-10. Thus, OAL's jurisdiction is derived from the jurisdiction of the agency head. As discussed, supra, the Commissioner does not have jurisdiction over the reasons underlying the termination. However, since N.J.S.A. 18A:16-1.3 arises under the school laws, the Commissioner has jurisdiction over the notification provisions of N.J.S.A. 18A:16-1.3.

In the present case, respondent made the determination to report petitioner's termination to the State Board of Examiners on March 12, 2008; only two days after the Board took action to terminate Ms. Hudson's employment. It seems, from the facts presented, that the Board prematurely notified the State Board since only two days had transpired following its termination of petitioner. This did not afford the petitioner the opportunity to pursue an appropriate appeal prior to notification. Had petitioner properly pursued her grievance through arbitration as anticipated by the statute, or had filed a contractual claim in Superior Court, or had brought an action before the Public Employment Relations Commission, see N.J.S.A. 18A:16-1.3, she would have perfected her right to challenge whether the Board met the "just cause" criteria necessary to report. However, there is no evidence that petitioner pursued her grievance in an appropriate forum; therefore, the Board's procedural violation has no impact because the Board is required to notify the State Board unless the dismissal is appealed to an "administrative tribunal of competent jurisdiction." N.J.S.A. 18A:16-1.3. The OAL is not a tribunal of competent jurisdiction in this matter. Therefore, it does not have jurisdiction to grant petitioner's prayer for relief and the within Petition must be dismissed.

CONCLUSION

For the aforementioned reasons, I **CONCLUDE** that the Commissioner lacks jurisdiction to hear the present matter. Boards of education maintain wide latitude regarding the employment considerations of non-tenured teachers and petitioner was terminated in accordance with the sixty day termination clause of her individual employment contract.

ORDER

Based on the foregoing analysis, it is therefore **ORDERED** that the respondent's motion for Summary Decision be granted and that Ms. Hudson's petition 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.

6/26/09
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency:

June 26, 2009
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: JUN 29 2009
db

310-09

#310-09

PAMELA KONDRATICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAMBURG, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the non-renewal of her employment as a middle school social studies teacher at the end of the 2006-2007 school year, notwithstanding the recommendation of renewal by the Superintendent. Petitioner would have acquired tenure on the first day of class for the 2007-2008 school year, had her contract been renewed. Respondent asserted that the non-renewal was performance based, citing petitioner's reliance on showing videotapes during class, insufficient parent contacts, and failure to adequately maintain her classroom, among other things.

The ALJ found, *inter alia,* that: a board of education possesses broad discretion in renewing the contract of non-tenured teaching staff members; the burden of proof rests upon the petitioner to show that the Board's non-renewal decision was arbitrary, capricious or unreasonable; and respondent's non-renewal determination is supported by credible evidence and was not arbitrary or capricious. The ALJ concluded that petitioner had failed to sustain her burden of proof, and recommended dismissal of the petition.

Upon careful and independent review of the record, the Commissioner concurred with the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. 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.

September 28, 2009

OAL DKT. NO. EDU 11195-07
AGENCY DKT. NO. 198-7/07

PAMELA KONDRATICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HAMBURG, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner and the Board sought and were granted extensions of time within which to file exceptions and reply exceptions, respectively, to the Initial Decision. These submissions – received in accordance with the modified timelines – were fully considered by the Commissioner in reaching her determination here.

Petitioner's exceptions charge that the Administrative Law Judge's (ALJ) factual findings and legal conclusions with respect to the Board's reasons for her non-renewal were not supported by the credible evidence. In support of this contention, she essentially recasts and reiterates her arguments advanced below in her post-hearing summation: 1) as to the ALJ's finding that she placed over-reliance on videos based on written lesson plans – testimony and evidence showed she did not actually show many of the videos but, rather, included them for the benefit of a possible substitute teacher and, additionally, one of the videos was not shown during class time but during a week of standardized testing when the regular academic schedule was suspended; 2) as to his finding that she kept an untidy classroom and condoned damage to desks

by students, he overlooked clear testimony that petitioner shared her classroom with another teacher who found it difficult to control her students and petitioner's uncontroverted testimony established that the damage and disarray occurred when this teacher was using the room; 3) as to his finding that she had insufficient parent contacts recorded in her log book, he discounted evidence that the Board provided no guidance as to the number of parent contacts which were expected and, even so, the number of contacts recorded by petitioner substantially exceeded any minimum number which could have been expected by the Board. (Petitioner's Exceptions at 1-3) Petitioner also contends that although the ALJ found that the Principal was very specific in detailing her deficiencies, he failed to specifically cite them. Also, she argues, this finding is severely compromised by this Principal's admission on cross-examination that he requested that the petitioner revise and rewrite the District's social studies curriculum guide over the summer of 2008 and further asked that she attend a textbook fair to pick out new texts for the District. These responsibilities, she professes, are obviously not ones which would be given to a teacher lacking the qualities necessary for renewal of her contract. (*Id.* at 3) Petitioner, therefore, requests that the Commissioner reject the Initial Decision.

In reply, the Board submits petitioner offers no support for her contention that the ALJ's findings and conclusions were not supported by the credible evidence; rather, she merely offers the fact that contrary testimony was presented. Petitioner's sole argument, it contends, is that the ALJ should have interpreted the proffered evidence in a light most favorable to her. (Board's Reply Exceptions at 2-3) As recognized by petitioner in her post-hearing brief, the Board offers, "if a rational consideration of the relevant evidence can arguably yield two different decisions, it is not arbitrary and capricious...if there is substantial evidence to support that ruling." Petitioner's Brief 4-5 (citation omitted) (*Id.* at 3-4) Here, the Board offers,

"[a]mple testimony offered at the hearing indicated Petitioner's failure to comply with the exceptional standard for teachers as required by Respondent. In making his findings, the ALJ relied on evidence of Petitioner's unsatisfactory communication with parents, her failure to maintain a controlled classroom, and the Board's overall dissatisfaction with her performance." (*Id.* at 4) The Board, therefore, urges adoption of the Initial Decision.

Upon full review and consideration of the record, which included transcripts of the proceedings conducted at the OAL on December 22, and 23, 2008, and January 14 and April 2, 2009, the Commissioner, finding petitioner's exception arguments wholly unpersuasive, concurs with the ALJ – for the reasons fully and clearly presented on pages 19-22 of his Initial Decision – that petitioner has failed to sustain her burden of establishing by a preponderance of the credible evidence that the Board's decision not to renew her employment contract was arbitrary, capricious, unreasonable, or otherwise unlawful.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 9/28/09

Date of Mailing: 9/29/09

* 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 11195-07
AGENCY DKT. NO. 198-7/07

PAMELA KONDRATICK,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF HAMBURG, SUSSEX COUNTY,
Respondent.

Gary A. Kraemer, Esq., for petitioner (Daggett, Kraemer, Eliades, Kovach & Ursin, attorneys)

Matthew J. Giacobbe, Esq., and **Bruce W. Padula,** Esq., for respondent (Scarinci Hollenbeck, attorneys)

Record Closed: May 19, 2009 Decided: June 29, 2009

BEFORE **J. HOWARD SOLOMON,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Patricia Kondratick appeals the nonrenewal of her employment contract with respondent Board of Education of the Borough of Hamburg (respondent or Board) for

school year 2007-2008, thereby depriving her of tenure. The matter was referred by the Department of Education, Bureau of Controversies and Disputes, to the Office of Administrative Law (OAL), where it was received on October 16, 2007, for hearing as a contested case pursuant to N.J.S.A. 18A:6-11 and N.J.S.A. 52:14B-2(b).

On August 7, 2008, respondent filed a motion for summary decision to dismiss the appeal, asserting that, as a matter of law, it could deny the renewal of petitioner's contract, who was a nontenured employee. The motion was denied on the basis that a genuine issue existed about whether nonrenewal was based upon arbitrary or capricious reasons.

Hearings took place on December 22 and 23, 2008, and January 14 and April 2, 2009. After an extension was granted for the submission of post-hearing legal memoranda, the record closed on May 20, 2009, the date all legal memoranda were received.

The issue involved is whether the nonrenewal of petitioner's employment contract was arbitrary, capricious or unreasonable.

FACTUAL DISCUSSION

The parties entered into the following joint Stipulation of Facts (J-1) and, accordingly, I **FIND** that:

1. Petitioner is a public school teacher and has been licensed and certified since 1981.

2. Respondent employed petitioner as a social studies teacher for grades six, seven and eight during the 2002-2003 school year as a substitute teacher for a teacher on maternity leave.

3. When that teacher returned, petitioner was no longer needed and consequently was not employed by respondent during the 2003-2004 school year.

4. Petitioner was subsequently hired by respondent as a social studies teacher for grades six, seven and eight during the 2004-2005, 2005-2006 and 2006-2007 school years.

5. If petitioner had been renewed for the 2007-2008 school year and actually appeared the first day of class for the 2007-2008 school year, she would have acquired tenure.

6. Petitioner was recommended for employment and therefore tenure by the Chief School Administrator of respondent, Robert McCann, for the 2007-2008 academic year.

7. On April 26, 2007, respondent notified petitioner that her teaching contract would not be renewed for the 2007-2008 academic year.

8. Petitioner then requested that respondent furnish a written statement of the reasons for not renewing her contract pursuant to N.J.S.A. 18A:27-3.2 and N.J.S.A. 18A:27-4.1(b). She also requested a Donaldson hearing [Donaldson v. Bd. of Educ. of North Wildwood, 65 N.J. 236 (1974)].

9. By letter dated May 7, 2007, Cynthia May-Hostler, the Business Administrator and Board Secretary, on behalf of respondent, sent a letter to petitioner informing her of the reasons her contract was not renewed.

10. Respondent held a Donaldson hearing on June 13, 2007 and affirmed its decision not to renew petitioner's contract.

11. Petitioner's personnel file (Kondratick pages 1-76) is stipulated [in evidence].

12. Respondent's lesson book for 2006-2007 [J-2] [is stipulated] in evidence and Bates Stamped [pages] 1-92.

In addition to these stipulations, testimony was heard. While petitioner had the burden of proof, as discussed below, I directed the respondent to proceed first to set forth the reasons for nonrenewal. Respondent called Steven Engravalle, its chief school administrator (CSA) and superintendent, to testify. Engravalle was appointed to his positions on July 1, 2007, replacing Robert McCann, who retired at the end of the 2006-2007 school year.

Prior to becoming the CSA, Engravalle was the principal of the Hamburg school, where petitioner taught. As such, he was her direct supervisor and had the opportunity to observe her teaching, either while he was in her classroom or from the hallway outside the classroom door. He was critical of petitioner in several areas, contending that she was inefficient and wasteful of classroom time, was textbook driven, lacked sufficient parent contacts, failed to adequately maintain her classroom, and relied heavily on showing videotapes during class.

Engravalle stated that at times he would write notations in petitioner's lesson-plan book that required responses from her, but he never heard from her.[1] He had to "chase her down" for a response. Upon reviewing her lesson-plan book, he noted fifty-two instances in which petitioner scheduled videotapes during class. For example, he mentioned that "Remember the Titans," which is a video about desegregation and civil rights, was shown by petitioner in March 2007, at a time when there was no correlation with either the birth date of Martin Luther King, Jr., or Black History Month. Although he was not aware that "Remember the Titans" was shown during a study period, he stated that petitioner, nevertheless, failed to mention the videotape in her lesson-plan book, which she was required to do.

[1] All nontenured teachers were to hand in their lesson-plan books to Engravalle each Friday, and the books were returned to the teachers after his review and with any notes he may have written.

In addition to lesson-plan books, Engravalle required teachers to contact their students' parents about any concerns or even positive information and to record those contacts in parent-contact logs. These logs were to be submitted weekly to Engravalle for his review. While he did not require that each student's parents be contacted weekly, there had to be sufficient contacts. He mentioned that he sometimes wrote notations in petitioner's logs requesting reasons why there were either no parent contacts or insufficient parent contacts for certain periods of time. Again, he would not hear from her.

Engravalle also felt that petitioner did not demonstrate adequate maintenance of her classroom. He said that he found chewing gum and papers on the floor. Eighteen desk chairs in her classroom were vandalized. The bookracks installed beneath the desk chairs were deliberately bent. Although there was another teacher who shared petitioner's classroom, it was, nevertheless, petitioner's responsibility to have her room properly maintained since this was her assigned classroom. When she failed to report the damage to the desk chairs, Engravalle felt that this displayed a lack of regard for school property.

Engravalle also mentioned that, on one occasion, he stopped by petitioner's classroom, and, while in the hallway, he heard her mention that the Battle of Camden, which took place in South Carolina during the American Revolutionary War, occurred in New Jersey. He brought this to the attention of McCann, who was then the CSA and superintendent. Engravalle further stated that he observed petitioner about five to ten times each week during the 2006-2007 school year and frequently had conversations with her about his concerns. He recalled speaking with McCann about twenty to thirty times about his concerns regarding petitioner.

Engravalle mentioned that there was a school policy to display the work of students in celebration of their efforts. He found petitioner's classroom lacking in such displays. He noticed that one of the projects petitioner's students completed was displayed in a showcase, but the same project remained there for the school year without a change. When asked about displaying work in the hallway cases, Engravalle

could not specifically recall any projects displayed by petitioner other than the one he noted.

As the incoming CSA and superintendent, Engravalle attended respondent's Board meetings and executive sessions. At a closed session of the Board on April 25, 2007, McCann, who was also present, recommended renewal of petitioner's contract. Engravalle did not. The Board voted to deny renewal by a vote of six to two. Prior to the Board meeting, petitioner was given notice to waive the confidentiality of the discussion about her contract renewal, which she chose not to do.[2]

Following the April 25 meeting, petitioner was notified that her contract was not renewed. She thereafter requested the reasons for nonrenewal and subsequently received a letter from the Board signed by its administrator/secretary setting forth the Board's reasons. R-8. She then requested a Donaldson hearing[3] and met with the Board on June 13, 2007. At the conclusion of that meeting, the Board reaffirmed the vote taken at its April meeting not to renew her contract. A new vote was not taken.

When Engravalle was shown evaluations of petitioner conducted by either McCann or Jeanette Ericsson, the prior principal, he acknowledged that petitioner had, for the most part, positive ratings. J-3.[4] When he met with petitioner on the Friday before the April 25, 2007, Board meeting, when the Board voted not to renew, he acknowledged that petitioner seemed anxious and that he did not give her any indication that he would oppose her contract renewal. He also acknowledged that before the April meeting, he told her to select social studies textbooks for the next school year, stating that he did so not knowing what the Board would decide about her contract renewal.

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2 Rice v. Union County Reg'l High Sch. Bd. of Educ., 155 N.J. Super. 64 (App. Div. 1977), certif. denied, 76 N.J. 238 (1978).

3 In Donaldson, supra, 65 N.J. 236, the Supreme Court held that a teacher was entitled to the reasons for the nonrenewal of his or her contract.

4 Each evaluation form gave the evaluator a choice in rating the efficiency of petitioner in various categories. The range of the rating form went from "Needs Attention" to "Thoroughly Satisfactory." J-3. Petitioner scored "Satisfactory" or "Thoroughly Satisfactory" on the evaluations shown.

When asked about petitioner's involvement with the school play, Engravalle mentioned that he received negative comments, either that she was late for rehearsal or did not properly supervise the production. Petitioner was also the cheerleading coach, but Engravalle felt that because she did not enter the cheerleaders in a regional competition with other schools, she had not performed well. He noted, however, that producing the play and coaching the cheerleading squad, for which petitioner was paid extra, had nothing to do with the academic curriculum.

No other witnesses testified for respondent at this point.

Robert N. McCann testified on behalf of petitioner. He began teaching with the Hamburg School District in 1972 and ultimately became its CSA and superintendent. He retired on June 30, 2007.

Initially, he hired petitioner as an interim teacher for the 2002-2003 school year to replace a teacher who had taken maternity leave. During that time he had the opportunity to observe her and felt that she did an outstanding job. He confirmed this in a letter he wrote for her when the regular teacher returned. P-2. He stated that he was sorry to see petitioner leave since he felt that she was good with the "kids" and got along well with the faculty. He was not aware of any negative comments about her during this period.

When the position for a full-time social studies teacher became available in the 2004-2005 school year, McCann, after interviewing several applicants, including petitioner, recommended petitioner to the Board because he felt that she had the appropriate demeanor, character, and "feel for the school" and got along well with the faculty. The Board accepted his recommendation and hired petitioner.

Prior to and during the 2006-2007 school year, the school was undergoing extensive construction for the expansion of its building. McCann candidly stated that his primary focus was on the construction rather than on his supervisory duties, which he delegated to others. For instance, he did not walk the hallways as often as he should have and relied upon Ericsson to conduct evaluations of the faculty. He also

acknowledged that during the 2006-2007 school year he did not review petitioner's lesson-plan book or her parent-contact logs. He indicated, however, that 80 to 120 parent contacts each school year would have been sufficient.

McCann mentioned that when he prepared a teacher's evaluation, he would often write a critical comment in the narrative portion of the evaluation to enhance the teaching ability of that particular teacher, since he felt that no teacher was perfect and each needed improvement.

McCann stated that he observed the cheerleaders during football games and at some of their practices and was not aware of any concerns regarding petitioner's leadership. He also saw the play that petitioner produced and thought that it was viewed with enthusiasm. He did not hear any complaints.

McCann could not recall any complaints from parents about petitioner. If there had been any, they would have been placed in her personnel file and would have been handled by either the principal or vice principal, but not by him.

When petitioner showed "Remember the Titans," she told him that it involved civil rights, so he saw no concern with showing this video. However, it was his understanding that this video was not to be shown during a regular class. McCann acknowledged that in petitioner's second year, Ericsson met with petitioner about her excessive use of videos.

He was also unaware of any concern about her classroom management; he had always found her classroom neatly kept and properly laid out, and her students well behaved. He acknowledged, however, that it would have been petitioner's responsibility to report any damage in her classroom.

McCann had no reservation about recommending the renewal of petitioner's contract, although he acknowledged that he never failed to recommend a teacher in his or her third year. He also mentioned that the Board did not always agree with his

recommendations. After the Board meeting on April 25, he learned that the Board voted not to renew petitioner's contract.

When shown evaluations of petitioner conducted by either Ericsson or him (J-3), McCann candidly admitted that his evaluations were more generous. He also noted that Ericsson had criticized petitioner in one of her evaluations about her lessons being disjointed. P-5.

McCann was asked to review petitioner's lesson-plan book for the 2006-2007 school year, since he had not previously seen it. He was asked to count the number of videotapes entered for academic periods during that school year. At least fifty such videotape entries were noted.

Petitioner then called Carol Jaccodine to testify in her behalf. Jaccodine is a speech therapist who has been employed by respondent for nearly twenty-three years. She said that petitioner not only had a good reputation with the faculty, but was energetic in her work. However, she had never reviewed petitioner's lesson-plan book or contact logs, was unaware of the excessive use of videotapes, and had never observed petitioner teach. She mentioned that Ericsson, who had initiated parent-contact logs, never stated how many parent contacts were sufficient. She confirmed that since petitioner was assigned her own classroom, it would have been her responsibility to keep it properly maintained.

Petitioner then testified in her own behalf. She said that she had substituted in the 2002-2003 school year for a teacher who was on maternity leave, and in 2004 learned that the teacher was resigning. She then applied for the teaching position and was hired for the 2004-2005 school year as a social studies teacher for grades six, seven and eight. She continued to teach social studies for each of these grades until her termination at the end of the 2006-2007 school year.

Petitioner responded to each of the assertions made by respondent in not renewing her contract (P-8). With regard to her heavy reliance on videotapes, she stated that each video was shown in connection with the subject matter her class was

studying. Most of the videos were either purchased by the school or purchased through a social studies catalog. Some came from the public library. Petitioner explained that while she may have listed several videos in her lesson plan, not all were shown, citing as examples "Troy," "My Side of the Mountain," "Gettysburg," and others. Sometimes she only showed portions of videos. She said that when she explained this to Engravalle, he seemed satisfied.

She stated that she intended to show "Remember the Titans" during the week of standardized testing as a promise to one of her students, but because of personal reasons she showed it at a later time during a study period. When she learned that there were concerns about her showing this video, she contacted McCann immediately and he assured her that everything was fine.

Petitioner denied Engravalle's assertion that she failed to respond to notes he left in her lesson-plan book, stating that if there were such notes, she would have promptly spoken with him. According to petitioner, he always seemed satisfied with her answers.

With regard to her parent-contact logs, petitioner stated that she made 102 contacts in the 2006-2007 school year, as she had done during the previous school year, and had never before been criticized about her contact logs. She acknowledged that there was an informal requirement of making at least two to three contacts a week.

In response to the assertion that she failed to celebrate her students' work, she stated that her students created posters on matters that were presently being studied, such as the American Revolution or the Civil War, which she displayed in the rear of the classroom. She disputed Engravalle's assertion that he visited her classroom five to ten times a week, stating that he only visited her five times during the entire school year, if that. Since the door to her classroom was usually closed during class time, she would have noticed if he had entered the room. She acknowledged, however, that there was a window in the door of her classroom through which he could have observed her class.

Petitioner produced photographs that showed several Greek statues displayed on the windowsill of her classroom; she said that the display remained on the windowsill for about a week. P-7(a-e). She then placed those statues in the hallway display case.

In response to the assertion that she displayed a lack of class management, petitioner stated that she shared her classroom with a Spanish class twice a week and that the teacher of that class was unable to control her students. During the early part of winter in the 2006-2007 school year, the custodian notified her that the book-storage "loops" under the desk seats had been bent, which he discovered while cleaning her room after school. She stated that she did not notice the damage until it was brought to her attention by the custodian. She believed that the damage happened during the Spanish class. She spoke with McCann about the damage and then Engravalle, who told her that he hoped it would not affect her tenure. She acknowledged, nevertheless, that it was her responsibility to keep her classroom properly maintained. She stated that she kept her classroom spotless, cleaning the shelves and desks herself, particularly the desk of one of her students who suffered from allergies. She stated that Engravalle never before had an issue with the cleanliness of her classroom.

When asked if she said that the Battle of Camden was fought in New Jersey, she responded, although rather unconvincingly, "I'd have to say no," claiming that she knew that the battle took place in South Carolina. She stated that school textbooks had little information about the South during the American Revolution and, consequently, she brought in her own materials. P-10. She made over 500 photocopies at an office-supply store for student handouts, which were placed in individual packets for each student. She started making these packets for each of her grades in the 2004-2005 school year.

Petitioner disputed that she was textbook driven. She said that she had a Civil War re-enactor come to the school in the fall and spring of each year, with the exception of the last year, when the actor was injured. She laminated newspaper materials for discussions of current events and brought in articles for discussion, including articles from Teen Newsweek (P-15). Materials were also brought in by the students on matters they were studying (P-16).

Petitioner mentioned that during the 2006-2007 school year she became involved with an international-fair project, working with her sixth-grade students for almost two months, citing this as an example of her not being textbook driven. She mentioned that certain photographs (P-13(a-g)) depicted a project about Colonial America, which she started in the 2002-2003 school year and continued thereafter.

Both petitioner and another teacher volunteered to become cheerleading coaches. The other teacher was in charge of the junior varsity squad and petitioner was in charge of the varsity squad, which consisted of twelve students. At the end of the basketball season during her first two years as coach, she entered the varsity squad in a competition with other schools. In her final year, the varsity squad did not participate in the competition because it lacked the minimum number of participants required to compete.

Petitioner was also involved in the production of the school play. She made sure that each student who tried out was given a part, even if she had to create one. When Engravalle visited a rehearsal, he was critical of the students' acting, such as the volume of their voices when reciting their lines, not about her. His criticism of students was very disheartening to her. In response to Engravalle's assertion that she was late for rehearsals, she stated that she needed to close up her homeroom at the end of the day before going to rehearsal. While she may have been ten minutes late, another teacher was there to supervise the students.

In January 2007 Engravalle asked her to assist him in selecting textbooks. They both went to Paramus to review new textbooks. He later asked her to rewrite the social studies curriculum for the new textbooks and offered to pay her twenty-five dollars an hour for her work. This conversation took place the Friday before the April 25 Board meeting when her contract was not renewed. During that Friday meeting, Engravalle showed her that her name was on the agenda for tenure. She stated that he also told her that she was a great social studies teacher and that she had a job in September. She further stated that he said that when it came to the school, he could get anything he

wanted. After the Board denied her contract renewal, she was contacted by McCann. She then wrote to the Board requesting its reasons for her nonrenewal.

In her preparation for the Donaldson hearing, petitioner submitted identical packets of materials to each Board member in support of her position for renewal, which included copies of notes she received from two parents, a recommendation from her former employer, and a recommendation from her current colleagues. She related that she was ecstatic about teaching social studies, going "above and beyond," and felt that she got along well with both colleagues and students.

Petitioner acknowledged that in January 2007 Engravalle wrote to her expressing his concerns about her showing videotapes during class. In response, she stated that even though a videotape may have been noted in her lesson-plan book, she did not always show each video listed. When asked about the "Remember the Titans" video, she acknowledged that most of it was shown during a study hall, but that the final portion of the movie, which lasted only about five minutes, was shown at the beginning of an academic class. She acknowledged that Ericsson had spoken with her about showing videos, but stated that Ericsson only wanted her lesson-plan book to indicate whether the video was shown.

With regard to the assertion of insufficient parent contacts, petitioner acknowledged that there were times when she had few parent contacts (see R-1) and also times when she received written comments from Engravalle about her lack of parent contacts. She explained that her parent contacts were usually made during the time for her class preparation. Oftentimes, however, the Spanish instructor needed her assistance in controlling her students, which reduced petitioner's preparation time.

Petitioner stated that Engravalle twice told her that all he had to do was smile and he could get whatever he wanted from the Board. She also stated that at that Friday meeting, Engravalle told her that she was the best social studies teacher and that he thought she would get tenure.

When asked about Ericsson's evaluation (P-5), in which it was stated that petitioner gave a disjointed lesson, petitioner stated that she did not take this as a negative review. Rather, as McCann had stated, there was always room for improvement, and she, therefore, understood this comment to have been meant as notice to her of an area in which her performance could improve.

On June 13, 2007, petitioner went before the Board in her Donaldson hearing to present the reasons she believed her contract should have been renewed, and asked the Board to reconsider. Jaccodine, who had accompanied her, also gave a brief statement of support. As the Board was about to go into closed session, she overheard Engravalle mention that the session should take about "seven minutes." Both Engravalle and McCann attended the closed session. After she made her presentation, she remained outside the door. She estimated that the hearing lasted about an hour. She heard yelling and arguing among the Board members. After the meeting ended, she was told that the Board would not be renewing her contract.

No other witnesses testified in behalf of petitioner.

Respondent then called Patricia G. Harby as a rebuttal witness. She has been a member of the Board for the past twenty-six years and has served as its president for the last fifteen years. She mentioned that Hamburg, a small town with a population of about 3,500, only has one school. The school consists of grades K–8.

She stated that the Board deals with renewals and, on occasion, nonrenewals of employment contracts. At the April 25 Board meeting, McCann recommended three teachers for tenure, including petitioner, for the 2007-2008 school year. The Board voted against petitioner and one other teacher. In each instance, the vote was six to two against renewal. The Board discussed its concerns about petitioner, which included her lack of sufficient parent contacts, her failure to display her students' work, her classroom management, and her frequent use of videos. Also discussed were complaints received from parents.

Harby stated that she had been aware of complaints about petitioner from Ericsson, even before Engravalle became principal in 2006. She also mentioned that Board members Schoonover and Hall, whose own children were in petitioner's class during the 2006-2007 school year, spoke unfavorably about her. Each voted not to renew her contract. She also received complaints from parents about petitioner not being focused in class, and talking about fashions and other subjects that were unrelated to social studies.

Harby recalled receiving a packet of materials from petitioner in regard to her Donaldson hearing. Both Jaccodine, who was the union representative, and McCann spoke in her favor. She said that after petitioner had given her presentation for renewal, the Board thoroughly reviewed all of the facts, including the materials supplied by petitioner. There was a lengthy discussion, lasting close to an hour, since the Board wanted to ensure that the correct decision had been made at its April 25 meeting. No Board member's vote changed.

Harby mentioned that there was a public meeting on May 9, 2007, where the public was invited to speak about petitioner and the other teacher whose contract was also not being renewed. About half of those in attendance spoke in favor of petitioner and the other half in support of the other teacher. No negative comments were made about either teacher. Even Board member Schoonover's daughter appeared in support of petitioner.

Harby was aware that the Board's decision could not be arbitrary. Although she met with petitioner when she was hired, she had not met with her when her contract was renewed for the two ensuing school years. She also knew that petitioner had been a long-term substitute, and initially she was not aware of any negative comments about petitioner. Neither she nor, to her knowledge, any other Board member had ever visited petitioner's classroom.

When asked about the videos petitioner had shown, Harby acknowledged that she was not familiar with "Rosetta Stone," "Ancient China" or the video on Greek mythology that were noted in petitioner's lesson plans. Although it was her

understanding that videos lasted about an hour and a half, she acknowledged that she was not aware of the actual length of the videos noted in petitioner's lesson plans. Nor had Harby asked any other Board member about the videos. She agreed that videos were a part of core-curriculum standards (J-3 at 56). She also stated that the April 25 meeting was not the first time she had heard about excessive use of videos. She heard about this from both Ericsson and McCann. She also received four or five complaints from parents about use of videos.

When asked about the display of students' work in petitioner's classroom, Harby reiterated that since she never visited petitioner's classroom, she had no personal knowledge about such displays. However, she could not recall noticing any work of petitioner's students displayed in the hallway, with the exception of the Greek mythology display. Although petitioner brought photographs to the Donaldson hearing that showed her students' work displayed, Harby felt that these few photographs were unimpressive, considering the amount of time that petitioner had been a teacher with respondent.

On the matter of classroom management, Harby was aware that petitioner shared her classroom with another teacher, and was also aware that petitioner claimed that the desk chairs were damaged during that other teacher's class. On one occasion she passed petitioner's classroom and noticed papers and other debris on the floor and chairs in disarray, although she was not sure if that was caused by the Spanish class. She also stated that she had received ongoing complaints about petitioner's classroom from the janitorial staff.

Although Harby and the other Board members oftentimes relied upon the input of the superintendent in their decision making, they did not always agree with him. She acknowledged that she was not familiar with the amount of parent contacts that were required, nor what number would have been sufficient. Neither had she compared petitioner's contact log with any other teacher's log. She mentioned that although it was appropriate to show videos in the classroom on certain occasions, it was not appropriate to show them as often as petitioner did. However, she acknowledged that she was not aware how many videos petitioner had actually shown.

In regard to the assertion that petitioner was textbook driven, Harby stated that if petitioner had brought in an article about the Constitution or had a speaker come to class to talk about a particular culture or to share foods of that culture with the class, those would have been examples of lessons that were not textbook driven and would have been acceptable. However, she again stated that these few instances did not represent sufficient numbers of examples of lessons that were not textbook driven for the period of time that petitioner had been teaching. She was also unaware that petitioner's students had written their own myths when studying Greek mythology.

When shown materials petitioner used in her sixth-grade class (P-11), Harby stated that these materials would have been acceptable had petitioner done this type of work on a regular basis. She stated that Board members O'Grady and Bird, whose children were in petitioner's class for the 2006-2007 school year, voted in favor of renewing her contract, but that Board member Hall, who was a certified social studies teacher, was adamant about not renewing her contract.

LEGAL ANALYSIS AND CONCLUSION

The acquisition of tenure is governed by N.J.S.A. 18A:28-5, which provides, in pertinent part:

> The services of all teaching staff members employed in the positions of teacher . . . and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, . . . 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 this Title, 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.

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)). Under 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." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 81 (1982). According to N.J.S.A. 18A:28-5(c), all teaching staff members shall acquire tenure once employed in a school district for "[t]he equivalent of more than three academic years within a period of any four consecutive academic years." "An academic year runs for the ten months between September 1 and June 30 of the school year." Kletzkin v. Spotswood Bd. of Educ., 136 N.J. 275, 277 (1994) (citing N.J.S.A. 18A:1-1). Due to "its remedial purpose, the Tenure Act [N.J.S.A. 18A:28-1 to -18] should be liberally construed to achieve its beneficent ends." Spiewak, supra, 90 N.J. at 74 (citing Barnes v. Jersey City Bd. of Educ., 85 N.J. Super. 42, 45 (App. Div. 1964)).

The renewal of a teacher's employment contract is governed by N.J.S.A. 18A:27-4.1, which states, in part:

> Notwithstanding the provisions of any law, rule or regulation to the contrary,
>
> . . . .
>
> 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. . . . An officer or employee whose employment contract is not renewed shall have the right to a written statement of reasons for nonrenewal . . . and to an informal appearance before the board. The purpose of the appearance shall be to permit the staff member to convince the members of the board to offer reemployment. The chief school administrator shall notify the officer or employee of the nonrenewal . . . .

A local school board has "virtually unlimited discretion in hiring or renewing nontenured teachers." Dore v. Bd. of Educ. of Bedminster, 185 N.J. Super. 447, 453 (App. Div. 1982). A board's decision of nonrenewal does not have to be supported by evaluations, for indeed the board may reach its conclusions about a nontenured teacher "on a broad base of input received from a variety of people, including members of the public, parents of students and a board member's own knowledge of a teacher even if that knowledge is acquired through having a child in the teacher's class." Id. at 454. The breadth of the board's discretion is so broad that the Appellate Division has said, "absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board." Id. at 456. It is a well-established rule that discretionary decisions of the local board will only be vacated where the board acts in an arbitrary, capricious and unreasonable manner. Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960); see Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327 (App. Div. 1965), aff'd, 46 N.J. 581 (1966). And, unless there is a clear showing of abuse, the Commissioner of Education will not substitute her own judgment for that of a local board in matters that lie within its discretionary authority. Kopera, supra, 60 N.J. Super. at 296.

The Commissioner in Bigart v. Paramus Board of Education, 1979 S.L.D. 123, 133, stated:

> In our system of jurisprudence, petitioner has the burden of proving that the underlying reasons for the Board's

> actions are improper. Such an allegation requires substantial proof that the Board acted improperly and to the exclusion of all other bona fide reasons.
>
> [Citing Bradley v. Bd. of Educ. of Freehold, 1976 S.L.D. 596 (emphasis added).]

In Watson v. Board of Education of Asbury Park, EDU 04990-03, Initial Decision (September 13, 2004), adopted, Comm'r (October 15, 2004), appeal dismissed, State Bd. of Educ. (March 2, 2005) <http://lawlibrary.rutgers.edu/oal/search.html>, a nontenured teaching-staff member filed a petition challenging the Board's decision not to renew her employment contract, which denied her tenure, as arbitrary and unreasonable. Although the administrative law judge (ALJ) recognized that the ultimate burden of proof rested upon the employee, the ALJ, as was done here, required the Board to present first at least some evidence to explain the basis for its decision, so that he could then more intelligently assess petitioner's proofs. The ALJ found that "[g]iven the vast discretion in the school board under the statute, this record of documented performance at less than satisfactory levels over a period of time would, without question, be more than sufficient to insulate the board against any claim that its decision not to renew petitioner's contract was arbitrary and unreasonable."

Likewise, in Martin v. Board of Education of Asbury Park, EDU 06349-04, Initial Decision (September 13, 2004), adopted, Comm'r (October 15, 2004), appeal dismissed, State Bd. of Educ. (March 2, 2005) <http://lawlibrary.rutgers.edu/oal/search.html>, the ALJ wrote that the employee had to "demonstrate that the board's decision not to renew her contract was so far afield, so outside the realm of rational, evidentially based decision-making as to fail to even stand as a reasonable determination," which she failed to do.

In Donaldson, our Supreme Court noted that the federal courts have placed various restraints on local boards in their dealings with nontenured as well as tenured teachers. For example, a local board may not refuse to rehire a teacher because of his membership in a labor union or in the exercise of his constitutional rights. Donaldson, supra, 65 N.J. at 242 (citing Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); Perry v. Sindermann, 408 U.S. 593, 598, 92 S. Ct.

2694, 2698, 33 L. Ed. 2d 570, 578 (1972)). Nor could such nonrenewal be predicated upon statutorily proscribed discriminatory practices, such as race, religion, color, age, gender or the like in hiring or dismissing staff. Id. at 247; see also Greenberg v. Camden County Vocational and Technical Sch., 310 N.J. Super. 189 (1998). None of these types of circumstances existed here. No underlying malice, motives or other reasons were advanced by petitioner for her nonrenewal. This case was strictly based upon questions of petitioner's efficiency.

Respondent presented compelling reasons for her nonrenewal. There were serious concerns about her reliance upon showing videos during academic class time, some of which were not period appropriate, such as "Remember the Titans," which was shown neither around the birth date of Martin Luther King, Jr., nor during Black History Month. Her classroom was found to be untidy, with chewing gum and papers on the floor and chairs in disarray, even though petitioner was responsible for its proper maintenance. Complaints were lodged by the janitorial staff. The vandalizing of the desk chairs was petitioner's responsibility to report.

There were also concerns about whether petitioner displayed enough of her students' work. Although she disputed this, there was ample credible testimony that she had not. In addition, there were concerns about whether she had sufficient contacts with parents. Petitioner confirmed that she used part of her preparation time, when she usually made her parent contacts, to assist the Spanish teacher in controlling her students. She also acknowledged that, in some instances, she made limited contacts even though she was aware of the policy of requiring two to three parent contacts a week.

McCann candidly admitted that when the school was undergoing construction he delegated many of his supervisory tasks to others. By his own admission he failed to walk the hallways as often as he should have, did not evaluate teachers as he had done in the past, and was even unaware of petitioner's lesson-plan book for the 2006-2007 school year. Engravalle, on the other hand, and as petitioner's direct supervisor, was very specific about petitioner's deficiencies. He mentioned, for example, that whenever he wrote a notation in her lesson-plan book for her to see him, he had to track her

down. The same lack of response occurred when he questioned her parent-contact logs.

The burden of proof rests upon petitioner to show by competent and credible evidence that the Board's decision not to renew her contract was arbitrary, capricious or unreasonable. The burden of proof for "[s]uch an allegation requires substantial proof that the Board acted improperly and to the exclusion of all other bona fide reasons." Bigart, supra, 1979 S.L.D. at 133 (emphasis added). Based upon the facts adduced and the legal principles discussed above, I **CONCLUDE** that petitioner has failed to sustain this burden of proof.

ORDER

Based upon the foregoing, it is **ORDERED** that the petition filed by petitioner be and is hereby **DISMISSED**.

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

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

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

6-29-09
DATE

J. HOWARD SOLOMON, ALJ

Date Received at Agency:

6/29/09

Date Mailed to Parties: JUL 1 2009

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

db

APPENDIX

Witnesses

For Petitioner:

Robert N. McCann
Carol Jaccodine
Pamela Kondratick

For Respondent:

Steven Engravalle
Patricia G. Harby

Exhibits

Joint:

J-1	Stipulation of Facts
J-2	Petitioner's Lesson Plan Book
J-3	Petitioner's Personnel File

For Petitioner:

P-1(a-e)	Photographs of petitioner's classroom
P-2	Letter from Robert N. McCann
P-3	Evaluation dated November 2, 2004
P-4	Evaluation dated November 30, 2005
P-5	Evaluation dated March 7, 2007
P-6	List of videos shown by petitioner
P-7(a-e)	Photographs
P-8	Student project "How the Horse Came to Be"
P-9	Student project "The God of Baseball"
P-10	Supplemental teaching materials for 7th grade

P-11 Supplemental teaching materials for 6th grade

P-12 Supplemental teaching materials for 8th grade

P-13(a-h) Photographs

P-14 Not offered

P-15 Supplemental materials

P-16 Student projects

For Respondent:

R-1 Contact Sheet

R-2 Executive Session Minutes of April 25, 2007

R-3 Administrator's Report for Regular Meeting of April 25, 2007

R-4 Minutes of Executive Session of April 25, 2007

R-5(a) Minutes of Executive Session of May 9, 2007

R-5(b) Minutes of Regular Meeting of May 9, 2007

R-6 Minutes of Workshop Meeting of June 13, 2007

R-7 Executive Session Minutes of June 13, 2007

R-8 Letter to petitioner dated May 7, 2007, signed by Cynthia May-Hostler on behalf of the Hamburg Board of Education

R-9 E-mail from Robert N. McCann dated March 27, 2007, to petitioner

311-09

#311-09

IN THE MATTER OF THE TENURE	:	
HEARING OF EMMA PAINTER	:	COMMISSIONER OF EDUCATION
KINGSWAY REGIONALSCHOOL	:	DECISION
DISTRICT, GLOUCESTER COUNTY.	:	
	:	

SYNOPSIS

The petitioning school district certified tenure charges of unbecoming conduct and other just cause against respondent – a tenured physical education teacher – for alleged misconduct, including witness tampering. Criminal charges were brought against respondent, who was later found guilty of third degree witness tampering and second degree official misconduct. By virtue of an Order of Forfeiture signed on May 20, 2009 by the Honorable M. Christine Allen-Jackson, J.S.C., Superior Court of New Jersey, Criminal Division, Gloucester County, respondent forfeited her public employment with the district pursuant to *N.J.S.A.* 2C:51-2, effective December 18, 2008.

Upon consideration, the ALJ concluded that it is in the public interest to bring these administrative tenure charges to a conclusion consistent with the Order of Judge Allen-Jackson. Therefore, based on the Order of Forfeiture and pursuant to *N.J.S.A.* 2C:51-2, respondent is considered to have been removed from her employment based on her conviction for the crimes she committed. The record of the matter is referred to the State Board of Examiners for action against respondent's 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. The tenure charges are hereby dismissed as moot, and the matter is transmitted to the State Board of Examiners for action against respondent's certificates 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 29, 2009

OAL DKT. NO. EDU 100-08
AGENCY DKT NO. 387-12/07

IN THE MATTER OF THE TENURE	:	
HEARING OF EMMA PAINTER	:	COMMISSIONER OF EDUCATION
KINGSWAY REGIONALSCHOOL	:	DECISION
DISTRICT, GLOUCESTER COUNTY.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon full consideration, the Commissioner finds and concludes that – by virtue of the Order of Forfeiture signed by the Honorable M. Christine Allen-Jackson, J.S.C., Superior Court of New Jersey, Criminal Division, Gloucester County, on May 20, 2009 – the respondent forfeited her public employment with the Kingsway Regional School District, pursuant to *N.J.S.A.* 2C:51-2, effective December 18, 2008. As such, the instant tenure charges have been rendered moot.

Accordingly, the recommended decision of the OAL is adopted as reflected above and the instant tenure charges are hereby dismissed. This matter is being transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.*

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 9/29/09

Date of Mailing: 9/29/09

* 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 100-08
AGENCY DKT. NO. 387-12/07

IN THE MATTER OF THE TENURE HEARING OF EMMA PAINTER, KINGSWAY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY.

Armando V. Riccio, Esq., for petitioner (Capehart Scatchard, attorneys)

Cristal Holmes-Bowie, Esq., for respondent (Michael A. Armstrong, attorney)

Record Closed: May 28, 2009 Decided: August 18, 2009

BEFORE **DANIEL B. MC KEOWN,** ALJ (t/a):

HISTORY

On November 13, 2007, the Kingsway Regional School District Board of Education (Board) certified charges of unbecoming conduct and other just cause for removal from employment against Emma Painter (respondent), a teacher with a tenure status in its employ, to the Commissioner of Education for determination under N.J.S.A. 18A:6-10, et seq. On December 17, 2007, the Board confirmed its adoption of the foregoing resolution. Respondent was simultaneously suspended from her teaching

duties, without pay, pending disposition of the charge. The charges relate to the conduct underlying criminal charges brought against her for witness tampering contrary to N.J.S.A. 2C:29-5, a crime of the third degree, and official misconduct contrary to N.J.S.A. 2C:30-2.

After the matter was transferred January 18, 2008, to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to-13, respondent requested placement on the six month inactive list. While it is recognized tenure charge cases are to be expedited towards resolution, the request was granted because of the pending criminal charges. See, Ott v Board of Education of Twp. Of Hamilton, 160 N.J. Super. 333 (App. Div. 1978).

While on the six month inactive list, the criminal charges against respondent were tried in New Jersey Superior Court. In a bench trial before the Honorable M. Christine Allen-Jackson, J.S.C., respondent was found guilty of violating N.J.S.A. 2C:28-5a (1), the third degree crime of tampering with a witness, and of violating N.J.S.A. 2C:30-2, a second degree crime of official misconduct.

On the same day, respondent was scheduled to be sentenced for the crimes of which she was found guilty, the Gloucester County Prosecutor and the Kingsway Regional Board filed applications before the Court to have N.J.S.A. 2C:51-2, et seq., applied. That statute provides as follows:

> a. A person holding any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office, position or employment if:
>
> (1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or crime;
>
> (2) He is convicted of an offense involving or touching such office, position or employment . . .

On May 20, 2009, Judge Allen-Jackson signed an Order by which respondent's employment with the Board was forfeited as of December 18, 2008.

APPLICATION FOR ADMINISTRATIVE ORDER

On the strength of Judge Allen-Jackson's Order, the parties seek an administrative order by which the Commissioner of Education would direct that respondent forfeited her tenure rights and employment as of December 18, 2008, and that, should the Judge Allen-Jackson's Order rescinded or vacated for any reason, the tenure charges would be considered reinstated against respondent.

CONCLUSION

In light of the approval of the Order of Forfeiture signed by the Honorable M. Christine Allen-Jackson removing respondent from her tenured employment, I **CONCLUDE** that it is in the public interest of to bring these administrative tenure charges to a conclusion. Such a conclusion must be consistent with that of Judge Allen-Jackson. Therefore, based on the Order signed by Judge Allen-Jackson and by operation of law, specifically, N.J.S.A. 2C:51-2, respondent is considered to have been removed from her employment based on her conviction for the crimes she committed.

Furthermore, because of the nature of the crimes for which respondent is now convicted, the record of the matter is referred to the State Board of Examiners for its consideration of whether the certificates possessed by respondent enabling her to teach in the public schools should be revoked pursuant to N.J.A.C. 6A:9-17.6.

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.

Daniel B McKeown

August 18, 2009
DATE

DANIEL B. MC KEOWN, ALJ (t/a)

Date Received at Agency: August 18, 2009

Date Mailed to Parties: AUG 19 2009

/bdt

313-09

OAL DKT. NO. EDU 8748-08
AGENCY DKT. NO. 243-8/08

T.B.W. on behalf of minor child N.S.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the 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.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/29/09

Date of Mailing: 9/29/09

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.EDU 8748-08

AGENCY DKT. NO. 243-8/08

T.B.W. O/B/O N.S.W.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,

Respondent.

Maisha L. Aziz, Esq., for petitioner

Katherine A. Gilfillan, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: August 11, 2009 Decided: August 20, 2009

BEFORE **DENNIS P. BLAKE**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 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. Hearings were conducted on November 18, 2008, and March 5, 2009. The matter was settled on June 8, 2009.

The parties have prepared a Settlement Agreement and Board Resolution indicating the terms thereof, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

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

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

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

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

August 20, 2009

DATE

DENNIS P. BLAKE, ALJ

Date Received at Agency: August 20, 2009

Date Mailed to Parties: AUG 21 2009

/jfk, mamf

EXHIBITS

Jointly Submitted

Settlement Agreement

Cherry Hill Public Schools

Malberg Administration Building
45 Ranoldo Terrace, P.O. Box 5015
Cherry Hill, New Jersey 08034-0390
(856) 429-5600
Fax (856) 354-1864

RECEIVED
2009 AUG 11 A 10:29
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ACTION AGENDA
July 28, 2009

D. POLICIES & LEGISLATION COMMITTEE

ITEM 2. RESOLUTION FOR RESIDENCY SETTLEMENT

WHEREAS, a residency hearing concerning pupil 2011710 was held by the Board on or about July 22, 2008 at which the student's parents were present and were heard regarding whether the student resided within the geographical limits of the Cherry Hill Public School District; and

WHEREAS, on July 22, 2008, after hearing all of the evidence presented, the Board of Education adopted a resolution accepting the Superintendent's recommendation that 2011710 be removed from the District as it was found that the parents did not meet their burden of proof that the student was domiciled in Cherry Hill during a portion of the 2007-2008 school year; and

WHEREAS, the parent of student 2011710 filed a petition of appeal with the Commissioner of Education; and

WHEREAS, the appeal was transferred to the Office of Administrative Law, Agency Reference No.: 2243-8/08, OAL Docket No. 08748-20085

WHEREAS, the parties have conferred and agreed to a settlement of the matter; and

WHEREAS, the terms of the settlement are reflected in a written Stipulation of Settlement and Release, which Stipulation was prepared and approved by the Board Solicitor; and

WHEREAS, the Board of Education, having reviewed the terms of the proposed settlement, has determined that the resolution of this matter, without further litigation, is in the best interests of the District;

NOW, THEREFORE, BE IT RESOLVED, that the Board approves settlement of the pending action in accordance with the terms of the Stipulation as presented to the Board; and be it

FURTHER RESOLVED, that the Board Solicitor is authorized to withdraw the District's counterclaim for tuition reimbursement upon the petitioner's withdrawal of the residency petition; and be it

FURTHER RESOLVED, that the Superintendent is authorized to execute any and all documents necessary to effectuate this request.

Resolution #17-7'10

Motion: Mr Roth Second: Mr. Tarken Vote: Ayes - 8 No - 0

CERTIFICATION

I hereby certify that the foregoing is a true, full and correct copy of Resolution Number 17-7-10 adopted by the Cherry Hill Township Board of Education at its meeting on July 28, 2009.

BY: James Devereaux
James Devereaux
Asst. Supt., Business/Board Secretary

ATTESTED BY: Janet Heilhorn Cohen
Janet Cohen
Notary Public

Settlement Agreement and Release

This Agreement and Release is made and entered into on this 2nd day of June, 2009 between Tanya Watson ("Parent") on behalf of herself and her child, Nigel Watson ("N.W."), and the Cherry Hill Township Board of Education ("Board") with administrative offices located at 45 Ranoldo Terrace, Cherry Hill, N.J.

Whereas, on June 27, 2008, the Board provided the Parent with a Notice of Ineligibility relative to N.W.'s attendance in the Cherry Hill School District; and

Whereas, a Board-level residency hearing was held on July 22, 2008 during which it was determined that N.W. was residing with his father in Philadelphia, P.A. during a portion of the 2007-08 school year and therefore was not eligible to attend school in the Cherry Hill Public School District; and

Whereas, the Board voted to disenroll the student from the District; and

Whereas, the Parent instituted an appeal to the Commissioner of Education relative to the Board's determination and the matter was assigned to Judge Dennis Blake under the caption of T.B.W. o/b/o N.S.W. v. Cherry Hill Board of Education, and docketed under OAL Docket No. EOUOS 08 748-2008, Agency Reference # 243-8/08; and

Whereas, the parties recognize the validity of the instant claim but in good faith have negotiated concerning this matter and have a desire to settle the matter, without admitting any liability or deficiencies in the case; and

Whereas, after institution of this case, it was determined that N.W. had been living with his mother in the District for the 2008-2009 school year; and

Whereas, the Board has agreed not to seek further tuition for the prior school year; and

Whereas, the District has agreed to waive its claim for tuition based on the facts of this case, provided that NW remains domiciled within the District; and

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the parties hereto agree as follows:

1. The Board has agreed to waive all past tuition for the 2007-08 school year;

2, The Board has agreed to forego all interest for the prior years' tuition, provided that the student remains domiciled within the geographical boundaries of the Cherry Hill Public School District.

3. The Parent understands that should evidence again be obtained that N.W. resides outside the geographic boundaries of the District, the District reserves its rights to proceed with a residency hearing and disenrollment proceedings.

4. For and in consideration of this Settlement Agreement and Release, both parties agree that this Agreement is a full and final settlement as to this claim and shall be deemed to release and forever discharge the other party, their heirs, executors and/or administrators, from any and all liability, responsibilities or obligations, claims, actions, causes of actions, suits at law or in equity of whatsoever kind or nature, whether based on a claim of tort, contract, breach of duty, or other remedy, demands, known or unknown, fixed or contingent, or any kids or nature whatsoever. costs, damages, loss of services, expenses, compensation, lost principal or interest, and attorneys' fees, from the beginning of time to the date of this Release on account of or in any way related to the instant petition and the disenrollment proceedings heretofore had herein.

5. The Parent acknowledges that she has been apprised of her right to review this agreement with independent legal counsel, that she has done so, and that she enters into it without duress, and of her own free will and volition. She further acknowledges that she fully understands the terms of this Agreement and the duties and obligations enumerated herein and that this Agreement constitutes a knowing release of all claims and a waiver by the Parent of any right to bring any claim arising out of the terms of this Agreement, either directly or indirectly.

6. This Agreement contains the entire Agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

7. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

8. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

WHEREUPON, the individuals below has set forth their hand and seal, on the date(s) indicated below:

Parent:

Tanya Watson

7/2 09
Date

Cherry Hill Township Board of Education:

By: Dr. David Campbell, Superintendent

7/29/09
Date

314-09

OAL DKT. NO. EDU 6654-08
AGENCY DKT. NO. 151-5/08

MAUREEN PRICE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WASHINGTON, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

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

Upon such 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.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/29/09
Date of Mailing: 9/29/09



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6654-08

AGENCY DKT. NO. 151-5/08

MAUREEN PRICE,

Petitioner,

v.

WASHINGTON TOWNSHIP
BOARD OF EDUCATION,
BURLINGTON COUNTY,

Respondent.

Richard A. Friedman, Esq, (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys) for petitioner

Rita Barone, Esq. (Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys) for respondent

Record Closed: July 15, 2009 Decided: August 13, 2009

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

This matter was transmitted to the Office of Administrative Law (OAL) and filed on September 29, 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.

Petitioner Maureen Price, a tenured teacher, whose position was abolished through a reduction in force, contends that the Washington Township Board of Education (Board) is violating her tenure/seniority rights by employing nontenured and/or less senior staff in positions to which she is entitled. The Board, in defense, claimed that her petition was untimely and petitioner did not acquire tenure.

A hearing was scheduled for May 4, 5, and 7, 2009. Prior to the date of the hearing, petitioner's counsel requested an adjournment of the May 4, 2009 hearing date. On May 1, 2009, the Board's counsel advised that the parties reached a settlement agreement that resolves all issues in dispute and requested adjournment of the remaining hearing dates. She attached a draft settlement agreement. On May 15, 2009, the Board's counsel sent an agreement signed by the Board superintendent. On June 8, 2009, petitioner's counsel sent a settlement agreement signed by both parties. However, the agreement noted that board approval was needed. On July 15, 2009, Board counsel faxed the attached copy of the extract of the minutes showing that the board voted to accept the settlement agreement.

Having reviewed the contents of the attached Settlement Agreement and Release, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

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

I **CONCLUDE** that this 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.

August 14, 2009
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: AUG 21 2009

Date Mailed to Parties: AUG 21 2009

mph

PURCELL, RIES, SHANNON, MULCAHY & O'NEILL
One Pluckemin Way
P.O. Box 754
Bedminster, NJ 07921
(908) 658-3800
Attorneys for Defendant, Washington Township Board of Education, Burlington Township
Our File: (304) 19131-H/RFB

MAUREEN PRICE Petitioner, v. WASHINGTON TOWNSHIP BOARD OF EDUCATION, BURLINGTON COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency No. 151-5/08 OAL Docket No. EDUOR 06654-2008S **SETTLEMENT AGREEMENT AND RELEASE**

THIS AGREEMENT entered into this _____ day of April, 2009 by and between the Washington Township Board of Education, Burlington County ("the Board") and Maureen Price("Petitioner").

WITNESSETH:

WHEREAS, Petitioner instituted a Petition of Appeal before the Department of Education under OAL Docket No. 06654-2008S alleging that the Board violated Petitioner's tenure and seniority rights; and

WHEREAS, a hearing was scheduled in this matter before the Honorable Stephanie M. Wauter, ALJ; and

WHEREAS, the parties engaged in settlement negotiations prior to the commencement of the hearing and as a result of those settlement discussions, the parties have reached an amicable

resolution of all the issues set forth in the Petition of Appeal; and

WHEREAS, the Board denies that it has violated Petitioner's tenure and seniority rights;

NOW, THEREFORE, the parties stipulate and agree as follows:

1. In consideration of the Petitioner withdrawing her Petition of Appeal against the Board, the Board recognizes that the Petitioner has not waived her right to challenge any of the Board's future tenure or seniority decisions to the extent such may implicate Petitioner's tenure and seniority rights as alleged in the Petition of Appeal or otherwise;

2. Despite the recognition that Petitioner has preserved her rights as set forth in paragraph 1 above, by signing this agreement it is understood by both parties that the Board continues to deny that Petitioner has a valid claim of tenure or seniority in any available position, at the present time;

3. By withdrawing the Petition of Appeal, the Petitioner does not waive her claim that she acquired seniority in the elementary category. In addition, by settling this dispute, the Board does not admit that Petitioner acquired seniority in the elementary category.

4. This settlement constitutes the full and complete agreement of the parties and resolves all issues that could have or should have been instituted in this action including all claims for attorney fees and costs. This settlement may not 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 construed as if it were drafted by both parties contemporaneously.

5. The Board and Petitioner each hereby verify, affirm and represent that they have each had the opportunity to discuss the terms of this agreement with counsel, that they understand its contents and are entering into this agreement voluntarily and with a full understanding of its meaning and that they are fully satisfied with their respective legal representation.

6. This agreement is subject to Board approval.

Maureen Price

Maureen Price, Petitioner

Richard A Goldberg

Mr. Richard Goldberg, Superintendent
Township of Washington Board of Education

EDU6654-08

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2009 JUL 15 P 4:01
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Washington Township Board of Education

Green Bank School
2436 Route 563
Egg Harbor City NJ 08215

School Phone: 609-965-3520
Business Office: 609-561-3868 ex 124

Washington Twp. Board of Education
Regular Meeting
May 18, 2009

A motion was made by Mr. Vogel, second Mr. Scarnoffa, roll call vote with all members voting yes, to accept the settlement agreement as presented and discussed in closed session between Washington Township Board of Education and Maureen Price.

I, Lourdes LaGuardia, secretary of the Board of Education of the Township of Washington, in the County of Burlington, State of New Jersey, hereby certify that the foregoing extract from the minutes of the Board of Education held on May 18, 2009 has been compared by me with the original minutes as officially recorded in my office in the Minute Book of said Board of Education and is a true, complete, and correct 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.

Lourdes LaGuardia
(Secretary)

316-09

#316-09

BOARD OF EDUCATION OF THE BOROUGH OF WESTVILLE, GLOUCESTER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner seeks a determination that respondent is responsible for the cost of educating W.J.H., a minor child receiving special education services, for the 2004-2005 school year. Petitioner contends that the controlling factor in this matter is an agreement between the divorced parents of W.J.H. – which was signed in February 2005 – and not the domicile of the child on October 15, 2004. The respondent filed a motion for summary decision.

The ALJ found, *inter alia,* that: there are no genuine issues of material fact and the matter is ripe for summary decision; prior to February 2005, W.J.H.'s physical custody was on a shared, equal-time, alternating-week basis, such that the child was not living with either parent for a majority of the school year, and there was no court order designating the school district of attendance; on October 15, 2004, W.J.H. resided with his father in the Westville school district; school attendance is determined by domicile and residence as a general rule; pursuant to *N.J.A.C.* 6A:22-3.1(a)(1)(ii), a court-sanctioned agreement altering a residence-based determination must be in effect on the last school day prior to October 16 preceding the date of the application; and retroactive alteration of the school district of attendance based on a court order or court-sanctioned agreement would contravene regulations. Accordingly, the ALJ granted respondent's motion for summary decision, concluding that Westville is responsible for the cost of educating W.J.H. for the 2004-2005 school year.

Upon full and careful consideration, the Commissioner concurred with the ALJ's determinations, 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 29, 2009

OAL DKT. NO. EDU 10144-05
AGENCY DKT. NO. 219-8/05

BOARD OF EDUCATION OF THE BOROUGH OF WESTVILLE, GLOUCESTER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.[1] The Commissioner agrees that the matter is appropriate for summary decision, and adopts the Initial Decision as the final decision for the reasons set forth by the Administrative Law Judge.

Accordingly, respondent's motion for summary decision is granted and petitioner is responsible for the costs of W.J.H.'s education during the 2004-2005 school year.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 9/29/09

Date of Mailing: 9/30/09

[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 10144-05
AGENCY DKT. NO. 219-8/05

BOARD OF EDUCATION OF THE BOROUGH OF WESTVILLE, GLOUCESTER COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF OAKLYN, CAMDEN COUNTY,
Respondent.

Kelly M. Estevam, Esq., for appellant (Capehart Scatchard, attorneys)

John E. Collins, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: July 10, 2009 Decided: August 19, 2009

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE

Petitioner Westville Borough Board of Education (Westville) seeks a determination that respondent Oaklyn Board of Education (Oaklyn) is the responsible

party for the cost of educating W.J.H., a minor child receiving special education services, for the 2004-05 school year. Westville contends that the controlling factor in determining that responsibility is not the domicile of the boy on October 15, 2004, but rather an agreement between the parents. At issue is the application of N.J.A.C. 6A:22-3.1(a)(1)(ii) to the facts of this case, and respondent Oaklyn moves for summary decision.

PROCEDURAL HISTORY

On February 25, 2005, the Camden County superintendent of schools issued a letter to respondent, but not to petitioner Westville, stating that the district responsible for W.J.H.'s educational program was Westville. Based on that letter, Oaklyn later denied financial responsibility by letter of March 24, 2005. Westville filed a petition for due process dated June 22, 2005, with the Office of Special Education of the New Jersey Department of Education (Department). By letter of August 15, 2005, the Department notified petitioner that the matter involved a dispute based upon domicile/residency and should be filed not as a special education matter, but rather as a Petition of Appeal before the Commissioner of Education. On August 25, 2005, petitioner transmitted this appeal to the Bureau of Controversies and Disputes of the Department, where it was received on August 29, 2005. On September 19, 2005, an Answer was filed by respondent, and the matter was transmitted for a hearing as a contested case to the Office of Administrative Law (OAL), where it was filed on December 15, 2005.[1]

Upon the motion of the parties, an order for the deposition of W.J.H.'s mother was entered. Respondent then filed this motion for summary decision and petitioner filed in opposition.

[1] Respondent raises the issue of the timeliness of this petition, under the 90-day provision of N.J.A.C. 6A:3-1.3(h)(4)(i). However, Petitioner was not copied on the Camden County Superintendent's letter regarding domicile and did file its original petitions with the Department of Education in June 2005. Additionally, respondent did not raise the issue of untimeliness until the filing of its motion, well after the parties had commenced litigating this case.

FACTUAL DISCUSSION

W.J.H. is a minor child whose parents, W.H. and M.C., are divorced. Before their divorce, the then six-year-old boy was placed at the Burlington County Special Services School by Oaklyn, his district of residence. After the divorce his father relocated to Runnemede, New Jersey, while his mother remained in Oaklyn. At some point prior to the 2004-05 school year, W.J.H.'s father relocated to Westville, New Jersey. On November 20, 2002, W.J.H.'s parents executed an addendum to their divorce agreement providing that W.J.H. would "reside with each respective parent on alternating weeks," but did not specify which district was responsible for his education.

Sometime in the summer of 2004, W.J.H.'s parents attempted to register him in both districts. Oaklyn had prepared his Individualized Education Plan (IEP) and made arrangements for his continued attendance at the Burlington County placement. After the parents were advised that they could not register W.J.H. in both districts, their request and arrangements for bus transportation set off a series of communications by and between Westville and Oaklyn regarding the child's registration and bus transportation. Sometime in October 2004, Westville staff filed an Application for State School Aid for W.J.H., on the assumption that he was being validly registered in the Westville school district. Westville received a State aid credit for W.J.H. for the 2004-05 school year. On October 15, 2004, W.J.H. resided with his father in Westville.

In February 2005, the Westville Child Study Team contacted M.C. regarding the preparation of W.J.H.'s IEP for the 2005-06 school year. As M.C. preferred to have Oaklyn continue as the district responsible for W.J.H.'s education, she consulted her matrimonial counsel, and sometime in February 2005 M.C. and W.H. executed another addendum to their divorce agreement in which they agreed that for purposes of educational placement the district of residence for W.J.H. would be Oaklyn. As set forth in her deposition, M.C. admitted that the addendum designating Oaklyn as the district of residence was not entered into in November 2002, but rather was executed in February 2005. The fact that the language regarding Oaklyn was not present in the original

November 2002 addendum to the divorce agreement was corroborated by M.C.'s matrimonial counsel.

Since W.H.'s relocation to Florida, W.J.H. has continued to reside with his mother in the Oaklyn school district for the school years subsequent to 2004-05.

LEGAL DISCUSSION

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.

Children in New Jersey are provided a free public education, and a child is eligible to attend school in the district where the child is domiciled. N.J.A.C. 6A:22-3.1(a). The domicile of a child is based upon the domicile of the parents or legal guardians with whom they live. N.J.A.C. 6A:22-3.1(a)(1). When a child's parents live in different school districts, the school district of attendance may be provided for by court order or written agreement of the parents. N.J.A.C. 6A:22-3.1(a)(1)(i), (ii). In the absence of such an agreement, "the student's domicile is the school district of the parent with whom the student lives for the majority of the school year." N.J.A.C. 6A:22-3.1(a)(1)(i). N.J.A.C. 6A:22-3.1(a)(1)(ii) provides:

> Where a student's physical custody is shared on an equal-time, alternating week/month or other similar basis such that the student is not living with one parent for a majority of the school year, and where there is no court order or written agreement between the parents designating the school district for school attendance, the student's domicile is the present domicile of the parent with whom the student resided on the last school day prior to October 16 preceding the date of the application.

I **FIND** that the facts essential to a decision in this matter are not in dispute. W.J.H.'s physical custody was on a shared, equal-time, alternating-week basis, such

that he was not living with one parent for a majority of the school year. There was no court order designating the school district of attendance. Finally, on October 15, 2004, the last school day prior to October 16 preceding the date of the application, W.J.H. resided with his father in the Westville school district. The parents did not enter into a written agreement designating the district for residency purposes until February 2005.

In opposing this motion, petitioner contends that because the "question of where a student resided on the last school day prior to October 16, is only reached as a last resort when the Court is unable to determine the parents' intent from a written agreement," and that the February 2005 written agreement is sufficient to satisfy the requirements of N.J.A.C. 6A:22-3.1 and place financial responsibility on the respondent.

Contrary to the petitioner's argument, the residence of a student is not a method of last resort in determining the school district of attendance, but is the default; as a general rule, school attendance is based on domicile and residence. N.J.S.A. 18A:38-1; N.J.A.C. 6A:22-3.1(a). While the provisions of N.J.A.C. 6A:22-3.1 allow written agreements to alter the residence-based determination, any such agreement must be in effect on the last school day prior to October 16 preceding the date of the application. N.J.A.C. 6A:22-3.1(a)(1)(ii). Holding, as the petitioner suggests, that the parents of a student may retroactively alter the school district of attendance based on a written agreement would contravene the regulations.

Petitioner also argues that the actions of Oaklyn in its communications with Westville should be taken into account. While it appears that miscommunications and misassumptions may have played a role in the actions taken by the parties, those facts are not germane to the underlying issue of residency. The facts needed to determine that issue are clear, and Westville bears the burden of educating W.J.H. for the 2004-05 school year.

ORDER

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.

August 19, 2009

Patricia R. Kerins

DATE

PATRICIA M. KERINS, ALJ

Date Received at Agency: 8-19-09 lom

Date Mailed to Parties: 8-19-09 lom

/jfk

320-09

DARYUS QUARLES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner sought reversal of the final decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying his request for a "hardship waiver" to allow him to participate in Paulsboro High School interscholastic basketball contests for the 2009-2010 school year, following his March 2009 transfer from a private school back to his former public school without a *bona* fide change in parental residence. Petitioner contended that the transfer, which was made after the completion of the 2008-2009 basketball season, was because of financial hardship and homesickness, rather than athletic advantage.

The NJSIAA's Eligibility Appeals Committee (EAC) determined that petitioner's reason for enrolling at Life Center Academy (Life Center) was to better position himself for athletic recruitment by colleges – in contravention of Article V, Section 4(K) of the NJSIAA bylaws – and that since petitioner's transfer back to Paulsboro was not in connection with a bona fide change of residence by petitioner's parents or guardians, petitioner was subject to a one year period of ineligibility pursuant to Article V, Section 4(K)(2), the Transfer Rule. NJSIAA contends that: the "hardship" provision of its transfer rule permits waivers from athletic ineligibility *only* where the transfer is compelled by an "unforeseeable, unavoidable, and uncorrectable act, condition or event that causes the imposition of severe and non-athletic burden upon the student or his family," and petitioner's transfer back to Paulsboro did not meet that criteria; petitioner's claim that his transfer was due to financial hardship was contradicted by the fact that he was allowed to continue as a student at Life Center – which is not a member of NJSIAA and has "an outstanding basketball program" – through the end of the basketball season, despite purported financial difficulties; and petitioner's claim of homesickness does not constitute a hardship.

The Commissioner upheld the NJSIAA's decision and dismissed the petition, finding that petitioner did not meet his burden so as to entitle him to prevail on appeal. The Commissioner – who may not substitute her judgment for that of the NJSIAA on appeal – noted, *inter alia*, that petitioner is 18 years old and therefore falls under Article V, Section 4(K)(1) of the NJSIAA Bylaws, which states that "[a transferring] student who becomes emancipated shall be deemed not to have made a bona fide change of residence", thereby subjecting him or herself to the transfer rule; petitioner's two transfers cannot be considered without reference to each other; there is sufficient evidence supporting the NJSIAA's finding that petitioner transferred to Life Center for athletic considerations; and NJSIAA's denial of a hardship waiver of the Transfer Rule was not arbitrary, capricious or unreasonable.

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

October 2, 2009

AGENCY DKT. NO. 143-7/09

DARYUS QUARLES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,	:	DECISION
RESPONDENT.	:	

Daryus Quarles, Petitioner *Pro Se*

For Respondent, Michael J. Herbert, Esq. (Herbert, Van Ness, Cayci & Goodell)

This matter came before the Commissioner of Education on July 6, 2009, through the filing of a *pro se* petition of appeal by Daryus Quarles (petitioner), in substantial compliance with applicable procedural rules at *N.J.A.C.* 6A:3-7.1.[1] In his appeal, petitioner sought reversal of the final decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying his request for a "hardship waiver" exempting him from NJSIAA Article V, Section 4(K)(2) (the Transfer Rule) that requires a 365-day ineligibility period for student athletes who transfer schools without a *bona fide* change in parental residence.[2] On July 24, 2009 the NJSIAA duly filed an answer and statement of items comprising the record.

[1] Petitioner provided a copy of the NJSIAA decision that he challenges, a transcript of the May 6, 2009 hearing at which the question of his eligibility to play basketball at Paulsboro High School in the coming year was examined, and certain exhibits, including documents pertaining to his father's economic circumstances and an application by a family friend to gain guardianship of him.

[2] Insofar as petitioner is 18 years old, the Commissioner notes that "[a] student who becomes emancipated shall be deemed not to have made a bona fide change of residence." Article V, Section 4(K)(1) of the NJSIAA Bylaws.

Petitioner's brief was filed on July 28, 2009; respondent's brief was filed on August 5, 2009, and petitioner's reply brief was filed on August 14, 2009. Upon receipt of these submissions, the record was closed and the matter proceeded to determination.

It is undisputed that petitioner is eighteen years old and a rising Senior in Paulsboro High School. For most of his life petitioner has lived in Paulsboro with his mother, who continues to reside there. In his Freshman and Sophomore high school years, petitioner attended Paulsboro High School. Petitioner testified that he is 6 feet 7 inches tall (T15[3]), has won recognition for his basketball skills since his early years at Paulsboro High School and has been highly recruited by colleges. (T13; T15-16)

For the first six months of his Junior year, petitioner attended Life Center Academy (Life Center), a private religious school in Burlington County. There are conflicting accounts in the record regarding the reason why petitioner transferred from Paulsboro High School to Life Center. Petitioner's father, Albert Quarles, testified that when petitioner failed 9th grade mathematics, a representative of Huntington Learning Center recommended Life Center. (T8) Petitioner testified that because Life Center's school year was organized into semesters, he had hoped to catch up on his mathematics courses by taking one during each semester of the school year – as opposed to taking two mathematics courses at the same time, which would allegedly be required at Paulsboro High School. (T14) Albert Quarles also testified that a Rutgers coach had recommended Life Center because petitioner needed to improve his grades to go to college, even with his athletic talent.

[3] "T" designates the above referenced transcript of the May 6, 2009 hearing. "15" is the page number upon which the relevant testimony may be found.

Life Center is not a member of the NJSIAA and consequently does not have to comply with NJSIAA rules.[4] Thus, it was not obligated to sign a waiver form stating that petitioner's transfer to it (and from it) was not for athletic advantage. Nor was it required to wait 365 days before accepting petitioner into its athletic programs.

Representatives of respondent describe Life Center as an athletic powerhouse with an established, outstanding basketball program, and petitioner has not contradicted this description. Petitioner testified that while he was at Life Center, he made a verbal commitment to attend St. Joseph's University as a student athlete:

> When I went to Life Center – St. Joe's is where I wanted to go.
> While I was at Life Center, I verbally committed to St. Joe's.
> (T13-14)

It is undisputed that petitioner stayed at Life Center through the 2008-2009 basketball season and then transferred back to Paulsboro High School. It is also undisputed that Life Center did not charge petitioner for tuition. He was charged $200 per month for housing only. Petitioner's eighteenth birthday was on March 1, 2009, and the parties agree that he returned to Paulsboro High School on March 2, 2009. It is undisputed that upon returning to Paulsboro he went to live with a friend, Nanette Bagby, rather than his mother, with whom he had always lived prior to attending Life Center.[5]

When asked why petitioner left Life Center, Albert Quarles testified that he could not afford to pay the $200 monthly fee for housing and that petitioner was homesick. (T15) Documents that petitioner provided to the Commissioner, but that he had not submitted to the NJSIAA at or prior to the hearing, corroborated that petitioner's father had not been paying the

[4] The Paulsboro school district, however, is a member of the NJSIAA.
[5] Petitioner's father lives in another municipality.

full $200 monthly housing fee. No one disputes the fact that petitioner was nonetheless allowed to stay at Life Center for six months.

The NJSIAA's Eligibility Appeals Committee (EAC) sent out its decision in this matter on May 13, 2009. It determined that petitioner's reason for enrolling at Life Center was to better position himself for athletic recruitment by colleges, in contravention of the purpose of such NJSIAA rules as Article V, Section 4(K), that were put in place to discourage school transfers for athletic advantage. The "facts" that the EAC articulated in support of its determination were:

1. Petitioner was encouraged to go to Life Center by a college coach that was recruiting him.

2. Petitioner transferred back to Paulsboro only after improving his basketball skills, verbally committing to St. Joseph's, and finishing the basketball season at Life Center.

The EAC also found that since petitioner's transfer back to Paulsboro was not in connection with a bona fide change of residence by petitioner's parents or guardian, it required a one-year period of ineligibility, pursuant to the Transfer Rule.[6]

Petitioner's claim that he should be granted a hardship waiver under Article V, Section 4(K)(2) was rejected by the EAC. It emphasized the rule's own definition of hardship, *i.e.,* "an unforeseeable, unavoidable and uncorrectable act, condition or event that causes the imposition of a severe and non-athletic burden upon the student or his/her family." For the following reasons, the EAC did not believe that the circumstances relating to petitioner's transfer back to Paulsboro High School met the definition:

1. Homesickness is not, in the EAC's opinion, a "hardship."

[6] The EAC pointed out that Bagby, the friend with whom petitioner now lives, is not in fact petitioner's legal guardian. The Commissioner notes, however, that petitioner is 18 years old, rendering the question of guardianship irrelevant.

2. There was no testimony about a change in petitioner's economic circumstances. Thus, the inability of petitioner's father to pay the Life Center housing fees had not been "unforeseeable."

3. Petitioner's economic situation notwithstanding, he was nonetheless allowed to stay at Life Center through the 2008-2009 basketball season.

In summary, the EAC found that petitioner's transfers and their underlying purpose qualified as the type of conduct that the Transfer Rule was promulgated to discourage, and that petitioner should be subject to the 365-day waiting period set forth in Article V, Section 4(K)(2).

In his appeal, petitioner makes several points. He contends that the EAC has presented no credible evidence that he attended Life Center to promote his standing as a basketball player. He emphasizes his father's difficult financial situation, urging that it was the reason that he left Life Center and that it satisfies the standard for a hardship waiver of the waiting period for transfer students.

In the alternative, petitioner argues that Article V, Section 4(K) only applies to transfers between public schools and should not affect his ability to play basketball at Paulsboro High School in the coming season. In that regard petitioner denies that *D.S.J. on behalf of minor child J.J. v. NJSIAA* (Commissioner Decision No. 93-09, March 13, 2009) – a case relied upon by respondent – applies to the present matter. In *D.S.J.,* the Commissioner upheld the NJSIAA's denial of a hardship waiver to a student whose parent transferred him for good faith academic reasons from Seton Hall Preparatory School to Parsippany High School. Petitioner appears to argue that *D.S.J.* is inapposite because the student in that case transferred between two NJSIAA member schools.

Petitioner also replies to respondent's references to discussions between his father and college coaches by pointing to the National Collegiate Athletic Association (NCAA) recruiting rules that allow certain types of contacts between college coaches and students or their parents at certain stages of student athletes' high school careers. For example, those rules allow for discussions between players and college coaches during the second year of high school – when initiated by the students. After June 15 of the second high school year, college coaches may call students once a month. Using the NCAA rules as a framework, petitioner maintains that there was nothing improper about a coach recommending to Mr. Quarles – during petitioner's Sophomore year – that petitioner transfer to Life Center.

Finally, petitioner asks that if the Commissioner affirms the decision of the EAC to impose a waiting period, the 365 days of ineligibility be counted from March 2, 2009 – the date of his re-enrollment into Paulsboro High School. Petitioner advises that this period would expire prior to the basketball playoffs.

At the outset of any discussion of this controversy, it is important to address the standard to which the Commissioner must conform. More specifically, *N.J.A.C.* 6A:3-7.5(a)(1) provides that the Commissioner shall not substitute her judgment for that of the NJSIAA, so long as the petitioner has been given due process and the NJSIAA's decision is supported by "sufficient credible evidence in the record as a whole." And *N.J.A.C.* 6A:3-7.5(a) (2) prohibits the Commissioner from overturning the NJSIAA's application of its own rules absent a demonstration that the rules were applied in an arbitrary, capricious or unreasonable manner.

It is helpful to recognize that the present case includes <u>two</u> transfers – the first one from Paulsboro High School to Life Center and the second one from Life Center back to

Paulsboro High School. The two transfers should not be examined without reference to each other.

Prior to the first switch, from Paulsboro to Life Center, at least one college basketball coach had recommended that petitioner – a highly recognized basketball player – transfer to Life Center, which apparently 1) has an outstanding athletic program,[7] 2) is not subject to the NJSIAA rules requiring schools to certify that student-athlete transfers are not taking place for athletic reasons, and 3) could welcome petitioner into its basketball program immediately. While it may not have been improper for a coach to have discussions with petitioner's father, it is not unreasonable to conclude that the kind of transfer the coach(es) recommended was meant to help advance petitioner's athletic career. Indeed, while petitioner was attending Life Center, he made a verbal commitment to attend St. Joseph's University as a student-athlete.

The record also shows that Life Center – a private school – not only waived tuition from petitioner, but allowed him to stay long after it became clear that petitioner's father was not paying the monthly charges for housing. Life Center kept petitioner, a highly talented basketball player, until the basketball season had ended. Respondent argues that these facts signify that petitioner was essentially on an athletic scholarship at Life Center until leaving at the end of the basketball season.[8] Such scholarships are prohibited by NJSIAA Article V, Section

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[7] Paulsboro High School basketball coach Chila testified that Life Center has a better basketball program than Paulsboro. T6-7

[8] While petitioner is correct that neither he nor his father testified that he had transferred to Life Center for athletic reasons, the Commissioner cannot find that the respondent's inference of athletic motivation was unsupported by the evidence in its totality.

Section 4(D).[9]

The Commissioner is also mindful that petitioner's stated reason for attending Life Center was to make progress in completing required academic courses. More specifically, petitioner stated that he had wished to make up two mathematics classes by taking them consecutively in the two semesters comprising the Life Center school year instead of having to take them simultaneously at Paulsboro High School. However, when petitioner left Life Center he abandoned that goal.

Upon a thorough review of the facts pertaining to the first transfer, the Commissioner cannot find that the NJSIAA was arbitrary, capricious or unreasonable in determining that there is sufficient credible evidence to conclude that the first of petitioner's transfers was made for athletic advantage.

Petitioner focuses more on the second transfer, *i.e.,* from Life Center back to Paulsboro High School. As referenced above, he contends that the economic circumstances connected with his transfer back to Paulsboro, and his homesickness, provide the basis for him to be granted a hardship waiver of the Transfer Rule. Also, insofar as his transfer was from a non-public school not affiliated with the NJSIAA, petitioner maintains that the Transfer Rule should not be imposed upon him. His position is that the rule only applies to transfers between "public schools."

The Commissioner is not persuaded by these arguments. First, petitioner's father's circumstances were and are such that it was likely known by petitioner and his father at the outset that he would have difficulty paying for his son's tenure at Life Center. Thus, the requirement that petitioner's "hardship" be an unforeseeable one is not met. Moreover, the

[9] Petitioner submitted a letter from Life Center dated June 9, 2009 stating that petitioner was on a need-based scholarship. This letter was dated after the hearing and NJSIAA decision in this matter and the Commissioner must therefore carefully consider the evidentiary weight, if any, to give to its contents.

financial difficulties did not appear to be the catalyst for the transfer back to Paulsboro High School. To the contrary, petitioner was allowed to remain at Life Center long after Mr. Quarles began submitting less than what he owed for the monthly housing fees.

Additionally, in correspondence dated June 4, 2009 and addressed to "To Whom It May Concern," Life Center stated that petitioner wanted to transfer back to school in December 2008, but – after discussions between Mr. Quarles and Life Center's coach Arroyo – it was decided that it would be better for Daryus to remain at Life Center. This determination was made in spite of Mr. Quarles' failure to make the monthly housing payments. Further, it cannot escape the Commissioner's notice that the discussions about petitioner reportedly occurred not between his father and the dean or principal of Life Center, but between his father and the coach, who jointly decided not to allow Daryus to return to Paulsboro in the middle of basketball season.

Petitioner, his father, and others suggested that homesickness was both a reason for petitioner's transfer back to Paulsboro High School and the basis for a hardship waiver from imposition of the Transfer Rule. However, the Commissioner notes that when petitioner transferred back to Paulsboro, he did not return home to his mother, or any other family member. As an 18-year-old, petitioner could establish his own residency in Paulsboro for purposes of receiving a free education in the Paulsboro public schools and was free, as a legal matter, to live with Ms. Bagby. However, his choice not to return to his family undermines his argument about homesickness. And there is no precedent for the granting of a hardship waiver based upon the fact that a student misses his friends.

The Commissioner must also disagree with petitioner's suggestion that the Transfer Rule only applies to "public schools." The language of Article V, Section 4(K) makes

no such distinction, and petitioner offers no Commissioner decision or other authority in support of this proposition. Moreover, the Commissioner agrees with respondent's analysis that carving out from the purview of the Transfer Rule all private schools or all secondary schools that are not members of the NJSIAA would grossly undermine the purpose of the rule. That purpose, as articulated by the NJSIAA and endorsed by the Commissioner, is to prevent transfers for athletic advantage, which transfers undermine fair competition and displace student athletes who are already in the programs into which the transferring athletes enter:

> [The Commissioner] cannot substitute her judgment for that of the NJSIAA, nor can she find the NJSIAA to have applied its rules in a patently arbitrary or unreasonable manner, particularly in light of the NJSIAA's duty to ensure fairness and integrity in athletic competition statewide [and] the potential for creation of an unworkable "slippery slope" if parental decisions to transfer students for academic reasons were deemed to fall within the purview of the "hardship" waiver . . . .
>
> (*D.S.J. on behalf of minor child J.J. v. NJSIAA, supra,* p. 10)

Petitioners seeking to overturn decisions of the NJSIAA bear a heavy burden. Considering the record of this matter and in light of the prescribed standard of review, the Commissioner cannot find that petitioner has met his burden so as to entitle him to prevail on appeal. Petitioner received the process to which he was due. There is sufficient evidence in the record to support the NJSIAA's finding that athletic considerations underlay the transfer to Life Center, and that the transfer back to Paulsboro occurred after petitioner had achieved the athletic objectives, such as a verbal commitment to St. Joseph's University. Nor can the Commissioner characterize the NJSIAA's denial of a hardship waiver of the Transfer Rule as arbitrary, capricious or unreasonable under the above described circumstances of this case.

The Commissioner appreciates that petitioner is a young man with great promise,

but is constrained to uphold the letter and spirit of the NJSIAA bylaws that were promulgated to ensure fairness in secondary school athletics. Accordingly, the petition is dismissed.[10]

IT IS SO ORDERED.[11]

COMMISSIONER OF EDUCATION

Date of Decision: 10/02/09

Date of Mailing: 10/05/09

[10] Petitioner's request that he be allowed to participate in the "play-offs" was not adjudicated below and will consequently not be addressed in this decision.

[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.

321-09

#321-09

MAURO DeGENNARO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY AND JOHN R. RASLOWSKY, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner, a teacher in the Hoboken School District since September 1974, asserted that he had not been properly compensated for his services as a part-time athletic director and sought a salary adjustment retroactive to December 1992, which corresponds to the date petitioner earned a supervisory certificate. The respondent Board filed a motion for summary decision, arguing that the petitioner's April 2009 appeal was not timely filed.

The ALJ found, *inter alia,* that: there are no disputed material facts, and the matter is ripe for summary decision; petitioner's appeal was filed well past the regulatory timeline set forth at *N.J.A.C.* 6A:3-1.3(i); petitioner received clear notice with every paycheck received after December 1992 that the Board had determined to continue to pay him at the teacher's salary level; a challenge to salary guide placement must be brought within ninety days of the time that the teacher first became aware of the amount of his salary; and petitioner's claim was filed close to seventeen years beyond the ninety day statute of limitations. Accordingly, the ALJ granted respondent's motion for summary decision, and dismissed the petition.

Upon careful and independent review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter for the reasons clearly stated therein.

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

October 6, 2009

OAL DKT. NO. EDU 5630-09
AGENCY DKT. NO. 72-4/09

MAURO DeGENNARO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY AND JOHN R. RASLOWSKY, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

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

Petitioner's exceptions essentially recast and reiterate his 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, the Commissioner concurs with the ALJ that summary decision is appropriately granted to the Board as the instant petition 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.

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.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/06/09
Date of Mailing: 10/07/09

* 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 05630-09
AGENCY DKT. NO. 72-4/09

MAURO DeGENNARO
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY and JOHN R. RASLOWSKY, SUPERINTENDENT
Respondents.

John R. Schwartz, Esq., for petitioner (Hoogstra, Schwartz and Scerbo, attorneys)
Joseph R. Morano, Esq., for respondents

Record Closed: August 24, 2009 Decided: August 31, 2009

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

STATEMENT OF THE CASE

Petitioner, Mauro DeGennaro (DeGennaro), a teaching staff member employed by the respondent, Board of Education of the City of Hoboken (the Board), asserts that he has not been properly compensated for his services as a part time athletic director, and seeks a salary adjustment retroactive to 1992. The Board contends that DeGennaro's petition of appeal was not timely filed, and seeks an order dismissing the petition.

PROCEDURAL HISTORY

DeGennaro filed his appeal with the Commissioner of Education on April 16, 2009. An answer was filed on behalf of the Board and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case on May 12, 2009. A Motion for Summary Decision, pursuant to N.J.A.C. 1:1-12.5, was filed by the Board on July 21, 2009. DeGennaro filed a brief in opposition to the motion on August 13, 2009.

Thereafter, the Board submitted a letter dated August 19, 2009 and received by me on August 24, 2009, which supplemented the record with a memorandum from the Superintendent of Schools to DeGennaro dated January 17, 2006. DeGennaro's counsel copied me on a letter to counsel for the Board, also dated August 24, 2009, in which he states that the January 17, 2006 memorandum was not included in the personnel file produced in discovery. Counsel suggests in his letter that further discovery may be needed prior to disposition of the pending motion. I have reviewed the correspondence from counsel which I received on August 24, 2009, and do not believe that any material factual disputes preclude disposition of the motion for summary decision. Accordingly, I have closed the record as of August 24, 2009.

FINDINGS OF FACT

The material **FACTS** are not in dispute, and I **FIND** as follows:

DeGennaro has been employed by the Board as a teacher since September 1974. On or about December 17, 1985, he additionally assumed the part-time position of Director of Athletics. He has held the Director position to date, and is compensated via a stipend, which he receives in addition to his base teachers' salary. At the time he commenced his service as a Director of Athletics, DeGennaro did not hold supervisory certification.

In 1991, N.J.S.A. 18A:26-2.1 was signed into law, and established the requirement that a secondary school Director of Athletics hold a supervisory certificate issued by the State Board of Examiners. However, pursuant to N.J.S.A. 18A:26-2.2, any individual who

possessed a teaching certificate and was employed as a Director of Athletics in a public high school prior to the effective date of N.J.S.A. 18A:26-2.1, could continue to be so employed. Although DeGennaro could have continued to serve as Director of Athletics pursuant to the "grandfather" provisions of N.J.S.A. 18A:26-2.1, he nonetheless completed additional course work and received a supervisory certificate from the State Board of Examiners in December 1992.

Upon receiving his supervisory certificate, DeGennaro believed that he should be compensated at the supervisory level, rather than on the teacher's salary guide. He made repeated requests for a title change from Director to Supervisor, as well as requests for a concomitant increase in salary. These requests date back to October 1992. DeGennaro seeks retroactive compensation in the amount of $247,252, which he claims is the differential between the salary he has actually earned since 1992, and the salary to which he contends he was entitled once he earned his supervisory certificate.

DeGennaro states that he did not receive a reply to these many requests for a position change. The Board has submitted a memorandum from Superintendent of Schools, Patrick Gagliardi, to DeGennaro dated January 17, 2006 in which Gagiardi denied DeGennaro's request. The August 24, 2009 letter from his counsel implies that this memorandum was not received by DeGennaro. However, as will be more fully set forth below, any dispute regarding whether the January 17, 2006 memorandum was actually received by DeGennaro is immaterial to a resolution of the Board's motion.

ANALYSIS AND CONCLUSIONS OF LAW

The Board seeks relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c) which provides that "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, supra., 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 v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (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.

I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts which require a plenary hearing, and the Board is entitled to judgment as a matter of law. DeGennaro has filed his appeal pursuant to N.J.A.C. 6A:3-1.1, et. seq. which establishes the procedures for the filing of petitions of appeal before the Commissioner of Education. See: N.J.S.A. 18A:6-9. The time for filing is clearly set forth at N.J.A.C. 6A:3-1.3 (i), which provides that a petition of appeal before the Commissioner shall 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 ... which is the subject of the requested contested case hearing." DeGennaro's appeal was filed well past the regulatory timeline, and should be dismissed.

DeGennaro asserts that the Board failed to formally reply to his requests for a position change, and that he received no "notice of a final action of the Board" that would trigger the ninety day rule. Adequate notice has been defined as notice "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. Board of Education of Berkley, 131 N.J. 572, 587 (1993). DeGennaro first asked for a title change in October 1992, prior to receiving his supervisory certificate. Each time DeGennaro received a paycheck after receiving his certificate in December 1992 the Board clearly communicated to him that it had determined to continue to pay him at the teacher's salary level. Each time he received a paycheck he received "adequate notice...sufficient to inform him" that he was not being paid at a supervisory salary level.

A challenge to salary guide placement must be brought within ninety days of the time that the teacher first became aware of the amount of his salary. O'Donnell v Hanover Township Bd. of Educ., 97 N.J.A.R. 2d (EDU) 364. The Commissioner has recognized that receipt of a paycheck affords a staff member constructive notice of his salary, and begins the ninety day period for formally filing an appeal. See: Arlequin and Alsup v. Perth Amboy Bd. of Educ. EDU 2578-97, Initial Decision, (October 16, 1997, adopted, Comm'r (December 4, 1009) <http://lawlibrary.rutgers.edu/oal/search.html>. Accordingly, it is unnecessary for me to determine whether DeGennaro actually received the January 17, 2006 memorandum from Superintendent Gagliardi in which his request for a change in title was denied, because DeGennaro's time for filing an appeal had expired years before January 17, 2006. DeGennaro knew that the Board had rejected his request to be paid as a supervisor as early as December 1992, when he received a paycheck at the teacher's rate. Any later requests for a salary adjustment, or rejections of those later requests, are of no moment. DeGennaro's claim began to toll in December 1992 and accordingly, has been filed close to seventeen years beyond the ninety day statute of limitations.

It is well established that the ninety day rule is to be strictly applied. See: Kaprow , supra.; Morris-Union Jointure Commission v. Board of Education of the Borough of South River, 92 N.JA.R. 2d (EDU) 453; Markulin and the Neptune Education Association v.

Board of Education of the Township of Neptune, 92 N.J.A.R. 2d (EDU) 406. The rationale for this requirement was articulated by the Kaprow court as follows:

> The [ninety day] 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 teachers and the administration. The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Moreover, because local school boards operate on a cash basis, claims must be file promptly so that the local board can anticipate any back-pay requirements. Kaprow at 582.

DeGennaro seeks an exorbitant sum in back pay. His claim serves to emphasize the policy considerations which gave rise to the ninety day requirement. Indeed, the Board did not budget for an expense in excess of $200,000, relying on the belief that it had correctly compensated DeGennaro, and that he did not intend to formally challenge his salary level. See: Lavin v. Board of Education of the City of Hackensack, 90 N.J. 145, 153 (1982).

The Board correctly argues that a relaxation of the ninety day rule would be inappropriate. While the Commissioner has the discretion to relax the rule, N.J.A.C. 6A:3-1.16, this extraordinary relief has been reserved only for 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 Board of Education of the City of Newark, 94 N.J.A.R. 2d (EDU) 381,384. Cordell Wise v Board of Education of the City of Trenton, OAL Dkt No. EDU160-00 Final Decision, (September 11, 2000)<http://lawlibrary.rutgers.edu/oal/search.html>. DeGennaro's claim has no import or significance beyond his personal employment relationship with the Board, making a relaxation of the rule unwarranted.

Accordingly, I **CONCLUDE** that DeGennaro'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, 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 31, 2009
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 8/31/09

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

323-09

R.C. on behalf of minor child, R.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The instant petition was filed as an application for emergent relief, requesting that petitioner's daughter be removed from the private school in which her mother placed her in 2006 or 2007, and re-enrolled in the Vineland public schools, where she had completed kindergarten through third grade. Petitioner claims that he has joint custody of his child, and contends that she was illegally removed from the public school system without his consent or permission. Petitioner further claims that the Vineland school district bears the blame for this action. The respondent Board asserts that it was advised in 2006 that the child had been enrolled in a private school by the mother, and it has acted properly and fulfilled all legal obligations.

The ALJ found, *inter alia*, that: petitioner has not met the criteria for emergent relief as set forth in *N.J.A.C.* 6A:3-1.6 as the child is enrolled in private school for the 2009-2010 school year, and will not suffer any irreparable harm, and no facts have been presented to indicate that petitioner would be successful on the merits before the OAL; and petitioner's dispute appears to be over the custody arrangement, but he failed to produce the purported agreement giving him equal custody of his daughter. The ALJ concluded that this matter must be addressed in the Court with the appropriate jurisdiction, ie: the Superior Court of New Jersey, Family Division. The ALJ denied the application for emergent relief.

The Commissioner concurred with the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter, noting that she has no jurisdiction under the school laws or pursuant to any other authority to adjudicate, bestow, terminate or modify custody rights, or to order a non-party parent to transfer her child from a private school to a public school. 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 07, 2009

323-09

OAL DKT. NO. EDU8883-09
AGENCY DKT. NO. 162-7/09

R.C. on behalf of minor child, R.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner would like his daughter to be 1) removed from the private school in which her mother placed her in 2006 or 2007 and 2) enrolled in the Vineland school district. He filed an emergent application in addition to the instant petition.

At the hearing on petitioner's emergent application in the Office of Administrative Law (OAL), petitioner was asked to provide evidence demonstrating that he is the father of the child in question, and that he has the residential and legal custody rights necessary to determine where the child may attend school. Petitioner failed to provide any such evidence. Nor did he explain why his petition was filed after the minor child had already attended the private school for two or three years.

After the conclusion of the hearing the Administrative Law Judge (ALJ) correctly determined that the standards for emergent relief set forth in *N.J.A.C.* 6A:3-1.6 had not been met, and, consequently, denied the emergent application. More specifically, he concluded that 1) the child's current enrollment in school – as verified by the respondent after contacting the child's

mother – precludes a finding of irreparable harm, and 2) the petitioner has not demonstrated a settled right, let alone a likelihood that his claim can succeed.

The Commissioner also concurs with the ALJ that the correct forum for claims such as petitioner's is Superior Court, Family Division. The Commissioner has no jurisdiction under the school laws or pursuant to any other authority to adjudicate, bestow, terminate or modify custody rights, or to order a non-party parent to transfer her child from private school to a public school. Accordingly, the underlying petition in this matter is dismissed.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/07/09

Date of Mailing: 10/08/09

* 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 8883-09

AGENCY DKT. NO. 162-7/09

R.C. ON BEHALF OF MINOR CHILD, R.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,

Respondent.

R.C., petitioner, pro se

Damon Tyner, Esq., for respondent

Record Closed: September 3, 2009 Decided: September 3, 2009

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE

On or about September 1, 2009, R.C. filed a petition for emergent relief with the Department of Education. Petitioner asserts that his child, for whom he allegedly has joint custody, was illegally enrolled in a private Christian school without his consent or

permission. Petitioner demands that his child be placed back in the Vineland public school system for the start of the present school year.

PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies received a petition for emergent relief on or about September 1, 2009. The matter was transmitted to the Office of Administrative Law (OAL) on September 2, 2009, to be heard as an emergent contested case. The Director of the OAL assigned the undersigned to hear this matter pursuant to N.J.S.A. 52:14F-5o.

The matter was scheduled for hearing on September 3, 2009. The hearing proceeded on that date.

SUMMARY OF REVELANT FACTS

Petitioner is purportedly the father of R.C. R.C. (child) is eleven years old and currently entering the sixth grade at the New Life Christian School. The child's mother is M.M. She was not a participant in the present proceeding.

The child/s mother removed R.C. from the Vineland school district some time in or around 2006-2007. She attended the Vineland public schools for grades kindergarten through third. She has attended private school for grades four and five. Petitioner desires that she be placed back in the public school system for sixth grade starting September 2009.

Petitioner contends that his child was illegally removed from the public school system years earlier. (P-2, P-3, and P-4). Petitioner contends that the school district is to blame for this action. He relies upon the K-12 registration information packet (P-1) setting forth the district's policy in connection with parents' rights and responsibilities. Therein, the policy states as follows:

> The Board will presume that each natural or adoptive parent or legal guardian of a pupil enrolled in this district possesses full parental rights of access to the pupil and to information about the pupil, notwithstanding any separation of the parents or dissolution of the marriage. Accordingly and in the absence of notice to the contrary, the Board directs that school principals accommodate the needs of both parents for access to their child, to their child's teachers, and to information about their child.
>
> The Board's presumption of the equal rights and responsibilities of parents may be set aside only upon the presentation to the principal of proper notice that custody of a pupil resides in only one parent and that the custodial rights of the other parent have been limited or that guardianship resides in some third party. When such notice is duly presented, the principal will be directed by the terms of that notice to limit the access of a non-custodial parent to the child or to information about the child. Proper notice consists of the custodial parent's or guardian's sworn affidavit or certification supported by a copy of the pertinent portion of a legal agreement or court order that awards custody and establishes the rights and limitations of any non-custodial parent or terminates the parental rights of any non-custodial parent. Any questions or problems should be directed to the Superintendent for the review and if necessary, referral to the Board Solicitor.

During the course of petitioner's presentation, he was continuously requested to provide a copy of the custodial agreement outlining the parental rights and responsibilities. Petitioner refused to provide or did not have a copy of a custodial agreement.

The district asserts that it acted properly. Its records reflect that on or about September 15, 2006, the Assistant Principal spoke to the child's mother. The district was further advised that the child had been enrolled in a private school by the mother and no other information was available. (P-3). Under the circumstances, the district's legal obligations were fulfilled. The district remains ready, willing and able to accept the child as a student for the 2009-2010 school year, if a resident of Vineland and lawfully and properly enrolled.

APPLICABLE LAW

Petitioner carries the burden in seeking emergent relief. The standard is set forth in N.J.A.C. 6A:14-2.7(s)1. Those criteria are:

> Emergent relief may be requested according to N.J.A.C. 1:6A-12.1. Emergent relief may be granted if the administrative law judge determines from the proofs that:
>
> i. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> ii. The legal right underlying the petitioner's claim is settled;
>
> iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> iv. 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); Princeton Ins. Co. v. 349 Associates, L.L.C., 147 N.J. 337, 340 (1997).

I **CONCLUDE** that petitioner has not met the criteria for emergent relief. The district verified that the child continues to be enrolled at the New Life Christian School for the 2009-2010 school year. This was verified by telephone with the child's mother, M.M. Consequently, the child will not suffer any irreparable harm, as she will continue to receive her education at a private institution.

I further **CONCLUDE** that petitioner has not presented any facts indicating he will be successful on the merits before the Office of Administrative Law. The gravamen of petitioner's dispute appears to be over the custody arrangement. He contends that he had equal custody over his daughter, notwithstanding he did not produce the custodial agreement. Petitioner stated this agreement was approved by the Cumberland County Superior Court, Family Division in or around 1999. It has not been amended since that time. Assuming petitioner's argument is accurate, that is he has a 50/50 custodial

arrangement, then the parental determination as to the educational placement remains with the parents to be resolved, not with the district or Office of Administrative Law. If the parents are unable to reach an amicable determination, they should return to the Family Court for that Court to determine who has the greater rights in this decision-making process. Currently M.M. is the residential parent. Consequently, she would bear the responsibility of preparing the child each day for school. That may provide her with a greater interest in the placement determination.

Based upon the foregoing, I **CONCLUDE** that petitioner has not satisfied the criteria for emergent relief. I further **CONCLUDE** that this matter would be better addressed in the Superior Court of New Jersey, Family Division. Therefore, there is no need for a plenary hearing in this matter. Rather, petitioner should address his concerns to the Court with the appropriate jurisdiction.

ORDER

For all the foregoing reasons, petitioner's request for emergent relief is **DENIED.** It is further **ORDERED** that the Vineland Public Schools accept R.C. as a student for the 2009-2010 school year so long as she meets the legal criteria for such placement.

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

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

9-3-09
DATE

W. TODD MILLER, ALJ

Date Received at Agency: 9-3-09

Date Mailed to Parties: 9-3-09

/sd

APPENDIX

Documents In Evidence

For Petitioner:

P-1 Vineland Board of Education Registration-Transportation Department Packet

P-2 Computer print out/history

P-3 Computer print out/student comments

P-4 Vineland Public School Enrollment Information Admission Slip 2002

For Respondent:

None

Witnesses

For Petitioner:

R.C., petitioner, pro se

For Respondent:

None

324-09

OAL DKT. NO EDU 3930-09
AGENCY DKT. NO. 58-3/09

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES SQUICCIARINI,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF PATERSON,	:	DECISION
PASSAIC COUNTY.	:	
	:	

The record of this matter, the parties' Settlement Agreement and Release of Claims 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 *N.J.A.C.* 6A:9-17-11 with respect to respondent's relinquishment of his certificate(s) and the remaining terms of the settlement. This matter shall be forwarded to the State Board of Examiners to ensure effectuation of respondent's certificate(s) relinquishment.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 10 | 08 | 09
Date of Mailing: 10 | 08 | 09



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3930-09
AGENCY DKT. 58-3/09

I/M/O TENURE HEARING OF JAMES SQUICCIARINI, STATE – OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY.

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

Ronald J. Ricci, Esq., for respondent (Ricci, Fava, attorneys)

Record Closed: August 20, 2009 Decided: August 26, 2009

BEFORE **DANIEL B. MC KEOWN,** ALJ t/a:

This matter concerns the Tenure hearing of James Squicciarini of conduct unbecoming a tenured teacher. The Department of Education transmitted this matter to the Office of Administrative Law ("OAL") on April 16, 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. A telephone prehearing was held on April 28, 2009 and hearing dates were scheduled for on June 17, 23, 24 and July 1, 2009. However, June 24 and July 1, 2009, hearing dates were adjourned to provide the parties time toward finalizing a settlement.

On August 19, 2009, the parties submitted a Settlement Agreement as well as the Board resolution, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

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

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

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

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

August 26, 2009
DATE

DANIEL B. MC KEOWN, ALJ t/a

Date Received at Agency: 8-27-09

Date Mailed to Parties: AUG 27 2009

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

rr

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for the State Operated School District of Paterson

ER 20 P 12:12
OFFICE OF ADMINISTRATIVE LAW

In the Matter of Tenure Charges Against **JAMES SQUICCIARINI**	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDUTH 03930-2009N AGENCY REF. NO. 58 -3/09 **SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS**

This matter having come before the Court upon the filing of Tenure Charges by Petitioner State Operated School District of Paterson (hereinafter referred to as "Petitioner" and/or "District") against James Squicciarini (hereinafter referred to as "Respondent" and/or "Squicciarini"), and

WHEREAS, the parties have determined that resolution of this matter without a hearing is in the interests of the public and consistent with furthering the public good, since (1) Respondent has surrendered any and all certificates/certifications issued by the State of New Jersey-State Board of Examiners; (2) Respondent has resigned as a tenured teacher with Petitioner; (3) Petitioner will not need to prosecute thirty-six tenure charges (thirteen of which have multiple counts contained therein); (4) Petitioner will not need to produce its anticipated witnesses to testify (including at least ten, but possibly in excess of twenty, employees of Petitioner; five former employees of Petitioner, at least one of whom resides outside of the State of New Jersey; and at least two, but possibly six,

middle school aged student witnesses); and (5) Petitioner will not have to devote the substantial time and public expense attendant to a hearing expected to span at least ten hearing dates; and

WHEREAS, the parties agree to fully and finally settle and/or release all claims between them arising out of Squicciarini's employment and separation from employment with District;

The parties do hereby agree as follows:

1. Squicciarini has executed and supplied an irrevocable letter of resignation, which is attached to this Agreement, which resignation will become effective on the date that this Agreement is approved by the Commissioner of Education.

2. Squicciarini has executed and supplied an irrevocable letter of surrender of any and all certifications issued by the State of New Jersey-State Board of Examiners, which is attached to this Agreement, which surrender will become effective on the date that this Agreement is approved by the Commissioner of Education.

3. From this day forward, and in perpetuity following the approval of this Agreement by the Commissioner, Squicciarini will not volunteer for, be a participant in, or attend any program, event, or activity which is at all related to the Paterson Public Schools, which shall include, but not be limited to, any program, event or activity which is sponsored by the Paterson Public Schools, any co-curricular or extra curricular program, event or activity involving the students of the Paterson Public Schools (regardless of location), any program, event or activity which operates with or uses Paterson Public Schools monies or funding, or any program, event or activity which is located in or on any Paterson Public Schools property (whether owned or leased).

4. In consideration of the foregoing, the Petitioner School District will not prosecute the thirty (36) tenure changes certified against Respondent Squicciarini.

5. In consideration of the foregoing, Squicciarini hereby releases and forever discharges the District 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 Squicciarini 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. Squicciarini acknowledges that this general release also includes but is not limited to claims arising under federal, State, and local laws prohibiting employment discrimination, claims arising under the State education laws, including the tenure laws, claims arising under State, federal or common law for breach of contract, or claims growing out of any legal restrictions on the District's rights with regard to employment of individuals. Squicciarini hereby expressly waives and releases any and all claims or rights 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., and the Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq. Squicciarini hereby agrees to withdraw with prejudice his suit against all defendants in Docket Number PAS-L-4765-08, New Jersey Superior Court, Bergen County. Petitioner

hereby agrees to withdraw with prejudice its claims against Respondent in Docket Number PAS-L-4765-08, New Jersey Superior Court, Bergen County.

6. 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.

7. The terms of this Agreement shall be kept confidential, but shall be subject to the Open Public Records Act. Squicciarini agrees not to disclose the terms thereof to any person other than Squicciarini's immediate family, accountant, attorney, income tax preparer or similar professional, or taxing authorities, unless otherwise ordered by a court of competent jurisdiction. 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.

8. This Agreement shall be binding upon and inure to the benefit of Squicciarini, the District, and any of their respective heirs, legal or personal representatives, employees, officers, directors, successors or assigns.

9. This Agreement sets forth the entire Agreement between the parties and supersedes any and all prior agreements or understandings between the parties. Squicciarini represents and acknowledges that he does not rely, and has not relied upon, any representation or statement not

set forth in this Agreement made by District or its counsel with regard to the subject matter, basis, or effect of this Agreement or otherwise.

10. In the event of a breach of this Agreement, either party may seek relief, including damages, restitution and injunctive relief, at law or in equity, in a court of competent jurisdiction.

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. Squicciarini acknowledges that he has carefully read and fully understands all of the terms of this Agreement, including the general release contained herein, that he has had a reasonable period of time to consider the terms hereof, and that he enters into this Agreement voluntarily and with the advice of counsel.

13. The parties agree that this Agreement will be incorporated into an Initial Decision by the Honorable Daniel McKeown, the Administrative Law Judge assigned to preside over the pending tenure dismissal action bearing OAL DKT. NO. 03930-2009N and Agency Ref. No. 58 -3/09.

14. The parties recognize that if this Agreement is not approved by the Commissioner of Education, the tenure dismissal proceeding will resume before Judge McKeown until completion.

WITNESS

JAMES SQUICCIARINI
Date:

THE STATE OPERATED SCHOOL
DISTRICT OF PATERSON

Mark Tolentino
WITNESS

By: John W. Ewan

Date: August 11, 2009

JUN 2 5 2009

TO: Commissioner of Education
State of New Jersey

On this 24th day of June, 2009, I, James Squicciarini, hereby relinquish with prejudice any and all teaching Certifications that I may hold that were issued by the New Jersey Department of Education.

Date: 6/24/09

JAMES SQUICCIARINI

WITNESS
Brooke Bagley, Esq.

JUN 29 2009

I, James Squicciarini, hereby resigned from my position as a school teacher for the Paterson Public School System effective June 23, 2009.

Date: 6/23/09

JAMES SQUICCIARINI

PC# 9225

6th grade math

WITNESS
Brooke Bagley, Esq.

Co-workers

Michelle
Barbara
Olga
Luna
Shunda
Gloria L
Zenaida
Lovey

Maria G
Maria C
Gloria R
Rosa G
Alicia W
Shelia W

326-09

CAROLYN MACCHIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY AND DR. TIMOTHY BRENNAN, ACTING EXECUTIVE COUNTY SUPERINTENDENT FOR HUDSON COUNTY, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner – formerly a tenured teacher of television technology in respondent's district, whose position was abolished due to a reduction in force – claimed that the decision of the respondent Board to appoint a non-tenured individual to an in-school suspension monitor position for the 2007-2008 school year, instead of appointing petitioner to this position, violated her tenure rights. Additionally, petitioner challenged the determination of the Interim Executive County Superintendent of Schools for Hudson County (Interim ECS) that the position of in-school suspension monitor is not an instructional position and that the County Substitute Certificate is appropriate for the position. Respondents contend that the petition should be dismissed because the Interim ECS's determination was not arbitrary, capricious or unreasonable.

The ALJ found that: there are no genuine issues of material fact at issue here, and the matter is ripe for summary decision; the Interim ECS reviewed the duties of the in-school suspension position as an "unrecognized title" pursuant to *N.J.A.C.* 6A:9-5.5(b) and concluded that it is not an instructional position, but one of a monitor; petitioner's contention that, as a matter of law, the position as created by the Board requires an instructional certificate is misplaced; the determination of the Interim ECS was based on a thorough review of the facts and was not arbitrary, capricious or unreasonable; and petitioner's tenure rights have not been implicated. 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's findings and conclusions, 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.

October 8, 2009

OAL DKT. NO. EDU 5776-09
AGENCY DKT. NO. 85-4/09

CAROLYN MACCHIA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY AND DR. TIMOTHY BRENNAN, ACTING EXECUTIVE COUNTY SUPERINTENDENT FOR HUDSON COUNTY, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and replies of both respondents – filed in accordance with *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her determination herein.

Petitioner's exceptions essentially replicate her brief in opposition to the Board's Motion to Dismiss filed below. In that it is determined that all of petitioner's allegations and arguments were fully considered and addressed in the Administrative Law Judge's (ALJ) Initial Decision, they will not be revisited here.

Upon full consideration, the Commissioner concurs with the ALJ – for the reasons comprehensively presented in his decision – that summary decision is appropriately granted to the Board.

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/08/09

Date of Mailing: 10/08/09

* 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 05776-09
AGENCY DKT. NO. 84-4/09

CAROYLN MACCHIA,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY AND DR. TIMOTHY BRENNAN, ACTING EXECUTIVE SUPERINTENDENT FOR HUDSON COUNTY, NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondents.

Gregory T. Syrek, Esq., for petitioner (Bucceri and Pincus, attorneys)

Robert J. Merryman, Esq., for respondent Board (Apruzzese, McDermott, Mastro and Murphy, attorneys)

Cynthia Raymond Rimol, Deputy Attorney General, for respondent Hudson County Acting Executive County Superintendent (Anne Milgram, Attorney General of New Jersey, attorney)

Record Closed: July 23, 2009 Decided: August 31, 2009

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

STATEMENT OF THE CASE

Carolyn Macchia, a laid-off former tenured teacher with the Bayonne Board of Education (Board or District), protests the appointment of a non-tenured individual rather than Macchia to an in-school suspension monitor position for the 2007-2008 school year. She contends that the appointment was to an individual not properly certified to be solely in charge of supervision of a class of students and that the Board's failure to instead appoint her violated her tenure rights. She also challenges the determination of Monica Tone, Interim Executive County Superintendent of Schools for Hudson County (Interim ECS),[1] that the position of isolated classroom experience monitor is not an instructional position and that the County Substitute Certificate as required in the Board's job description is appropriate for the position.

The Executive County Superintendent contends that the petition should be dismissed because the Interim ECS's decision was not arbitrary, capricious or unreasonable. The Board also argues for dismissal because of the determination of the Interim ECS after her review of the duties of the position of in-school suspension monitor (also identified as isolated classroom experience monitor).

PROCEDURAL HISTORY

Macchia initially filed a petition with the Commissioner of Education on November 21, 2007, alleging that the appointment of a non-tenured individual who was not properly certified to an in-school suspension monitor position violated her pension rights. Administrative Law Judge Jeffrey A. Gerson issued an Initial Decision on September 8, 2008, dismissing the petition upon concluding from the stipulated job duties of the permanent substitute position that the position is not one of a teaching staff member subject to the tenure laws. On December 5, 2008, the Commissioner rejected the Initial Decision because the factual record was incomplete and did not provide a

[1] According to the Answer filed on behalf of Dr. Timothy Brennan, he is currently the Acting Executive County Superintendent, County of Hudson, State of New Jersey, Department of Education.

determination by the County Superintendent of the appropriate certification, if any, required for the position. The Commissioner directed the Board to submit the position of in-class suspension monitor to the County Superintendent for determination of what certification, if any, is necessary to hold it. She also dismissed the petition without prejudice. Macchia v. Bd. of Educ. of Bayonne, EDU 01396-08, Initial Decision (September 8, 2008), rejected, Comm'r (December 5, 2008), <http://lawlibrary.rutgers.edu/oal/search.html>. After the Interim ECS issued her determination on January 16, 2009, Macchia filed the instant petition on April 27, 2009, followed by the Board's May 19, 2009, Motion to Dismiss and the Acting ECS's May 20, 2009, Answer.

The Bureau of Controversies and Disputes of the Department of Education referred the matter to the Office of Administrative Law (OAL), where it was filed on June 3, 2009, 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 receiving Macchia's opposition to the Motion to Dismiss and replies from the other parties by July 23, 2009, this matter is now before me on the Motion to Dismiss.

STATEMENT OF FACTS

I **FIND** the following undisputed **FACTS**:

Macchia was employed by the Board for eight years while holding an instructional certificate as a teacher of television technology. By virtue of her employment and certification, she gained tenure pursuant to N.J.S.A. 18A:28-5. The Board notified Macchia that her employment would not continue for the 2007-2008 school year due to a reduction in force that abolished two teaching positions in its television production program.

James Burton, who had been employed by the Board from September 2005 through June 2007, holding a standard instructional certificate with an endorsement as teacher of audio-visual broadcast production technology, also had his position abolished at the end of the 2006-2007 school year. The Board rehired Burton as a permanent

substitute teacher for the 2007-2008 school year and has assigned him to the in-school suspension room since September 1, 2007, as an isolated classroom experience (ICE) monitor.

The in-school suspension program is entitled ICE and is assigned to students for disciplinary infractions. The job description for ICE monitor is as follows:

Title: Isolated Classroom Experience (ICE) Monitor

Qualifications:

1. Must possess County Substitute Certificate (60+ college credits)
2. Ability to relate to children
3. Required criminal history background check and proof of U.S. Citizenship or legal resident alien status
4. Must pass a Board of Education health examination
5. Must attend orientation/training session

Reports to: Principal and Vice Principals

Job Goal: To assist in a supervisory capacity of monitoring students assigned to an in-school suspension program.

Performance Responsibilities:

1. To remain in an assigned location to monitor students assigned to the In-School Suspension program;
2. Supervision of I.C.E., which program is described below and is in the High School Student Handbook;
    a. The program is assigned to students for disciplinary infractions.
    b. Students are assigned to the I.C.E. program for one (1) to eight (8) instructional periods during a school day or for a number of days as determined by the vice principal.
    c. Typically, students are only assigned for one period per day.
    d. Students assigned to I.C.E. are required to have with them all materials necessary to complete the assignment(s) given to them by their teachers.
3. The employee assigned to the I.C.E. program monitors student behavior;
4. Take attendance;
5. Make sure that work assignments provided by the classroom teacher are distributed to the students;

6. Collect work completed by the student during the time they are in the I.C.E. program;
7. Report violations of the rules of conduct to the principal or vice principal;
8. Maintain a written record of student attendance, incidents and/or disciplinary infractions as required;
9. Maintain a professional relationship with students; and
10. Perform other related tasks as assigned by the high school principal.

Since the staff member is left alone with the students, the Board requires that the staff member hold at least a County Substitute Certificate. No instruction takes place in the ICE program, and the staff member assigned is not expected to provide any assistance to the students with respect to their school work. Permanent substitutes are utilized in a number of positions in the District. They are used as classroom aides since their substitute certificate allows them to remain with students when a certified staff member is not present. They are also used to monitor after school detention.

Since June 30, 2007, there has been no new position or opening for a teacher of television production technology in the District.

In response to the Commissioner's December 5, 2008, directive, District Superintendent Patricia L. McGeehan communicated with Tone, attaching the Commissioner's Decision and a copy of the above job description for ICE Monitor. Additionally, McGeehan's submission indicated that each student assigned to the ICE program will be given their assigned classroom work for that particular day by the classroom teachers. She also set forth as follows:

> The role of the Isolated Classroom Experience Monitor is simply to oversee the students assigned to the ICE program. The Monitor will take attendance, hand out work assignments which are provided by the classroom teacher, collect the work at the end of the period and/or day depending on the length of the student's stay in the program, and report any violations of the rules of conduct that take place in the ICE program. The Monitor is not expected to provide any assistance to the students with respect to academics. His or her job is simply to monitor the students assigned to the program, much like security personnel, and

> complete any necessary record keeping concerning student attendance.

Nothing in McGeehan's letter is inconsistent with the stipulations agreed to by the parties with regard to the original petition.

Interim ECS Tone issued her opinion on January 16, 2009, regarding the Board's support staff position and the Commissioner's directive that the ECS make a determination of what certification, if any, is necessary for the position. Tone reviewed McGeehan's submission as well as the ICE Monitor job description and concluded as follows:

> Based on a review of the job description, I have determined that this is not an instructional position, but one of a monitor. Therefore, a County Substitute Certificate (60+ credits) as required in the qualifications section of the job description is appropriate for the position. This determination is based on the following:
>
> - Assignment of students to the Isolated Classroom Experience (ICE) Monitor is a form of discipline for students guilty of various violations of the student code of conduct.
> - Students are assigned to the ICE program for anywhere from one period for minor disciplinary issues to a full day for more serious infractions.
> - Students sent to the ICE program are assigned classroom work for the particular day by the classroom teacher(s) in which students are expected to complete the assignments while they are in the ICE location.
> - The role of the Isolated Classroom Experience Monitor is to oversee the students assigned to the ICE program.
> - The Monitor takes attendance, hands out the work assignments which are provided by the classroom teacher, collects the work at the end of the period and/or day depending on the length of the student's stay in the ICE program.
> - The Monitor is not expected to provide any assistance to the students with respect to academics. The role of the person assigned as the ICE position is to monitor students assigned to the program and complete any necessary record keeping concerning student attendance.
>
> This determination is further supported by the District's assurance that the ICE Monitor position is in keeping with

the District policy that any staff member who may be alone with students have a County Substitute Certificate as do other positions in the district (e.g., Security Guards and Support Services Personnel).

LEGAL DISCUSSION

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 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).

The Board has satisfied the procedural and record deficiencies noted by the Commissioner in her December 5, 2008, decision. It has provided a job description for ICE Monitor that includes information regarding the direction, supervision and reporting responsibilities of the person assigned to the in-school suspension room, who is left alone with students. Additionally, the ECS has reviewed this position as an "unrecognized title" pursuant to N.J.A.C. 6A:9-5.5(b). She concluded that this is not an instructional position, but one of a monitor. Macchia, nevertheless, again challenges the action of the Board and now the determination of the Hudson County ECS, arguing that the position is one requiring proper certification.

Macchia does not suggest any facts to dispute or disturb the determination of the ECS that the ICE Monitor position is just one of a monitor and not an instructional position. She instead contends that, as a matter of law, the position as created by the Board requires an instructional certificate. Her reliance on cases where the holding of an instructional certificate was relevant for determining issues of the assignment of tenured teachers to an in-house suspension teacher position is misplaced. See Rogan v. Edison Twp. Bd. of Educ., 1985 S.L.D. 635; Cucolo v. Bd. of Educ., Essex County Vocational Sch. Dist., 1985 S.L.D. 875; Vanderhoof v. Scotch Plains Fanwood Reg'l Sch. Dist. Bd. of Educ., 1987 S.L.D. 848, aff'd, State Bd. of Educ., 1988 S.L.D. 2532. In none of those cases did an ECS, as here, determine that an instructional certificate was not necessary. The only factual basis for a further appeal by Macchia would have been a determination by the ECS that the ICE Monitor position did require an instructional certificate. See Judge Gerson's analysis of these cases relied upon by Macchia in the earlier related case, Macchia, supra, EDU 01396-08.

The ECS, at the direction of the Commissioner, considered the specific duties to be performed in the ICE Monitor position and conducted the required assessment of whether the employment is of such character to require that the individual hold an instructional certificate. Her determination was consistent with the State Board's following holding in Dowding v. Board of Education of the Township of Monroe, 1990 S.L.D. 1711, 1712:

> We reject the notion that in-school suspension is necessarily a teaching staff assignment within the position of "teacher" requiring possession of a valid certificate in order to be qualified to serve in the assignment. The cases cited by the Commissioner do not justify a blanket determination that all in-school suspension assignments are instructional. Nor do we find such a blanket determination proper. Whether or not an in-school suspension assignment is a teaching staff assignment requiring an instructional certificate turns upon the specific duties to be performed in that particular assignment, requiring assessment of whether the employment is of such character as to require that the individual assigned thereto hold appropriate certification in order to perform such functions.
>
> [Citations omitted.]

Macchia further argues that the Board, with the approval of the ECS, is improperly using the possession of a County Substitute Certificate as a requirement for this position, because, under N.J.A.C. 6A:9-6.5(a), that credential is intended only for persons acting temporarily in replacement for a fully certified and regularly employed classroom teacher. Since the ECS has determined that the position of ICE Monitor is not an instructional position, its assignment to an individual other than Macchia does not implicate Macchia's tenure rights. She, therefore, lacks standing to argue whether the Board is properly using the County Substitute Certificate as a prerequisite for this non-instructional position. In any event, although it is correct that the ICE Monitor position is not a temporary replacement for a fully certified classroom teacher, Macchia does not dispute the Board's explanation that this prerequisite ". . . is based solely on the District's preference that any staff members who may be alone with students have a County Substitute Certificate. Such requirement is also in place for Security Guards and Support Service Personnel employed by the District." See McGeehan letter to Tone (December 19, 2008). As such, this Certificate is extraordinary rather than mandatory under the tenure laws.

Under the above circumstances, there is no genuine issue as to any material fact that can only be determined in an evidentiary hearing. Nor is Macchia entitled to relief as a matter of law. The determination of the ECS was based on a thorough review of the facts presented to her, and certainly was not arbitrary, capricious or unreasonable.

See Wynne v. Camden County Superintendent of Schs., 96 N.J.A.R.2d (EDU) 995. Accordingly, I **CONCLUDE** that respondent City of Bayonne Board of Education is entitled to summary decision dismissing this petition.

ORDER

It is hereby **ORDERED** that the Board's motion for summary decision is **GRANTED**.

It is further **ORDERED** that petitioner Carolyn Macchia's appeal of the determinations of the Bayonne Board of Education and the Executive County Superintendent, County of Hudson, 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.

August 31, 2009
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: 9/31/09

Date Mailed to Parties: SEP 1 2009

Laura Sanders
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

id

OAL DKT. NO. EDU 704-09
AGENCY DKT. NO. 25-2/09

W.D.M. on behalf of minor child, K.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

At issue in this controversy is whether K.P. is domiciled in Ewing and entitled to a free public education in its school district. A hearing in the Office of Administrative Law (OAL) was scheduled for August 11, 2009, and petitioner was so notified.

Petitioner did not appear at the hearing and, consequently, the Administrative Law Judge (ALJ) accepted as fact respondent's uncontested evidence suggesting that K.P. is domiciled in Trenton. The ALJ further found that $55.06 is the relevant daily tuition fee for Ewing High School students, and that petitioner owes respondent tuition for 198 days, amounting to $10,901.88. An Initial Decision was issued on August 24, 2009 and mailed to the parties on August 27, 2009.

On September 8, 2009, the Commissioner received exceptions from petitioner asserting that he had "inadvertently missed the [OAL] hearing" because he "was away in Georgia." Petitioner further stated that if this matter is reopened he will present facts that demonstrate that K.P. permanently resides in his household. More specifically, he contends that

when the Ewing investigator witnessed K.P. in Trenton it was because K.P. was there temporarily assisting his aunt.

After the Commissioner forwarded petitioner's exceptions to the respondent Board, the Board filed a reply urging that the matter proceed to a final determination. The Commissioner, however, has decided to remand the case to the OAL for findings and recommendations concerning the merits of petitioner's application to reinstate his petition. Should the ALJ decide in favor of petitioner on that threshold issue petitioner's claim that K.P. is domiciled in Ewing may be adjudicated.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10|09|09

Date of Mailing: 10|09|09

* 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.

327-09

W.D.M. on behalf of minor child, K.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a resident of Ewing Township – contested the Board's determination that his grandson is not domiciled in Ewing and is therefore ineligible to attend school in respondent's district. Petitioner asserts that K.P. – for whom he is legal guardian – lives with him in Ewing, but spends time in Trenton assisting his aunt. Respondent Board contended that K.P. is domiciled in Trenton, and sought tuition reimbursement for his alleged period of ineligible attendance at the rate of $55.06 per day.

The ALJ found that between May 2008 and June 2009, K.P. was observed thirty times boarding a bus in Trenton and traveling to Ewing High School, and petitioner failed to appear at the hearing in this matter to refute the Board's testimony and surveillance report. The ALJ concluded that K.P. was domiciled in Trenton for the period of time at issue, and therefore was not entitled to receive a free public education in Ewing Township schools. The ALJ dismissed the petition, and granted the Board's counterclaim for tuition in the amount of $10,901.88.

Upon consideration of petitioner's exceptions to the Initial Decision – in which W.D.M. states that he was in Georgia on the date of the scheduled hearing and requests that the matter be reopened so that he can present facts that will demonstrate that K.P. is permanently domiciled in his household – the Commissioner remanded the matter to the OAL for findings and recommendations concerning the petitioner's application to reinstate his petition and, if the ALJ finds in favor of petitioner on that threshold issue, for findings and recommendations on the underlying merits of the case.

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

October 9, 2009



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 704-09
AGENCY DKT. NO. 25-2/09

W.D.M. ON BEHALF OF K.P.,
Petitioner,
v.
EWING TOWNSHIP
BOARD OF EDUCATION,
MERCER COUNTY,
Respondent.

No appearance by or on behalf of petitioner

Jeffrey F. Belz, Esq., for respondent

Record Closed: August 11, 2009 Decided: August 24, 2009

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Ewing Township Board of Education (Board) advised petitioner W.D.M. that it disputed that a child of whom he has custody, K.P., was entitled to receive a free public education provided by the Board, as it did not believe that K.P. was actually

domiciled within the Ewing Township School District. The Board issued a Notice of Final Ineligibility to Mr. M. through his attorney on January 28, 2009. In addition to claiming that K.P. was ineligible to attend the schools of the district, this Notice also alerted Mr. M. that if no appeal was filed from the Board's decision, the Board might assess Mr. M. tuition at the rate of $55.51 per day for each day K.P. attended the District's school while not entitled to do so for free. On February 17, 2009, Mr. M.'s appeal was received by the Department of Education's Office of Controversies and Disputes. The Board filed an Answer to Mr. M.'s appeal and a Counterclaim for tuition expenses incurred for K.P. during the period of ineligible attendance, which was received by the Department on February 27, 2009. The contested case was transmitted to the Office of Administrative Law, where it was filed on March 2, 2009.

FINDINGS OF FACT

The following facts are undisputed and therefore **FOUND** as **FACT**. K.P. attended public school in the Ewing Township School District between May 28, 2008, and June 23, 2009. Between those dates, K.P. was observed thirty times by Ewing Township Board of Education surveillance. Each of those thirty times, K.P. was observed boarding a bus at Calhoun Street in Trenton, getting off at Parkway Avenue in Ewing, and entering Ewing Township High School. K.P. did not live with his grandfather Mr. M. in Ewing, but with his aunt in Trenton.

The New Jersey Department of Education establishes the amount it costs each student to attend school in each school district in the state. For the period from May 28, 2008, to June 23, 2009, the amount it cost the Ewing Board of Education to educate each high school student was $9,911 per year. This amount is divided by 180 school days per school year, to arrive at a cost per day to educate the student. In Ewing, it cost $55.06 per day to educate each high school student. K.P. attended Ewing Township High School for 198 school days between May 28, 2008, and June 23, 2009. Thus, Mr. M., on behalf of K.P., owes the Ewing Board $10,901.88 ($55.06 x 198) in tuition for the time period in question.

CONCLUSIONS OF LAW

N.J.S.A. 18A:38-1 provides:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> a. Any person who is domiciled within the school district . . . .

"In a strict legal sense, the domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving." In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991) (quoting Kurilla v. Roth, 132 N.J.L. 213, 215 (Sup. Ct. 1944)). Thus, domicile is what is regarded as an individual's true and permanent home. In re Jaffe, 74 N.J. 86, 90-91 (1977).

Petitioner did not appear at the hearing to refute the Board's testimony and surveillance report asserting that during the period of surveillance K.P. left a home in Trenton to attend school in Ewing each morning and, thus, resided with someone in Trenton, not with his grandfather in Ewing. Therefore, I **CONCLUDE** that K.P. was domiciled in Trenton from the start of surveillance in May 2008 through the end of the 2008-2009 school year. Further, I **CONCLUDE** that K.P. was not entitled to receive a free public education from the Ewing Township Board of Education during the period from May 28, 2008, to June 23, 2009.

ORDER

Based upon the foregoing, it is **ORDERED** that W.D.M.'s petition of appeal is hereby **DISMISSED WITH PREJUDICE**. And it is further **ORDERED** that the Board's counterclaim for recovery of tuition costs associated with K.P.'s attendance at Ewing Township High School in the Ewing Township School District from May 28, 2008, through the end of the 2008-2009 school year in the amount of $10,901.88 is hereby **GRANTED**.

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

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

August 24, 2009
DATE

LISA JAMES-BEAVERS, ALJ

8/24/09 lom

Date Received at Agency: AUG 27 2009

Date Mailed to Parties:

cmo

WITNESSES

For Petitioner

None

For Respondent

David Mikalauskas

EXHIBITS

For Petitioner

None

For Respondent

R-1 Surveillance Report from May 28, 2008, to January 21, 2009

325-09

OAL DKT. NO. EDU 13989-08
AGENCY DKT. NO. 343-11/08

E.L., ON BEHALF OF MINOR CHILD, N.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC 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 OAL hearing – has been reviewed. Petitioner filed no explanation for his failure to appear, notwithstanding the opportunity to do so.

Additionally, the record forwarded by the OAL indicates – via a July 6, 2009 letter from counsel for the Board of Education – that N.J. has returned to her home country, thereby mooting petitioner's appeal of the Board's determination that she was ineligible to attend school in the district.

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.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/08/09
Date of Mailing: 10/08/09

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.

329-09E

329-09

OAL DKT. NO. EDU 9946-09
AGENCY DKT. NO. 229-9/09

S.Y., on behalf of minor children, E.Y., et. al.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN 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) – along with the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner agrees with the ALJ's recommended order granting emergent relief in this matter as she concurs – for the reasons articulated in the order – that petitioner has satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby granted. This matter – along with the case file which was erroneously returned to this agency – is being sent back to the OAL for such further proceedings as may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/09/09

Date of Mailing: 10/13/09

* 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 9946-09
AGENCY DKT. NO. 229-9/09

S.Y. o/b/o E.Y. and E.T, AL,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF WYCKOFF, BERGEN COUNTY,
Respondent.

S.Y. and **E.Y.**, petitioners, pro se

Mark G. Sullivan, Esq., for respondent (Sullivan and Sullivan, attorneys)

BEFORE **IRENE JONES**, ALJ:

On or about September 3, 2009, petitioner attempted to enroll her five children in the Wyckoff School District. The District denied enrollment on the basis that the family were not residents of the Town of Wyckoff but were domiciled in Fair Lawn, N.J. On or about September 10, 2009, petitioner filed with the Commissioner of Education an Application for Emergent Relief alleging that the respondent improperly refused to permit her children to enroll in school while she appeals the residency determination. On September 10, 2009, the Commissioner of Education transmitted the matter to the Office of Administrative Law for hearing as a contested case. Thereafter, Respondent

filed a cross-petition and a response to the emergent petition. In addition, to the non-residency defense, the Board noted that petitioner's children were not registered for kindergarten. The Cross-petition sought tuition for the 2007-2008 and 2008-2009 school years. On September 15, 2009, an emergent hearing was held and concluded. An oral ruling was issued from the bench. This written decision memorializes my oral ruling.

Petitioner's household consists of herself, her husband, M.Y., and their ten children. The family asserts that they reside at 492 Ackerson Avenue in Wyckoff, N.J. Petitioner contends that as residents of Wyckoff, her children are entitled to attend the District schools. The children have attended the District schools for the last two school years. However, on June 5, 2009, the District requested a meeting with Mr. and Mrs. Y. to discuss the "registration of [their] incoming kindergarten children." Thereafter, on July 8, 2009, the District sent them a "Notice of Initial Determination of Ineligibility" which advised that his children would not be eligible for a free education in the District because the family did not reside in Town. R-3. On July 17, the District served the family with a Notice of Final Ineligibility which reiterated that the family was not residing in the District for "at least the full school year, thus forbidding the children from attending the District schools." P-4. The notices advised that petitioner had a right to a hearing. In this notice the District said it had evidence from a private detective agency which had conducted a video surveillance of their purported residence at 492 Ackerson Avenue. And it had a statement from the tenant of 492 Ackerson who stated that the family did not live at the premises during 2008-2009 school year.

The Board contends that the family lived at 36-19 Lindsay Road in Fair Lawn during 2008-2009 school year and since their children attended school in the District during that school year, they had perpetrated a fraud on the District in violation of N.J.S.A. 2C:20-8. Finally, the school noted it had previously forwarded a bill for tuition for the 2008-2009 school and demanded immediate payment. R-4.

In support of their residency claim, the petitioner provided the respondent with an Orange and Rockland County utility bill and a Deed and Survey of the property at 492

Ackerson Avenue. At the hearing, Mr. Y. testified that three years ago, the family purchased a lot with a house on it in Wyckoff. At that time, they were living in Fair Lawn on Lindsey Road. Their intent was to tear down the existing house and construct a new home. Construction on the new home commenced some three to three and a half years ago and extended well beyond their expected completion date of approximately one year. In 2006, his wife advised the school Administrators that the construction of their house was way behind schedule. However, they wanted the kids to start school in September so as avoid having them to change schools during the school terms. At that time, the construction was in the "advanced" stage. Subsequently, he learned that there were wetlands in the neighborhood and the DEP was conducting an inspection of a neighboring property. During this inspection, the DEP learned that their house touched on the wetlands and shut down the construction site because they did not have the required permit to disturb the wetland area. The construction site remained dormant for two and a half months. S.Y. notes that the town issued the building permit without any mention of the wetlands.

Mr. Y. admits that his children were in the District schools while the family resided in Fair Lawn. However, he and his wife believed that the construction of the new house would be built in a year or less. In 2008-2009, he purchased the house next door to the construction site. In the summer of 2009, the entire family moved to Wyckoff. S.Y. states that the children never attended public schools in Fair Lawn but were enrolled in the Solomon Schechter School. Since moving to Wyckoff, he and his wife have changed their driver's license to the new address. All their utilities are at the new address.

Under cross-examination, S.Y. admits that in the 2008-2009 school year he rented the house on Ackerson Avenue to a former employee. He considers the vacant-house property in Fair Lawn as commercial property. He admits that it is currently in foreclosure as are his two properties in Wyckoff.

Petitioner, Mrs. Y., also testified. She recalls that their children started the District school during fall 2007. Prior to the start of the fall term, she visited the school

and advised them of the delayed construction schedule. At that time, she envisioned that the house would be completed in three months. However, in November 2007 the town inspector issued a Construction Stop Order because they had improperly cut down trees on protected wetlands.

Under cross-examination, she asserts that many of the school's hierarchy knew their house was not finished. She admits that at most they stayed at 492 Ackerson for a couple of weeks. Finally, she admits that she failed to file kindergarten registration statements for her children.

Based on the record, I **FIND**:

1. Petitioner purchased property at 492 Ackerson Avenue in Wyckoff, N.J. on February 29, 2008.

2. Petitioner is a customer of Orange and Rockland Utility Company and has taken utility service from at least from August 28, 2008, until the present.

3. Mrs. Y. has a driver's license reflecting the 492 Ackerson Avenue address. Mr. Y has applied to DMV for a change of address on his driver's license to reflect the 492 Ackerson Avenue address.

FINDINGS AND CONCLUSIONS OF LAW

The standards for the granting of emergency relief are set forth in N.J.A.C. 1:6A-12.1(e). It 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. In the instant case, after hearing the arguments of counsel and any other documentation submitted, I **FIND** that petitioner is entitled to emergent relief. Specifically, I am persuaded that the applicable regulations require enrollment to take place immediately.

Under N.J.A.C. 6A:22-3.1(a)(1), 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 intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of houses or residences elsewhere. Accordingly, based upon N.J.A.C. 6A:22-4.1(c)(2), respondent must permit immediate enrollment. I **FIND** that the children reside with their parents and that the parents are domiciled in the Township of Wyckoff, Bergen County. See, e.g., N.J.A.C. 6A:22-4.1(c).

Based upon the foregoing regulation, I am satisfied that the proofs have established the necessary elements to grant emergent relief, N.J.A.C. 1:6A-12.1(e). I **FIND** that the children would suffer irreparable harm if denied enrollment within the school district. Additionally, I **FIND** that the legal right underlying petitioner's claim for the current school year is settled and that no clear, uncontested denial has been brought forth by respondent. Additionally, I **FIND** that if an evidentiary hearing was undertaken, I **FIND** that there is good likelihood of petitioner prevailing on the merits. Lastly, I **FIND** that when the equities and interests of the parties are balanced, the petitioner and his children would suffer greater harm than the respondent would suffer if

the requested relief was not granted. Specifically, I am satisfied that the marginal cost to the school district of taking petitioner's children in as students would be significantly less by comparison to the harm that would inure to the children if they are denied the opportunity to attend school.

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.

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.

9/30/09
Date

IRENE JONES, ALJ

sej

330-09

#330-09

LONG BEACH ISLAND EDUCATION ASSOCIATION AND JOHN PULJER, RESIDENT AND TAXPAYER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LONG BEACH ISLAND CONSOLIDATED SCHOOL DISTRICT AND DAWN M. WATSON,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioners challenged the respondent Board's use of a private contractor rather than a school employee to provide speech language services to a classified minor child, contending that the action is in violation of *N.J.A.C.* 6A:14-4.3(b)(9), *N.J.A.C.* 6A:14-4.3(d), *N.J.A.C.* 6A:14-5.1(a) and *N.J.A.C.* 6A:14-5.1(c)(1)(iv-v). The matter was transmitted to the OAL with a request that the Commissioner's jurisdiction in this matter be determined as a threshold issue.

The ALJ found that: the core issue in this case is whether the Commissioner has jurisdiction over a complaint that alleges a public education agency violated the requirements of State regulations governing the provision of special education and related services; pursuant to *N.J.A.C.* 6A:14-9.2, the State Director of the Office of Special Education Programs (OSEP) determines whether a local education agency has violated the requirements of state and federal laws regarding the provision of special education and related services; in past cases decided by the Commissioner that involved special education regulations, the underlying claims involved violations of tenure, seniority, or other rights arising out of the school laws over which the Commissioner clearly has jurisdiction; in the instant case, there is no allegation of any violation of tenure, seniority rights, or any other school law rights. Accordingly, the ALJ concluded that this matter should be dismissed for lack of jurisdiction.

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.

October 13, 2009

province[2] – not the Commissioner's – no decision can be made about petitioners' claims that the Board's contract with Watson was improper.

Finally, it is undisputed that the speech correctionist employed by the district as a staff member suffered no reduction in pay or benefits as a result of the engagement of Watson for the limited purpose of working with H.L. Consequently there is no tenure or seniority dispute for the Commissioner to adjudicate. In that regard the Commissioner agrees with the ALJ's legal analysis, on pages 8-11 of the Initial Decision. In that analysis the ALJ noted that the past cases, in which the Commissioner exercised jurisdiction despite the involvement of special education regulations, are distinguishable from the present case because they – unlike the instant matter – contained underlying claims of infringement of tenure and seniority rights or other rights and responsibilities under the school laws.

In consideration of the foregoing, the Commissioner adopts the recommendation in the Initial Decision that the petition be dismissed for lack of jurisdiction.

IT IS SO ORDERED.[3]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/13/09

Date of Mailing: 10/13/09

[2] The State Director of the Office of Special Education Programs (OSEP) determines whether a local education agency has violated the requirements of state and federal laws regarding the provision of special education and related services. *N.J.A.C.* 6A:14-9.2. The final decision reached by OSEP under the procedures set forth in *N.J.A.C.* 6A:14-9.2 cannot be appealed to the Commissioner. *Bd. of Educ. of the Lenape Reg'l High Sch. Dist. v. New Jersey Dep't of Educ., Office of Special Educ. Programs*, 399 *N.J. Super.* 595, 606 (App. Div. 2008). The finality of the decisions respectively reached by OSEP and OAL are "entirely consistent with the longstanding general absence of the Commissioner and State Board [of Education] from adjudication of special education disputes despite the fact that these arise under State statutes and regulations and are inarguably controversies and disputes arising under the school laws." *Lenape Reg'l High Sch. Dist. Bd. of Educ. v. State of New Jersey, Dep't of Educ., Office of Special Educ. Programs*, EDU 2781-06, Initial Decision (June 27, 2006).

[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 10501-07
AGENCY DKT. NO. 351-11/07

LONG BEACH ISLAND EDUCATION ASSOCIATION, and JOHN J. PULJER, RESIDENT AND TAXPAYER,

Petitioners,

v.

BOARD OF EDUCATION OF THE LONG BEACH ISLAND CONSOLIDATED SCHOOL DISTRICT AND DAWN M. WATSON,

Respondents.

Richard A. Friedman, Esq., and **Michael P. Chiacchio**, Esq., co-counsel for petitioners (Zazzalli, Fagella, Novak, Kleinbaum & Friedman, attorneys)

Francis J. Campbell, Esq., attorney for respondent (Reussille, Mausner, Carotenuto, Barger, Kenny & Steel, attorneys)

Record Closed: July 30, 2009 Decided: September 3, 2009

BEFORE **JOSEPH F. MARTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioners filed a petition of appeal charging that the respondent school district's use of a private contractor rather than a school employee to provide speech language services to classified students is violative of regulations found at N.J.A.C. 6A:14-4.3(b)(9), N.J.A.C. 6A:14-4.3(d), N.J.A.C. 6A:14-5.1(a) and N.J.A.C. 6A:14-5.1(c)(1(iv-v). The matter was transmitted to the Office of Administrative Law (OAL) on December 26, 2007, for hearing as a contested case. In the transmittal, the Commissioner requested that the Commissioner's jurisdiction determination be undertaken as a foundational issue.

The case was assigned to me on January 15, 2008, and I scheduled a series of telephone conferences with counsel between February 29, and December 8, 2008. As a result of these conferences, the parties agreed to stipulate to the facts in this case and to address the jurisdictional issue by the submission of written arguments. Although the submissions of the parties were received at an earlier date, through inadvertence I did not close the record until July 30, 2009.

The issue in this case is whether the Commissioner of the Department of Education has jurisdiction over a complaint that alleges a public education agency violated the requirements of State regulations governing the provision of special education and related services? For the reasons stated herein, I have determined that while the Commissioner has broad jurisdiction to hear and decide cases arising under the school laws, such jurisdiction does not extend to special education matters such as those raised in this case.

FACTUAL DISCUSSION

The underlying facts in this matter have been stipulated to by the parties in a Stipulation of Facts (J-1) and are not disputed. These stipulated facts are summarized in the paragraphs which follow.

Lisa Hattrich is employed by respondent on a full-time basis. She holds an instructional certificate with an endorsement as a teacher of the handicapped and an educational services certificate with an endorsement as a speech correctionist. She holds the "highly qualified status" under the Federal No Child Left Behind Act. She holds the proper certification and appropriate endorsements for each of her assignments.

H.L. is a preschool-aged pupil residing in the respondent school district who is eligible to receive speech and language services from the Board of Education of the school district. After H.L. was classified and determined to be eligible for speech and language services, Ms. Hattrich provided speech therapy to H.L. until October 17, 2006, when H.L.'s parents objected to her as an instructor for H.L. H.L. is diagnosed as having severe apraxia and in May 2006, the parents of H.L. demanded that speech therapy services be provided for H.L. by Barbara Jordan, a certified speech pathologist rather than by a speech correctionist.

The Child Study Team and Superintendent met with the parents and attempted to resolve the dissatisfaction expressed by the parents of H.L. in December 2006, but the parents refused to agree to any instructional program for H.L. if Ms. Hattrich were to be the professional staff member assigned for the provision of speech therapy services for H.L.

On January 9, 2007, the parents of H.L. directly engaged a certified speech pathologist to provide services for H.L. after they rejected the school district's offer to continue speech services to H.L. from Lisa Hattrich.

On February 7, 2007, the parents of H.L filed a request for mediation. This dispute between the parents of H.L. and the Child Study Team and the school district was resolved by an agreement to provide speech therapy program services to H.L. from a certified speech pathologist. On March 20, 2007, the parents of H.L. withdrew their application for due process and mediation as part of the agreement for resolution of their application because of their satisfaction with the planned change to the program and services to be provided to H.L. by the school district. On August 28, 2007, the school district Board of Education took action to engage the services of Dawn M. Watson for the 2007-08 school year.

There has been no reduction in salary earned by Lisa Hattrich as a consequence of any change in her assignment as a certified speech correctionist employed by the school district Board of Education. For the purposes of the jurisdictional issues to be decided the threshold of this case it was stipulated by the parties that notwithstanding the refusal of the parents of H.L. to agree to the continuation of services by Lisa Hattrich, no judgment was rendered by the respondent that speech correctionist Lisa Hattrich was unable to perform speech therapy services required by the IEP of H.L.

LEGAL DISCUSSION AND ANALYSIS

In this case, the respondent board of education hired a private contractor to provide a classified student with speech therapy in order to settle a dispute between respondent and the parents of the student over the student's IEP. Petitioners Long Beach Island Education Association and Mr. Puljer, a resident and taxpayer in the school district, allege that by its actions in hiring the private

contractor, respondent violated N.J.A.C. 6A:14-4.3(b)(9), N.J.A.C. 6A:14-4.3(d), N.J.A.C. 6A:14-5.1(a) and N.J.A.C. 6A:14-5.1(c)(1(iv-v), and otherwise acted unlawfully because respondent already employed a teaching staff member who has not been found to be unable to provide the speech therapy services required by the student's IEP. Petitioners do not allege that the teaching staff member has suffered any violation of her tenure or seniority rights or a reduction in salary as a result of respondent's decision to hire the private contractor.

The Commissioner of the Department of Education has jurisdiction to hear and determine all controversies and disputes arising under the school laws. N.J.S.A. 18A:6-9; N.J.A.C. 6A:2-1.2. However, the State Director of the Office of Special Education Programs (OSEP) determines whether a local education agency has violated the requirements of state and federal laws regarding the provision of special education and related services. N.J.A.C. 6A:14-9.2. The final decision reached by OSEP under the procedures set forth in N.J.A.C. 6A:14-9.2 cannot be appealed to the Commissioner. Bd. of Educ. of the Lenape Reg'l High Sch. Dist. v. New Jersey Dep't of Educ., Office of Special Educ. Programs, 399 N.J. Super. 595, 606 (App. Div. 2008). Additionally, a party may file a request for a due process hearing before the Office of Administrative Law "when there is a disagreement regarding identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education, or disciplinary action."[1] N.J.A.C. 6A:14-2.7(a). In a due process hearing, the decision of the administrative law judge (ALJ) is final. N.J.A.C. 6A:14-2.7(l). The finality of the decisions respectively reached by OSEP and OAL are "entirely consistent with the longstanding general absence of the Commissioner and State Board [of Education] from adjudication of special education disputes despite the fact that these arise under State statutes and regulations and are inarguably controversies and disputes arising under the school laws." Lenape Reg'l High Sch. Dist. Bd. of Educ. v. State of New Jersey,

[1] There is no claim that this should be a due process hearing. The due process hearing procedure is mentioned in order to illustrate the Commissioner's lack of jurisdiction in the special education context.

Dep't of Educ., Office of Special Educ. Programs, EDU 2781-06, initial decision (June 27, 2006), adopted, Comm'r. (October 16, 2006) <http://lawlibrary.rutgers.edu/oal/search.html>.

Of course, the Commissioner is not devoid of all authority over special education matters. For instance, the Commissioner monitors special education programs and services and can order corrective action under N.J.A.C. 6A:14-9.1. However, under the special education regulations the two bodies to which a party may file a complaint regarding a special education matter are OSEP and OAL.

The scope of the Commissioner's jurisdiction may be seen through an overview of various special education matters that have come before the OAL and the Commissioner. For purposes of this decision, "special education matters" means matters that involve any regulations under N.J.A.C. 6A:14. First, there are cases in which the Commissioner acknowledged lack of jurisdiction over special education matters under the IDEA. Second, there are cases in which the Commissioner exercised jurisdiction over matters involving special education regulations. Taken together, these cases show that the Commissioner does not have jurisdiction over the instant matter.

I. Cases in which the Commissioner acknowledged lack of jurisdiction over special education matters.

As the following cases show, the Commissioner's jurisdiction to hear and decide matters arising under the school laws does not include special education disputes.

(1) In Lenape Reg'l High Sch. Dist. Bd. of Educ. v. State of New Jersey, Dep't of Educ., Office of Special Educ. Programs, supra, ALJ Masin found that the Commissioner does not have jurisdiction over appeals to final decisions made by

OSEP under N.J.A.C. 6A:14-9.2. The Commissioner adopted ALJ Masin's initial decision and stated,

> [a]s the ALJ aptly observed, the [State Board of Education] could have [placed responsibility for the process under N.J.A.C. 6A:14-9.2 with the Commissioner or the State Board instead of OSEP], and the choice it made is entirely consistent with the longstanding general absence of the Commissioner and the State Board from adjudication of special education disputes despite the fact that these arise under State statutes and regulations and are 'inarguably controversies and disputes arising under the school laws; indeed, this very absence militates against finding the Commissioner and State Board to have indispensable expertise for purposes of reviewing matters inextricably linked to disputes arising under the IDEA.[2]

(2) In R.S. v. Bd. of Educ. of the Village of Redwood, EDU 7679-04, initial decision, adopted, Comm'r. (September 17, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>, the Commissioner approved the settlement terms between the parties and noted,

> [p]aragraph two of the settlement agreement references possible claims for the provision of Special Education services. The Commissioner's review and approval of the within agreement pursuant to N.J.A.C. 1:1-19A [sic] does not reach to matters which may arise under the IDEA and/or Section 504 of the Rehabilitation Act of 1973, which he is without jurisdiction to hear and determine.

[2] In Bd. of Educ. of the Lenape Regional High Sch. Dist. v. New Jersey State Dept. of Educ., Office of Special Education Programs, 399 N.J. Super. 595 (App. Div. 2008), Lenape appealed the decision of the State Board affirming a decision of the Commissioner dismissing petitioner's appeal from a final decision by OSEP under N.J.A.C. 6A:14-9.2. Ibid. The court held that a party could not appeal a final decision by OSEP to the Commissioner. Id. at 602.

(3) In L.H. and L.H. v. Bd. of Educ. of the City of Rahway, EDU 5449-00, initial decision, (November 14, 2000), adopted, Comm'r. (February 26, 2003) <http://lawlibrary.rutgers.edu/oal/search.html>, the Commissioner approved a settlement reached by petitioners and Rahway over a disciplinary matter involving a special education student.[3] According to the Commissioner,

> [t]he Commissioner recognizes that the student who is the subject of the agreement is a classified special education student entitled to the protections of the IDEA, thus raising a question about the Commissioner's jurisdiction to hear an appeal of, and by inference, review a settlement pertaining to, disciplinary action taken against him. However, the instant matter was clearly pleaded as a school law dispute arising under N.J.S.A. 18A:37-1 et seq., thus placing it within the Commissioner's jurisdiction pursuant to N.J.S.A. 18A:6-9; and petitioners expressly indicated that they did not seek to invoke the IDEA's processes or protections in their appeal.

II. **Cases in which the Commissioner exercised jurisdiction over matters involving special education regulations.**

In the following cases the Commissioner exercised jurisdiction over matters involving special education regulations. However, these cases may be distinguished from the present case in that the underlying claims involved violations of tenure, seniority, or other rights arising under the school laws over which the Commissioner clearly has jurisdiction. Thus, in order to decide school law disputes in the cases below, the Commissioner needed to address certain special education regulations. Here, petitioner does not allege any violation of tenure, seniority rights, and any other school law rights. Instead, the present

[3] The parents appealed the matter to the State Board of Education on the issue of the constitutionality of a zero tolerance policy, but the State Board dismissed the appeal as moot. There is no indication from the procedural history of this case that the terms of the settlement were affected by the appeal.

case is a special education matter over which the Commissioner does not have jurisdiction.

(1) In Elson v. Hudson County Area Vocational-Technical Schools Board of Education, 96 N.J.A.R.2d (EDU) 229, the Commissioner affirmed the initial decision of ALJ Sukovich, holding that a local board may, through contract, supplement child study team evaluation and diagnostic services, not supplant them. In that case, petitioner was a psychologist employed by respondent on a child study team. After petitioner was subject to a reduction in force, respondent hired an outside contractor to serve as child study team psychologist. Petitioner argued that respondent's actions violated his tenure and seniority rights. In reaching her decision, ALJ Sukovich held that respondent violated former N.J.A.C. 6:28-5.1(c)(1)(i) by contracting certain services, and that petitioner was entitled to seniority with respondent from the time respondent supplanted his services to the time petitioner declined re-employment with respondent.[4]

(2) In Edison Twp. Educ. Assoc. v. Bd. of Educ. of the Twp. of Edison, 94 N.J.A.R.2d (EDU) 301, the Commissioner affirmed the initial decision of ALJ Metzger, holding that a local board's contract with an outside firm for crisis intervention therapists (CITs) did not violate the contract rights of guidance counselors and child study team members employed by the local board. According to ALJ Metzger,

> [t]he decision to contract for services is generally a matter of managerial prerogative and is only limited where such action conflicts with specific rights established under the school law. Thus, to prevail, petitioner must show that its members have been supplanted and that CIT functions must be

[4] Former N.J.A.C. 6:28-5.1(c)(1)(i) reads:

Services which may be contracted shall be restricted to the following:
1. For public school pupils:
i. Independent child study team evaluations and/or child study team diagnostic services to supplement existing local district services.

> accomplished with certified school employees.[5] This has not been done.

(3) In Becton Education Association v. Bd. of Educ. of Carlstadt-East Rutherford Regional Sch. Dist., EDU 7061-01, initial decision, (November 3, 2004), adopted, Comm'r. (December 20, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>, petitioners were former members of a child study team within the District. When the District eliminated their jobs and contracted with a jointure commission to provide child study team services, petitioners alleged that the District violated their tenure rights. However, ALJ Monaco found, and the Commissioner and State Board affirmed, that the District did not violate petitioners' tenure rights and complied with statutory and regulatory requirements, including N.J.A.C. 6A:14-3.1(b) and N.J.A.C. 6A:14-5.1(a).

More importantly, ALJ Monaco stated in relevant part in her decision:

> [p]etitioners sent a written request to the Department [of Education] to conduct a complaint investigation. Petitioners maintained that the Board had terminated all CST positions for the 2001-2002 school year and contracted with an agency that was noncompliant with State and/or federal statutes and/or regulations in providing special education services. OSEP investigated whether the District was contracting with an appropriate agency to provide full CST services. The OSEP issued a Complaint Investigation Report, which quoted the provisions of N.J.A.C. 6A:14-5.1(a) and found the District to be compliant.[6]

Thus, petitioners filed separate complaints. First, petitioners filed a complaint with OSEP alleging noncompliance with child study team provisions of

[5] Judge Metzger did not cite to a particular regulatory provision, but it appears from this language that the provision at issue is former N.J.A.C. 6:28-5.1(c)(1)(i).
[6] It is noted that in this case petitioners argue that respondent violated N.J.A.C. 6A:14-5.1(a).

the special education regulations. There is no indication in ALJ Monaco's decision that either the Commissioner or OAL considered this matter.[7] That is because OSEP is the only body with decision-making authority over written complaints filed with OSEP pursuant to N.J.A.C. 6A:14-9.2. Second, petitioners filed a complaint with DOE that was subsequently transferred to OAL as a contested case. While the matter before OAL involved the same regulatory provisions as the complaint filed with OSEP, the underlying claim in the proceeding before OAL and the Commissioner was that petitioners' tenure rights had been violated. Thus, the Commissioner could exercise jurisdiction, and since the tenure rights claim was intertwined with the alleged violations of child study team provisions of the special education regulations found at N.J.A.C. 6A:14, any decision would necessarily entail an analysis of compliance with such regulations even though they touch upon special education matters.

Here, petitioners allege that respondent, by hiring the private contractor, violated N.J.A.C. 6A:14-4.3(b)(9), N.J.A.C. 6A:14-4.3(d), N.J.A.C. 6A:14-5.1(a) and N.J.A.C. 6A:14-5.1(c)(1(iv-v), and that the respondent's actions were and are unlawful, because respondent employs Lisa Hattrich, a teaching staff member who is qualified and properly certificated to provide the appropriate and necessary speech and language services to H.L., is able to do so. However, it is clear that petitioners allege violations of special education regulations, and not any violations of any teacher's tenure, seniority rights, or any other rights that arise under the school laws. Indeed, as petitioners stipulate, "[t]here has been no reduction in salary earned by Lisa Hattrich as a consequence of any change in her assignment as a certified speech correctionist employed by [respondent]." There is here an allegation only that respondent violated certain procedural requirements of the child study team provisions under N.J.A.C. 6A:14. Since this is really a claim that respondent violated the requirements of State regulations governing the provision of special education and related services, this matter like

[7] It is unclear whether ALJ Monaco should have reached the question of the District's compliance with regulatory provisions with which OSEP had already decided the District complied.

the first complaint filed by petitioners in Becton, is properly before OSEP under N.J.A.C. 6A:14-9.2 and not properly before the Commissioner or OAL.

DECISION AND ORDER

For the reasons stated herein, I **CONCLUDE** while the Commissioner has broad jurisdiction to hear and decide cases arising under the school laws, such jurisdiction does not extend to special education matters such as those raised in this case. Therefore, I **ORDER** that the petitioners' petition of appeal be **DISMISSED** based on the Commissioner's lack of jurisdiction.

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

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

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

September 3, 2009
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

Date Received at Agency: 9-3-09

Date Mailed to Parties: 9-3-09

mph

APPENDIX

LIST OF EXHIBITS

Joint Exhibits:

J-1 Stipulation of Facts

For petitioners:

P-1 Letter Brief on behalf of petitioners

For respondents:

R-1 Notice of Motion to Dismiss Petition

R-2 Letter Brief in support of Motion to Dismiss with attachments:

Exhibit A: Stipulation of Facts

Exhibit B: Certification of J.L.

Exhibit C: Dawn M. Watson letter of December 14, 2007

331-09

OAL DKT. NO. EDU 6134-08
AGENCY DKT. NO. 140-5/08

BENJAMIN R. KENION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the 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.

Lucille Davy
COMMISSIONER OF EDUCATION

Date of Decision: 10/13/09

Date of Mailing: 10/13/09



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6134-08

AGENCY DKT. NO. 140-5/08

BENJAMIN R. KENION,

Petitioner,

v.

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

Respondent.

Jason E. Sokolowski, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Rocky L. Peterson, Esq., for respondent (Hill Wallack, attorneys)

Record Closed: September 4, 2009 Decided: September 8, 2009

BEFORE **PATRICIA M. KERINS**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 27, 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 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.

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.

September 8, 2009 — Patricia M. Kerins
DATE — **PATRICIA M. KERINS**, ALJ

Date Received at Agency: SEP 11 2008

Date Mailed to Parties: SEP 11 2008

/jfk

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

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2009 SEP -4 A 10:46
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

BENJAMIN R. KENION Petitioner, v. TRENTON BOARD OF EDUCATION, MERCER COUNTY, Respondent.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDUOR 06134-2008S Agency Dkt. No.:140-5/08 **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

The parties to this matter, Benjamin R. Kenion and the Trenton Board of Education, having reached an agreement to resolve the within matter, hereby request that the Administrative Law Judge and the Commissioner of Education approve the following terms and conditions as their settlement agreement.

1. The parties agree that their agreement to this agreement and general release and its validity is contingent upon the approval of the Commissioner of Education of all of the terms of this agreement and general release, and that if any of the terms of this agreement and general release are rejected by the Commissioner of Education, this agreement and general release shall be deemed null and void, and that in such event, neither parties' position in relation to the petition of appeal shall be prejudiced and the matter shall be returned to the Office of Administrative Law for a hearing in relation to the petition of appeal, provided that nothing in this paragraph or in this agreement and general release shall, in such event, preclude the parties from

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ATTORNEYS AT LAW

agreeing to a new, revised, or modified settlement agreement and general release provided that such agreement and general release is subject to the approval of the Commissioner of Education.

2. The parties agree that based upon and subject to the Commissioner of Education's approval of all of the terms of this agreement and general release, the petitioner shall withdraw the petition of appeal.

3. Rationale for Settlement

A. On or about May 21, 2008, petitioner filed his petition of appeal with the Commissioner against the respondent.

B. The petition of appeal alleges that respondent repeatedly engaged in improper and/or unlawful conduct by purporting to terminate petitioner's pay without proper legal authority in the form of prior Board action effectuating the termination of petitioner's pay while on a military leave of absence and ignoring that respondent voted in favor of, and has never rescinded providing petitioner with pay while on a military leave of absence.

C. In response, respondent alleges that it has properly paid petitioner the amount required by law during his military leave of absence, and that it actually overpaid petitioner during previous military leave of absences.

D. Both parties acknowledge that they are desirous of resolving the matters addressed by this agreement, and that upon review of all of the circumstances, and of their respective prospects of success in the matter, it is in the best interests of both parties and the public, and it being consistent with applicable law, to resolve this matter by this settlement agreement.

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

4. The parties agree that respondent will within two (2) weeks of the approval of the settlement agreement by the Commissioner of Education pay petitioner $12,000.00. This amount represents the approximate "differential pay" petitioner would have received during his Board approved military leave of absence from November, 2007 through the end of 2008 minus any disputed overpayment amounts made by respondent to petitioner during his other approved military leave of absences in 2007. The parties agree that payment will be subject to all deductions, together with proper pension deductions, if applicable.

5. In exchange for the consideration set forth herein, petitioner hereby agrees to release and forever discharge respondent, its individual members, successors, assigns, and agents from any and all past, present, and future claims, suits, actions at law or in equity of any kind, in any form, that he may have against them arising from or related to the payments made by respondent to petitioner as a result of any approved military leave of absences through 2008. This release applies only to payments made by respondent to petitioner for petitioner's military leaves of absences through 2008.

Petitioner agrees that execution of this settlement agreement shall serve as full and final satisfaction of same, except for any claims arising under the applicable Pension and/or Workers' Compensation statutes, and any claims arising from a breach of this settlement agreement or any provision thereof, or which are not covered by this paragraph. Petitioner represents that he is unaware of any claims arising under these exceptions as of the date he executes this settlement agreement, and specifically releases the following claims as to respondent:

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
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Any claims which Petitioner asserted, or which could have been asserted in the petition brought before the Commissioner of Education, Agency Reference No. 140-5/08, OAL Docket No. EDUOR 06134-2008S.

6. In exchange for the consideration set forth herein, respondent hereby agrees to release and forever discharge petitioner, his successors, assigns, and agents from any and all past, present, and future claims, suits, actions at law or in equity of any kind, in any form, that it may have against them arising from or related to the payments made by respondent to petitioner as a result of any approved military leave of absences through 2008. This release applies only to payments made by respondent to petitioner for petitioner's military leaves of absences through 2008.

Respondent agrees that execution of this settlement agreement shall serve as full and final satisfaction of same, except for any claims arising from a breach of this settlement agreement or any provision thereof, or which are not covered in this paragraph. Respondent represents that it is unaware of any claims arising under these exceptions as of the date it executes this settlement agreement, and specifically releases the following claims as to petitioner:

Any claims which respondent asserted, or which could have been asserted, in response to the petition brought by petitioner before the Commissioner of Education, Agency Reference No. 140-5/08, OAL Docket No. EDUOR 06134-2008S.

7. By settling this matter, petitioner acknowledges that he is waiving his right to a hearing before the Office of Administrative Law and Commissioner of Education, in which he could seek an adjudication on the merits of the petition of appeal.

8. Both parties voluntarily and willingly enter into this settlement agreement and general release without any duress or coercion. Both parties further acknowledge

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that they understand and agree to the terms of this agreement and general release and that they are satisfied with the legal representation that they received in this matter.

9. The parties agree that their respective covenants and entry into this agreement and general release does not constitute any admission of wrongdoing or guilt on the part of either party.

10. The parties agree that in the event that the Commissioner of Education does not accept any provision of this settlement agreement and general release, this settlement agreement and general release shall be deemed null and void, and the matter shall be returned to the Office of Administrative Law for a hearing without prejudice to either parties' position and without waiver of any of either parties' legal rights.

11. The respondent board of education has approved the terms of this settlement as acknowledged by the attached resolution.

L. Diane Campbell 9/2/09

Dr. L. Diane Campbell, President of the Trenton Board of Education

STATE OF NEW JERSEY :
: SS
COUNTY OF MERCER :

I certify that on Sept. 2, 2009, Dr. L. Diane Campbell, President of the Trenton Board of Education, personally came before me and acknowledged under oath, to my satisfaction, that she is the person named in and personally signed this document, and signed, sealed and delivered this document as her act and deed.

ADRIEN ROSAMILIA
Notary Public of New Jersey
My Commission Expires Feb. 22, 2010

Adrien Rosamilia

Jayne S Howard

Jayne S. Howard, Business Administrator/Board Secretary
Trenton Public Schools

STATE OF NEW JERSEY :
: SS
COUNTY OF MERCER :

I certify that on Sept. 2, 2009, Ms. Jayne S. Howard, Business Administrator/Board Secretary, personally came before me and acknowledged under oath, to my satisfaction, that she is the person named in and personally signed this document, and signed, sealed and delivered this document as her act and deed.

ADRIEN ROSAMILIA
Notary Public of New Jersey
My Commission Expires Feb. 22, 2010

Adrien Rosamilia

Benjamin R. Kenion, Petitioner

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

STATE OF NEW JERSEY :
: SS
COUNTY OF MERCER :

I certify that on 29 June, 2009, Benjamin R. Kenion, petitioner in the within matter, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

JULIA BRINES
Notary Public of New Jersey
My Commission Expires May 25, 2010

ZAZZALI, AGELLA, NOWAK, KLEINBAUM & FRIEDMAN
PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

RESOLUTION AUTHORIZING APPROVAL OF SETTLEMENT AGREEMENT WITH BENJAMIN KENION

WHEREAS, the Trenton Board of Education has reviewed the Settlement Agreement and General Release between Benjamin Kenion and the Board of Education in regard to OAL Docket No. EDUOR 06134-2008S and Agency Docket No. 140-5/08; and

WHEREAS, the Board has voted on this date to approve the Settlement Agreement and General Release; therefore be it

RESOLVED that the Trenton Board of Education approves the Settlement Agreement and General Release between Benjamin Kenion and the Board of Education.

L. Diane Campbell

Dr. L. Diane Campbell
Board President

Jayne S Howard

Jayne S. Howard
School Business Administrator/Board Secretary

June 8, 2009
ADOPTED

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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

375-09

IN THE MATTER OF THE TENURE	:	
HEARING OF MARCELINO BASULTO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN OF	:	DECISION
WEST NEW YORK, HUDSON COUNTY	:	
	:	

SYNOPSIS

Petitioning school district certified tenure charges against respondent – a tenured custodian – alleging unbecoming conduct, misbehavior, insubordination, inability to complete duties and other just cause. These charges stem from the Board's contentions that respondent was on many occasions absent from his post during his assigned shift, including an incident when respondent was found sleeping in his car, and these absences resulted in unclean conditions in the building to which respondent was assigned.

The ALJ found that: on August 5, 2008, respondent was in his car for over an hour during his regularly scheduled shift without permission; video surveillance tapes additionally revealed that respondent was away from his post without permission on July 28, July 30, and August 4, 2008; respondent's conduct clearly impacted the cleanliness of his assigned area in the school building; the school administration did express repeated informal concerns about the cleanliness of respondent's assigned work area; and respondent was previously warned about leaving his post without permission, and about unclean conditions in his work area. The ALJ concluded that petitioner's tenure charges are well supported, and that respondent should be terminated from his tenured employment with the District.

Upon careful review and consideration, the Commissioner adopted the Initial Decision of the OAL as the final decision for the reasons well expressed therein. Respondent is dismissed from his tenured 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 15, 2009

OAL DKT. NO. EDU 3190-09
AGENCY DKT NO. 29-2/09

IN THE MATTER OF THE TENURE	:	
HEARING OF MARCELINO BASULTO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN OF	:	DECISION
WEST NEW YORK, HUDSON COUNTY	:	
	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge that the District has sustained its burden of establishing – by a preponderance of the credible evidence – that respondent is guilty of unbecoming conduct, insubordination, and other just cause, and that removal from his tenured custodial position is warranted.

Accordingly, the Initial Decision of the OAL is adopted for the reasons well expressed therein. Respondent is hereby dismissed from his tenured position in the West New York School District as of the date of this decision.[1]

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10|15|09

Date of Mailing: 10|15|09

[1] It is hereby clarified, however, that respondent's removal from his position is as of the date of this decision – **not the date of his suspension** – as stated on Page 14 of the Initial Decision.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3190-09
AGENCY REF. NO. 29-2/09

IN THE MATTER OF THE TENURE HEARING OF MARCELINO BASULTO, SCHOOL DISTRICT OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY.

Bruce W. Padula, Esq., for petitioner, West New York Board of Education (Scarinci & Hollenbeck, attorneys)

Philip Feintuch, Esq., for respondent, Marcelino Basulto (Feintuch, Porwich and Feintuch, attorneys)

Record Closed: August 6, 2009 Decided: September 11, 2009

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Marcelino Basulto is employed by petitioner, the West New York Board of Education (the Board), as a custodian under tenure, pursuant to N.J.S.A. 18:17-3. On January 12, 2009, tenure charges were filed with the Board by Dr. Robert Van Zanten, Superintendent of Schools, and served on Basulto. On February 11, 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 Basulto's dismissal from his employment. Also on February 11, 2009, the Board suspended Basulto without pay, in accordance with N.J.S.A. 18A:6-14.

On February 17, 2009 the Board, pursuant to N.J.S.A. 18A:6-10 et seq., certified charges of unbecoming conduct, misbehavior, insubordination, inability to complete duties and other just cause against Basulto, who filed an answer on February 27, 2009. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on March 6, 2009. Hearings were conducted on May 21, 2009 and June 23, 2009.

At the hearing, Basulto asked for the assistance of an interpreter. Initially, his daughter, Caridad Nin, attempted to interpret, but found it difficult to do so. Rick Solares, a Board representative who was going to testify on the Board's behalf, offered to serve as interpreter, and indicated that he was bilingual and had prior experience serving as an interpreter. Basulto and his attorney stated that they were comfortable with this arrangement. After Mr. Solares interpreted for about an hour, I asked Basulto and his daughter on the record if they remained comfortable with the interpretation being provided, and they responded that they did.

On the second day of hearing, Ms. Nin did again interpret when Mr. Solares testified. For the remainder of the hearing, Mr. Solares served as an interpreter, again with the express consent, on the record, of Basulto and his attorney. The parties filed post-hearing briefs on August 6, 2009, at which time the record closed.

Basulto denies having engaged in any inappropriate conduct and further denies that just cause exists for his removal from his tenured position of employment.

FACTUAL DISCUSSION AND FINDINGS OF FACT

The Charges

Basulto has been employed by the Board as a custodian since May 1, 2003. The Board certified five charges against Basulto, all of which arise from the same factual allegations. The Board asserts that during his assigned shift, on August 5, 2008, Basulto was found sleeping in car. He was absent from his post without permission for one hour and twenty-one minutes. Additionally, the Board contends that on July 28, 2008, July 30, 2008 and August 4, 2008, Basulto left the school building and his post of duty without permission. Basulto had been previously warned in writing about leaving his post without authorization. Such warnings date back to 2006, when Basulto was reprimanded for taking two hour lunches. The Board asserts that, as a result of Basulto's repeated absences from his assigned job duties, his building is not well maintained and is unclean. He was previously warned, in writing, about unclean conditions in his building.

The Testimony

The Incident of August 5, 2008

In support of its claim that Basulto was sleeping in his car during his shift on August 5, 2008, the Board presented the testimony of Ramon Fernandez, Robert Jameson and Rick Solares. Fernandez has been employed by the Board for the past five years doing custodial work. For the past two years he has been employed as a head custodian at the middle school. His duties entail keeping the building clean, and assigning appropriate tasks to the custodians in the building. He is Basulto's direct supervisor. Jameson is employed by the Board as Supervisor of Fields, Grounds, Custodians and Maintenance. He has been employed by the Board for approximately twelve to thirteen years, and has served in a supervisory role for the last six years of his employment. He

supervises all the custodial staff, including Basulto. Solares is employed as Facilities Supervisor for the Board. He supervises the custodians and maintenance workers and is generally responsible for the maintenance and cleanliness of school district buildings, grounds and fields.

On August 5, 2008 Fernandez could not locate Basulto in the building, became concerned and attempted to call Jameson for assistance. When he was unable to reach Jameson, Fernandez contacted Solares, and advised him that Basulto was missing from his assigned area. Fernandez indicated to Solares that he had no idea where Basulto could be since he was nowhere in the building and had not been given permission to leave. Solares asked Fernandez if he had tried to contact Basulto via the intercom and Fernandez indicated that he had, but to no avail. Solares was with Jameson at the high school and they indicated that they would come to the middle school to investigate. All three witnesses testified that initially their primary concern was for Basulto's safety and physical well-being.

Solares and Jameson walked to the middle school and approached the building through the parking lot. Solares is familiar with Basulto's vehicle and was able to immediately identify it. He approached the car and observed Basulto sitting upright inside, with his eyes closed. Solares was about to bang on the window, but heard Basulto loudly snoring, and concluded that Basulto was asleep. Solares and Jameson waited to see how long Basulto remained in the car. Solares explained that during the summer months custodians work five days a week, Monday through Friday, for a six hour day, with no break for lunch. Accordingly, Basulto was not entitled by contract to more than fifteen minutes of time away from his duties on August 5, 2008.

Jameson testified that he and Solares observed Basulto in his car for about a half hour to forty-five minutes, after which time Basulto exited and began to walk back into the school. Solares put the time at about twenty-five to thirty

minutes. Jameson and Solares stopped Basulto and questioned him regarding his conduct. Basulto advised that he had gone to his car to obtain needed medication, and stated that he was only in the car for five minutes. Solares and Jameson explained that they had observed him in the car for longer and asked if he wanted to change his story. Basulto declined to do so, even after Solares reminded him that surveillance cameras had captured the incident on tape. Basulto continued to insist that he was in the car for only five minutes.

The parties proceeded to the head custodian's office to discuss the matter further. There, Basulto changed his explanation, stating that he was resting his eyes, which were irritated in the aftermath of cataract surgery. He stated that his eyes needed to be washed out. [1] The next day Basulto was called to the Board office, and in the presence of his union representative, Tony Perez, given a written warning which indicated that he was not on the job during his shift, and that his conduct was considered a violation of school rules and a theft of services. (P-5) The warning noted that Basulto had been observed in his car for thirty-one minutes. Basulto was advised that the matter would be referred to Gary Lentini, the Director of Human Resources, for further review. Later, Solares asked Mr. Costello of the Information Technology Department (IT) to provide him with the surveillance tapes from that date. Those tapes were entered into evidence in the form of several DVDs. (P-7) The DVDs reflect that on August 5, 2008, Basulto was actually in his car, and not on the job, for well over an hour, from approximately 8:39 a.m. until 9:53 a.m.

In his testimony, Basulto did not deny his conduct. Rather, he offered excuses for being in his car and away from his assigned post. He stated that he had gone to his car because his eyes were stinging due to the chemicals used to clean the buildings. He wished to obtain some drops for his eyes. When asked why he was in the car for so long, he commented that perhaps people who have

[1] Solares testified that the science labs, which were in Basulto's area on the third floor, all had eye wash stations.

not had cataract surgery or glaucoma would not appreciate his situation. He admitted to not having notified his supervisor, but testified that this was his supervisor's fault because Fernandez himself is often not at his post, but rather is in another building, visiting a friend. Finally, Basulto stated that his building was clean that day nonetheless, apparently arguing that his absence did not affect his work responsibilities, and thus, was not worthy of management's concern.

Accordingly, the charge that Basulto was away from his post on August 5, 2008 without permission is uncontroverted and I **FIND** as **FACT** that Basulto was in his car for over an hour during his regularly scheduled shift without the permission of his supervisor. He was asleep at least during the time he was observed by Solares and Jameson, approximately one half hour. Basulto's contention that his could not seek permission to leave his post is unpersuasive. Even if Fernandez was not in the building, there were other ways to request the assistance of a supervisor, including using the phone to call someone else in authority, either in his building or elsewhere in the district.

The Incidents of July 28, July 30, and August 4, 2008

Solares testified that the incident of August 5, 2008 now raised concerns in his mind that Basulto might have been absent from his post without permission on other occasions. Accordingly, he asked Costello of the IT Department to look back at surveillance tapes for approximately thirty days, to see if there were other occasions where Basulto left the building. These efforts confirmed that on at least three prior occasions Basulto had left the school during his shift for more than fifteen minutes. On July 28, 2008, Basulto was viewed in his car from 8:49 a.m. until 9:22 a.m., for a total of thirty-three minutes. On July 30, 2008, Basulto left the premises in his car from approximately 9:03 a.m. until 9:22 a.m., for a total of nineteen minutes. He again left on July 30, 2008, from 10:54 until 11:30 a.m., which is an additional thirty-six minutes. Accordingly, the video surveillance shows Basulto away from his post for a total of forty-five minutes on July 30,

2008. On August 4, 2008, Basulto left the premises in his car at 9:38 a.m. and did not reenter the building until approximately 10:13 a.m. He returned to the parking lot at about 9:56 a.m., but the tape shows him conversing with another district employee until he reenters the building. Thus, Basulto was away from his duties on August 4, 2008, for a total of thirty-five minutes.

As a result of Solares' findings, a meeting was conducted on August 26, 2008 to discuss Basulto's conduct. Lentini, Solares, Jameson, Basulto and his union representative, Perez, were present.[2] A September 22, 2008 letter from Lentini confirming the discussion at that meeting states that Basulto did not assert that he had permission for these absences, and rather, indicated at the August 26, 2008 meeting that he did not recall if he had sought permission. (P-8) Solares' testimony was consistent with the content of the September 22, 2008 letter. He testified that Fernandez had advised that Basulto did not seek permission to leave his post on the days in question. Solares further testified that Fernandez had advised him that he only recalled one instance where he had granted permission to Basulto to leave the building. Solares stated that after that one instance, Basulto was told that he would have to use his personal leave time if he wished to be away from his post.

Fernandez testified on behalf of the Board regarding Basulto's absences from his post of duty on July 28, 30 and August 4, 2008. He claimed to be unable to recall particular dates or times when Basulto was away from his duties without permission. Fernandez did recall allowing Basulto to leave the building on two prior occasions, to obtain coffee and to take his wife to the doctor, but

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[2] Minutes of the meeting were kept by Nora Crespo, who was likewise present. (P-6) Solares pointed to several inaccuracies in the minutes, including the list of who was present, and the omission of one of the incidents discussed at the meeting. For this reason, counsel for Basulto objected to its admissibility. I admitted the document because it was relevant to the issues presented by the pleadings, Solares could clarify any inaccuracies on both direct and indirect examination, and our rules liberally permit the introduction of all relevant evidence. N.J.A.C. 1:1-15.1. However, it ultimately became unnecessary for me to afford P-6 much weight. A letter to Basulto from Lentini dated September 22, 2008 confirms the discussion at the August 26, 2008 meeting with accuracy, and was admitted into evidence without objection. (P-8)

could not state whether these events occurred on the dates the surveillance tape caught Basulto leaving the building. Although Fernandez testified that he had informally warned Basulto several times about sleeping on the job and about other inadequacies in his performance, Fernandez later stated that he knew of no times when Basulto was not at his assigned duties. But it is clear that Fernandez knew that on August 5, 2008 Basulto had left without permission, as it was Fernandez who had alerted his superiors to Basulto's unexplained disappearance from his post.

Fernandez' hesitant and sometimes contradictory testimony was clearly due to his discomfort in testifying against Basulto, who sat directly across from him in the courtroom. This was plain from Fernandez's demeanor and tone, and from his statement at hearing that he tended to protect Basulto because he and Basulto were part of a group of custodians who were over sixty years of age, and he understood that Basulto needed his job. I found it hard to believe that Fernandez was unaware, as he stated, of any situations other than the August 5, 2008 incident where Basulto had left his post of duty without permission. Rather, I believe Solares' testimony that Fernandez advised that he did not give Basulto permission to leave the building on the dates the surveillance tape recorded Basulto leaving the building. Solares' testimony was presented in a clear, consistent and professional manner.

Basulto's testimony regarding these additional alleged absences from his post was replete with inconsistencies and was often evasive. Our courts have held that "credibility findings are 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 (1998). I observed Basulto in the courtroom, and his testimony in regard to the additional absences lacked credibility. Basulto insisted that he never left the building without permission. He stated that no one is permitted to leave their post without permission, and that he would not dare do so. But only minutes earlier Basulto had testified that he could

not and did not secure permission to go to his car on August 5, 2008 because Fernandez was not in the building.

Basulto testified that he went to his car on August 4, 2008 to obtain medication for his diabetes and kidney ailments. But when asked on direct examination why he then drove away in his car, he stated that it was to purchase potatoes and eggs for the other custodians, explaining that they routinely chip in for these items for their personal consumption and he is sent to make the purchase. Basulto was asked why, when he returned to the parking lot on August 4, 2008, he lingered to converse with a co-worker. Basulto admitted to not being attentive to his duties, and unabashedly replied that he knew this individual and wished to bring his friend up to date regarding his health issues. Apart from his general contention that no one may leave their post without permission, Basulto did not testify that he had specific permission to exit the building on August 4, 2008.

Basulto was asked on direct examination whether he left the building on July 28, 2008 with permission. He again replied that "no one can leave without permission," and thus failed to directly answer the question asked. Basulto offered no testimonial explanation for his absence on July 30, 2008, but again reiterated that "nobody could leave without permission." Later, when asked again whether he had obtained Fernandez's permission prior to leaving the building, Basulto stated that he always had, but then changed his testimony and stated that he sometimes got permission from another supervisor, Steve Baldwin.[3]

Basulto's conduct clearly impacted the cleanliness of his assigned area in the school building. Fernandez testified that Basulto was "not great" as a worker, and only "sometimes" completed his job responsibilities, and that Basulto had received informal reprimands as a result. Fernandez testified that there "was not

[3] The Board attempted to supplement the record with Basulto's answers to interrogatories, noting that Baldwin is not named as a person with knowledge regarding the tenure charges. I did not consider this late submission in reaching my decision.

good cleaning" in Basulto's rooms and that there were teacher and administrator complaints regarding the condition of these classrooms.

Accordingly, I **FIND** as **FACT** that on July 28, July 30 and August 4, 2008, Basulto was away from his post without permission, and for periods of time that exceeded his contractually authorized break of fifteen minutes. I further **FIND** as **FACT** that school district administration did express repeated informal concerns about the cleanliness of Basulto's assigned work area.

Basulto's prior Disciplinary Record

Prior incidents of misconduct by Basulto were offered into evidence by the Board. These incidents are not part of the charges which are presently before me for consideration, but rather are offered to confirm that Basulto had been previously warned about similar misconduct. In or about January 2006, Jameson heard from another staff member that Basulto was leaving early for lunch. Jameson reported the concern to his supervisor who advised him to investigate further. Accordingly, Jameson stopped by Basulto's school and observed Basulto leaving for lunch at 5:55 p.m. and returning at 8:00 p.m. Basulto was allowed a one hour lunch.[4] To afford Basulto the benefit of the doubt, Jameson returned the next day and observed Basulto, once again, leaving early for lunch. Jameson spoke to him about what he had observed but found Basulto's excuse less than satisfactory. Basulto indicated that he had to go home to retrieve medication. Jameson testified that he could understand forgetting medication once, but not two days in a row. He further noted that Basulto lives in West New York, not far from the school, making it easy for Basulto to retrieve his medication within his allotted break time. Accordingly, Jameson memorialized his concerns in a letter to Lentini dated January 19, 2006. (P-2) The letter was shared with Basulto and his union representative, and signed by his representative. Basulto refused to sign a copy of the letter.

[4] Since Basulto was working a later shift, the hour off which is referred to as "lunch" is at a time of day more typically considered dinner time.

After conferring with his supervisor, Jameson sent a follow up letter dated January 24, 2006 to Lentini, which specified that he had warned Basulto that any further infractions of the lunch policy would result in his termination. That letter was likewise presented to Basulto and his union representative, and Basulto again declined to sign a copy of the letter. His union representative did acknowledge receipt of the letter, however. (P-3)

Additionally, Jameson had concerns about the cleanliness of the area assigned to Basulto. These concerns are documented in a January 28, 2007 warning, which notes that it is "part of the district's practice of progressive discipline." (P-4) This warning notes that the third floor rooms assigned to Basulto were not maintained in a clean or sanitary condition on December 26, 27 and 28, 2007. Basulto signed the warning, thus acknowledging its receipt.

Basulto offered no testimony which contradicted the substance of the concerns expressed in these prior warnings, except to generally assert that when absent from his post, his area was still clean and properly maintained. Questioning of Board witnesses seemed to be directed at establishing that the written warnings were not received by Basulto. However, the testimony clearly demonstrated that Basulto received the warnings and Jameson convincingly testified that he warned Basulto verbally and in writing about his misconduct. He testified that these warnings are part of Basulto's personnel file. Basulto's union representative acknowledged receipt of P-2 and P-3, and Basulto himself signed P-4. Accordingly, I **FIND** as **FACT** that Basulto was previously warned about leaving his post without permission, and about unclean conditions in his work area.

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 Basulto with conduct unbecoming a tenured custodian, insubordination, misbehavior, inability to complete his duties and other just cause. 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 it has filed against Basulto.

During the summer of 2008 Basulto repeatedly left his post without permission to either sleep or attend to non-school business. He did so after receiving warnings during the 2006-2007 school year that such conduct was unacceptable. Basulto's assertion at hearing that despite these absences from his post his assigned duties were properly completed is unconvincing. Basulto's dereliction of his duties is clearly proven by the testimony, and that dereliction rises to conduct unbecoming a tenured custodian and misbehavior as defined by N.J.S.A. 18A:17-3. Indeed, I concur with Solares' assertion at hearing that Basulto's conduct constitutes a theft of services. He was being paid to work his contractual hours, and not the amount of time he thought appropriate to complete

his assigned tasks. In light of the prior warnings issued to him both verbally and in writing, his conduct likewise constitutes insubordination.

The Board urges that Basulto's conduct warrants his dismissal from his tenured position of employment. I concur. Custodians in the public schools perform a crucial function, and they have been held by the Commissioner of Education to a high standard. The role of the custodian has been described as follows:

> A school janitor occupies a position of trust and responsibility necessitating high standards of dependability and morality. His functions far exceed opening and closing the schoolhouse and keeping it clean and tidy. The safety and welfare of the children may depend upon the proper discharge of his duties. In the Matter of the Tenure Hearing of Joseph McDougall, 1975 S.L.D. 170, 178.

The Commissioner has recognized that the failure of a custodian to properly attend to his duties could jeopardize the safe and efficient functioning of a building's educational program. State-Operated School District of Paterson v. Watson, 93 N.J.A.R. 2d (EDU) 362. The Commissioner has not hesitated to order the dismissal of tenured custodians who have failed to faithfully perform their duties. See: In the Matter of the Tenure Hearing of David Riddick, State Operated School District of the City of Paterson, Passaic County, 93 N.J.A.R.2d (EDU) 345; Jimenez v New Jersey State Operated School District of the City of Paterson, 96 N.J.A.R.2d (EDU) 600; In the Matter of the Tenure Charges against Nathan Purnell, Irvington Public School District, Essex County, 96 N.J.A.R. 2d (EDU) 364.

Basulto has continued to absent himself from his assigned post without permission despite being previously warned about such conduct. He has been previously warned that his assigned area was not satisfactorily cleaned as a result. His flagrant disregard for the rules of his workplace is confirmed by the testimony at hearing, and indeed, by Basulto's demeanor at hearing. He

admitted much of his misconduct, offering flimsy excuses and demonstrating a complete lack of remorse or understanding of the legitimacy of his employer's concerns. The record makes it plain that allowing him to continue in the employ of the Board would place the unwarranted burden on his supervisors of "continually monitoring a subordinate demonstrated to be lax" in performing his assigned duties, and who has a record of leaving his assigned post without permission. See: State Operated School District of the City of Paterson, Passaic County v Richard Cox, 93 N.J.A.R. 2d (EDU) 748.

Finally, I must reject Basulto's argument in his post-hearing submission that the actions of the Board are being taken because he is an elderly custodian with health issues. To the contrary, it was readily apparent from Fernandez' testimony that he attempted to protect Basulto precisely because of his age. Nor can I accept Basulto's argument that, at worst, he experienced a bad week due to his health issues. The record readily confirms a pattern of inattentiveness to his duties that dates well before the week in August 2008 when he was caught sleeping in his car.

Accordingly, I **CONCLUDE** that Basulto should forfeit his tenure, and be dismissed from his position of employment with the Board.

ORDER

I **ORDER** that Marcelino Basulto's tenured position as custodian in the West New York School District be forfeited as the date of his suspension.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is

authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, 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 11, 2009

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 9/11/09

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

Witnesses

For Petitioner:

Ramone Fernandez

Robert Jameson

Rick Solares

For Respondent:

Marcelino Basulto

Exhibits

For Petitioner:

P-2 Letter prepared by Jameson, dated January 19, 2006

P-3 Letter prepared by Jameson, dated January 24, 2006

P-4 Warning dated January 28, 2008

P-5 Warning dated August 6, 2008

P-6 Minutes of H.R. meeting, dated August 26, 2008

P-7 Surveillance DVDs

P-8 September 22, 2008 letter to Mr. Basulto

P-9 September 15, 2008 doctor's note

For Respondent:

None

336-09

OAL DKT. NO. EDU 8582-09
(EDU 51-09 ON REMAND)
AGENCY DKT. NO. 347-11/08

P.S. on behalf of minor child, J.R.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CLEARVIEW REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the executed "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 approves the terms of the Agreement with the following comments.

First, Section 1 of the Agreement recites that respondent will pay petitioner installments of $1,000 each on or before April 30, 2009 and May 30, 2009. Thus, these provisions anticipated that certain conduct would occur on a date that ultimately fell before the Agreement was considered 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 Commissioner also notes that Section 6 of the Agreement states that the terms of the agreement are confidential and may not be disclosed to any third parties. However, the settlement agreement will be annexed to the Final Decision in this matter and will,

consequently, be part of a public document. Thus, while the parties themselves may comply with their accord not to disclose the terms of the settlement agreement, the settlement document will be subject to the provisions of the Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*

In light of the foregoing, 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 effectuation of same, and recognizing the limitations on confidentiality imposed by law.

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 10/15/09

Date of Mailing: 10/15/09



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8582-09

AGENCY DKT. NO. 347-11/08

P.S. ON BEHALF OF MINOR CHILD, J.R.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CLEARVIEW REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,

Respondent.

Patrick Sullivan, petitioner, pro se

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

Record Closed: September 3, 2009 Decided: September 8, 2009

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

This matter was transmitted to the Office of Administrative Law on August 4, 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.

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

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

9/8/09
DATE

DONALD J. STEIN, ALJ

Date Received at Agency: SEP 11 2008

Date Mailed to Parties: SEP 11 2008

cmo

File No. 14305-0001

Law Offices
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STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

PATRICK SULLIVAN o/b/o JORDAN MYERS, Petitioners, v. CLEARVIEW REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION STATE OF NEW JERSEY AGENCY REF. NO. 347-11/08 OAL DOCKET NO. CIVIL ACTION **SETTLEMENT AGREEMENT**

This Agreement is made this 27th day of March, 2009 by and between the Clearview Regional School District Board of Education (the "District"), and Patrick Sullivan and Charles Myers ("Petitioners"), all of whom are collectively referred to as "the Parties."

WITNESSETH:

WHEREAS, Jordan Myers was enrolled in the Clearview Regional School District by Charles Myers prior to the start of the 2008-09 school year; and

WHEREAS, at the time of enrollment Patrick Sullivan claimed that he was applying for guardianship of Jordan Myers; and,

WHEREAS, the District permitted Jordan Myers to enroll in the Clearview High School pending proof of guardianship and/or affidavit of the parent, Charles Myers, that Jordan Myers was being kept in Patrick Sullivan's home gratis for longer than the school year; and,

WHEREAS, the Petitioners, collectively, neither filed the appropriate guardianship documents, nor appropriate affidavit establishing that Jordan Myers was domiciled in the District; and,

WHEREAS, the District provided notice of the removal of Jordan Myers from the Clearview High School to the Petitioners; and,

WHEREAS, the Petitioners filed a Petition of Appeal with the Commissioner of Education challenging the removal of Jordan Myers from the Clearview High School; and

WHEREAS, the District filed an Answer and Counter-petition of Appeal seeking payment of tuition from the Petitioners; and

WHEREAS, a Settlement Conference was scheduled at the Office of Administrative Law for March 27, 2009, before the Honorable Donald Stein, ALJ; and

WHEREAS, the Parties, participated in extensive settlement discussions; and

WHEREAS, the Parties have reached agreement and are desirous of memorializing a settlement of all issues, educational and financial, relating to everything that has happened until now; and

NOW, THEREFORE, the Parties, for the consideration specified below, set forth their full and complete agreement as follows:

1. **Payment.** Petitioners agree to donate the total amount of Two Thousand Dollars ($2,000.00) to the District. Said payment will be made as follows: $1,000.00 on or before April 30, 2009 and $1,000.00 on or before May 30, 2009. Failure to make said payments shall be cause for the immediate removal of Jordan Myers from the District without any right of appeal of said action.

2. **Other Conditions and Agreement.** Jordan Myers shall be permitted to remain in attendance in the District so long as the provisions of Paragraph 1 are met and all other Rules and Regulations of the Student Handbook and Board of Education Policy are followed by Jordan Myers. Upon successful completion of the course of study at the Clearview High School, Jordan Myers shall receive a High School Diploma.

3. **No Admissions of Liability; Execution.** 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 District or the Petitioners and shall not be referred to in any subsequent proceeding by any party other than to enforce the express terms of this Agreement. In the event that this Agreement is not fully executed and approved by the Parties hereto, this Agreement shall become null and void and shall neither constitute an admission of any party, nor be referred to by any party in any subsequent legal proceeding for any purpose whatsoever.

4. **Parents' Representation by Counsel.** The Petitioners acknowledge that they have not been represented by legal counsel during the negotiations of this Agreement and all proceedings leading to the entry into this Agreement and that they have knowingly and voluntarily waived the right to be represented by legal counsel.

5. **Voluntariness.** The Petitioners hereby state that they are signing this Agreement voluntarily of their own free will and not under duress or coercion of any kind.

6. **Confidentiality.** The Parties agree that the terms and conditions of this Settlement Agreement are confidential and my not be disclosed to any third parties, except as is necessary to carry out the terms and conditions of this Agreement.

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

8. **Successors and Assigns.** The Parties are bound by this Agreement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns, are also bound. This Agreement is made for the benefit of the Parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors or assigns.

9. **Entire Agreement.** This Agreement constitutes the full and complete agreement of the Parties hereto with respect to its subject matter, it 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 the Parties hereto.

IN WITNESS WHEREOF, the Parties hereto set their hands this 30th day of April, 2009.

PETITIONERS

4-14-09

PATRICK SULLIVAN **Date**

4-1-09

CHARLES MYERS **Date**

CLEARVIEW REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION

4/30/09

Date

FRANK P. CAVALLO, JR. ESQUIRE
ATTORNEY FOR RESPONDENT,
CLEARVIEW REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION

Date: 9/1/09

339-09

JOHN HILKEVICH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – currently incarcerated and with an appeal of his sentence on criminal charges dating back to 1999 pending before the Appellate Division of the New Jersey Superior Court – was employed by respondent Board as a tenured teacher prior to his conviction in 2000 for aggravated sexual assault, endangering the welfare of a child, and criminal sexual conduct. Petitioner seeks reinstatement to his position, with back pay and benefits. The case was the subject of orders of inactivity or otherwise held in abeyance from September 2003 through March 2009 because of the pendency of criminal proceedings involving petitioner. Respondent Board filed a motion to dismiss, contending that the petitioner's appeal is inappropriate and without merit.

The ALJ found that: the petitioner's suspension without pay, beginning on September 14, 1999, was valid and proper; there was no period of time since September 14, 1999 when petitioner was not under indictment, convicted, or had tenure charges certified against him; petitioner was twice convicted for crimes that require automatic forfeiture of his tenured teaching position; and the pending appeal in Superior Court is in reference to petitioner's sentence has no effect on the within matter. Accordingly, the ALJ granted the respondent's motion to dismiss the petition.

Upon independent and careful review of the record, the Commissioner adopted the Initial Decision as the final decision in this matter. A copy of this decision has been transmitted to the State Board of Examiners for consideration.

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 19, 2009

339-09

OAL DKT. NO. EDU 6064-03
AGENCY DKT. NO. 175-5/03

JOHN HILKEVICH,	:	
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. Petitioner's exceptions and the Board's reply thereto – filed in accordance with *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching her determination herein.

Exceptions on behalf of petitioner forward two copies of his letter brief filed before the Administrative Law Judge (ALJ) below. Additionally, petitioner's counsel advises that it is his belief that Mr. Hilkevich's pro se appeal – currently pending before the Appellate Division – appeals not only his sentence but also his second conviction on both substantive and procedural grounds. (Petitioner's Exceptions at 1-2)

In reply, the Board points out that – notwithstanding the argument that petitioner's appeal involves more than just appeal of his sentence, "Exhibit B of Petitioner's own brief dated July 1, 2009, characterizes the nature of the appeal as an 'Appeal of Resentencing' throughout the document." It, thus, urges – based on this fact and for the reasons presented in the ALJ's decision – that the Commissioner uphold the Initial Decision. (Board's Reply Exceptions at 1)

Upon full consideration, the Commissioner agrees with the ALJ that the Board's Motion to Dismiss this matter is appropriately granted as she fully concurs that "there was no period of time since September 14, 1999, when petitioner was not under indictment, convicted, or had tenure charges certified against him. Therefore, he has no claim to back pay, benefits or emoluments for any period following his

September 1999 indictment." (Initial Decision at 7) The Commissioner is further in accord with the ALJ's determination that – as the crimes for which petitioner has been convicted require automatic forfeiture of his position as of the date of his conviction – the tenure charges against him which have been held in abeyance pursuant to *Ott v. Hamilton Township Bd. of Education,* 160 *N.J. Super.* 333 (App. Div. 1978) are rendered moot and are hereby dismissed. Notwithstanding that petitioner's forfeiture of his position was automatic upon conviction, given that the Court at that time did not specifically order it, the Board is encouraged to file an application with the Superior Court of New Jersey for entry of an Order of Forfeiture of petitioner's public employment pursuant to *N.J.S.A.* 2C:51-2. *See State v. Ercolano*, 335 *N.J. Super.* 236 (App. Div. 2000).

Accordingly, the recommended decision of the OAL is adopted for the reasons stated therein and the instant petition of appeal is dismissed. A copy of this decision will be transmitted to the State Board of Examiners for consideration.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 10/19/09

Date of Mailing: 10/19/09

*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).